A Changing Notion of Complementarity under the Rome Statute of the International Criminal Court

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I. Introduction

In English language, the term complementarity means ‘a relationship or situation in which, two or more different things improve or emphasize

each other's qualities',[1] or 'a state or system that involves complementary components'.[2] In international criminal law, this term specifically refers to a relationship between the International Criminal Court (ICC) and national criminal jurisdictions in which, the ICC is complementary to the latter.

Complementarity was officially introduced by the International Law Commission (ILC) during the discussion on the Draft Statute for an international criminal court in 1994 to suggest the Court be complementary to national criminal justice system.[3] The Ad Hoc Committee set up in 1995 and later the Preparatory Committee set up in 1996 for the establishment of the ICC used the term complementarity to describe the relationship between the ICC and national systems, which was then frequently referred to by States as 'principle of complementarity' or 'complementarity principle'. Even though Rome Statute does not use or define the term 'complementarity' as such but it has been adopted generally by negotiators and commentators to refer to the 'entirety of norms governing the complementary relationship between the ICC and national jurisdictions'.[4] The underlying of this relationship is that the ICC plays a subsidiary role and supplements national investigation or/and prosecution of the most serious international crimes.

In its strict sense, and given the first use of the term, complementarity is a new principle, which acknowledges the complementary role of the ICC to national jurisdictions. It means the Court does not function as a supranational or appeals court against the decision of national courts. It

1）'Complementarity *noun'*, *The Oxford Dictionary of English* (revised edition), Catherine Soanes and Angus Stevenson (eds.), Oxford University Press, 2005. *Oxford Reference Online*, Oxford University Press, Nagoya University, 13 March 2009, http://www.oxfordreference.com/views/ENTRY.html?subview=Main & entry=t140.e15631

2）Collins English Dictionary: 21st Century Edition, 5th ed., Harper Collins Publishers, 2001, p. 427.

3）Report of the International Law Commission on the Work of its forty-sixth session, Draft Statute for an international criminal court [hereafter ILC Draft Statute], U. N. GAOR, 49th Sess., Supp. No. 10, U. N. Doc A/49/10, 1994, Preamble, para. 3.

4）Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' in A. von Bogdandy and R. Wolfrum (eds.) *7 Max Planck Yearbook of United Nations Law*, 2003, at 592.

can act only if national justice systems do not carry out proceedings or are unwilling or unable to genuinely carry out such proceedings. Nevertheless, in a much broader sense, that is the share of labour between international and national jurisdictions, one might find the similar ideas of sharing work in the international tribunals set up after World War I, the International Military Tribunals set up after World War II, and also the two Ad Hoc tribunals set up by Security Council in 1993 and 1994.[5)]

Complementarity is a basic component of the entire ICC system or a 'central to the whole idea of the ICC.[6)] The Pre-Trial Chamber II of the ICC has observed that:

> 'the cornerstone of the Statute and of the functioning of the Court is the principle of complementarity according to which the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions". 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.'[7)]

Given the importance of complementarity, it is essential to understand this principle in order to define the framework within which the ICC will interact with national jurisdictions. The interpretation of this principle,

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5）See, for example, Maria Chiara Malaguti, 'Can the Nuremberg Legacy Serve any Purpose in Understanding the Modern Concept of "Complementarity"', in Mauro Polity and Federica Goia (eds.), *The International Criminal Court and National Jurisdiction*, Ashgate, 2008, at 115; Florian Razesberger, *The International Criminal Court: The Principle of Complementarity*, Peterlang, 2006, at 22. But see Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development, and Practice*, Nijhoff, 2008 (In this book, the author claims that the idea of complementarity developed over a long period of time since the First World War until it was inserted into the 1998 Rome Statute).

6）Mireille Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems', in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, at 1915.

7）ICC, Decision on the admissibility of the case under article 19(1) of the Statute, ICC−02/04−01/05−377, 10 March 2009, para. 34, at http://www.icc-cpi.int/iccdocs/doc/doc641259.pdf

which is left to the ICC, however, is unclear yet. Its interpretation is changing as complementarity is still in an early stage of being crystallized through its application in practice. This article will explore the variation in the notion of complementarity since it was first introduced by the ILC until now and the effects caused by that change on the operation of the Court as well as the relationship between the ICC and national jurisdictions.

For that purpose, firstly, this article will introduce the background context against which complementarity of the ICC emerged. It then will examine the development in elaboration of complementarity and specific provisions through the discussions at the ILC in 1994, the Ad hoc Committee in 1995, the Preparatory Committee between 1996 and 1997, and the Rome Conference in 1998. Subsequently, it will study the notion of complementarity under the Rome Statute at the time this principle was adopted in 1998 till 2003 (traditional complementarity) and the new concept of complementarity introduced by the Office of the Prosecutor (OTP) in its Policy Paper in 2003 and Prosecutorial Strategy. Based on this analysis, this article will make an assessment on the evolution of the concepts of complementarity, including the similarities and differences between the traditional concept and the new concept as well as the effects of such change on the operation of the ICC and on the relationship between the Court and national jurisdictions. Finally, a sum- up and some observations on the future of complementarity will be introduced as a conclusion of this article.

II. Background

Under international law, States have primary right to exercise criminal jurisdiction over acts committed in their territory or by their nationals. Jurisdiction is a central feature of state sovereignty,[8] and States certainly

8）See, for example, Ian Brownlie, *Principles of Public International law*, Firth Edition, Oxford University Press, 1998, at 301; G. Kor, 'Sovereignty in the Dock', in Jann K. Kleffner and Gerben Kor (eds.), *Complementarity Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the*

would have interest, though with different degrees, in safeguarding it.[9] States thus rarely waives that right, having perpetrators who are their own nationals or authors of crimes committed in their territories tried by an international judicial organ. The relationship between international jurisdiction and national jurisdiction is a kind of antagonism in which States often 'preferred to exercise their jurisdiction exclusively, and only occasionally, when coerced by special circumstances, have they accepted international intervention'.[10]

Indeed, States have been always trying to protect sovereignty, preserving the primary right to exercise jurisdiction even over crimes of international character. As World War I finished, the Allies required German Government to hand over 'all persons accused of having committed an act in violation of the laws and customs of war' to the Allies so that such person or persons could be tried by the Allies's military tribunals 'notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies'.[11] German, however, persisted in exercising its national jurisdiction over war criminals and the Allies eventually had to accept Germany's offer to conduct the trials before German Supreme Court, though at the same time reserving their right to try the defendants if they found the prosecutions by the German court to be unsatisfactory.[12] A similar example can be seen when the Allies obliged Turkey to surrender those responsible for the massacres committed during the continuance of the state of war on territory forming part of the Turkish Empire on August 1, 1914 and reserved to themselves the right to designate

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International Criminal Court, Amsterdam, 25/26 June 2004, T. M. C. Asser Press, 2006, at 64 ('judicial sovereignty' means state's 'right and power to adjudicate').

9）Jo Stigen, *The Relationship between the International Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff, 2008, at 15.

10）Mohamed El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law,* 2002, at 870.

11）Treaty of Versailles, 28 June 1919, Article. 228.

12）Cherif Bassiouni, 'World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System', 30 *Denver Journal of International Law and Policy*, 2002, at 276−297 and 281−182.

the tribunal, which would try the persons so accused under Article 230 of the Treaty of Sevres.[13] Like Germany, Turkey insisted on carrying out the trials of those responsible for the alleged violators before its own courts and finally was permitted to do so.[14] The Treaty of Sevres, however, was never ratified and was replaced by the Treaty of Lausanne, which did not contain any provisions on prosecution.[15] After World War II, the need to bring the persons responsible for international crimes committed during the war to justice arose but the preference for national prosecution was still acknowledged. In the Moscow Declaration (Joint Four-Nation Declaration) in October 1943, President Roosevelt, Prime Minister Churchill and Premier Stalin signed a statement on atrocities, declaring that the German perpetrators would be judged and punished in the countries in which their crimes were committed except those 'whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies'.[16] The London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis, while establishing Nuremberg International Military Tribunal to trial major war criminals, stated that "... nothing in this Agreement shall prejudice the jurisdiction of the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals".[17]

The drafting history of the Genocide Convention in 1948 concerning the establishment of an international criminal court to punish the authors of genocide also demonstrated that States rarely waive the right to exercise their jurisdiction and even if they 'are unwilling to prosecute the

13）Treaty of Peace between the Allied Powers and Turkey (Treaty of Serves), 10 August 1920, reprinted in the American Journal of International Law Vol. 15, No. 3, Supplement: Official Documents (Jul., 1921), pp. 179−181.
14）Mohamed El Zeidy, *supra* note 5, at 24−25.
15）Treaty with Turkey and Other Intruments (Treaty of Lausanne), 24 July 1923, reprinted in the American Journal of International Law, Vol. 18, No. 1, Supplement: Official Documents (Jan., 1924), pp. 1−4.
16）Moscow Declaration, October 1973.
17）London Agreement, 8 August 1945 Article 6.

perpetrators, they nevertheless resist the idea of exclusive international intervention'.[18] During the debates at the Ad hoc Committee, while some States were in favour of setting up an international jurisdiction to deal with the acts of genocide, others opposed and claimed to exercise their own national jurisdiction.[19] The Soviet Union, for example, stressed that 'no exception should be made in case of genocide to the principle of the territorial jurisdiction of states, which alone was compatible with the principle of national sovereignty'.[20] The Committee then decided unanimously that the crimes of genocide should be punishable by national courts.[21] With regard to the idea of creation of an international criminal court, in order to allay any fears on the part of signatories that the court may infringe their sovereignty, the Chair of the Ad Hoc Committee, John Maktos, proposed to limit the competence of the international court by inserting a clause stating 'the jurisdiction of the international criminal court would be exercised in cases where it has found that the State in which the crime was committed, had not taken adequate measures for its punishment'. The Ad Hoc Committee adopted the principle proposed by the Chairman by four in favor with three abstentions.[22] However, article VI of the Genocide Convention as it is now only referred to a (future) 'international penal tribunal' without specifying its relation to the national courts of Contracting Parties.[23]

The creation of the two ad hoc tribunals by the Security Council, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 with primacy over jurisdiction of national courts marked an innovation but also raised a big question concerning the appropriate relationship between international jurisdiction and national jurisdiction. It was said that the

18）Mohamed El Zeidy, *supra* note 10, at 877.
19）E/AC. 25/SR. 7, 20 April 1948.
20）*Id.* p. 4.
21）E/AC/25/SR8, 17 April 1948, p. 5.
22）*Id*. pp. 13−15.
23）Article VI, Convention on the Prevention and Suppression of the Crime of Genocide (1948), United Nations Treaty Series, vol. 78, 277.

extraordinary jurisdictional priority of the two ad hoc tribunals was justified by 'the compelling international humanitarian interests involved and by the Security Council's determination that the situation in the former Yugoslavia, as well as that in Rwanda, constituted a threat to international peace and security'.[24] However, the notion of the primacy proved problematic in both cases of the ICTY and the ICTR. It was argued that the primacy of the two tribunals infringed States' sovereignty by allowing the tribunals to require States to defer the case to the former.[25] The Federal Republic of Yugoslavia claimed that perpetrators of war crimes committed in the territory of the former Yugoslavia should be prosecuted and punished under national laws and that the Statute of the ICTY was 'inconsistent and replete with legal lacunae to the extent that make it unacceptable to any State cherishing its sovereignty and dignity'.[26] The Rwanda government also objected to the wording of the Statute of the ICTR though it had initially requested the establishment of the Tribunal.[27] Right after the ICTY Statute was adopted by the Security Council, its four permanent members made statements purporting to limit the scope of the Tribunal's primacy.[28] Concerning the ICTR, some States explicitly emphasized special character of the tribunal, stating that the ICTR empowered with primacy is exceptional due to the urgency required by extremely serious situation in the country.[29] It appears from the experience of the two Ad Hoc tribunals that States are very cautious with the scope of the primacy of international jurisdiction and tend to restrict the practice of such primacy to the two situations in the Former Yugoslavia and Rwanda only.

