Iustum Aequum Salutare
IV. 2008/2. · 93–120.

DISSERTATIONES

THE PRINCIPLE OF COMPLEMENTARITY AND THE INTERNATIONAL CRIMINAL COURT

ALINA-IOANA APREOTESEI
PhD Candidate (PPKE JÁK)

"The States Parties to this Statute […],
Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes […],
Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions […],
Have agreed as follows…"[1]

Unlike the ad-hoc tribunals which are based on the principle of concurrency, the International Criminal Court (ICC) is based on the principle of complementarity which means that ICC can only exercise its jurisdiction if a state is 'unwilling' or 'unable' to conduct proceedings concerning the international crimes. The principle of complementarity is a new principle on the field of international law. The present article analyzes the elements of this principle, the difference between complementarity and concurrency and some problematical aspects which arise from this principle. Some examples of states (un)willing or (un)able to prosecute or try war criminals are also taken into account.

I. Principle of complementarity – a new principle of law

A new principle of law has been established in Rome in 1998 when the Rome Statute was voted by 120 states: the principle of complementarity. This principle of law, which was unknown before the year 1998, even if contested by some participants to

[1] The Preamble of the Rome Statute.

the Rome Conference,[2] was accepted by 60 states[3] in less than 4 years and it was already put into practice in four situations by the mid of 2007.[4]

The principle of complementarity is finding itself somewhere between the sphere of action of public international law and international criminal law or rather between the substantive and procedural international criminal law. It is not a part of *jus cogens* as the following principles are: the sovereign equality of states, immunity and other limitations of sovereignty, non-intervention in the internal or external affairs of other states, prohibition of the threat or use of force, peaceful settlement of disputes, respect for human rights, self-determination of peoples.[5] It is not a part of the fundamental principle of legality in international criminal law as *nullum crimen sine lege* or *nulla poena sine lege*[6] are, and yet, it is a principle of law on which the first permanent international criminal court is based on, a principle accepted by more than 100 states.[7]

Genocide, war crimes, crimes against humanity and aggression are crimes under international law, "the most serious crimes of concern to the international community as a whole."[8] These crimes form the object of activity of a new branch of law, international criminal law. Their effective prosecution must be ensured by taking measures at the national level and in case of failure, they form the jurisdiction of the first permanent international criminal court. This is basically, the principle of complementarity. States are given priority in exercising criminal jurisdiction over those responsible for international crimes, but in case of failure, International Criminal Court[9] takes this task over. Therefore, ICC is an instance of last resort.

International criminal law protects human rights providing an answer to the failure of national mechanisms, when victims remain unprotected, especially if human rights violations are initiated by states themselves.[10] ICC comes to complement the lack of justice at the national level.

As it was said before, the principle of complementarity represents a new principle of law, which regulates the relationship between national and international criminal justice systems. The International Military Tribunal was based according to the Nuremberg

---

[2] France, the United Kingdom and the United States considered that ICC should not act as an appeals tribunal or engage in judicial review of national decisions. See OTTO TRIFFTERER (ed.): *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsegesellschaft, 1999, article 17, paragraph 12.

[3] The number of signatures required fort he entrance into force of the Rome Statute.

[4] Uganda referred the situation in December 2003 and the investigation was opened in July 2004. The Democratic Republic of the Congo referred the situation in April 2004 and the investigation was opened in June 2004. The situation in Central African Republic was referred to the Prosecutor in January 2005 and the investigation was opened in May 2007. The United Nations Security Council referred the situation in Darfur, the Sudan in March 2005 and the investigation was opened in June 2005. For details, see the official site of the International Criminal Court www.icc-cpi.int.

[5] ANTONIO CASSESE: *International Law*. New York: Oxford University Press, 2001, 86–113.

[6] GERHARD WERLE: *Principles of International Criminal Law*. The Hague: TMC Asser Press, 2005, 24.

[7] 105 states as the situation in December 2007.

[8] The Preamble of the Rome Statute.

[9] From now on also referred as ICC.

[10] Id. 6, 40.

Charter, on the principle of exclusivity, jurisdiction being granted only to the countries of commission for other perpetrators.[11] The jurisdiction of the ad-hoc tribunals, ICTY and ICTR is based on the principle of concurrency, international tribunals accepting the concurrent jurisdiction of national courts but having primacy over those.[12] The Rome Statute came with the principle of complementarity, meaning that priority is given to the national courts to exercise their criminal jurisdiction over those responsible for international crimes, but in case of failure, ICC would exercise its jurisdiction. Therefore, international jurisdiction does not replace the national jurisdiction, but simply supplements it in case of failure. What failure really means, is explicitly written in the Rome Statute, more exactly in the article 17. Failure is expressed by 'unwillingness' or 'inability' of a state to carry out the investigation or the prosecution. The International Criminal Court itself determines if a state is unable or unwilling to make justice.[13]

II. Concurrency vs. complementarity

The principle of concurrency is comprised in the article 9 of the ICTY Statute:[14] "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991"

and article 8 of the ICTR Statute:[15]

"The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighboring States, between 1 January 1994 and 31 December 1994."

Both statutes contain a second paragraph adding that the Tribunal has primacy over national courts: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts[16] to defer to the competence of the International Tribunal in

---

[11] Ibid 68.

[12] See also Richard May et al. (eds.): *Essays on ICTY Procedure and Evidence. In Honor of Gabrielle Kirk McDonald*, The Hague: Kluwer Law International, 2001.

[13] This is the main difference between the principle of complementarity comprised in the Rome Statute and the one comprised in the Statute of the Special Court for Sierra Leone (SCSL). The second provides in article 1 paragraphs 2–3 that the Security Council may authorize at the proposal of any state, for the SCSL to exercise jurisdiction over persons if the sending state is unwilling or unable genuinely to carry out an investigation or prosecution. See the statute of SCSL available at http://www.sc-sl.org/Documents/scsl-statute.html last visited January 2008. See also Florian Razesberger: *The International Criminal Court. The Principle of Complementarity.* Frankfurt am Main – New York: Peter Lang, 2006, 23.

[14] See John R. W. D. Jones – Steven Powles: *International Criminal Practice*. New York: Transnational Publishers, 2003, 367–368. or John R. W. D. Jones: *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.* New York: Transnational Publishers, 1998, 73.

[15] Ibid 368–370.

[16] See also André Nollkaemper: Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY. In Gideon Boas – William A. Schabas (eds.): *International Criminal Law Developments in the Case Law of the ICTY.* Leiden: Martinus Nijhoff Publishers, 2003, 277–296.

accordance with the present Statute and the Rules of Procedure and Evidence[17] of the International Tribunal."[18]

The principle of complementarity is contained in the Preamble of the Rome Statute, in article 1, 12, 17, 18, 19 and their dispositions will be discussed in the next section concerning complementarity in the Rome Statute.

A question that may arise is why a new principle of law, why not a principle that was already put into practice of international law?

In the case of the ad-hoc tribunals,[19] the ongoing conflict and the animosity of the different ethnic and religious groups were the main reasons that primacy of the Tribunal was stipulated. It was unlikely that the authorities would bring their own people in front of the courts of justice. If we analyze the four situations in front of the ICC, the Central African Republic, Uganda, the Democratic Republic of the Congo and Darfur, the Sudan, we may think that the principle of concurrency would be better applied, considering the same reasons: on-going conflicts and animosity between different ethnic and religious groups or tribes.

But unlike the ad-hoc tribunals which were created for a specific conflict, ICC has jurisdiction over the most serious crimes which might be committed starting with the 1st of July 2002, no matter if these crimes would have place in a context of a conflict, a crisis situation or in time of peace. It is true that there are more chances for the heinous crimes to be committed in time of conflict, but there is also the possibility for some of these crimes to be committed in time of peace, and than would be no reasons for the authorities not to hand over the criminals to their national courts of justice. In this latter example, if a crime is committed in time of peace it would be more fair for the national systems to be given a chance for making justice and only if they are not able or willing to defer the criminals to justice, it would be only then, that an international jurisdiction would have been taken into account.

The primacy of the ad-hoc tribunals is not automatic, though. The rules of evidence and procedure provide that the concurrent jurisdiction may lead to the prevalence of national courts if the Tribunals consider that the case may be tried more appropriately at the national level. In this regard, the ICTY rule11 bis[20] provides that: "After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers, which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

---

[17] See also VIRGINIA MORRIS – MICHAEL SCHARF: *The International Criminal Tribunal for Rwanda.* New York: Transnational Publishers, 1998.

[18] See as an example, *Prosecutor v. Dusko Tadic A/K/A "Dule"* – Decision on the Defence Motion on Jurisdiction, B point, available at http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm,last visited December 2007.

