

International Center for Transitional Justice



# Handbook on Complementarity

An Introduction to the Role of National Courts  
and the ICC in Prosecuting International Crimes

By Paul Seils

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*Front cover*

*Above: Simone Gbagbo, Cote d'Ivoire's former first lady, sits in the dock at the Court of Justice in Abidjan, at the start of her trial for crimes against the state, December 26, 2014. She was convicted for her role in the 2010-2011 post-election crisis. (Getty Images)*

*Below: In the ICC's first verdict, Thomas Lubanga is found guilty of conscripting and enlisting children under the age of 15 and using them to participate in hostilities, March 14, 2012. (ICC-CPI/ Evert-Jan Daniel/ANP)*

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## About the Author

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## About ICTJ

ICTJ assists societies confronting massive human rights abuses to promote accountability, pursue truth, provide reparations, and build trustworthy institutions. Committed to the vindication of victims' rights and the promotion of gender justice, we provide expert technical advice, policy analysis, and comparative research on transitional justice approaches, including criminal prosecutions, reparations initiatives, truth seeking and memory, and institutional reform. For more information, visit [www.ictj.org](http://www.ictj.org)

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# Introduction



*The Assembly of States Parties to the Rome Statute of the ICC elect Luis Moreno Ocampo, of Argentina, as the first ICC Prosecutor, April 21, 2003. (UN Photo/Eskinder Debebe)*

## The Struggle Against Impunity

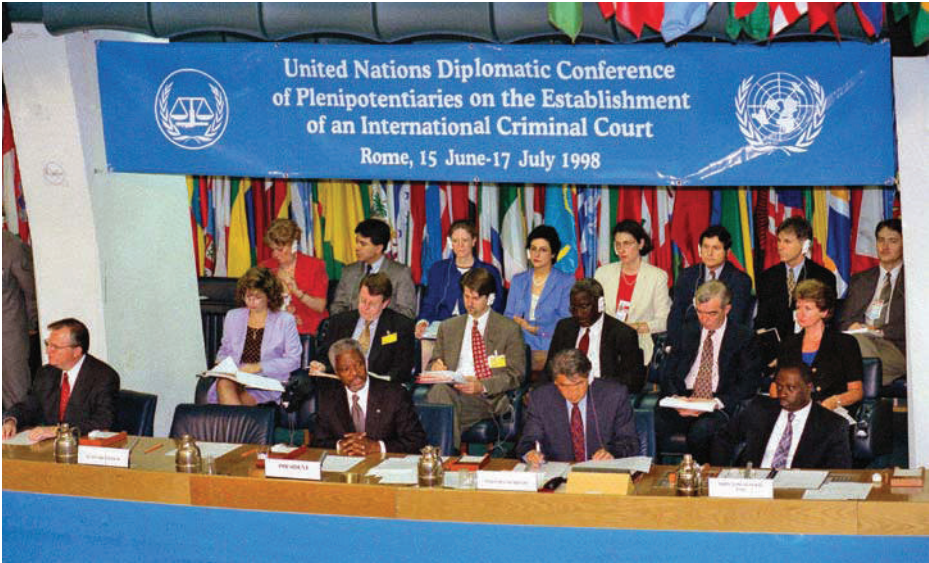
**T**he creation of the International Criminal Court represented the culmination of a long journey in what has been called the Struggle Against Impunity. In a report to the UN Commission on Human Rights in 1997, Louis Joinet highlighted four phases of the struggle from the 1970s through the end of the millennium. The first phase—which largely took place in Latin America, driven by civil society organizations—sought to guarantee the rights of political prisoners suffering at the hands of repressive regimes. The second phase took place in the 1980s, when states began granting sweeping amnesties to prevent prosecutions and victims’ organizations became increasingly organized and vocal in response. The third phase emerged as a result of peace deals and democratization processes triggered by the end of the Cold War, where questions of impunity played an important part. The fourth phase came with the maturity of regional human rights courts and international systems of human rights protection and a series of decisions outlawing amnesty provisions and insisting on serious crimes being prosecuted.

