Article

The Enigmatic Principle of Complementarity: A Negotiated Machinery for Implementing International Criminal Law

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Abstract

The International Criminal Court (ICC) is the first court of its kind—a permanent international criminal tribunal. It has introduced a new kind of jurisdictional principle, namely the principle of complementarity. However, the idea of a forum exercising jurisdiction over transgressors of rules of international criminal law did not emerge with the ICC and can be traced back to the Nuremberg Tribunal. When the idea to establish a permanent international criminal court came about, it was apparent that the doctrine of state sovereignty and the territoriality principle would be the biggest hurdles that would have to be overcome. Complementarity would prove to be the solution that was agreed upon.

Keywords: complementarity; primacy; Nuremberg Tribunal; Tokyo Tribunal; ICTR; ICTY; International Criminal Court; admissibility; state sovereignty

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Introduction

International criminal justice evolved through the International Military Tribunals (IMTs) established in the aftermath of the Second World War, especially the Nuremberg Tribunal and several ad hoc tribunals. As important as the ad hoc tribunals had been, there had long been calls for a permanent international court to exercise jurisdiction over serious international crimes; its establishment was seen as an important element in the fight against impunity, because often states did not prosecute the perpetrators of grave crimes of concern to the international community. But the idea of a permanent international court was met with resistance because of concerns about state sovereignty and the strong sense which states had that sovereignty gave them the right to prosecute crimes within their jurisdiction and that only in exceptional cases, such as situations leading to the establishment of ad hoc tribunals, could this right to prosecute be internationalised. The principle of complementarity was the key that unlocked this debate by mediating between the need to have a permanent international criminal court aimed at prosecuting those responsible for committing serious crimes under international law, on the one hand, and the need to respect sovereignty, on the other.[1]

The principle of complementarity has been the subject of much academic research due to the fact that the international community now has its first permanent International Criminal Court (ICC).[2] The road leading to the creation of the ICC has been an extremely rocky one because this court could potentially put in jeopardy the right of every state to prosecute its own nationals under the personality principle, or prosecute nationals or non-nationals who committed a crime within their borders under the territoriality principle, or even prosecute non-nationals who committed serious crimes against nationals under the passive personality or protective principle.[3] The sovereign right to prosecute—whether under the territoriality, personality or passive personality principles—is well established in international law and valued highly by states.[4]

The Rome Statute, which established the ICC, does not define complementarity.[5] Complementarity is mentioned in both the Preamble and article 1 of the statute but neither of these can be said to constitute a definition of the concept. As a term in everyday use, complementarity means ‘a relationship or situation in which two or more

1 Xavier Phillipe, ‘The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?’ (2006) 88(862) International Review of the Red Cross 380.

2 Anna Olsson, ‘The Principle of Complementarity of the International Criminal Court and the Principle of Universal Jurisdiction’ (Graduate thesis, University of Lund 2003) 10.

3 Mohamed El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23 Michigan J Intl L 870.

4 ibid.

5 The principle is mentioned in the Preamble and art 1 of the Rome Statute but is not defined. Article 17 then goes on to state when the ICC may exercise jurisdiction on a matter; it gives guidelines on when a matter will be admissible before the court and there it becomes evident that the court is indeed complementary to national courts.

different things improve or emphasize each other's qualities.'[6] In a legal sense, as used in the Rome Statute, complementarity concerns the distribution of jurisdictional competence between the ICC and national jurisdictions. The purpose of this article is to try to identify the core content, from a legal perspective, of the principle of complementarity in the Rome Statute. This will be achieved by looking at the way in which previous tribunals have considered or dealt with the distribution of jurisdictional competence between international and domestic jurisdiction. The article will limit itself to the two IMTs established in the aftermath of the Second World War and the two ad hoc tribunals, as these tribunals are a prime example of the way in which jurisdictional competence has always been connected to the justice that was sought to be achieved. Examining this issue is important for the purposes of answering the question what the core content of complementarity entails, because this shows how and why the evolution from primacy to complementarity took place. Without a definition of the principle of complementarity, it is important to understand what existed previously and the reason the current international criminal system required it. The principle of complementarity in the Rome Statute will then be examined and the role of the ICC's admissibility regime will be identified as the core of the principle of complementarity. The possibility of waiving the principle of complementarity will also be looked into. Understanding what makes up the principle of complementarity and whether it is optional will help with understanding what the core content of complementarity is. On this basis, the article will then set out the essence of the principle as it stands in the Rome Statute.

The Evolution of Jurisdictional Competence

General

At the inception of the modern state, the establishment of the law was a priority for the sake of order. It was part of the social contract that the citizens would respect both one another and the laws put in place by the state. In the event of their breach of this contract, the state was well within its rights to take the necessary steps against them.[7] This is the period during which the notion of state sovereignty originates, even though the term 'sovereignty' is one that was adopted by the international community with the emergence of the international law system.[8] The definition of this term is one that encapsulates the idea of this period:

6 The literal meaning of complementarity was found at <https://en.oxforddictionaries.com.definition/complementarity> accessed 6 June 2018.

7 Jeffrey Reiman, 'Liberal and Republic Arguments against the Disenfranchisement of Felons' (2005) Criminal Justice Ethics 3.

8 MP Snyman, 'The Evolution of State Sovereignty: An Historical Overview' (2006) 12(2) Fundamina 3.

> [S]overeignty is also defined as supreme 'power', and under this definition power must mean the same as authority, legal power, the competence of imposing duties and conferring rights.[9]

This state of affairs is one that can be traced back to the time of the popes and the Emperor of the Holy Roman Empire.[10]

Jurisdiction is an integral part of a state's sovereignty and it can be exercised because of sovereignty. However, jurisdiction can also be limited by sovereignty.[11] This point was made by Mann in the 1964 Hague Lectures, where, quoting Lord Macmillan, he said:

> it is an essential attribute of the sovereignty of this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits.[12]

When the nation state was created, the only form of jurisdiction for criminal acts was national jurisdiction. This national jurisdiction was

> based on the rule of territorial jurisdiction, a rule that played a leading role in the consolidation of the authority of the territorial sovereign during the rise of the Nation State.[13]

It is said that

> [s]tate practice will probably show that the great majority, if not all, [s]tates take jurisdiction over an offence if an essential component element of it takes place in the territory of the [s]tate.[14]

Also connected to jurisdiction, and incidentally to sovereignty, is the territoriality principle.[15] In terms of this principle, 'jurisdiction obtains over acts that have been committed within the territory' of a state.[16] This principle became the main basis for the exercise of jurisdiction only in the 17th century. Before then, the primary basis for the

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9 Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) The Yale LJ 208.

