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**THE PRINCIPLE OF COMPLEMENTARITY: THE ADMISSIBILITY
OF CASES BEFORE THE INTERNATIONAL
CRIMINAL COURT**

David Rosello Gates

**In Fulfillment of the Requirements for the Degree of
Master of Jurisprudence (M.Jur)**

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ABSTRACT

Regarded as the most important international institution established since the United Nations, the International Criminal Court (*ICC*) was created to help end impunity. With its jurisdiction based on the principle of complementarity, it will only act when States are found unwilling or unable to investigate or prosecute perpetrators of serious international crimes.

The provision that reflects the complementarity principle, article 17, stipulates the grounds for establishing whether a situation or a case is admissible before the Court. The said article defines the unwillingness and inability criteria, but had not provided any directive concerning instances where a State had remained inactive in relation to a crime that is under the jurisdiction of the ICC. Nevertheless, the Pre-Trial Chamber of the ICC held that a case in which a State had remained inactive is admissible.

Satisfying the prerequisites of the unwillingness criteria, laid under article 17, is a difficult task which the Prosecutor must bear. It requires examining the genuineness or the *bona fide*, or the lack thereof, of States in initiating proceedings. Inability, the other criteria of admissibility, appears to have provided clear conditions as when it can be said that a State is unable to carry out a genuine investigation or prosecution. Whilst helpful, inability's strict guidelines may restrain the admissibility of cases.

Apart from the decision made by the Pre-Trial Chamber relating to cases of inaction, there is no admissibility determination applying article 17 which the Court had made. There are, nevertheless, significant questions that can be raised, and which relate to how article 17 might be construed and applied in practice. The essence of this study is to explore those questions and speculate possible answers.

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I. INTRODUCTION

Article 17: Issues of Admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

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

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principle 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 an intent to bring the person concerned to justice.

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

Article 20: Ne Bis In Idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

[...]

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. '*

The present study intends to examine the admissibility of cases before the International Criminal Court (*ICC or the Court hereafter*). The issue of admissibility is mainly provided under article 17 and 20 of the Rome Statute of the International Criminal Court (*the Rome Statute*) and is governed by the principle of *complementarity*. The said principle maintains that the ICC is only to complement domestic courts and function as a last resort when national judicial systems are found unwilling or unable to investigate or prosecute genuinely. The study will seek to explore how the ICC, being the first tribunal of its kind, could interpret and apply the provisions of the said articles. It will speculate about the theoretical application of the relevant provision and look into other factors that may affect an admissibility determination. Finally, the study will attempt to answer questions whether a broad reading could be given to the terms of article 17 or strict adherence to the drafters' intent is most desirable.

The importance of getting the right balance in interpreting admissibility must be underscored as it will determine the future of the ICC, that is, whether it becomes a significant institution in the international community.¹ On the one hand, an unreasonably rigid interpretation of article 17 might lead the Court's jurisdiction to become often dormant. On the other hand, a wider interpretation may entail serious repercussions; *inter alia*, it can be viewed as incompatible with the principle of complementarity to which the jurisdiction of the Court is based. The recognition of the relevance and implications of article 17, of how it might be applied in practice, makes an attempt to understand the same a worthy endeavour.

The Rome Statute, regardless of how comprehensive it may seem, has inevitably unforeseen repercussions. Even before the Statute came into force, the lack of clear and comprehensible provisions on the issue of admissibility was already pointed out. Article 17, for example, did not elaborate on cases emanating from a State that has remained inactive or had voluntarily referred the matter to the ICC. In such instances when the Rome Statute has limited interpretative guidelines, the Court judges are left to construe and adjudicate on their own discretion. Pending precedence, it would be impossible to speculate with a certain degree of certainty, as to how the Court will determine the admissibility of a case where article 17

¹ See discussion in Summers, *A Fresh Look At the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty* [2001] 20 Wis. Int'l Law Journal 57, at p. 75-6.

appears to be silent or even in cases where the said article appears to have provided adequate directive terms. Indeed, framing the limits of admissibility under a statute is one thing and putting it in practice is altogether, another matter. It is in the latter that issues will arise and which the Court will have to settle on a case-to-case basis.

In this first chapter, the study commences with a brief history of the Court's establishment. It will be followed by a discussion of the principle of complementarity apropos to interpreting the Rome Statute, a concise account of the Court's jurisdiction and the role of the Prosecutor in relation to the admissibility of cases. The second chapter will focus on the legislative history that led to the present form of article 17. The third chapter will consider the said provision, section by section, and will examine possible situations or cases that are potentially admissible under the terms of the article. The fourth chapter will tackle article 20(1) and (3), and will exclude section (2) of that article as it concerns admissibility before national courts of cases that had already been decided by the ICC. The fifth chapter will provide a short discussion on Security Council referrals. Lastly, the final chapter will then contain the conclusion, highlighting important issues discussed in this study.

A. Brief History of the Establishment of the International Criminal Court

The Nuremberg trial raised the prospect of establishing a permanent international criminal tribunal that will be responsible for holding perpetrators of egregious international crimes individually liable.² The United Nations (UN) subsequently took the initiative and embarked on what proved to be a long and complex endeavour. The UN General Assembly assigned the International Law Commission (ILC) to make a draft code of legal principles inherited from the Nuremberg trial.³ By 1953, two draft statutes transpired but which were never

² For further discussion on the Nuremberg trial see, *inter alia*: Summers, *ibid.*, at p. 57, McGoldrick, 'Criminal Trials Before International Tribunal: Legality and Legitimacy' in *The Permanent International Criminal Court* by McGoldrick, Rowe, & Donnelly (Eds.) (Hart Publishing 2004), p. 14-20; and Stimson 'The Nuremberg Trial: Landmark in Law' [1947] 25 Foreign Affairs 179.

³ General Assembly (GA) Resolution, UN General Assembly Official Records (GAOR), 2nd Session, UN Doc. A/519 (1947).

implemented.⁴ The initiative was stalled partly due to lack of political will and partly because of the cold war era.

Not until the establishment of the *ad hoc* International Criminal Tribunal of the former Yugoslavia (ICTY)⁵ and the International Criminal Tribunal for Rwanda (ICTR)⁶ that significant progress towards establishing a permanent international criminal court took place. The work initiated more than 50 years ago, was then pursued with eminent momentum. The earlier drafts were revived and used as bases for drafting a new statute for a permanent court. Unlike the *ad hoc* tribunals which were created by the highly politicized Security Council, the proposed international court was to be established through a multilateral treaty in order to gather greater legitimacy than either the ICTY or ICTR.⁷

Commissioned once again by the General Assembly to address the question of establishing an international criminal court, the ILC⁸ adopted a final draft statute in 1994, following a sustained consideration of the earlier drafts.⁹ Although it served as an impetus to which the future Rome Statute was to be fashioned, the 1994 draft was criticised as having structural flaws. Among others, the ILC draft would create an international court where State consent, except for genocide, is required to activate its jurisdiction. It was also noted that the 1994 draft, if adopted, would create an international court that is closely linked to and, to a large extent, dependent upon the Security Council – an arrangement that was widely viewed to surely undermine the independence of an international criminal tribunal.¹⁰

⁴ *Report of the Sixth Committee to the General Assembly*, UN GAOR, 5th Session, UN Doc A/1639 (1950) and *Report of the Committee on International Criminal Jurisdiction*, UN GAOR, 7th Session, Supp. No. 11, UN Doc. A/2136 (1952).

⁵ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Security Council (SC) Resolution 827, SCOR, 48th Session, UN Doc. S/RES/827 (1993) [ICTY Statute hereafter].

⁶ *Statute of the International Criminal Tribunal for Rwanda*, SC Resolution 955, SCOR, 49th Session, UN Doc. S/RES/955 (1994) [ICTR Statute].

⁷ See Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals* [1998] 23 Yale Int'l L. 383, at p. 386.

⁸ GA Resolution 44/39, UN GAOR, 44th Session, Supp. No. 49, UN Doc. 1 A/44/39 (1989).

⁹ *Report of the International Law Commission*, UN GAOR, 49th Session, Supp. No. 10, UN Doc. A/49/10 (1994).

¹⁰ See Derby, *An International Criminal Court for the Future* [1995] 5 Transnational Law & Contemporary Problems 307, at 311 and Brown, *op. cit.* note 7, at p. 388.

Subsequently, the General Assembly established an *ad hoc* committee to further examine the 1994 draft statute with a view to convene a diplomatic conference of plenipotentiaries for its possible adoption.¹¹ After considering the issues that transpired out of the ILC 1994 draft, the *Ad Hoc* Committee concluded that a diplomatic conference was yet too early.¹² As a result, the General Assembly decided to set up the Preparatory Committee, inviting UN member States, Non-Governmental Organisations (NGO) and other international organisations to take part in the Committee's proceedings. The PrepCom, as it was called, was mandated to 'prepare a widely acceptable consolidated text of a convention for an international criminal court' using the 1994 draft and the work of the *Ad Hoc* Committee as its bases.¹³ It was during the PrepCom sessions where the fundamental question of the court's jurisdiction, based on the principle of complementarity, was resolved. The resultant consensus enabled progress on other fundamental issues such as the exercise of jurisdiction and trigger mechanism, which are essentially intertwined.¹⁴

Pursuant to adopting a draft statute based on the Preparatory Committee's work, a diplomatic conference of plenipotentiaries (*Rome Conference*) was convened in Rome, Italy in 1998.¹⁵ As the question of complementarity was largely sorted out during the Preparatory Committee, the challenge for the diplomatic conference was to resist reopening negotiations on the said subject. The conference ended with the adoption of the Rome Statute of the International Criminal Court. The Statute required ratification of at least 60 States before it enters into force. The sixtieth ratification was achieved in April 2002 in spite of the widespread expectation that it would take years or even a decade to reach the required minimum number of ratifications. The Rome Statute thus, entered into force on the 1st of July 2002 amidst hopeful enthusiasm. The Court is located in The Hague and, as of the time of writing, has *yet* to decide on its first case. It is regarded as the most important international institution established since the UN in 1945.

¹¹ GA Resolution, UN GAOR, 49th Session, UN Doc. A/49/53 (1994).

¹² *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Session, Supp. No. 22, UN Doc. A/50/22 (1995).

¹³ GA Resolution, UN GAOR, 50th Session, UN Doc. A/RES/50/46 (1995)

¹⁴ See for further discussion Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers 2005), p. 147.

¹⁵ GA Resolution, UN Doc A/50/46 (1995), *op. cit.*

B. The Principle of Complementarity

During the negotiation period, drafters were confronted with the fundamental question as to which judicial body shall prevail when an international court and domestic courts have concurrent jurisdiction over a particular crime. Two general options to which the question can be addressed¹⁶ were identified. The first option is the general *primacy* of an international court over national courts which provides that an international tribunal will have the prior right to prosecute crimes under its jurisdictional ambit. The jurisdiction of the ICTY and ICTR are based on this arrangement; both *ad hoc* tribunals have the power to stop a domestic court from prosecuting a case if they so discern that a particular case is for them to adjudicate.¹⁷ The second option is based on the principle of *complementarity* which means, as the term suggests, that an international criminal court is only to function as a supplement to domestic courts when the latter fail to operate efficiently and in good faith. Phrased differently, it denotes that an international tribunal could only assume jurisdiction over cases or situations to which States have failed to investigate or prosecute genuinely because they are neither able nor willing. It was agreed that the jurisdiction of the ICC is based on this principle and as such, it acknowledges that national legal systems have the prior right or primacy to adjudicate.

Complementarity provides that the jurisdiction of an international court remains dormant so long as national judicial systems function properly. Its activation will be contingent upon certain conditions, *e.g.* when the domestic court is not available or unwilling to adjudicate in faith good. During the ICC negotiation, the extent of those conditions upon which ICC's jurisdiction could be activated was heavily debated. There was a proposal that any proceeding taken by a State shall be enough ground to preclude the Court from intervening.¹⁸ However, the ensuing view which prevailed was to go further than that. As tyrants in the past proved capable of abusing their powers in order to escape their culpabilities, the idea was to include sham proceedings as one of the conditions that could activate the Court's jurisdiction. Hence,

¹⁶ See Brown, *op. cit* note 7.

¹⁷ Article 9 of the ICTY Statute and Article 8 of the ICTR Statute.

¹⁸ See discussion in Preparatory Committee on Establishment of International Criminal Court, 1 & 2 April 1996, 1st Session, 11th & 13th Meetings, available at CICC website: <www.iccnw.org> (visited last 14 January 2007); and Holmes, 'The Principle of Complementarity', in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiation, Results* (Kluwer Law International, 1999), at p. 47-53.

the ICC has jurisdiction not only when national legal systems are found unable but also when they are proven unwilling to carry out *bona fide* proceedings.

It was perhaps inevitable that the jurisdiction of the ICC is based on complementarity.¹⁹ First, primacy over domestic courts could exceedingly impinge upon State sovereignty. However an international court based on complementarity should not altogether be viewed as no longer posing a threat to sovereignty. The difference is that in having a primacy of jurisdiction, States are given the first opportunity to investigate or prosecute; where national courts are able to perform their tasks in *good* faith, an international criminal court is barred from intervening. In the drafters' view, it also seemed unlikely, if not impossible, that many States will sign and ratify a treaty that confers primacy on an international tribunal. In the case of the ICTY and ICTR, their primacy ensued because of the expedient method in which they were created. A Security Council resolution, which is binding on all UN member States, established these *ad hoc* tribunals. The jurisdiction of the *ad hoc* courts were temporally and territorially restraint, having fewer States affected within a limited time-frame. Owing to the envisaged international character of the Court and its unlimited temporal reach, it was deemed inappropriate and conceivably politically impossible for the Security Council to set up a permanent international court via a binding resolution.²⁰ Second, given that many States already have the international obligation to prosecute certain international crimes, such as Genocide,²¹ if a permanent international court has primacy, it is possible that States could end up in a dilemma: whether to defer prosecution and risk breaching international duties or uphold their international obligations and blatantly disregard the primacy of such an international court. This conflict can be minimised considerably if States are to retain their prior right to investigate or prosecute, with the international court intervening only to *complement* domestic judicial systems when they fail to prosecute serious international crimes.

¹⁹ See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Session, Supp. No. 22, UN Doc A/50/22 (1995), at para. 36 where the principle of complementarity was described as 'an essential element in the establishment of an international criminal court'.

²⁰ See discussion in Brown, *op. cit.* note 7, p. 386-7.

²¹ Article 1 & 4-6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

C. Interpreting the Rome Statute

As an international treaty, interpreting the Rome Statute is subject to articles 31 and 32 of the Vienna Convention on the Laws of Treaties of 1969. Article 31 stipulates that a treaty is to be read 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The context referred to includes the preamble and any agreement and instrument which were adopted in connection to the conclusion of the treaty. In instances where an interpretation, in accordance with article 31, leaves the meaning ambiguous, unreasonable or manifestly absurd, article 32 provides that the drafting history or the *travaux preparatoires* may be resorted to; however, it must be emphasised that article 32 is subordinate to article 31.

In relation to admissibility of cases, the Rome Statute, in light of the principle of complementarity, should always decide in favour of national proceedings. Article 1 of the Rome Statute maintains that the ICC is only complementary to domestic courts when the latter is unable or unwilling to carry a genuine proceeding. Thus, if a domestic authority initiates an investigation, the ICC *prima facie* has no jurisdiction to intervene.

D. The Jurisdiction of the ICC

Jurisdiction and *admissibility* are two distinct concepts. The former refers to the legal parameters in which a court can exercise its judicial powers. These include the subject matter or *ratione materie*, territorial jurisdiction or *ratione loci*, temporal jurisdiction or *ratione temporis*, and personal jurisdiction or *ratione personae*. Any criminal court, including the ICC, must first establish that a situation or a case is within its jurisdictional ambit before it can issue an authorisation to investigate or before it can prosecute. Admissibility, nonetheless, arises normally at the subsequent stage once the court is already satisfied that it has jurisdiction to commence proceedings. It involves some kind of discretion on the part of the Court, assessing whether a situation or a case can or should be admitted.

The two concepts, however, are not often easy to distinguish. In relation to the ICC which is founded on the complementarity principle, it is submitted that the above distinction is not as significant in comparison to a domestic criminal justice system. For example, in a case of genocide where a national court appropriately dealt with the matter and in good faith, the jurisdiction of the Court would have to remain dormant. This is so, despite the fact that genocide is one of the crimes under the ICC jurisdiction. Such a case will not only be inadmissible because of the action already taken domestically but, by virtue of the Rome Statute preamble and article 17, the Court's jurisdiction shall have to be put on hold. To this extent therefore, it is possible to posit that issues of admissibility in relation to article 17 co-define the Court's jurisdiction.²² Nevertheless, the distinction between jurisdiction and admissibility is of relevance when the ground used to challenge admissibility is that a case is 'not of serious gravity to justify further action by the Court.'²³ Under such circumstances, jurisdiction must first be established before any challenge concerning the gravity of a case will arise.

Article 5 of the Rome Statute lists the *ratione materie*, that is, the crimes within the jurisdiction of the ICC. These violations, regarded as 'the most serious crimes of international concern',²⁴ include the following: genocide, crimes against humanity, war crimes and aggression. Aggression, however, is subject to further agreement during a future review process and the subsequent adoption of a provision that will define the conditions under which the ICC may exercise its jurisdiction.²⁵ The Court, furthermore, has jurisdiction over 'offences against administration of justice,' which involve perjury, interfering or tampering of evidence, and bribing officials, among others.²⁶

The ICC is not retroactive and as such, it will not have any jurisdiction over crimes committed prior to its establishment.²⁷ If a State became a party subsequent to the Rome Statute's creation, the ICC could only exercise its jurisdiction over crimes committed after the

²² See Summers, *op. cit.* note 1, at p. 66-7.

²³ Article 17(1)(d) of the Rome Statute.

²⁴ Article 1, *ibid.*

²⁵ Article 5(2), *ibid.*

²⁶ Article 70, *ibid.* and Rules 162-9 and 172, ICC Rules of Procedure and Evidence.

²⁷ Article 11(1), *ibid.*

Statute came into force with respect to that State.²⁸ Concerning ICC's territorial jurisdiction, article 12(2)(a) provides that the Court has jurisdiction over events that took place in the territory of any State party, regardless of the perpetrator's nationality. The ICC may also assume jurisdiction over crimes committed in the territory of States that accepted Court's jurisdiction on an *ad hoc* basis²⁹ or in the territory of non-States Parties where the Security Council acting under Chapter VII so authorizes. As regards to personal jurisdiction, the Court may exercise its authority over nationals of State parties and non-State parties that accepted ICC's jurisdiction and likewise, where the Security Council designates the same.³⁰

E. The Role of the Prosecutor *vis-à-vis* Admissibility

A better appreciation of the practical application of article 17 requires a brief examination of the role of the Prosecutor. The Prosecutor is authorised to initially determine which case may be brought before the Court. Since victims cannot formally instigate an ICC proceeding, the role of the Prosecutor assumes greater significance³¹ – particularly, in light of the prevailing State practice where governments are disinclined to accuse or complaint against other governments and the Security Council, for its part, to refer a situation to the ICC has to overcome a political burden.

Under article 15 of the Rome Statute, the Prosecutor may initiate an investigation *proprio motu* on the basis of information made available to him or her by the UN, intergovernmental or non-governmental organisations or by victims or if already deceased, their families. Upon receiving such information, the Prosecutor is to determine whether the reported situation is within the jurisdiction, if it appears admissible before the ICC and whether the data collected form a reasonable basis to initiate an ICC investigation.³² When the Prosecutor concludes there is a sufficient ground, he or she is required to seek an authorisation from the Pre-Trial

²⁸ Article 11(2), *ibid.* For further discussion see Schabas, *Introduction to the International Criminal Court* (Cambridge University Press 2000), at p. 56-9.

²⁹ Article 12(3), *ibid.*

³⁰ Article 12(2)(b), *ibid.*

³¹ See Cassese, *Is the ICC Still Having Teething Problems?* [2006] 4 JICJ 434, at p. 435.

³² Article 53(1), *op. cit.*

Chamber to proceed with an investigation.³³ Only when the Pre-Trial Chamber authorises an investigation will the Prosecutor be able to further pursue the matter.

Exemptions to the requisite authorisation from the Pre-trial Chamber to initiate an investigation are referrals directly emanating from a State Party or the Security Council. It is not clear, however, whether the Prosecutor, in such instances, is obliged to initiate a *formal* investigation.³⁴ Nevertheless, in deciding whether to commence an investigation, the Prosecutor is compelled to determine the following: if the information provided forms a reasonable basis that a crime within the Court's jurisdiction had been committed; if 'the case would be admissible under article 17'; and whether it is in the interest of justice.³⁵

When the Prosecutor decides to initiate an investigation *proprio motu*, following an authorization from the Pre-Trial Chamber or State referral, he or she is mandated to notify all State Parties who 'would normally exercise jurisdiction over the crimes concerned.'³⁶ This allows the manifestation of the complementary relationship of the Court and domestic jurisdiction. The interested State or States are given a month to 'inform the Court that it is investigating or has investigated' the crime in question and to request the Prosecutor to defer to the domestic proceeding.³⁷ The Prosecutor ought to defer to national jurisdiction, unless he or she is able to obtain an authorization from the Pre-Trial Chamber on the basis that the State concerned had remained inactive, that the domestic proceeding being carried out is, in truth, intended to shield a perpetrator from his or her criminal responsibility, or that the State is unable to undertake a genuine proceeding. Both the Prosecutor and the interested State may appeal the decision of the Pre-Trial Chamber to the Appeals Chamber.

Another role of the Prosecutor relates to the onus of proof in establishing that a domestic judicial body is unwilling or unable to carry out a genuine proceeding. Although the Rome Statute is silent as to who, in particular, shall carry the burden in proving whether a case is admissible or not, it is submitted that it is for the Prosecutor to bear – at the very least, during

³³ Article 15(3), *ibid.*

³⁴ Schabas, *op. cit.* note 28, p.100.

³⁵ Article 53(1), *op. cit.*

³⁶ Article 18(1), *ibid.*

³⁷ Article 18(2), *ibid.*

the initial stages of proving admissibility.³⁸ It can be argued that the criminal law principle *onus probandi actori incumbit*, i.e. ‘he who alleges must prove’, which is common to most domestic criminal justice systems, would attest to this. On the contrary, it was proposed during the PrepCom to cast such burden upon States which should be in a better position to provide information of whether the domestic proceeding in question was genuine.³⁹ The proposal did not prevail during the deliberations but it is a possibility that the merits of this argument might eventually be taken up by the Court – particularly, where valuable evidence pertaining to the genuineness of a proceeding is exclusively accessible to national authority. Nevertheless, it seems more logical to conclude that, in general, the onus of proving the admissibility of a case falls upon the Prosecutor.

Under article 19, the Court, on its own motion, may determine that a case before it is not admissible. The article also provides as to who may challenge the Court’s jurisdiction or the admissibility of a case: ‘an accused or a person for whom a warrant of arrest or a summons to appear has been issued’; a State party that has jurisdiction over the case concerned; and a State who accepted the jurisdiction of the ICC under article 12. Those with *locus standi* as regards to challenging admissibility or jurisdiction may present their opposition to the Pre-trial Chamber only once before the trial commences or under exceptional circumstances, subject to a leave and only on the ground based on article 17(1)(c), during the commencement of the trial.

³⁸ Where the Rome Statute is silent, the Court will have to develop jurisprudence through case law. See discussion in The Office of the Prosecutor, *Informal Expert Paper: the Principle of Complementarity in Practice* [2003] at p. 16-18, available at <<http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>> (last visited 10 January 2006) [Informal Expert Paper hereafter].

³⁹ See authority on international law: *Bleiser v Uruguay*, Communication No. R 7/30 (23 May 1978), UN Doc. Supp. No. 40 (A/37/40) at p. 130: ‘With regard to burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has the access to relevant information.’

