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THE INSTRUMENTALIZATION OF THE COMPLEMENTARITY PRINCIPLE OF THE INTERNATIONAL CRIMINAL COURT: A MATTER OF ACTUALITY

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ABSTRACT

This project explores a principle considered by me as a researcher to be at the heart of the architecture of the Rome Statute of the International Criminal Court (ICC), namely complementarity. The balance between the sovereignty of states to prosecute alleged perpetrators of international crimes and the development of an autonomous and independent judicial institution, the principle of complementarity is here approached from a critical point of view. The researcher focuses in particular on the situations of the Democratic Republic of the Congo, Kenya and Ivory Coast, according to recent developments in the decisions rendered to date. The project looks at the attempts by various actors to instrumentalize the principle of complementarity and its interpretation in order to achieve different objectives. The researcher attempts to determine whether the principle of complementarity does in fact serve the interests of justice or is more used as a policy instrument. This project also sheds new light on the concept of "proactive/positive complementarity" advocating a greater role for the ICC vis-a-vis member and non-member states in order to achieve the objectives of the Rome Statute, notably in terms of collaboration and assistance.

Keywords: *International Criminal Court, Complementarity principle and Rome Statute.*

INTRODUCTION

The International Criminal Court (ICC) has experienced significant developments, including the referral of the situation in Libya by the UN Security Council, progress in the situation in Kenya, following the arrest of the former Ivorian President Laurent Gbagbo, or the referral to the Court by Mali and Comoros. Article 17 provides that a case before the Court may be declared inadmissible if domestic proceedings (inquiries, prosecutions) take place or took place, except in cases of unwillingness or incapacity of the court of the State having jurisdiction in the case. The Rome Statute appears to be a balance or compromise acceptable to the states that have ratified it, between respect for their sovereignty and the development of an independent and autonomous judiciary. In this regard, we hypothesize that member and non-member states are attempting to tip the balance of this balance to their advantage when a situation (within the meaning of the Rome Statute) in which international crimes have occurred, concerns them. The legal uncertainties that arise as to the argumentation of what are, for example, adequate internal procedures or when it is felt that there is a lack of willingness on the part of the State to act, or an inability of the national justice system to deal with it, tend to allow a form of political instrumentalization. In this project researcher discusses in detail the question concerning complementarity of the ICC from a critical point of view in order to analyze whether this principle really serves the interests of justice or is rather an instrument for political purposes.

The complementarity of the ICC is, in our view, at the heart of the Rome Statute's architecture since it connects the Court as an international institution with States parties and non-parties.

Since the entry into force of the Rome Statute on 1 July 2002, the ICC has come to play an increasingly important role in the context of international relations in situations of human rights violations and humanitarian law. Following Ivory Coast ratification on 15 February 2013, 122 States have ratified the Rome Statute so far, while 139 have signed the Rome Statute. Although the United Nations and its institutions played an important role in the establishment of the ICC and the two institutions are bound by an agreement on cooperation and assistance[1], the ICC is an independent judicial body. The first cases before the Court

[1] Rome Statute, supra note 1, art 2.

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were self-referrals under Article 14 of the Rome Statute[2] by Uganda (2003), the Democratic Republic of the Congo (DRC) (2004) and the Central African Republic. (2005). It was not until 2006 that a first arrest warrant was filed in the Lubanga case[3] (DRC) whose trial began in 2009 after several delays in 2008. On October 13, 2013, the ICC is officially seizure of 8 situations: in Uganda, the Democratic Republic of the Congo (DRC), Sudan (Darfur), the Central African Republic, Kenya, Libya, Ivory Coast and Mali. There are 20 cases pending before the Court, involving a total of 32 individuals[4]. Three of them died in connection with the situation in Uganda, Libya and Sudan[5] and 12 of them have still not appeared before the Court. Among them is the current President of Sudan, Omar Al-Bashir[6]. Charges were not laid against four individuals, Calixte Mbarushimana (DRC), Henry Kiprono Kosgey and Mohammed Hussein Ali (Kenya), and against Bahar Idriss Abu Garda (Darfur)[7]. On 3 October 2011, the Prosecutor received authorization from Pre-Trial Chamber III to open a *proprio motu* investigation in Ivory Coast on crimes allegedly committed there since 28 November 2010. A sealed arrest warrant was issued against Laurent Gbagbo on November 23, 2011, against his wife, Simone Gbagbo, on February 29, 2012 and against Charles Ble Goude on December 21, 2011[8]. In addition, since January 16, 2013, the Prosecutor opened an investigation at the Mail after the Malian government referred the situation to the Court on 13 July 2012[9]. "Preliminary examinations were also held in Georgia, Guinea, Colombia,