Although Joinet does not mention it, in 1993 and 1994 the UN Security Council created the ad hoc tribunals for the former Yugoslavia and Rwanda. Their creation (which would not have been possible during the Cold War due to political divisions on the UN Security Council) signaled an important shift at the highest political level. In a sense, states had caught up with civil society and human rights bodies around the world in recognizing that impunity for serious crimes was unacceptable, representing a threat to peace and democracy generally. It is in this context that negotiations for the creation of a permanent international criminal court began in the mid 1990s.

## Creation of the Rome Statute

The Rome Statute of the International Criminal Court is the treaty that created the International Criminal Court (ICC). It was signed by 120 states in July 1998 and came into effect four years later, in 2002. The treaty created the ICC and, in effect, a new system to deal with the world’s most egregious crimes: war crimes, crimes against humanity, and genocide. The court was set up to help prevent serious crimes by ending impunity for them.





*UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, during which the statute of the ICC was adopted by the conference and opened for signature on July 17, 1998. (ICC-CPI)*

At the heart of that new system is the idea that, first and foremost, the courts at the national level should deal with cases of serious crimes. The ICC only deals with cases under very limited circumstances. The Rome Statute says in its very first article that the ICC will be *complementary* to national jurisdictions. This is where the word we now frequently use in reference to the Rome Statute system comes from, *complementarity*.

There are at least four reasons for the complementary system: 1) it protects the accused if they have been prosecuted before national courts; 2) it respects national sovereignty in the exercise of criminal jurisdiction; 3) it might promote greater efficiency because the ICC cannot deal with all cases of serious crimes; and 4) it puts the onus on states to do their duty under international and national law to investigate and prosecute alleged serious crimes (that is, it is not just a matter of efficiency but a matter of law, policy, and morality).

The ICC began operating in 2003, one year after the Rome Statute came into force.

One of the surprising things to have developed in the last decade is the interest in and confusion about complementarity. As time has passed it has become increasingly obvious that this idea is one of the most important (if not *the* most important) in the statute. How it is understood, what the ICC does in connection with it, what national authorities do, and what civil society should do have all become important aspects in the debate about justice for victims after very serious crimes have been committed.

## The Purpose of This Handbook

This handbook is intended to explain the main issues of law and practice related to complementarity for those who are not legal specialists. It is aimed at civil society organizations that are not specialists on the ICC or criminal law issues, victims' representatives, students, journalists, opinion makers, and others who have an interest in justice for serious crimes and who want to understand the basic legal issues as well as the broader contextual matters connected to complementarity. It is not a legal textbook and it is not an attempt to address in detailed scholarly fashion all aspects of this complex field. It is impossible, however, to address the legal rules on complementarity—and what the ICC has so far said about them—without some degree of technicality.

For the most part, this handbook is descriptive. It generally avoids entering into a discussion about the merits and demerits of the ICC's decisions and policies. It does not, for example, address the question of whether the ICC focuses unjustifiably on African situations. However, it is hoped that a better informed understanding of how the complementarity regime works in practice will help to make that debate more critical and less polemical.

After reading this handbook, readers should have a basic understanding of the ICC, the concept of complementarity, how key cases on the issue have been decided, what the different stages of the admissibility process entail, what it means for national legal systems, and what it means for other national actors, including civil society and victims' representatives.

## PART ONE

# Why a Complementary Court?



*Judges at the trial of former Chadian ousted leader Hissène Habré, in Dakar, Senegal, July 20, 2015. The former Chadian leader is charged with crimes against humanity, war crimes, and torture during his rule from 1982 to 1990. The landmark case is the first time a court of one country in Africa has prosecuted a former ruler of another country. This is also the first universal jurisdiction case to proceed to trial in Africa. (Getty Images)*

Of the four reasons underpinning the system of complementarity, the states that negotiated the treaty were concerned especially with two: sovereignty and efficiency. To understand the idea of complementarity we have to understand the alternative. The choice facing states was to create a permanent international criminal court with either *primary jurisdiction* or *complementary jurisdiction*.