From the examination of the history of repression of international

24）Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals, 23 *Yale Journal of International Law*, 1998, at 495.
25）*Id.* at 386.
26）Letter dated 17 May 1993 from the Deputy Primer Minister and Minister for Foreign Affairs of the Federal Republic of Yugoslavia to the Secretary General, annexed to A/48/170.
27）Jo Stigen, *supra* note 9, at 43.
28）*Id*. at 399−402.
29）Mohamed El Zeidy, *supra* note 10, notes 71−76 accompanied with the text.

crimes, one may say that States often resist any attempt to subordinate their sovereignty. States prefer to exercise their national jurisdictions through domestic courts. The case of two Ad Hoc tribunals was acceptable because they were created by special method (Security Council's resolutions) to deal with unique situations in the Former Yugoslavia and Rwanda respectively, which means that they have limited mandates and jurisdictions. It would be inappropriate therefore to create a permanent international criminal court in the same way with the primacy over national jurisdictions. It would be also very hard or even impossible for States to accept a permanent international intervention that might defeat or override their sovereignty. For these reason, in order to create an international criminal court, a compromise must be made to the extent that could pave the way for the existence of both national and international jurisdictions but still preserve state sovereignty. The principle of complementarity thus emerged as a compromised solution, which allows international and national systems functioning in subsidiary manner with priority given to domestic courts.

Furthermore, the work of the ILC on drafting a statute for an international criminal court took place during its 1991−94 sessions, at the same time with the creation of the ICTY and the ICTR. The problems with the primacy of the Ad Hoc tribunals made it clear that primacy was not 'viable alternative' for an international criminal court.[30] Thus, States tried to develop a balanced relationship between national jurisdiction and international jurisdiction. The principle of complementarity, according to which the ICC complements national courts, then was chosen to strike a balance between the interest of States Parties in respeching sovereignty and the interest of international community in effective prosecution of international crimes.[31] However, defining the precise nature of such a

30）For detailed discussion, see Bartram S. Brown, *supra* note 24, at 431.

31）Sharon A. Williams, 'Article 17: Issue of Admissibility' in Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, at 392 (margin note 20); Markus Benzing, *supra* note 4, at 595; Jo Stigen, *supra* note 9, at 17.

relationship was 'both politically sensitive and legally complex'[32] not only during the drafting process but even long after the Rome Statute was adopted. It also depended on other key issues that might expand or limit jurisdiction of the ICC including the list of crimes under jurisdiction of the Court and the requirement of State's consent or acceptance to the Court's jurisdiction.

III. Discussion during the drafting process of the Rome Statute

1. Draft Statute of the International Law Commission (1994)

The ILC began considering the issues concerning the creation of an ICC in 1989 at the request of the UN General Assembly.[33] In the draft statute for an ICC prepared by the ILC in 1994, the principle of complementarity was addressed in the third paragraph of the Preamble, which stated that the ICC was 'intended to be complementary to national criminal justice system in cases such trial procedures may not be available or may be ineffective'.[34] The ILC explained that the Court was intended to operate in cases where there would be no prospect of those persons being duly tried in national courts.[35] It held that:

> 'The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the rights of States to seek extradition and other forms of international judicial assistance under existing arrangements'.[36]

32）John T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed.), *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, at 41.
33）General Assembly Resolution 44/39, A/RES/44/39, 4 December 1989.
34）ILC Draft Statute, *supra* note 3, Preamble.
35）Report of the International Law Commission *supra* note 3, p. 27, commentary (1).
36）*Id.* at 27, commentary (1).

The purposes set out in the preamble including complementary role of the ICC, according to the ILC, was intended to assist in the interpretation and application of the Statute, particularly in the exercise of the power conferred by draft Article 35.[37)]

Draft Article 35 addressed the question of admissibility,[38)] allowing the ICC to decide, having regard to certain criteria, whether a particular case was admissible so that it would go to exercise jurisdiction over the case. It was to ensure that the Court only dealt with cases in the circumstances outlined in the Preamble where it was really desirable to do so.[39)] The criteria for the Court to determine a case before the Court inadmissible under draft Article 35 were (i) when the case had been duly investigated by a State with jurisdiction over it (ii) when the case was being investigated and (iii) when the case was not of such gravity to justify further action by the Court. In the event of a case having been investigated, the Court must satisfy itself that the national decision not to proceed to a prosecution was 'apparently well-founded' in order to declare the case inadmissible. In the event of a case of ongoing investigation, the Court would defer if there was 'no reason' for it to proceed.

In the commentary to this article, the ILC stated that 'the grounds for holding a case to be inadmissible are, in summary, that the crime in question has been or is being duly investigated by any appropriate national authorities or is not of sufficient gravity to justify further action by the Court. In deciding whether this is the case, the Court is directed to have regards to the purposes of the Statute as set out in the preamble'.[40)] However, the criteria in draft Article 35 and the terms 'available' and 'ineffective' in the preamble appeared to be vague and the Court, therefore, would have a wide discretion to decide the exercise of jurisdiction in many instances.[41)]

37）*Id.* at 27, commentary (3).
38）ILC Draft Statute, *supra* note 3, Article 35.
39）Report of the International Law Commission, *supra* note 3, at 52, commentary (1).
40）*Id.* at 53, commentary (2).
41）John T. Holmes, 'Complementarity: National Courts versus the ICC' in Antonio

Article 35 providing for the primacy of national jurisdictions and exception for the ICC reflected the strong concerns of many States about sovereignty,[42] even though the criteria to determine the admissibility were insufficient and unclear. The same concerns were also reflected in other provisions concerning the subject matter and the requirements for acceptance of the Court's jurisdiction. The ILC Draft Statute distinguished two categories of crimes over which the ICC might exercise jurisdiction.[43] The first category consisted of genocide, aggression, serious violations of the laws and customs applicable in the armed conflict, and crimes against humanity, which were known as "core crimes". The second category consisted of a list of crimes established under or pursuant to relevant treaties, which were known as 'treaty crimes'. With regard to genocide, the ICC would have 'inherent' jurisdiction, which meant that the Court did not need to seek the consent of States Parties to have jurisdiction.[44] As for the other crimes, there was opt-in system whereby the ICC would not automatically have jurisdiction by the sole fact of a State becoming a party unless the custodial State and the territorial State accepted it.[45] However, in case the Security Council referred a matter to the ICC, such acceptance was not necessary.[46] Perhaps, this provision was influenced by the practice of the two Ad Hoc Tribunals set up by the Security Council.

2. Discussion at the Ad Hoc Committee (1995)

Ad Hoc Committee for the Establishment of an ICC was established by the General Assembly to review the issues arising from the Draft Statute

Cassese, Paola Gaeta, John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford University Press, 2002, at 671.

42）*Id.*

43）ILC Draft Statute, *supra* note 3, Article 20.

44）*Id*. Article 21(1) (a).

45）*Id*. Article 21(b), Article 22.

46）*Id*. Article 23.

prepared by the ILC.[47] The discussion in the Ad Hoc Committee also showed the tension between the need to protect state sovereignty and the demands of international jurisdiction, which were rationales of the complementarity principle.

With regard to the meaning of complementarity, many States agreed with the ILC Draft Statute that the ICC was not to replace but to complement national courts.[48] The principle of complementarity was described as 'an essential element in the establishment of an international criminal court' but it needed further elaboration 'so that its implications for the substantive provisions of the Draft Statute could be fully understood'.[49] However, there was a disagreement on the concept. Some delegations emphasized that 'the principle of complementarity should create a strong presumption in favour of national jurisdiction', which was justified by the advantages of national judicial systems and the vital interest of States in remaining responsible and accountable for prosecuting violations of their laws.[50] Other delegations, to the contrary, did not think the concept of complementarity creating such a presumption. They assumed that while the national courts would retain concurrent jurisdiction with the ICC, the latter would have primacy of jurisdiction.[51] At the same time, a third view was also expressed that a balanced approach was necessary because 'it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction'.[52]

Concerning the admissibility criteria to set aside national jurisdictions, many States agreed that the words 'available' and 'ineffective' in the third

47）General Assembly Resolution 49/53, A/RES/49/53, 17 February 1995.
48）Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U. N. GAOR, 50th Sess., Supp. No. 22, U. N. Doc. A/50/22, 1995 [hereafter Report of the Ad Hoc Committee], para. 29. (Generally, the names of specific States in the discussions were not mentioned in the Report).
49）*Id.* para. 29.
50）*Id.* para. 31.
51）*Id.* para. 32.
52）*Id.* para. 33.

