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THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE BASED ON THE CASE-LAW OF THE INTERNATIONAL CRIMINAL COURT

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INTRODUCTION

The aim of the present paper is to outline in a nutshell the basics of one of the novelties of international criminal law, and international public law as well, namely the so-called complementarity principle, and then to present the tenets and views crystallized in legal literature and in the case-law of the International Criminal Court (hereinafter: ICC) related to this newly established concept.

LEGAL BACKGROUND

The *Preamble* of the Rome Statute (hereinafter: Statute) of the ICC provides with principal sharpness that the court shall be complementary to national criminal jurisdictions, as well as Article 1 of the Statute which repeats *expressis verbis* the same provision. Besides that, Article 17 (1) a)-b) of the Statute, under the title of *Issues of admissibility*, defines *in concreto* the complementarity principle. Accordingly, the ICC shall determine that a case is inadmissible where 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; or 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.
Therefore, the jurisdiction of the ICC is complementary compared to national criminal jurisdictions, that is, it is the court of last resort. The ICC is only entitled to initiate proceedings against the alleged perpetrators of the most serious international crimes, such as genocide, crimes against humanity and war crimes, as an international *ultima ratio*, when national courts with jurisdiction are not willing or not able to bring the accused to justice.
On one hand, the reason behind complementarity is that this kind of solution interferes less into the principle of state sovereignty than other types of jurisdiction. On the other hand, the efficiency of national proceedings are more likely, since the states concerned with conflict can easier reach the required evidences. Although it is not referred in the Statute literally, the complete lack of national proceedings, *argumentatio a minori ad maius,* establishes the procedure of the ICC.
Due to inherent limits of the present paper in length and thematic, it does not seek to analyze the *Preconditions of the exercise of jurisdiction*, the *Exercise of*

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jurisdiction and further *Issues of admissibility*. However, it is noteworthy that these categories are to be circumscribed. The *Preconditions of the jurisdiction* (Article 12 of the Statute) refer to the territorial and personal jurisdiction. Based on these provisions, the ICC may exercise its jurisdiction if the state on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft; or if the state of which the person accused of the crime is a national. While the *Exercise of jurisdiction* (Article 13 of the Statute) defines the so-called triggering mechanisms, which are state parties of the Statute, the United Nations Security Council (hereinafter: UNSC) and the Prosecutor of the ICC.

ELEMENTS OF COMPLEMENTARITY

Unwillingness

The definition of complementarity is rather common, therefore some questions of interpretation obviously arise. First of all, what does unwillingness mean exactly? Theoretically, the expression does not remain vague as the concept becomes explained by the forthcoming passages (Article 17 (2) a)-c) of the Statute). So in order to determine unwillingness in a particular case, the ICC 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; 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; or 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 concerned person to justice. Thus in the case of unwillingness, the state is supposed to have made a deliberate decision, which aims to avoid bringing the perpetrator to justice.

The Office of the Prosecutor issued an informal expert paper on complementarity in 2003, which emphasizes that political interference into national procedures, intentional obstruction or delaying of national procedures, insufficient institutional structures of the state of jurisdiction, violations of rules of national procedures and the combination of the above mentioned features unambiguously refer to the unwillingness of the state.

Furthermore, the Office of the Prosecutor in a report to the UNSC noted that the state is unwilling to investigate or prosecute when the conduct of it purposes to shield the suspect to go punished, or when involvement of governments and other state authorities is also possible.

Inability

When is the state unable to carry out genuinely the investigation or the prosecution? Compared to the unwillingness of the state, it seems easier to define inability for the

ICC, as this concept is comprised of objective criteria. Article 17 (3) of the Statute provides that 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.

However, it is not clear based only on the Statute that what kind of procedure is to be carried out and what kind of factors are to be considered when it comes to establish the elements of inability. As the Office of the Prosecutor expounded in the above mentioned report to the UNSC, the state is unable to carry out the criminal procedures, when its national judicial system does not exist, or is interweaved by social discontent, war or corruption. Thus, the inability of the state comes from the lack of necessary personnel, judges, investigators, prosecutors; the lack of judicial infrastructure; the lack of substantive or procedural penal legislation rendering system "unavailable"; the lack of rendering system "unavailable"; obstruction by uncontrolled elements rendering system "unavailable"; amnesties, immunities rendering system "unavailable"; or when its system of law and administration is substantially collapsed.