[2] Rome Statute, supra note 1, art 14.
[3] Mr. Lubanga was convicted on 14 March 2012 of war crimes for the enlistment and conscription of child soldiers.
[4] International Criminal Court, Situations and Cases, online: ICC <http: //www.icccpi. int / en menus / icc / situations% 20and% 20cases / Pages / situations% /. 20a d% / o20cases.aspx>.
[5] Following the confirmation of the death of Raska Lukwiya in August 2006, the proceedings against him were dropped as well as the death of Muammar Gaddafi, the Pre-Trial Chamber I decided, on November 22, 2011, to close the case. More recently, on 4 October 2013, the Trial Chamber ordered the closure of the case against Saleh Jerbo.
[6] For an interesting discussion on the question of the immunity of the Sudanese president and the obligations of states under the ICC arrest warrant, see Paola Gaeta, "Does President Al Bashir Enjoy Immunity from Arrest? (2009) 7: 2 J Int'l Crim Just 315.
[7] The Prosecutor v Callixte Mbarushimana, ICC-01/04 01 / 10-465-Red, Decision on the Confirmation of Expenses (16 December 2011) (ICC, Pre-Trial Chamber 1); The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey andJoshua Arap Sang, ICC-01 / 09-01 / 11 373.
[8] Situation in the Republic of Ivory Coast, ICC-02 / 11-01 / I 1- FRA, arrest warrant against Laurent Koudou Gbagbo (23 November 2011) (ICC, Pre-Trial Chamber I11)
[9] Situation in Mali, ICC-01/12, Letter of Reference by the Government of Mali, (13 July 2012) (CPI) online: ICC <http: //www.icc.cpi.int/NR/rdonlyres/A245A47F BFDI - 45B6-891 C-3BCB5BI 73F57 /O/ReferralLetterMalil3O7l2.pdf>

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Honduras, Korea and Nigeria Since April 3, 2012, the Prosecutor's Office decided to abandon its preliminary examination in Palestine[10]".

In this Project, we will discuss in more detail the question of the complementarity of the ICC from a critical point of view, according to recent events, in order to analyze whether this principle really serves the interests of justice or rather of instrument serving political purposes. As a first step, we will give an overview of the news of the ICC, then we will look in detail at the principle of complementarity. In the second part of our work, we will deal in more detail with our hypothesis, the political instrumentalisation of the principle of complementarity. We will study in particular the cases of the Democratic Republic of Congo (DRC), Kenya, Ivory Coast and Libya. We will also look at alternative justice processes to determine their impact on the admissibility of a case based on the principle of complementarity. In conclusion we will propose a return and an application of a proactive rather than a passive form of the principle of complementarity.

I. The ICC and Complementarity: The Principles and Foundations

The complementary character of the ICC is thus not to be analyzed in a vacuum, since it is the result of an evolution of international law based on the experiences of the criminal courts that preceded it and certain principles in international law, such as the obligation (or the right) to prosecute and/or extradite according to the Latin maxim aut dedere aut judicare and the principle of the exhaustion of domestic remedies.

A. Complementarity of the ICC Contrary

The provisions of the Statutes of the ICTY and the ICTR to the effect that these courts have primacy over national jurisdictions[11], the ICC is complementary to the latter. Indeed, as provided for in the tenth preambular paragraph and Article 1 of the Rome Statute[12], priority is given to national jurisdictions to try those suspected of international crimes. The Rome Statute seems to be a balance and an acceptable

[10] On 3 April 2012, the Public Prosecutor's Office issued a statement announcing that it could not determine whether the declaration of Palestine accepting the jurisdiction of the ICC under Article 12 (3) was valid, claiming that it did not have jurisdiction to determine whether Palestine forms a state or not. See Update on Situation in Palestine, (3 April 2012).

[11] Their statutes provide in Articles 8 and 9, respectively, that they have competing jurisdiction with the national courts and specify that they prevail over the latter in their application.

[12] Rome Statute, supra note 1, art 1.

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compromise for the states that have ratified it, between respect for their sovereignty and the development of an autonomous and independent judiciary. We believe that this balance or compromise is mainly at the level of complementarity.

From a pragmatic point of view and from the interests of justice, it is possible to explain the reasons justifying the interest of giving priority to national courts rather than to the international system. As is the case with the principle of the exhaustion of domestic remedies found in regional and international systems for the protection of human rights"[13], it is considered that national jurisdictions are generally better off tools to take care of these situations, taking for granted that they are functional and independent. Thus, it is considered that the national system on whose territory crimes occurred would have a better understanding of the historical and political context, easier access to victims and witnesses and thus better access to evidence. All of these factors lead to lower costs, while investigations and trials of such large scale involve sending field investigators, organizing visits, moving many witnesses or rogatory commissions for those outside the territory[14]. It is also a question of balancing the fact that different actors can bring the matter before the Court: the States Parties, the Security Council and the Prosecutor, in conjunction with the principle of State sovereignty, while leaving to them the primacy the credibility of the ICC as an independent judiciary would be greatly diminished, given the risks significant political interference. This system therefore favours national systems, depending on the obligation or right of States to try or extradite as recalled in paragraphs 4 and 6 of the preamble to the Statute of the Tribunal. Nevertheless, this may have the effect of encouraging Member States to adopt national legislation implementing the obligations arising from the Rome Statute in order to have adequate instruments and institutions to deal with these situations. This is what Canada did with the passage of the Crimes against Humanity and War Crimes Act in 2000[15].