paragraph of Preamble were unclear and the complementarity as reflected in the preamble was barring inherent jurisdiction of the ICC over crimes of genocide as well as its 'exclusive jurisdiction'.[53] Observations were made that the commentary to the preamble clearly envisaged a high threshold for the exceptions to national jurisdictions and the ILC only expected the ICC to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts.[54] It was stressed, therefore, that since the exercise of national jurisdiction encompassed decisions not to prosecute, the presumption in draft Article 35 should be reversed so that the decisions of acquittal or conviction by national courts or decisions by national prosecution authorities not to prosecute would be respected except where they were not well-founded.[55] The inaction scenario was also mentioned by some States as only condition for the ICC to set aside national jurisdictions. They maintained that the Draft Statute in Article 25 should allow the ICC to pursue a complaint only when no State was investigating, or had already investigated, the case.[56] This suggestion was viewed by some delegations as 'giving adequate expression to the concept of complementarity'.[57] At the same time, others felt that the ICC could exercise jurisdiction when States failed, without a well-founded reason, to take action.[58]

The Ad Hoc Committee also discussed other questions on the placement of complementarity in the statute and the power to set aside national jurisdictions. On the first question, many delegations expressed the view that a mere reference in the preamble was insufficient and a definition or at least a mention of the principle should appear in an article of the Statute to remove any doubt as to the importance of the principle of complementarity in the application and interpretation of subsequent articles.[59] On the second

53）*Id.* para. 41.
54）*Id.* para. 42.
55）*Id.*
56）*Id.*
57）*Id.*
58）Report of the Ad Hoc Committee, para. 45.
59）*Id.* para. 36.

question, while some States expressed their concerns about the fact that the Court would have authority to decide on admissibility,[60] other States emphasized that it was necessary to define criteria and to establish standards to be applied in many diverse situations in the future and the burden of proof should be on the Court.[61]

The discussion on complementarity at the Ad Hoc Committee showed that States, though generally agreeing upon the role of the ICC to complement national courts, had disagreement on the details. In considering this principle, States also took into account of other related issues including the subject matter of jurisdiction, the State consent requirement, triggering mechanism, as any modification to one of those issues would affect the others. A trend in negotiations was to exclude treaty crimes and limit jurisdiction of the ICC to 'core crimes' only,[62] and therefore the Court could have 'inherent jurisdiction'.[63] In other words, States tended to reduce the requirement of State's consent for the Court to have jurisdiction but to increase conditions for the Court to take action under complementarity. It was argued that this approach would make it easier to achieve a goal of complementarity and simplify the problems of consent to the exercise of jurisdiction by the Court.[64]

3. Discussion at Preparatory Committee (1996−1998)

Based on the report of the Ad Hoc Committee, the General Assembly

60）For example, US stated that it would endorse this authority only if challenges to the jurisdiction and admissibility were available at every stages and the ICC had limited discretion to proceed despite a State' objection. See Comments of United States to Ad Hoc Committee, discussion paper A/AC. 244/1/Add. 2 (1995).

61）Report of the Ad Hoc Committee, *supra* note 48, paras. 48, 49.

62）Some delegations considered that core crimes included genocide, crimes against humanity and war crimes while other included also crimes of aggression. Still, a number of delegations also claimed to include the crimes relating to terrorism and drug trafficking in to that list. See Report of the Ad Hoc Committee, *supra* note 48, paras. 54, 55.

63）*Id.* paras 102−111.

64）*Id.* paras. 38, 56, 90.

decided to set up Preparatory Committee to prepare 'a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries'.[65] When the Preparatory Committee opened its discussion in March-April 1996, broadly different views existed as to 'how, where, to what extent and with what emphasis complementarity should be reflected in the statute'.[66]

With respect to the meaning of complementarity, some States suggested that the ICC should assume jurisdiction on the grounds of no good faith and no credible national justice system.[67] Since the police power and criminal law were a state prerogative under international law, the jurisdiction of the ICC should be considered as an exception to this prerogative.[68] Further, it was observed that 'the limited resources of the Court should not be exhausted by taking up the prosecution of cases, which could easily and effectively be dealt with by national courts'.[69] Other States raised a concern that 'complementarity should not be used to uphold the sanctity of national courts. This approach would shift the emphasis from what the Court could do to what the Court should not do'.[70] It was also noted that 'the establishment of the Court did not by any means diminish the responsibility of States to investigate vigorously and prosecute criminal cases'.[71] Those views reflected the conflicting concerns of States in preserving national sovereignty on the one hand and in building an effective mechanism for prosecution of serious crimes on the other hand.

Relating to the admissibility criteria, the term 'unavailability or ineffectiveness' in the preamble of the ILC's draft was criticized by some

65）General Assembly Resolution 50/46, A/RES/50/46, 11 December 1995.
66）Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee During March-April and August 1996), U. N. GAOR, 51st Sess., Supp. No. 22, U. N. Doc. A/51/22, 1996 [hereafter Report of the Prep Com 1996, Vol. I], para. 153. (Generally, the names of specific States were not mentioned in the Report of the Preparatory Committee).
67）*Id.* para. 154.
68）*Id.* paras. 53, 54.
69）*Id.* para. 155.
70）*Id.* para. 158.
71）*Id.* para. 156.

as being too vague and by others as being too intrusive.[72] The formulation of draft Article 35 was also criticized as being too narrow and should be expanded to cover not only the cases that were being investigated but also the cases that had been or were being prosecuted subject to qualifications of impartiality, diligent prosecution and so on.[73] After many informal consultations, draft Article 35 on admissibility criteria was introduced.[74] In comparison with the ILC Draft Statute on complementarity, the Preparatory Committee's Draft Statute had two major changes: first, it expanded the grounds on which the ICC could exercise jurisdiction (the cases that are being prosecuted) and second, it introduced the issue of good faith into the admissibility criteria ('inability' and 'unwillingness'). The text of this article was included in the Draft Statute as draft Article 15 approved by the Preparatory Committee at its session in March 1998 and forwarded to the Rome Conference.[75]

With a tentative agreement on the admissibility criteria, during the session in December 1997, the Preparatory Committee turned its attention to procedural aspects of complementarity, focusing on the questions relating to challenges to the jurisdiction of the Court or the admissibility of a case. The outcome of discussion was reflected in the text of draft Article 36 with many square brackets.[76] Apart from that, at the last session of Preparatory Committee in March/April 1998, the United States submitted a provision on preliminary rulings regarding admissibility to allow States to invoke complementarity to challenge the Prosecutor's initiation of an investigation *proprio motu* or at the referrals from States Parties, thus creating additional

72）John T. Home, *supra* note 122, at 45.
73）Report of the Prep Com 1996, Vol I., para. 164.
74）Article 35, Decision Taken by the Preparatory Committee at its Session held 4 to 15 August 1997, A/AC. 249/1997/L. 8/Rev. 1, 1997, annex1 [hereafter 1997 Preparatory Committee Decision].
75）Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Submitted to the Rome Conference, Part One, Draft Statute for the International Criminal Court, A/CONF. 183/2/Add. 1, 14 April 1998 [hereafter Prep Com Draft Statute 1998].
76）Decisions Taken by Preparatory Committee at its Session held in New York 1 to 12 December 1997, A/AC. 249/1997/L. 9/Rev. 1, 18 December 1997, p. 28, 29.

safeguard to protect national jurisdictions.[77] This procedure would be applied before a single case had been sorted out, i. e. before the regular challenge to the jurisdiction and admissibility as provided in draft Article 36 above could be made. The objective of this provision was to ensure that States were notified of any investigation being conducted by the Prosecutor and to require the Prosecutor to defer investigation if they might be conducting or had conducted or had an interest in so doing.

On other issues that had close links to complementarity, a large majority of States were in favor of limiting jurisdiction of the ICC to 'core crimes', namely genocide, crimes against humanity, war crimes, and aggression 'to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts'.[78] Though some States attempted to include the acts of terrorism and drug trafficking into the list of 'core crimes', these proposals did not received much attention.[79] Concerning the issue of State consent requirement and the conditions for the exercises of jurisdiction, a majority of States was expressing a preference for inherent jurisdiction over core crimes while a minority, however, found inherent jurisdiction was incompatible with complementarity and continued to support for opt-in system since this approach was consistent with the principle of sovereignty.[80] It appeared that the support for an international judicial body was growing though the tension between national and international jurisdiction still remained.

4. Rome Conference (1998)

The principle of complementarity was one of the underlying principles of the Statute and draft Article 15 on admissibility was the corner stone of that

77）'Article 11Bis, Preliminary Rulings regarding admissibility: Proposal submitted by the United States of America, A/AC. 249/1998/WG. 3/DP. 2 (25 March 1998).
78）Report of the Prep Com 1996, Vol. I, *supra* note 66, para. 51.
79）*Id*. paras 106−107, and 111−113. The main reasons to exclude these crimes are their different characters, the danger of overburdening the Court, and the ability of States to deal with these crimes through international cooperation.
80）*Id*. paras. 117−120.

principle. In fact, at the Rome Conference, States were not totally satisfied with the formulation of complementarity in draft Article 15 but they saw it as a balanced compromise. However, some States including China, Egypt, Mexico, Indonesia, India, and Uruguay proposed to reopen and renegotiate the provisions, holding that the texts did not fully meet their concerns.[81] The views were expressed that paragraph 2 of this article gave the Court too broad discretion in determining unwillingness while there were no objective criteria to guide the Court; the phrase 'undue delay' was a too low threshold for unwillingness; and the criterion 'partial collapse' of national judicial system for the Court to determine inability was insufficient.[82] To deal with these problems, a phrase 'having regard to the principle of due process recognized by international law' was added to the criterion for determination of unwillingness in paragraph 2.[83] Also the term 'unjustified delay' was used instead of 'undue delay' to imply the right of States to justify its delay in proceedings before the ICC could determine that a case was admissible, and the term 'partial collapse' was replaced by 'substantial collapse' to make the criterion narrower.[84] The Bureau of the Committee of the Whole eventually decided to include these changes in a final package.

Since draft Article 15 (becoming Article 17) had elaborated on complementarity, States decided that it was no longer necessary to include further elaboration of complementarity in the Preamble. However, it was suggested that a reference to complementarity should also be added in Article 1 due to the importance of the principle and for the sake of clarity.[85] To this effect, a reference in Article 17 to complementarity in Preamble and Article 1 was included.