II. ARTICLE 17 LEGISLATIVE HISTORY

Upon drafting a statute for an international criminal court, the ILC envisaged a court that is to supplement, as opposed to supplant, domestic legal systems. From the ILC 1994 draft statute, it had been apparent that the Court's jurisdiction will be based on complementarity. However, due to the draft's inadequate elaboration of complementarity, its precise nature and parameters have *yet* to be settled. In the preamble of the draft statute, it was emphasised that the Court is only intended to intervene when national legal proceedings are unavailable or ineffective.⁴⁰ Article 35 of the 1994 draft, entitled 'Issues of Admissibility' and which served as the embryo of article 17 of the Rome Statute, made reference to this preamble but failed to establish sufficient and effective criteria as to when the international criminal court can assume jurisdiction.⁴¹ For example, while article 35(b) provided that a case is inadmissible if it is under investigation by a national court, the said article lacked clear guidelines in ascertaining an 'ineffective' investigation or a 'sham' proceeding. Moreover, it was concluded during the PrepCom that amendments to the draft statute were in order – to extend the jurisdiction of the Court to cases which had been or are being prosecuted rather than limiting the same to situations that have been investigated or are being investigated.

Under the ILC draft, the Court may intervene with respect to a crime when the domestic judicial body concerned is unable to proceed. The draft, nevertheless, did not provide for specific criteria pertaining to this ground; it was presumed that a national legal system's inability to function is essentially self-evident. Whilst the concept of inability as a basis for the Court to assume jurisdiction was generally accepted, there was a clamour during the PrepCom that the statute should explicitly contain a criteria defining inability. Those who advocated for further clarification of the term 'inability' felt that in failing to do so, the statute

⁴⁰ *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, UN GAOR, 49th Session, UN Doc A/49/355.

⁴¹ Article 35 of the ILC draft: 'The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question: (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded; (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (c) is not of such gravity to justify action by the Court.'

will confer wide discretion upon the Court. Consequently, the Preparatory Committee heeded this proposal and developed the criteria delineating inability.

First, it was established that in determining inability, any of the following facts have been identified: the State in question is unable to obtain the necessary evidence, arrest the suspect or otherwise unable to carry out the appropriate legal proceedings. The latter qualifier, 'otherwise unable to carry out its proceedings', whilst regarded by some delegations as 'superfluous',⁴² was included in response to the argument that there are factors, other than inability to gather the requisite evidence and gain custody of the suspect, which may impede a State from executing a legal action.

Second, it was agreed that the above identified criteria – inability to acquire the necessary evidence and arrest the suspect or the inability to carry out legal proceedings – must have been a result of 'total or partial collapse or unavailability' of a State legal system. In spite of the PrepCom's approval, some State delegations during the Rome Conference expressed their concern over the term 'partial collapse.' They argued that a partial collapse in a domestic judicial system does not necessarily imply that the State concerned is no longer capable of carrying out *bona fide* proceedings. As a ground justifying intervention, they further cited that partial collapse might trigger ICC jurisdiction in circumstances where only an obscure district of a particular country is affected by an outbreak but that the judicial system in the other regions of that State continue to operate normally. Several proposals were put forward to address this concern. It was suggested that the adjective 'partial' should be dropped and 'total collapse' be retained. Another proposal urged the use of the term 'substantial' instead of 'partial.' The latter proposal elicited a consensus from among the delegations. Whilst, to a lesser extent, it was acknowledged that the word can also be subjected to the same criticism put forth against 'partial', the adjective 'substantial' was acceptable to most of the state delegations because this qualification raised the threshold to a higher, relatively more precise, level.

The inclusion of the term 'ineffective' in the preamble of the 1994 draft established that the ILC intended the jurisdiction of the Court to go beyond situations where national forums are

⁴² Holmes, 'The Principle of Complementarity,' *op. cit* note 18, at p. 49.

not available or are simply unable to function. In pursuing this matter during the PrepCom, the criterion ‘unwillingness’ was developed, in reference to *sham* proceedings in domestic legal systems which may be performed for the purpose of shielding perpetrators from criminal convictions. Once proven, it is only at this juncture that the Court can step in and intervene. In other words, the Court will be able to exercise jurisdiction over cases where domestic proceedings have been found to include fraudulent measures geared at impunity.

However, on one hand, whilst consensus was arrived at, without much difficulty, insofar as inability was concerned, on the other hand, the notion of ‘unwillingness’ as another prerequisite to activate the Court’s dormant jurisdiction, was strongly objected to, by several State delegates. Those who opposed its inclusion reasoned that, if such an authority is conferred upon the ICC, the Court could impinge upon State sovereignty. It was also pointed out that unwillingness appears incompatible to the criminal law principle of *ne bis in idem* or the right not to be prosecuted twice for the same offence, which is often guaranteed constitutionally. Although those objections were not without validity, they were outweighed by the assertion that if unwillingness is not included ‘it would be almost a signal to States that they could easily prevent the ICC from taking jurisdiction by initiating an investigation or prosecution’, regardless of whether such domestic proceedings are *bona fide*.⁴³ Furthermore, Justice Louise Arbour argued that ‘if unfounded charges are laid, the accused will be acquitted. But if persons guilty of crimes within the Statute are out of reach of the Prosecutor, the very purpose of the Statute will be defeated.’⁴⁴ As deliberations in the PrepCom continued concerning the unwillingness criterion, more delegations became open to the idea and concessions from both sides of the argument began to emerge.

In defining unwillingness, several State delegations expressed concern that the ICC might in turn pass judgments on how domestic legal systems *should* function. In line with this argument, they insisted that unwillingness as a criterion has to be unequivocally objective; accordingly, qualifiers which seemed to be subjectively inclined were ruled out. Illustrative of this move was the replacement of the word ‘effectively’ with the term ‘genuinely,’ owing to

⁴³ Williams, ‘Article 17 Issues of Admissibility’ in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden 1999), p. 388.

⁴⁴ Justice Arbour during the PrepCom session, 8 December 1997.

‘a judgmental aspect’ which the former adjective accords to the Court. The State delegations argued that their criminal justice system might be judged against a ‘perfectionist’ standard. States were concerned that the Court might admit a case on the basis that another method of pursuing accountability is more effective than the one taken by domestic authorities, notwithstanding States’ *bona fide* intentions. The latter term was considered ‘the least objectionable word’, albeit some delegates still believed ‘effectively’ is clearer than ‘genuinely’.⁴⁵

As the purpose of establishing the unwillingness criteria was to cover cases where domestic proceedings were, in truth, for the purpose of protecting perpetrators from criminal convictions, sham proceedings was immediately included as a condition that defines unwillingness. Even during the deliberations, the difficulty in proving that a domestic proceeding is fraudulent in character was already foreseen. Consequently, further conditions were put in place in order to ease this burden. One of the two additional conditions, the PrepCom agreed is ‘undue delays’ that is ‘inconsistent’ with an intention of undertaking a *bona fide* investigation or prosecution. The other condition involved the lack of independence and impartiality on the part of the national criminal systems. The agreed-upon text reads that a case is admissible before the ICC if proven that the relevant proceedings carried out by the State concerned, lacked independence or impartiality. This condition covers possible situations where the threshold to establish *sham* proceedings cannot be satisfied yet *good faith* in carrying out the procedure seems difficult to ascertain. The possibility was also raised that in actual practice, a State may have been investigating or prosecuting in good faith; however, in the course of the legal action, powerful and influential individuals might tamper with the legal system to ensure the acquittal of those who are criminally responsible.

Subsequently, during the Rome Conference, the criterion, ‘undue delays’ was modified. The term ‘undue’ was unacceptable to many State delegates who argued that it would provide a very low threshold for unwillingness. The adjective ‘undue’ was then replaced with ‘unjustified’, which was believed to have raised the threshold higher. The preference for ‘unjustified’ was in light of the fact that it entails a chance for States to give their reason for the delay; an opportunity which is not available, if the word ‘undue’ was employed.

⁴⁵ Holmes, ‘The Principle of Complementarity,’ *op. cit.* note 18, at p. 50.

As exemplified above, the PrepCom believed that the ILC draft has to be expanded to include cases that had been or were being prosecuted. Along this line, ‘cases being prosecuted’, were incorporated to subsume instances where the State concerned is unwilling or unable to genuinely investigate or prosecute. However, for cases that had already been previously prosecuted by a domestic court called for a different set of provisions. For a start, to allow the Court to hear a case that had already been prosecuted was viewed as incompatible to the *ne bis in idem* principle or the rule against double jeopardy. This principle had been provided in another article in the 1994 draft, article 42, under the heading *ne bis in idem* and which can now be found in article 20 of the Rome Statute. Article 42, nevertheless, stipulated two exemptions to the principle: one, where the domestic prosecution was not conducted impartially or independently and two, where it was for the purpose of shielding the accused from his or her international criminal culpability. During the PrepCom, the committee decided to articulate under the admissibility article that a case which had already been prosecuted by a domestic court is inadmissible; the exemption under the article on *ne bis in idem* was rewritten and ended up reflecting the wording of the unwillingness criteria. The article on *ne bis in idem* then provides that a case already heard by a national court is inadmissible unless: (a) it was for the purpose of shielding the person concerned from criminal responsibility, or (b) the proceeding was not conducted independently or impartially, rendering the action(s) taken to be inconsistent with an intent to undertake a *bona fide* proceeding.

Article 17, which dealt with issues of admissibility after the renumbering of articles during the Rome conference, was described as the ‘cornerstone’ of the Rome Statute.⁴⁶ It manifests the complementary nature of the relationship between the ICC and domestic courts, particularly, as to when the ICC could admit a case or defer to national jurisdiction. In reference to admissibility, it must also be noted that article 20 of the Rome Statute, which stipulates the principle *ne bis in idem*, is highly relevant. Article 20 was referred to in article 17(1)(c) and has a provision rendering prosecuted cases to be admissible, that is, after certain prerequisites have been met.

⁴⁶ Williams, *op. cit.*, at p. 384, para 1.

Before moving on to the next section, it must be pointed out that the distinction between ‘situations’ and ‘cases’ was not reflected in article 17. The former concept refers to the pre-investigation period at the domestic or international level whilst the latter is when the ICC Prosecutor had already initiated a formal investigation.⁴⁷ It is submitted – notwithstanding the language contained in the said article which only refers to ‘cases’⁴⁸ – that article 17 is applicable to both.⁴⁹ Hence, the Prosecutor, upon receiving a referral from a State or the Security Council, is not actually in receipt of a ‘case’, but rather a ‘situation’ in which a decision of admissibility has to be undertaken for a possible case worthy of an ICC investigation. Furthermore, Article 17 did not make any reference to article 53 of the Rome Statute, under the heading, ‘Initiation of an Investigation,’ which to a certain extent, should be read in conjunction with the former article. Article 53 commends the Prosecutor to make a preliminary determination whether a situation referred to him or her has reasonable basis to justify an investigation and, *inter alia*, appears admissible under the terms of article 17. In light of Article 53, when a situation is referred, the Prosecutor is tasked to apply the provisions of article 17 in order to determine whether, indeed, there is a reasonable basis to proceed.⁵⁰

The failure of the drafters to incorporate the distinction between ‘cases’ and ‘situations’ can be drawn from the fact that article 17 was mainly resolved during the PrepCom sessions whilst their distinction was finalised during the Rome Conference. It is either lack of time or the strong resistance to reopen the negotiation on complementarity that hindered the drafters to reflect in printed form, the applicability of article 17 not only to ‘cases’ but likewise to ‘situations’.⁵¹

⁴⁷ For discussion as regards the distinction between the notion of ‘situation’ and ‘case,’ see Olásolo, *Reflections on the International Criminal Court’s Jurisdictional Reach* [2005] 16 Crim. L. Forum 279, at p.281-5.

⁴⁸ See Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility* [1999] 10 Crim. Law Forum 61, at p. 77-8.

⁴⁹ Olásolo, *op. cit.* note 14, p. 147-8.

⁵⁰ See *Informal Expert Paper*, *op. cit.* note 38, at p. 9.

⁵¹ See *ibid.*

III. ARTICLE 17 OF THE ROME STATUTE

Under article 17 of the Rome Statute, there are three instances where a case or a situation is potentially admissible before the ICC: (i) inaction – where the State concerned remained inactive in relation to a situation that appears to be within the jurisdiction of the Court; (ii) unwillingness – where an investigation or prosecution was a result of a State's unwillingness to investigate or prosecute genuinely; and (iii) inability – where a State is found to be unable to carry out genuine investigation or prosecution. The admissibility of a case could also be subjected to article 16 of the Rome Statute which confers power to the Security Council to bring to a halt any investigation or prosecution of a situation or case which the ICC is undertaking through the adoption of a resolution to that effect. Under the said article, such a resolution will have a validity of one year but the same can be extended *ad infinitum* through a similar means, if the Council so decides.

The ICC determines whether a situation or a case is admissible based on the genuineness of a proceeding. The term 'genuinely' is the key qualifier that divides cases or situations which are potentially admissible from those which are not. A case may be admissible to the ICC because an investigation or a decision *not to* prosecute in the national court was due to inability or unwillingness of the State concerned. Likewise, a domestic case *being* prosecuted is admissible when the State conducting such a prosecution was proven to be unable or unwilling. In both instances, the adjective 'genuinely' sets the objective standard for admissibility. As earlier recalled, the previous term 'effective' was rejected during the negotiation because the word 'genuine' proved more acceptable to many. It was agreed that the term 'genuine' makes the threshold higher than referring to a domestic proceeding as 'effective.' Furthermore, insofar as the Statute is concerned, the meaning of genuine proceeding must be construed in light of the 'principles of due process recognised under international law.'⁵²

⁵² Article 17. Discussions on unwillingness and inability, below, would provide further understanding as to what is meant by a proceeding that is not genuine, p. 50-76.

A. Article 17(1)

Article 17 assumes inadmissibility of cases which are being addressed by States that have jurisdiction. Paragraph 1 of the said article provides that a case or a situation is inadmissible: (i) if it is being investigated; (ii) if it had been investigated and the State concerned decided not to proceed; (iii) if the case was already prosecuted; or (iv) where it is not of sufficient gravity to justify an ICC proceeding. Save for the last condition, the other criteria are subject to exceptions. Even though a case is being investigated or had been investigated or prosecuted it may still be admitted to the Court provided it can be established that the domestic procedure taken were out of unwillingness to investigate or prosecute genuinely or that the State is simply unable to carry out the investigation due to a total or substantial collapse of its legal system. If a State, nonetheless, remained inactive in relation to a situation where serious international crimes under the jurisdiction of the ICC had been committed, such a situation will be admissible under the terms of article 17(1).

1. Inaction

Article 17 gives effect to the complementarity regime of the ICC. Accordingly, there are two ways of interpreting the principle of complementarity.⁵³ On the one hand, there is the 'negative' interpretation of the complementarity principle. It entails that the Court's jurisdiction is limited to cases where a State is proven unwilling or unable for the purposes of the Rome Statute to genuinely carry out a proceeding.⁵⁴ With this interpretation, the Court has to be satisfied that a State is either unwilling or unable in any situation or case, including where a State had remained inactive. Thus, if article 17's unwillingness or inability criteria cannot be satisfied, the Court must then render a situation or case, even in the absence of domestic proceeding, inadmissible. On the other hand, the 'positive' interpretation of the complementarity principle asserts that article 17(2) and article 17(3), which spell out the unwillingness and inability conditions, become only relevant when a State had exercised its

⁵³ See Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court* [2005] 99 Amer. J. Int'l. L. 403, at p. 413.

⁵⁴ *Ibid.*

jurisdiction. A situation or case will be admissible in the absence of any domestic investigation or prosecution. The unwillingness or inability criteria will only be engaged if a State had initiated a proceeding in order to determine whether the ICC has the authority to supersede a State's endeavour to investigate or prosecute.⁵⁵

The question as to which interpretation will be used is important in cases of inaction – that is, where no State had initiated an investigation with regards to a situation involving an alleged crime or crimes within the jurisdiction of the ICC. The language of article 17 does not mention 'inaction' nor spell out *in positive terms* whether those cases where no jurisdiction was exercised are presumed admissible.⁵⁶ In the negotiation period, it appears as well that the framers of the Rome Statute assumed that States would be averse to ICC intervention and had not carefully contemplated the possibility of a State's voluntarily invitation to the Court to exercise its jurisdiction, nor a State's indifference and decision against taking any legal action, after having been notified of the Prosecutor's intention to investigate,⁵⁷ under article 18. If a negative interpretation of the principle of complementarity is considered, the admissibility under inaction would require that article 17(2) or (3), the unwillingness and inability criteria, is first satisfied before a case of inaction could be admitted. That could pose a problem because under the stipulated criteria, the preconditions defining unwillingness and inability refer to 'proceedings,' which would not be relevant if a State had not, in the first place, initiated any domestic action.

If inaction is to be admissible before the Court, the positive interpretation has to be adopted. Accordingly, legal experts who were gathered upon the request of the Court to study the principle of complementarity in practice, concluded: 'where no State has initiated any investigation [...] the case is simply admissible under the clear terms of article 17.'⁵⁸ In the Informal Expert Paper they produced, it was reasoned that none of the barriers of admissibility under article 17(1)(a) to (c) are satisfied. In other words, as article 17(1)

⁵⁵ *Ibid.*

⁵⁶ See Arsanjani & Reisman, *The Law-In-Action of the International Criminal Court* [2005] 99 Amer. J. Int'l. L. 285, at p. 392: 'such [Ugandan voluntary] referral does not seem to meet the requirement of admissibility under article 17 of the Statute.'

⁵⁷ See the *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, para. 47, UN Doc. A/50/22 (1995); and discussion in Arsanjani & Reisman, *ibid.*, at p. 386-7.

⁵⁸ ICC, Office of the Prosecutor, *Informal Expert Paper*, *op. cit.* note 38, para 18.

enumerated those cases that are inadmissible and that inaction was not identified as one, it can therefore be assumed that cases of inaction are automatically admissible.⁵⁹

More significantly, jurisprudence may be cited to shed light on this matter. In a decision by the ICC Pre-Trial Chamber, in the case of *the Prosecutor v Thomas Lubanga Dyilo*,⁶⁰ the Chamber adopted a positive interpretation. It was concluded therein that where no jurisdiction can be regarded to have initiated a proceeding in relation to a serious international crime and the perpetrator involved, such a situation or case is admissible before the ICC.⁶¹ In deciding the admissibility of the case in question, the Pre-Trial Chamber held that ‘in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.’⁶² The authority of this decision, confirming that it is to be applied in future decisions, is entrenched under article 21(2) of the Rome Statute: ‘the Court may apply principles and rules of laws as interpreted in its previous decisions.’

Furthermore, on practical and heuristic grounds, further compelling arguments can be cited in support of the admissibility of cases of inaction before the Court. First, inaction can also be construed as a surrender of a State’s sovereignty over a particular case or a ‘waiver of complementarity.’⁶³ As discussed above, the principle of complementarity was designed to avoid the infringement of States’ sovereign rights. In cases of inaction, where no State had exercised its jurisdiction, no State sovereignty will be infringed if the Court so decides to admit the same. Second, the argument that inaction is inadmissible because it was not specifically and *expressly* provided under article 17, brings to the fore a loophole in the admissibility of cases. Indeed, if inaction is not admissible, all rogue States have to do is not to lodge any investigation in order to prevent the ICC from intervening. Such setting could undermine the Court’s avowed aim to put an end to impunity: whilst States which initiated proceedings can be subjected to the ICC’s jurisdiction if found unable or unwilling to

⁵⁹ See also discussion in Broomhall, *The International Criminal Court: A Checklist for National Implementation* [1999] 13 *Nouvelles Études Pénales* 113 [A Checklist for Implementation hereafter], at p. 144.

⁶⁰ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo* [2006] ICC-01/04-01/06.

⁶¹ *Ibid.*, at p. 20-24, para. 35.

⁶² *Ibid.*, at para. 40.

⁶³ See Kress, ‘Self-Referrals’ and ‘Waiver of Complementarity’ *Some Considerations in Law and Policy* [2004] 2 JICJ 944.

investigate genuinely, those States which opt to remain silent or inactive will be beyond the Court's grasp.

1.1. *Four Forms of Inaction*

There are four forms of potentially admissible cases of inaction.⁶⁴ The first case of inaction is an *a priori* inaction where no State had initiated any proceeding, pertaining to a situation involving one or more of article 5 crimes.⁶⁵ This type of inaction is straightforward. It can take the form of a State making a declaration that it is not carrying out any proceeding in relation to a crime under the jurisdiction of the Court. The case is admissible because no investigation had been initiated concerning the commission of a crime under article 5 and concomitantly, the perpetrator most responsible for it. It must be noted, nevertheless, that the Court on *its own motion* may yet consider the case involving *a priori* inaction inadmissible.⁶⁶

The second type of inaction is where the ICC admits a situation on the basis that the State concerned had voluntarily referred the matter to the Court. A State may, without any attempt to initiate a proceeding, refer a situation to the ICC, or after having initiated an investigation or prosecution, bring the proceeding to a halt for reasons other than those specified under article 17(2) unwillingness and (3) inability, then refer the situation to the Court. Arguably, whilst voluntary referral could be seen as evidence of inability, it is not always the case that a State which made a voluntary referral is *unable* within the terms of article 17(3). For instance, in the case of Uganda where a voluntary referral to the Court was made with regard to the situation in its northern region, the Pre-Trial Chamber II confirmed the Prosecutor's decision to initiate an investigation and held that 'the case appears to be admissible,'⁶⁷ that is, despite the absence of evidence that the Ugandan authorities were unable to carry out genuine proceedings. Whilst the State authorities failed to obtain the suspects, the conflict in the northern part of the country does not appear to affect the whole or substantial part of the

⁶⁴ See Broomhall, *A Checklist for Implementation*, *op. cit.* note 59.

⁶⁵ See Olásolo, *op. cit.* note 14, at p. 147-150.

⁶⁶ Article 19(1) of the Rome Statute.

⁶⁷ ICC, Pre-Trial Chamber II, *Warrant of Arrest for Joseph Kony on 8 July 2005 as Amended 27 September 2005* [2005] ICC-02/04-01/05, at para 38.

judicial system and thus, under the terms of article 17(3), the State cannot be regarded as unable.⁶⁸

The admissibility of voluntary referral is justifiable on the basis that it can reasonably be viewed as a surrender of State sovereignty – in effect, upholding the very purpose of the principle of complementarity. However, in light of the failure of the Statute to *expressly* provide for its admissibility, the matter of voluntary referral inadvertently raised an issue relative to the possible undermining of the right of an accused, as specifically itemized under article 19 of the Rome Statute, to challenge the admissibility of such a case. Arsanjani and Reisman pointed out that ‘a State’s consent, expressed in the act of referral, would automatically override the statutory right that was [explicitly] granted to the accused.’⁶⁹ Where it was based on a voluntary referral, an accused’s admissibility challenge is deemed to fail. The experts in the Informal Paper stated that ‘in the clear absence of any investigation or prosecution by a State, an admissibility challenge on the grounds of complementarity [e.g. that a State is carrying out genuine proceedings] would not have any merits.’⁷⁰

It can be argued that an accused’s right to challenge the admissibility of a case involving inaction should be overridden based on two reasons. First, it can be said that the right to challenge the admissibility of a case based on complementarity is only relevant when a domestic proceeding had been initiated. To a large extent, the right to challenge was included as a safeguard that the ICC would not intervene and step upon a State’s sovereign right, that is, if the State concerned had exercised its jurisdiction, in the first place. However, if there is a voluntary referral from the State that has jurisdiction over the relevant situation, it can be said that the State’s sovereignty had been waived and thus, an admissibility challenge ‘would not have any merits.’ Second, voluntary referral can be viewed as a clear indication that a State does not intend to investigate a situation or prosecute perpetrators. The Preamble to the Rome Statute affirmed the States Parties’ determination to put an end to impunity for the perpetrators of the most egregious international crimes. If it is to give effect to that intention,

⁶⁸ See discussion below on article 17(3): Inability, at p. 76-80.