[19] See also JOHN E. ACKERMAN – EUGENE O'SULLIVAN: *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia. With Selected Materials from the International Criminal Tribunal for Rwanda.* The Hague: Kluwer Law International, 2002.

[20] ICTY Rules of Evidence and Procedure.

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State."[21]

ICTY has already made use of this rule in the case *Prosecutor v. Gojko Jankovic* and referred the case to the authorities of the State of Bosnia and Herzegovina.[22]

However, the Rule 9 provides that at the request of the Prosecutor the Tribunal may use its primacy in three cases.[23]

"(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal."

One may take a close look to the ICTY Rule 9 (ii) and ICC[24] Rome Statute article 17 (2) which define unwillingness, and may discover the resembling between the principle of concurrency and the principle of complementarity:[25] which is primary for ICTY, is complementary for ICC, meaning that international jurisdiction shall be applied:

"In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."[26]

---

[21] See supra note 14, 584–587. See also Steven D. Roper – Lilian A. Barria: *Designing Criminal Tribunals. Sovereignty and International Concerns in the Protection of Human Rights*. Hampshire: Ashgate, 2006, 72.

[22] *Prosecutor v. Gojko Jankovic,* Decision on referral of case under rule 11 bis, available at http://www.un.org/icty/stankovic/trialc/decision-e/050722.htm, last visited December 2007.

[23] See also supra note 14, 377–378.

[24] See also Sacha Rolf Lüder: The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice. *International Review of the Red Cross* (IRRC) March 2002, Vol. 84, No. 845, 79–92.

[25] See also Xavier Philippe: The principle of universal jurisdiction and complementarity: how do the two principles intermesh? IRRC, Vol. 88, No. 862, June 2006, 375–398.

[26] Rome Statute article 17(2).

One may say that every time unwillingness or inability is determined, ICC has primacy in investigating and prosecuting the responsible for the gravest international crimes. The drafters of the Rome Statute found a clever solution proving dispositions which states would vote for, dispositions which would not breach the states sovereignty and in the same time would claim for the international jurisdiction. In other words they did not include the word 'primacy' in the statute, infringing the sovereignty of the states, but they put 'complementarity' whenever 'unwillingness' or 'inability' is determined, which practically means the same thing with 'primacy" but expressed in a more proper manner.

III. Complementarity in the Rome Statute

The principle of complementarity is expressed in the 10th paragraph of the Preamble of the Rome Statute, as well as in the first article of the Statute or in the Articles 17, 18 and 19. The dispositions of Articles 13, 14, 15 and 20 will be considered within the next section of this article.

Article 1 of the Statute spells out this new principle of law,[27] representing the basic principle of the Court: "an International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions." The first article comes to confirm the disposition from the 10th paragraph of the Preamble: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions […]"

Article 17 is referring to the issues of admissibility of a case.[28] Paragraph one of this article points out the situations when a case is inadmissible:

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

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court."

---

[27] See GERRY SIMPSON: Politics, Sovereignty, Remembrance. In DOMINIC MCGOLDRICK – PETER ROWE – ERIC DONNELY (Eds.): *The Permanent International Criminal Court. Legal and Policy Issues.* Oxford and Portland Oregon, 2004, 55 or IAIN CAMERON: Jurisdiction and Admissibility Issues under the ICC Statute, ibid, 86–89.

[28] See also supra note 25.

The last part of subparagraphs (a), (b) and (c) is very important considering the principle of complementarity. Therefore, if case is being investigated or prosecuted by a State which has jurisdiction over it, primacy is given to the national courts and the jurisdiction of the ICC is inadmissible. However, if the State is unwilling or unable genuinely to carry out the investigation or prosecution, ICC will come to complement the lack of justice at the national level, and its jurisdiction would become admissible. Primacy is also given to the national system of justice if a state started an investigation and decided not to prosecute the person concerned. The decisions of the national courts are therefore respected, but only if they do not result from unwillingness or inability of the State genuinely to prosecute. If a person has already been tried for the same crime ICC would have jurisdiction over, according to the ne bis in idem principle, the jurisdiction of the ICC would be inadmissible. ICC would have jurisdiction though, if „the proceedings in the other court:

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[29]

Paragraph 2 of the article 17 explains what unwillingness means:

"In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

Paragraph 3 of article 17 defines inability:

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

Analyzing the dispositions of article 17, we discover the criteria for determining weather a state in question has met the required standard for conducting criminal proceedings or not: 'unwilling' or 'unable', decision not to prosecute by state, double

[29] Article 20 paragraph 3 of the Rome Statute.

jeopardy, gravity of the case, 'shielding the person', unjustifiable delay, lack of impartiality, collapse or unavailability of national judicial system.[30]

Article 18 also contains some dispositions concerning the principle of complementarity. If the Prosecutor starts an investigation, he or she will notify "all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned."[31] If within one month from the notification, a State inform the Court that "it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5", the Prosecutor, based on the principle of complementarity, may "defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation."

In connection to this article there are the dispositions of article 19 paragraph 2 (b), which foresee that the state which has jurisdiction may challenge the admissibility of a case based on "the ground that it is investigating or prosecuting the case or has investigated or prosecuted." This means that the state can ask for the application of the principle of complementarity.

IV. Problematical issues on complementarity

The complementarity principle is the cornerstone of the Rome Statute.[32] It provides a balance between state sovereignty and an effective and credible ICC,[33] but it also represents a compromise because without it, there would have been no agreement. As consequences of this compromise, there are more problematical aspects in my opinion, which I will discuss further.

Article 13 of the Rome Statute foresees the trigger mechanisms of the Court, providing that ICC shall exercise its jurisdiction if:

"(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

---

[30] For explanations see SHARON A. WILLIAMS: Article 17. Issues of Admissibility. In OTTO TRIFFTERER (ed.): *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsegesellschaft, 1999, 383–394 or JOHN T. HOLMES: Complementarity: national Courts versus the ICC. In ANTONIO CASSESE – PAOLA GOETA – JOHN R. W. D. JONES (eds.): *The Rome Statute of the International Criminal Court: a Commentary*. New York: Oxford University Press, 2002, Chapter 18.1, 667–687.

[31] Article 18 of the Rome Statute.

[32] B. SWART – G. SLUITER: The International Criminal Court and International Criminal Cooperation. In H. VON HEBEL (ed.): *Reflection on the International Criminal Court*. The Hague: T.M.C. Asser Press 1999, 91, 105.

[33] OTTO TRIFFTERER (ed.): *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsegesellschaft, 1999, article 17, paragraph 20.

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

The problematical aspects will be analyzed considering each trigger mechanism.

1. Referral by a state-party

According to article 14 paragraph 1 of the Rome Statute, "a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."

In my opinion, the principle of complementaririty implies two aspects: a positive and a negative one. The positive aspect consists in the possibility of a state-party to refer its situation to the ICC, whenever it considers that it is unable to bring to justice the responsible for the gravest crimes. Article 14 takes into consideration the positive aspect of the principle of complementarity. The use of the verb 'may', suggests once more time the right of the state to opt between prosecuting itself or referring the situation to the international jurisdiction. Therefore, the national jurisdiction is given priority over the international one.

There are already a few examples of states making use of the positive aspect of the complementarity principle within ICC. Uganda referred the situation to the ICC in December 2003 and the investigation was opened in July 2004. The Democratic Republic of the Congo referred the situation in April 2004 and the investigation was opened in June the same year. The situation in Central African Republic was referred to the Prosecutor in January 2005 and the investigation was opened in May 2007.

The negative aspect of the principle of complementarity consists in the possibility of a state-party to withdraw its previous referral to the ICC. Unlike the ICTY Rule 11 bis, which provides that concurrent jurisdiction may lead to the prevalence of national courts if the Tribunals consider that the case may be tried more appropriately at the national level, such rule does not exist within ICC. In other words, once a trigger mechanism is pulled, there is nothing you can do. If a state-party referred a situation to the ICC based on the complementarity principle, and afterwards it turns out that it is able or willing to bring to justice the responsible or to find out another proper solution for its own situation, the state-party can not take the case back. It seems like the ICC complements the national courts but the national courts do not complement ICC. This is a critical point for the Rome Statute. The base of the complementarity principle is the will of the states. They are given priority in prosecuting and if they can not exercise this priority, the situation becomes a matter of international jurisdiction. If afterwards, the states want to take the situation back, their will do not triumph anymore. The principle of complementarity provides only for the states' priority, not for their primacy in prosecuting.