*Defendants in the dock at the International Military Tribunal at Nuremberg. The main target of the prosecution was Hermann Göring (at left, in first row of benches).*

Having primary jurisdiction would have meant that the ICC would have been able to deal with cases whether or not the national authorities were trying to deal with them. This was the system used for the International Military Tribunal at Nuremberg (1945) and the International Military Tribunal for the Far East (1946), both of which had primary jurisdiction. It was also the system the United Nations used in the 1990s for the International Criminal Tribunal

for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Those courts had the right to try matters regardless of whether the national authorities in East or West Germany, Japan, Rwanda, or the former Yugoslav states wanted to do so first.

## Sovereignty

States want to control the criminal law system in their own countries, especially for serious crimes and crimes that have political consequences or contexts.

The crucial difference between the four tribunals mentioned above and the ICC is that the tribunals were imposed on the state by international bodies or powers. In the cases of Nuremberg and Tokyo it was the decision of the victorious Allies to create





*Radovan Karadzic, former President of Republika Srpska during the Bosnian War, at his initial appearance before the International Criminal Tribunal for the former Yugoslavia, July 2008. He was convicted of genocide, war crimes and crimes against humanity on March 24, 2016. (ICTY/Flickr)*

the tribunals. In the cases of the former Yugoslavia and Rwanda it was the decision of the UN Security Council, under Chapter VII of the UN Charter.

In contrast, the Rome Statute is a treaty—a voluntary agreement. It is not imposed on anyone. In these circumstances states negotiating the treaty had to decide to what extent they were willing to give up their sovereign right to exercise criminal jurisdiction over their own territory and their own nationals regarding certain crimes.

The idea of criminal jurisdiction goes to the very heart of sovereignty. One of the defining notions of sovereign power is the state's monopoly of force, which is epitomized in the power of the police to detain and arrest and of the courts to try and punish. States are understandably extremely reluctant to give up that power voluntarily. If an agreement to set up a permanent international court was to succeed it was obvious, even before negotiations began, that it could not provide the court with primacy of jurisdiction.

## Efficiency

The efficiency argument emerged from the experiences of the ICTY and ICTR. As these tribunals have carried out their work over the last two decades, the states that were paying for the courts began to feel that there were some inherent inefficiencies. These included operating languages, distance from victims and crime scenes, witness protection, victim attendance and participation, and lengths of trials. If trials could take place at the national level presumably all of these issues would be addressed more quickly and more cheaply.

Of course, it was recognized that in many situations holding trials in the national courts would not be a viable option for a number of reasons; but they made it clear, all things being equal, it would be preferable for trials to take place at the national level than at the international level.

## Restoring Trust in National Institutions

Another possible reason in favor of national proceedings raises questions about what is expected to be achieved by holding trials for these kinds of crimes.

The kinds of crimes that the ICC was set up to deal with will normally have taken place in a context of armed conflict (internal or international) or systematic repression. In those circumstances crimes will have been committed to such a degree that the basic rules of society will have been profoundly challenged and the institutions in charge of enforcing and safeguarding those rules will have been severely damaged or have failed entirely. Those institutions will include the police, the prosecution services, and the judges as well as parliament and other facets of government.

One of the reasons why national proceedings are to be valued above international ones wherever possible is that they can help to restore public confidence in the national institutions that failed citizens and help to re-establish damaged confidence in the basic rules of society. This is not so much an argument about efficiency but about what is sometimes called *civic trust*—that is, the trust citizens of a country have in state institutions and in each other.