⁶⁹ Arsanjani & Reisman, *op. cit.* note 56, at p. 396.

⁷⁰ Informal Expert Paper, *op. cit.* note 38, at para. 64.

the ICC must be able to admit cases where the relevant States expressed resolutions that they will not or cannot prosecute.

It is, however, different if a challenge on admissibility based on complementarity is instigated by another State. This scenario is possible in circumstances where there is more than one State that has jurisdiction over a particular situation. According to article 19 of the Rome Statute, a challenge may be made by 'a State which has jurisdiction over a case, on the grounds that it is investigating or prosecuting the case or has investigated or prosecuted.' It is submitted that when a challenging State can establish that it is either investigating or prosecuting a specific, a voluntary referral by another State that also has jurisdiction over it cannot override the former's right to challenge – in the same manner as the ICC, by virtue of the complementarity principle, cannot supersede a State's sovereignty if that same State is already investigating or prosecuting genuinely. Voluntary referral is only admissible if no other State is genuinely undertaking any proceeding.

Moreover, in admitting cases solely based on voluntary referral, the ICC may inadvertently give a misleading impression to States. It might be taken as a signal that difficult domestic cases can be referred to the Court to save States the trouble and resources they would have had exhausted, if they were to investigate and prosecute by themselves.⁷¹ Concomitantly, it can also be argued that admitting cases based on voluntary referral does not seem to be in total harmony with the complementarity regime of the Court. The complementarity principle is designed to encourage States to deal primarily with domestic situations and cases,⁷² ideally without any qualification as to how difficult or troublesome a situation or a case may be. The complementarity regime is intended to serve 'as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes.'⁷³ If voluntary referral is used much too frequently as a basis for admitting a case, it

⁷¹ See Arsanjani Reisman, *op. cit.*: voluntary referral 'could encourage governments to externalise to the Court the domestic political problems [...] they do not wish to invest the necessary resources to manage or resolve,' at p 392.

⁷² See the Rome Statute 6th Preambular paragraph: 'Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.'

⁷³ Informal Expert Paper, *op. cit.* note 38, at para 2.

could well mean that States are not carrying out their primary responsibility to adjudicate serious international crimes.⁷⁴

Nevertheless, it can be argued that an ICC intervention on the basis of voluntary referral may be desirable or even necessary – particularly in cases where the article 17 inability criterion cannot be satisfied and the national authority concerned seems unable to judicially resolve a conflict.⁷⁵ It cannot be automatically assumed that a State is capable of carrying out genuine proceedings even if, strictly speaking, it does not fall under the inability criterion of article 17(3). The inability criterion has preconditions to satisfy, one of which is that a State's judicial system had wholly or substantially collapsed. However, there may be other causes as to why a domestic judicial institution is incapable of dealing with a situation, for reasons other than a total or substantial collapsed of its legal order. In order to help end impunity, the Court has to exercise its jurisdiction and take on cases that States seem incapable of prosecuting. In the Informal Expert Paper, the authors claimed that '[t]here may be situations where the appropriate course of action is for a State concerned not to exercise jurisdiction, in order to facilitate admissibility before the ICC.'⁷⁶ The Office of the Prosecutor in its Policy Paper, indicated a similar conviction.⁷⁷ The Ugandan situation, where the State made a voluntary referral, can be taken as an example in this regard. Uganda referred a longstanding conflict in its northern region involving the Lord's Resistance Army (*LRA*), which resulted to countless and grievous violations of human rights. Up to the present, the government was not able to resolve the conflict. The domestic authority had also failed to prosecute perpetrators who committed or are still committing crimes that are within the Court's jurisdiction. The conflict is even much more complicated with the involvement of neighbouring States such as Sudan. Whilst Uganda's 'functional' legal system⁷⁸ does not render the State as 'unable'

⁷⁴ For States' responsibility to investigate and prosecute serious international crimes, see Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in Bassiouni (Ed.) *Post Conflict Justice* (Transnational Publisher 2002), at p. 3 and Bassiouni, 'Proposed Guiding Principles for Combating Impunity for International Crimes' in Bassiouni, *ibid.*, at p. 255.

⁷⁵ See Charney, *Editorial Comments: International Criminal Law and the Role of Domestic Courts* [2001] 95 *Amer. J. Int'l L.* 120, at p. 122 where the author argued: '[i]n certain cases circumstances, States may find it in its interest to allow a prosecution to go forward before the ICC, considering the matter too dangerous to be handled domestically and preferring trial before a distant international tribunal.'

⁷⁶ Informal Expert Paper, *op. cit.* note 38, at para.61.

⁷⁷ ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* (ICC-OTP 2003), Pt. II at p. 5 [OTP Policy Paper hereafter]: 'there may be cases where inaction by States is the appropriate course of action. [...] In such cases there will be no question of "unwillingness" or "inability" under article 17.'

⁷⁸ US country report on Uganda.

under article 17(3), it is apparent that the Ugandan conflict cannot be resolved domestically and as such, it can be argued that the admissibility of voluntary referrals, at least in this particular case, can be said to be tenable.

Another issue concerning voluntary referrals revolves around the possibility of the ICC being used as a political tool by governments.⁷⁹ As the ICC is not immune from politics, it was argued that governments could opt to make a voluntary referral for their own interests, for instance, as a means to escape political embarrassment for failing to resolve a particular troublesome case or to expose rebels to the international community. If a situation could not be settled after numerous attempts – owing to deeply entrenched political and cultural issues which necessitate peace negotiations and settlements as the only feasible solution – in referring the situation to the ICC, a government's failure may well thus, become the Court's.⁸⁰

The third scenario in which a case might be admitted based on inaction is where there is a pre-trial amnesty⁸¹ or where there is a lack of extradition agreement between States that prevents one from carrying out a proceeding.⁸² Although pre-trial amnesties were not expressly addressed in the Rome Statute, situations where no criminal investigation or prosecution had been initiated because an amnesty law is in force can be considered as a form of inaction.⁸³ As with the lack of extradition agreement scenario, this can be regarded as a case of inaction where the State concerned does not initiate any proceeding, aware that it will not be able to obtain the potential suspect from a custodial State.⁸⁴ Unless otherwise proven, it is inappropriate to brand a State as unwilling to genuinely carry out a proceeding because of the existence of a pre-trial amnesty or a lack of extradition agreement which prevent the same from prosecuting the accused concerned. Furthermore, the whole purpose of the ICC, to bring

⁷⁹ See Arsanjsani & Reismann, *op. cit.* note 56, at p. 391-397; Cassese, *op. cit.* note 31, at p. 436; Charney, *op. cit.* note 75; and Kress, *op. cit.* note 63, at p. 946.

⁸⁰ *Ibid.*, at p. 395.

⁸¹ Broomhall, *A Checklist for Implementation*, *op. cit.* note 59.

⁸² See Olasolo, *op. cit.* note 14, at p. 166.

⁸³ See discussion below on article 17(3), Inability. If amnesty was granted after the initiation of a proceeding or during prosecution, it may be argued that the amnesty makes a judicial system 'unavailable' under the terms of the said subsection, p. 76-80

⁸⁴ See discussion below, article 17(3): inability. This scenario where a State cannot carry out prosecution because the custodial State refuses to extradite the accused concerned was argued as a potential ground for satisfying one of the conditions of the inability criterion. Whether it will be under the admissibility grounds of inaction depends on how the term 'unavailability' will be construed under the said subsection, p. 76-80

impunity to a halt, would be undermined if national laws granting pre-conviction amnesties can override the Court's authority.

The fourth possible case of inaction is said to be where a domestic proceeding is being undertaken, pertaining to a particular conduct but that the State concerned, had proceeded on narrower grounds, in effect, failing to encompass the full extent of the conduct in question.⁸⁵ This scenario could arise when a criminal conduct is treated by a domestic jurisdiction as an 'ordinary crime' whilst from the perspective of the ICC Prosecutor such conduct constitutes an 'international crime.'⁸⁶ For example, a perpetrator may be prosecuted for multiple murders based on acts which the Prosecutor regards as genocide. The same conduct, that is, of killing several individuals, had been the basis of both allegations, one of multiple murders by the State concerned and of genocide by the Prosecutor. It can be pointed out that in the example given above, in charging the relevant person with multiple murders and with genocide, there is a gap between the scopes of culpability. The latter is much wider and entails a significant label on the perpetrator. To the extent where multiple murders have failed to address the conduct appropriately, it could be argued that there is inaction on the part of the State that exercised its jurisdiction. The Prosecutor can maintain that the span of culpability of multiple murders is narrower than genocide to the point which trivialises the act and would result to an actual impunity, that is, if the same conduct is not addressed appropriately.

The extent of how the domestic definition of a crime differs from that of the Rome Statute is perhaps of greater significance. If the scope of culpability under the national criminal law is fundamentally divergent from the Rome Statute's, then a claim of admissibility based on inaction may have more chances of succeeding. The reason as to why a State would treat a conduct as an ordinary offence instead of an international crime may also be relevant. As will be mentioned below, where it can be established that downplaying a conduct constituting an international crime to a mere ordinary offence, is an attempt to shield a perpetrator from his or

⁸⁵ Broomhall, *A Checklist for Implementation*, *op. cit.* note 59, at p 149.

⁸⁶ See Holmes, 'The Principle of Complementarity,' *op. cit.* note 18, at p. 57 where it was defined: '*ordinary crime* refers to the situation where the act has been treated as common crime as distinct from an international crime having the special characteristic.' This situation must also be distinguished from cases where the defendant had already been acquitted or convicted for a crime categorised under 'ordinary crimes' as oppose to 'international crimes.' Although the main idea of the *ne bis in idem* principle applies in general, its relevance technically speaking concerns cases that were already decided. See discussion below on article 20: *ne bis in idem*, p. 81-7.

her actual responsibility, the relevant ground for admissibility is no longer inaction but unwillingness under article 17(2).⁸⁷ This point is worthy to note, considering that many national penal codes do not provide for international crimes. A domestic prosecutor, for example, may recognise the seriousness of a conduct as an international crime but within the context of the relevant national criminal law, be constrained to charge the accused with an ordinary criminal offence.

It was claimed that a fourth case of inaction may also arise when a State's criminal law allows for defences that are too broad in comparison to those available under the Rome Statute.⁸⁸ The argument goes that the Rome Statute 'could make a case admissible before the Court if national law thereby allowed impunity where the Court would punish.'⁸⁹ For example, an acquittal following the successful submission of a particular defence under the national criminal law concerned, but that such a defence is much narrower under the Rome Statute,⁹⁰ could be seen as a *resulting* impunity from the point of view of the ICC. It had been argued that this instance should be regarded as a potentially admissible case of inaction. On the contrary, however, it is submitted that this argument seems unlikely to work. Article 17(1) precludes ICC intervention if domestic proceeding had been undertaken or is being carried out. If a State claims that it already initiated a prosecution in relation to a specific person and conduct, strictly speaking, it can no longer be considered as a case of inaction. It is altogether a different matter if the conduct is the one being debated, particularly whether a conduct's extent was fully addressed or only in part – in which instance, a State can be said to have remained inactive. There is a clear distinction between the subject matter of the inquiry, that is, whether a State had dealt or is addressing a situation, the person responsible and the conduct in question, and the *manner* in which a State attends to or had dealt with a case. In relation to the admissibility of cases, the use of a domestic law defence, regardless of its consistency to the Rome Statute or the lack thereof, does not seem to be of relevance to the former question.

⁸⁷ See discussion on Unwillingness, at p. 49-75.

⁸⁸ See Broomhall, *International Justice and the International Criminal Court* (Oxford University Press 2003) [International Justice hereafter], at p. 92.

⁸⁹ *Ibid.*

⁹⁰ Article 31 of the Rome Statute provides the defences available to defendants.

1.2. *Inaction and the Prosecutor v Thomas Lubanga Dyilo*

The decision of the Pre-Trial Chamber in *the Prosecutor v Dyilo* relates to inaction and requires a more detailed discussion. The facts of the case involve Thomas Lubanga Dyilo who was arrested and detained by the State authority of the Democratic Republic of Congo (DRC) on the basis of several criminal charges under its national criminal law, foremost of which is genocide as well as additional crimes of murder, illegal detention and torture.⁹¹ Despite the domestic proceedings carried out by the State concerned, the Prosecutor claimed that the case against the accused is admissible before the ICC. In particular, the Prosecutor alleged that the accused was criminally responsible for war crimes which include the following: policy/practice of the *Union des Patriotes Congolais* (UPC)/*Forces Patriotiques pour la Liberation du Congo* (FPLC) of enlisting and conscripting children under the age of fifteen into the FPLC and using them to actively participate in hostilities. The Pre-Trial Chamber held that the case was admissible based on the findings that no State can be considered to have initiated a proceeding on the crimes which the Prosecutor specifically identified. The Chamber's decision of admissibility was made, despite the fact that the State authority initiated proceedings against the same accused. It was pointed out, that the war crimes alleged by the Prosecutor was not included or covered by the national proceedings. The Pre-Trial Chamber established that for a national proceeding to be held inadmissible, it must encompass both the person and the conduct. It was found in the *Lubanga Dyilo* decision that the State had remained inactive in connection to the alleged war crimes because the domestic proceedings did not encompass the conduct which the Prosecutor had based his allegation.⁹² It was further confirmed by the Chamber that there is no need to make an unwillingness or inability analysis where no State had acted upon a crime that is within the jurisdiction of the ICC. The decision implies a necessary qualification to the complementarity regime of the Court, that is, the jurisdiction of the ICC will be only deferred if national proceedings cover both the person and the conduct.

⁹¹ *Case of Lubanga Dyilo*, *op. cit.* note 60, at para. 33.

⁹² *Ibid.*, at para 37: it was held that national proceedings to be inadmissible 'must encompass both the person and the conduct'. See also discussion above.

The extent of the term ‘conduct,’ which was not further elaborated by the Pre-Trial Chamber, is of immense significance in this regard. In the decision in the *Lubanga Dyilo* case, the manner in which the domestic authority had based its allegation of genocide was different from that which the ICC Prosecutor founded his war crimes allegation – although there may have been overlaps. The domestic proceedings therefore, did not encompass the specific conduct upon which the Prosecutor had alleged war crimes. In that case, the Pre-Trial Chamber did not encounter any difficulty in establishing inaction, in spite of the fact that the person accused by the State of genocide and by the Prosecutor of war crimes was the same. Consequently, where the unwillingness and inability criteria seems impracticable to satisfy and the Prosecutor is keen to prosecute a certain perpetrator, in theory, he or she may decide to look at another conduct which appears to have been excluded in the national proceeding and opt to allege and capitulate to an arguably lesser crime, *e.g.* war crimes instead of genocide.

However, in the hypothetical example earlier cited relating to the fourth type of inaction – where a State charged multiple murders, on the one hand, whilst the Prosecutor alleged genocide, on the other hand – it seems more complicated, or perhaps impossible, to establish an admissible case of inaction. The reason for such is that the *conduct* of killing several persons as addressed by both the State concerned and the Prosecutor is one and the same. The difference merely rests upon how that particular conduct was characterised, that is, as multiple murders by the domestic authority and as genocide by the Prosecutor. If the term ‘conduct’ based on the *Lubanga Dyilo*’s ruling (that a national proceeding only becomes inadmissible before the Court if it encompassed both the person and the conduct) is strictly interpreted, then the case example would be inadmissible⁹³ and the fourth possible case of inaction would likely be unfeasible. A State, challenging the admissibility of such a case, could easily argue that its domestic proceeding had encompassed both the *conduct* and the person, regardless of the fact that the crime being prosecuted domestically is different from what the Prosecutor believes it to be.

On the contrary, a broader reading of the term ‘conduct,’ that is, to include a qualification as to the scope of culpability of a domestic crime, will allow a determination of a case of

⁹³ Unless unwillingness can be established. See discussion below on Sham Proceedings, at p. 53-67

inaction that could be admissible before the Court. For instance, where the allegation of the domestic authority and the Prosecutor is based on the same act, in order to establish the admissibility of a case, the Prosecutor could maintain that, in charging the perpetrator with multiple murders instead of genocide, the conduct was not appropriately addressed – the allegation of multiple murders failed to recognise the fact that those killed all belonged to the same ethnic group – and as a consequence, the national proceeding failed to encompass the conduct in question. A liberal reading of ‘conduct’ would include the intent of a perpetrator, *e.g.* to exterminate an entire ethnic group, as well as the offender’s mental state, apart from the criminal act *per se* of shooting to death a certain group of people. This interpretation, if taken as the prevalent one, could potentially open a wide discretionary avenue for the Prosecutor as well as enable the Court to admit a broader latitude of situations and cases. The Prosecutor, in principle, may potentially argue for admissibility on the grounds of inaction on many situations by alleging that an international crime had been committed but a concerned State had charged the accused with an ordinary crime. This argument is further strengthened by the fact that, in the absence of any legal obligation, notwithstanding strong recommendations to this effect, many of the member states of the ICC have not put their criminal laws in line with the Rome Statute. A number of military codes, for instance, do not encompass the full extent of acknowledged international crimes.⁹⁴ Disparities between the Rome Statute and national criminal laws where ‘conduct’ is read widely, may open the possibility for admissibility of cases in the face of States’ efforts to prosecute offenders.

In looking at the possible broad interpretation of the term ‘conduct,’ one may consider the *ne bis in idem* provision under article 20, which applies to cases that had already been adjudicated.⁹⁵ The *ne bis in idem* article used the term ‘conduct’ and not ‘offence or crime,’ in prohibiting the Court from prosecuting a person already tried in a national forum. In comparison with the *ad hoc* tribunals, the Statutes of ICTY and ICTR clearly provide that there is an exemption from the double jeopardy principle, involving a conduct characterised as an ordinary crime in a national court where its perpetrator was domestically prosecuted for the same.⁹⁶ In other words, if a person was tried for murder based on a particular conduct that

⁹⁴ In certain military codes, recruited of child soldiers are not prohibited. See Broomhall, *International Justice*, *op. cit.* note 79, at p. 91-92.

⁹⁵ See also discussion below on article 20, at p. 81-6.

⁹⁶ Article 9 and 10 of the Statutes of the ICTY and ICTR, respectively.

also constitutes a war crime, he or she may yet be tried *again* by the *ad hoc* tribunals. The ICTY and ICTR Statutes would thus, allow a retrial if the ‘conduct’ was not characterised instead as an international crime, but rather as an ordinary crime. In contrast, article 20 of the Rome Statute has no *express* provision exempting ordinary crime prosecution from the double jeopardy rule. Perhaps, whilst it is unwise to conclude with certainty, it appears that the Court would be barred from re-prosecuting a person already charged and tried for an ordinary crime, on the basis of a conduct that also constitutes an international crime.⁹⁷ Be that as it may, it would seem peculiar if a case could potentially be admissible before the ICC on the grounds of inaction because a particular conduct was not legally characterised appropriately, *i.e.* as an international crime before the Court. Indeed, this may be possible in cases where judgment has *yet* to be made but otherwise inadmissible, where a domestic court had *already* acquitted or convicted the person concerned. To keep in line with article 20, it may be posited that the term ‘conduct’ *vis-à-vis* inaction be given a narrow reading, which would thus entail the fourth case of inaction improbable.

Furthermore, the role of the Pre-Trial Chamber must be underscored. For a start, the Chamber is not legally bound to accept the Prosecutor’s legal characterisation of a conduct.⁹⁸ In other words, if the Prosecutor alleges a perpetrator to have committed a particular article 5 crime, the Pre-Trial Chamber may decide to admit such a case, even without necessarily agreeing with the Prosecutor’s label of the conduct. The pivotal role of the Chamber lies in its independence from the Prosecutor and primacy in decisions concerning admissibility. Interestingly enough, in the absence of any findings on unwillingness or inability, it cannot be surmised whether the Court would hold a case inadmissible merely on the strength of its disagreement with the Prosecutor’s legal characterisation of a conduct. Accordingly, the ICC Prosecutor may be encouraged to follow the practice set by the prosecutors of the *ad hoc* tribunals of including several charges of crimes on the basis of a single incident and in so doing, enabling the Pre-Trial Chamber to decide which classification or charge, in its view, is the appropriate one.

⁹⁷ Unless article 20(3) exemptions are satisfied. See discussion in Tallgren, ‘Article 20: *Ne bis in idem*’ in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden 1999), at p. 430-1.

⁹⁸ See *Lunbanga Dyilo case*, *op. cit.* note 60, at para. 16, p 14.

1.3. *Other Relevant Factors*

In determining a case of inaction, the Prosecutor has to take other facts into account. First, the Prosecutor will have to consider the limited resources of the Court and in particular, the Office of the Prosecutor. If careful discretion is not adhered to, it had been widely anticipated that the Prosecutor and the Court will respectively be overburdened with referrals and cases. Thus, in instances where a State authority is already investigating a particular conduct, although different from what the Prosecutor intends to pursue, the latter may discern against proceeding further, opting instead, to utilise the Office's limited resources on other priority situations. For example, following the commission of crimes under article 5 where the concerned State charged the accused with murder, instead of genocide as the Prosecutor may allege, the Prosecutor may so decide to withhold his or her investigation. The Prosecutor can rest with the assurance that, once convicted, the person will be meted the most severe punishment by the national authorities since murder is considered a most serious criminal offence in many, if not all, domestic criminal justice systems. Second, the Prosecutor will likewise have to consider political factors. In a situation where several crimes under the jurisdiction of the Court appear to have been committed by an accused and the concerned State, using its discretion, decides to investigate only the most serious conducts – to save time and resources – such a State may not be enthusiastic towards an intervention by the ICC on the grounds of inaction, pertaining to conducts advertently not addressed by the State. In such a circumstance, the Court may also be viewed as indirectly pressuring the State concerned to deal with a conduct or conducts that the latter earlier decided not to pursue.

Last but not the least, the crimes alleged by the State and the Prosecutor have a decisive impact upon impunity. For example, a State may insist that the ICC give way to its domestic jurisdiction as it is already dealing with the same perpetrator – albeit different crimes were alleged by the domestic authority and the Prosecutor. For its part, the Prosecutor may counter that the said State had, in fact, trivialised a conduct constituting a crime within the Court's jurisdiction. The gravity of the crime charged can expediently solve the impasse. If a State charged a perpetrator for a crime that is similar or arguably as serious or perhaps, more serious as the one being alleged by the Prosecutor, then the Court would likely be inclined towards deferring to the national jurisdiction.

1.4. *Conclusion*

As discussed above, it is imperative that cases of inaction be admitted before the ICC. The silence of the Rome Statute with regard to *inaction* initially raised an important question on the very assertion that inaction entails automatic admissibility. The Pre-Trial Chamber, however, confirmed the conclusion of the experts in the Informal Expert Paper that when no State can be considered to have initiated any proceeding, the case is simply admissible. The Chamber, nonetheless, had not elaborated on its ruling concerning national proceedings, in particular, as to when a domestic investigation or prosecution encompass both the conduct and the person concerned and of equal importance, how the term ‘conduct’ should be construed. Although unlikely, if the term ‘conduct,’ as established by the Pre-Trial Chamber in *the Prosecutor v Lubanga Dyilo*, is to be interpreted broadly, many situations and cases could potentially be admissible before the ICC. However, in admitting cases of inaction, the Court must take cognizance of other factors, including political ones. It is naïve to hold that the ICC exists in a social vacuum and is free from politics. Indeed, the admissibility of inaction, particularly voluntary referral, can be used by States for their political ends.