The situation in Uganda is an example of not respecting the principle of complementarity in its negative aspect. In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord's Resistance Army to the Prosecutor of the ICC. The decision to open an investigation was

reportedly taken after thorough analysis of available information in order to ensure that requirements of the Rome Statute are satisfied.[34] Arrest warrants were publicly announced and unsealed on 14 October 2005 for five members of the Lord's Resistance Army: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya.[35] Ugandan authorities have enacted an amnesty law in order to encourage to return to normal life, members of the LRA, who are themselves victims, having been abducted and brutalized by the LRA leadership. President Museveni has indicated to the Prosecutor his intention to amend this amnesty, to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice.[36]

The situation though, it was not simple. Uganda is a country which bears the marks of a long war, and Joseph Kony, the leader of the LRA do not intend to renounce rebellion. In May 2006 the President Musevini gave Kony a final peace offer declaring that if he gets serious "about a peaceful settlement, the Government of Uganda would guarantee him safety."[37] Unfortunately, even if Kony would settle a peace agreement with the Government of Uganda, the President Musevini can not "guarantee him safety" because of Uganda's obligation to arrest the leader of the rebel LRA.[38] The situation is more difficult, as LRA leader do not intend to make peace until the warrants of arrest are withdrawn.[39]

The situation is very complex. An important question arises: peace or justice? According to ICC, there can no be peace without justice. The ideal solution would be peace with justice, meaning that ICC would withdraw its charges, Kony would make peace and he would be brought to justice by a national court. The solution is only idealistic, since Kony would never accept to be brought to a court and ICC would never drop its charges. The problematical aspect is that the will of state, which is the most important according to the principle of complementarity, stays out of this matter.

2. Referral by the United Nations Security Council

The Court has "international legal personality"[40] and its relation with the United Nations is based on an agreement approved by the Assembly of States Parties.[41]

---

[34] http://www.iccnow.org/?mod=northernuganda, last visited December 2007.

[35] The last one was reported dead and thus the warrant of arrest on his name, available at http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-55_English.pdf was rendered without effect therefore the name of Raska Lukwiya has been removed from the case.

[36] http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html last visited December 2007.

[37] The New Vision (Uganda), *Musevini gives Joseph Kony finalpeace offer,* 16th May 2006, available at http://www.newvision.co.ug/D/8/12/498862, last visited December 2007.

[38] To read the reactions to Musevini's announcement see e.g.
BBC News: http://news.bbc.co.uk/2/hi/africa/4992896.stm or
The Monitor: http://allafrica.com/stories/200605180694.html last visited December 2007.

[39] The Monitor (Uganda), FRANCK NYAKAIRU: *Drop cases against me, Kony tells world court.* 25 May 2006 available at http://allafrica.com/stories/200605250273.htmllast visited December 2007.

[40] Article 4 of the Rome Statute.

[41] Article 2 of the Rome Statute.

Unlike the ad-hoc tribunals, which were created by UN SC Resolution, ICC is a treaty-based, independent court. A specific relation between ICC and the SC arises from article 13 (b) which provides the possibility for the SC to refer a situation to the Prosecutor of the ICC, if one or more crimes referred to in article 5 of the Rome Statute appears to have been committed. The SC referral born controversies among states,[42] but the need for maintaining or restoring international peace[43] according to the Chapter VII of the UN Charter, triumphed and the states parties accepted this trigger mechanism.

A problematic aspect arises in connection with a non state party, if we consider the principle of complementarity. If the Security Council refers to ICC a situation concerning a state which did not sign and ratify the Rome Statute, it violates that state's authority to make justice, that state's priority in bringing the responsible to justice, and furthermore, it violates the principle of complementarity.

An example is offered by the situation in Darfur, the Sudan. This state did not ratify the Rome Statute, so it did not accept the jurisdiction of the ICC, but still, contrary to its will, which is fundamental according to the principle of complementarity, its situation was referred to the ICC. The SC adopted the Resolution 1593 (2005) using its "authority under the Rome Statute to provide an appropriate mechanism to lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked."[44]

Sudan is not obliged to cooperate and handle the criminals, according to the Rome Statute, since it is no party to it, but still, it is obliged under international humanitarian law, according to Geneva Conventions IV, article 146, to bring to justice the responsible for the gravest crimes: "each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."[45]

---

[42] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, volume 1 (Proceedings of the Preparatory Committee during March-April and August 1996), G.A., 51st Sess., Supp. No.22, A/51/22, 1996 in M. Cherif Bassiouni (ed.): *Statute of the ICC: a Documentary History*. New York: Transnational Publishers, Ardsley, 1998, 405, paragraphs 129–130. See also Statement of India's Vote on the Adoption of the Statute of the International Criminal Court. In William Driscoll – Joseph Zompetti – Suzette W. Zompetti (eds.): *The International Criminal Court. Global Politics and Quest for Justice*. New York: International Debate Education Association, 2004, 42–45.

[43] See also Aurélio Viotti: In search for symbiosis: the Security Council in the humanitarian domain. *IRRC*, Vol. 89, No. 865, March 2007, 131–153.

[44] Referral of the situation in Darfur, the Sudan, available at http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm, last visited December 2007.

[45] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, article 146 paragraph 2, available at http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5, last visited December 2007.

One could argue that even if Sudan is not obliged under the principle of complementarity, it is binding under the principle of universal jurisdiction. The problem is that this latter principle offers only the authority to prosecute, not also the duty to prosecute.[46] Even if the Security Council power to refer a situation to the ICC is based on its role to assure international peace, when it comes for a situation concerning a non-state party to the Rome Statute, it still represents a breach of the principle of complementarity, a violation of the state' right to bring its criminals before is own courts.

3. Prosecutor's *proprio motu* referral and the conditions of admissibility

Article 15 paragraph 1 provides that "the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court." The Prosecutor must seek information which constitutes a reasonable basis for an investigation. He has to be sure that the conditions of admissibility set out in the article 17 are met: 'unwillingness' or 'inability' of the state to conduct investigations, decision not to prosecute by state, double jeopardy, gravity of the case, 'shielding the person', unjustifiable delay, lack of impartiality, collapse or unavailability of national judicial system.

The term 'genuinely' was put to both concepts of unwillingness and inability. The drafters of the Rome Statute considered also the concept of good faith but it was not accepted because it was considered narrower than genuineness[47]. Terms as 'ineffective', 'diligently' or 'sufficient grounds' were also taken into consideration, but they were finally rejected, as they were too subjective.

The terms 'unwillingness' and 'inability' are explained in the statute in order to avoid the subjectivism.[48] First of all unwilling is considered a state when "the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5."[49] The term 'shielding' is quite broad and it would be not easy for the Prosecutor of the ICC to prove that a state fulfills the letter of the Statute but not its spirit.[50] Secondly, there is unwillingness when "there has been an unjustified delay in the proceedings which in the circumstances is

---

[46] Id 6 at 63.

[47] See JOHN T. HOLMES: Complementarity: national Courts versus the ICC. In ANTONIO CASSESE – PAOLA GAETA – JOHN R. W. D. JONES (Eds.): *The Rome Statute of the International Criminal Court: a Commentary*. New York: Oxford University Press, 2002, Chapter 18.1., 674.

[48] A list of indicia of unwillingness or inability to genuinely carrying out proceedings is also provided in Annex 4 of the Informal Expert Paper for the Office of the Prosecutor of the International Criminal Court: *The principle of complementarity in practice*, December 2003, available at http://www.icc-cpi.int/library/organs/otp/complementarity.pdf last visited December 2007.

[49] Article 17,paragraph 2 (a).

[50] SHARON A. WILLIAMS: Article 17. Issues of Admissibility. In OTTO TRIFFTERER (Ed.): *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsegesellschaft, 1999, paragraph 27, (a) "shielding the person", 393.

inconsistent with an intent to bring the person concerned to justice."[51] Article 17 does not specify what unjustified delay means. There have been some suggestions[52] that a comparison of the concerned case with the usual procedure of the state would be most relevant. Proceedings, which exceed the usual national practice, unexplained, may be considered unjustified delay. Thirdly, there is the case of unwillingness if "the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."[53] This criteria would be very hard to prove since it is based on a lot of subjectivism and it must be connected with the Rule 51 which provides: "in considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted."[54] Another rule with respect to article 17 was proposed by the United States[55] but it was received with negativism as it contained more criteria for the Court to take into consideration when declaring a case admissible based on unwillingness or inability. Among these criteria there was the independence of the state's applicable justice system, including its court martial system, the state's past experience in genuinely investigating or prosecuting similar conduct, whether official or non-official, by its military personnel or citizens and the state's communication in writing to the Office of the Prosecutor that the person concerned was acting in the course of his or her official duties.

A problem of this proposal was that the first two criteria related to a state's judicial system or process in general rather than relating to the way the state was addressing a specific case. Another problem was the distinction between official and non-official acts which was not considered by the Rome Statute, as a state must prosecute the crimes covered by the Statute no matter if they were committed in an official or non-official capacity.[56] Even if the US argued that the proposal referred both to unwillingness and inability, it was not taken into consideration, as many delegations argued that the proposal referred only to unwillingness and not to inability, also.