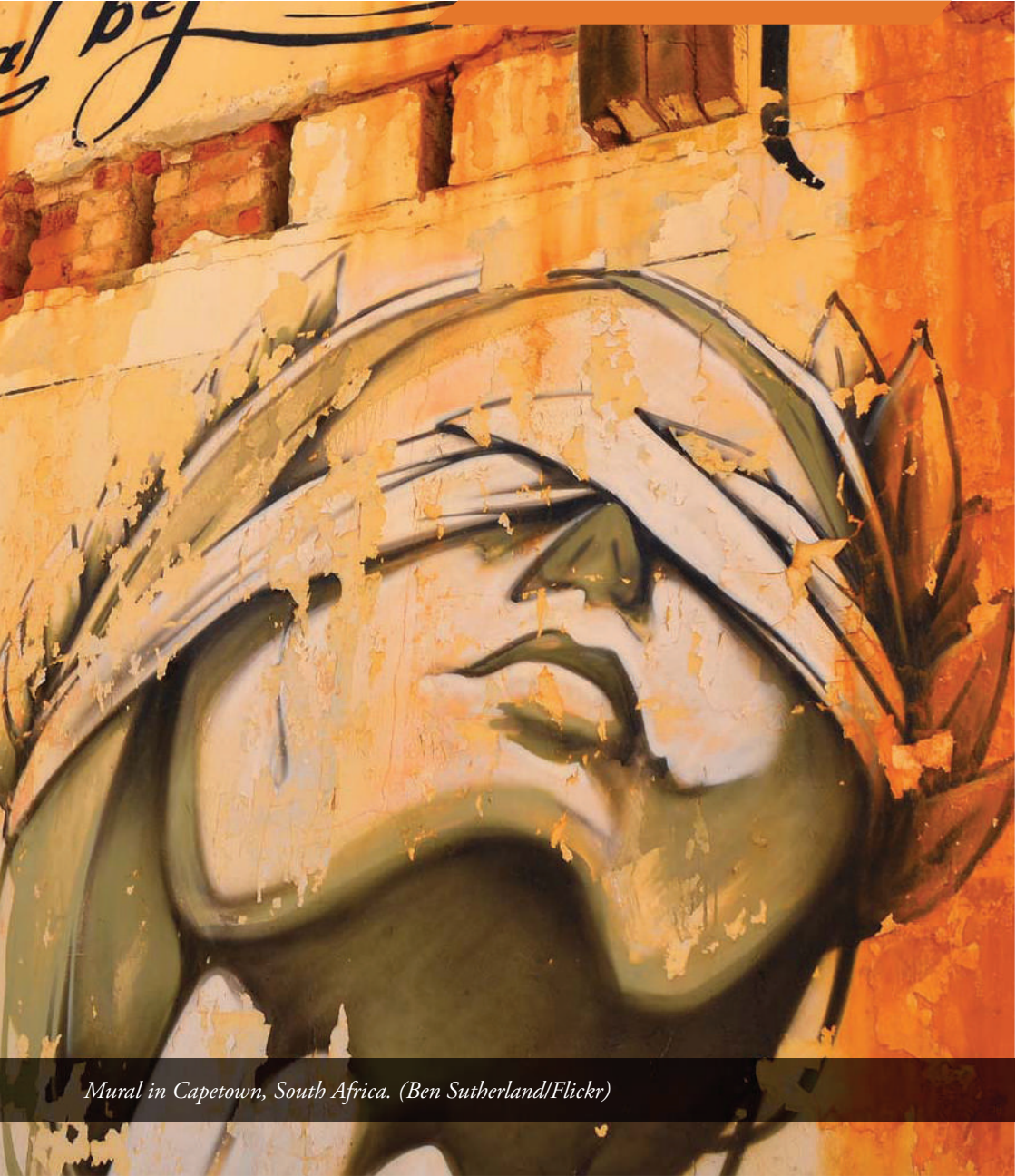
*Webstreaming in Lukodi, Uganda, of an ICC hearing for Dominic Ongwen, alleged Brigade Commander of the Sinia Brigade of the Lord's Resistance Army, accused of three counts of crimes against humanity (murder, enslavement, and other inhumane acts) and four counts of war crimes (murder, cruel treatment, attack against the civilian population, and pillaging) committed at the Lukodi IDP Camp in Gulu in May 2004. (ICC-CPI)*

It is true that this was not a view that was often heard in the context of the Rome Statute negotiations, but it was an idea widely expressed by many who had worked on issues about how states and societies deal with legacies of massive crimes and human rights abuses. It is also an idea that is widely accepted today as an important reason for respecting the primacy of states in the exercise of their criminal jurisdiction, as long as they intend to act in good faith.