10 Snyman (n 8) 4–5.

11 Hannah Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 The American J of Comp L 632.

12 FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111(1) Recueil des Cours 30.

13 Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court: Certain Uncontested Issues* (PhD thesis, University of Leiden 2011) 13.

14 Iain Cameron, 'Jurisdiction and Admissibility Issues under the ICC Statute' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 73.

15 Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2015) ch 3, 49.

16 Ryngaert (n 15) 49.

exercise of jurisdiction was the personality principle, which refers to the rights of states to prosecute foreigners who commit crimes against their citizens in areas beyond their jurisdiction.[17] The concept of law and order is premised on these three concepts in the modern state—jurisdiction, personality and territoriality. Baxbaum expresses this well when she says that '[s]tatehood is articulated by reference to a particular geographic territory; or events, by reference to their location within that territory.'[18] This is the basic rule in the law: the exercise of legal authority by a sovereign state. Crawford makes the argument 'that the creation of States is a matter in principle governed by international law and not left to the discretion of individual States.'[19] Yet the emergence of international criminal jurisdiction challenges the basic principle of international law of the authority of the sovereign and the assumptions underlying it. The challenge to the authority of the sovereign did not begin with the ICC and the Rome Statute; it was already evident in the previous international tribunals established to prosecute crimes under international law.

The Second World War and International Military Tribunals

The period after the Second World War saw the international community take a stand against the crimes that are committed during the time of war. International law played a major role in this process. This was an important period in the development of international prosecutions and the acceptance of the basic rules of accountability for international crimes. This is not because the international community did not take any action against the atrocities committed during the First World War but rather because their actions were more successful in the aftermath of the Second World War.[20] The Leipzig trials could be seen as failures due to the light sentences being imposed and the fact that only a few suspects were tried,[21] but also because the international community allowed itself to be convinced by Germany that they could prosecute the suspects themselves.[22] In many ways, the decision to allow Germany to carry out its prosecutions was a reflection of the adherence to sovereignty.

At the end of the Second World War, the Allied Powers occupied courts in Germany[23] and two IMTs were established, the first of which was located in Nuremberg while the later tribunal was located in Tokyo.[24] These two tribunals differed in the manner in

17 Ryngaert (n 15).

18 Buxbaum (n 11) 632.

19 James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) v.

20 Ove Bring, *International Criminal Law in Historical Perspective, Comments and Materials* (Jure 2002) 13.

21 Bring (n 20).

22 Bring (n 20).

23 See Allied Control Council Law No 10 (CCL 10) of 1945.

24 These were the Nuremberg International Military Tribunal created by the Moscow Declaration on German Atrocities of 30 October 1943 and the International Military Tribunal for the Far East created by the International Military Tribunal for the Far East Charter, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo 19 January 1946; amended charter dated 26 April 1946.

which they were established but their jurisdictional competence tells us what the initial relationship between national and international jurisdiction, as it was envisaged by the Allied Powers, was.

Nuremberg Tribunal

The decision to punish major war criminals of the European Axis—Germany, Italy and Japan—was reflected in the Moscow Conference of 1943.[25] The governments of the allies, led by the United States, the United Kingdom and the Union of Soviet Socialist Republics (Soviet Union) entered into a 'Declaration on German atrocities' in Moscow on 30 October 1943.[26] The Moscow Declaration determined that German soldiers and members of the Nazi Party would be sent to the countries where they had committed their criminal deeds and atrocities in order to be 'judged and punished according to the laws of these liberated countries and of the free governments which will be created therein.'[27] In this sense, the declaration foresaw a reliance on the traditional principles of sovereignty and the application of jurisdiction based on territoriality and passive personality. It was, in part, on the basis of the declaration that the London Agreement of 8 August 1945 was adopted.[28] In terms of article 1 of this agreement an IMT was to be established after consultation with the Allied Control Council for Germany.[29] The council was made up of the Soviet Union, the United States, the United Kingdom and France. These states were also the governing body in Germany and Austria following the Second World War, replacing the former government of Nazi Germany.[30] The tribunal was to conduct 'the trial of war criminals whose offences have no particular geographical location.'[31] Article 2 stipulates that the Charter of the International Military Tribunal (the Nuremberg Charter)[32] shall be annexed to it which will set out the jurisdiction of the IMT and the manner in which it will function.[33] By setting up an international tribunal, the London Agreement departed from the principles of sovereignty embodied in the London Agreement. This agreement was adopted by Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand,

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25 ILC, 'The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General' (1949) UN Doc A/CN4/5, 3 <http//www.un.org/law/ilc/index.htm> accessed 21 June 2018; see, generally, the Moscow Declaration on German Atrocities of 30 October 1943 (Moscow Declaration).

26 Moscow Declaration (n 25).

27 Moscow Declaration (n 25).

28 Agreement for the establishment of an international military tribunal done in quadruplicate in London on 8 August 1945 (London Agreement).