B. Complementarity and the Rome Statute

[13] American Convention on Human Rights, 22 November 1969, 1144 UNTS 23, art. 46 (l) (a), (entered into force: 18 July 1978) [San José Pact].

[14] As an example, the Munyaneza trial was held in Montreal between 2007 and 2008 under the Canadian Crimes Against Humanity and War Crimes Act, RSC 2000, c 24, resulting from the Bill of Rights. C-19, Crimes Against Humanity and War Crimes Act, 2000

[15] Crimes Against Humanity and War Crimes Act, supra note 15

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The admissibility of a situation and / or a case is examined at different stages of the proceedings and is thus not limited to Articles 1 and 17 and the principles set out in the preamble to the Rome Statute. At the stage of assessing the information before the Prosecutor for the purpose of initiating an investigation under Article 53 (1), paragraph (b) specifies that he must verify whether the case would be admissible under article 17. In the particular case where the Prosecutor himself was seized of a *proprio motu* case within the meaning of Article 13 (c) and Article 15(3) (4) specify that the authorization of the Pre-Trial Chamber is necessary in order to open an investigation and to ascertain whether the Court has jurisdiction. Rule 48 of the Rules of Procedure and Evidence of ICC[16] specifies that the determination of the reasonable basis for initiating an investigation by the Prosecutor *proprio motu* must be based on the considerations of Rule 53 (1) (a), (b) and (c), whose admissibility under Article 17. In the case of a decision of the Prosecutor not to investigate under Rule 53 (2), the Chamber may, at the request of the State which has made the referral or Security Council, review the decision of the Prosecutor and ask him to reconsider. The same criteria of Article 53 (1) will apply under Article 17. Subsequently, when the Court is seized by a State (Article 13 (a)) or the Prosecutor (Article 13 (c)), Article 18 (1) specifies that, having considered that there are reasonable grounds to investigate, the latter must notify all States that may have jurisdiction. Following this, a State could, according to Article 18 (2), inform the Court that it opens or has opened an investigation and the Court should then consider the admissibility. First, following the issuance of an arrest warrant or subpoena, the individual may challenge the admissibility under section 19 (2) (a). A challenge may also be made under Article 19 (2) (b) by the State having jurisdiction, but only on the basis that it conducts or has conducted an investigation and not on all the criteria of Article 17. A State not party to the Rome Statute and not having accepted the jurisdiction of the Court within the meaning of Article 12 may also challenge the admissibility of a case under Article 19 (2) (c), except where the referral was made by the Security Council under Article 13 (b). Finally, the Prosecutor may, on his own initiative, ask the Court to rule on a question of admissibility or jurisdiction under Article 19 (3). At this point, the victims and those who have referred the situation will be able to comment. Also, Article 19 (1) specifies that the Court may decide ex officio on a question of admissibility. The

[16] The Regulations, supra note 12.

question remains whether this is discretion or an obligation, given the scope of the English version of paragraph 1 of Article 17 stating: "[...] the Court shall determine which a case is inadmissible where [...]"[17]. However, in the Ntaganda case, the Pre-Trial Chamber II asserted that the assessment of its proprio motu power regarding admissibility is discretionary[18]. In closing, the one and only way to challenge a case on the basis of admissibility after the commencement of the trial is that provided for in Article 19 (4), i.e. on the basis of the ne bis in idem rule, therefore on the basis of the res judicata authority provided for in Articles 17 (l) (c) and 20 (3) of the Rome Statute.

C. Passive complementarity versus proactive complementarity

According to some authors[19], there are two types of complementarity in the Rome Statute system. First, a more objective or passive complementarity, which is mainly the one we have presented so far. The latter is applied in its strict and pragmatic sense, only relevant when a state is unable or unwilling to initiate proceedings. Thus, there is a vertical relationship between the states and the ICC, placing it in the role of a court of last resort in deciding whether a case is admissible. The hidden side of complementarity is the one that emphasizes collaboration and assistance between the ICC and the states. The scope of this collaboration is provided, but not exclusively, in Article 93 (10), which provides for a framework for collaboration between the ICC and the State conducting an internal investigation and requesting it. This provision is supplemented by Rule 194 of the Rules of Procedure and Evidence:

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[17] Rome Statute, supra note 1, art. 17.