With respect to the procedural aspects of complementarity, many States

81）John T. Holmes, *supra* note 32, at 52.
82）*Id.*, at 53.
83）*Id.* at 54.
84）*Id.* at 54−55; Sharon A. William and William A. Schabas, Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 2008, Second Edition, at 612 (margin note number 18).
85）John T. Holmes, *supra* note 32, at 56.

believed that only States Parties should have the right to make a challenge to the jurisdiction of the ICC since they accepted obligations under the Statute.[86] Other States insisted on the inclusion of States not party as the principle of complementarity should be applied regardless of whether national proceedings were being conducted by a State Party or a State not party.[87] The compromise was that any State could make a challenge provided that it had jurisdiction over a case and was investigating or prosecuting or had done so. These conditions were to 'forestall situations where a State could challenge (and delay) the Court from proceedings with a case on the ground that it was investigating when in fact the investigation or prosecution was sure to fail because the State lacked jurisdiction'.[88] To keep a balance, States agreed to allow the Prosecutor to continue the investigation pending the decisions on admissibility to avoid delays and loss of valuable evidence caused by the challenge of admissibility.[89]

The negotiation on draft Article 16 proposed by the United States on preliminary rulings regarding admissibility 'underwent the most significant development of all provisions on complementarity'.[90] The United States explained that draft Article 16 would be necessary because it recognized the ability of national judicial system to investigate and prosecute.[91] Some delegations welcomed proposals as a way to strengthen the principle of complementarity and a necessary safeguard for sovereignty.[92] However,

86）For example, Portugal, Senegal, Philippine, Finland, Venezuela, Iraq, Republic of Korea, Norway, Italy, Netherlands, Summary Records of the 1998 Diplomatic Conference: A/CONF. 183. C. 1/SR. 11 (22 June 1998); A/CONF. 183. C. 1/SR. 12, 23 June 1998.

87）For example, UK, Australia, Germany, Israel, Cuba, China, Algeria, Switzerland, Japan, Singapore, Egypt, Slovenia, Colombia (Summary Records of the 1998 Diplomatic Conference: A/CONF. 183. C. 1/SR. 11 (22 June 1998); A/CONF. 183. C. 1/SR. 12, 23 June 1998).

88）John T. Holmes, *supra* note 32, at 66–67.

89）John T. Holmes, *supra* note 32, at 66.

90）Jann K. Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions*, Oxford University Press, 2007, at 92.

91）Summary Records of the 1998 Diplomatic Conference, A/CONF. 183. C. 1/SR. 11, 22 June 1998. Also see Proposal Submitted by the United States of America, A/CONF. 183/C. 1/L. 25, 29 June 1998.

92）For example, Romania, Cuba, India, Japan, Egypt, Libya, Turkey Iraq, United

many States, mainly from the Like-Minded Group, considered that it merely set up an obstacle to the Court's operation.[93] More changes to the text of draft Article 16 had been negotiated to seek for a balance between a complementarity and the danger of creating a procedure, which would allow States to protect perpetrators by barring the investigation by the Prosecutor. The draft Article 16, which became Article 18 was finally included in a final package. It served as a filter of complementarity when the Prosecutor decided to commence investigation, especially on his own initiation.

Also included as important parts in the final package were the issues concerning the list of crimes subject to jurisdiction of the Court and the acceptance/consent of States to jurisdiction, which were considered inextricably connected to complementarity. Notwithstanding strong attempts by a number of States,[94] acts of terrorism were excluded from the list of crimes subject to jurisdiction of the Court, which consisted of genocide, war crimes, crimes against humanity, and aggression.[95] The same was applied with the crimes of drug trafficking even though Trinidad and Tobago as well as other Caribbean States again formally proposed to include in the Statute.[96] On the question of jurisdiction, after a tough negotiations and consultations,[97] the final draft was introduced by the

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Arab Emirates. Summary Records of the 1998 Diplomatic Conference: A/CONF. 183. C. 1/SR. 12, 29, 30, 31, 33.

93) For example, Belgium, Poland, Switzerland, Norway, New Zealand, UK, Australia, Germany, Finland, Greece, Spain, Italy, France, Austria, Croatia, Israel, Venezuela, Chile, Senegal, Philippine, Sierra Leone, Syria, Jamaica. Summary Records of the 1998 Diplomatic Conference: A/CONF. 183. C. 1/SR. 11, 12, 29, 30, 31, 33.

94) For example, Algieria, Indial Sri Lanka, Turkey, A/CONF. 183/C. 1/L. 27/Rev. 1.

95) However, since no compromise could be reached on the definition of the crime of aggression or the role of Security Council concerning this crime, non-aligned States proposed to include this crime in the Statute but to leave the elaboration of a definition to a later stage, U. N. Doc. A/CONF/183/C. 1/L. 75.

96) U. N. Doc. A/CONF. 183/C. 1/L. 48. Nevertheless, in Resolution E adopted by the Rome Conference as a part of its Final Act, it was recommended that the future Review Conference would consider those crimes with a view to eventually include in the list of crimes within jurisdiction of the Court, see U. N. Doc. A/CONF. 183/C. 1/L. 46.

97) For the details discussion and analysis on the negotiation of this point, see, among others, Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Roy s. Lee (eds), supra note 32, at 133−139; Hans-Peter Kaul, 'Preconditions to the Excersice of Jurisdiction'

Bureau of the Committee of the Whole in which the opt-out was limited to war crimes with restriction to a period of seven years after the entry into force of the Statute for the States concerned; automatic jurisdiction in respect of States Parties to the Statute was given, allowing the Court to exercise its jurisdiction if either the territorial State or the State of nationality was a party to the Statute or had accepted the Court's jurisdiction on an ad hoc basis.[98)]

The text on complementarity in Preamble, Article 1 and Article 17 and other related articles as well as other parts of the ICC Statute were finally adopted by the Rome Conference on 17 July 1998 as a package deal. The success in the Rome Conference was the result of difficult and long negotiations. Although the general idea of complementarity was agreed early in the negotiating process, it was the details of that principle in dealing with the appropriate relation between national courts and the ICC that proved controversial. Throughout the negotiation, there was a dramatical change in a way to treat that relation. At first, States planed to have a weak permanent court, which depended on the consent of the States in order to exercise jurisidiction since they most concerned about the protection of national sovereignty and the primacy of national proceedings. As the negotiation went on, they realized that the effectiveness of the internaitonal justice system was necesarry, and therefore tried to protect the provisions that could bring about that effect (for example, the automatic jurisdiction of the Court). However, in order to preserve state sovereignty, they added some more objective criteria of admissibility and created the procedure to allow States to invoke complementarity to avoid undue intervention by the Court. The provisions governing the principle of complementarity as they are now was approved by States because such provisions striked a delicate balance between national and international jurisdictions, adequately addressing States' concerns with their primary right to exercise jurisdiction

in Antonio Cassese, Paola Gaeta, John R. W. D. Jones (eds.), *supra* note 41, at 596−605, Sharon A. William and William A. Schabas, 'Article 12; Preconditions to the exercise of jurisdiction', in Otto Triffterer (ed.), *supra* note 84, at 550−555.

98）Article 12, Draft Statute of the Conference, Add. 2.

while providing a domain for the ICC to act effectively. This principle assumed a vital role in making the Rome Statute acceptable to States as well as in attracting their support, which in turn contributes to the effectiveness and legitimacy of the ICC.

IV. Complementarity under the 1998 Rome Statute

1. General meaning

The Preamble and Article 1 of the Rome Statute establish complementarity as a general principle underlying the nature of the ICC, according to which the Court 'shall be complementary to national criminal jurisdictions'. The duplicative reference of complementarity in both the Preamble and Article 1 emphasizes the significance and importance of this principle in defining the role of the Court. The Statute does not define the term 'complementarity' but it is widely understood that the ICC is intended to supplement but not supplant national criminal jurisdictions. The Pre Trial Chamber I of the ICC, in the case against *Lubanga*, confirmed that according to the principle of complementarity, 'the Court by no means replaces national jurisdictions, but is complementary to them'.[99)]

In his solemn undertaking ceremony in June 2003, the Chief Prosecutor of the ICC stated:

> 'The Court is complementary to national systems. This means that whenever there is genuine State action, the court cannot and will not intervene.
>
> But States not only have the right, but also the primary responsibility to prevent, control and prosecute atrocities. Complementarity protects national sovereignty and at the same time promotes state action.
>
> The effectiveness of the International Criminal Court should not

99) Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8-Corr 17-03-2006, 10 February 2006 (here after referred to as Decision on 10 February 2006), para. 35.

> be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'[100]

The Former President of the ICC, Judge Philippe Kirsch in several occasions in 2005 and 2007 also made the same observations with regard to complementarity of the ICC:

> 'The ICC is a Court of last resort, intended to act where national courts are unwilling or unable. This is known as the "principle of complementarity'. Under this principle, a case will be inadmissible if it is being or has been investigated or prosecuted by a State with jurisdiction. There is an exception for when the State is unwilling or unable genuinely to carry out the investigation or prosecution.'[101]

and

> 'The primary responsibility to investigate serious international crimes, like all crimes, belongs to states. The ICC will only ever act when national jurisdictions are unwilling or unable genuinely to investigate crimes within its jurisdiction.'[102]

As can be seen from those statements and the history of the negotiation, complementarity has been viewed as safeguard for state sovereignty, protecting States against undue interference by the ICC. It means to regulate the allocation of competence between the ICC and national courts, to ensure that the Court can only exercise jurisdiction when national courts failed to do so. National jurisdictions 'remain the first port of entry for investigations and prosecutions' and the ICC is a Court of last

100）Statement made by Mr. Luis Moreno Ocampo at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC, 16 June 2003, at http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf

101）Lecture by the ICC President at the Case Western Reserve University School of Law, 7 November 2005, at 5, at http://www.icc-cpi.int/NR/rdonlyres/777C9300-BD47-4EAE-B9A2-8465959772ED/143893/PK_20051107_En.pdf

102）Philippe Kirsch, 'ICC Marks Five Years since Entry into Force of Rome Statute', 5 July 2007, at 2, at http://www.icc-cpi.int/NR/rdonlyres/C307EC9D-B735-47D6-BA5C-508D0A5D8C71/143884/PK_20070627_en.pdf

resort, which is 'only entitled to step in where a domestic system does not function properly'.[103] In this regard, the exercise of jurisdiction by the ICC is attached to the failure of domestic jurisdiction. Only when States are unwilling or unable to carry out the investigation or prosecution of the crimes, may the Court take action. Thus, the ICC acts as a 'watchdog' over the failure of the national courts and plays a role of a substitute or a 'backstop' to national jurisdictions.[104] It serves as 'an entity to remedy shortcomings or failures of domestic jurisdiction'[105] and provides 'a simple substitution of international forum for a domestic one'.[106] Complementarity, however, reflects an antagonism between the ICC and national courts in that States are expected to maintain jurisdiction over a case by effectively carrying out national proceedings otherwise they may face the threat of the ICC interference. In this relationship, there seems to be a competition between States and the ICC to exercise jurisdiction over a case. The Court will monitor the national proceedings in order to step in if States fail to exercise jurisdiction whereas States will try to conduct genuine investigation and prosecution to retain its jurisdiction and prevent the Court from stepping in.