2. *Article 17(1)(a)*

2.1 *Domestic Proceedings*

The first question concerning article 17(1)(a) is when can it be said that a domestic action, an investigation or prosecution, satisfies the complementarity requirement which would, *prima facie*, preclude the Court from activating its otherwise dormant jurisdiction. National criminal procedures, to say the obvious, differ from State to State; such being the case, the answer to the question depends on the particular procedures obtaining in various States. Since in domestic investigations, States have diverse methods of initiating investigations, it would be impossible, at least in this study, to survey each and every criminal procedure of all countries which acceded or have *yet* to accede to the Rome Statute. In taking this legal diversity into account, it is logically compelling to conclude that the ICC, adhering to the complementarity

principle, will construe the earliest step of national authorities *vis-à-vis* their respective investigative procedures as sufficient, *prima facie*, for it to defer to domestic jurisdiction. To suppose otherwise, the ICC may extend itself beyond its complementary role and might be viewed as directly or inadvertently discriminating or favouring a particular investigative procedure over another.

To satisfy the complementary requirement, any investigation of a situation must also cover both the person and the conduct which appear to be within the Court's mandate, as discussed above. In the *Prosecutor v Lubanga Dyilo*, the Chamber held: 'for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct.'⁹⁹ The case was decided to be admissible despite the fact that the relevant authority had initiated an investigation and had even issued a warrant of arrest against the accused for crimes, some of which appear to be within the Court's jurisdiction but differed from those which the Prosecutor alleges to have been committed, in relation to the case in question.¹⁰⁰ The decisive factor had been that the domestic proceedings 'do not encompass the conduct' that the Prosecutor alleged. A situation or a case, therefore, would only be rendered inadmissible if the domestic action encompasses both the person and the conduct.

2.2. Truth Commissions & Other Prosecutorial Alternatives

The second question relating to article 17(1)(a) concerns domestic proceedings which are not primarily for the purposes of criminal prosecution. Beside criminal prosecution and punishment, national authorities had devised alternative ways of addressing serious human rights and humanitarian violations, the most common of which are *Truth and Reconciliation Commissions*. Truth commissions carry out investigations mainly to establish the facts, for instance, what happened during a period of internal armed conflict or war, rather than determine culpability, as ordinary or standard criminal investigations commonly aim. They

⁹⁹ *Ibid.*, at p. 23.

¹⁰⁰ The Prosecutor alleges the accused for war crimes (for his alleged criminal responsibility of UPC/FPLC's alleged policy of enlisting, conscripting, and using to participate actively in hostilities children under the age of 15. The State concerned, nevertheless, charged the same accused of genocide. See further discussion above on 'Inaction,' p. 21-36.

seek to compile a record of events from victims or their families, if the former are deceased, and likewise from perpetrators. Unlike the ICC or any criminal court, truth commissions put emphasis on acknowledging the truth, rather than holding perpetrators accountable to the crimes they have committed.¹⁰¹ Although it can be said that criminal trials like truth commissions do disclose the details of an incident, they are, nonetheless, subject to rules of evidence which limit the information that can be revealed.

In exchange, however, for a full account of what happened, truth commissions often offer amnesties from prosecution in order to encourage all those involved to come forward and tell their stories. Several issues concerning truth commissions are envisaged to bear upon admissibility which the Court will have to deal with, sooner or later. The first issue is whether truth commission investigations would satisfy the complementarity requirement under article 17 and would thus, bar the ICC from initiating its own investigation, unless unwillingness or inability is proven. The second area of concern revolves on whether it is most desirable and beneficial for both the ICC and truth commissions that the Court disregards truth commission investigations and amnesties. The latter issue, albeit more of a political and practical than a technically legal question, will be a likely factor for the Prosecutor, in deciding whether to initiate an investigation, and for the Court, in determining whether such a case should be admitted. In spite of these foreseeable issues which were, in fact, raised by a number of states during the Rome Conference, most notably South Africa, the Statute made no reference to the subject of truth commissions.

Technically, there is nothing in the Rome Statute which specifies that when a case or a situation had been or is being investigated by a truth commission, the ICC is automatically precluded from exercising its dormant jurisdiction. On the one hand, it can be argued that since the truth commission investigations are not essentially conducted for judicial purposes, they cannot be regarded as national proceedings that could satisfy the complementarity requirement of article 17(1)(a). Unlike truth commission investigations, the very nature of criminal investigations is its view to prosecute. It then follows the argument that a situation

¹⁰¹ For further and detailed discussion on truth commissions see Olson, *Mechanisms Complementing Prosecution* [2002] 84(845) Int'l Rev. of the Red Cross, available at <www.icrc.org> (last visited 5 January 2006) and O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International 2002).

investigated by a truth commission can be regarded as a case of inaction. In the absence of an intent to prosecute, where there are gathered evidence which reasonably demand prosecution, it can be claimed that article 17(1)(a) cannot be satisfied, as no ‘criminal’ investigation can be considered to have been carried out. On the other hand, some truth commission investigations are not totally disentangled from judicial purposes and as such, do not *do away* with the possibility of prosecuting persons responsible for serious international crimes. Granting of an amnesty by some States are not taken lightly and are even impermissible on certain cases, depending on the nature and seriousness of an offence and the surrounding circumstances.¹⁰² Not everyone who had given full disclosure before a truth commission will be granted an amnesty; some may be prosecuted on the basis of the account they had given. In this manner, it can be maintained that some truth commission investigations in certain instances are capable of satisfying article 17(1)(a) and that situations investigated by truth commissions could thus, be held inadmissible, unless the unwillingness and inability criteria are met. Accordingly, if the test of admissibility under article 17 can be satisfied, *i.e.* that a truth commission investigation or amnesty was, in reality, found to be for the purpose of shielding a specific perpetrator from his or her criminal responsibility, then such a case is admissible provided, that other legal requirements are met. As with the first issue, there is therefore, a strong case to assert that the Court is not barred from commencing its own investigation by virtue of truth commission investigations or amnesties. One might recall, at this juncture, of the amnesty accorded to the late Chilean Dictator, Augusto Pinochet. The resulting Statute clearly did not reflect any intention to pacify the jurisdiction of the ICC, simply because a truth commission is investigating a case or that an amnesty was granted to those responsible for the crime(s).¹⁰³

It may, nevertheless, be difficult to prove unwillingness when a truth commission is investigating a specific case. States could easily argue that truth commissions are not designed to prosecute criminals nor shield perpetrators from their culpability, but that their

¹⁰² The South African Truth Commission, for example, requires certain conditions to be met before granting an amnesty. Under the Promotion of National Unity and Reconciliation Act 34 of 1995, section 20(1), among others, the conducts committed or acts of omission by a person giving full disclosure of what occurred must be related to a political objective.

¹⁰³ See Schabas, *op. cit.* note 28, at p. 69.

primary aim is precisely to restore peace and facilitate national reconciliation.¹⁰⁴ To establish unwillingness, there has to be evidence equivocally pointing to a contradiction between the identified purpose of the truth commission's creation and the real motive behind the amnesties given. The nuances involved necessitate that the Court will have to assess each and every situation on its own merit. Where blanket amnesties are granted as what happened in El Salvador,¹⁰⁵ the ICC should be more wary than when amnesty is given on a case by case basis. Moreover, under article 53(1)(c), in determining whether to initiate an investigation, the Prosecutor has to take into account if, – after a thorough consideration of ‘the gravity of the crime and the interests of victims – there are nonetheless substantial reasons to believe that an [ICC] investigation would not serve the interests of justice. Whilst the Court is not technically barred from exercising its jurisdiction if a truth commission investigates, article 53(1)(c) appears to have refined the discretion of the Prosecutor from *taking on* cases that would not serve the interest of justice. It can be said that the relevant subsection rightly addresses the concern of some States, South Africa for example with its successful Truth and Reconciliation Commission, as it reassures them that genuine truth commission investigations for the purpose of national peace and reconciliation, could dissuade the Prosecutor from proceeding with the matter.¹⁰⁶

Article 53(1)(c) is perhaps, more relevant to the second issue of whether it is most desirable that the ICC altogether discount truth commission investigations and amnesties. It can be maintained that article 53(1)(c), in effect, compels the Prosecutor, in his or her pursuit of justice, to consider questions involving the attendant risks in inadvertently destabilising a nation which, having undergone a period of conflict, seeks to reconcile its people through the establishment of a truth and reconciliation commission as an appropriate method of doing so. Many would attest to the argument that prosecution and punishment are not, in every case, the most preferable method of addressing internal or internationally related armed conflicts.¹⁰⁷

¹⁰⁴ See discussion in Roche, *Truth Commission Amnesties and the International Criminal Court* [2005] 45 Brit. J. Criminol. 565, at p. 568.

¹⁰⁵ See Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study* [1994] 16 H. Rts. Quarterly 597, at p. 627-29.

¹⁰⁶ See discussion in Schabas, *op. cit.*, p. 68-9.

¹⁰⁷ In Alfonsín, ‘*Never Again*’ in *Argentina* [1993] 4 Journal of Democracy 19, the Argentinean president held: ‘In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience.’ Furthermore, the Rome Statute itself under article 16 had placed ‘peace’ above

The UN itself had helped push for the establishment of truth commissions and the granting of amnesties with the view to restoring peace and order.¹⁰⁸ This struggle between ‘peace’ and ‘justice’ is a recurrent theme in post-conflict resolutions which often involve heretofore serious violations of human rights and humanitarian law.¹⁰⁹ To a certain extent, it can be said that article 53(1)(c) takes into consideration that which is the seeming counterpart of favouring ‘justice,’ the preference for settlements and peace over prosecution.¹¹⁰ The relevant subsection brings in a sense of pragmatism¹¹¹ and *realpolitik*¹¹² to the Prosecutor in determining which case should be brought before the Court.

Nonetheless, there had been claims that the Court should rather take a more cooperative approach towards truth commissions.¹¹³ One commentator articulated that ‘the ICC was established to allow the prosecution and punishment of wrongdoers who continue to wield power or otherwise simply take advantage of a lawless State, not to gainsay the decisions of democratic States such as South Africa, where victims of an authoritarian regime inherit power and decide that their prosecutorial resources are best used prosecuting those individuals who choose not to apply for amnesty from a truth commission, or who are unable to satisfy commission’s conditions for the grant amnesty.’¹¹⁴ In addition, owing to practical limitations, the Court’s finite financial resources may mean that it will, out of necessity, set its priorities elsewhere rather than jeopardise a nation’s movement towards reconciliation.

It must be noted that it is only right that the Court has the authority to override truth commission amnesties if need be, but whether it is most desirable for the ICC to do so will

‘justice’ by prohibiting the Court from investigating or prosecuting for 12 months if the Security Council, acting under its Chapter VII powers, so decides through a Resolution.

¹⁰⁸ See Scharf, *The Letter of the Law: the Scope of the International Obligation to Prosecute Human Rights Crimes* [1996] 59(4) L. Contemp. Probs. 41 and Morris, *Accountability for International Crimes and Serious Violations of Fundamental Human Rights* [1996] 59 L. & Contemp. Probs. 29.

¹⁰⁹ See discussion in Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers 2002), at p. 55-58.

¹¹⁰ For further discussion, see Brubacher, *Prosecutorial Discretion within the International Criminal Court* [2004] 2 JICJ 71, at p. 80-4.

¹¹¹ In Rwanda, for example, after the atrocious incident, the government is faced with significant impediments from prosecuting those perpetrators of genocide. In spite of its genuine efforts, appears practically impossible with its current state of affair that Rwanda will not be able to prosecute all of them.

¹¹² See Sadat, *op. cit.*, at p. 69: ‘international negotiators eager to bring about a settlement in the hopes of ending a bloody conflict will often ignore calls for justice.’

¹¹³ See Roche, *op. cit.* note 104, at p. 565.

¹¹⁴ *Ibid.*, at p. 568.

depend on the characteristics and background of each case and the nature of the truth commission investigations and amnesties. Although it can be said that the genuineness of a truth commission's inquiry and amnesty could be a significant or even the ultimate decisive factor towards national reconciliation, it is submitted that insofar as impunity is concerned, the Court cannot simply rest there. The plethora of factors surrounding the quest for ending impunity predisposes the Court to strike a careful balance; for example, so as to avoid contributing to a collapse of a fragile State in transition from an oppressive and bloody regime to peaceful governance. Finally, it must be emphasised that the silence of the Rome Statue pertaining to truth commissions implies that the final determination is left upon the Court's sound judgment. Pending actual cases to be brought before its bar, it would be impossible in the present study, to precisely predict how the Court will interpret and value truth commission investigations and amnesties.

Albeit the most common, truth commissions are not the only prosecutorial alternative. States may have devised other methods of inquiry or investigation which are different from their ordinary criminal procedures. For instance, some domestic authorities might have developed unconventional processes of accountability for heads of States or government officials.¹¹⁵ A parliament, for example, could summon a committee to carry out an inquiry involving a political leader who is suspected of instigating one of the crimes under article 5, and subsequently, decide whether the matter has to be referred to legal authorities for judicial prosecution. Other examples are cultural or traditional customs used to resolve conflicts. In Rwanda, for instance, the *Gacaca* system was established to cope with the overwhelming number of cases which resulted from the atrocious incident in 1994.¹¹⁶ Under staffed and financially constrained, the Rwandan domestic courts are unlikely to deal with all the pending genocide-related cases. To expedite the processes of justice and reconciliation, the government adopted a judicial method based on a popular indigenous forum used for conflict resolution within a given community. The *Gacaca* tribunals do not employ standard methods

¹¹⁵ Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Test*, Vol. 1 (Transnational Publishers 2005), p. 134-5.

¹¹⁶ For further information on *Gacaca* courts, see *inter alia*: Amnesty International, *Rwanda: Gacaca: A Question of Justice*, 17 Dec. 2002 (available at <<http://web.amnesty.org/library/index/engaf470072002>> last visited 10 Jan. 2007); Boed, 'The International Criminal Tribunal for Rwanda' in Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers 2002, at p. 495-6; Corey & Joireman, *Retributive Justice: The Gacaca Courts in Rwanda* [2004] 103 African Affairs 73, at p. 81-4; Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building* [2002-2003] 15 Fla. J. Int'l L., at p. 15.

in dealing with criminal cases, yet they are vested with wide ranging legal powers.¹¹⁷ If given that the said system appears to help reduce impunity and that the unwillingness or the inability criteria under article 17(2) and (3) cannot be established, how would the ICC Prosecutor or the Pre-Trial Chamber perceive such a system? Is it sufficient to argue that a proceeding such as that provided under the Gacaca system cannot be considered a domestic proceeding under article 17(1)(a) because of its unconventional characteristics, not to mention its inconsistency relative to prevailing norms of international law?¹¹⁸ If so, would that render a case admissible on the grounds that the State concerned had not acted? The ICC will soon encounter and decide eventually on varied mechanisms of accountability, some of which may be significantly different from standard domestic criminal investigations. *Sans* precedence, these queries will have to wait for answers as to how the Court, once confronted with actual situations, will interpret them.

3. Article 17(1)(b) & (c)

Article 17(1)(b) stipulates that a case is not admissible, subject to exemptions, if it had already been investigated and that the domestic authority decided not to prosecute. The exemptions are founded upon the satisfaction of the Court that the decision by the concerned State not to proceed with any legal action was a result of unwillingness or inability. As the complementarity jurisdiction of the Court is hinged upon the ‘genuineness’ of a proceeding, a decision not to prosecute, following an investigation because of insufficient evidence or where it is not in the interest of justice, would satisfy article 17(1)(b). As for article 17(1)(c), it provides that a case which had already been prosecuted is not admissible. This subsection, citing article 20, upholds the rule against double jeopardy or the *ne bis in idem* principle, which is codified under the International Covenant on Civil and Political Rights (*ICCPR hereafter*).¹¹⁹ However, it is also subject to exemptions, albeit more restrictive than article 17(1)(a) and (b), under article 20(3) of the Rome Statute.

¹¹⁷ See Corey & Joireman, *ibid.*; Daly, *Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda* [2002] 34 NYU J. Int'l. L. and Pol. 355; and Amnesty International, *ibid.* See also discussion below at p. 61-2.

¹¹⁸ Amnesty International, *ibid.*

¹¹⁹ Article 14 of the ICCPR (1976) UNTS 171.

Concerning admissibility of cases and the principle *ne bis in idem*, the ICC seemed permanently precluded from intervening in cases that had already been properly prosecuted but, nonetheless, the perpetrator was subsequently pardoned.¹²⁰ If the exemptions under article 20, *ne bis in idem* provision, cannot be met with satisfaction, then the Court would be barred from intervening and commencing a retrial. An example used in this regard was the case of William Calley, who was convicted of war crimes in the 1970s but was later pardoned after serving only a brief period of his detention.¹²¹ If a similar case arises today, where the convicted had not been justly punished, the ICC, where it cannot establish unwillingness under article 20, will be barred from intervening and consequently, its main objective to end impunity would thus, be undermined.

4. Article 17(1)(d)

Article 17(1)(d) renders it mandatory, with the use of the term ‘shall,’ that the Court declares inadmissible, cases that are found not of sufficient gravity. An appreciation of what is meant by ‘not of sufficient gravity’ involves examining both the conduct and the nature of the crime and the offender to be investigated or prosecuted.¹²² In *The Prosecutor v Lubanga Dyilo*¹²³, the ICC Pre-Trial Chamber formulated three questions to help determine whether a case had satisfied the gravity threshold. A case is said to be of sufficient gravity if the following questions can be answered positively:¹²⁴

- ‘i) Is the conduct which is the object of a case, systematic or large-scale (with *due* consideration of the social alarm caused to the international community by the relevant type of conduct)? ;

¹²⁰ See discussion in Tallgren, *op. cit.* note 97, at p. 434 and Ellis, *op. cit.* note 116, at p. 235.

¹²¹ See Schabas, *op. cit.* note 28, at p. 70.

¹²² In a number of decisions, the ICTY and ICTR made determinations as to a case’s seriousness based on considerations of the nature of the crime involved and the offender to be prosecuted. See for example the *Prosecutor v Zdravko MUCIC, Hazim DELIC et al* (also known as ‘Celebici’), ICTY-96-21, Appeal Judgment and the *Prosecutor v Akayesu*, ICTR-96-4-A, Appeals Chamber.

¹²³ *Op. cit.* note 60.

¹²⁴ *Ibid.*, at p. 32, para. 63.

ii) Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation? ; and

iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisation or armed groups to which he belongs, commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?’

The first of the three questions concerns the conduct or the nature of the crime involved and the other two questions relate to the relevant person being investigated or to be prosecuted.

4.1. *The Conduct and Nature of the Crime Involved*

The Pre-Trial Chamber, in the same case, held that the gravity requirement under article 17(1)(d) is ‘in addition to the drafters’ careful selection of the crimes’¹²⁵ included in the Rome Statute and the Preamble’s direction that the Court’s material jurisdiction is ‘limited to the most serious crimes of international concern.’¹²⁶ This means that a conduct which appears to constitute a violation under article 5 of the Rome Statute and thus, considered a serious international crime, will not *automatically* be admissible before the Court. Notwithstanding the fact that the *ratione materie* of the ICC is limited to serious international crimes, the Court is yet compelled to closely examine cases brought to its attention and admit only the ones which involve the most grievous conducts, among the crimes included in article 5. In practice, a future defendant who committed crimes against humanity, can possibly argue that the crime alleged against him, albeit categorised under article 5 and therefore, considered as a grave international crime, is not serious enough to activate the Court’s dormant jurisdiction. The Chamber maintained that ‘the conduct must present particular features which render it

¹²⁵ *Ibid.*, at p. 24, para. 41.

¹²⁶ Preamble to the Rome Statute.

especially grave.’¹²⁷ These features to which the Court are to consider are contained in the first question, quoted above.

Firstly, the conduct must have been performed systemically or in large scale. Systemic would mean that there is an evidence of a ‘pattern of incidents’ or similarities among several events. As for large scale, the Court must take into account key information such as the number of deaths which resulted from the criminal enterprise against the population of an area. Both are evidential matters to which the Prosecutor will have to discharge. Secondly, the Pre-Trial Chamber cited that consideration should be given to the extent of ‘social alarm’ that a specific conduct has triggered in the international community. Social alarm refers to the response, reaction or concern of the international community towards the crime concerned. The fact, for instance, that the UN Security Council deliberated over an atrocity may well imply that such infraction is of international concern. However, social alarm seems to be a relatively peripheral concern and to a certain extent, contingent upon the first requirement, *i.e.*, that the conduct in question must be systematic or large scale. The fact that a criminal enterprise is systematic or large scale usually involves raising an alarm to the international community.

4.2. *The Person Investigated or to be Prosecuted*

It had been said that the term ‘not of sufficient gravity’ under article 17(1)(d) entails that the Court is only to prosecute those who bear the greatest responsibility for the atrocity committed.¹²⁸ The second and third questions help determine whether a case is of sufficient gravity by examining the position of the accused and the role he or she played in the atrocity under investigation. The second question inquires whether an accused held a high senior leadership over the State entity or the organisation alleged to have committed a systematic or large scale criminal act. It must be underscored, however, that holding a high senior leadership position is not a sufficient basis *per se* to conclude that such leader bore the greatest responsibility. The third question further directs a consideration as to the actual role or contribution of such a leader, the State entity or organisation to which he or she holds a

¹²⁷ *Lubanga Dyilo case*, *op. cit.* note 60, p. 26, para 45.

¹²⁸ Morris, *The Trials of Concurrent Jurisdiction: the Case of Rwanda* [1997] 7 Duke J. of Comp. & Int’l. L. 349, at p. 366.

position, in the overall criminal enterprise. The Pre-Trial Chamber also cited that the application of the two questions pertaining to the perpetrator was rooted upon the fact that those senior leaders who played essential roles in the commission of systemic or large scale wrongdoings are also the ones who could ‘most effectively prevent or stop the commission’ of such crimes.¹²⁹

Following the establishment of the ICC, the Prosecutor released a policy paper where it was indicated that he ‘will initiate prosecutions [...] for leaders who bear most responsibility’ and ‘encourage national prosecutions [...] for lower ranking perpetrators.’¹³⁰ Prior to the Prosecutor’s policy paper and the Pre-Trial Chamber’s decision in *Lubanga Dyilo*, a legal commentator raised the issue of whether a lack of leadership position on the part of the defendant can form the basis for a claim of inadmissibility.¹³¹ In accordance with the Chamber’s judgment and the Prosecutor’s policy paper, not only would a future defendant be able to argue that the case against him or her is inadmissible for his or her lack of high leadership status but that such a suspect will unlikely reach the Pre-Trial Chamber for an admissibility determination.

One may, nevertheless, call into question the necessity of requiring a ‘senior leadership position.’ Albeit in most cases it is often the political, military, or armed group leaders who are behind systemic undertakings of humanitarian and human rights violations, can it be argued that the gravity of the crime and the vital role played by a person could compensate for his or her lack of a more *senior* leadership rank? The policy paper indicated that in ‘some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.’¹³² This seems to be inconsistent with the three questions formulated by the Pre-Trial Chamber in *Lubanga*. However, in any case if a future Chamber decides to discount the ruling in *Lubanga*, an admissible case involving one who holds no senior ranking would be of exceptional nature.

¹²⁹ *Lubanga Dyilo case*, at para 60.

¹³⁰ OTP Policy Paper, *op. cit.* note 77, Sept. 2003.

¹³¹ Morris, *op. cit.*, at p. 366-7.

¹³² OTP Policy Paper, *op. cit.* note 77, p. 3. Another reason, one might cite, for pursuing individuals who hold no senior leadership position is that it may ultimately lead to relevant information concerning their superiors. See also Schrag, *Lessons Learned from ICTY Experience* [2004] 2 JICJ 427.

Furthermore, could it be maintained that ICC's principal purpose to reduce impunity does not necessarily imply prosecuting only those with senior leadership status but rather, to exercise a complementary jurisdiction when States are unable or unwilling to carry out genuine proceedings?¹³³ In accordance with the Pre-Trial Chamber's decision, the Court is only to adjudicate those who hold senior leadership positions.