According to the Rome Statute, a state is unable to prosecute or to conduct proceedings when "due to a total or substantial collapse or unavailability of its national judicial system", it can not "obtain the accused or the necessary evidence and testimony" or it is "unable to carry out its proceedings."[57] The American proposal was

---

[51] Article 17, paragraph 2 (b).

[52] Id 47 at 676.

[53] Article 17, paragraph 2 (c).

[54] ICC Rules of Evidence and Procedure, Rule 51.

[55] PCNICC/1999/WGRPE/45 (2 December 1999).

[56] JOHN T. HOLMES: Jurisdiction and Admissibility. In ROY S. LEE (Ed.): *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*. Transnational Publishers, Inc. 2001, 335.

[57] Article 17, paragraph 3.

ineffective concerning inability because in case of total or substantial collapse or unavailability of a state's judicial system, it would not matter if that system functioned effectively in the past or that the state would be willing to act.

Unlike unwillingness which is based on more subjectivism, inability is more objective, being based on facts. Unwillingness and inability can go together or they can exclude each other. For example, if a state suffered a collapse of the institutions, including the judicial system, it might be willing to prosecute, but it is unable.[58] In some cases there could be crimes which are not punishable under national law. For example criminally or military codes may not comprise the using of child soldiers[59] or sexual offences prohibited as crimes against humanity and war crimes,[60] which might lead to the qualification of that state as unwilling or unable to prosecute.

One may say that in the end the principle of complementarity manifests in two situations: if the ICC is the only court seized with the matter, the only condition for ICC to deal with the case is its gravity; if not, the national jurisdictions have primacy unless an element of unwillingness or inability is manifested.[61]

The drafters of the Rome Statute tried to provide the most objective criteria in the process of admissibility of a case within ICC. But even if they used words as "genuine", which was seen as "the least objectionable word"[62], the fact that the Court itself is to consider if a state is unwilling or unable to prosecute, makes in my opinion, a jurisdiction of control from ICC.[63] The Court appears as an appellate body to decide if the domestic authorities do their job or not. This role is can be seen also in article 20 of the Rome Statute which provides:

"No person who has been tried by another court shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

---

[58] Id 47 at 677. The author gives Rwanda as an example. Other such situation is Somalia, see Mahnoush H. ARSANJANI: Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court. In H. von HEBEL (Ed.): *Reflection on the International Criminal Court*. The Hague: T.M.C. Asser Press, 1999, 70.

[59] See BRUCE BROOMHALL: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*. New York: Oxford University Press, 2003, 92.

[60] Rape, sexual slavery, enforced prostitution.

[61] JOHN R. W. D. JONES – STEVEN POWLES: *International Criminal Practice.* Oxford University press 2003[3], at 392, paragraph 5.108.

[62] Id. 50 paragraph 22(a) 'unwilling or unable' at 392.

[63] Some authors call it 'supervisory function', see e.g. J. K. KLEFFNER: Complementarity as a catalyst for compliance. In J. K.KLEFFNER – G. KOR (Eds.): *Complementarity Views on Complementarity. Proceedings of the International Roundtable on the Complementarity Nature of the International Criminal Court.* The Hague: T.M.C. Asser Press, 2006, 82.

Once again, ICC appears as an appellate body to review decisions at the national level. As China suggested,[64] it would be preferable if the Security Council or the domestic courts had the capacity to decide that a case before ICC is admissible or not. But than, new discussion would arise: the Security Council is a political body and the domestic courts would not recognize their unwillingness or inability to prosecute. Maybe a solution would be to consider the domestic rules of criminal procedure. In most countries, when a conflict of competence arises, the common superior court is to decide which court is competent in the concerned case.[65]

On the international level though, there is no common superior court. Therefore, when a conflict of competence arises between a national and an international court, the situation is delicate. ICC should not have automatic competence, because there would be a violation of the principle of complementarity. In the same time, ICC should not be the court to decide if a domestic court is unwilling or unable to bring to justice the criminals because it is the risk of being seen as a court of control. This is why another body or another court should hold this authority. The International Court of Justice is not the suitable court to decide in this matter, since it has jurisdiction over states and not over individuals or over the conflicts aroused between national and international courts. To establish a special court to have authority in cases of conflict of jurisdiction between domestic courts and ICC, means time and money. One may that the Security Council would be the proper organ to decide in this matter, even if it is a political body, on the same grounds it is the organ to decide if an act of aggression occurred or to defer a situation to the ICC.[66]

In the young literature concerning the ICC[67] there have been raised already some problematical issues which might arise from complementarity in practice. For example, taking into consideration the potential divergence of interests between the different categories of ICC beneficiaries, some questions which need to be answered would be: whose interest is the Court intended to serve? The one of the principally affected state? The interest of the victims? The interest of the states parties to the Rome Statute?[68] It is most probably that the interests of victims would be retribution while the interests of the states parties would be deterrence. As ICC focuses only on the crimes of the most concern for the international community which are mainly leadership crimes, it might be expected for the ICC to try only the political leaders and not also the ones who have a lower role in committing the crimes. The latter's conviction would be expected by the victims of the crimes. How can ICC deal with complementarity principle in this case?

---

[64] Id. 50 paragraph 7, footnote 18.

[65] See e.g. article 43 of the Romanian Code of Criminal Procedure.

[66] With the reservation that in my opinion, the referral of a situation which concerns a non-state party represents a violation of the principle of complementarity.

[67] As it is a new institution in the field of international law.

[68] See Madeline Morris: Complementarity and Conflict :States, Victims and the ICC. In Sarah B. Sewall – Carl Kaysen (Eds.): *The United States and the International Criminal Court*. American Academy of Arts and Science, 2000, 196–208. The article can be found also in Dinah Shelton (Ed.): *International Crimes, Peace, and Human Rights: the Role of the International Criminal Court*. Ardsley – New York: Transnational Publishers, 2000, at 177–201.

A risk which exists when ICC exercises its sole active jurisdiction, where international prosecutions before the ICC are carried out in the absence of national jurisdiction, is for the Court to be satisfied with a small number of trials.[69] As the states' parties interest would be deterrence, to ensure that this kind of crimes would not occur again, a few examples would be enough to make deterrence exemplary. This would be contradictory to the will of the victims who would prefer a large number of trials. If we accept this point of view,[70] and ICC is going to deal only with a small number of cases, it is expected to prosecute only leadership-level perpetrators, which would not correspond with the will of the victims.[71] In this case the prosecutorial policy would be that of a stratified concurrent jurisdiction approach to the distribution of defendants meaning that ICC would prosecute the leaders while the lower ranked defendants would be left to be prosecuted by the national jurisdiction. This form of application of the complementarity principle could lead to a failure in making justice. For instance, there have been examples in Rwanda, where many low-ranked defendants have been sentenced to death in national courts, while leaders of the genocide have received lighter sentences after trials at ICTR.[72]

Another problematic aspect of the principle of complementarity might arises when ICC, based on a proprio motu or a UNSC referral would start an investigation considering the concerned state unwilling or unable to prosecute, while the state would run a parallel investigation, as it would consider itself both willing and able to fulfill the process of justice. In this case, there have been some suggestions[73] for the ICC Prosecutor to negotiate with the national government on an ICC prosecutorial strategy and where negotiations fail, ICC would have to foster national proceedings if the state is willing or able to prosecute or, on the contrary, ICC would not have to foster the proceeding or to cooperate if the state lacks impartiality or willingness. Another critically issue of complementarity which during the Rome Statute negotiations got channeled into admissibility[74] is that it might involve complex disputes between the ICC Prosecutor and one or more states.[75] As it was shown in the

---

[69] Ibid at 198.

[70] There are authors who do not share such point of view: "It is a fact that possible accomplices will include everyone, from the head of state, through the generals and soldiers right down to the mayors and even a supervisor in a tea factory. We can hope that this wide net of accountability, covering not only people in positions of authority but also those simply aid and abet others, should serve to prevent crimes as people alter their conduct to avoid liability", ANDREW CLAPHAM: Issues of complexity, complicity and complementarity: from the Nuremberg trials to the down of the new International Criminal Court. In PHILIPPE SANDS (Ed.): *From Nuremberg to The Hague. The Future of International Criminal Justice*. Cambridge University Press, 2003, 67.

[71] Id 68 at 201. The author is arguing that "applying deterrents as top, middle and lower levels of criminal hierarchies ultimately may be a more effective deterrence strategy than exclusive prosecution of those in leadership position."

[72] Ibid at 204, notes 35 and 36.

[73] Ibid at 205–206.

[74] ROGER S. CLARK: The ICC Statute: Protecting the Sovereign Rights of Non-Parties. In SHELTON ibid 216.