PART TWO

# Ten Core Aspects of the Rome Statute



*Mural in Capetown, South Africa. (Ben Sutherland/Flickr)*

**1 The Rome Statute is a treaty.** That means states voluntarily decide to become a party to it. No one forces them to do it. Some powerful and large states have decided not to become a party to the statute, including the United States, Russia, India, and China. The states that have voluntarily become parties have made a solemn promise to keep its rules. Currently there are 124 states parties to the Rome Statute: 34 from Africa; 19 from the Asia Pacific region; 18 from Eastern Europe; 28 from Latin America and the Caribbean; and 25 from Western Europe and other states.

**2 The court can deal with crimes alleged to have been committed in states that are not parties to the Rome Statute or by nationals of nonstate parties if the UN Security Council refers the situation to the ICC.** This has so far happened in two situations: Darfur and Libya. It is also possible for a state that has not fully signed up to the court to accept its jurisdiction on an exceptional basis by making a declaration. Cote d'Ivoire did this in 2003.



*Concerned about violence and use of force against civilians, the UN Security Council unanimously votes to refer the situation in the Libyan Arab Jamahiriya since February 15, 2011, to the ICC Prosecutor, February 26, 2011. (UN Photo)*

**3 The statute has 128 articles, divided into 13 parts.** Some of these address administrative issues, such as how the court is financed and how the Assembly of States Parties (the body of states that have signed up to the treaty) should be organized. The most important part of the statute from the point of view of complementarity is Part 2, on Jurisdiction, Admissibility and Applicable Law.

**4 Two other important documents are the ICC Rules of Procedure and Evidence (RPE) and “Elements of Crimes.”** The RPE provides more detailed rules about all aspects of the ICC’s operations, while the Elements of Crimes sets out in more detail what a prosecutor has to prove if she is to obtain a conviction in respect of each of the criminal acts set out in Articles 6, 7, and 8 of the Rome Statute.

**5** The Rome Statute allows the ICC to deal with only three types of crimes: war crimes, crimes against humanity, and genocide. These are sometimes referred to in shorthand as *international crimes*. The term *international* may be a bit confusing, as there are other crimes (for example, piracy and drug trafficking) that are also international crimes but are not part of the ICC's remit. To avoid this confusion another term used to refer to war crimes, crimes against humanity, and genocide is *core crimes*.

### GENOCIDE Article 6

The crime of carrying out certain acts **with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group**

### CRIMES AGAINST HUMANITY Article 7

- Committed in a **widespread or systematic way**, as part of **a plan or policy**
- Targeted at the **"civilian population"**
- Can occur in war or in peace time
- Includes murder, torture, rape, slavery, forced displacement

### WAR CRIMES Article 8

**The crime must be committed in an internal or international conflict** (different rules apply in some cases) and be connected to the conflict. The kinds of acts prohibited are extensive: murder, torture, rape, pillaging, unnecessary destruction of property, among others

Each of these three crimes has particular features. Genocide requires that prohibited acts are committed *with the intention of destroying certain protected groups*. Prosecutors, therefore, have to show that the acts were deliberately carried out with that destructive intention.

Crimes against humanity and war crimes have so-called *threshold* elements. In crimes against humanity it has to be shown that the crime was committed as part of a widespread or systematic plan and that the target was the civilian population. These crimes can be committed in time of peace or war.

War crimes require that: 1) there is an armed conflict going on and 2) the crime was connected to the conflict. This means that not every crime that happens





*An exhumed mass grave in Potocari, Bosnia and Herzegovina, where key events in the July 1995 Srebrenica Massacre unfolded. (Adam Jones)*

during wartime is a war crime. A husband might beat his wife and commit assault, a greedy neighbor might steal cattle from a local farmer while a war rages around them, but these are not war crimes. The crime has to be connected to the conflict, not simply occur while it is going on.