Complementarity generates an incentive effect on States' compliance with their duty to investigate and prosecute international crimes. Since the ICC is perceived as a threat to sovereignty, States in turn will be eager to exercise jurisdiction to bar the Court from getting involved.[107] States are aware of the fact that if they fail to act, the ICC will step in. In addition, States never want to be declared unwilling or unable to bring those responsible for international crimes to justice. Thus, in order to

103）Carsten Stahn, 'Complementarity: A Tale of Two Notions', 19 *Criminal Law Forum*, 2008, at 97.

104）William Burke White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 *Harvard International Law Journal*, 2008, at 56.

105）Carsten Stahn, *supra* note 103, at 97.

106）William Burke White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice, 19 *Criminal Law Forum*, 2008, at 60.

107）Jann K. Kleffner, 'Complementarity as a Catalyst for Compliance' in Jann K. Kleffner and Gerben Kor (eds.), *supra* note 8, at 84.

avoid that embarrassment, they must try to carry out genuine investigation and prosecution. States' compliance with their duty to investigate and prosecute, therefore, is fostered through the ICC's threat and potential embarrassment resulting from the Court monitoring.[108] This compliance is in both fields of legislation and enforcement since States would incorporate Rome Statute norms into their domestic laws, which may culminate in core crimes being investigated and prosecuted domestically.[109] Nevertheless, complementarity may also bring about some negative effects on the implementation of international criminal justice. States may invocate complementarity to impinge on the ICC's ability to assume jurisdiction and to affect negatively the efficiency of the ICC's proceedings.[110] For example, a State that wishes to shield an alleged perpetrator may launch the proceeding to block the ICC or may challenge the admissibility of a situation or case under Article 18 and 19 of the Rome Statute. Before the Court can authorize the Prosecutor to continue his investigation over the crimes concerned, the State in question would have time to warn the offender, to destroy the evidence or to influence the witnesses.

2. Complementarity test

The substance of complementarity lies in complementarity test, which consists of specific rules set forth substantial standards to determine which

108）However, it is submitted that the complementarity effect on compliance is limited to the extent to which the interest of States and the ICC to retain or assume jurisdiction over a case coincide since lacking this concurrence, the pressure on States resulting from the threat of the ICC taking over a case cannot materialized. See Jann K. Kleffner, *supra* note 107, at 85.

109）The immediate effect of complementarity on States' compliance has been the increase in States' implementing legislation. Right after Rome Statute is adopted in 1998, States have begun to adopt implementing laws that create the legislative framework for national investigations and prosecutions. By 2009, at least 42 State Parties of the Rome Statute have adopted or have been in the drafting process of implementing legislation. The list of these States and their legislations can be found at the website of the ICC (Legal Tools).

110）See John T. Holmes, *supra* note 32, at 75−76; Giuliano Turone, 'Powers and Duties of the Prosecutors' in Antonio Cassesse, Paola Gaeta and John. R. W. D. Jones (eds.), *supra* note 41, at 1163.

cases would be dealt by the ICC. In other words, it is a tool to allocate jurisdiction of the ICC. It functions as a scanner on the cases before the Court to ensure that the Court would not unduly take over the cases from national systems. It is mainly elaborated in Article 17 on admissibility criteria, in particular, Article 17 subparagraph (1) (a) to (c) and subparagraph (2) and (3),[111] and considered as the first part of admissibility test.[112] This article, which is the central of complementarity, represents the most direct mechanism for allocating responsibility for investigation and prosecution between the ICC and one or more States that may have jurisdiction over the crimes concerned. In order to follow the principle of complementarity, the Court must respect and adhere to the admissibility criteria in Article 17. If, according to the criteria listed in Article 17, a case is inadmissible for the Court, the proceedings will be blocked and States can continue to deal with that case.

The first paragraph of Article 17 concerning complementarity test reads:

> '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 invested 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

111〉 Article 17 (1) (c) links to Article 20 (3) which refers to a State's unwillingness.

112〉 The admissibility consists of 2 parts: a complementarity test in Article 17(1) (a)-(c) and (2) (3) and a gravity test in Article 17(1) (d), see Decision on 10 February 2006, *supra* note 99, paras. 29, 30, 41. The analysis of the complementarity test in Article 17 will be based on the assumption that a given case is of sufficient gravity. For the discussion on the question of gravity threshold and the ICC, see among others, Mohammed El Zeidy, 'The gravity Threshold Under the Statute of the International Criminal Court', 19 *Criminal Law Forum*, 2008; Ray Murphy, 'Gravity Issues and the International Criminal Court', 17 *Criminal Law Forum*, 2006.

the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3.'[113]

Article 17(1) is drafted in a double negative form (the Court shall determine that the case is inadmissible unless). It regulates the exceptions to the admissibility (the case is being investigated or prosecuted; the case has been investigated and the State had decided not to prosecute the person concerns; the accused has already been tried) and exceptions to the first exceptions (unless the State is unwilling and unable).[114] The exceptions are the exhaustive list of circumstances and criteria. These structure and wordings suggest that a case is admissible before the Court where none of the first exceptions for admissibility exists or where the exceptions to the first exceptions are satisfied. Putting it in a more simple way, as Article 17(1) set out the conditions for the inadmissibility of a case before the Court, it follows that the failure to meet any of these conditions would make the case admissible.[115]

The assessment of complementarity test in Article 17 has two folds or steps.[116] The Pre-Trial Chamber I, in *Lubanga* case, stated that 'the case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable'.[117] First, it is necessary to check whether there are national proceedings over a case or not. This is an empirical question. If the answer is negative, meaning there is no action taken by a State to investigate or prosecute the crimes (inaction scenario), then none of the circumstances in paragraph (a) to (c) is applied and the case is simply admissible without further enquiry

113） Article 17 (1) Rome Statute.

114） Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', 3 *Journal of International Criminal Justice*, 2005, at 709.

115） Mohamed El Zeidy, *supra* note 5, at 159; Markus Benzing, *supra* note 4, at 600−01, Carsten Stahn *supra* note 114, at 709; Claudia Cardenas Aravena, 'The Admissibility test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions' in Jann K. Kleffner and Gerben Kor (eds.), *supra* note 8, at 116.

116） See Darryl Robinson, 'Comments on Chapter 4 of Claudia Cardenas Aravena', in Jann K. Kleffner and Gerben Kor (eds.), *supra* note 8, at 142.

117） Decision on 10 February 2006, *supra* note 99, para. 29.

about 'unwillingness' or 'inability' of the State concerned. If the answer is affirmative, meaning the State that has jurisdiction over a case is conducting or has conducted an investigation or prosecution (action scenario), then the second check must come into play on whether or not the State concerned is unwilling or unable genuinely to carry out the proceedings. This is a normative question. The case will be admissible if the unwillingness or inability of the State concerned is proved. So, in the action scenario, the core criteria are 'unwillingness' and 'inability', which would help test the quality of national proceedings in order to determine the admissibility of a case.

It should be noted that in the four situations before the ICC,[118] the Court found many cases admissible under the complementarity test due to the absence of national proceedings (inaction scenario) in the States concerned. For example, in the situation in the DRC, notwithstanding the fact that the Congolese authorities had conducted national proceedings against *Lubanga* and he had been in the custody in the DRC, the Pre-Trial Chamber I determined that 'no State with jurisdiction over the case against Mr Thomas Lubanga Dyilo is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability'.[119] This contention was based on the concept of 'a case' defined earlier by the Pre-Trial Chamber I as comprising "specific incidents during which one or more crimes within jurisdiction of the Court seem to have been committed by one or more identified suspects".[120] Consequently, the Pre-Trial Chamber I indicated "for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct, which is the subject of the case before the Court".[121] Therefore, in *Luganba*, the case is admissible since

118) Situation in the Democratic Republic of Congo (DRC), situation in Uganda, Situation in Darfur (Sudan), and situation in the Central Africa Republic (CAR).
119) Decision on 10 February 2006, *supra* note 99, para. 40.
120) Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC−01/04−101, 17 January 2006, para. 65.
121) Decision on 10 February 2006, *supra note* 99, para. 37.

the national proceedings of the DRC against *Lubanga* do not encompass the conducts that Prosecutor charged him of (conscripting children under the age of fifteen and using them to participate actively in hostilities between July 2002 and December 2003) and there is no other State with jurisdiction over the case against *Lubanga* investigating, prosecuting or trying him of having done so. By the same token, the Pre-Trial Chamber I found the cases against *Bosco Ntaganda*, *Germain Katanga*, and *Mathieu Ngujolo Chui* admissible.[122] This approach was also adopted by the Prosecutor in the situation in Darfur (Sudan) when examining admissibility of the case against *Ahmad Harun* and *Ali Kyshayb*[123] as well as the case against *Al Bashir*[124] and by the Pre-Trial Chamber III in the situation in the CAR when declaring the case against *Jean-Pierre Bemba* admissible.[125] In the situation in Uganda, the fact that the government of Uganda did conduct or intend to conduct criminal proceedings relating to acts committed by the LRA leaders,[126] and that no State informed the OTP or the ICC of any past or current investigation or prosecution of crimes concerned,[127] made the Pre-Trial Chamber II come into conclusion that the case against LRA

122）Decision on The Prosecutor's Application for Warrants of Arrest, Article 58, ICC−01/04−02/06−20−Anx2 21−7−2008 2/69 SL PT, 10 February 2006 concerning the case against Ntaganda, paras. 34−40, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC−01/04−02/07−4, 6 July 2007, paras. 18−21; Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, ICC−01/04−01/07−262, 6 July 2007, paras. 18, 19.

123）Prosecutor's Application under article 58(7), ICC−02/05, 27 February 2007, para. 253, 267, at http://www.icc-cpi.int/iccdocs/doc/doc259838.PDF; Decision on the Prosecutor's Application under Article 58(7), ICC−02/05−01/07−1−Corr, 27 April 2007, para. 25.

124）Public Redacted Version of Prosecution's Application under Article 58, 14 July 2008, para. 3.; Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC−02/05−01/09−3, 4 March 2009, paras. 49−50.

125）Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC−01/05−01/08−14, 10 June 2008, para. 21−22.

126）Excerpt of Letter of Jurisdiction, Warrant of arrest for Joseph Kony, on 8 July 2005 as amended on 27 September 2005, ICC−02/04−01/05−53, unsealed on 13 October 2005, para. 37.

