

Art. 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 the 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 further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized

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 judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

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1. General and Historical Overview

The principle of complementarity is not termed as such in the Statute: it is *proclaimed* by paragraph 10 of the Preamble and Article 1, and laid down in more detail within Article 17. Dealing with admissibility of cases before the Court, Article 17 does not define but implements complementarity. Art. 18 to 20 cannot be separated from Art. 17, and Art. 86 to 102 of the Statute also concretise complementarity by organising the cooperation between the Court and the States. Read together, these provisions establish one of the fundamental principles of the Statute, namely that the Court is complementary to national criminal courts (ICC, *Situation of the Democratic Republic of the Congo, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Reasons for the oral decision on the Motion Challenging the admissibility of the case, 16 June 2009, para. 74).

As 'cornerstone of the Rome Statute' (S.A. WILLIAMS and W.A. SCHABAS, 'Article 17. Issues of Admissibility' in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 605), this provision governs the conditions to be fulfilled if ICC wishes to exercise its jurisdiction. States and the ICC concurrently share jurisdiction as in the *ad hoc* Tribunals sphere, but national jurisdictions have *priority* over the jurisdiction of the ICC: the ICC may only intervene if no concerned State is genuinely reacting to mass atrocities. The principle of complementarity 'means that the Court will complement but not supersede national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the International Criminal Court will act when national courts are unable or unwilling to perform their tasks' (R.S. LEE, 'The Rome Conference and its Contribution to International Criminal Law. Introduction' in R.S. LEE (ed.), *The International Criminal Court: the Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 27). This constitutes a delicate balance between, on the one hand, the desire to prevent serious crimes going unpunished and, on the other hand, the desire to preserve the sovereignty of the national judicial systems.

The mechanism of complementarity results from 'politically sensitive and legally complex' negotiations (J.T. HOLMES, 'The Principle of Complementarity' in R.S. LEE (ed.), *The International Criminal Court: the Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 41). The International Law Commission did first confront the different conceptions regarding the relationship between national and international levels (see e.g. Report of the International Law Commission to the General Assembly on the work of its 46th session, A/CN.4/SER.A/1994/Add.I, para. 50) and established the main foundations of this unprecedented jurisdictional structure within the Article 35 of its Draft Statute: '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

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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 further action by the Court.').

Debates were not closed. Until the end of the negotiation process, 'different views were expressed on how, where, to what extent and with what emphasis complementarity should be reflected in the Statute' (see e.g. the Report of the Preparatory Committee on the Establishment of an International Criminal Court from March, April and August 1996, A/51/22, Vol. 1, para. 153; or Decisions taken by the Preparatory Committee on the Establishment of an International Criminal Court at its session held from 4 to 15 August 1997, A/AC.249/1997/L.8). The future Article 17, established by the Preparatory Committee, was considered as generally acceptable at the very end of the *PrepCom* meetings, and finally adopted in Rome after minor changes (see the final Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, Art. 15).

2. Criteria of Admissibility

In its jurisprudence, the Court confirmed that 'complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed. Accordingly, admissibility can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario' (ICC, *Situation in Uganda, Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05, Decision on the admissibility of the case under Art. 19(1) of the Statute, 10 March 2009, para. 34; *Situation in the Republic of Kenya, ICC-01/09-19-Corr*, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 52; *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sanfg*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute, 30 May 2011, para. 47).

Article 17 sets an 'admissibility test' founded on sufficient gravity of the case (Art. 17(1)(d)) and of complementarity (Art. 17(1)(a) to (c)) (see the following 2 sections). Gravity and complementarity constitute the two parts of admissibility (ICC, *Situation of the Democratic Republic of the Congo, Prosecutor v. Thomas Lubanga*, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's decision of 10 February 2006 and the incorporation of documents into the record of the case against M. Thomas Lubanga Dyilo, 24 February 2006, para. 30).

Furthermore, a preliminary condition should be fulfilled: a case will be found inadmissible before the ICC if national investigations cover the *same conduct* and the *same persons* as involved in the Court's proceedings (*Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sanfg*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute, 30 May 2011, para. 60, confirmed in Appeal see *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11OA, Judgement on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute', 30 August 2011, paras. 43, 50, 55).