[18] Situation in the Democratic Republic of the Congo, ICC-01-04-169-tFRA, Judgment on the Prosecutor's Appeal Against the Pre-Trial Chamber's Decision The Request for Prosecutor's Order of the Order of 58 '(13 July 2006) at para 48 (ICC, Appeals Chamber).

[19] See, for example, William Schabas, "Complementarity in Practice": Some Uncomplimentary Thoughts "(2008) 19: 1 Crim LF 5 [Schabas, Complementarity in Practice]; Carsten Stahn, "Complementarity: a Tale of Two Notions" (2008) 19: 1 Crim LF 87; William W Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49: 1 Harv IntL'Jl 5 3 ["Proactive Complementarity"].

> "Consistency with its mandate to help ensure that serious international crimes do not go unpunished, it should be a high priority for the Office of the Prosecutor to be active and effective and carry out prosecutions"[20].

In practice, this positive complementarity can materialize in different forms[21]. This can be indirect, while the ICC acts as a catalyst for change and reform, or by encouraging non-States to ratify the Rome Statute, or by encouraging states to enact legislation implementing the Rome Statute and to carry out national investigations and prosecutions. Nevertheless, in practice, this idea of positive complementarity seems to have been put aside by the prosecutor's office in the first cases[22]. In the case of self-referrals from the Central African Republic, the Democratic Republic of the Congo and Uganda, it is noted that it was rather the Prosecutor who encouraged these States to make such referrals, rather than collaborating with them to continue investigations and prosecutions initiated at the national level.

In terms of state capacity, some authors claim that Uganda has one of the best judicial systems and the capacity to hold such trials[23]. With regard to the DRC, it was first tried at the 2004 dismissal that it did not have the capacity. Then, at the time of the confirmation of the arrest warrant against Thomas Lubanga, it was considered that the situation had evolved in such a way as to permit the holding of trials of this magnitude following the major reforms carried out since 2006[24]..

This is what happened in the case of self-referrals, a situation that never seems to have been seriously considered during the preparatory conferences and during the drafting of the Rome Statute in connection with the Article 14[25]. Only complaints from other States were considered. In the first three auto-referrals, both the Prosecutor and the States involved waived any arguments regarding admissibility on the basis of complementarity, since there had been an agreement. The danger in this regard is that, while the Prosecutor wishes to continue to encourage States to make such referrals, this only seems to encourage the

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20 Ibid at p 5.

21 See Christopher K Hall, "Positive complementarity in action" in Carsten Stahn and Mohamed El Zeidy, ed., The International Criminal Court and Complementarity: From Theory to Practice, vol II, Cambridge, Cambridge University Press, 2011.

22 Schabas, "Complementarity in Practice", supra note 23.

23 Schabas, "Complementarity in Practice", supra note 23.

24 The Prosecutor v Lubanga, ICC-01 / 04-01 / 06-8-US-Corr, Decision on the Prosecutor's Application for Warrant of Arrest, Article 58 (10 February 2006) (ICC, Pre-Trial Chamber 1) at para 36.

25 Schabas, Complementarity in Practice, supra note 23 at 11

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prosecution of opponents of the current regime, whereas only members of armed groups opposed to the governments in place have been worried until now in these three situations. Based on this collaboration, the State is free to provide evidence and testimony on a discretionary basis, while it is unlikely that communicates elements that incriminate its own leaders. Also in the light of the case law of the ICC, the qualification of what internal procedures within the meaning of Article 17 (investigation and prosecution), can also cause problems. In the case of the DRC and of Thomas Lubanga, if one ignores the inability of the Congolese justice system at the beginning of the survey in 2004, Mr. Lubanga was still imprisoned in the DRC and accused of crimes against humanity, genocide, murder, illegal detention and torture[26]. The Court ruled that the fact that Mr. Lubanga was only charged with various crimes before the ICC, either for war crimes related to enlistment, the conscription of child soldiers and for their participation in hostilities, does not make the case inadmissible, since it is a different case involving different crimes. To be considered inadmissible, internal procedures must address the same case, or aim for the same person in the same conduct. Against Germain Katanga, also in connection with the situation in the DRC, was also detained and a Congolese arrest warrant weighed against him for crimes against humanity. The Court determined that, despite the fact that the Prosecutor is also accused of crimes against humanity, the Congolese arrest warrant was not on the same line[27]. This is essentially the same situation regarding Mathieu Ngudjolo Chui, also detained and prosecuted in Congo. In short, in all these cases, the Chamber ruled that national proceedings did not deal with the same cases as those of the Prosecutor, rather than dealing in detail with the issues of the willingness and ability of those States to actually conduct investigations or prosecution.