29 London Agreement (n 28).

30 London Agreement (n 28).

31 Article 1 of the London Agreement.

32 Charter of the International Military Tribunal (signed 8 August 1945, London) UNTS 251 (The Nuremberg Charter).

33 London Agreement (n 28).

India, Venezuela, Uruguay and Paraguay.[34] The Nuremberg Charter was an integral part of the London Agreement.[35]

The jurisdictional competence of the tribunal is dealt with in article 6 of the Nuremberg Charter.[36] This article stipulates:

> [t]he Tribunal established by the Agreement referred to in article 1 thereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the … crimes [set out in article 6 of the Charter].[37]

The distribution of jurisdictional competence is also set out clearly in the above article in that this IMT was mandated to deal with serious international crimes only. Therefore, other crimes remained the subject of the national jurisdiction. In relation to international crimes, the IMT operated in terms of the principle of primacy. In other words, for crimes under the jurisdiction of the tribunal, the tribunal's jurisdiction prevailed over that of the state.[38] For all other crimes, however, national courts retained exclusive jurisdiction in accordance with the principle of sovereignty.

The tribunal also had an opportunity to pronounce upon 'the foundation of its jurisdiction in international law.'[39] First, the court located its foundation in '[t]he making of the Charter'. The court said that this

> was the exercise of the sovereign legislative power by the countries which the German Reich unconditionally surrendered; and undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.[40]

The court made this statement because of Germany's unconditional surrender in 1945 to the governments of the Allied Powers.[41] The tribunal noted that under the 'declaration the said countries assumed supreme authority with respect to Germany.'[42] According to the tribunal, the signatories simply came together to do what they could have achieved alone. This is because any state can establish a tribunal.[43] Since the IMT was concerned with international crimes, this statement implies that even international crimes are, as a

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34 ILC (n 25).
35 Article 2 of the London Agreement.
36 The Nuremberg Charter (n 32).
37 Article 6 of The Nuremberg Charter.
38 ibid.
39 International Military Tribunal, *Trial of the Major War Criminals, Vol 1* (International Military Tribunal 1947) 48.
40 ibid.
41 ibid.
42 ibid.
43 ibid.

rule, subject to the jurisdiction of individual states.[44] This means that, in effect, the tribunal was exercising the sovereignty of the states in question and that, seen from this perspective, the primacy of the jurisdiction was not disturbed by the tribunal.

Tokyo Tribunal

The IMT for the Far East followed the Nuremberg Tribunal and it is not as well known as its predecessor.[45] It was established by a special proclamation that was concluded by the Supreme Commander, Douglas McArthur, for the Allied Powers in Tokyo on 19 January 1946.[46] The leading state in the establishment of the tribunal was the United States, but it was supported by the other governments of the Allied Powers and also by the Moscow Conference of 26 December 1945.[47] This tribunal was established to prosecute 'the major war criminals in the Far East'.[48] The court was to operate in Tokyo.[49] This IMT, like its predecessor, was to enjoy primacy over national jurisdiction in certain cases. In terms of article 5 of the Tokyo Charter,[50] the tribunal was awarded jurisdiction over persons charged with offences listed in the charter. These included crimes against peace, conventional war crimes and crimes against humanity. The work of this court was made manageable by the fact that it was to focus on the 'major war criminals', leaving the rest to be dealt with in terms of national law.[51] This form of distribution of jurisdictional competence was an essential feature as the tribunal was awarded sole jurisdiction and if it were to cover all crimes, its work would never have been completed. In a judgment where its jurisdiction was being challenged, the tribunal said that

> [i]t derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter.[52]

Conclusion

These two tribunals operated in terms of a principle that was stronger than the principle of primacy because they had the sole mandate to act in specific cases, there was an ouster of national jurisdiction, and only they could decide to defer to the national

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44 ibid.

45 Milton Owuor, 'The International Criminal Court and Positive Complementarity: Legal and Institutional Framework' (LLD thesis, University of Pretoria 2018) 27.

46 Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946.

47 ibid.

48 Article 1 of the 'International Military Tribunal for the Far East' Special Proclamation by the Supreme Commander for the Allied Powers (charter dated 19 January 1946; amended charter dated 26 April 1946, Tokyo) (The Tokyo Charter).

49 ibid.

50 The Tokyo Charter.

51 Article 1 of The Tokyo Charter.

52 *International Military Tribunal for the Far East Judgement, 4 November 1948, Court House of the Tribunal War Ministry Building Tokyo, Japan* <werle.rewi.hu-berlin.de> accessed on 25 March 2018.

courts.[53] This form of the primacy rule amounted to an almost complete derogation from the sovereignty principle in that states could not exercise the jurisdiction—whether it be territorial, nationality or passive—that is so central to sovereignty. A major criticism of the tribunals was the concept of victor's justice. However, one could not expect Germany after 1945 to prosecute its former leaders, the very leaders they had voted into power. On the one hand, it may be argued that in the literal meaning of the word, these two IMTs operated complementarily to the national courts that were mandated to take the appropriate action by the Moscow Declaration with the Nuremberg Tribunal;[54] and in the case of the Far East, with the national courts that prosecuted the less serious crimes.[55] This method ensured that their work was more manageable as a result of the distribution of the jurisdictional competence between the IMTs and the national systems. On the other hand, it may also be argued that both the Nuremberg and the Tokyo tribunals had primacy over national jurisdiction because for particular crimes only the IMTs had jurisdiction. The territoriality principle played a major role in this period because suspects were tried by the national courts of the place where they had committed their crimes and only those suspects that committed crimes that did not fall within a specific territory were tried by the IMTs.[56] The manner in which the IMTs were operated was as a result of the lessons learnt by the Allied Powers after the First World War, when they failed to prosecute the leaders who had committed crimes under international law.

The Two Ad Hoc Tribunals

In 1993 the International Criminal Tribunal for the former Yugoslavia (ICTY)[57] was established. This was followed by the establishment of the International Criminal Tribunal for Rwanda (ICTR)[58] in 1994. The ICTY and the ICTR were created on an ad hoc basis by the UN Security Council (UNSC) in terms of the powers awarded to them in Chapter VII of the UN Charter.[59] This was the first time that the UNSC had created a judicial organ 'and the members of the Security Council were able to assess the possible influence of such a tribunal on their own state sovereignty and conclude that it would be acceptable.'[60] Both of these tribunals 'represent[ed] the legacy of international

53 Article 6 of the Nuremberg Charter and art 5 of The Tokyo Charter awards them primacy in the specific situations.

54 The Moscow Declaration; this is an argument presented by El Zeidy (n 3).

55 Article 1 of The Tokyo Charter.

56 Article 1 of the London Agreement, which gave life to the Nuremberg Charter. This is also in terms of The Moscow Declaration and The Tokyo Charter echoed similar sentiments by allowing national courts to have jurisdiction over those that committed less serious crimes.