This preliminary condition reveals a consequent difference between cases and situations (for a detailed analysis, see R. RASTAN, 'Situation and Case: Defining the Parameters' in C. STAHN and M. EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge, Cambridge University Press, 2011; for a more contextual analysis of the situations' issue, see R. RASTAN, 'The Jurisdictional Scope of Situations before the International Criminal Court', *Criminal Law forum* 23, 2011, p. 1-34). While a situation 'denotes the confines within which the Prosecutor determines whether there is a reasonable basis to initiate an investigation' (R. RASTAN, 'Situation and Case: Defining the Parameters' in C. STAHN and M. EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge, Cambridge University Press, 2011, p. 1), cases involve a higher level of specificity. First defined as entailing 'specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects' (ICC, *Prosecutor XX*, ICC-01/04-101, Decision on applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6, Pre-Trial Chamber, 17 January 2006, para. 65. The concept of a 'case' has been detailed as starting 'with an application by the Prosecutor under Article 58 of the Statute for the issuance of a warrant of arrest or summons to appear, where one or more suspects has or have been identified' (ICC, *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sanfg*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute, 30 May 2011, para. 47). The preliminary condition shows that the admissibility test is more specific at the case stage, as specific conducts as well as the identity of investigated suspects are to be compared. 'Being investigated' in this context signifies the taking of steps directed at ascertaining whether this individual is responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses' (ICC, *Situation in the Republic of Kenya, Prosecutor v. William Samoei Ruto, Henri Kiprono Kosgey and Joshua Arap Sanfg*, ICC-01/09-01/11, Judgement on the appeal of Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Art. 19(2)(b) of the Statute, 30 August 2011, para. 1; or ICC, *Situation in the Republic of Kenya, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11OA, Judgement on the appeal on the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011

entitled Decision on the Application by the Government of Kenya challenging the admissibility of the case pursuant to Art. 19(2)(b) of the Statute, 30 August 2011, para. 1) (see also the annotations on Art. 18 and 19 in this Code, for a detailed analysis of the difference between 'case' and 'situation', see R. RASTAN, 'Situation and Case: Defining the Parameters' in C. STAHN and M. EL ZEIDY (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge, Cambridge University Press, 2011; for a more contextual analysis of the situations' issue, see R. RASTAN, 'The Jurisdictional Scope of Situations before the International Criminal Court', *Criminal Law forum* 23, 2011, p. 1-34). Hereafter ... detailed the two parts of the admissibility test.

2.1. The Sufficient Gravity of a Case

According to Article 17(1)(d), a case might be declared inadmissible if it 'is not of sufficient gravity to justify further action by the Court'. This may be linked to the assessment of gravity by the Prosecutor according to Article 53 (see the annotation on Art. 53 in this Code).

Introduced by the International Law Commission (Report of the International Law Commission to the General Assembly on the work of its 46th session, A/CN.4/SER.A/1994/Add.I, Part 2, p. 52), this criterion of gravity may appear as already included in the jurisdiction *ratione materiae* of the ICC: the crimes within its jurisdiction are by definition 'the most serious crimes of concern to the international community' (as formulated i.a. in the Preamble, al. 4). However, the Pre-Trial Chamber specified that 'the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient to be admissible before the Court' (ICC, *Situation of the DRC, Prosecutor v. Thomas Lubanga*, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's decision of 10 February 2006 and the incorporation of documents into the record of the case against M. Thomas Lubanga Dyilo, 24 February 2006, para. 41 or, as confirmation, ICC, *Situation in Darfur, Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09, Public redacted version of the Decision on the confirmation of charges, 8 February 2010, para 30), since 'all crimes that fall within the subject-matter jurisdiction of the Court are serious and thus the reference to the insufficiency of gravity is actually an additional safeguard which prevents the Court from investigating, prosecuting and trying peripheral cases' (ICC, *Situation of the Republic of Kenya*, ICC-01/09, Decision pursuant to Art. 15 of the Rome Statute on the authorization of an investigation into the situation of the Republic of Kenya, Pre-Trial Chamber, 31 March 2010, para. 56). The preliminary analysis of the Iraqi situation gave the former Prosecutor Ocampo the opportunity to express the same opinion: 'while, in a general sense, any crime within the jurisdiction of the Court is 'grave', the Statute requires an additional threshold of gravity' (see OTP, Letter to communications received concerning Iraq, 9 February 2006, p. 8. See p 8-10 for general explanations about gravity, i.a. regarding the alleged number of victims). In this situation, the OTP has considered that a specific gravity threshold for war crimes proposed in Article 8(1) of the Statute (as a guidance for assessing gravity) was not met, i.e. war crimes were not committed 'as part of a plan or policy or as a part of large-scale commission of such crimes'.