127）Prosecution's Observations regarding the Admissibility of the case against Joseph Kony, Vicent Otti, Okot Odhiambo and Dominic Ongwen, ICC−02/−4−01/05, 18 November 2008, para. 8.

leaders admissible.[128]

The complementarity test is applied at various stages of the ICC's proceedings. First, when a situation is referred to the Court by a State Party, or by the UN Security Council acting under Chapter VII of the UN Charter, or by the Prosecutor acting on his *proprio motu,*[129] the Prosecutor has to examine the information to determine whether there is 'a reasonable basis' to proceed with an investigation over the situation.[130] The 'reasonable basis' includes the admissibility of the case in Article 17 concerning complementarity test. Thus, the Prosecutor has to be satisfied that any potential case arising from the situation that will be investigated falls within the jurisdiction of the Court and is admissible under Article 17.[131] The Pre-Trial Chamber, upon examination of the request for authorization to initiate an investigation of the Prosecutor under Article 15(4), also considers whether there is a reasonable basis to proceed with an investigation. Second, right after the Prosecutor initiates an investigation over a situation referred by a State Party or on his own, States Parties can invoke complementarity to challenge the admissibility of the situation subject to the Prosecutor investigation pursuant to Article 18. When examining the situation in order to make rulings on admissibility under Article 18(2), the Pre-Trial Chamber has to consider the complementarity test in Article 17.[132] Later, when a case is sorted out and brought before the Court, under Article 19(2), States that have jurisdiction over the case, an accused or a person for whom a warrant of arrest or a summons to appear has been issued may make a challenge to the admissibility of the case based on the complementarity test in Article 17. Prosecutor may also seek a

128) Decision on the Prosecutor's Application for Warrants of arrest under Article 58, ICC–02/04–01/05–1, 8 July 2005.
129) Article 13 Rome Statute.
130) Articles 13, 15 and 53, Rome Statute; Rule 48, Rules of Procedures and Evidence.
131) This potential case is a 'case hypothesis', and not a 'case' as such. See Rod Rastan, 'What is the case for the purpose of the Rome Statute', 19 *Criminal Law Forum*, 2008, at 441.
132) Rule 55(2), Rules of Procedure and Evidence.

ruling from the Court regarding a question of admissibility.[133] In addition, the Court may, on its own motion, determine the admissibility of the case in accordance with Article 17.[134] Decisions on admissibility of the Pre-Trial Chamber or Trial Chamber may be appealed to the Appeal Chamber.[135]

These procedures allowing States to make a challenge on admissibility of the situation or case under Article 18 and 19 of the Rome Statute were created by the negotiators to protect the primary rights of States to exercise national jurisdiction. These procedures someway may impair the effectiveness of the ICC. The balance, however, can be found in other provisions, for example, in paragraphs 5 and 6 of Article 18 and paragraph 8 of Article 19, which allows the Prosecutor to carry some investigative steps to preserve evidence, and especially, in the discretion of the Court to interpret and apply the principle of complementarity, which is considered the 'fundamental strength of the Statute's complementarity regime'.[136]

V. Complementarity in Policy Paper and Prosecutorial Strategy of the OTP

1. Policy Paper

In September 2003, the OTP announced the Paper on some policy issues before the OTP (Policy Paper), encapsulating central strategic and policy issues facing the Office since it commenced operations, such as complementarity strategy.[137] In this Policy Paper, the principle of complementarity is defined by the OTP as:

> 'The ICC is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct

133） Article 19 (3) Rome Statute.
134） Article 19 (1) Rome Statute.
135） Article 19 (6) Rome Statute.
136） Mohammed El Zeidy, *supra* note 10, at 969.
137） Paper on some policy issues before the Office of the Prosecutor, September 2003, [hereafter OTP's Policy Paper], at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

investigations and prosecutions.

Unlike the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda, the ICC does not have primacy over national systems. The ICC is complementary to national systems. Thus, in cases of concurrent jurisdiction between national systems and the ICC, the former have priority'.[138)]

The OTP states that the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States. It is States that remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.[139)] Thus, the effectiveness of the ICC 'should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success'.[140)] Accordingly, the OTP indicates that the implications of complementarity for the OTP's policy in the initial phase of operation will be (i) 'to take action only where there is a clear case of failure to take national action' and (ii) to 'encourage and facilitate States to carry out their primary responsibility of investing and prosecuting crimes'.[141)]

It can be easily realized in the second part of the OTP's policy a total new feature of complementarity that the OTP would encourage and facilitate States to exercise their national jurisdiction over international crimes. The Prosecutor, in his address to the diplomatic corps at The Hague in 2004, noted that the OTP has taken a number of strategic decisions, including a positive approach to complementarity with which the OTP, rather than competing with national systems for jurisdiction, would encourage national proceedings wherever possible.[142)] Similarly, in the

138) OTP's Policy Paper, p. 4.
139) OTP's Policy Paper, p. 5.
140) OTP's Policy Paper, p. 4.
141) OTP's Policy Paper, pp. 4–5.
142) Statement of the Prosecutor Luis Moreno-Ocampo to Diplomatic Corps The

Report of activities performed during the first three years from Jun 2003 to June 2006, the OTP stated: 'The Office has developed and adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation'.[143] In so doing, the OTP will

> '... take into consideration the need to respect the diversity of legal systems, traditions and cultures... develop formal and informal networks of contacts to encourage States to undertake State action, using means appropriate in the particular circumstances of a given case. For instance, in certain situations, it might be possible and advisable to assist a State genuinely willing to investigate and prosecute by providing it with the information gathered by the Office from different public sources'.[144]

The new approach to complementarity can also be seen in the first part of the OTP's policy relating to the admissibility criteria or in complementarity test in which the OTP decides to take action only in case where there is a clear failure to act by the State or States concerned. The Policy Paper makes it clear that 'the Prosecutor can proceed only where States fail to act, or are not "genuinely" investigating or prosecuting, as described in article 17 of the Rome Statute' that is a State is unwilling or unable to carry out the proceedings.[145] However, it further explains:

> 'There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For

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Hague, the Netherlands, 12 February 2004, at 1, at http://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf

143）OTP Report on the activities performed during the first three years (June 2003−June 2006), 12 September 2006, para. 58, at http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf.

144）OTP's Policy Paper, p. 5.

145）OTP's Policy Paper, p. 4.

example, the Court and a territorial State incapacitated by mass crimes may agree that a *consensual division of labour* is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third State has extraterritorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum. In such cases there will be no question of "unwillingness" or "inability" under article 17'.[146] [emphasis added]

The concept 'division of labour' seems to conflict with the policy of the Prosecutor to take action only on the basis of domestic failure since it allows the Prosecutor to initiate and carry out an investigation and prosecution even when the State concerned is willing and able to do so. In this case, the intervention of the Prosecutor is decided by reason of a proper forum of justice, which is based on the comparative advantage of the ICC over domestic jurisdictions.[147] For instance, the territorial State and the Prosecutor may agree that the Court will focus on the crimes committed by the most high-ranking perpetrators while the State deals with the crimes committed by the lower levels. In fact, this policy was adopted by the Prosecutor in the situation in the DRC in which the Prosecutor limited the investigation and prosecution to the leaders who bear the greatest responsibility and left the task of dealing with other responsible individuals to the DRC. The Prosecutor stated:

'We have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals. The DRC has responded with a

146) OTP's Policy Paper, p. 5.
147) Carsten Stahn, *supra* note 103, at 88.

letter affirming that such a division of labour would be welcomed.'[148]

2. Prosecutorial Strategy

Complementarity is developed and formulated by the OTP as a general strategy of its operation. In the Report on Prosecutorial Strategy 2006−2009, the OTP considers positive complementarity as one of three essential principles lying at the core of the Prosecutorial Strategy. The OTP states:

> 'With regard to **complementarity**, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.'[149]

This positive approach to complementarity is further explained and clarified by the OTP in its Prosecutorial Strategy 2009−2012.[150] According to the OTP, the principle of complementarity has two dimensions, namely

148）Remarks by ICC Prosecutor Luis Moreno-Ocampo, 27th Meeting of the Committee of Legal Advisors on Public International Law, Strasbourg, 18 March 2004, at http://www.iccnow.org/documents/ICCProsecutorCADHI18Mar04.pdf

149）OTP's Report on the Prosecutorial Strategy, 14 September 2006, p. 5, at http://www.icc-cpi.int/NR/rdonlyres/699AA4B3-E8C2-4E41-9EFA-EBA503BDBF7F/143694/OTP_ProsecutorialStrategy20060914_English.pdf

150）Prosecutorial Strategy 2009−1012, 1 February 2010, at http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf

(i) the admissibility test, *i.e.* how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, *i.e* a proactive policy of cooperation aimed at promoting national proceedings.[151] The second dimension that is the positive approach to complementarity is defined by the OTP as 'the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance'. Particularly, it includes:

> 'a) providing information collected by the Office to national judiciaries upon their request pursuant Article 93 (10), subject to the existence of a credible local system of protection for judges or witnesses and other security-related caveats; sharing databases of non-confidential materials or crime patterns;
>
> b) calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, taking into account the need for their protection; inviting them to participate in the Office's network of law enforcement agencies (LEN); sharing with them expertise and trainings on investigative techniques or questioning of vulnerable witnesses;
>
> c) providing information about the judicial work of the Office to those involved in political mediation such as UN and other special envoys, thus allowing them to support national/regional activities which complement the Office's work; and
>
> d) acting as a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts'.[152]

It can be understood from the Policy paper and the Prosecutorial Strategies of the OTP that complementarity has two facets. The first one concerns allocation of jurisdiction, which is a judicial issue. It mainly lies in Article 17 on admissibility criteria as complementarity test and

151) Prosecutorial Strategy 2009−1012, p. 5.
152) Prosecutorial Strategy 2009−1012, p. 5.

therefore would be applied by the Prosecutor and by Chambers during the proceedings. The second one concerns activity of cooperation to promote national proceedings, which is a prosecutorial policy and primarily implemented by the OTP. Thus, the notion of complementarity under the approach of the OTP goes beyond the original understanding of this principle: The ICC will complement national jurisdictions not only by being a backstop to the national courts when they are unwilling or unable to carry out the investigation and prosecution but also by being a partner who encourages and facilitates States to investigate and prosecute crimes within jurisdiction of the Court. With the support and encouragement of the Court, especially from the OTP, States would be more willing and able to comply with their duty to exercise criminal jurisdiction over those responsible for such crimes as emphasized in the Preamble of the Rome Statute. The relationship between the ICC and the national courts, in this connection, is not of competitive but of cooperative character.