57 Established by UN Security Council Res 827 (25 May 1993), as amended by UN Security Council Res 1166 (13 May 1998).

58 Established by UN Security Council Res 955 (8 November 1994).

59 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945, San Francisco).

60 Olsson (n 2) 12.

criminal law laid out by the Nuremberg trials.'[61] They were created to deal with the horrendous human rights violations that took place in these two countries.[62]

The ICTY and the ICTR were ad hoc tribunals because they were not created to be permanent features in international criminal law. They had instead been established to fulfil a specific mandate and once that had been achieved, then they would be dissolved. Their purpose was to restore international peace and security in the two regions. Because the ICTY and the ICTR were not intended to be permanent institutions, completion strategies were adopted for both tribunals[63] and it was because of these strategies that they dealt only with high-profile perpetrators and left the less important ones to the domestic courts to prosecute. The International Residual Mechanism for Criminal Tribunals (UNMICT) established pursuant to this completion strategy was intended to complete any outstanding trials and appeals.[64]

Article 9(1) of the Statute of the ICTY confers the ICTY and the national courts with concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.[65] In other words, both the ICTY and the national courts could investigate and prosecute crimes under the Statute of the ICTY. Similarly, under article 8(1), concurrent jurisdiction was conferred on the ICTR and national jurisdiction to prosecute 'persons for serious violations of international humanitarian law committed in the territory of Rwanda' and to prosecute Rwandan citizens for 'violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994'.[66] While concurrent jurisdiction was conferred—meaning that both the tribunals and the national systems had jurisdiction—it was the jurisdiction of the tribunals that would take precedence, according to the respective second paragraphs of the two abovementioned articles.[67] In this context, '[p]rimacy means that the Tribunals have the ability to request the national courts to defer a specific case to the tribunals at any stage of the procedure.'[68] Moreover, if requested to defer a specific case to the tribunals, national courts would be obliged not to proceed with that case. As much as both tribunals are based on the principle of primacy, it would seem that the manner in which the ICTR was awarded primary jurisdiction was perfected from the manner in which it was awarded to the ICTY: article 9(2) of the Statute of the ICTY states that '[t]he

61 L Clarke, 'Complementarity as Politics' (2016) 2(1) J of Intl and Comp L 48–49.

62 El Zeidy (n 3) 882.

63 UN Security Council Res 1534 (2004) UN Doc S/REA/1534, 5; Completion Strategy adopted in UN Security Council Res 1503 (2003) UN Doc S/REA/1503 as well as the UN Security Council Res 2329 (2016).

64 Established by UN Security Council Res 1966 (2010). *Prosecutor v Augustin Ngirabatware* ICTR-99-54-T (Trial Chamber II) and UN Security Council Res 1503 (2003).

65 Updated Statute of the ITCY as amended 7 July 2009 by Res 1877 (ICTY Statute).

66 Statute of the International Tribunal for Rwanda, New York, 8 November 1994 (ICTR Statute).

67 Article 9(2) of the ICTY Statute and art 8(2) of the ICTR Statute.

68 Olsson (n 2) 13.

International Tribunal shall have primacy over national courts',[69] whereas article 8(2) of the ICTR Statute states that '[t]he International Tribunal for Rwanda shall have primacy over national courts of all States.'[70]

The superiority of these tribunals means that they have the power to formally take the prosecution of an accused from the domestic authorities.[71] However, the imposition of a superior international tribunal upon a sovereign state did not go unchallenged by some states.[72] The primary jurisdiction of the ad hoc tribunals has been challenged on the ground that it infringes on the sovereignty of the state.[73] The Appeals Chamber of the ICTY dealt with this argument in *Prosecutor v Tadic* (the *Tadic* case) and concluded that this infringement was permitted by the UN Charter, which does restrict sovereignty if such restriction is permitted by means of a mandate from the UNSC.[74] The Appeals Chamber found that

> when an international tribunal such as the present one is created, it must be endowed with primacy over national courts, because if it were not so, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' in order to avoid the jurisdiction of the international tribunal.[75]

The essence of this finding is that the ICTY and the ICTR carried on the legacy of the IMTs in that the international tribunal and international law were superior to the national judicial process.[76] This may have been necessitated by the fact that the two conflicts were internal in both territories, with the political situation that remained in the aftermath leading to their governments not being trusted to prosecute all of the perpetrators.[77] The exercise of national jurisdiction in such instances would be fraught with political difficulties and tensions. For example, it would not be improbable that Serbia would be unlikely to prosecute in earnest grave crimes committed by its nationals. In the instance of the ICTR, the tribunal was a necessity because after hundreds of thousands of Rwandans had been killed, it would not have been possible for the Rwandan judiciary to prosecute individuals. Importantly, the ICTR did not work alone, and the national system also played its part in prosecuting the majority of the

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69 ICTY Statute.

70 ICTR Statute.

71 Article 8(2) of the ICTR Statute.

72 *Prosecutor v Tadic,* No IT-94-1 (ICTY 2 October 1995), *Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction* (*Tadic*) <www.un.org/icty/tadic/appeal/decision-e/51002.htm> accessed 31 March 2018.

73 *Tadic* (n 73) para 55.

74 *Tadic* (n 73) conclusion reached by the tribunal after analysing various articles in the UN Charter at paras 55–60.

75 *Tadic* (n 73) para 58.

76 Olsson (n 2) 12.

77 *Tadic* (n 73) on the question of jurisdiction.

offenders in the Rwandan genocide through the Gacaca courts.[78] It was also important that neither of these tribunals were located too far from the conflict areas.