[75] See WILLIAM A. SCHABAS: *An Introduction to the International Criminal Court*. Cambridge University Press, 2004[2], 85.

doctrine, this might lead to a complex and litigious jurisdictional matter that could nearly paralyze the Court.[76] The Court might not be allowed by governments or by the Security Council to indict, obtain custody of or judge the main perpetrators of the most serious crimes of concern to the international community as a hole.[77]

V. Precedents of (un)willingness or (in)ability to prosecute in international law

When it comes of prosecuting or punishing war criminals or perpetrators of crimes against humanity, the general impression among the specialists in law is unfortunately, characterized by the word 'impunity'.[78] The Armenian genocide is not recognized by the Turkish governments and in spite of the end of communism in Russia, more Soviet leaders have enjoyed impunity.[79] The Khmer Rouge, the Chinese communists or the Indonesian leaders responsible for atrocities committed in their country were not sent to trial. More Nazi leaders found shelter in South America instead of ending in prison cells. Sometimes measures were taken, international trials took place, indictments were brought, but the indicted perpetrators were not arrested because they were considered heroes at the national level.[80] In Darfur, the Sudan, rejecting the jurisdiction of the ICC and breaching the UNSC referral[81] Ahmed Haroun continues to fulfill the office of State Minister for Humanitarian Affairs despite the fact that ICC issued a warrant of arrest on his name citing 42 counts of crimes against humanity and war crimes.

1. The Nuremberg Trials

The St. James Palace Declaration of 13 January 1942 was followed, on 20 October 1943, by the establishment of the United Nations War Crimes Commission (UNWCC) which was to get information about the Nazi criminals of war. Only a few days later, on 1 November 1943, in the Declaration from Moscow[82] was written that the Nazi criminals should be send in the countries they committed the atrocities were they were supposed to be tried. The ones whose offences had „no particular geographical localization" were to be punished by a special tribunal. The decision of establishing an international tribunal was made at Yalta, in February 1945.

---

[76] Louise Arbour – Morten Bergsmo: Conspicuous Absence of Jurisdictional Overeach. In H. von Hebel (ed.): *Reflection on the International Criminal Court*. The Hague: T.M.C. Asser Press 1999, 131.

[77] See Yves Beigbeder: *Judging War Criminals. The Politics of International Justice*. New York: Palgrave, 1999, 199.

[78] See e.g. ibid at 200 or Ruti G. Teitel: *Transitional Justice*. New York: Oxford University Press, 2000, 37 or Shelton ibid Introduction, at ix-x. See also cases cited by M. Cherif Bassiouni: Strengthening the Norms of International Humanitarian Law to Combat Impunity. In Burns H. Weston – Stephan H. Marks (eds.): *The Future of International Human Rights*. 1999 at 245, 277–279. To see the philosophical issues in international sentencing, Ralph Henham: *Punishment and Process in International Criminal Trials*. Aldershot: Ashgate Publishing Limited, 2005.

[79] Id 77 at 200.

[80] Ibid at 201 note 1.

[81] UNSC Resolution 1593/2005.

[82] Issued by Churchill, Roosevelt and Stalin.

The International Military Tribunal of Nuremberg was established "for the just and prompt trial and punishment of the major war criminals of the European Axis."[83] Some critics[84] were brought against the Tribunal but still, it had its importance. Together with the Tokyo Tribunal,[85] they marked a new road: the one to international justice. They served for changing the judicial mentality. New crimes had been discovered. They represented a step in the development of international criminal law.

At Nuremberg there were tried only the highest ranking perpetrators. There were only twenty-two[86] defendants in the dock,[87] despite the fact that there were 3000 men who killed people on grounds of race, ethnicity, or religion. "The chief managers of genocide, the Gestapo chief, Heinrich Müller, and his deputy Adolf Eichmann, were missing from most lists of potential defenders."[88] As Professor Benjamin Ferencz said, at Nuremberg they „aimed to do justice knowing" they „could not do perfect justice."[89]

2. The trial of Adolph Eichmann

It was only after fifteen years that Adolph Eichmann was finally captured. Israel proved to be very willing to prosecute him if we consider the way he was turned to justice.[90] During the Second World War Eichmann was the person directly responsible for the execution of Hitler's orders concerning the murder of every single Jew in the territories of Europe which the Nazis occupied at that time.[91]

After the war he flew the country. He chose South America because he knew it hosted underground Nazi operating organizations which would help former Gestapo officers to escape. He contacted one of these organizations, ODESSA[92] which

---

[83] See the text of the Statute available on http://www.icwc.de/fileadmin/media/IMTC_en.pdf, last visited January 2009.

[84] It was said that the trials imposed *ex post facto* punishment. Professor Benjamin Ferencz, former prosecutor at Nuremberg expressed his opinion on that: "The *ex post facto* principle is a principle of justice: that no one should be accused of an illegal act when the act was not known to be illegal at the time it was done. Who didn't know that it was illegal to murder a million innocent people, including hundred of thousands of women and children, helpless people, because of their color, their race or their religion? Who didn't know that such conduct was illegal? It was no *ex post facto*, but was putting into positive international law fundamental principles of humanity and of morality, and national law, and making them legally binding through international law", BENJAMIN FERENCZ: The Experience of Nuremberg. In SHELTON ibid 8–9.

[85] See the Tokyo Tribunal Statute, available on http://www.yale.edu/lawweb/avalon/imtfech.htm last visited January 2008.

[86] See RICHARD OVERY: The Nuremberg Trials: international law in the making. In PHILIPPE SANDS (ed.): *From Nuremberg to The Hague. The Future of International Criminal Justice*. Cambridge University Press, 2003, 12–14.

[87] There were 13 death sentences and long prison sentences for the others. See supra note 72 at 6.

[88] Ibid at 11.

[89] Id 84 at 6.

[90] He was kidnapped in the suburbs of Buenos Aires.

[91] EDWARD FREDERICK LANGLEY RUSSELL: *The Trial of Adolf Eichmann*. Kingswood: The Windmill Press, 1962, xii.

[92] Organisation der SS Angerhörige – The Organization of Members of the SS.

brought him to Rome and put him into connection with a Franciscan Father. This priest procured him a refugee passport in the name of Richard Klement. Soon he got an Argentine Visa and went to Buenos Aires where he described himself as stateless, a bachelor with a secondary education and knowledge of German and English. After a couple of month he obtained his Argentinean papers.[93]

It was only in 1960 they discovered the real identity of Richard Klement. Why did the Israelis choose to kidnap Eichmann and not to report the Argentinean authorities the real identity of Klement? Why did they choose to violate the Argentinean law and hand Eichmann to the Israelis justice system? There is no answer to these questions. Maybe they considered that only Israel could prosecute and try him for the millions of murders and for the extirpation of the Jewish cultural and spiritual centre of their people in Europe.[94] Or maybe they were afraid Argentina would not be willing to bring Eichmann to justice by granting him asylum or by shielding him from criminal responsibility.

It is not sure though, that Argentina knowing Eichmann truly identity would have been admitted him in its territory "free to spread the poison of his twisted soul to a new generation."[95] After all, the crimes he was found guilty of (crimes against the Jewish people, crimes against humanity and war crimes[96]) were not crimes "under Israeli law alone". They were "grave offences against the law of nations (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an international criminal court, the international law is in need of the judicial and legislative authorities of every country to give effect to its penal injunctions to try crimes under international law are *universal.*"[97]

After eight month from the trial started, Adolf Eichmann was sentenced to death on 15 December 1961.[98]

3. The trial of Klaus Barbie, butcher of Lyons

Another Nazi leader who found shelter in South America was Klaus Barbie, called the Butcher of Lyons,[99] as he was the head of Gestapo of Lyon. He was put in trial

---

[93] Mosche Pearlman: *The Capture and Trial of Adolf Eichmann*. New York: Simon and Schuster, 1963, 36–37.

[94] Id 91 at xii.

[95] Mrs. Golda Meir, the Israeli Minister of Foreign Affairs at the hearing of Argentina's complaint with the occasion of the Security Council's meeting to consider the violation of the rights of sovereignty of the Argentine Republic resulting from the illicit and clandestine transfer of Adolf Eichmann from Argentine territory to the State of Israel.

[96] He was also found guilty for membership in hostile organizations.

[97] Judge Halevi, arguing that the jurisdiction of the Jerusalem court – challenged by Dr. Servatius – was supported not only by Israeli law but by international law. See supra note 79 at 563.

[98] See his verdict available at http://www.ess.uwe.ac.uk/genocide/Eichmannz.htm#convict and his sentence available at http://www.ess.uwe.ac.uk/genocide/Eichmannza.htm last visited January 2008. See also supra note 80 at 560–643 or supra note 79 at 271–306.