Experts and scholars have developed a theory of policy on the positive approach to complementarity of the OTP. A group of experts participating in an 'informal expert consultation on complementarity in practice' held by the OTP in 2003 produced an Informal Expert Paper, which held that '[t]he Prosecutor's objective is not to "compete" with State for jurisdiction but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity'.[153] According to the Paper, complementarity serves as a mechanism to encourage and facilitate the compliance of States with their primary duty to investigate and prosecute core crimes; where States fail to genuinely carry out proceedings, the Prosecutor must step in.[154] Thus, the Paper introduces two "guiding principles" of 'partnership' and 'vigilance' for the approach to complementarity.[155] The partnership highlights a positive and constructive

153）OTP, Informal Expert Paper: the principle of complementarity in practice, 2003 [hereafter OTP's Informal Expert Paper], para. 2.

154）OTP's Informal Expert Paper, para. 2.

155）OTP's Informal Expert Paper, para. 3.

relationship between the Court and States that are genuinely investigating and prosecuting, where the Prosecutor, through 'dialogue' and 'assistance', encourages such States to initiate national proceedings and, if necessary, shares the burden with them in the name of consensual division of labour.[156] On the other hand, the vigilance suggests that the Prosecutor must diligently carry out its responsibilities under the Rome Statute, meaning to verify the genuineness of domestic proceedings and to take follow-up steps to exercise the Court's jurisdiction in case national process is not genuine.[157] With these two guiding principles, the Paper indicates that complementarity can magnify the effectiveness of the ICC beyond what it can achieve through its own prosecutions.[158]

Many scholars refer to the positive approach to complementarity as positive complementarity or proactive complementarity.[159] Positive complementarity is defined by an author as a 'multi-dimensional concept' with 'a managerial approach towards the allocation of the forum of justice'.[160] This complementarity organizes the relationship between the ICC and national courts on the basis of three cardinal principles: the idea of shared burden of responsibility, the management of effective investigations

156）*Id.* paras. 3, 7−15, 61.

157）OTP's Informal Expert Paper, para. 3.

158）OTP's Informal Expert Paper, para. 6.

159）For example, William Burke White, *supra* note 108; William Burke White, *supra* note 104; Carsten Stahn, *supra* note 103; Hitomi Takemura, 'A Critical Analysis of Positive Complementarity', in Stefano Manacorda, Adán Nieto (eds.), *Criminal Law between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions: Proceedings of the XVth International Congress on Social Defense*, Ed. de la Universidad de Castilla-La Mancha, 2009; Cedric Ryngaert, 'The Principle of Complementarity: A Means of Ensuring Effective International Criminal Justice', in Cedric Ryngaert (ed.), *The Effectiveness of International Criminal Justice*, Intersentia, 2009; Christopher Keith Hall, 'Developing and implementing an effective positive complementarity prosecution strategy', in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff, 2009.

160）See Carsten Stahn, *supra* note 103, at 104, 108.

and prosecutions, and the two-pronged nature of the cooperation regime.[161] It is noted by another author that the meaning of positive complementarity contrasts with that of the term complementarity articulated at the time of the drafting of the Rome Statute in 1998 as it suggests 'a far more active role for the court, not merely stepping in where national courts fail to act to prosecute, but actively encouraging prosecutions by national governments of crimes within the ICC's jurisdiction'.[162] Accordingly, when being applied in practice, the positive complementarity means that 'the OTP would actively encourage investigation and prosecution of international crimes within the Court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.'[163] The first concept places emphasis on the interaction between the ICC and national jurisdictions while the second concept on the promotion of domestic justice. However, they all entail a broader field of activities of the Court and more proactive role of the Prosecutor.

The positive complementarity, however, is not clearly articulated in the Rome Statute. The drafting history of the Statute shows that the idea of positive complementarity did not exist in mind of negotiators.[164] Draft Article 35 was inserted in the ILC Draft Statute for the purpose of limiting

161） Carsten Stahn, *supra* note 103, at 113.

162） William Burke White, *supra* note 108, at 60.

163） *Id.* at 62.

164） But see, Carsten Stahn, 'Complementarity: A Tale of Two Notions', 19 *Criminal Law Forum*, 2008, at 89. The author makes a broad assumption based on current provisions of the Rome Statute concerning complementarity and claims that 'the drafters of the Statute opted for a systemic vision of complementarity which encompasses two dimensions: a classical 'threat-based' side of complementarity which is designed to foster compliance through a sophisticated system of carrots and sticks ('classical' complementarity), and a more gentle side, which defines the relationship between the Court and domestic jurisdictions in a positive fashion (e.g. burden-sharing on the basis of the comparative advantages and assistance from the Court to States)'.

the cases to be dealt by the ICC. The same attitude was applied in Article 17 and related articles in the current Statute. Article 17 mainly regulates the allocation of jurisdiction and says nothing about the role of the Court, in particular the Prosecutor, in encouraging States to investigate or prosecute. Article 53 merely requires the Prosecutor, in order to decide to initiate an investigation, to consider whether there is a reasonable basis to proceed. Neither Article 17 nor Article 53 explicitly imposes any sort of obligation upon States to investigate and prosecute crimes within jurisdiction of the Court when the case is inadmissible. It follows that 'the literal language of these provisions does not seem to visualize the Court taking positive action in relation to certain cases'.[165] This is, however, not to suggest that the positive complementarity is illegitimate as it is not covered by the express terms of the Rome Statute. In fact, Preamble, Article 1, Article 17 and other related articles do not prohibit the positive understanding of complementarity. On the contrary, the main objective of the positive complementarity to encourage States to punish crimes at national level raises no legal problem because it is consistent with the objective and

165) For a detailed analysis, see Mohamed El Zeidy, *supra* note 5, at 301−04; Jann K. Kleffner, *supra* note 107, note 23 (The complementary nature of the ICC rests on the fundamental premise that national jurisdictions remains the primary line of defense in the fight against impunity. Their strengthening should thus be understood as an integral part of effectuating complementarity with a view to achieving the object and purpose of the Statute, that is 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes. For this reason, the term complementarity will be employed in the following as encapsulating not only the formal framework but also the broader notion developed by the Office of the Prosecutor). Some scholars however have made a bit broad interpretation of the Rome Statute in order to argue that the positive complementarity has statutory basis. For example, it is submitted that Articles 15, 18, 53, 54 justify for this principle as they establish a platform for dialogue and interaction between the Prosecutor and States (see William Burke White, *supra* note 104, at 81; William Burke White, *supra* note 108, at 66−68) or that the express and implied power of the Prosecutor provides a strong foundation for him to adopt and implement the positive complementarity (see William Burke White, *supra* note 108, at 63−68; Jann K. Kleffner, *supra* note 107, at 88, 89).

purpose of the Rome Statute reflected in the Preamble, that is to put an end to impunity for the perpetrators of core crimes and thus to contribute to the prevention of such crimes.[166]

VI. Assessment

Originally, complementarity was created to balance the need to have an international judicial institution to deal with the most serious international crimes in order to end impunity and the need to protect the right of national jurisdiction, which is at the core of state sovereignty. As seen in the early discussions at the ILC in 1994, States insisted on preservation of sovereign power of jurisdiction and expressed concerns about the ICC interference. In order to respond to such concerns, the ILC used the principle of complementarity to allocate concurrent jurisdiction of the Court to ensure that the Court only deals with cases where it was really desirable to do so. Under the ILC Draft Statute, the Court had a mixed jurisdiction of both compulsory and optional characters.[167] It had automatic or inherent jurisdiction over the crimes of genocide but it needed the consent of territorial State and custodial State to have jurisdiction over other crimes. The requirements for the exercise of jurisdiction by the ICC set out in Article 21, 22, and 25 were combined with the principle of complementarity for the best guarantee of state sovereignty. It meant that even when the Court had jurisdiction by States' acceptance, it might not be able to exercise jurisdiction should a case be under investigation or had been duly investigated by a State that had jurisdiction over it. Complementarity, however, was not obligatory as it did not impose an obligation on the Court to apply. This can be seen in the wording of draft Article 35, which reads '[t]the Court may... decide... that a case before it inadmissible...'.[168] The

166） See Mohamed El Zeidy, *supra* note 5, at 304.

167） For the discussion on the forms of jurisdiction characterizing the relationship between international and national jurisdiction, see Jo Stigen, *supra* note 9, at. 4–6.

168） ILC Draft Statute, Article 35.

high threshold in jurisdictional regime going with the lenient requirements of complementarity presented a good example of compromise between national and international jurisdiction that the ILC tried to achieve.

Under the 1998 Rome Statute, the jurisdiction of the ICC is compulsory. Generally, the Court will have automatic jurisdiction over genocide, crimes against humanity, war crimes once States have ratified the Rome Statute without additional acceptance from them. Complementarity suggests that the ICC may only exercise jurisdiction where there is clear evidence that the States fail to act or do not genuinely carry out the proceedings. So, if a State is inactive or unwilling or unable to carry out the investigation and prosecution over a case, the Court could proceed without further consent of that State. This is different from the ILC Draft Statute at least in cases concerning crimes against humanity and war crimes since under the ILC Draft Statute, the Court needed States' acceptance of its jurisdiction.[169] Also, complementarity under Rome Statute is obligatory as the Court, which includes the Prosecutor and Chambers, has obligation to apply it in various stages of the proceedings for the purpose of ensuring that the ICC is the last resort.[170] Even when a State self refers a situation to the ICC followed by waiver of complementarity, the Court still has to apply complementarity test set forth in Article 17 to determine the admissibility of potential cases that may arise from that situation.[171] So in the Rome Statute, the compromise is made of the low threshold in jurisdictional regime and the high requirements of complementarity.

The principle of complementarity in ILC Draft Statute and in the Rome Statute though has some different qualities as attached to different

169) ILC Draft Statute, Articles 21, 22.

170) Article 17 of the Rome Statute states that 'the ICC shall determine that a case is inadmissible..'.