II. The complementarity of the ICC: Between interest of justice and political instrumentalization

This second part deals more specifically with regard to the political instrumentalization that can be made of the principle of complementarity of the International Criminal Court.

A. Legal uncertainties as to the application of the principle of complementarity

[26] See Sarah M.H Nouwen, "Fine-tuning complementarity" in Bertram S. Brown, "Research Handbook on International Criminal Law," Cheltenham, Edward Elgar, 2011 at 206.
[27] Prosecutor v Germain Katanga, ICC-01 / 04-01 / 07-55-tFRA, Decision on Evidence and Information Provided by the Prosecution for Warrant of Arrest against Germain Katanga (5 November 2007) at para 20 (ICC, Pre-Trial Chamber 1).

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The Rome Statute appears to be a balance or compromise acceptable to ratifying States, between respect for their sovereignty and the development of an independent and autonomous judiciary. We believe that this balance or compromise is mainly at the level of complementarity

Although Article 17 (2) and (3) provide some pointers for assessing when there is a lack of willingness or incapacity of the State in a particular case, in practice we note that these concepts remain unclear. On the one hand we have benchmarks in terms of legal standards that are contained in the aforementioned articles, but on the other hand we have facts and practices from states that must be analyzed in light of these standards. It is at this decisive stage that, on both sides, attempts will be made to resort to the indeterminate nature of legal norms by using law as a tool to assert one's position[28].

This indeterminate character, in the case of Article 17, may nevertheless be reduced in order to limit the interpretation that can be made of it. This is what Burke-White asserts[29] that one of the objectives of the Rome Statute is to provide objective criteria in order to limit the interpretations that can be made of them. On the one hand for the benefit of lawyers and judges to reduce the margin of appreciation and interpretation of the admissibility of a case, but also for States to allow them to adjust their national practices and systems by the adoption of reforms.

B. The case of the DRC, Kenya and Ivory Coast

1. THE DEMOCRATIC REPUBLIC OF CONGO

For more than two decades now, the DRC has experienced many conflicts combining natural wealth, ethnic conflict and political conflict involving several neighbouring countries as well as several armed groups. These conflicts have reportedly caused more than 3.3 million casualties in recent years[30]. Despite the signing of peace agreements and the establishment of a transitional government in 2003, violence continued in the Ituri and Kivu regions. The Democratic Republic of the Congo first signed the Rome Statute in September 2000 and ratified it in April 2002, making it one of the first 60 states to do so. It was in June

[28] Martti Koskenniemi, "The Politics of International Law 20 Years Later" (2009) 20 EJIL 7.
[29] William W Burke-White, "International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo" (2005).
[30] According to figures from the International Rescue Committee, see Burke White, "International Criminal Court as Part of a System", supra note 47

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2004 that the Prosecutor took the decision to open an investigation into the territory of the DRC on serious crimes alleged to have been committed on its territory since July 1, 2002, following a self-referral by the Congolese State in March 2004. Following his investigations, the Prosecutor filed a first arrest warrant against Thomas Lubanga in February 2006, a trial that began in January 2009. Subsequently, arrest warrants were filed against Germain. Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana and Sylvestre Mudacumura in 2012. According to Burke-White, President Kabila did not seem personally targeted and did not have to be worried about future The ICC's investigations, unlike its main political rivals, including ex-president Bemba (MLC party) and Azarias Ruberwa (RCD party), have both been at the head of armed groups in the past. In this way, by pleading the failure and inability of the Congolese justice system (at the time) to judge international crimes of this magnitude, the ICC's principle of complementarity has been used to achieve certain objectives[31].

On the other hand, we note that the referral to the ICC served as a catalyst for reforms in the Congolese national justice system. As mentioned, the admissibility of the case was made possible partly because of the incapacity of the Congolese judicial system. Just as President Kabila used to advance his interests, his political rivals in the government did the same, but in the opposite direction when they initiated important institutional reforms to assert jurisdiction. the DRC to try these crimes. Controlling the Ministries of Justice, Finance, Budget, Foreign Affairs and Defense, they have been able to initiate important reforms. In this way, it was possible for them to challenge the admissibility of the case before the ICC by pleading the primacy of the Congolese state to try these cases under Article 17 (I) (a). Nevertheless, despite the fact that the Trial Chamber recognized that the Congolese justice system had been reformed since 2004 and that investigations and prosecutions had been initiated, the Court was of the view that the conditions of article 17 (l) (a) to (c) and 17 (3) were not fulfilled[32]. On another level of analysis, it is interesting to note that following the Prosecutor's announcement in 2003 that he was going to take a close look at the situation in the DRC, the creation of a truth reconciliation commission was announced, along with the reforms. However, in the opinion of several international observers, the partisanship of the

[31] See Marlies Glasius, "A Problem, Not a Solution: Complementarity in the Central African Republic and Democratic Republic of the Congo" in Carsten Stahn and Mohamed El Zeidy, supra note 28 at pp. 1214 et seq.
[32] Prosecutor v Thomas Lubanga Dyilo, supra note 4.