[99] See Tom Bower: *Klaus Barbie. Butcher of Lyons*. London: Michael Joseph, 1984, 51–64.

only twenty-seven years after Eichmann was sentenced to death. What were the reasons a war criminal enjoyed freedom for forty years? Was it the unwillingness or inability of a particular state to prosecute and try him or were the political interests which kept him away from the process of justice?

Following the St. James Palace Declaration, Churchill and Roosevelt agreed that the Allies should set up a United Nations Commission on Atrocities which would investigate and collect the evidence of German war crimes.[100] Barbie was the target number three of the 'Operation Selection Board' to arrest fifty-seven Nazis.[101] He managed to escape and afterwards he was invited to become an agent of the US Army Counter Intelligence Corps (CIC).[102] The US proved willingness but unfortunately, not to prosecute Barbie, but to use him as an anti-communist agent in Bolivia.[103]

Four years later he escaped from Europe with the help of a 'Rat Line'[104] which put him in a connection with a Croatian priest, Krunosla Draganovic.[105] From Italy he went to Argentina and finally to Bolivia where he took the name of Klaus Altmann.[106] If one can argue that in the case of Adolf Eichmann, the Argentinean government knew nothing about his truly identity, this was not the case of Bolivia and Klaus Barbie. The butcher of Lyons worked for the Bolivian oppressive leader, Hugo Banzer, whom he served by torturing and executing his enemies. He even served as an officer in the Bolivian secret police for a few years.[107]

The Bolivian authorities not only were not willing to prosecute Barbie at that time, but they were also not willing to apply the 'aut dedere, aut judicare' principle – prosecute or extradite. The requests of Germany and France to Barbie's extradition remained without result.[108] France even had sentenced him to death in absentia twice for his crimes against the Resistance under France's Statute of Limitations. The French request for extradition was rejected on the grounds that there was no extradition treaty between France and Bolivia, that Barbie was a Bolivian citizen and that the Bolivian penal code did not recognize war crimes.[109] It seemed like the universality of the war crimes which judge Halevi from the Eichmann trial called *delicta juris gentium* was not applied in the Bolivian case.

It was only in 1983, after the changing of the government in Bolivia, that Barbie was sent to France. What seemed to be an extradition to Germany was in fact an expulsion to France.[110] His trial started in May 1987 in Lyon. In less than two month

---

[100] Ibid 114.
[101] Ibid 128.
[102] Ibid 123–124. See also http://en.wikipedia.org/wiki/Klaus_Barbie, last visited January 2008.
[103] Ibid 129. See also http://members.aol.com/voyl/barbie/Barbie.htm last visited January 2008.
[104] Ibid 175–197. A rat line was also ODESSA, the organization which helped Eichmann in his escaping.
[105] Ibid 176. One may observe the resembling between the escape of Klaus Barbie and the one of Adolf Eichmann.
[106] Ibid 183.
[107] http://members.aol.com/voyl/barbie/Barbie.htm last visited January 2008.
[108] Id. 99 at 18, 209.
[109] Ibid 209.
[110] Ibid 222–224. See also Klaus Altmann (Barbie) c/France Decision of 4 July 1984, European Court of Human Rights, Application 10689/83.

he was sentenced to life imprisonment for crimes against humanity.[111] He died in prison for years later. He enjoyed forty years of impunity to end in prison four years as a perpetrator of crimes against humanity. The loss for international justice would have been even grater if he would have not been put in trial at all.

4. The Pinochet Trial

The capture of General Pinochet was another victory for international law. From 1973 until 1990 he ruled Chile with terror, torturing tens of thousands of people. He appointed himself president of a military junta, Supreme Chief of the Nation and President of the Republic.[112] The Chilean dictator was involved in the Operation Condor, a campaign of political repression aiming to deter all left wing influence and to kill political opponents.[113] After losing the presidential election in 1989, Pinochet remained Commander-in-Chief of the Army and was sworn as senator for life which granted him immunity from prosecution.

Legal challenges began in 1998 when Pinochet was in London for health reasons and he was arrested on the principle of universal jurisdiction. It was for the first time in the history of international law when a dictator was arrested on such grounds. The dictator was arrested on a Spanish provisional warrant for the murder in Chile of Spanish citizens while he was president. Five days later he was served with another warrant of arrest for torture, murder, illegal detention and forced disappearances.[114] The detention of Pinochet in a foreign country for crimes against humanity committed in his own country was without precedent in international law. There was no warrant of arrest or an extradition request from Chile.[115] There was no example of a former head of state, visiting another country, being held legally charged for crimes against humanity committed in his own country.[116] There was no kidnapping as in the Eichmann case, there was no expulsion as in the Klaus Barbie's case, there was simply an unprecedented warrant of arrest.

The British House of Lords favored extradition to Spain on the base that sovereign immunity does not apply to dictators, to sovereigns who spread torture, but only to the ones who exercised legitimate state functions, and there was no such case there.[117] Because Britain's law did not incriminate extra-territorial torture until 1988, which led to the lack of 'double criminality' principle, there were only the crimes committed after this date that represented the base for Pinochet's extradition.[118] Despite the

---

[111] See http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_2492000/2492285.stm last visited January 2008.

[112] See Geoffrey Robertson QC.: *Crimes Against Humanity. The Struggle for Global Justice.* London: Penguin Book, 2002, 394.

[113] See http://en.wikipedia.org/wiki/Operation_Condor last visited January 2008 or ibid.

[114] Id 112 at 397.

[115] See also http://en.wikipedia.org/wiki/Augusto_Pinochet%27s_arrest_and_trial#The_principle_of_universal_jurisdiction last visited January 2008.

[116] Id 112 at 395.

[117] Ibid 397.

[118] Ibid 398.

pressures which came from political leaders,[119] the British authorities let the law take its course. Unfortunately, due to a brain damage caused by a stroke, Pinochet was declared unfit for trial and he was sent back home, in Chile.

In the absence of an international criminal court, the Spanish and British legal authorities proved to be willing and able to prosecute and try a perpetrator of crimes against humanity. For the first time sovereign immunity was not allowed to become sovereign impunity.[120] In the same time the decision of the House of Lords represented the first judgment rendered by a municipal court in which a former head of state of a foreign country has been held accountable for the acts he committed while he was in office.[121]

In Chile there was not the willingness or unwillingness of the state to prosecute or try Pinochet, but rather the one of doctors and lawyers. There was a playing game concerning Pinochet's immunities, his state of health and his condition to stand trial. He was declared suffering of 'dementia' by a doctor or of 'light dementia' by another, than he lapsed back in a 'vascular dementia' and finally he seemed to recover miraculously as his status of dementia was revoked in 2004.[122]

In 2006 Pinochet was finally charged among other with 36 counts of kidnapping and 23 counts of torture. He died a few days later without being convicted for any of the terrible crimes he committed.[123]

5. Transitional justice in the former communist countries

The former communist countries found themselves in profound dilemmas concerning the system of justice due to the radical political changes: to punish or to amnesty? Who bears responsibility for the past?[124] People expected punishment and trials of ancient regimes but transitional practice show a small number of trials, due to a number of legal obstacles.

In Hungary for example, the principle of 'non retroactivity' was shown as an impediment to willingness in prosecuting and trying persons responsible for treason or war crimes. The law concerning "the prosecutability of serious criminal offences committed between December 21, 1944 and May 2, 1990 and not prosecuted for political reasons" was found unconstitutional[125] because it suffered from retroactivity: "the Law

---

[119] Lady Margaret Thatcher, the former British Prime Minister condemned the inhumanity of the police, disturbing the rest of a 'sick and frail old man'. Home Secretary Jack Straw was demanded to show compassion for an old man and respect for the sovereignty of Chile. See id 112 at 397–398.

[120] Id 112 at 399.

[121] See ANDREA BIANCHI: Immunity versus Human Rights: the Pinochet Case. *EJIL,* 1999, Vol.10, No.2, 237–277.

[122] See http://news.bbc.co.uk/2/hi/americas/2080500.stm or http://en.wikipedia.org/wiki/Augusto_Pinochet%27s_arrest_and_trial#The_principle_of_universal_jurisdiction last visited January 2008.

[123] See also PHILIPPE SANDS: *After* Pinochet: the role of national courts. In PHILIPPE SANDS (Ed.): *From Nuremberg to The Hague*. Cambridge University Press, 2004, 68–109 or JOHN R. W. D. JONES: Immunity and "Doubly Criminality": General Augusto Pinochet before the House of Lords. In *International Law in the Post-Cold War World. Essays in memory of Li Haopei*. London: Routledge, 2001 at 254–268.

[124] RUTI G. TEITEL: *Transitional Justice*. Oxford University Press, 2000, 7, 27.