Conclusion

The ad hoc tribunals established in response to grave crimes committed in particular territories aimed to restore peace and security through the prosecution of persons who had committed serious violations of international humanitarian law.[79] The ad hoc tribunals reflected an evolution of legal rules concerning the distribution of jurisdictional authority between an international tribunal and a domestic system. Initially, there was only a national exercise of jurisdiction due to the operation of the principle of sovereignty. This applies to all crimes, including serious crimes that constitute crimes under international law. Under the charters establishing the IMTs,[80] while national jurisdiction persisted over less serious crimes, international jurisdiction emerged as the main form of jurisdiction over crimes which were of a more serious nature. The ad hoc tribunals established a system of primacy under which national jurisdiction was subject to the international tribunals. Therefore, what we see emerging is the gradual rise of international jurisdiction to the point where it assumes the primary role in relation to the commission of crimes under international law.

This emergence of international jurisdictional competence, even the primacy of such international jurisdiction, arose mainly because of the dominance of the Allied Powers after the Second World War and later the UNSC after the end of the Cold War. The above tribunals had to have primary jurisdiction because they were not a product of any negotiations or compromise. None of the above countries had a choice in the process of determining the distribution of jurisdictional competence between the international tribunal and the national courts. Indeed, these countries had no choice in the very establishment of the tribunals: all of the tribunals had been imposed upon the states concerned either because they had lost a war or because the conflict that occurred in their territory shocked the international community to the point that steps had to be taken against the perpetrators to send a strong message that such conduct would not be tolerated. In effect, the world witnessed national judicial systems becoming increasingly subordinate after each conflict, and this became the image of international law.

The adoption of the Rome Statute occurred in a completely different context: the Statute was not the product of a response to a particular state and there were therefore no ‘victors’ and no ‘affected States’. Also, states could, therefore, possibly be affected by the approach to the distribution of jurisdiction. Under these circumstances, it would, as

78 See Timothy Longman, ‘An Assessment of Rwanda’s *Gacaca* Courts’ (2009) 21 A Journal of Social Justice 304–312 <http://doi.org/10.1080/10402650903099369> in which there is a discussion of the traditional judicial system.

79 Olsson (n 2) 14.

80 The Moscow Declaration and The Tokyo Charter.

a political matter, be expected that there would be a greater incentive to safeguard the principle of sovereignty.

The Principle of Complementarity in the Rome Statute of the International Criminal Court

General

The Draft Statute for an ICC[81] was a complete departure from the elevation of international jurisdiction over national jurisdiction in the statutes of previous international tribunals. The International Law Commission (ILC) prepared the Draft Statute of the ICC over a number of decades,[82] and it already provided for the complementary nature of the court in its preamble as well as in several articles, namely, articles 20, 25, 26, 27, 34 and 35.[83] Article 20 dealt with the 'subject-matter jurisdiction of the court';[84] articles 25, 26 and 27 all dealt with the investigation and prosecution procedure. Specifically, they set out the procedures for a complaint, the investigation of the alleged crime and the actual commencement of the prosecution respectively. Article 34 set out when the jurisdiction of the court may be challenged and article 35 was the admissibility clause. The idea that the ILC had with this principle was that the court would complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters.[85]

According to the ILC, the ICC was not intended to exclude the existing jurisdiction of national courts or to affect the rights of states to seek extradition and other forms of international judicial assistance under existing arrangements.[86] Therefore, this Draft Statute, which was submitted to the UN General Assembly (UNGA) in 1994, already reflected a greater respect for national jurisdictions and sovereignty than the statutes of previous tribunals.

Upon receiving the ILC Draft Statute, UNGA submitted it to an ad hoc committee established to scrutinise and make recommendations based on it.[87] The ad hoc committee submitted its report on the text to UNGA on 6 September 1995.[88] After

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81 ILC, 'Draft Statute for an International Criminal Court with Commentaries' (22 July 1994) <http://www.refworld.org/docid/47fdfb40d.html> accessed 6 June 2018 (the Draft Statute).

82 Pursuant to the General Assembly's mandate under the UN Charter, art 13(1)(*a*), the Assembly created the ILC via Res 174 (II) of 21 November 1947. The original version of the ILC Statute was annexed to that resolution. Article 1 of the statute charges the ILC with 'the promotion of the progressive development of international law and its codification.'

83 The Draft Statute.

84 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court (1995) GAOR 50th Session Supp 22 UN Doc A/50/22 para 54.

85 Paragraph 2 of the commentary to the Preamble, the Draft Statute.

86 Report of the International Law Commission on the work of its 46th Session, Draft Statute for an International Criminal Court GAOR 49th Session Supp 10 UN Doc A/49/10/1994, Preamble para 3.

87 UNGA Res 49/53 (9 December 1994).

88 GAOR (n 84).

scrutinising the 'third preambular paragraph of the draft statute', the committee found that the principle of complementarity 'deals with the relationship between the proposed ICC and national criminal and investigative procedures.'[89] In other words, in the view of the committee, it concerned the distribution of jurisdiction between the proposed ICC and a national authority to investigate and prosecute international crimes.

Some states felt that 'the principle of complementarity should create a strong presumption in favour of national jurisdiction.'[90] Others, however, were against this presumption because, in their view, even though 'such [national] courts should retain concurrent jurisdiction with the court, the latter should always have primacy of jurisdiction.'[91] The majority of its members were of the view that this paragraph meant that the ILC never intended this proposed court to replace national courts;[92] they favoured a 'balanced approach' which saw the importance of protecting 'the primacy of national jurisdictions, but also [of avoiding] the jurisdiction of the court becoming merely residual to national jurisdiction.'[93] The members of this committee all agreed that the principle of complementarity was a necessity; but they could not easily reach agreement about the question of the primacy of national jurisdictions.[94] Three groups of views emerged on the interpretation of the complementary nature of the court: one was in favour of national prosecutions, the other was in favour of international prosecutions while the final one offered a more balanced approach, which was that

> it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction.[95]