4.3. *The Rationale for the Gravity Threshold*

First and foremost, the gravity threshold is justified because it is consistent with the Court's deterrent role to prevent serious international crimes from occurring in the future. It was held in *Lubanga Dyilo* decision that by focusing on senior leaders who perpetrated grave international crimes 'can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to *prevent* the systemic or large-scale commission of crimes within the jurisdiction of the Court, can they be sure that they will not be prosecuted by the Court.'¹³⁴ In prosecuting senior leaders, the ICC sends a prominent message to potential perpetrators that even those in power are not beyond the reach of the international community. Moreover, in the same decision, the Pre-Trial Chamber concluded that the Court's retributory role must come second to its deterrent or preventive function.

It must be underscored, however, that in not prosecuting perpetrators of international crimes, owing to his or her lack of any leadership position, alongside the inability to function of the national court that has jurisdiction over such an offender, a message of deterrence is inadvertently suppressed. In response to this issue, the other rationale for upholding the gravity threshold can be cited. The ICTY Appeals Chamber succinctly stated: 'in any criminal justice system, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall

¹³³ In *ibid.*, it was recognized the possibility of leaving an 'impunity gap' in focusing on those most responsible for the crime, 'unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.'

¹³⁴ *Lubanga Dyilo case, op. cit.* note 60, at Para. 54.

within the strict terms of its jurisdiction.’¹³⁵ Taking the experience of the ICTY as example, one would observe that a lot of the tribunal’s resources were consumed and its system was overstrained because the ICTY had focused on pursuing low ranking individuals, with ‘not enough attention paid at the outset to limiting the number’ of such prosecution.¹³⁶ The ICC, with its wide territorial jurisdiction and its limited financial resources, cannot be expected to investigate or prosecute each and every alleged offender of article 5 crimes. As it is, the Court would reasonably opt to investigate or prosecute only those perpetrators most responsible for committing remarkably serious crimes. The regrettable reality is that some perpetrators of serious international crimes may go unpunished when national courts are unable or unwilling to prosecute them and the ICC, for its part, is tied down with priority cases that are considered to be of exceptional gravity.

B. Article 17(2): Unwillingness

The question of unwillingness arises when a State had initiated a proceeding, where it is investigating or had investigated but decided not to prosecute and likewise, where it is prosecuting a case. The three criteria to which a State can be said to be unwilling include: (i) where a domestic proceeding is a mere sham, that is, for the purpose of shielding a perpetrator from his or her criminal responsibilities; (ii) where there are unjustified delays, making the proceeding inconsistent with an intention to investigate or prosecute genuinely; and (iii) where there is a lack of independence and impartiality in conduct or manner of the proceeding, contradicting the intent to genuinely carry out a legal action. Article 17(2) provides that a mere initiation of a proceeding does not bar the ICC from intervening. The complementarity regime of the Court requires a genuine effort on the part of the State concerned. It lays the grounds to which the Court may step in on the face of the States’ sham or un-genuine efforts to investigate or prosecute.

¹³⁵ *Prosecutor v Zdravko MUCIC, Hazim DELIC et al* (also known as ‘Celebici’), ICTY-96-21, Appeal Judgment, at para. 602.

¹³⁶ Schrag, *op. cit.* note 132, at p. 30.

Establishing that a State is unwilling may involve a truly challenging task for the Prosecutor. If the standard criteria for determining admissibility were criticised as being too high,¹³⁷ to prove unwillingness, in particular sham proceedings, would garner the highest point. The Court has to be satisfied that the State concerned intended to protect the accused from his or her criminal culpability or that a lack of intention on the part of the State to conduct a *bona fide* proceeding is obtaining in the instance. Proving unwillingness requires examining a State's intent to investigate or prosecute genuinely or the lack thereof.¹³⁸ A subjective enquiry is thus, inevitable which makes the task inherently difficult.

According to article 17(2), in considering unwillingness, the Court must give regard to 'the principles of due process recognised by international law.' The real extent of this phrase in practice is arguably uncertain. On the one hand, during the negotiation, State delegations voiced their concern that the ICC might in turn pass judgments on the *due process* that States elect to have in handling domestic criminal matters. On the other hand, the Court has to be aware of domestic criminal justice systems which tend to *overdo* due process. In being exceedingly lenient towards the accused, national courts may reinforce a culture of impunity; their excessively liberal approach might be abused to shield perpetrators from their criminal responsibilities. In determining this criterion, however, the Court is compelled to be prudent against easily conferring unwillingness upon an acting State which is taking steps to ensure that the rights of suspects or the accused are respected and similarly, to be cautious of States which excessively favour due process. The phrase indicates to the ICC judges that the standard of due process to be applied is that 'recognised by international law.' However, the fact that it is 'recognised by international law' does not help clarify the definitive extent of the term. In application, the phrase might end up undermining its own value as an interpretative tool because of its broad and uncertain scope.¹³⁹

¹³⁷ See Arbour & Bergsmo, 'Conscious Absence of Judicial Overreach,' in von Hebel *et. al.* (eds.) *Reflections on the International Criminal Court* (T. M. C. Asser Press 1999).

¹³⁸ See Olasola, *op. cit.* note 14, at p. 151 and Arbour & Bergsmo, *ibid.*, p. 129: 'the prosecutor must prove a devious intent on the part of a State, contrary to its apparent actions.'

¹³⁹ See Olasola, *ibid.*, p. 152.

Concomitant to the difficulty involved in proving unwillingness is the fact that an accusation charging a State as unwilling is a very serious allegation.¹⁴⁰ In a manner of speaking, the admissibility determination places a domestic legal system on trial.¹⁴¹ It is very likely that an accusation of that nature would cause political embarrassment on the part of the State.¹⁴² However, the very same State which in all likelihood, become politically mortified, is also expected to eventually cooperate with the Court in the gathering of relevant information and evidence as well as in arresting the accused, that is, if such person had not yet been obtained. As Cameron pointed out, the Prosecutor could be in a ‘paradoxical’ position, ‘having to show first that the State is not acting in *good faith* and then, under article 86 to seek cooperation of that same State.’¹⁴³ One may thus, be justified in asking whether States accused of being unwilling will, in fact, cooperate with the Court.¹⁴⁴ It is also interesting to consider the possible political repercussion in alleging that a State is unwilling, upon the Prosecutor or even the Court. Whilst in principle, such a backlash is precluded, nevertheless, it would not be surprising if there will be relatively fewer cases which will be admitted to the ICC on grounds of unwillingness, compared to cases of inaction or inability. Perhaps, the innate difficulty lies in examining a State’s subjective intention or its lack of intent but it seems naïve to assume that the Prosecutor or the Court is free from political considerations – more so, if somewhere along the course, the State charged is expected to cooperate with the ICC. Indeed, State cooperation may become precarious when the State concerned, in the first place, expressed refusal to cooperate with the ICC because it disagrees with the Prosecutor’s allegation of unwillingness. Without state cooperation, the investigation and prosecution may seriously be jeopardized; in such a situation, the Court may well consider putting the matter before the Assembly of States or the Security Council, in instances when the latter previously referred the situation to the Prosecutor.

¹⁴⁰ See Informal Expert Paper, *op. cit.* note 38, at para. 44: ‘politically sensitive (amounting to an accusation against the authorities).’

¹⁴¹ Arbour, *The Challenges of Litigation in the 21st Century: From the ad hoc Tribunals to the International Criminal Court* (Address to the American Bar Association, Toronto (1998)) [1998] ICTY Y.B. 445, at 446.

¹⁴² See Summers, *op. cit.* note 1, at p. 76, where it was said that an unwillingness ‘determination by the ICC would be a slap in the face of any State that had requested the Court to defer to its national jurisdiction.’

¹⁴³ See McGoldrick *et al.* (Ed.), *The Permanent ICC*, *op. cit.* note 2, at p. 92.

¹⁴⁴ In Cassese, *op. cit.* note 31, at p. 435 it was mentioned: ‘the ICC relies heavily upon State cooperation, to the extent that it might be crippled in the absence of such cooperation’ [emphasis added].

Although it was stated in the Informal Expert Paper that ‘the ICC is not a human rights monitoring body and its role is not to ensure perfect procedures and compliance with all international standards,’ one cannot underestimate the future role of international human rights in the admissibility of cases.¹⁴⁵ In any case, a national proceeding that gravely breaches the minimum standards of international human rights law may give the Prosecutor an impression that such a proceeding is not genuine. For example, biased proceedings which are tilted in favour of the accused, may serve as gauge of the lack of independence and impartiality. In the final analysis, the ultimate determination of admissibility is rooted upon the available evidence showing a State’s intent to stage a sham proceeding or its lack of intent to investigate or prosecute genuinely. Nevertheless, the current structure of the international human rights system and the extent to which human rights monitoring bodies have developed, alongside the active role of established non-governmental organisations (*NGO*) in monitoring human rights violations, it is highly possible that the Prosecutor and the Court would maintain a constant reference to human rights in assessing whether or not a State is unwilling.¹⁴⁶

As earlier mentioned, the unwillingness criterion is essentially contingent upon the evidence on hand. The evidentiary burden on the part of the Prosecutor, however, brings vital questions to the fore which are not addressed by the Rome Statute. Foremost of these queries deals with how much weight of evidence would suffice for an allegation of unwillingness to succeed. As regards to the standard of proof, the Informal Expert Paper recommended that the appropriate standard for admissibility is the balance of probability.¹⁴⁷ It was reasoned that the issue does not refer to a person’s guilt but rather, the objective is to determine whether a case is admissible. Thus, if the Court applies the experts’ logic, it is not necessary for the Prosecutor to prove that a State is unwilling *beyond reasonable doubt* but a mere preponderance of proof indicating that the proceeding is a sham would be sufficient to establish unwillingness.

¹⁴⁵ The Informal Expert Paper, *op. cit.* note 38, at paras. 23 & 49.

¹⁴⁶ See McGoldrick *et al.* (Ed.), *op. cit.* note 2, at p. 87: ‘[a]n indirect result of the adoption of the [Rome] Statute is that the reports of the UN special country rapporteurs and Commission and Sub-Commission them rapporteurs on the administration of justice may well receive close reading in the future.’

¹⁴⁷ See the Informal Expert Paper, *op. cit.* note 33.

An assessment of unwillingness would have to be based on procedural grounds.¹⁴⁸ For example, the Prosecutor may infer unwillingness on the grounds that a national authority had failed to disclose a piece of significant evidence contrary to the domestic criminal procedure concerned. Pending precedence, it would be interesting to see how the ICC will proceed in cases where an accused who had been accorded a fair investigation but will not be prosecuted, despite the existence overwhelming evidence against him or her, because the national authority had made an honest mistake in its decision.¹⁴⁹ As a matter of fact, ‘mistakes’ in domestic criminal proceedings do occur without necessarily amounting to a shielding of a person from criminal responsibilities. Will the ICC be able to argue that a ‘mistake’ was so obvious that there appears to be a purpose to shield a perpetrator from conviction? Although there is no concrete limit as regards the proof that could be used to establish unwillingness, strict adherence to the terms of article 17 denotes that only when a national proceeding is not genuine can the ICC intervene. Thus, if a proceeding is genuine and the ‘mistake’ is also genuine, then the Court will unlikely be able to satisfy the unwillingness criteria. The *travaux préparatoires* are also inclined toward the view that the ICC is not to act as an appellate court in cases where domestic forums committed mistakes in the administration of justice.

1. Article 17(2)(a): Sham Proceedings

It is technically difficult to establish that a domestic proceeding is geared at shielding a person from criminal culpability. A sham investigation or prosecution is a proceeding not having its supposed character or simply not genuine.¹⁵⁰ In practical terms, this refers to situations where the suspect or accused is indirectly or covertly being favoured, or that there is a likelihood that the suspect will not be prosecuted or will be acquitted, or if the same will be prosecuted, he or she will not be meaningfully convicted. A mere intent to protect a perpetrator from the consequences of his criminal conduct, as evidenced, for instance, by a government official’s statement, if not acted upon by the relevant domestic authorities would not constitute

¹⁴⁸ *Ibid.*, at para 46.

¹⁴⁹ See discussion in McGolrick, *op. cit.* note 2, at p. 87.

¹⁵⁰ In the Informal Expert Paper, *op. cit.* note 38, the definition of genuineness was taken from the oxford dictionary.

unwillingness on the part of the State. To establish unwillingness ‘the prosecutor must prove a devious intent on the part of a State, contrary to its apparent actions.’¹⁵¹

1.1. *Potential Indicia*

A finding of an intention to obviate legal sanctions against the criminal deeds of a perpetrator must be based on objective and perceptible grounds or *indicia*, confirming that the relevant domestic proceeding is far removed from being genuine. The sham proceeding as a criterion is by itself broad and could be, arguably arrived at, after a thorough examination of different and vast *indicia*. The following *indicia*, mostly drawn from the Informal Expert Paper, are to serve as potential evidence to which the Court may draw an inference of unwillingness. It remains upon the Pre-Trial Chamber, however, to discern which particular evidence is crucial or how much *indicia* would result to a finding of unwillingness. Perhaps, considering the seriousness of the allegation that a State is not acting in good faith, a combination of two or several *indicia* will be required, depending on the strength of each evidence obtained.

- *Reluctance to cooperate with the ICC* – When the Prosecutor so decides to commence an investigation of a situation, he or she may request the relevant State that has jurisdiction over the matter, to provide the needed information. Should the State refuse to grant the Court’s request, would the Prosecutor be able to draw an inference of unwillingness to cooperate with the ICC? According to the Informal Paper, there is a possibility that ‘reasonable inferences might of necessity be drawn if information cannot be collected because of non-cooperation.’¹⁵² The evidence to which unwillingness can be established is said to be vast. As mentioned above, an allegation of unwillingness may concomitantly lead to political issues and a State may well refuse to cooperate because of these reasons. An adverse inference could be necessary in cases where, for example, a State’s reluctance to provide information to the Prosecutor appears to emanate from a desire to conceal critical information which may incriminate certain personalities. However, the lack of State cooperation may be due to its failure to develop the necessary implementing or enabling legislation. In view of this possibility,

¹⁵¹ Arbour & Bergsmo, *op. cit.* note 137, at p. 129, 131.

¹⁵² Informal Expert Paper, *op. cit.*, at p. 10, para 30.

the Prosecutor must be mindful of the difference between a state's reluctance to cooperate because it has *yet* to properly implement the ICC requirements or its refusal is correlated to an intent or a devious plan to ensure that the accused will not be sanctioned. Nonetheless, it is questionable whether an inference of unwillingness based on a State's refusal to cooperate is in itself adequate to satisfy article 17(2)(a).

- *Procedural Irregularities* – Uncommon departures from the standard criminal procedure concerning serious crimes may create suspicion as to whether the domestic proceeding being undertaken or carried out by a State authority is truly genuine.¹⁵³ For example, if under its normal criminal procedures investigations involving grave offences are usually carried out for about 1 year, whilst in a particular case, an authority, by means of bypassing normal procedures, completed a criminal investigation in an unusually short period of time, a reasonable inference may be drawn from the procedural irregularity. In this instance, it can be held that the authority concerned intends to fast track the proceeding, risking the possibility of not being able to gather crucial and relevant evidence, and in so doing, increasing the likelihood of an acquittal of the accused. It had also been cited that deviations from the standard procedures may occur when a special investigator is employed or when a case is transferred to a 'secret tribunal.'¹⁵⁴

One may nevertheless note that in considering procedural irregularities, the standard used would seem to be that of the domestic legal system. In other words, departures from the usual procedures become known when scrutinized in relation to how the relevant criminal justice system normally handles cases involving serious crimes. The argument that the standards must adhere to the international criminal procedure is untenable. In the first place, there is no existing comprehensive and concrete international criminal procedure model which can be used as a frame reference. Even the standards in international human rights cannot be adopted because of diverging principles; at best, their relevance to criminal law will only be to a limited extent. Second, States do have varying criminal procedures. A normal procedure in one

¹⁵³ *Ibid.*, at p. 14 and Holmes, 'Complementarity: National Courts *versus* the ICC' in Cassese, Gaeta & Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press 2002), at p. 675.

¹⁵⁴ Holmes, *ibid.*

jurisdiction could be perceived as an irregularity in another. In the United Kingdom, for example, the procedure for serious cases during the pre-trial phase is much faster than in most legal systems in continental Europe.¹⁵⁵ In Italy, Germany and France, pre-trial proceedings for cases involving grave offences take, by far, much longer. From the point of view of an English lawyer, the delays in the continental system are extraordinary. Whilst from the perspective of continental judiciary, it could be claimed that the pre-trial phase in English criminal procedure is 'insufficiently rigorous to make sure that all the evidence has been properly examined in advance in a case where the facts are grave or complicated.'¹⁵⁶ The point rendered from the example is that a procedural irregularity could be relative, unless measured in relation to how a particular legal system operates.

As States have different investigative and prosecutorial procedures, it could therefore be observed that the Prosecutor might find it easier to detect procedural irregularity in certain jurisdiction than in others. Some national legal systems, for example, bestow much greater discretion on authorities in the conduct of investigations, whilst in others judicial authorities may have to follow a rigid procedural scheme. It would thus, be less demanding to find an irregularity in the latter than in comparison to the former. Indeed, this may appear unfair for some domestic systems. Nevertheless, it is a fact that States do not have uniform criminal procedures and that the Prosecutor, in determining unwillingness, will ultimately be looking at the genuineness of a proceeding. If a procedural irregularity is found, the Prosecutor must yet essentially link it to an intent to shield a perpetrator from criminal conviction.

- *Institutional Deficiencies* – In considering institutional deficiencies, the Prosecutor or the Court must be cautious in drawing inferences of unwillingness. The Court must not be seen as passing judgments on a State's legal order. In including institutional deficiency as potential *indicia*, the authors of the Informal Paper cited its relevance where there is a 'political subordination of investigative, prosecutorial or judicial

¹⁵⁵ See discussion in Spencer, 'Introduction' in Delmas-Marty & Spencer (eds.), *European Criminal Procedures* (Cambridge University Press 2002), at p. 33.

¹⁵⁶ See *ibid.*, at p. 34.

branch.’¹⁵⁷ Bearing in mind what history had shown in which many perpetrators of massive and systematic human rights and humanitarian violations are State leaders themselves, the Prosecutor may be justified in being wary towards systems where the executive branch has significant and unreasonably excessive influence over the judicial body. In assessing judicial independence, it is likely that the Pre-Trial Chamber will rely on the standards set forth in the Basic Principles on the Independence of the Judiciary¹⁵⁸ which was adopted by the UN. Moreover, lack of transparency could also be taken as *indicia* in proving unwillingness on the part of the State.

- *Inadequacy of Action* – As much as inadequacy of action by a State can be used as evidence of inability, it could also be taken as a proof of unwillingness to carry out a genuine proceeding. Again the potential issue in this regard is from which yardstick can it be established whether the steps taken by a State is adequate. First one may postulate the possibility of referring to the standards of international human rights.¹⁵⁹ To reiterate what was said in the Informal Expert Paper, the ICC is not tasked to ensure strict compliance with the human rights standards. The standard of whether an investigation or prosecution is genuine is different from whether a State had fulfilled the minimum requirements of international human rights norm. Second, a specific action’s adequacy should be measured in reference to domestic standards, that is, as to how a particular State conducts proceedings involving cases of serious gravity. The inherent difficulty lies with the fact that standards vary from State to State.
- *Lack of Parallel Legal Characterisation* – It is possible that a State intentionally or by virtue of the fact that its domestic criminal law does not provide for crimes of international nature, prosecutes a perpetrator for an ‘ordinary’ offence as opposed to a grave international crime. An example is where a person who inflicted heinous conducts

¹⁵⁷ The Informal Expert Paper, *op. cit.* note 38, at p. 14.

¹⁵⁸ Adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

¹⁵⁹ See for example: *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by General Assembly resolution 55/89 Annex, 4 December 2000; *Guidelines on the Role of Prosecutors*, *ibid.*; and *Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, adopted by the General Assembly Resolution 40/34 of 29 November 1985.

of ethnic cleaning is charged with multiple murders instead of genocide. In this example, would the ICC be able to infer unwillingness to prosecute genuinely – citing State intent to protect an accused from the fullest extent of his or her criminal responsibility on the grounds that domestic authorities are *under* prosecuting the offender?¹⁶⁰ Although this was not included in the Informal Expert Paper, it is submitted that the lack of parallel legal characterisation could be taken as an *indicia* of a State's unwillingness. In such a determination, the issue lies in the genuineness of the *intent* or the lack thereof, of the State concerned to investigate or prosecute a particular case. Such unwillingness or shielding may well take the form of not charging the person responsible for the offence with the appropriate crime suited to his or her conduct.

It has been said that *under* prosecution in itself cannot make a case admissible.¹⁶¹ Such a statement has merits, considering the possibility that *under* prosecution may be the most practicable procedure at the time – the possibility of plea bargaining¹⁶² – or because the domestic legal system does not have any law criminalising international crimes. The Rome Statute did not include an *express* provision on State obligations to legislate the necessary domestic laws incorporating article 5 crimes in its penal code. In the absence of an enabling national legislation, the Prosecutor can revert to or cite inaction as a ground for admissibility. Nevertheless, if the absence of an implementing law can be linked to the claim that the State is acting in *bad faith* in ensuring impunity for perpetrators, then the Court will be justified to draw an inference of unwillingness. More so, if the State in question has laws criminalising international crimes, there seems to be no reason or cause which can hinder the Prosecutor to argue for unwillingness of the State concerned.

It is likewise possible that the lack of parallel legal characterisation could take the form of *over* prosecution, *e.g.* charging genocide in relation to a specific conduct, instead of war crimes, to raise evidentiary burden required to get a conviction. In this instance, legal action can be carried out to ensure that a particular defendant will not be

¹⁶⁰ Werle, *Principles of International Criminal Law* (Cambridge University Press 2005).

¹⁶¹ See Broomhall, *A Checklist for Implementation*, *op. cit.* note 59, at p. 149.

¹⁶² An offender may likely plea guilty on lesser offence of murder or rape than more serious genocide or war crimes.

convicted, as the substantive and evidentiary burdens will be greater and as such, insurmountable. Though such scenario may seem unlikely, if *over* prosecution can be proven as a way of protecting a person, for instance, by showing similar practices in the past, then an inference of unwillingness may also appear reasonable.

1.2. Evidence From Third Parties

There is always a possibility to obtain evidence of unwillingness from an insider or one who works for the government. Whenever corroborated by other findings, a statement from a national official claiming that the proceeding is a sham could be taken as strong evidence in establishing unwillingness on the part of a State to conduct a *bona fide* proceeding. Moreover, institutions which are part of the State such as human rights entities or truth commissions, may also be a source of evidence for the Prosecutor. A human rights case decided by the Inter-American Commission on Human Rights (IACHR) can be taken as an illustrative example in this regard. In *Ignacio Ellacuria, S.J., y Otros v El Salvador*¹⁶³, the report of the El Salvadorian Truth Commission became the basis to which the IACHR made its decision. In that case, it was alleged that the domestic proceeding carried out by the State authority served to obviate the criminal sanctions which should have been bestowed upon the intellectual authors of the massacre. In its report, the Truth Commission held that there is sufficient evidence to conclude that the relevant authority had deliberately taken steps to conceal the truth. Before relying upon the conclusion of the report, the IACHR initially assessed the credibility of the Truth Commission, its methodology in conducting investigation and the circumstances upon which the said commission was established. The IACHR noted the role of the UN Secretary General in electing the members of the Truth Commission with the advice and consent of the State concerned. The IACHR considered that the ‘impartiality, soundness and good faith of the Truth Commission are not open to question.’¹⁶⁴ In deciding, *inter alia*, that the State had breached its human rights obligation to warrant the right to judicial guarantees and effective judicial protection,¹⁶⁵ the IACHR accepted the Truth Commission’s findings that the domestic authorities had staged a sham proceeding.

¹⁶³ [1999] Case 10.488, Report No. 136/99 OEA/Ser.L/V/II.106 Doc. 3 rev. at 608.