No precise guidance regarding the interpretation of gravity can be found in the *travaux préparatoires* of the Statute. Rule 145(1)(C) and 2(B)(iv) of the RPE does however help by providing elements of assessment, such as the extent of damage caused to victims and their families, the nature of the unlawful behaviour and the means used to execute the crime. The Pre-Trial Chamber affirms that the gravity of a case has to be evaluated in general, quantitatively and qualitatively, and has to be linked to the general situation (ICC, *Situation in the Republic of Côte d'Ivoire*, ICC-02/11, (Public) Decision pursuant to Art. 15 of the Rome Statute on the Authorisation of an investigation into the situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber, 3 October 2011, paras. 202-203. As a complete reference in the matter, see K.J. HELLER, 'Situational Gravity under the Rome Statute' in C. STAHN and L. VAN DEN HERIK (ed.), *Future Directions in International Criminal Justice*, Cambridge, T.M.C. Asser/Cambridge University Press, 2009). Systematicity and the magnitude of the conduct, on the one hand, and the impact of the conduct on the international community, on the other hand, have been pointed out as being determining elements (ICC, *Situation of the DRC, Prosecutor v. Thomas Lubanga*, ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's decision of 10 February 2006 and the incorporation of documents into the record of the case against M. Thomas Lubanga Dyilo, 24 February 2006, para. 46).

2.2. The Primacy of National Authorities and the Complementarity of the Court

As complementary to the national actors, the ICC may intervene only if States are unwilling or unable to genuinely struggle against impunity (Art. 17(1)(a) and (b)) and do not have already judged the case (Art. 17(1)(c)). This complementary ... the second part of the admissibility test.

2.2.1. After a national decision: cross reference to *ne bis in idem* (Art. 20)

Article 17(1)(c) is dedicated to circumstances where a judgement *stricto sensu* (in the sense of strictly judiciary, probably excluding extra-judicial process, see also the commentary of Art. 20) has been rendered at the national level. Referring to Article 20(3) for a precise definition of the *ne bis in idem* principle, this subparagraph may appear superfluous (W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 347). The distinction between 'issues of admissibility' and 'the principle of *ne bis in idem*' probably expresses the fact that Article 20 is originally linked to the rights of the accused where Article 17 only deals with the articulation between national and international courts (for a more detailed analysis, see D. BERNARD, '*Ne bis in idem*: Protector of Defendants Rights or Jurisdictional Pointsman?', *Journal of International Criminal Justice* 2011, Vol. 9, n° 4, p. 863-880).

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There may arise situations where no judgement *stricto sensu* has been rendered, but where an extra-judicial process has been set up in reaction to mass atrocities. Traditional or local judicial processes, amnesty, compensation or public discovery of the truth had been envisaged by the drafters of the Statute. However, no agreement could be reached about an explicit opening to extra-penal processes (J.T. HOLMES, 'The Principle of Complementarity' in R.S. LEE (ed.), *The International Criminal Court: the Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 59 or W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2004, p. 68. In the reports, see e.g. Report of the Preparatory Committee on the Establishment of an International Criminal Court. Vol. 1, A/51/22, *General Assembly Official Records*, 51st sess., Suppl. 22, para. 174; Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2 /Add.1, 14 April 1998, note 42). In particular, it was feared that abusive amnesties or sham processes would be sufficient to declare cases inadmissible before the ICC. The drafters have then remained silent on the issue. It seems that the principle of *ne bis in idem* then applies to judgements *stricto sensu* only. In consequence, genuine but extra-judicial efforts (e.g. Truth and Reconciliation Commissions), even if they lead to an end decision, do not fall under the scope of the principle of *ne bis in idem* as defined in the Statute.