Subsequent to the work of the ad hoc committee, a Preparatory Committee (PrepCom) was established in 1995 to convert the Draft Statute of the ILC into a comprehensive convention that could be submitted for adoption by the member states.[96] The PrepCom took the ILC's Draft Statute and developed it into the product that was submitted to the States at the Rome Conference in 1998.[97] In 1996, the PrepCom published the first volume of its report in which they indicated that were in agreement that the principle of complementarity was about the jurisdictional relationship between national courts and the ICC.[98] The only matter that was left for them to agree on was the proper balance between the two and the emphasis that complementarity should be given in the final

89 ibid para 29.
90 Paragraph 31.
91 Paragraph 32.
92 Paragraph 29.
93 Paragraph 32.
94 Paragraph 38.
95 Owuor (n 45) 53 and GAOR (n 84) para 33.
96 UNGA Res 50/46 (11 December 1995); GAOR 50th Session Supp 49, 307; (1995) UN Doc A/50/46.
97 In accordance with UNGA Res 50/46 (11 December 1995).
98 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol 1, Proceedings of the Preparatory Committee during March–April and August (1996) GAOR 51st Session Supp 22 (A/51/22) <http//www.legal-tools.org/doc/e75432/> accessed 21 June 2018.

statute.[99] On 3 April 1998, the PrepCom completed the Draft Statute and the Draft Final Act which dealt with the admissibility criteria in its article 36.[100] This article was exactly the same as article 35 of the ILC's Draft Statute, except that it also covered suspects who are being prosecuted or who were previously prosecuted instead of dealing only with cases that were still under investigation.

A Complementary Court

The Rome Statute establishes a court that must be 'complementary to national criminal jurisdictions'[101] and even though the statute does not go further to define what it means by this requirement, it has been said that

> the term has come to encompass both the nature of the relationship between national courts and the ICC, and the specific application of those provisions relating to admissibility.[102]

The nature of the relationship between the court and domestic jurisdictions encourages the exercise of jurisdiction by states and therefore promotes sovereignty. This approximates what has been referred to as complementarity being the 'big idea'.[103] Complementarity as a 'big idea', over and above delineating domestic jurisdiction as being superior to that of international courts, goes beyond legal norms by promoting the exercise of jurisdiction by states. It is from this 'big idea' that the notion of positive complementarity has become *en vogue*.[104] This is not a legal concept, since it merely serves to encourage and facilitate the exercise of jurisdiction—it neither obliges nor permits anything. Complementarity as an admissibility requirement, on the other hand, is a specific legal concept with specific consequences: it serves as a tool with which to facilitate the distribution of jurisdictional competence between the ICC and national courts.[105] These tools can be found in articles 17 and 18 of the Rome Statute, which deal with the preliminary rulings regarding admissibility, and article 19, which sets out guidelines on the ways in which challenges to the jurisdiction of the court or the admissibility of a case should be dealt with.

The distribution of jurisdictional competence in the Rome Statute is characterised by the admissibility requirements in the Statute as it sets out the standard that national proceedings have to meet in order to exclude the jurisdiction of the ICC. Interestingly,

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99 ibid para 153.

100 UN Prep Committee on the ILC, 'Decisions Taken by Preparatory Committee at its Session held in New York, 1–12 December 1997' (18 December 1997) A/AC 249/1997/L 9/Rev 1 at 28, 29.

101 Preamble and art 1 of the Rome Statute.

102 Lijun Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court' (2005) 4(1) Chinese J of Intl L 121–122.

103 Sarah Nouwen, *Complementarity in the Line of Fire – The Catalytic Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013) 414.

104 Owuor (n 45) 94.

105 Nouwen (n 103) 414.

it should be noted that the notion of complementarity as a 'big idea' might lead to competition between jurisdictions and therefore raise the issue of the distribution of jurisdictional competence. This article now turns to a consideration of the specific provisions relevant to complementarity as an admissibility requirement, namely, those under article 17.

Article 17: The Heart of the Complementarity Regime of the ICC

An important issue that had to be dealt with by the drafters of the Rome Statute was the relationship that they envisaged the permanent ICC would have with national courts. As described above, the statute dealt with this through the principle of complementarity.

The principle of complementarity was formally codified in the Rome Statute. Paragraph 10 of the Preamble to the Statute states that

> … the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.[106]

This sentiment is echoed in article 1 of the Statute, which states that an

> International Criminal Court is hereby established. It 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 jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

The main provision in respect of the ICC's complementarity regime is article 17, especially article 17(1), which states:[107]

> 1. Having regard to paragraph 10 of the preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> *(a)* The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> *(b)* The case 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;

106 The Rome Statute.
107 The Rome Statute.

(*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.

This article sets out the conditions under which a case in which the court has jurisdiction will be admissible, that is, the condition under which the court may exercise its jurisdiction. Put differently, this provision concerns the distribution of jurisdiction between the ICC and national jurisdictions. Key to the admissibility framework is the idea that the court may exercise its jurisdiction to prosecute a matter only where the national authorities have failed to deal with that matter.[108] This ensures that the manner in which the court operates remains true to the intentions of the drafters of the Rome Statute, which included that the court should be a court of last resort.[109] The notion of the court being one of last resort is achieved by the objective standards set out by the provision to ensure that the court is forced to respect the primary right and responsibility that lies with states to investigate and prosecute international crimes.[110] According to Benzing, the principle of complementarity was created to offer a

> balance between [the right and responsibility of every] sovereign [State] to exercise jurisdiction and the realisation that, for the effective prevention of such crimes and impunity, the international community has to step in to ensure that these objectives are reached and retain its credibility in the pursuance of these aims.[111]

The article 17 admissibility requirements in the Rome Statute seek to promote this objective.[112]

Article 17 provides an exhaustive list of the requirements of inadmissibility, that is, if none of the elements mentioned in the provision exist in a specific matter, then the case will be admissible.[113] Put differently, if one of the elements is present in a particular case, such a case will be deemed inadmissible. Article 17(1)(*a*) of the Rome Statute provides as follows:

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108 Article 17 of The Rome Statute.

109 Paul Seils, 'Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes' (2016) International Centre of Transitional Justice 2.

110 Seils (n 109) 3.

111 Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 Max Planck Yearbook of United Law 600.