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Commission and the lack of protection of witnesses led to its being quickly discredited and considered to be illegitimate[33].

2. KENYA

The situation in Kenya concerns the violence that followed the December 2007 elections following the victory of President Mwai Kibaki of the Party of National Unity (PNU) at the expense of his opponent Raila Odinga of the Orange Democratic Movement (ODM). Following the unveiling of election results, riots and violence erupted in several parts of the country following allegations of fraud. The violence took place against the background of political and ethnic tensions over a period of two months until 28 February 2008, the date of the signing of a power-sharing agreement and the creation of a commission of inquiry. More than 1,200 people are dead, several thousand wounded and several hundred thousand displaced. Sexual violence was also reported to have occurred. Following the March 2005 ratification of the Rome Statute by Kenya, it is through the use of its proprio motu power under Articles 13 (c) and 15 that the Prosecutor sought leave to initiate an investigation, while the situation was under preliminary investigation since February 5, 2008.

A) First. The Pre-Trial Chamber It authorized the initiation of an investigation in March 2010, relating to crimes against humanity within the jurisdiction of the Court committed between June 1, 2005 and November 26, 2009. In December 2010, two motions for subpoenas (Art. 58) were lodged against six high level personalities and two cases were opened[34]. Following their initial appearance on 7 and 8 April 2011, the Pre-Trial Chamber found that there were reasonable grounds to believe that they were criminally responsible as direct or indirect perpetrators. The confirmation of charges hearings took place in September and October 2011. In two judgments delivered on 23 January 2012, the charges were confirmed against four accused, excluding Mohammed Hussein Ali and Henry Kiprono Kosgey[35]. An arrest warrant was issued on 2 October 2013 against Walter Osapiri Barasa,

[33] Burke-White, « Proactive Complementarity », *supra* note 23 aux pp 573-574.
[34] The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, iCC-0 1 / 09-01 / l -1 - tFRA, Decision on the Prosecutor's Motion for Submission to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (March 8, 2011) (ICC, Pre-Trial Chamber II).
[35] The Prosecutor v Francis Kirimi Muthaura, Decision on the Confirmation of Charges, supra note 8 at 154

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alleged to have committed several attacks on the administration of justice consisting of the bribing or attempted bribery of Court witnesses[36].

Since the opening of the Prosecutor's investigation into these events, the Kenyan government has tried by various means to avoid referral to the ICC on the basis of complementarity. First, following the adoption of a new constitution in April 2010, the country has initiated major reforms of its justice system and police services, changes that now allow it to undertake investigations and prosecutions under the Rome Statute. This is what the Kenyan government reiterated in a 30-page document filed on March 31, 2011 in support of its application on the basis of Article 19 (2) (b). In particular, it was argued that these reforms to the country's justice system resulted in the inadmissibility of the case before the Court while the six suspects were under investigation in Kenya[37]. However, the Pre-Trial Chamber found that these statements were insufficient for lack of evidence to establish that investigations had indeed been conducted[38]. Note that here we are not at the stage of analyzing the state's willingness or ability to conduct proceedings, but to demonstrate the existence of these procedures. Indeed, the burden of proof rests with the State which alleges the inadmissibility of a case under Article 17[39].

In this case, the instrumentalisation of the principle of complementarity by Kenya appears in a different form. Thus, seeing that the Prosecutor was interested in the post-election violence situation of 2007-2008, a whole series of measures and procedures were initiated in the country. It is obvious that it cannot be speculated whether these measures would have been taken in the event that the Prosecutor had not begun an investigation. On the other hand, what can be said is that Kenya did everything possible to prevent the Court from seizing the case and then to declare them inadmissible on the basis of complementarity.

3. IVORY COAST

[36] The Prosecutor v Walter Osapiri Barasa, ICC-01 / 09-01 / 13-1-Red2, Warrant of Arrest for Walter Osapiri Barasa (2 August 2013) (ICC, Pre-Trial Chamber II).

[37] The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01 / 09-02 / 11-274, Situation in the Republic of Kenya (20 August 2011) at para 58 (ICC, Appeals Chamber) [Situation in the Republic of Kenya], quoting Kenya's Reply of 16 May 2011 at para 3.

[38] In 2009, following the implementation of the Rome Statute in Kenyan law in December 2008, attempts were made to create a special court for Kenya, but the initiative failed because of the lack of support for 2/3 in parliament.

[39] Situation in the Republic of Kenya, supra note 59 at para 61.