[125] *Constitutional Court Decision on the Statute of Limitations*. No. 2086/A/1991/14 (March 5, 1992), in NEIL J. KRITZ (ed.): *Transitional Justice. Volume III Laws, Rulings and Reports*. Washington: United States Institute of Peace Press, 1995, 629–640.

violates the requirement of constitutional criminal law that statutes of limitations[126] […] must apply the Law in effect at the time of the commission of the offence except if during the running of a statute regulations more favorable to the defendant are introduced."[127]

Non-retroactivity principle[128] proved to be more like an obstacle in Hungary's ability to prosecute than one in its willingness to try the criminals as a follow-up law that limited prosecutable offences to war crimes enabled the prosecutions to go forward based on an analogy to Nuremberg trials.[129] Some of the indictments are still contested. János Korbély, for example, a former captain who was indicted for commending shootings against a group of civilians who took over the building of Tata Police Department during the 1956 uprising, suited Hungary before the European Court of Human Rights (ECHR). In 2001 he was indicted by the Military Bench of the Budapest Regional Court for crimes against humanity under the Geneva Convention to five years imprisonment, sentence reduced by one eighth on account of an amnesty. After two years and two months of serving his sentence, Borbély was conditionally released. His complaint against Hungary is based on Article 6 (right to a fair trial within a reasonable time) and 7 (no punishment without law) of the European Convention on Human Rights, as he is arguing the acts he had been convicted of did not constitute a war crime at the time they were committed. The case is pending before the ECHR and it is expected for the Grand Chamber to issue a judgment during the year 2008.[130]

The situation is quite the same with the application in *K.-H.W. v. Germany.* The applicant brought Germany before the European Court of Human Rights on the grounds "that the act on account of which he had been prosecuted did not constitute an offence, at the time when it was committed, under national or international law."[131] He was held accountable for killing an unarmed fugitive by sustained fire, while he was serving his military service. The European Court of Human Rights found that the applicant's conviction by the German courts did not breach Article 7 of the Convention. The concurring opinion of judge Loucaides deserves a special attention. He considered that "by associating himself as a border guard with the execution of the relevant murderous plan against civilians who attempted to escape from the GDR and by intentionally killing a fugitive, the applicant in this case became responsible for the commission of a crime against humanity. […] The fact that the applicant's relevant conduct took place in 1972, i.e. about a year before the adoption of the UN Resolution 3074 (XXVIII), cannot reasonably result in the conduct in question not being considered a crime against humanity. […] In the light of the above, I found that the act for which the applicant in this case was convicted was also a crime against humanity under the principles of customary international law."[132]

---

[126] See JUDITH PATAKI: Dealing with Hungarian Communists' Crimes. In NEIL J. KRITZ (ed.): *Transitional Justice. Volume II Countries Studies*. Washington: United States Institute of Peace Press, 1995, 647–652.

[127] Id 125, paragraph 4 of the Decision.

[128] See also KRISZTINA MORVAI: Retroactive Justice based on International Law: A Recent decision by the Hungarian constitutional Court. In id. 112 at 661–662.

[129] Id 124 at 38.

[130] See *Korbély v. Hungary,* ECHR, application no. 9174/02.

[131] *K.-H.W. v. Germany*, ECHR, application no, 37201/97, Judgement of 22 March 2001, paragraph 3.

[132] *K.-H.W. v. Germany*, ECHR, application no, 37201/97, Judgement of 22 March 2001, *Concurring opinion of Judge Loucaides.*

Another former communist country which proved to be willing to prosecute the Communist party leadership, was Romania. Genocide[133] charges were brought in military courts[134] against Nicolae and Elena Ceausescu[135] for attempting to put down the revolution in 1989. Romania proved to be too willing to try the dictator and his wife. The trial was criticized as lacking the rule of law.[136] They were tried, convicted and executed in the same day[137] for genocide over 60 000 of people,[138] subversion of state power by encouraging armed violence, destruction of state property and damages to important economic and cultural institutions, subversion of the national economy and attempting to flee Romania to use over $1 billion deposited in foreign banks.[139]

Ceausescu's aids called terrorists, were never brought to justice and people began to doubt their very existence.[140] Only a few of them were convicted for their roles[141] in the revolution but some were released over a two year period, either on health grounds or as a result of free pardon.[142]

6. Russia's amnesty over the war criminals in Chechnya

The long Russian-Chechen conflict[143] was "the most bloody and sickening war" which devastated the planet.[144] The Russian aggression[145] over Chechnya devastated the capital Grozny leading to the fleeing of tens of thousands of refugees, to the death of thousands of elderly Russians[146] and of a quarter and fifth of the Chechen population.[147]

---

[133] Some authors argue that genocide was not a proper charge. See e.g. NESTOR RATESH: *Romania: the Entangled Revolution.* Washington: CSIS, 1991, 78–79.

[134] Tribunalul Militar Extraordinar – The Extraordinary Military Tribunal, an extraordinary ad-hoc military tribunal created for Ceausescu's trial.

[135] Nicolae Ceausescu was the president of Romania from 1965 till 1989. See JOHN SWEENEY: *The Life and Evil Times of Nicolae Ceausescu*. London: Hutchinson, 1991.

[136] Id 124, at 38.

[137] The First Christmas Day, 25 December 1989.

[138] Which later proved to be 1104 from which 944 after 22 December, STAN STOICA: *Romania, 1989–2004, O istorie cronologica*. Bucuresti: Meronia, 2004, 19.

[139] When the Romanian population's nourishment was the daily limited number of bred(s) and soy salami.

[140] See MATEI CALINESCU – VLADIMIR TISMANEANU: The 1989 Revolution and Romania's Future. In DANIEL N. NELSON (ed.): *Romania After Tyranny.* Colorado: Westview Press, 1992, 15, note 12.

[141] See ADRIAN DASCALU: *Romania Jails Eight for 1989 Timisoara Uprising Massacre,* Reuters, 9 December 1991.

[142] Id 124, at 48, 60.

[143] See TRACEY C. GERMAN: *Russia's Chechen War*. New York: Routledge Curzon, 2003 or JOHN B. DUNLOP: *Russia Confronts Chechnya. Roots of a Separatist Conflict*, Cambridge University Press, 1998, or BEN FOWKES (ed.): *Russia and Chechnia: the Permanent Crisis. Essays on Russo-Chechen Relations.* London: Macmillan Press, 1998, or CARLOTTA GALL – THOMAS DE WAAL: *Chechnya. A Small Victorious War.* London: Pan Original, 1997.

[144] ANDRÉ GLUCKSMANN: *If Putin has an Ally, it is Basaev.* The Chechen Society Newspaper, 13, 4 July 2005.

[145] ROMAN KHALILOV: *Main Causes of the present Russian Aggression,* 12, December 1999, available at http://www.amina.com/article/main_causeswar.html last visited January.

[146] ROBERT SEELY: *Russo-Chechen Conflict, 1800-2000. A deadly Embrace*. London: Franck Cass publishers, 2001, at 1.

[147] Ibid 122.

Instead of punishing the war criminals, the Russian government made use of the amnesty clause in Article 6(5) of the 1977 Geneva Protocol II.:[148] "[…] at the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, weather they are interned or detained." In this case the government used the institution of amnesty in order to grant impunity to perpetrators of humanitarian law violations who moreover belonged to the governmental forces.[149]

Russia's unwillingness to prosecute the war criminals was criticized by the Parliamentary Assembly of the Council of Europe: "the Assembly believes that any continuing unwillingness or inability of the prosecuting authorities to investigate crimes committed by federal servicemen against the civilian population and to bring those guilty to court, will lead to a lack of accountability and a resulting climate of impunity which foster human rights violations and impedes a political settlement of the conflict."[150]

Even if the Council of Europe found the Russian Federation „to be violating some of her most important obligations under both the European Convention on Human Rights and international humanitarian law, as well as the commitments she entered into upon accession to the Council of Europe"[151], none of the forty states in the Council was willing to bring Russia before the European Court of Human Rights over violations in Chechnya.[152] The only measure it was taken against Russia was the suspension from the Council in 2000–2001.[153]

7. Milosevic's trial

One of the most recent trials which was supposed to make history in international law, was Milosevic's trial. The former president of Serbia and later the president of Federal Republic of Yugoslavia was arrested in Serbia on 1 April 2001 and transferred to The Hague at the end of June the same year. He was the first state president to be tried for genocide.[154] He was arrested in Serbia and he was convinced that he would be tried by the national authorities.[155]

---

[148] For the commentary see Sylvie S. Junod in Sandoz – Swinarski – Zimmerman (eds.): *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva: Nijhof, 1987, at 1402.