- 6 The crime of aggression refers to the act of going to war illegally.** The Rome Statute does mention the crime of aggression, but the ICC is not yet able to act on this provision. It still requires states parties to take certain steps to make it active.
- 7 The statute says that it does not matter what position within the government or military the accused occupies.** Even presidents, prime ministers, and armed forces chiefs if accused of committing a core crime can be tried by the ICC. This means that the provisions of immunities that might apply in national situations do not apply before the ICC.

- 8 **The Rome Statute has rules for the punishments that the ICC can impose.** It does not allow for the death penalty, and it has a maximum period of imprisonment of 30 years. It can also order fines and forfeiture of property. The Rome Statute provisions do not affect national provisions on punishment; thus, states parties can impose penalties for international crimes according to their own laws. That includes penalties that may be more severe or lenient than the ICC's.
- 9 **The ICC does not have its own police force.** This is perhaps the biggest difference between it and national justice systems. It means that it relies on a system of cooperation set up in Part IX of the Rome Statute that requires states parties to assist the court, especially in facilitating investigations and arresting and transferring suspects.
- 10 **States can withdraw from the statute after they have joined, but withdrawal only takes effect one year after that state has given notification.** States are required to meet any obligations that arose during their membership, including cooperation with court investigations.



## PART THREE

# How the ICC Is Structured



*ICC President and Judge Silvia Fernández de Gurmendi (right) and ICC Judge Elizabeth Odio Benito on the day Laurent Gbagbo, former president of Cote d'Ivoire, made his first appearance before the ICC. December 5, 2011. (UN Photo/ICC/AP Pool/Peter Dejong)*

The ICC is divided into four sections, known as *organs*. These are the Presidency, the Chambers, the Office of the Prosecutor, and the Registry.

### The Presidency

The president of the ICC is elected by the judges from among their number. In external matters the president is the principal ambassador for the court.

The Presidency is responsible for managing judicial aspects of the court, including the composition of chambers. It has a significant role in external relations, and has overall responsibility for the administration of the court other than matters under the Prosecutor's mandate.

### The Registry

The Registry is responsible for all nonjudicial aspects of the administration of the court other than in connection with the Office of the Prosecutor. Many of its responsibilities are like those of a national court registrar, like court management; but it also carries out responsibilities in the areas of organization of defense, victims and witnesses, outreach, and detention.

For many people it will be the outreach unit of the Registry that is the only point of contact with the ICC in situation countries.

### The Office of the Prosecutor

The prosecutor is elected by the Assembly of States Parties.

The Office of the Prosecutor is independent. It cannot be instructed to investigate or prosecute by any person or entity.

### The Chambers

The Chambers have three divisions:

1. The Pre-Trial Division, which has two chambers with three judges each.
2. The Trial Division, with a trial chamber created for each trial. (There are currently seven trial chambers.)
3. The Appeals Division, with five appeal judges in one chamber.

For the purposes of complementarity, the key players are the Office of the Prosecutor and the Chambers. Among the chambers, the Pre-Trial Chambers and the Appeals Chambers address the issues of complementarity most frequently. States or the accused can challenge admissibility at any point until the beginning of a trial.

Therefore, although such challenges are more likely to happen before the Pre-Trial Chamber, the Trial Chamber has dealt with a number of significant challenges on admissibility, most notably in the cases of Germain Katanga in the DRC situation and Jean-Pierre Bemba in the Central African Republic (CAR) situation.

## WHEN DOES AN ICC TRIAL BEGIN?



*ICC Prosecutor Fatou Bensouda (right) at the ICC during the initial appearance of Jean-Pierre Bemba, Aimé Kilolo Musamba, and Fidèle Babala Wandu, November 27, 2013. (ICC-CPI)*

It might seem strange that there could be any controversy over the issue of when an ICC trial begins, but different trial chambers have expressed different views.

Trial Chamber II has said that the trial begins **at the moment a trial chamber is constituted**. The logic is that from this point forward the power to deal with the case transfers from the Pre-Trial Chamber to the Trial Chamber. For admissibility challenges by states to be timely they should be made at this point.