112 The Rome Statute.

113 Benzing (n 111) 601–605.

> 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.

In the first part of this provision it is clear that in order for a state to argue against the admissibility there needs to be some sort of action on its part after the commission of a serious crime of international concern. It is therefore insufficient for a state to approach the court with an admissibility challenge and claim an intention to start looking into the matter or officially to work on it. The Rome Statute encourages states to take positive steps against any atrocities committed and this is an essential requirement, because the ICC is a court that has as its primary aim the fighting of any impunity.[114] An admissibility challenge can be raised even if the state investigating or prosecuting is not a state party. The only requirement is that such a state must have jurisdiction over the particular offence on which the inadmissibility claim is based.[115] In other words, for a successful admissibility challenge, it needs to be shown that the state in question is actually investigating or prosecuting the crimes and has jurisdiction over them. Benzing states that:[116]

> jurisdiction, in this context, is not limited to the permissibility to exercise jurisdiction under a principle of international law but should also be taken to include the actual competence under the respective domestic legal system to adjudicate and enforce a judgement concerning a crime under the jurisdiction of the Court.

The final part of article 17(1)(*a*) provides an 'exception to inadmissibility'[117] and is the most contentious part of the provision.[118] It is this part of article 17(1)(*a*) that is the root of most of the issues that have been taken up against the admissibility of a matter before the court.[119] Regardless of the fact that a state with jurisdiction over a matter has investigated or prosecuted it, the court may still be able to exercise its competence to hear the matter if the state is 'unwilling or unable genuinely to carry out the investigation or prosecution.'[120] The court's interpretation of the above text is vital to its image as an independent legal institution. In the enquiry into a state's unwillingness, the court should always assess a case independently instead of formulating a general standard.[121] This is, however, not the case with the inability requirement, because that has to do with the state of the judicial system and therefore where some sort of general standard may

114 Seils (n 109).

115 A state with jurisdiction may also bring a challenge on the ground that it is investigating or prosecuting the case, or has already done so in terms of art 19(2)(*b*) of the Rome Statute.

116 Benzing (n 111) 602.

117 ibid.

118 ibid.

119 For example, in *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the admissibility of the case against Saif Al-Islam Gaddafi,* No ICC-01/11-01/11, Pre-Trial Chamber, 31 May 2013 paras 53–54.

120 ibid.

121 This is required by art 17(2) of The Rome Statute.

be put forward.[122] This final requirement in this provision means that a State will not get away with initiating proceedings to protect suspects from being held accountable. States are being held to a certain procedural standard, and if their effort does not meet it, then the ICC would be entitled to exercise jurisdiction. This is set out in article 17(2) of the Rome Statute, which reads as follows:

> In order to determine unwillingness in a particular case, the Court shall consider having regard to the principle of due process recognised 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.

This provision gives an exhaustive list of scenarios that will be taken as unwillingness on the part of a state.

A state may also be found to be unable to carry out an investigation or a prosecution; this situation is dealt with in article 17(3) of the Statute:[123]

> The notion of inability was inserted to cover situations where a State lacks a central government due to a breakdown of state institutions (ie the situation of a failed State), or suffers from chaos due to civil war or natural disasters, or any other event leading to public disorder.[124]

Article 17(3) continues as follows:

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

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122 ibid.
123 The Rome Statute.
124 Benzing (n 111) 613.

The provision sets out three possible scenarios of inability, and the final one 'serves as a generic term capturing all other possible situations.'[125] For a state to be said to be unable to proceed with a matter, it has to be evident that that specific state's judicial system is either completely, or at least partially, inoperative. This is the case where the government has lost so much control over its territory, to the extent that the administration of justice has broken down. This was stated by the court in the first *Gaddafi* case, although the same Chamber went on to contradict itself in the *Abdullah Al-Senussi* admissibility challenge. In that matter, the Pre-Trial Chamber found the matter to be inadmissible before the ICC even though it stated that Libya had no control over the administration of justice in the country and the accused in domestic proceedings lacked legal representation.[126]

This admissibility provision, a central element of complementarity, is meant to ensure that the ICC respects the general rule that states have the first right and responsibility to exercise their criminal jurisdiction over international crimes in accordance with the principle of sovereignty. In other words, states retain the primary right to investigate or prosecute, and only in certain cases may the ICC intervene: 'In order to implement the complementarity principle, the ICC prosecutor and judicial chambers must respect and adhere to the Statute's admissibility criteria.'[127]

In order to determine the issue of admissibility, the Rome Statute requires the court first to ask four questions. First, the court must ask whether the case is being investigated and/or prosecuted by a state with jurisdiction.[128] Second, where there is no ongoing prosecution or investigation, it should be enquired whether a state has investigated and concluded that there is no basis to prosecute.[129] Third, has the accused already been prosecuted for what they are being charged with?[130] Finally, the gravity of the case should be probed before the court may proceed with the matter.[131]

Should the above enquiries produce affirmative responses, then 'the accused or the [S]tate normally challenges the admissibility of the matter but the Court may, *sua sponte*, raise the issue of admissibility.' Similarly, the 'ICC Prosecutor must, *sua sponte*, raise the issue of admissibility.'[132] The most contentious test of the admissibility

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125 ibid.

126 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the admissibility of the case against Saif Al-Islam Gaddafi,* No ICC-01/11-01/11, Pre-Trial Chamber, 31 May 2013; and *Prosecutor v Saif Al-Islam Gaddafi and Abdullal Al-Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi*, No ICC-01/11-01/11, Pre-Trial Chamber, 11 October 2013.