[149] See Péter Kovács: Authority and Weakness of the 1977 Geneva Protocol II in the Light of the Conflict in Chechnya. In *International Peacekeeping*, Vol. 6, Nos. 4–6, July-December 2000, 137–144.

[150] Resolution 1227 (2000) *Conflict in the Chechen Republic: recent developments* (follow up to Recommendations 1444 (2000) and 1456 (2000)) of the Parliamentary Assembly, Article 9.

[151] Recommendation 1444 (2000) of the Parliamentary Assembly of the Council of Europe, (PACE), 27 January 2000, in International Peacekeeping, Vol. 6, Nos. 4–6, July-December 2000, 274–275.

[152] Interview with Lord Russel Johnston, then President of the PACE, in *Le Monde*, 6 February 2001.

[153] See John Russell: *Chechnya – Russia's 'War on Terror'*. BASEES/Routledge Series on Russian and East European Studies, 2007.

[154] Adam Lebor: *Milosevic. A Biography.* London : Bloomsbury, 2002, 318.

[155] Ibid 316.

Milosevic did not recognize the jurisdiction of the ICTY,[156] the tribunal which was established to avoid the political unwillingness of the post war national courts to prosecute war crimes in accordance with the international legal standards.[157] Having an astonishing role[158] in the conflict in the Former Yugoslavia,[159] Milosevic was charged with genocide; complicity in genocide; deportation; murder; persecutions on political, racial or religious grounds; inhumane acts/forcible transfer; extermination; imprisonment; torture; wilful killing; unlawful confinement; wilfully causing great suffering; unlawful deportation or transfer; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; cruel treatment; plunder of public or private property; attacks on civilians; destruction or wilful damage done to historic monuments and institutions dedicated to education or religion; unlawful attacks on civilian objects.[160]

As a consequence of his decease, the trial was closed on 14 March 2006.[161] Another war criminal[162] died without being indicted.

8. Saddam Hussein's trial

Another example of willingness to prosecute the responsible for committing atrocities is Saddam Hussein's trial. The Iraqi president[163] was charged among other with ethnic cleansing campaign against Kurds[164] and invasion of Kuwait.[165] After the terrorist attacks from 11 September 2001 in the United States,[166] the latter authorized the

---

[156] 'Milosevic challenges the legality of the UN tribunal', Online NewsHour, 13 Feb. 2002, available at http://www.pbs.org/newshour/updates/february02/milosevic_2-13.html last visited January 2008.

[157] See also IVO JOSIPOVIC: Responsibility for War Crimes before National courts in Croatia. *IRRC*, Volume 88, No. 861, March 2006, 145–168.

[158] See also ROBERT THOMAS: *Serbia under Milosevic. Politics in the 1990s*. London: Hurst and Company, 1999.

[159] See also GREGORY KENT: *Framing War and Genocide. British policy and news media reaction to the war in Bosnia.* USA: Hampton Press, 2006.

[160] See Slobodan Milosevic, ICTY Case information sheet, available at http://www.un.org/icty/cases-e/cis/smilosevic/cis-slobodanmilosevic.pdf last visited January 2008. See also JOHN R. W. D. JONES – STEVEN POWLES: *International Criminal Practice.* Oxford: 2003, index Milosevic, 1074.

[161] See Order terminating the proceedings, in *Prosecutor v. Milosevic,* Case No. IT–02–54–T, Trial Chamber 14 March 2006.

[162] See e.g. FRED HIATT: *Washington Post, "Who is a war criminal?"* August 30, 2001, http://www.pbs.org/newshour/bb/europe/yugoslavia/july-dec01/criminal_8-30.html last visited January 2008.

[163] See EFRAIM KARSH – INARI RAUTSI: *Saddam Hussein. A Political Biography*. New York: The Free Press, 1991.

[164] See JOHN BULLOCH – HARVEY MORRIS: *Saddam's War. The origins of the Kuwait Conflict and the International Response.* London: Faber and Faber, 1991.

[165] BBC News, *Charges facing Saddam Hussein,* 1 July 2004, available at http://news.bbc.co.uk/2/hi/middle_east/3320293.stm last visited January 2004.

[166] See on-line information at http://www.11-sept.org last visited January 2008. See also DOMINIC MCGOLDRICK: The Legal and Political Significance of a Permanent International Criminal Court. In DOMINIC MCGOLDRICK – PETER ROWE – ERIC DONNELLY (eds.): *The Permanent International Criminal Court. Legal and Policy Issues.* Oxford and Portland Oregon, 2004, 474–476.

invasion of Iraq.[167] The conflict[168] is more controversial as it is still on-going.[169] One may say that since the Iraqi Special Tribunal[170] was established by the United States and its allies,[171] it was more the United States' willingness to prosecute Saddam than the one of Iraq. The Tribunal was established by the Coalition Provisional Authority[172] and its jurisdiction was not recognized by Saddam.[173]

Even so, on 5 November 2006, Hussein was found guilty[174] of willful killing, forcible deportation and torture and was sentenced to two terms of ten years imprisonment and death by hanging.[175] Saddam Hussein was executed on 30 December 2006.

VI. Conclusions

The principle of complementarity was an innovative solution to make at least 60 states to sign and ratify the Rome Statute in order for the first International Criminal Court to come into being. The most important merits of the principle of complementarity worth mentioning: it represents respect for traditional sovereignty; it recognizes that national courts will be often the best to deal with international crimes, taking into consideration the availability of proofs and the costs; it recognizes that the criminal jurisdiction should be spread over the world and not centralized in the Hague; it encourages the states to develop an apply their national criminal justice system; it allows more states to become parties to the Rome Statute.[176]

---

[167] Alex Roberto Hybel – Justin Matthew Kaufman: *The Bush Administrations and Saddam Hussein. Deciding on Conflict.* New York: Palgrave, 2006, 2.

[168] Knut Dormann – Laurent Colassis: International Humanitarian Law in the Iraq Conflict. *German Yearbook of International Law* 47 (2004), 293–342 available at http://www.icrc.org last visited January 2008.

[169] As the situation in January 2008.

[170] Its Statute is available at http://www.cpa-iraq.org/human_rights/Statute.htm last visited January 2008.

[171] Michael A. Newton: The Iraqi High Criminal Court: Controversy and Contributions. *IRRC*, Vol. 88, No. 862, June 2006, 399–425. For a comparison with other tribunals, see Robin Geib – Noemie Bulinckx: International and Internationalized Criminal Tribunals: a Synopsis. *IRRC*, Vol. 88, No. 861, March 2006, 49–63.

[172] See Louis-Philippe F. Rouillard: *Precise of the Laws of Armed Conflicts*. Lincoln: Univers, 2004, 285.

[173] Id 171 at 405. See also Saddam's application no. 23276/04 at ECHR. He argued that the Coalition States (Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Turkey, Ukraine and the United Kingdom) represented *de facto* power in Iraq, and therefore he fell within their jurisdiction. The Court though did not consider there was any jurisdictional link between the applicant and the respondent States or that the applicant was capable of falling within the jurisdiction of those States, within the meaning of Article 1 of the Convention. The application was declared inadmissible. http://www.echr.coe.int/Eng/Press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm last visited February 2008.

[174] M. Cherif Bassiouni – Michael Wahid Hanna: The Iraqi High Criminal Court: a Statutory Analysis. *CASE W. RES. J. INT'L* L, 39, available at http://www.isisc.org/public/Bassiouni_Hanna_IHCCFinal.pdf last visited January 2008.

[175] See Martin Asser: *Opening Salvoes of Saddam Trial*, available at http://news.bbc.co.uk/2/hi/middle_east/4356754.stm last visited January 2008.

[176] Philippe Sands: After Pinochet: the role of national courts. In Philippe Sands (ed.): *From Nuremberg to The Hague. The Future of International Criminal Justice*. Cambridge University Press, 2003, 75–76.

Even if it presents some problematical aspects, which I laid down in this paper, mainly arising from the fact that the Court is given too much discretion to declare cases admissible, this principle has been admitted by more than 100 states until the end of 2007.[177] This does not mean that the number of cases that reach the Court should represent a measure of its efficiency. "On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success"[178] in other words „if complementarity works properly, then the ICC will have no cases."[179]

[177] See supra note 7.

[178] Statement by Luis Moreno-Ocampo, June 16, 2003, Ceremony for the Solemn Undertaking of the Chief Prosecutor, in Informal Expert Paper for the Office of the Prosecutor of the International Criminal Court: "The principle of complementarity in practice", id 36.

[179] IAIN CAMERON: Jurisdiction and Admisibility Issues under the ICC Statute. In DOMINIC MCGOLDRICK – PETER ROWE – ERIC DONNELLY (eds.): *The Permanent International Criminal Court. Legal and Policy Issues.* Oxford and Portland Oregon, 2004, 86.