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The situation in Ivory Coast concerns the post-election violence of 20 November 2010 between incumbent President Laurent Gbagbo and elected President Alassane Ouattara. According to reports by Amnesty International and Human Rights Watch (HRW), several violations of international humanitarian and human rights law have been committed by all parties against civilian populations[40]. With regard to the ICC, the Prosecutor requested on 23 June 2011 the Pre-Trial Chamber to open an investigation into possible crimes against humanity and war crimes according to its powers proprio motu. In his request, the Prosecutor notes the absence of national that could bear the heaviest responsibility. On 3 October 2011, Pre-Trial Chamber III authorized the Prosecutor to open an investigation for crimes allegedly committed in Côte d'Ivoire since 28 November 2010[41].This statement was later confirmed by President Ouattara on December 14, 2010[42]. In a letter dated May 3, 2011, President Ouattara asserted that there are valid reasons to believe that crimes falling under the jurisdiction of the ICC would have committed and requested the assistance of the Court[43]. Note that despite this invitation from President Ouattara, this is not a self-referral, but a referral by the Prosecutor via his power proprio motu. On 23 November 2011, an arrest warrant was issued under seal by Pre-Trial Chamber III against Laurent Gbagbo. He is charged with four counts of crimes against humanity. He was handed over to the ICC on November 30 and his initial appearance was on December 5. The confirmation of charges hearing, which was originally scheduled for August 13, 2012, was postponed for medical reasons. "The hearing was finally held from February 19 to 28, 2013 and the decision was rendered on June 3, Pre-Trial Chamber I then adjourned the hearing for lack of sufficient evidence by the Prosecutor and giving the Prosecutor a new deadline for submitting new investigations"[44]. On November 22, 2012, the seals of a new warrant of arrest were lifted against Simone Gbagbo, the wife of the Ex-President[45]. This warrant issued on February 29, 2012 also charged him with four counts of crimes against humanity. On 1 October 2013, the seals of a third arrest warrant were lifted

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[40] Amnesty International, "" They looked at his identity card and shot him "Back six months of post-election violence in Côte d'Ivoire" (2011), online: amnesty.fr <http: // www .amnesty.org / sites / default / files / AFR 31 002 2011 ext fra.pdf>

[41] In a decision of 22 February 2012, the Pre-Trial Chamber II extended its authorization to investigate the situation in Ivory Coast to include crimes committed since 19 September 2002.

[42] Situation in the Republic of Ivory Coast, ICC-02-11, Letter confirming the acceptance of the jurisdiction of the ICC (14 December 2010), online: ICC <http://www.icc-cpi.int/NR /rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>.

[43] Situation in the Republic of Ivory Coast, ICC-02-1 1, Letter from President Ouattara to the ICC (May 3, 2011), online: www.icc-cpi.int <http: //www.icc-cpi. int / NR / rdonlyres / 7DAO8D8E-FF5E-40C8- 92D7-F058D5B032F3 / 283315 / LetterOuattaratoOTP03051 1.PDF>

[44] The Prosecutor v. Laurent Gbagbo, ICC-02/11-01/l1.

[45] The Prosecutor v Simone Gbagbo, Arrest Warrant, supra note 9.

against Charles Ble Goude, a warrant issued on 21 December 2011, which also charged him with four counts of crimes against humanity[46]. In parallel with the Prosecutor's investigation, international arrest warrants have been issued by Ivory Coast against former Gbagbo collaborators and several dozen people are also detained. More recently, the creation of the Commission for Dialogue, Truth and Reconciliation was announced April 11, 2011 in a speech delivered by President Ouattara. Although it is still not operational, its membership was announced in late September 2011 and will be chaired by former Prime Minister Charles Konan Banny and another formed between the star footballer Didier Drogba. Note that for now she is not given the power to grant amnesties.

C. Alternative Justice Processes: True Reconciliation Commissions

In post-conflict situations, there is an increasing use of alternative justice processes to shed light on human rights violations and alleged crimes[47]. In relation to the ICC, there is the question of whether these processes fulfil the requirements of Article 17 on the basis of complementarity as internal procedures to investigate and prosecute alleged perpetrators of international crimes. According to some authors, an alternative, non-judicial, but sincere, process of attributing responsibility for crimes would have the effect of, not rendering the case inadmissible under article 17, but of "convincing the Prosecutor to put his priorities elsewhere"[48]. Moreover, no provision prohibiting amnesties is contained in the Rome Statute, nor is there any indication that the Court would be bound by such amnesties under the non bis in idem rule[49]. In the case of the Special Court for Sierra Leone (SCSL), the Statute specifically provided that it was not bound by amnesties[50]. The criterion of the interests of justice included in Articles 53 (1) (c) and 53 (2) (c) of the Rome Statute[51] is also relevant, since in spite of the only elements set out in these articles, that of the gravity of the crimes committed and the interest of the victims and the status of the accused, two additional criteria can be assessed by the Prosecutor's Office. According to the Office of the Prosecutor's policy paper on the interest of justice, these additional criteria are the ongoing peace processes and