127 El Zeidy (n 3) 897–898.

128 Article 17(1)(*a*) of The Rome Statute.

129 Article 17(1)(*b*).

130 Article 17(1)(*c*).

131 Article 17(1)(*d*).

132 El Zeidy (n 3) 898.

provision of the statute is the unwillingness and inability of a state with jurisdiction to investigate or prosecute a matter.[133]

State Referrals and the Waiver of Complementarity

One of the ways which the ICC can hear a matter is if a state refers its own situation to the attention of the court. This is done in terms of article 14 of the Rome Statute and has been encouraged by the court.[134] The Pre-Trial Chamber has, for instance, held that self-referral by the Democratic Republic of the Congo (DRC) was

> consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them.[135]

The problem with self-referral cases arises when an admissibility challenge is brought before the court by the state itself. It raises the question whether a self-referral amounts to a waiver of the state's right to challenge the admissibility of a case on account of complementarity. It has been argued that by referring a situation to the court, a state can be seen as deliberately abstaining from initiating a national investigation, in this way making the international proceedings admissible vis-à-vis the passive state because the case is not 'being investigated or prosecuted' nor 'has [the case] been investigated'.[136] The referral of a situation by a state party is dealt with only in article 14 of the Statute, and that provision does not offer a solution to the abovementioned problem because it deals only with whom the referral must be made to and the type of information that is required to accompany the referral.[137]

The issue of waiver is fully dependent on the way one interprets the treaty. If one adopts the interpretation that the principle of complementarity is incorporated in the Rome Statute as a means of ensuring the security of the sovereignty of all states by respecting their primary right to investigate or prosecute situations within their jurisdiction, then, Benzing has argued, by declining to exercise the above right 'under general international law', a state 'may waive its primacy and so enable the Court to act'.[138] Now, one can also view the function of the court's complementarity regime as not only limited to protecting the doctrine of state sovereignty but rather also to fulfilling the aim of being

133 El Zeidy (n 3) 899.

134 Ahmed Hassanein, 'Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis' (2017) 17(1) Intl Criminal LR 107–134.

135 F Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 Leiden J of Intl L 1114.

136 Claus Kress, 'Self-referrals and Waivers of Complementarity – Some Considerations in Law and Policy' (2004) 2 J of Intl Criminal Justice 944–948 at 946.

137 Article 14 of the Rome Statute.

138 Benzing (n 111) 630.

a right for the individual (a perspective which has also been endorsed by the court).[139] In such a case, Benzing states that

> such a waiver by a [S]tate would not be possible, as such a [S]tate cannot unilaterally take away a right of a person that it has agreed to in a multilateral instrument.[140]

This second understanding of the complementarity regime will not be realistic, because the Rome Statute does not award rights to individuals. This the court does not do even though it has taken into account the protection of an accused's right in the assessment of the actions taken by a state during an admissibility challenge that was brought before it.[141]

This then makes the first argument the more feasible and realistic one: that a waiver is indeed a possibility when it is limited only to a state's own rights to prosecute; and should there be other states also having jurisdiction over the matter, then they will have to be given a reasonable opportunity to object to the waiver.[142] In Benzing's view, '[n]either is a "waiver" of complementarity prescribed where a duty to exercise criminal jurisdiction over those responsible for international crimes exists.'[143] A state may waive its right totally or partially, but the question whether this waiver becomes permanent or whether the state can retract it when there has been a new development that has made it possible for it to pursue the matter as they see fit it has yet to be dealt with.[144]

Conclusion

It is clear that the exercise of jurisdiction by a state is an important element of sovereignty. The introduction of international law has led to the evolution of jurisdiction and has also forced developments in the area of sovereignty. States used to be the only entities with the right to prosecute perpetrators of criminal acts within their jurisdiction. In the aftermath of the Second World War, however, the right to prosecute was transferred to IMTs. Similarly, while the statutes of the ad hoc tribunals provided for concurrent jurisdiction between international tribunals and national courts, the former had primacy. Regardless of the development, emergence and rise to prominence of international jurisdiction, it remains important that states be able to exercise their own criminal jurisdiction for offences over which they would normally have jurisdiction, whether by virtue of the territoriality or the nationality principle. This has been recognised by the international community with the principle of complementarity. This

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139 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the admissibility of the case against Saif Al-Islam Gaddafi,* No ICC-01/11-01/11, Pre-Trial Chamber, 31 May 2013 ('*Gaddafi admissibility challenge*').

140 Benzing (n 111) 630.

141 ibid.

142 ibid.

143 ibid.

144 Situation in Uganda in the case of *The Prosecutor v Joseph Icony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Case No ICC-02/04-01/05 Pre-Trial Chamber II.

principle is a new legal phenomenon that was introduced to the international community by the Rome Statute in order to establish a means of mediation between the jurisdiction of international tribunals and that of national jurisdictions. The ICC was not imposed on any state but, rather, it is a voluntary commitment made by a state which can be withdrawn by such state at any time. The ICC was therefore created to complement national courts by being subsidiary to them with regard to crimes within its jurisdiction; the importance of individual criminal responsibility in general under the ICC should also be emphasised. Its complementary nature calls for it to step in only where there is a shortfall in the domestic legal system: it fills a gap rather than taking the lead. This differs greatly from the IMTs and the two ad hoc tribunals, the ICTY and the ICTR, which were established to enjoy primacy over the national courts to prosecute the crimes within their jurisdiction.[145] The ICC is a negotiated court and so the states made sure that it would never infringe their sovereignty. With the need that states felt to protect their sovereignty vigorously, it was only to be expected that they would want the ICC's jurisdiction to be secondary and to have their national jurisdiction take priority.[146] This led to the view that 'The principle [of complementarity] is the outcome of the struggle between "Court-friendly" and "Court-unfriendly" states.'[147]

The Rome Statute resolves the question of the distribution of jurisdictional competence between the ICC and national courts by reference to complementarity. On the one hand, this means that the national legal systems have primacy, at least from a formal perspective. Yet, on the other hand, it is for the ICC to decide whether the national legal system should take priority over the court. The court, in a sense, has a kind of *competence de la competence* over its jurisdiction. Put another way, it is a referee in the metaphorical competition between itself and a national legal system. This raises the question whether, beyond the formal provisions in the Rome Statute, the ICC does not have the real primacy. Expressed differently, is the primacy of national legal systems as envisaged in the Rome Statute merely rhetorical?

145 Benzing (n 111) 592,
146 El Zeidy (n 3).
147 Olsson (n 2) 34–35.

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