¹⁶⁴ *Ibid.*, at para. 75.

¹⁶⁵ Article 8(1) and 25 of the American Convention on Human Rights. El Salvador, as a State party, has the obligation to guarantee the rights enshrined under the said convention.

Coming now to the ICC, if the Prosecutor or the Pre-Trial Chamber is presented with similar evidence from an institution that is part of the State in question, there will be a greater probability that the Court will also subject the source to a similar assessment as regard its trustworthiness. It needs to be underscored, however, that the above cited example, the case of *Ignacio Ellacuria* is of a peculiar circumstance. In view of the role played by the UN Secretary General of the UN, it became relatively easier for the IACHR to place confidence in the Truth Commission's credibility and consequently, its conclusions. However, without the involvement of a reliable organisation such as the UN, the task of determining the reliability of a source, which is part of the State being examined, could be difficult. The political factor, for example, can pose a challenge. In any State as there is always an opposition ready to undermine the credibility of any current or incumbent government. One might ask, how an outside party, the Prosecutor or the Court, could judge whether information obtained from within the State is not tainted with internal politics?

Information from sources other than an institution of the State or individuals working for the government could be used to establish unwillingness or to corroborate other evidence. UN reports, such as those prepared by special country rapporteurs, where they may be relevant, could be of significant value for the Prosecutor's work. Nonetheless, the Prosecutor or the ICC still has to ensure whether in a given UN report, a State's action had been judged in accordance to human rights standards. The nature, author and the purpose of the UN reports must be taken into consideration before the same can unequivocally be of substantive use for the Court. For example, a report by the Human Rights Committee suggesting that a legal action taken at the national level lacks transparency, cannot by itself instantaneously support a claim of lack of genuineness of a proceeding. The burden for the Prosecutor goes further than simply determining whether the domestic proceeding concerned had breached the minimum international standards of human rights. The crux of his or her investigation must examine whether, indeed, there exists an attempt to manipulate domestic proceedings to preclude a conviction..

There are, nevertheless, UN reports prepared solely for inquiry such as a confirmation whether genocide or other international crimes are being committed in a given State or region.

A perfect example would be that of the Report of the International Commission of Inquiry on Darfur to the UN Secretary-General.¹⁶⁶ With its mandate to investigate alleged violations of humanitarian and human rights law, identify the perpetrators and suggest the desired means to ensure accountability of those who are responsible of the breaches, the Commission of Inquiry on Darfur held that it is of ‘the opinion that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders.’¹⁶⁷ Before reaching its conclusions, the Commission examined the actions taken by the State authority in response to the reported violations of international humanitarian and human rights law. The Commission found that the steps taken by the domestic authority ‘constitute more a window-dressing operation than a real and effective response to large scale criminality’ and that its judicial system showed lack of willingness to prosecute and punish effectively those who are criminally responsible.¹⁶⁸ Based on the recommendation of the Commission on Darfur, the Security Council referred the situation in Darfur to the ICC Prosecutor who determined that there is sufficient basis to initiate a formal investigation.¹⁶⁹ In circumstances like the one in Darfur where there is a ‘reliable’ report explicitly confirming a State’s unwillingness, how much credence will the Pre-Trial Chamber confer on such a report prepared by a UN commission in the event that an admissibility challenge based on complementarity is raised? Considering that the burden on admissibility would likely be ‘on the balance of probability’ as opposed to ‘beyond reasonable doubt,’ it could be argued that such a UN commission’s report, once the Pre-Trial Chamber is satisfied as to its impartiality, would be heavily relied upon; but whether it would suffice on its own merit remains to be a question awaiting for the Court’s decision.

For their part, NGOs are expected to be a likely valuable source of information for the Prosecutor in investigating *bona fide* proceedings. In more recent years, NGOs have played an increasingly instrumental role in monitoring serious violations of humanitarian and human rights law, as well as providing relevant information and evidence. In this regard, NGOs may also provide crucial assistance to the Prosecutor. Moreover, many established organisations have expertise which the Prosecutor could benefit from, especially in relation to specific domestic legal orders of States. Nevertheless, as to how a NGO’s report pointing to sham

¹⁶⁶ Available at <www.un.org/News/dh/sudan/com_inq_darfur.pdf>.

¹⁶⁷ *Ibid.*, at p. 144.

¹⁶⁸ *Ibid.*, p. 144 and 115.

¹⁶⁹ SC Resolution, UN Doc. S/RES/1593 (2005).

proceedings will be taken by the Court would depend on the nature of the report and whether, in the Court's view, an organisation is reliable enough.¹⁷⁰

1.3. *National & International Law Discrepancies*

As said above, there are various *indicia* from which the Court may draw an inference of unwillingness. It is, nevertheless, interesting to raise the question about a given domestic legal system's ineffectiveness and failure to conform to principles of *due process* in light of the *seemingly* irreconcilable discrepancy between national and international law. Would the ICC unhesitatingly be ready to accept a claim of unwillingness on the grounds that the judicial body is operating in such a manner that is inconsistent to the principles of *due process* as recognised under international law? For instance, whilst only a few State parties have based their legal systems on Islamic law,¹⁷¹ the distinctive structure of their criminal and procedural laws provides an excellent example of this discrepancy.

Shariah or Islamic law is unique in comparison to western legal systems as its substantive sources are a religious book, the *Quar'an*, and *Sunna* or Tradition, which includes the Prophet Mohammed's lifetime actions and sayings.¹⁷² There could be several forms of constitutional arrangements to which *Shariah* becomes the State rule. The most extreme is supreme sovereignty where God is constitutionally recognised as the supreme ruler over sovereignty and State. Sudan exemplifies this kind of constitutional arrangement¹⁷³ which 'imposes an excessively rigid form of *Shariah* on the people with little, if any, regard for due process or the basic rights of citizens.'¹⁷⁴ One must keep in mind that the ultimate purpose of *Shariah* is towards the realisation of God's will and obedience to God's commandments. A rigid

¹⁷⁰ Hypothetically, how would the ICC treat the statement of the Human Rights Watch (*HRW*) in "Justice Denied for East Timor: Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of UN Action," 20 Dec 2002, (available at <www.hrw.org>), where the *HRW* unequivocally claimed that the Indonesian government conducted sham proceedings.

¹⁷¹ Lebanon and Sudan, for example.

¹⁷² For discussions on Islamic Law and Norms of International Law, see among others: Baderin, *International Human Rights & Islamic Law* (Oxford University Press, 2003); Abdel Haleem, Omar Sherif, Daniels (eds), *Criminal Justice in Islam: Judicial Procedure in the Sharia* (I.B. Tauris, 2003); and Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Graham & Trotman Limited 1994).

¹⁷³ Article 4 of the Constitution of the Republic of Sudan.

¹⁷⁴ Roach, *Arab States and the Role of Islam in the International Criminal Court* [2005] 53 *Political Studies* 143, at p. 147.

interpretation of the purpose of *Shariah* may be used, in theory, as a justification for bypassing principles of *due process* or human rights. It is to be emphasised, nevertheless, that the *Shariah* shares many commonalities with the norms of due process and human rights and that Islamic law does acknowledge such principles.¹⁷⁵ However, as a source of law guaranteeing *due process*, there seems to be a case to claim that *Shariah* is ambiguous. *Shariah* only purports, although rather compellingly, substantive justice and leaves procedural matters, including regard for *due process*, subject to the interpretation of State authorities.

Such a legal structure will not posit any problem even if principles of *due process* are not given constitutional ranking, as long as they are respected and put to practice.¹⁷⁶ However, an overriding concern from such States is the possibility that Western standards of *due process* will be used to judge their domestic systems. Their concern is not without any basis as principles of *due process* and fairness of trials developed from Anglo-American legal traditions.¹⁷⁷ Thus, a State that has a legal system which, in many respects, fundamentally differs from most of western States' legal structures, may be prejudiced by such a disparity between its national criminal system and the principles of *due process*, as recognised by international law and mainly founded upon Western tradition.¹⁷⁸ In connection to Islamic law, such a concern could be further aggravated by negative views, especially in the interpretation of the *Shariah vis-à-vis* international law.¹⁷⁹ Albeit easier said than done, the Prosecutor or the Pre-Trial Chamber, in ascertaining possible admissibility, must be careful not to be seen as imposing the so-called Western standards and instead, put more emphasis on the task of assessing the genuineness of an investigation or prosecution.

¹⁷⁵ Baderin, *op. cit.* note 172, at p. 96.

¹⁷⁶ In Tabandeh, S., *A Muslim Commentary on the Universal Declaration of Human Rights* (Goulding 1970), at p. 28, the author claimed that the 6 articles on fair trial and due process under the Universal Declaration of Human Rights 'conform fully to Islamic law.'

¹⁷⁷ See Novak, M., *Commentary on the UN Covenant on Civil and Political Rights* (N. P. Engel 1993), at p. 237.

¹⁷⁸ See Summers, *op. cit.* note 1, at p. 76.

¹⁷⁹ It was cited in Baderin, *op. cit.*, at p. 3, for example, that in relation to international human rights law, there is a general view that 'Islamic law is incompatible with the ideals of international human rights and that human rights are not realisable within the dispensation of Islamic law.' Although it was in relation to international human rights, at the international level the standards of human rights and of due process of criminal law intertwine in many respects. See also Strawson, J., 'Encountering Islamic Law', *University of East London Law Department Research Publication Series*, No. 1, at p. 1: 'Islamic law is represented within the Anglo-American scholarship as an essentially defective legal system.'

Other examples of legal systems which are different from the Western legal tradition are old customary methods of administering justice. For instance, the Rwandan *Gacaca*, which was also cited above, is modelled from its ancient system of resolving conflicts. The *Gacaca* tribunals are vested with wide ranging powers, both that of the normal Rwandan courts and the domestic prosecutor. However, the *Gacaca* system may have failed to conform to the international law standards of due process. The prosecutor, for example, is not independent from the judge and that, contrary to article 14 of the International Covenant on Civil and Political Rights (ICCPR), defendants in *Gacaca* tribunals are not provided with equal legal powers as the prosecutor. Judges in the *Gacaca* courts are not professionals but elected individuals who had undergone informal legal training and adjudged to be of sound moral stature. The independence and impartiality of *Gacaca* tribunals were questioned, ‘since nearly all of the elected individuals were involved in the events of the genocide to some degree.’¹⁸⁰ As such, judges and witnesses may likely have personal interests in a case beyond determining the guilt or innocence of a defendant.¹⁸¹ With the lack of procedural rules, many defendants may be punished for a serious crime they have not committed or may be acquitted despite their guilt. If such a system goes under the admissibility test of the Court, it could easily conclude that it does not conform to the ‘principle of due process recognised by international law.’ The ultimate decisive factor, nonetheless, even if such system may fall short of the norms of international law is whether an intent to shield a perpetrator was present.

1. 4. *Unwillingness & States’ Rules on Evidence*

As discussed above, an inference of unwilling may be drawn from a finding of an institutional deficiency in a legal system. However, in cases where an aspect of a legal system seems overly lenient and poses risks of impunity but only to a certain extent, that is, it does not amount to a sufficient ground to adjudge an institutional deficiency or a procedural irregularity. In this instance, the crucial point is: in the absence of bad faith in the State concerned, would the Prosecutor be willing to review such aspect of the domestic criminal justice system to show hesitation on the part of the State to conduct a genuine investigation or prosecution. For example, States’ rules on criminal evidence do vary from one jurisdiction to

¹⁸⁰ Corey & Joireman, *op. cit.* note 116, at p. 85.

¹⁸¹ *Ibid.*

the other. In certain States, the rules governing evidence might be rigid, making it potentially easier for the Prosecutor to argue for an irregularity in the procedure but then again, in other legal systems, the rules of evidence are lax. However, the leniency in the latter system only reaches a point where imperfections, whilst palpable, do not constitute an outright institutional deficiency nor a procedural irregularity. It is interesting to note that, if and when the Prosecutor is confronted by such a situation, would he bring about an unwillingness claim on the basis that State authorities appear to have abused their system, within its *wide legal* scope, particularly its rules on criminal evidence, in order to ensure acquittal of the accused from any criminal sanction. Will the Court be able to establish unwillingness on the grounds that a State's domestic law on evidence are 'too lax and generous in allowing the exclusion of evidence?'¹⁸² If significant evidence had been excluded under national law due to the leniency of its rules of evidence, albeit within its domestic legal terms, will the Prosecutor be allowed to argue that in excluding those evidence, the State in question is unwilling to prosecute? Although there is no concrete guideline or limit as to what evidence can be used to prove unwillingness, in this regard it might be difficult to draw the line indicating whether the ICC is superseding a State's discretion over its chosen rules on evidence, or where it is acting within its mandate to intervene over national jurisdiction whose domestic proceedings were found not to be genuine. The issue becomes more problematic if exclusion of evidence is justified under the mantle of allegedly upholding human rights and principles of due process, which is not an uncommon scenario. Without an explicit prohibition under the Rome Statute, it seems possible for the Prosecutor to argue that a State's liberal rules of evidence redound to forestalling any criminal conviction. In allowing such an argument, the Court might inadvertently, and arguably beyond its authority, be setting or raising international standards on rules and evidence.

1.5. *Violation of the Rights of an Accused*

Of sham proceedings and violation of the rights of an accused, an argument that a violation of an accused's rights could be used as *indicia* of a State's unwillingness to conduct a *bona fide* proceeding is very unlikely to yield any merit. The mandate of the Court to assume

¹⁸² Bohlander, *Evidence before the International Criminal Court – Basic Principles* [2005] 4 ERA 543, at p. 552-3.

jurisdiction over domestic cases is linked to a purpose of ending impunity and not the protection of the rights of an accused.¹⁸³ Furthermore, the *travaux préparatoires* would attest to the claim that the Court is not to serve as an appellant court, nor as a human rights court of appeals. It must be pointed out, however, that shielding a person from his or her criminal responsibilities may take the form of accusing another person whose rights, *e.g.* a presumption of innocence, may have to be violated in the process. The ensuing wrongful verdict for the falsely accused shall warrant the real perpetrator's escape from conviction with certainty. Although this sort of scenario would classify as a sham proceeding, it may be more reasonable and expedient to argue for its admissibility on the grounds that a State had remained inactive, and not base on article 17(2)(a). As discussed previously, such a case could be admissible in light of the decision in *Lubanga Dyilo*¹⁸⁴, that is, on the basis that a national proceeding had not encompassed both the conduct and the person; in the instant case, the person was left out.

1.6. Conclusion

Without any precedence, it may be difficult to speculate the full range of possible interpretations relative to article 17(2)(a) with some degree of certainty, as well as the relevance of the various *indicia* and their applicability in actual cases. The Rome Statute provides very little guidance in construing which acts constitute shielding a perpetrator from criminal sanctions. The evidence that can be used to establish that a State intends to protect a person from criminal accountability is vast; however, it cannot be taken as an indication that the task of proving such allegations is easy and straightforward. The extent or degree of difficulty cannot as *yet* be envisaged, considering that a subjective examination of the State authorities' intentions must be equivocally identified and supported by a preponderance of evidence, not to mention the resulting aggravation once international politics will come into play. In their defence, States charged of acting in bad faith may well protest that the Prosecutor or the Pre-Trial Chamber had been biased towards their legal systems or that the Court had over stepped its mandate by passing judgments on their judicial systems.

¹⁸³ See the Preamble of the Rome Statute.

¹⁸⁴ *Ibid.*

2. Article 17(2)(b): Unjustified Delay

This section concerns the second criterion to establish unwillingness as contained in article 17(2)(b), that is, a State is unwilling to carry out a genuine proceeding where there is an unjustified delay and which, under these circumstances, causes a marked deviation from an intent to carry out a *bona fide* investigation or prosecution. From the foregoing statement, two requirements have to be met in order to fulfil this criterion.¹⁸⁵ First, it must be established that there is an unjustified delay. Second, it must be proven that such a delay is inconsistent with an intent to carry out a genuine proceeding. The existence of a *de facto* delay, by and of itself, cannot be regarded as a sufficient basis to conclude unwillingness; it must be clearly identified that delays were resorted to, prior and during the conduct of proceedings, with the end in view of aiding or ensuring the acquittal of an accused.¹⁸⁶ An all-too-frequent occurrence, for example, of national courts being overburdened with numerous cases causing delays, likewise for developed States, would not automatically render a State as unwilling. There must be a link between the unjustified delay and the intention of the State concerned not to carry out a genuine proceeding.

In satisfying article 17(2)(b), the first question to ask is what constitutes an unjustified delay. The Rome Statute did not provide any clear guideline in this regard. Judges are thus, left to construe what is exactly meant by ‘unjustified delay.’ It must be recalled that during the drafting period, the language used was ‘undue’ delay. The term was later changed to ‘unjustified’ delay because many State delegations argued that the threshold to satisfy undue delay is not high enough. Unjustified delay as a criterion for admissibility for an international court is a legal innovation which is technically comparable to none. In contrast, undue delay had already been established in the context of international human rights and defined in a number of decisions by regional human rights courts such as the European Court of Human Rights and the Inter-American Court of Human Rights. Although the standards of unjustified delay is higher than undue delay, prior decisions rendered by the said human rights courts may provide the ICC, albeit to a limited extent, a basis to ascertain delays in a proceeding. In cursory looking at ECtHR and IACtHR decisions pertaining to undue delay, it has to be

¹⁸⁵ Olásolo, *op. cit.* note 14.

¹⁸⁶ See discussion in *ibid.*, p. 151.

mentioned that both regional courts only covered the period of trial and did not include the investigative or pre-trial phase.

2.1. *De Facto Delay*

In determining whether there is an *undue delay* under article 6 of the European Convention on Human Right, the ECtHR established that a proceeding will be examined in light of the circumstances of a case and having regard to the complexity of the facts and the conduct of both the applicant and the national authority.¹⁸⁷ As with the complexity of the facts of a case, the ECtHR, in *Karakaya v. France*, weighed a case's complexity against the availability, or the lack thereof, of information necessary for a domestic court to render a judgment. With regards to the conduct of the applicant and the competent authority, the European court assesses whether an applicant or a State authority had caused or contributed to a *de facto* delay and if proven to be so, the extent of such a contribution. The IACtHR, in applying article 8(1) of the Inter-American Convention on Human Rights which is 'equivalent in principle to article 6 of the European Convention,' invoked the formula established by the ECtHR in determining whether an undue delay had, indeed, taken place.¹⁸⁸ The IACtHR, however, went further and determined an approximate time; it held that a delay of 5 years, commencing from when an order had been made to initiate a proceeding, is deemed excessive and beyond what is reasonable.¹⁸⁹

In relation to the ICC, the Court may consider the formula adopted by the ECtHR whilst keeping mind that proceedings in the ECtHR are different from the ICC's. The conduct of the applicant in the context of international human rights would be the conduct of the defendant in the ICC criminal proceedings. Moreover, if the Court will apply the ECtHR ruling, it is to be cited that a defendant in criminal proceedings may internationally delay his or her litigation. In light of this common practice, the conduct of a State authority will become even more crucial. As such, a State will also be examined whether it had, of its own doing, unduly

¹⁸⁷ See, *inter alia*, ECtHR decisions: *Union Alimentaria Sanders S.A. v Spain* [1989] 11681/85 ECHR, at para. 31; *Zimmermann and Steiner* [1983] Series A no. 66, at para. 24; *Capuano v Italy* [1987] 9381/81 ECHR 10, at para.23; *Karakaya v France* [1994] 22800/93 ECHR 25, at para. 30.

¹⁸⁸ IACtHR decision in *Genie Lacayo* case, para 77.

¹⁸⁹ IACtHR decision in *Las Palmeras* para. 38.

delayed a proceeding or had unreasonably let a defendant abused the system who used delaying tactics.

In attempting to appreciate what ‘unjustified’ delay mean, the ECtHR’s *Case of Union Alimentaria Sanders S.A. v Spain*¹⁹⁰, may provide some help. In that case, the State authority affirmed that the uncommonly heavy workload of the domestic court concerned due to the increase of cases filed had resulted in a backlog of cases at a relevant time. The government further said that the ‘increase had followed on Spain’s return to democracy and was due to the establishment of new judicial safeguard systems, an overhaul of legislation and a tendency to have greater recourse to the courts.’¹⁹¹ The European court, whilst acknowledging the attendant difficulties the State was faced with, during the restoration to democracy, decided that the length of the proceeding in question was excessive and unreasonable. It held: ‘the undeniable difficulties encountered in Spain could not deprive the applicant company of its right to have its case heard within a ‘reasonable time.’¹⁹² The case relates to a right of a legal entity to a fair trial within reasonable time; a right that could not be undermined easily.¹⁹³ In *Sanders*, that right was assumed prevalent over the State’s justification as to why a delay had occurred. However, coming now to cases before the ICC, the Court’s fundamental concern is not to uphold such a right and that the threshold is ‘unjustified’ delay. That being the premise, it is interesting to ask whether a similar justification by a State, one that appears as valid and compelling as that in *Sanders*, would actually satisfy the requirement of article 17(2)(b).

As with determining an approximate time, it seems unlikely that the ICC would follow the IACtHR’s example of setting temporal limits to serve as basis in determining whether a proceeding is within reasonable time. The nature and seriousness of the crimes under the jurisdiction of the Court is a substantial factor. It may, out of necessity, entail a longer period of trial and hence, turn out unwise to set a specific time limit.¹⁹⁴ The ECtHR in a relatively old case, which took 11 years to decide concerning war crimes prosecution committed during

¹⁹⁰ *Sanders v Spain*, *op. cit* note 156.

¹⁹¹ *Ibid.*, at para. 37.

¹⁹² *Ibid.*, at para. 42.

¹⁹³ See for example *Mutatis Mutandis, the Martins Moreira Judgment*, Series A no. 143, p. 19 para 54 and *Sanders*, *ibid.* at para 40: ‘the fact that [...] backlog situations have become commonplace does not, in the [ECtHR’s] view, justify excessive length of proceedings.

¹⁹⁴ See below, the case *Kovacevic* [1998] Appeals Chamber Decision Stating Reasons for Appeals Chamber’s Order of 29th of May 1998 (Separate Opinion of Judge Shahabuddin) July 2, 1998 at 4-5.

the Second World War, commented that ‘the exceptional character of criminal proceedings involving war crimes [...] renders [...] inapplicable the principles developed in case-law [relating to the right to a trial without undue delay] of the Commission and the Court of Human Rights.’¹⁹⁵ In this regard, a State prosecuting one or more of article 5 crimes could follow on ECtHR’s commentary and argue that the serious nature of a case results to the inevitable need for a longer period of time. If this argument will be given significant merit, a justification on the grounds of the seriousness of a case would appear to be automatically available for States, given that the Court’s jurisdiction only involves serious crimes of international concern.

Regarding the trial period, the ICC has some sort of a benchmark in determining whether there is a delay, even though human rights’ undue delay is essentially different from ICC’s unjustified delay. Taking the pre-trial phase into account, *i.e.* examining if a *de facto* delay occurred during the period of investigation, the Court is faced with the question of which standard will a domestic proceeding be measured apropos to the possible occurrence of a delay. A reference to the common practice of States may bring no considerable assistance. First, State practices concerning criminal investigation enormously vary from one jurisdiction to the other.¹⁹⁶ Second, States do have substantial control over the facts and figures concerning the number of domestic cases and the average period it takes to adjudicate. There could be a risk when a State which is reluctant to bestow a case before the ICC, would conceal or even concoct numbers and figures to refute a claim of delays in its proceeding. In seeking guidance from the *ad hoc* Tribunals, an ICTY judge uttered that ‘the peculiarities and difficulties of unearthing and assembling material for war crimes prosecutions’ must be taken into account.¹⁹⁷ He then said: ‘the resulting need for reasonable judicial flexibility is apparent.’¹⁹⁸ The latter conclusion only brings to the fore the inevitability of delays due to the gravity or complexities of cases. Whilst unlikely to be of significant help to the ICC in determining whether there is an unjustified delay, it must be noted that the context of the judge’s statement was in the application of the principle of an accused’s right to a trial without undue delay. Owing to its unique features, it seems that the ICC will have to establish

¹⁹⁵ *X v Federal Republic of Germany* [1976] Application No. 6946/75/1976, at p. 115-16.