Whilst it is outlined in the Statute what are the major features of unwillingness and inability, these concepts arise many unanswered questions as well. Moreover, it remains unclarified what does term "genuinely" mean, even though it is also an essential element of the definition. If one looks back on the *travaux préparatoire* of the Statute, it can be found out that by using the expression "genuinely", the drafters of the Statute aimed to give green light to some subjectivity.

In reflection of the opinion of the Office of the Prosecutor, the ICC can infer genuine proceedings from the independence and impartiality of the national judicial system of the state. Nonetheless, well-founded consequence related to the lack of genuine proceedings can be inferred from the political interference in the case of certain procedures, the screenplay-like procedures and the lack of bringing certain groups of perpetrators to justice. In other words, "genuinely" refers to the standard of good faith.

Last but not least, some words also must be noted about the burden of proof. The Statute remains silent and does not clarify this question among the *Issues of admissibility*. For this reason, it also remains an opened question whether which party, the concerned state or the Office of the Prosecutor, bears the burden of proof with regard to unwillingness and inability.

THE PRINCIPLE OF COMPLEMENTARITY IN REFLECTION OF THE CASE-LAW OF THE ICC

The following parts of the present paper focus on the practice of the principle of complementarity based on the case-law of the ICC. Among the situations before the ICC, two cases are highlighted: the situation of the Democratic Republic of the Congo (hereinafter: DRC) and the situation of the Sudan. The reasons of these choices are not arbitrary but absolutely intentional and well-established, since they are not only pretty examples of the interpretation of complementarity by the ICC,

but also of the realization of the practical application of the provisions listed in the Statute.

The Situation of the DRC

The situation of the DRC was referred before the ICC by the head of the state in April 2004, and investigations were initiated by the Office of the Prosecutor in June 2004. However, arrest warrants were issued against six suspects (*Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga, Mathieu Ngudjolo Chui, Callixte Mbarushimana, Sylvestre Mudacumura*), the present paper only wishes to deal with the case of *Katanga,* which case was joined with the procedure against *Chui* by the Appeals Chamber of the ICC in November 2009.

Katanga is alleged to have been the commander of the *Force de résistance patriotique en Ituri*, who is accused of committing war crimes and crimes against humanity in relation to the attack conducted against the village of *Bogoro* on or about 24 February 2003. In particular, it is alleged that *Katanga*, acting jointly with *Chui*, committed the offences of murder, rape, sexual slavery, using children under 15 years to take active part in hostilities, targeting the civilian population, pillage and targeting the civilian property.

In February 2009, *Katanga* filed his challenge to the admissibility of his case, in which the argued the jurisdiction of the ICC in two aspects. On one hand, he criticised the same-conduct test used by the Pre-Trial Chamber I in making its preliminary assessment, arguing that its approach lacked legal foundation and that an alternative standard should be applied. On the other hand, he challenged the interpretation of the terms "unwilling" and "unable" found in Article 17 (1) a) of the Statute.

Katanga's challenge to admissibility was considered by the Trial Chamber, which denied the challenge orally in June 2009. As a preliminary issue, the Trial Chamber had examined the admissibility of the motion itself, and whether it had been filed out of time. It concluded that the reference to the "commencement of the trial" in Article 19 (4) of the Statute required admissibility challenges under the "complementarity" and "gravity" provisions of Article 17 of the Statute to be brought before the end of the pre-trial phase, defined by the confirmation of charges. The motion was thus out of time. Notwithstanding, the Trial Chamber noted that the second form of unwillingness is designed to protect the sovereign right of states to exercise their jurisdiction on good faith when they wish to do so.

Then, *Katanga* filed his appeal in June 2009 against the decision of the Trial Chamber. However, the Appeals Chamber did not approve completely the Trial Chamber's analysis, all things considered, it reached the same practical outcome, and *Katanga's* appeal was dismissed. The Appeal Chamber considered that the question of unwillingness or inability of a state having jurisdiction over the case becomes relevant only where, due to ongoing or past investigations or prosecutions in that state, the case appears to be inadmissible. The Appeal Chamber added in relation with article 17 (1) a)-b) of the Statute that "[T]he initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the state having jurisdiction has decided

not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs a) and b) ad to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a state having jurisdiction [...] renders a case admissible before the ICC, subject to Article 17 (1) d) of the Statute."