Extra-judicial decisions could nevertheless have an impact on international trials on the basis on the 'interests of justice' (see Commentary on Art. 53 in this Code). The Prosecutor may indeed decide not to prosecute, considering that traditional or local justice processes, amnesty, compensation or public discovery of the truth would be more appropriate when rebuilding peaceful societies. This kind of non-judicial actions could also be considered as inquiries followed by a decision not to prosecute: Article 17(1)(b) appears to constitute a possible basis for a recognition of such measures, at the same conditions of genuineness to other national actions (see below).

2.2.2. Assessing national actions

Article 17 provides two criteria of inadmissibility founding the complementarity: unwillingness and inability. In its jurisprudence, the Court has created an additional admissibility criterion.

a) Inactivity

A difference has to be made between cases where a State has decided not to prosecute, and cases where no action has been taken. Only an explicit and genuine decision not to prosecute may ground the inadmissibility of a case before the Court (see ICC, *Situation of the Central African Republic, Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, para. 242, as confirmed by the Appeals Chamber in the (Corrigendum to) Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled Decision on the Admissibility and Abuse of Process Challenges, 19 October 2010, paras. 1 and 74-75).

Article 17 does not describe circumstances where *no* State is (or has been) acting. But the Court has stated that 'in the absence of any acting State, the Chamber does not need to make any analysis of unwillingness or inability' (ICC, *Situation in DRC, Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Prosecutor's application for a warrant of arrest, 10 February 2006, para. 40). In other words, inactivity appears as 'an unwritten third criterion for complementarity' (W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 342), created by the Court (see W.A. SCHABAS, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *Journal of International Criminal Justice* 2008, Vol. 6, p. 731-761). The Appeals Chamber indeed stated that 'in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to Article 17(1)(d) of the Statute' (ICC, *Situation in DRC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Judgment on the Appeal of Mr Germain Katanga against the Oral decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78 i.a., or ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 53-54, in opposition to the Trial Chamber II in the Katanga case, according to whom a State in such a situation would have been paradoxically 'unwilling' precisely because it expresses its desire to cooperate with the ICC, ICC, *Situation in DRC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Reasons for the oral decision on the Motion Challenging the admissibility of the case, 16 June 2009, para. 77). In consequence a 'theoretical will' to act could not block further actions before the ICC (for a critique of this link between self-referrals and (un)willingness, see W.A. SCHABAS, 'A Major Complementarity Ruling by the Appeals Chamber of the International Criminal Court', www.humanrightsdoctorate.blogspot.com, 27 September 2009).

b) Inability

Paragraphs 1(a) and 1(b) of Article 17 contemplate circumstances where a case is being actively investigated or prosecuted, or has been investigated before the State formally decided not to prosecute. The core idea here is that an on-going (or closed) process does constitute a presumption of inadmissibility. This presumption will not suffice if it is found that the State is 'unwilling' or 'unable' to genuinely bring the accused to justice.

The notions of 'unwillingness' and 'inability' are defined in paragraphs 2 and 3 of Article 17; the requirement of 'genuineness' (para. 1(a)) applies to both. These two criteria directly refer to the former-Yugoslavian and Rwandan situations, at the creation of the ICTs.

Inability appears to be more concrete or objective: according to paragraph 3, it covers the 'total or substantial collapse or unavailability of its national judicial system'. This remains pretty hard to evaluate, especially in post-conflicts periods (see e.g. ICC, *Situation in DRC, Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Prosecutor's application for a warrant of arrest, 10 February 2006, para. 36). In the *Bemba* case, Trial Chamber III has made a distinction between the inability of the State (considering that 'the Central African Republic does not have the capacity to conduct a trial', due to practical (i.e. financial) issues and political instability) and the inability of judges (even if their opinion made be taken into consideration) (ICC, *Situation in the Central African Republic, Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Admissibility and Abuse of process challenges, 24 June 2010, paras. 245-247).

c) Unwillingness and fair trial standards

Three scenarios are described in Article 17(2) in order to determine unwillingness: the 'purpose of shielding the person concerned from criminal responsibility', an 'unjustified delay in the proceedings' and a 'lack of independence or impartiality'. Such an evaluation of national intentions may be politically delicate.