¹⁹⁶ See Delmas-Marty & Spencer (eds.), *op. cit.* note 155.

¹⁹⁷ See the case of *Kovacevic*, *op. cit.* note 194.

¹⁹⁸ *Ibid.*

its own general principles which can be applied to different judicial systems in assessing whether a State had delayed pre-trial proceedings.

2.2. *Inconsistency with an Intent to Investigate & Prosecute Genuinely*

The second question pertaining to article 17(2)(b) relates to whether an unjustified delay is 'linked to the intent of the State' to carry out an investigation or prosecution in good faith.¹⁹⁹ To establish unwillingness, it has to be proven that the delay is, in the circumstances, 'inconsistent with an intent to bring the person concerned to justice.'²⁰⁰ The wording of article 17(2)(b) implies that a State, in initiating a proceeding, is presumed acting with a *bona fide* intention to investigate or prosecute. A State could therefore, be held unwilling, under the said subsection, if there is a proven unjustified delay and that such a delay is linked and effectively contradicts the presumed *bona fide* intent of that State. In linking the connection of the unjustified delay to the inconsistency of intending to carry out a proceeding genuinely, would it suffice to argue that a State prolonging a proceeding without good reason or justification means that it is unwilling? If the test is purely objective, one could easily claim that any unjustified delay is not in line with an intent to take legal action and thus, automatically, bring into play the second condition. However, the second requirement entails a subjective examination; the terms of the subsection insinuate that the unjustified delay must be indicative of a State's unwillingness or a lack of intent to investigate or prosecute genuinely. Therein lies the attendant challenges in meeting these requirements.

3. Article 17(2)(c): Lack of Impartiality or Independence

The third and last of the exhaustive list of criteria to which unwillingness can be established as a ground for admissibility is the lack of impartiality or independence of domestic courts. As with unjustified delay, article 17(2)(c) requires that the Court must fulfil two conditions: (i) that the domestic court concerned had not been impartial or independent in conducting a proceeding; and (ii) that its partiality or lack of independence is 'inconsistent with an intent'

¹⁹⁹ See Holmes, 'The Principle of Complementarity,' *op. cit.* note 18, at p. 50.

²⁰⁰ Article 17(2)(b) of the Rome Statute.

to carry out a *bona fide* investigation or prosecution. To a certain extent, this criterion seems to replicate that of article 17(2)(a) which pertains to shielding a perpetrator from criminal responsibility.²⁰¹ During the drafting of the Statute, several delegates were concerned with the difficulty in proving that a State intended to conduct a sham proceeding. It was pointed out that there may be common scenarios in which a State or a judicial institution as a whole cannot be regarded as staging a sham proceeding but that, certain powerful and influential individuals interfere with the investigation or trial to unjustly increase the possibility of an acquittal. As the *travaux préparatoires* surrounding article 17(2)(c) indicate concerning such a scenario, there may be a case to argue that the relevant subsection can only be construed within in that limited scope.²⁰²

3.1. *De Facto Lack of Impartiality or Independence*

In establishing whether there had been a *de facto* lack of impartiality or independence, the Prosecutor may turn to some of the *indicia* discussed above relating to article 17(2)(a). Specifically, the Prosecutor could argue procedural irregularities and institutional deficiency in relation to politicians' capacity to influence the judicial body, on one hand, and inadequacy of action to establish a lack of impartiality or independence, on the other. In making a determination as to whether there had been a lack of impartiality or independence, the Court could seek some light from human rights cases decided by the ECtHR and IACtHR. Examples of cases, *inter alia*, to which the ICC may refer include: *Bahamonde v Equatorial Guinea*,²⁰³ *Coyne v U.K.*,²⁰⁴ and *Villagran Morales, et al.*²⁰⁵

The ECtHR held that the existence or lack thereof of impartiality 'for the purposes of article 6(1) of the ECHR' is to be determined 'by a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also by an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt'

²⁰¹ See discussion in Holmes, 'The Principle of Complementarity,' *op. cit.* note 18, p. 50-1.

²⁰² See Holmes, *ibid.*, and Olásolo, *op. cit.* note 14, at p. 152.

²⁰³ UN Human Rights Committee, 20 Oct. 1993.

²⁰⁴ ECHR, 24 Sept. 1997.

²⁰⁵ IACtHR, 19 Nov. 1999.

as pertaining to the impartiality of the judicial procedure concerned.²⁰⁶ The subjective test would obviously be of significance to the ICC. In determining impartiality, the Court could hold that a proceeding had not been conducted impartially where the acting judge concerned had personal interest in acquitting or in not giving the perpetrator a meaningful conviction.

As regards the objective test, however, the difference between the human rights court and the ICC must, once again, be emphasised. According to the ECtHR, the decisive factor for the objective test is whether or not an applicant's fear that there was impartiality in the proceeding was 'objectively justified.'²⁰⁷ Such a threshold may be insufficient for the ICC. The ECtHR is focused on whether a national court had fulfilled its minimum obligation to provide an impartial court, that is, in line with a person's right to be heard before an impartial and independent court.²⁰⁸ The ICC is not essentially concerned of such duty of domestic courts or the right of an individual. It is not to ascertain whether that right had been guaranteed, rather the ICC is to determine whether a national judge, investigator or any other person that could be involved in the proceeding had intentionally intervened in the procedure for the purpose of warranting acquittal or no prosecution. Once proven that an individual manipulated the conduct of a proceeding, the Court is to decide, based on the facts and characteristics of each case, whether the interference is significant enough to conclude that the proceeding had not been carried out in an impartial or independent manner.

3.2. *Inconsistency with an Intent to Investigate or Prosecute Genuinely*

The second condition which is similar to article 17(2)(b) requires that the lack of impartiality or independence must be inconsistent with an intent to carry out a genuine proceeding. It is submitted that in order to satisfy this second requirement, the Prosecutor must prove that the lack of impartiality or independence in a proceeding favours a suspect or an accused. In other words, due to the lack of impartiality or independence, such individual would unlikely face a

²⁰⁶ See, among other authorities, *De Cubber v Belgium* (Application no. 9186/80) [1984] ECHR 14, *Case of Hauschildt v Denmark* (Application no. 10486/83) [1989] ECHR, *Case of Castillo Algar v Spain* (79/1997/863/1074) [1998] ECHR.

²⁰⁷ See *Case of Algar*, *ibid.*, at para. 45 and *Case of Hauschildt*, *ibid.*, at p. 21, para 48.

²⁰⁸ In the judgment in *Hauschildt*, *ibid.*, it was said that 'what is at stake is the confidence which the courts in a democratic society must inspire in the public and above, as far as criminal proceedings are concerned, in the accused.'

prosecution or would in all probability, be acquitted. Any *de facto* lack of impartiality or independence, albeit could possibly be claimed as inconsistent with an intent to carry out a genuine proceeding, cannot satisfy the second requirement on its own. It was held, for instance, by the Human Rights Committee that ‘a situation where the functions and competence of the judiciary and the executive are not clearly distinguishable [...] is incompatible with the notion of an independent and impartial tribunal.’²⁰⁹ If such a situation is sufficient to satisfy the second requirement, not only would the gate of admissibility open wider, but it would also appear incompatible with the constraint complementary role of the ICC under the terms of article 17(2), which is to investigate or prosecute perpetrators *only* when States are not willing.

3.3. *Passing Judgments on States’ Legal System*

State delegates during the negotiation also expressed their concern that the ICC, in the course of an unwillingness determination, might pass judgments on States’ national laws and legal systems. It was underscored that the mandate of the Court to admit cases has to be based on procedural grounds.²¹⁰ The ICC has no authority to criticise substantive laws of States. However, in assessing whether a particular proceeding lacks impartiality or independence, an examination of the domestic criminal systems may be necessary; in this regard, the concern of delegates may seem more legitimate. Whilst article 17(2)(a) would overwhelm any such concern as it requires a specific intent and concomitantly sound evidence of shielding the accused, the impartiality or independence criterion demands, arguably at least, a lesser condition. To establish that a proceeding was conducted in a manner that raises doubts as to its impartiality or independence entails reviewing the relevant law applied. Inevitably in some cases, the demarcation line appears to be very fine between, on one hand, the claim that there had been impartiality in the application of a specific law and on the other hand, the counter perception of states that the Court is merely criticising domestic law. Indeed, there are instances to which national laws appear unfair and could lead to impartiality. Nonetheless, the

²⁰⁹ The Human Rights Committee, *Bahamonde case*.

²¹⁰ See the Informal Expert Paper, *op. cit.* note 38.

Court as a reviewing body must proceed with caution, least it be viewed as mocking States' laws and legal systems.²¹¹

The point put forth could become clearer if human rights cases are taken as examples. In *Hauschildt v Denmark*, the ECtHR appears to have taken prudence and specified that its 'task is not to review the relevant law and practice in *abstracto*, but to determine whether the manner in which they were applied to [...] gave rise' to a doubt as to the impartiality of the court in question.²¹² In the same case, it was held that there had been a violation of article 6(1) ECHR, the right to be heard before an impartial and independent court, as the Danish judge who made pre-trial decisions on the applicant also presided over the trial. Nevertheless, the ECtHR judgment was not delivered without emphasising that the 'mere fact that a trial judge [...], in a system like the Danish, has also made pre-trial decisions in the case [...] cannot be held as in itself justifying fears as to his impartiality.'²¹³ The decision was then grounded on the special features of the case's facts in which the judge made nine pre-trial decisions on the applicant. Similarly, the ECtHR in *Holm v Sweden*²¹⁴ held that the impartiality of the relevant national court was 'open to doubt' and the applicant's concern was 'objectively justified.' The case of *Holm* involved a jury trial where the membership of its five jurors subjected the impartiality of the decision to misgivings; that is, despite the fact that the jurors were elected 'in conformity with the legal conditions for eligibility,' to which the government had argued.²¹⁵ The ICC may encounter similar facts and arguments in the near future. Evidently as it shows in the examples, discretion is required and more so for the ICC, as it is to handle grave criminal cases that is of concern to the international community.

²¹¹ Take for example the case *Constitutional Right Project (in Respect of Akamu, Adega & Others) v Nigeria*, African Commission on Human & Peoples' Rights, 2 Oct. 1995, in which the national law in question – The Robbery & Firearms (Special Provision) Decree No. 5 of 1984 – creates special tribunals composed of a judge, a member of the armed forces and a member of the police force and whose judgments may be confirmed or disallowed by the Governor. The Act clearly violates Article 7 of African Charter which requires impartiality of courts. As the law and its application are intertwined, how can it be said that the application is wrong without implying that what was applied was erroneous, at least in this case?

²¹² *Ibid.*, at para. 45.

²¹³ *Ibid.*, at para 50.

²¹⁴ *Holm v Sweden* [1993] 1419/88 ECHR 58, at para 33.

²¹⁵ *Ibid.*, at para. 31.

C. Article 17(3): Inability

Establishing inability is less complicated than proving unwillingness. The inability criterion involves a more objective examination. It does not require the Prosecutor to investigate into States' subjective intentions in initiating proceedings. Determining whether a judicial system had collapsed or if national authorities had obtained the suspect or evidence are fact-driven enquiries. An issue, nevertheless, may still arise if a State, contrary to the Prosecutor's findings, believes that it is able to carry out a proceeding genuinely. There may seem to be an overlap between the inability and inaction as grounds for admitting cases. A State, for example, may have remained inactive and unable to initiate a proceeding due to a shortage of financial and human resources. To distinguish whether such a case would be admissible on the grounds of inaction or inability depends on whether such a State had remained inactive all along or had initiated a proceeding, *e.g.* a criminal investigation, encompassing both the person and the conduct. If no *a priori* proceeding was instigated, then it is to fall under inaction. Otherwise, a proceeding covering both the person and the conduct would potentially engage the inability criterion.

To satisfy article 17(3) two conditions must be met. First, it has to be established that there had been a 'total or substantial collapse or unavailability' of a State's judicial system. Second, due to such a collapse or unavailability, the State concerned had been 'unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.' Both conditions have to be satisfied in order to conclude that a State is unable to carry out a genuine proceeding, for the purpose of the article 17 of the Rome Statute. It seems therefore, that there is a case to argue that the said subsection only covers uncommon and 'very exceptional' circumstances, such as those, for instance, where a State has no operating government.²¹⁶ Accordingly, there has been a concern towards the strict terms of article 17(3) making it too difficult to establish inability.²¹⁷ For example, after experiencing a breakout, a State's judicial justice may yet be capable of functioning. However, due to an outstanding large number of situations that it has to deal with, it becomes incapable, albeit not unwilling, to arrest a perpetrator who committed a very grave article 5 crime and unable to

²¹⁶ Olásolo, *op. cit.* note 14, at p. 154.

²¹⁷ See Holmes, 'The Principle of Complementarity,' *op. cit.* note 18.

obtain the necessary evidence to commence a prosecution. In that example, the strict technical requirement of article 17(3) that a State's judicial system must have totally or substantially collapsed or is unavailable would probably entail that the Court will be unable to intervene pertaining to such an instance.

The first condition is 'total or substantial collapse' or 'unavailability' of the national judicial system concerned. What is meant by a collapse must be determined by the Court. During the negotiation period, the drafters had referred to situations where an international or civil armed conflict had caused a breakdown or collapse of the judicial system. A collapsed judicial system is one that is not able to function or do what it is supposed to carry out. The critical qualifier, which the Court must ascertain, is whether a collapse impeded the substantial fraction of a judicial system from operating. A mere partial collapse is not sufficient, even if it affects the efficiency of the whole legal system concerned.²¹⁸ Potential *indicia* that may suggest a collapse of a judicial system include: 'lack of necessary personnel, judges, investigators [or] prosecutors; [and] lack of judicial infrastructure.'²¹⁹

Although both 'collapse' and 'unavailability' were not defined under article 17(3), the former was accompanied by important adjectives, 'total or substantial,' whilst the latter was left for the judges to construe. Indeed, a judicial system that had totally or substantially collapsed is also unavailable, but an unavailable judicial system arguably, does not necessarily mean a collapsed domestic legal order. The way the subsection was worded appears to imply that the first condition of the said subsection does not necessitate that a collapse of a judicial system must have been established; that a domestic legal system being unavailable will suffice. This point is noteworthy because of the possibilities and the extent to which the term 'unavailability' could be interpreted. As total or substantial collapse of a judicial system seems too specific, a broader reading of 'unavailability' could lead to a wider number of situations being potentially admissible before the ICC on the grounds of inability.

²¹⁸ During the Conference in Rome, the adjective 'partial' was substituted with 'substantial' to cater the concerns of several State delegations.

²¹⁹ The Informal Expert Paper, *op. cit* note 38, at p. 31.

A key consideration with respect to the term ‘unavailability’ is whether it was intended only to cover administrative unavailability of a judicial system. An example is when a State cannot continue with a proceeding because there is no court building or that there is a shortage of professional personnel. On the one hand, if the question is to be answered affirmatively, then interpreting ‘unavailability’ cannot be far from construing ‘collapse.’ A national legal system that cannot operate and carry out its judicial functions due to the fact that it lacks court buildings and has severe shortage of personnel is likely because it has collapsed. On the other hand, it could be maintained that ‘unavailability’ can be given a wider interpretation. In the Informal Expert Paper, it was recommended that the relevant term be read in a broader sense to include ‘typical cases of inability.’²²⁰ In that light, could ‘unavailability’ be read broader to encompass instances where a domestic legal system is unable to carry out a proceeding for reasons other than administrative impediments? Albeit no further indication was mentioned as to how broad the extent of the interpretation can be allowed, the Expert Paper merely provided potential *indicia* to establish inability which suggests a wider reading of the term ‘unavailability.’²²¹ It stipulated that unavailability could be established where there are: ‘lack of substantive or procedural penal legislation; lack of [judicial] access; obstructions by uncontrolled elements; amnesties and immunities.’²²²

In the case of Uganda and the accused LRA leaders, for example, it would be possible to put forth the argument that the State’s judicial system is unavailable because ‘the presence of the accused in a neighbouring State prevents Uganda from taking them into custody.’²²³ The situation was admitted based on the voluntary referral of the State. However, had the government not referred the case before the ICC, could such an argument that the Ugandan authority is, under article 17(3), unable to exercise its jurisdiction, possibly succeed an admissibility determination? Since Uganda initiated proceedings, the admissibility of the case could not be regarded as inaction. No proven article 17(2) unwillingness on the part of Uganda was also established. Moreover, no evidence was found signifying a total or substantial collapse of its judicial system. One may be inclined to maintain that a broader

²²⁰ *Ibid.*, at p. 15, footnote 15.

²²¹ *Ibid.*, at p. 31.

²²² Amnesties and immunities could potentially result to a case of inaction where the State concerned had not initiated any proceeding due to an amnesty or immunity. See discussion above.

²²³ Akhavan, *op. cit.* note 53, at p. 415.

interpretation of ‘unavailability’ is reasonable to cover situations such as that in Uganda. The Informal Paper also suggested amnesties as *indicia* to argue unavailability. Amnesties would be relevant to article 17(3) where they had been granted after a domestic proceeding had been initiated, either during investigation or prosecution. Otherwise, if amnesties had prevented any national proceeding from commencing, then it will potentially be a case of inaction. It was argued that a State which is precluded from prosecuting a person because of an amnesty granted would amount to an unavailability of that State’s judicial system.²²⁴ Furthermore, it could be claimed that article 17(3) was intended to have a broad scope, evidenced by the addition of the phrase ‘or otherwise unable to carry out its proceedings’ at the end of the subsection.²²⁵

Another example is where a judicial system, due to an armed conflict, is overburdened with enormous number of cases. Could that be argued as capable of satisfying the term ‘unavailability’? One can perhaps surmise that it may be considered as an extreme or even far-fetch broadening of ‘unavailability.’ First of all, such a scenario was not considered during the negotiation period and second, determining whether or not a domestic legal system is overburdened is a matter of judgment, which it can be argued as contrary to the more objective essence of article 17(3).²²⁶ It could thus, be easily asserted that the drafters had not intended the inability criteria to cover overburdened judicial systems.²²⁷ Nevertheless, if such an example cannot come under the shadow of a substantially or totally collapsed legal system and the overburdening does lead to a *de facto* impunity, can a literal reading of article 17(3) result to a much broader interpretation of the term ‘unavailability’ in order to include such a situation? With all these questions raised as to how ‘unavailability’ could be construed, definitive answers are yet to come, if and when, the Court is confronted with a similar situation.

The second condition of article 17(3) is that a State was unable to obtain the suspect or the necessary evidence, or for other reasons a State was unable to carry out its proceeding. It must

²²⁴ See O’Shea, *op. cit.* note 101, at p. 126.

²²⁵ See Akhayan, *op. cit.* note 53.

²²⁶ See Arsanjani & Reisman, *op. cit.* note 56, at p. 388 and 390.

²²⁷ See Philips, *op. cit.* note 48, at p. 79: ‘... the Court is not envisioned as an adjunct to a strained national system.’

be emphasised that a failure of a State authority to obtain the suspect or evidence must be due to a substantial or total collapse or unavailability of its judicial system. Mere incompetence of a State to gather the evidence or to arrest the accused will not therefore, satisfy the relevant subsection. The phrase ‘or otherwise unable to carry out its proceedings’ was intended to subsume instances where a State is still unable – despite having obtained the accused and the evidence. The common example given in relation to this is where there is a serious shortage of personnel to carry out a genuine prosecution.²²⁸

As earlier mentioned, the inability criterion seems to cater to only a few situations. Even if the term ‘unavailability’ is given a broader interpretation, the conditions to be met in satisfying the criterion, suggest that the Court is only to intervene in very exceptional cases. At least in relation to the inability criterion, the complementarity regime of the ICC was criticised as it would only affect the judicial systems of poor or developing States.²²⁹ It was reasoned that in all probability, legal systems of developed nations would unlikely trigger article 17(3). Although it can be said that a functioning judicial system needs no intervention, the concern lies in the risk that the ICC might be viewed as an international institution that only imposes its authority over economically weak and usually, politically insignificant, States.

²²⁸ See Holmes, *The Principle of Complementarity ...*, *op. cit.* note 18.

²²⁹ Stated by Louise Arbour, see Schabas, *op. cit.* 28.

IV. ARTICLE 20(1) & (3): *Ne Bis In Idem*

Article 20 concerns cases that had already been tried by a competent judicial court and the object of the principle of *ne bis in idem* is to preclude retrial or re-punishment of persons already judged. This principle, inscribed under several human rights conventions,²³⁰ is being adhered to by most national judicial systems. Its effect, nevertheless, is generally restrained within a single jurisdictional regime. At the international level where an international court and a domestic forum have concurrent jurisdiction, the rule against double jeopardy is also respected. The statutes of the ICC precursors, the ICTY and ICTR, provided: no person can be tried again by a domestic court where such person had already been adjudicated by any of the international tribunals; and that only under certain circumstances can either the *ad hoc* tribunals carry out a subsequent prosecution against a person tried already by a national court.²³¹ Under the Statutes of the *ad hoc* tribunals, the general applicability of the double jeopardy rule is thus, subject to two exemptions. The first pertains to the conduct in which the defendant had been tried. This refers to situations where a national forum prosecuted an accused for ordinary crimes based on conducts that more appropriately, constitute an international crime. The second is based on the proceeding of the initial trial carried out by a national court. This is exemplified in situations where the legal action was done in a manner that cannot be regarded as impartial or independent or where the proceeding was found to be for the purpose of shielding a perpetrator from his or her criminal responsibility.

In the case of the ICC, the Court likewise adheres to the principle of *ne bis in idem*, more so, it is submitted, because of the complementary nature of its jurisdiction. It had been claimed that the *ne bis in idem* principle is, 'in some respects, a corollary to the principle of complementarity reflected in article 17, which precludes the Court from asserting jurisdiction when a competent national legal system has already accepted jurisdiction,'²³² The ICC follows its predecessors in providing exemptions to the said principle but the terms of article 20 of the Rome Statute largely differs from those of the *ad hoc* tribunals' statutes. Under

²³⁰ Stipulated under article 14(7) of the ICCPR, article 86 of Geneva Convention III and article 117(3) of Geneva Convention IV.

²³¹ Article 10 of the ICTY Statute and article 9 of the ICTR Statute.

²³² Bassiouni, *op. cit.* note 115, at p. 161.

article 20, the manner in which a proceeding had been conducted, where it is a mere sham or lacks impartiality or independence, was included as a potential ground for an exemption from the double jeopardy rule. It is, nonetheless, uncertain whether an initial domestic prosecution of a defendant for ordinary crimes based on conducts that constitute international crimes could also give rise to an exemption from the same rule.²³³

A. Article 20(1)

Article 20(1) prohibits subsequent prosecution by the Court of a person, already tried before the ICC, ‘with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.’ Two points can be raised in this regard. First, the said article began with the phrase ‘except as provided in this Statute.’ True enough, the Rome Statute has provisions that arguably contradict and confine the scope of the double jeopardy rule. Under article 81 of the Rome Statute, an appeal was not only permissible against a judgment of conviction but also against an acquittal; a position which appear unacceptable from the point of view of common law tradition but may be normal from the civil law tradition.²³⁴ On the grounds of procedural error, error of fact or law,²³⁵ an appeal against acquittal may be made by the Prosecutor.²³⁶ Where the Appeals Chamber finds that a decision was affected by such an error, it may ‘order a new trial before a different Trial Chamber.’²³⁷ More so in relation to the ground error of fact, the right of the Prosecutor to appeal against an acquittal may seem to undermine the *ne bis in idem* principle. However, where it is on the basis of new and significant evidence found, which ‘was not available’ at the time of the original trial, only conviction may be appealed against.²³⁸ Second, the wording of article 20(1) renders a broad reading of what would be prohibited by the *ne bis in idem* principle in relation persons already acquitted by the Court. The subsection employed the term ‘conduct’ and not ‘crime or offence.’ This presumably entails that if a person, for example, is acquitted by the

²³³ See Schabas, *op .cit.* note 28, at p. 70.