46 The Prosecutor v. Charles Ble Goude Arrest Warrant, supra note 9.
47 See Gregory S. Gordon, "Complementarity and alternative forms of justice, A new test for ICC admissibility" in Carsten Stahn and Mohamed El Zeidy, supra note 28 at pp 752
48 William A. Schabas, An Introduction to the International Criminal Court, 3rd ed., Cambridge, Cambridge University Press, 2007.
49 *A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier.*. S.v. "Ne bis in idem." Retrieved March 1 2019 from https://legal-dictionary.thefreedictionary.com/Ne+bis+in+idem.
50 Status of the Special Court for Sierra Leone, art. 10, online: <http: //www.scsl. org / LinkClick.aspx? fileticket-uCInd1MJeEw% / 3d & tabid 176>
51 Rome Statute, supra note 1, art. 53 (1) (c), 53 (2) (c).

what interests us more particularly are other alternative justice mechanisms organized at the national level. However, it remains discretion on his part to take this into account[52]. So far, the Prosecutor has never refused to open an investigation on this basis, but this criterion was nevertheless considered in the case of Uganda while many saw a possible settlement between the LRA (Lord Resistance Army) and the Ugandan state. However, it may be thought that such a decision could compromise the independence of the Prosecutor by demonstrating discretion in the face of political processes, which goes beyond his traditional role. Thus, the Prosecutor must be very careful in doing this analysis so as not to compromise his independence and impartiality.

What we can remember is that there is some legal uncertainty about alternative justice processes as to whether they are compatible with the Rome Statute. Indeed, the ICC Prosecutor did not really have to make this kind of assessment with regard to the desirability of opening an investigation and taking legal action. Although we admit that the issue remains primarily in the hands of the Prosecutor who has a wide discretion, we believe that some States could exploit this uncertainty to their advantage. This could be the case if they are worried about opening an investigation in their territory. However, we have seen that the creation of the Dialogue, Truth and Reconciliation Commission in Ivory Coast announced in April 2011 did not result in preventing the opening of an investigation by the Prosecutor's Office.

CONCLUSION

Although the principle of complementarity of the ICC has been largely addressed by the doctrine in recent years, we have been interested in a particular angle, often addressed indirectly by the authors. Thus, we have tried to show that, given the legal uncertainties that ensue, the actors of international law, mainly states, try to influence it in the achievement of their political interests. However, it is clear to us that better definitions and clarifications are needed in relation to Article 17 of the Rome Statute in order to allow a better assessment by the courts of the principle of complementarity and the national procedures put forward by the countries involved. Criteria such as a state's "ability" to "actually complete an investigation" seem rather vague, showing legal uncertainty.

[52] Policy Paper on the Interests of Justice (September 2007) (ICC, Office of the Prosecutor), online: ICC <http://www.icc.cpi.int/nr/rdonlyres/772c95c9-f54d-4321-bf09-73422bb23528/143640 /iccotpinterestsofjustice.pdf>

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For the future, we believe that the Office of the Attorney General should promote pro-active, rather than passive, complementarity, as is currently the case. The Rome Statute explicitly provides for this in Article 93 (10). Given the technical, political and legal means and influence it has, the ICC and the relevant bodies should work to develop and assist States to hold national trials of international crimes according to their obligation to prosecute and extradite. Given the limited resources and resources of the ICC, it is not possible to believe that it will have the capacity to deal with all the cases that would be admissible before it. For some authors, including Burke White, Article 17 should not be seen as a mere question of admissibility and jurisdiction, but as an opportunity to open a dialogue and collaboration between the International Criminal Court and States. Thus, the principle of complementarity, if used appropriately and innovatively, could help the Court to fulfil its greater purpose of combating and ending impunity in a spirit of collaboration. However, there is always a risk that this cooperation will be used in bad faith by the state to delay or prevent the opening of formal procedures[53]. On the other hand, according to the Court's Report on Complementarity, any form of cooperation is without prejudice to a decision of the judges on the inability or refusal to initiate national proceedings[54]. In conclusion, we can only hope that the objectives of the last resolution on complementarity adopted at the Assembly of States Parties (ASP-11) in November 2012 do not materialize in practice:

The Assembly of States Parties, [...]

"1. Decides to continue and strengthen the effective implementation of the Statute in the domestic legal order of States, to strengthen the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern, in accordance with internationally accepted standards of fair trial under the principle of complementarity[55]".

[53] Federicia Gioia, "Complementarity and reverse cooperation'" at pp. 807-816.
[54] Report of the Court on Complementarity, supra note 43 at para 3.
[55] Resolution on complementarity, supra note 38.