The chapeau of paragraph 2 explicitly indicates that the Court should have 'regard to the principles of due process recognized by international law' while assessing the national willingness to prosecute. The principle itself of such an evaluation of national due process may be questioned, as the ICC is not an international court of human rights: it is not competent to evaluate or oblige states to respect those (see i.a. R.E. FIFE, 'The International Criminal Court – Whence it Came, where it Goes', *Nordic Journal of International Law* 2000, Vol. 69, p. 66-67. About the strong and tangled links between international criminal law and human rights law, see i.a. W.A. SCHABAS, 'Droit Pénal International et Droit International des Droits de l'Homme: Faux Frères?', *Le Droit Pénal à l'Épreuve de l'internationalisation* in R. ROTH and M. HENZELIN (ed.), Paris/Genève/Bruxelles, Librairie générale de droit et de jurisprudence/Georg/Bruylant, 2002, p. 165-181; R. ROTH, 'Libres Propos sur la Subsidiarité du Droit Pénal', *Aux Confins du Droit. Essais en l'Honneur du Professeur Ch.-A. Morand*, Bâle/Genève/Munich, Helbing & Lichtenhahn/Faculté de droit de Genève, 2001, p. 437, referring to an oral contribution of C. VAN DEN WYNGAERT in Y. CARTUYVELS e.a. (ed.), *Les Droits de l'Homme: Bouclier ou Épée du Droit Pénal?*, Brussels, FUSL-Bruylant, 2007; D. BERNARD, *Trois Propositions pour une Théorie du Droit International Pénal*, Brussels, Pub. FUSL, to be published).

This would give the Court a significant new dimension (C. VAN DEN WYNGAERT and T. ONGENA, 'Ne bis in idem Principle, Including the Issue of Amnesty' in A. CASSESE, P. GAETA and J.R. JONES (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, Oxford, Oxford University Press, 2002, p. 725; T. VANDER BEKEN, G. VERMEULEN and T. ONGENA, 'Concurrent National and International Criminal Jurisdiction and the Principle of "ne bis in idem"', *Revue Internationale de Droit Pénal*, 2002, Vol. 73, p. 841). Drafters of the Statute, already in the International Law Commission, indeed showed reluctance about a Court that would re-examine national sentences and be 'superior' to national jurisdictions (Report of the International Law Commission on the work of its 46th session, 2 May-22 July 1994, A/49/10, *Yearbook of the International Law Commission* 1994, Vol. II, Part 2, para 72 and 159; J.T. HOLMES, 'The Principle of Complementarity' in R.S. LEE (ed.), *The International Criminal Court: the Making of the Rome Statute*, The Hague, Kluwer Law International, 1999, p. 50). By this reference to the 'norms of due process', the drafters wanted to limit the Court's discretion by providing 'objective' criteria of assessment (see i.a. HOLMES, *ibid.*, p. 53-54; E. CARNERO-ROJO, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: from 'no peace without justice' to 'no peace without victors' justice?', *Leiden Journal of International Law* 2005, Vol. 4, p. 851; M. BENZING, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', *Max Planck Yearbook of UN Law* 2003, Vol. 7, p. 606). Yet the drafters have opened a door to an international assessment of the quality of national proceedings (W.A. SCHABAS, *An introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2004, p. 68).

Article 31 of the Vienna Convention could theoretically help resolving the issue (Convention on the law of treaties, done at Vienna, 23 May 1969, entered into force in 27 January 1980). 'In the light of its object and purpose' (of the ICC Statute), should the ICC evaluate the quality of national trials? Yes and no, according to which pillar of the Statute one would base its decision on. If the essential goal of the ICC is to struggle against impunity, assessing the quality of trials seems to be less a priority. But if the ICC is complementary, it should have 'the capacity to improve domestic legal systems for the better as local officials promise more accountability and better procedural protections in order to prevent the ICC from taking over a case' (J. OHLIN, 'Libya & Positive Complementarity', 21 November 2011, www.liebercode.org). This approach, called 'positive complementarity', according to former Prosecutor Moreno Ocampo, 'means that the Office will encourage genuine national proceedings where possible' (ICC, OTP, prosecutorial Strategy 2009-2012, 1 February 2010, para. 17. See also ICC, OTP, Report on the activities performed during the first three years (June 2003 - June 2006), 12 September 2006, para. 58), i.e. 'providing information collected by the Office to national judiciaries (...), calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities (...), providing information about the judicial work of the Office to those involved in political mediation (...), and acting as a catalyst to promote support for relevant accountability efforts' (ICC, OTP, prosecutorial Strategy 2009-2012, 1 February 2010, para. 17). If positive complementarity deals with capacity building, it could logically include incentives to the implementation of due process norms.