²³⁴ Tallgren, *op. cit.* note 97, at p. 426, para. 12.

²³⁵ Article 81(1) of the Rome Statute.

²³⁶ For further discussion see Triffterer (ed), *Commentary on the Rome Statute ...*, *op. cit.* note 43.

²³⁷ Article 83(2) of the Rome Statute.

²³⁸ Article 84(1) of the Rome Statute.

Court for an allegation of genocide on the basis of a specific conduct, such person cannot be prosecuted again by the ICC for any other crime within the jurisdiction of the Court based on the same conduct. An issue raised in this regard is that article 5 crimes are said to be ‘partly overlapping.’²³⁹ The Prosecutor must thus, do his best in prosecuting a perpetrator for the first time in relation to a particular conduct as any subsequent case against the same on the basis of the same conduct will be held inadmissible.

B. Article 20(3)

Article 20(3) concerns cases that had already been decided by a domestic court. It provides that the ICC cannot prosecute a person previously tried by a competent national court unless certain conditions are established, rendering the *ne bis in idem* principle inapplicable. The conditions provided to which a case will be exempted from the double jeopardy rule mirror those of the unwillingness criterion under article 17(2). Article 20(3)(a) allows re-prosecution of an individual already tried under a domestic forum if the proceedings undertaken were found to be ‘for the purposes of shielding the person concerned from criminal responsibility.’ Article 20(3)(b) stipulates the ground where the proceedings lack impartiality or independence and ‘were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’ It must further be noted that the ICC, strictly speaking, cannot carry out a retrial of an individual already tried by a State on any other ground apart from those provided under article 20(2). It cannot embark on a subsequent trial based on an error of fact, law or a procedural error, unless of course if an inference from such mistake can be made which points to unwillingness of a State to prosecute genuinely. As emphasised in the above discussions, the ICC was not established to act as an appellant court for domestic courts.

Article 20(3) entails that a mere judgment of a domestic forum will not satisfy the complementarity requirement of the ICC. Its apparent violation of the *ne bis in idem* principle was justified to cover cases where a State aims to shield a person from criminal responsibility

²³⁹ See Tallgren, *op. cit.* note 97, at p. 426, para. 13.

through handing over a biased judgment, either via an acquittal or giving a sentence that is remarkably disproportionate to the crime committed. Article 20(3) is necessary to cure situations where a rogue State cleverly employs the application of the double jeopardy rule to bar the ICC from correcting an act of impunity. The *credo* was thought to be: ‘if criminal justice is said to be done, it is to be done properly.’²⁴⁰ The said subsection can further be justified based on the argument that it does not violate the *ne bis in idem* principle as the domestic trials it is concerned with are not genuine proceedings.

Some of the *indicia* relating to article 17(2)(a) and (c) are also applicable to satisfying the conditions of article 20(3). The latter article has to be distinguished as it concerns cases that had been adjudicated already by a domestic court. The relevant *indicia* would relate to how a national proceeding had been undertaken, as oppose to how it is being carried out. Procedural irregularities and institutional deficiencies, for example, are probable *indicia* to which the ICC may infer article 20(3) unwillingness, lack of impartiality or independence. It is submitted that the Court may also be able to infer unwillingness or lack of impartiality or independence in cases where a State had handed a sentence that was significantly disproportionate to the seriousness of the crime a person’s conviction was based.

Pertaining to a State’s substantive rules on defences, could the Prosecutor satisfy the *ne bis in idem* exemptions under article 20(3) on the basis that a defendant had avoided a domestic court conviction by successfully invoking a defence that would otherwise be unavailable under the Rome Statute?²⁴¹ On the one hand, a State could argue that allowing a retrial of a case based on such ground could undermine a State’s sovereign right to discern which defences should be available under its national criminal law, assuming those defences do not run against international law norms and principles. On the other hand, abusing an unreasonably lenient criminal law may result to impunity and that the Rome Statute had not specifically put a limit as to which basis can the Prosecutor establish unwillingness under the *ne bis in idem* article. Although there is no impediment for the Prosecutor to claim admissibility based on the said ground, it must be emphasised that the critical factor is the

²⁴⁰ *Ibid.*, at para. 19.

²⁴¹ See discussion above where it was argued that defences that were not contemplated under the Rome Statute could result to *de facto* impunity from the perspective of the ICC, at p. 30-1, and Broomhall, *International Justice, op. cit.*, note 88, at p. 92.

genuineness of the manner a trial was carried out. *Prima facie*, an acquittal or a conviction with a light sentence because of a successful summon of a defence, even if not contemplated under the Rome Statute, will suffice to meet the complementarity requirement of the Court and thus it would be inadmissible.

A potential scenario concerning the *ne bis in idem* principle and domestic trials is where the ICC Prosecutor would suspect that a judgment was not genuine on the basis that a national court had acquitted a defendant, despite the existence of overwhelmingly incriminating evidence in favour of a conviction. This may be problematic for several reasons. According to the Informal Expert Paper, a determination of unwillingness must not be based on the substantive outcome of a decision, as for example, an acquittal of an obviously guilty person, but rather on the ‘procedural’ and ‘institutional’ factors.²⁴² In principle, the ICC in determining unwillingness has no authority to evaluate the value of incriminating evidence against a person already tried by a competent domestic court. It can only base its admissibility determination on the manner a proceeding had been carried out. Allowing an ICC intervention, furthermore, on the basis that a domestic forum had unreasonably acquitted an accused – in the face of credible evidence incriminating that person – may run against the right of an accused to a presumption of innocence. If a retrial of a case based on such ground was allowed, the Court would be seen as having a prior opinion as to the guilt of the accused concerned even before the commencement of the ICC trial. In practice, however, it does not seem far from happening that the attention of the Prosecution will be drawn by victims or by NGOs to national decisions which blatantly contradict overwhelming evidence. Although it may not be permissible as evidence before an ICC admissibility determination, an acquittal that is truly unreasonable and virtually inconsistent to the available incriminating evidence would likely alarm the Prosecutor that such a judgment might not be genuine.

The power of the ICC under article 20(3) to re-prosecute an individual has no temporal restraint as to when the Court can exercise it. The relevant subsection had not provided any time limit. In other words, the ICC could thus, unsettle a final judgment by a domestic court any time from when a decision had been delivered until, in principle, countless years ahead. As pointed out by Olásolo, the absence of a time frame has an effect on the *res judicata* of

²⁴² Informal Expert Paper, *op. cit.* note 38, para 46.

domestic judgment *vis-à-vis* the ICC and article 20(3).²⁴³ From the perspective of States, it becomes uncertain as to when can a judgment become final in relation to the ICC. Although it can be said that *bona fide* efforts would bar the Court from intervening and would therefore, conclude *res judicata* of domestic decisions, the ultimate determination as to its finality rests upon the ICC. From the point of view of the ICC, nonetheless, the admissibility of a case is subject to strict conditions of establishing either an intention to shield a perpetrator or a lack of impartiality or independence that is contrary to an intent to carry out genuine proceedings; these conditions, given their high thresholds, are not that easy to satisfy and would most likely involve onerous evidentiary burden.

A further point in relation to article 20(3) that is worthy of a brief discussion is where a person was tried for an ordinary crime on the basis of a conduct that constitutes an international crime. As discussed above, the ICC is precluded from re-prosecuting a case based on conducts that was also the basis upon which a domestic court acquitted or convicted a defendant. The use of the term ‘conduct’ under article 20(3), as opposed to a ‘crime’ in article 20(2), which bar domestic courts from carrying out a retrial of cases that have been already decided by the ICC, suggests that the effect of the double jeopardy rule was intended to have a broad scope.²⁴⁴ Nevertheless, what if a prosecution of a person for ordinary crime based on conducts that constitute an exceptionally serious international crime trivialises the conduct committed, to the point in which it can be claimed that justice had not been served and impunity had been actualised? Unless *under* prosecution could be inferred as an underhanded way of shielding an offender from criminal accountability, it seems unlikely that the ICC would be able to commence a retrial under such circumstances. It could be added, however, that those conducts prescribed under the Rome Statute would constitute serious offences, even if in a given instance, the same were legally characterised as an ordinary crime and not as an international crime. For example, a conduct nationally characterised as a murder, instead of genocide, would yet sanction severe punishment under any domestic criminal law. Likewise, rape or torture even if not classified to be part of a criminal enterprise of crimes against humanity, would expectedly result to serious sentences if found to have been committed. Moreover, the practical aspect that the Court’s financial resources are

²⁴³ Olásolo, *op. cit.*, note 14, at p. 153.

²⁴⁴ See discussion in Schabas, *op. cit.* note 28, at p. 70

limited could mean that the Prosecutor and the ICC will prioritize and put their attention to more egregious situations elsewhere rather than contemplate upon a retrial of a case which was already decided domestically and likewise, protecting an accused, or a lack of impartiality or independence of the State concerned cannot be easily established.

V. UN SECURITY COUNCIL REFERRALS

Under article 13 of the Rome Statute, the UN Security Council, using its Chapter VII mandate, is given the power to refer situations to the Prosecutor.²⁴⁵ It is only logical that the main body responsible for the maintenance of international peace and security is conferred with the authority to refer situations to an institution that is mandated to adjudicate cases that are of international concern. In practical terms, article 13 also relieves the Council from political pressures to create *ad hoc* tribunals in response to every case of serious human rights and humanitarian law violations that would occur. The Court could thus, serve as a standing permanent judicial body that the Security Council may revert to, when maintaining international peace and security, renders prosecution of perpetrators to be necessary.

Where the Council is to refer a situation in which article 5 crimes appear to have been committed in the territory of a non-State party of the ICC or the alleged perpetrator is a citizen of a non-State party, such referral has the effect of extending the Court's jurisdiction beyond its member States' territories and nationals.²⁴⁶ The binding authority of Chapter VII

²⁴⁵ The Security Council only has power to refer 'situations' and not specific 'crimes.' See Philips, *op. cit.* note 48, at p. 72: 'The distinction between State and Security Council referral of "situations" and Prosecutor-initiated investigations into "crimes" is important, and reflects attempts to de-politicize the Court by withholding State party and Security Council authority to haul individuals before it ...'

²⁴⁶ The temporal scope of the Court's jurisdiction could also be extended (but not retrospectively prior to 1st of July 2003) where the situation the Security Council had referred occurred during the enforcement period of the Rome Statute to which the Statute was not in force yet in the national jurisdiction concerned.

Resolutions, to which Council referrals must take form,²⁴⁷ binds all UN member States, and in effect, allows for such provisional expansion of the jurisdiction of the ICC. This had been the case in the Security Council referral to the Prosecutor of the situation in Darfur. Sudan is not an ICC member State and the suspected perpetrators are Sudanese nationals. The Prosecutor, nevertheless, initiated an investigation, satisfied that the ICC has jurisdiction over the matter and that the situation was, indeed, admissible before the Court.

In view of the significant power of a Security Council Resolution to extend the Court's *ratione loci* and *personae*, a relevant question revolves around the possibility that a Council referral would effectively exempt a situation from the complementarity requirement of the Rome Statute.²⁴⁸ In other words, does inaction, unwillingness or inability under the terms of article 17 have to be established even in Security Council referrals or could a Council Resolution extend its authority so as to leave no discretion to the ICC but to hold its referrals admissible? An analysis of the relevant provisions of the Rome Statute would lead one to the conclusion that any case or situation, even those referred to by the Security Council, will have to satisfy the prerequisites of the complementarity jurisdiction of the Court.²⁴⁹

First, there is nothing in the Rome Statute which stipulates that a Council referral is automatically admissible before the ICC. In particular, no exemption from the complementarity requirement is specified under article 17. Second, the wording of article 53, which stipulates how the Prosecutor is to treat referrals by States or the Security Council, confers no special treatment favouring Council referrals. Regardless of whether a referral was received from a State party or from the Council or where the Prosecutor considers using its *proprio motu* power, article 53(1) applies and directs the Prosecutor to determine whether or not to initiate an investigation and ascertain, *inter alia*, if the situation or the case 'is or would be admissible under article 17.' Security Council referrals, in principle, do not entail that the Prosecutor will be under the obligation to prosecute or even initiate any formal investigation. In the event where the Prosecutor decides not to lodge an investigation, article 53(3)

²⁴⁷ Article 13(b).

²⁴⁸ This question had been left unresolved during the Rome conference. Discussion concerning the relationship of the ICC with the Security Council was dominated by the Council's ability to inactivate the Court's jurisdiction under article 16.

²⁴⁹ In the Informal Expert Paper, *op. cit.* note 38, at p. 21, the experts concluded: 'As a matter of principle, the complementarity regime applies even in the event of a Security Council referral.'

contemplates that the Council could *only* request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed and ask the Prosecutor to 'reconsider that decision.' Furthermore, it can be said that the Rome Statute would have explicitly provided for it, if Council referrals are, indeed, exempted from the complementarity requirement of the ICC.²⁵⁰

In contrast, however, article 18(1), which requires the Prosecutor, upon deciding to commence an initial investigation, to notify all States parties or those that may exercise jurisdiction, specifies that no notification requirement is mandatory for Security Council referrals. The purpose of the notification requisite under article 18 is significant to the complementarity regime in ensuring that no State is investigating or prosecuting genuinely, but the omission of the required notification for Council referrals does not entail exemption from the complementarity conditions of the Court's exercise of jurisdiction.²⁵¹ Whilst it alleviates one of the statutory requirements to which the Prosecutor must fulfil so as to bring a case before the Court, it is submitted that the essential complementarity precondition of article 17, *i.e.* a finding of inaction, unwillingness or inability, still applies.²⁵²

On a much broader perspective, mention must be made as regards the expansive discretionary power of the Security Council. The Council under Chapter VII of the UN Charter is given a wide discretion to issue measures with the view of maintaining international peace and security. From economic sanctions to establishing *ad hoc* tribunals, the Security Council had made Chapter VII Resolutions which legally bind all UN member States. Significantly however, Council Resolutions do not bind independent international institutions, including the ICC and its Prosecutor. It is submitted, not only would the Security Council be unable to modify the provisions of the Rome Statute even through the issuance of Resolution but accordingly, its broad powers cannot exempt its referrals from sieving through the Court on a

²⁵⁰ *Ibid.*

²⁵¹ See Fletcher & Ohlin, *The ICC – Two Courts in One?* [2006] 4 JICJ 428, at p. 431-3. The absence of the notification requirement under article 18 may suggest that States cannot challenge the admissibility of a situation on complementarity grounds, but it is not clear whether it is the same if such State is to challenge under article 19. Whether or not challenging admissibility under article 19 is viable, it seems at the very least one may conclude that the Office of the Prosecutor must satisfy itself that a situation referred to by the Security Council appears to be admissible under the terms of article 17.

²⁵² See *ibid.*

‘complementarity footing.’²⁵³ Apart from the notification requirement under article 18, the normal complementarity conditions of the Rome Statute will apply.²⁵⁴

The point that the Security Council cannot, in principle, legally enforce automatic admissibility of its referrals is important as it upholds the Prosecutor’s independence as well as the over-all integrity of the ICC. However, relevant practical and political factors have to be considered in contemplating about the admissibility of Council referrals in practice. Firstly, the value and significance of a Security Council Resolution must not be underestimated. With the veto power of the permanent five members of Security Council, adopting a binding Resolution normally involves a politically difficult and complicated process. A situation that triggered an adoption of a Council Resolution presumably entails that such a situation constitutes a threat to international peace and security and therefore, poses an alarming concern to the international community. By virtue of the fact that Council referrals come in the form of Chapter VII Resolutions, the Prosecutor cannot easily disregard them. It may be argued further, that the Security Council would not adopt a Resolution referring a situation, without any accompanying deliberation as regards to the complementarity principle and article 17 issues of admissibility under the Rome Statute. In the case of Darfur, for instance, the Security Council made a referral to the Prosecutor in accordance with the recommendation of the International Commission of Inquiry on Darfur, which claimed that the State authority concerned, lacked both willingness and ability to carry out genuine proceedings.²⁵⁵ As such, the Darfur case strongly suggests that it is not totally unreasonable to maintain that the Prosecutor, in practice, will at the very least, initiate a formal investigation, in response to Security Council referrals.

Secondly, the recurrent theme of the Court’s limited financial and human resources is also relevant in relation to referrals by the Council. Contrary to what had just been mentioned, where the Council uses its article 13 authority to refer situations much too frequently, the Prosecutor, citing logistical constraints, could not be expected to initiate formal investigation in every Security Council referral. Moreover, the question was raised pertaining to funding as

²⁵³ See Philips, *op. cit.* note 48, at p. 73.

²⁵⁴ For further discussion see Sarooshi, ‘The Peace and Justice Paradox: The International Criminal Court and the UN Security Council’ in *The Permanent International Criminal Court*, *op. cit.* note 2, at p. 96-102.

²⁵⁵ *Op. cit.* note 166.

regards referrals made by the Security Council. As the Court could serve as a standing judicial body for the Security Council, an alternative to creating an *ad hoc* tribunal which proved to be too expensive to maintain, it seems logical that a question can be raised concerning the Court's facilities being 'offered to the United Nations free of charge'; the ICC not being an organ of the UN, in the first place.²⁵⁶

Thirdly, it was maintained by Sarroshi that the Rome Statute 'has raised the stakes by requiring a Chapter VII decision and thus, arguably, raised the expectation of Security Council Members [and possibly the international community] that effective action in the form of a prosecution or at the very least, an investigation will follow.'²⁵⁷ How prepared would the Security Council be to accept a decision by the Prosecutor not to investigate or the Court not proceed with a trial? In this regard, it can be added that the ICC and the Prosecutor, having no enforcement body, need to keep a good relationship with the Security Council. In implementing its orders over rogue States, the ICC would likely need the power of the Council as a supra ordinate body to form forces necessary to enforce such orders.²⁵⁸ Decisions by the Prosecutor or the Court not to proceed with an investigation or a trial in response to Council referrals would unlikely help build a sound relationship between the Court and the Security Council. It must be noted, nevertheless, this third factor shall not be pertinent, at least in theory, to the Prosecutor or the ICC in determining the admissibility of Council referrals.

Whilst as a matter of principle, Security Council referrals are not automatically admissible before the ICC, the Informal Expert Paper discussed the possibility of the Council, through adopting a Chapter VII resolution, to 'order all or some UN member States to yield to the Court, by declining to exercise their primary jurisdiction with respect to crimes investigated

²⁵⁶ Schabas, *op. cit.* note 28, at p. 100.

²⁵⁷ *Ibid.*

²⁵⁸ Current example of non-cooperative States is the situation concerning Sudan. In a public oath on 4 April 2005, the president of Sudan, Omar al-Bashir, swore 'thrice in the name of God that I shall never hand any Sudanese national to a foreign court.' Hoge, *International War-Crimes Prosecutor Gets Lists of 51 Sudan Suspects*, New York Times, 6 April 2005 (available at <http://www.genocidewatch.org/sudaninternationalwarcrimesprosecutergetslistofsuspects6april2005.htm>). It is interesting to ask how the ICC would deal with uncooperative attitude of national governments. See also Kaufman, *Justice in Jeopardy: Accountability for the Darfur Atrocities* [2005] 16 Crim. L. Forum 343, at p. 349-54, and Arsanjani & Reismann, *op. cit.* note 56, at p. 399-401.

and prosecuted by the ICC.²⁵⁹ It was emphasised in the Informal Paper that the complementarity principle would still be applicable despite such a resolution but ‘admissibility would be upheld by the Court, given the resulting absence of competing national proceeding as a result of compliance’ with the resolution.²⁶⁰ In other words, the relevant situation would be admissible on the grounds of inaction, provided that the relevant States complied with the Council order and that the situation satisfies the gravity threshold of article 17(1)(c). Given the argument that the Security Council has wide powers, on the one hand, it was pointed out, on the other hand, that ordering inaction on States over crimes of genocide, crimes against humanity and war crimes may be regarded as a blatant violation of the principles of *jus cogens* under which States have the obligation to repress serious international crimes. The authors of the Informal Paper were divided as regards to the possibility of the Security Council adopting such a resolution towards a view of expediting the admissibility of a situation to the ICC. If for argument’s sake, it can be presumed that the Council could make such an order, it must nevertheless be underscored that the Prosecutor and the ICC would maintain their independence as to whether a formal investigation can be initiated or a case issuing from a referral by the Security Council will be admitted.²⁶¹

²⁵⁹ Informal Expert Paper, *op. cit.* note 38, at p. 22.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

VI. CONCLUSION

The Court's jurisdiction, based on the principle of complementarity, is only to supplement national courts when they are unwilling or unable to carry out proceedings genuinely. The complementarity principle is intended to preserve States' sovereign rights. As pronounced in the Rome Statute Preamble, the said principle recognises the duty of States to investigate and prosecute serious international crimes. The concept behind the complementarity principle is unequivocally clear, but its substantial application in practice remains to be seen. In looking at how article 17, which realises the complementarity principle, may be interpreted in practice, it seems that the relevant provision had left the ICC judges a significant task of interpreting the admissibility of cases. It can be argued, on the one hand, that the ICC judges are rightly left with a wide discretionary scope in construing article 17, so as not to constraint rigidly the admissibility of cases. On the other hand, a wide room for interpreting admissibility may be viewed as incompatible with the framers' intent and with what States had consented to when they signed and ratified the Rome Statute.

In the Court's first admissibility determination, the case involving Mr Lubanga, the Pre-Trial Chamber decided that the case was admissible on the basis of inaction. However, such ground for admissibility was not *expressly* mentioned anywhere in the Rome Statute. The Chamber was left to construe the inherent admissibility of inaction from the negative wording of article 17(1), *i.e.* a case is inadmissible where it falls under article 17(1)(a), (b) or (c). In other words, as a case of inaction, in its very definition, would not be one that is being investigated or prosecuted, or had been investigated or prosecuted by a State, it will therefore be automatically admissible.

The criterion unwillingness, which is defined under article 17(2), also leaves the Court with much room for interpretation. For example, evidence that the Prosecutor can put forth to establish an intent from a State to shield an accused from criminal conviction are varied and wide. As regards the inability criterion, this may appear more rigid than unwillingness. Satisfying the inability criterion requires proving a failure to obtain evidence or arrest an accused on the part of the State concerned, due to a total or substantial collapsed or

unavailability of its legal system. Whilst there is no question regarding ‘total or substantial collapsed’, the significance and how far can the latter term ‘unavailability’ be interpreted are uncertain.

Concerning Security Council referrals, they can have the effect of expanding the Court’s territorial jurisdiction to non-States parties. Indeed, the Security Council is bestowed with a vast power to pass resolutions which bind all UN members. Nevertheless, its authority is constrained within the UN Charter.²⁶² The Security Council is incapable of exempting its referrals from the complementarity requirement. There is also a firm case to argue that it cannot oblige States, through adopting a resolution, to remain inactive in order to defer jurisdiction to the Court, in relation to serious crimes which States have an international duty to investigate and prosecute. A hypothetical Council resolution requiring States not to investigate international crimes may run in conflict with international law and is therefore likely to be regarded as unsound. Furthermore, it is important that the ICC and the Prosecutor remains, in principle, independent from the Security Council because of their functions in dispensing justice. Nonetheless, it is to be emphasised that the ICC, which have no enforcement facilities to implement its rulings, would need the support of the Security Council in certain cases, *e.g.* where a State refuses to cooperate with the Court. It is thus, not an ideal setting that ICC is totally distanced from the Security Council.

²⁶² Article 24 of the UN Charter.

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