171) See, among others, Giorgio Gaja, 'Issues of Admissibility in Case of Self-referrals' in Mauro Politi and Federica Gioia (eds.), *The International Criminal Court and National Jurisdiction*, Ashgate, 2008, at 52 (Self-referring States cannot affect the admissibility of cases relating to the referred situation); Jo Stigen, *supra* note 9, at 248.

jurisdictional regimes of the ICC, is based on the same approach. This approach conveys the original and official meaning of complementarity, prevailing in the context of the negotiation on the establishment of the ICC since the early drafting of the ILC in 1994 and is articulated in details in the Rome Statute in 1998. Therefore it is sometimes referred by scholars as 'classical',[172] 'traditional',[173] or even 'passive'[174] approach to distinguish with the positive approach adopted by the OTP. Under this approach, complementarity means to allocate concurrent jurisdiction between the ICC and national courts by placing emphasis on the priority of national courts with the ICC in the second place in order to help States overcome the fear about the ICC and to attract as many ratifications as possible.[175] ICC thus acts as a backstop of national jurisdictions. The relationship between the ICC and national jurisdictions has a kind of vertical character to the extent that the Court could monitor and remedy shortcomings and failures of national jurisdictions.[176] To this effect, States' compliance with the duty to investigate and prosecute the crimes is fostered through threat of the ICC intervention because States are aware of the fact that if they do not act, then the Court will step in.

The concept of complementarity adopted by the OTP from 2003 is broader than the formal concept articulated at the time of drafting and adopting the Rome Statute in 1998. It consists of two aspects. The first one is the same as the formal concept in which complementarity serves as a mechanism to allocate jurisdiction in dealing with international core crimes and to help ensure the compliance of States with their duty to investigate and prosecute such crimes. The second one, which is totally

172） Carsten Stahn, *supra* note 165; at 88 et seq.

173） Mohammed El Zeidy, *supra* note 5, at 298.

174） William Burke White, *supra* note 104, at 56.

175） Morten Bergsmo, 'Occasional Remarks on Certain States Concerns about Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council', 69 *Nordic Journal of International Law*, 2000, at 99.

176） Carsten Stahn, *supra* note 165, at. 113.

new as it emerged through the practice of the first investigations and prosecutions of the OTP. It bases on a positive or proactive approach toward complementarity and entails more active role of the OTP from the early stage even before the Court officially gets involved. This active role means the OTP, instead of passively waiting for States to refer situations to, will encourage and support States to investigate and prosecute crimes by themselves through interactive contacts and cooperation. Under positive complementarity, the relationship between the ICC and national jurisdictions has some horizontal features as it involves the idea of shared burden of responsibility, the management of effective investigations and prosecutions, and the cooperation.[177)]

It can be seen that the notion of complementarity in the ILC Draft Statute, Rome Statute, and especially in the OTP's Policy Paper and Prosecutorial Strategies differs in meaning and features. However, both formal complementarity and positive complementarity aim to enhance the States' compliance with duty to exercise jurisdiction over those responsible for such crimes at national level, and to ensure that the most serious crimes of concern to international community as a whole must not go unpunished, thus ultimately to put an end to impunity.

Examining the revolution of the notion of complementarity since this principle was first introduced up to now, it appears that complementarity is not a rigid but a flexible concept, which can have many variations depending on the way of approach. From the formal approach emerged in 1994 to the positive approach developed in 2003, this notion has undergone a significant change, which has a substantial effect on the relationship between the ICC and national jurisdictions and the work of the Court.

First, the change in notion of complementarity from the formal to the positive approach implies a shift in its focus from a mechanism to allocate competence between the ICC and national courts to a forum of cooperation and interaction between them. If positive complementarity is

177) Carsten Stahn, *supra* note 173, at 113.

well implemented, it may reduce the inherent tension in the relationship between international jurisdiction and national jurisdictions, changing the nature of that relationship from antagonism to partnership and its features from vertical to horizontal one. The ICC and national courts then no longer compete with each other but stand along in the fight against impunity. It is expected that this relationship could effectively enhance the prosecution and punishment of the perpetrators of genocide, crimes against humanity and war crimes.

Second, the alteration of complementarity may bring about the transformation in the weight and the nature of the Court's work. The positive complementarity may initially prevent unnecessary communications and situations being referred to the ICC, since it targets strengthen national justice systems, reducing the need for the Court.[178] Unlike the formal complementarity, which is usually applied in the proceedings of the Court by the Prosecutor and by the Chambers, the positive complementarity is applied even before a situation is referred to the Court with the Prosecutor as a major player. The activities of cooperation of the OTP would become a considerable part in the work load of the Court and if the Prosecutor is successful in promoting national prosecutions as set out in his policy, cases that reach the Court would be less. As a result, most of the work at the Court would be cooperative activities carried out by the OTP rather than judicial activities by the Chambers. Even in case the Court carries out judicial function, the case load is also reduced.

The variations of complementarity also have different effects on the enforcement regime of the ICC. As the Court does not have its own enforcement body, it totally relies on State to implement its decision. Under the formal complementarity, the Court and States compete with each other in exercising jurisdiction over a case and the Court is considered as a threat to state sovereignty. This relationship may create an incentive for States to comply with its duty to punish crimes as a way to avoid the Court's

178） Mohammed El Zeidy, *supra* note 5, at 305.

interference, but at the same time, may bring about unfriendly attitude on the part of States toward the Court. When the Court declares that a State is unwilling or unable to investigate or prosecute and takes over the case, the attitude of that State may even become antagonistic. Consequently, the State concerned may not be positive in providing the Court necessary support and assistance to enforce the Court's decisions, particularly when the case is admissible due to its unwillingness. On the other hand, with the policy of positive complementarity, the OTP could create a more 'friendly' relation with the States concerned. The attitude of those States toward the Court, thus, may be less antipathetic. When the Court steps in to deal with a case because the States concerned are still unwilling or unable even after being encouraged and supported by the OTP, or as the result of division of labour, such attitude may lead to some degrees of cooperation from the States, which are essential for the effective enforcement of the Court's decisions.

It is stated that the positive complementarity offered the most effective way or even the only way for the ICC to meet its mandate and expectations, given the Court's limited resource, as it provides a framework for the ICC to maximize the contribution of national jurisdictions toward ending impunity.[179] However, as indicated by experts and authors,[180] the positive complementarity may cause a number of risks that may impair the independence and impartiality of the ICC or may bring about the delay of justice. For example, working too closely with States' national authorities to provide training, advice and assistance in relation to domestic proceedings relating or linked to an investigation before the Court may prejudice its credibility and independence. The risks may become more serious in the cases of division of labour and self-referral by territorial States especially when such referral is the result of promotion by the

179) William Burke White, *supra* note 104, at 58 et seq.

180) See among others, OTP's Informal Expert Paper, *supra* note 154, para. 14; William Burke White, *supra* note 104, at 100–01; Carsten Stahn, *supra* note 103, at 108; Mohammed El Zeidy, *supra* note 5, at 306.

A change in notion of complementarity can be described in the following table:

Complementarity	ILC Draft 1994	Rome Statute 1998	OTP Policy and Prosecutorial Strategy
Approach	Original, formal (passive, traditional, classical)		Positive (proactive, dynamic)
Functions	Allocation of jurisdiction		Allocation of jurisdictions Forum of interaction by cooperation
Meaning	ICC exercises jurisdiction over a case when national justice systems fail to do so		ICC actively encourages States to investigate or prosecute where possible and only steps in where there is a clear case of failure to take national action or a division of labour
Relationship between the ICC and national jurisdictions	Antagonism, competition		Partnership, cooperation
Features	- ICC intervention is due to the failure of national courts; - ICC is a backstop to national courts		- ICC intervention is due to the failure of national courts and the division of labour; - ICC is a partner, burden sharing and a backstop to national courts
Players	Chambers	Prosecutor and Chambers	Prosecutor (major player) and Chambers
Stages to apply	Judicial phase	Information analysis phase Investigative phase Judicial phase	Pre-proceedings phase Information analysis phase Investigative phase Judicial phase
Impact on the work of the ICC	- Lots of judicial activities - Enforcement may face with difficulties due to the unfriendly attitude of States towards the ICC		- More cooperative activities and less judicial activities - Enforcement is better ensured due to the cooperation of States
Impact on State's compliance with a duty to exercise national jurisdictions	State's compliance is fostered through threat of the ICC intervention (weak)	State's compliance is fostered through threat of the ICC intervention (strong)	State's compliance is fostered through assistance and encouragement of the ICC and through the threat of the ICC intervention
Ultimate objective	To put an end to impunity		

OTP.[181] Therefore, caution must be required concerning the adoption and implementation of the positive complementarity.

VI. Conclusion

Complementarity is the core of the ICC's system, regulating the relationship between the Court and national jurisdictions. It is designed to seek a balance between sovereign rights of States to exercise criminal jurisdictions over the crimes within their jurisdiction and the need to have an effective international forum to put an end to impunity and to deter the future atrocities. It is also a tool to attract more ratifications of the Rome Statute, which are essential for the legitimacy and success of the Court. The essence of this principle is that the ICC will not supplant but complement national criminal jurisdictions.

Complementarity, however, is a complex concept with many unclear features and elements. The interpretation of this principle thus can vary depends on different approaches as well as on how it is applied in practice. In deed, after the adoption of Rome Statute in 1998, complementarity has been on the way of taking its own life. It has been viewed not only as the instrument to allocate jurisdiction of the ICC and national courts in a formal approach but also as the forum of cooperation between the ICC and States in a positive approach. Because complementarity is the heart of the ICC system, its changing notion would strongly affect the work of the Court and also the relationship between ICC and national jurisdictions. The ICC thus carries out not only judicial activities when States fail to investigate and prosecute crimes but also cooperative activities to promote national

181）See OTP Report on the activities performed during the first three years (June 2003−June 2006), *supra* note 144, para. 2. The OTP stated that it adopted a policy of inviting and welcoming voluntary referrals by territorial States. For the discussion on the risks caused by self-referrals, see, for example, William Burke White, *supra* note 104, at 103; Jann K. Kleffner, *supra* note 90, at 217; Paola Gaeta, 'Is the Practice of 'Self-Referrals' A Sound Start for the ICC?', 2 *Journal of International Criminal Justice*, 2004, at 951−52; Carsten Stahn, *supra* note 103, at 111.

prosecutions. At the same time, the relationship between international and national jurisdictions, which is antagonistic and competitive, has become friendlier, representing a kind of partnership. This certainly would help ensure the effective investigation and prosecution of core crimes, which are the objective of the Rome Statute.

The notion of complementarity is still in the process of being conceptualized. The current concept of complementarity may not be the final version yet though it would possibly shape the way the Court treats this principle in the future. Complementarity will continue to revolutionize. It may take over the years until the detailed and exhaustive guidelines for the notion of complementarity are fully developed. However, no matter what variations it may be, the scope of complementarity should not necessarily be narrowed or broaden in a way that would not give full effects to the principle and would be far from the original purpose of the ICC.