Together with E. Fry (but for maybe different reasons. See E. FRY, 'Between Show Trials and Sham Prosecutions: the Rome Statute's Potential Effect on Domestic Due Process Protections', *Criminal Law Forum* 2012, Vol. 23, p. 35-62), we would opt for a dialectic position in this debate: it would be unrealistic to pretend that the ICC does not first pursue a repressive goal. But at the same time, norms of due process are more and more highlighted within States and at the international level, and the possibility for the ICC to assess due process norms is textually possible by Article 17(2) (as,

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more explicitly, in Art. 20(3)). Article 21(3) may also constitute an indirect incentive to implementing norms of due process from States, as it presents 'internationally recognised human rights' as a source for interpreting the Statute.

3. Conclusion

Can the principle of complementarity as described by Article 17 be considered as innovative? Yes and no. This new concept appears to be deeply related to the primacy of the *ad hoc* Tribunals. Their primacy (according to which the international jurisdiction supersedes national courts) was circumstantial indeed, linked to the Rwandan 'inability' and the former-Yugoslavian 'unwillingness' to prosecute.

The complementarity principle also seems conceptually close to subsidiarity, a mechanism essentially used within the European Union (see e.g. C. MILLION-DELSOL, *L'Etat Subsidaire. Ingérence et Non-Ingérence de l'Etat: le Principe de Subsidiarité aux Fondements de l'Histoire Européenne*, Paris, Presses Universitaires de France, 1992, p. 15-27). Both mechanisms indeed settle concurrence of competences by prioritizing the national level. However, there are two main differences. First, complementarity is judiciary where subsidiarity is dedicated to general governance and not surely invocable in court. Secondly, complementarity constitutes a firm criterion of admissibility, where subsidiarity is based on a permanent and fluctuating calculation of goals and means to these ends. Complementarity has also been compared to the denial of justice, since both mechanisms aim at struggling against failures of (national) jurisdictions; their history and purpose are nevertheless strongly divergent (see F. MÉGRET, 'Qu'est-ce qu'une Juridiction 'Incapable' ou 'Manquant de Volonté' au Sens de l'Article 17 du Traité de Rome? Quelques Enseignements Tirés des Théories du Déni de Justice en Droit International', *Revue Québécoise de Droit International* 2005, 17, 2, p. 185-216).

It should also be noted that the jurisdictional priority attributed to States by the Rome Statute finally implements the traditional principle of sovereignty. States remain masters in their own territory, as in the classical conception of international law. The real novelty is linked to the possibility to interfere within failing States: the national autonomy is subjected to a goal (the struggle against impunity), States being forced to bow down before this superior end.

As the primacy of the *ad hoc* Tribunals led to cooperation (and even to an 'anti-complementarity', national courts complementing the action of the *ad hoc* Tribunals (see the annotation on Art. 8 of the Statute of the ICTR, 9 of the Statute of the ICTY), the complementarity already exceeds its first rationale. It does not only limit attempts to national sovereignty, but finds a so-called 'positive' application (see e.g. W.W. BURKE-WHITE, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', *Criminal Law Forum* 2008, Vol. 19, p. 60). In this view, complementarity appears as a tool for fostering effectiveness and cooperation in the struggle against impunity (see e.g. C. RYNGAERT, 'The Principle of Complementarity: a Means of Ensuring Effective International Criminal Justice' in C. RYNGAERT (ed.), *The Effectiveness of International Criminal Justice*, Antwerp/Oxford/Portland, Intersentia, 2009, p. 145-172. Or Germain Katanga's defence, in ICC, *Situation in DRC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Art. 19(2)(a) of the Statute, 11 March 2009, para 48).