The Situation of Darfur

The situation of Darfur was the very first occasion when the UNSC referred a conflict situation before the ICC and the state, which was not a party of the Statute, filed an admissibility challenge. Although, Article 19 (2) a)-c) lists exhaustively who are entitled to challenge the admissibility of a case, it is not mentioned whether the complementarity principle should be applied when the UNSC refers a situation before the ICC. The informal expert paper of the Office of the Prosecutor merely adds that the Prosecutor may make a report on the situation related to comlementarity if it is needed.

Albeit, the chief-judge of the Special Criminal Court on the Events of Darfur (hereinafter: SCCED) had preliminary stated that the judicial system of the Sudan is willing and able to bring the perpetrators to justice, *Antonio Cassese*, the head of Commission of Inquiry on Darfur, after having examined thoroughly the ongoing events on the spot, referred to the UNSC that the genuineness of the Sudanese authorities can be questioned, and the legal and political environment are not suitable for carrying out the procedures. Meanwhile, in 2004, the National Committee of Inquiry was established to investigate the crimes having been committed in Darfur, such as Committee Against Rape and the Unit for Combating Violence Against Women and Children, however, none of the perpetrators were made accountable by the Sudanese authorities between 2003 and 2005, even though the apparent efforts.

From then on, as a result of the initiatives of some human rights organizations the SCCED was dissolved reasoned with that the exclusive purpose of its establishment and operation is to obstruct the initiation of the procedure of the ICC. The above mentioned statement can be supported as well by the fact that the SCCED was created very after the announcement, related to initiation of the investigation of the events in Darfur, of *Luis Moreno-Ocampo*, former Prosecutor of the ICC.

Even though, Sudanese authorities had arrested *Ali Muhammad Ali Abd-Al-Rahman* (also known as *Kushayb*), afterwards he was released, which referred to the lack of evidence. Later then, he was detained into home custody, yet news appeared in the press that no forcing measures were taken against him at all. Unwillingness of the Sudanese authorities became more obvious in the case of *Ahmad Muhammad Harun* (hereinafter: *Harun*). Despite the fact that evident evidences were available concerning the conspiracy between *Harun* and the irregular militia, named *Janjaweed*, he was not punished or demoted from the position of secretary of state, but, moreover, he was promoted and he became the minister of war in the Sudan. Nonetheless, *Omar al-Bashir*, who has also been charged with committing serious

crimes of international concern, remained the head of state in the Sudan. The above cited instances illustrate precisely that the Sudanese authorities were not willing to carry out the proceeding genuinely against the suspects.
As for the inability of the judicial system of the Sudan, as it has already been mentioned above, the Commission of Inquiry on Darfur established that the involvement of the Sudanese executive branch is able to undermine the independence and the efficiency of the judicial branch, and to make unviable to carry out procedure fairly. Since high-ranking officials were involved in the commitment of the crimes as well, it seemed obvious that it is impossible to bring perpetrators to justice on the national level.

SUMMARY

The introduction of the above cited informal expert paper starts with a citation by the former prosecutor of the ICC, *Luis Moreno-Ocampo*: "As a consequence of complementarity, the number of cases that reach the court should not be a measure of its efficiency. On the contrary, the absence of trials before this court, as a consecuence of the regular functioning of national institutions, would be a major success." So the aim of the establishment of the ICC is not to prosecute in every single case when the commitment of international crimes arise, but to urge states to overview their national legislation while implementing the Statute, develop their own criminal judicial systems and make them able to carry out proceedings genuinely in the cases of commitment of genocide, crimes against humanity and war crimes.
The complementarity principle got into among the provisions of the Statute as a *novum* of international public law, and besides the above mentioned advantages, it aims to prefer national proceedings to international procedures, as the more probable efficiency and the less interfering feature of them. Notwithstanding, it is also crucial that the perpetrators of the most serious crimes of concern to the international community as a whole must not go unpunished.
As the *travaux préparatoire* does not offer significant help when it comes to the implementation and the interpretation of the Statute, and the use of common terms also makes difficulties, the question of complementarity arises again and again in the case-law of the ICC. Therefore, the present paper sought to give a thumbnail sketch about complementarity based on the expert papers of the Office of the Prosecutor and on the jurisprudence of the ICC so as to comprehend this major principle of the Statute.

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