The opposing view held by Trial Chambers I and III is that a trial begins **at the opening arguments of the trial proceedings**. Trial Chamber III (in the Bemba case) set out several reasons for this, but argued mainly that the time between the constitution of the Trial Chamber and the beginning of trial proceedings can be six months or more. These months are taken up with a large number of preparatory measures. Chamber III said it was difficult to consider such measures as part of the trial proper. While accepting the importance of timely challenges the chamber said that the trial begins when the merits of the case come to be tried, not when all the preparatory measures for trial are begun.

When a trial begins in connection with admissibility challenges has not been decided by the Appeal Chamber yet. However, in a number of different contexts it has been made clear that trial begins with opening arguments. One would expect the Appeal Chamber to take this view if it was ever the subject of appeal in the future.

## PART FOUR

# The Role of the Prosecutor and the Chambers in Complementarity



*New ICC judges are sworn in at a ceremony at the seat of the court in The Hague, March 10, 2015. (ICC-CPI)*

**T**he Office of the Prosecutor (OTP) has three key functions, carrying out: preliminary examinations, investigations, and prosecutions.

It is the preliminary examination phase that is of particular importance for complementarity. In this process the OTP looks at the information it has received or obtained and decides whether or not to open an investigation. If the OTP has received a referral from a State Party or from the UN Security Council its decision to open an investigation is final.

If the OTP wants to open an investigation but there is no referral, it needs the authorization of the Pre-Trial Chamber. This is called a *proprio motu* investigation. (*Proprio motu* is a Latin phrase meaning “on its own initiative.”)

The OTP describes the process of preliminary examination as breaking down into four phases:

**In phase 1**, the OTP conducts an initial assessment of all information on alleged crimes received under article 15 (“article 15 communications”), to filter out information on crimes that fall outside the jurisdiction of the court.

**In phase 2**, the OTP analyzes all information on alleged crimes to determine whether there is *a reasonable basis to believe* that the alleged crimes fall under the subject matter jurisdiction of the court. This means that it does not have to be proved with the same level of certainty that is required to convict someone of a crime. It is, in fact, a fairly low threshold to meet. It means that there has to be some indication from credible sources that what is alleged actually happened, but this might simply be on the basis of reports from credible organizations, such as the United Nations or nongovernmental organizations.

**In phase 3**, the OTP analyzes admissibility in terms of complementarity and gravity. We will look at what this means in more detail later.

**In phase 4**, the OTP, having concluded from its preliminary examination that the case is admissible, examines the interests of justice. A recommendation that an investigation would not serve the interests of justice will be made only under highly exceptional circumstances. Often people think that this is a way for the



prosecutor to switch off investigations during peace processes. The prosecutor has issued a statement making it clear that is not how the provision is best understood and it is not how the current ICC Prosecutor, Fatou Bensouda, will apply it. (See [www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf))

In carrying out its functions the OTP communicates with states at various points, usually as a matter of policy rather than as a legal requirement. The OTP will, for example, write to a state telling its authorities that under the court's powers in Article 15 of the statute it is seeking further information to help analyze allegations of crimes it has received and any steps the state authorities may be taking.

## WHAT'S THE DIFFERENCE BETWEEN A PRELIMINARY EXAMINATION AND AN INVESTIGATION?

This is an important point, especially for journalists in reporting on issues connected with the ICC. The fact that a situation is subject to preliminary examination may not mean very much at all, or it may mean potentially something significant. The farther it moves through the phases, the more reason to believe that there may be grounds to open an investigation.



*The burning of Um Zaifa begins, December 12, 2004.*

The key difference between the examination phase and investigation phase relate to the specificity of the inquiries the OTP can make in relation to information. Article 15.2 allows the prosecutor to seek additional information to “analyse the seriousness of the information received.”

For example, the OTP may receive a dossier from a nongovernmental organization alleging that 300 killings occurred in country X. The OTP can seek further information of a general nature in order to decide how to treat the dossier. It may contact the organization to ask for more information about its



methodology. It may make inquiries to find out whether the information sources are generally well regarded as acting in good faith.

What the OTP cannot do at this point is ask for additional information about specific incidents or ask for information on specific individuals. Those are investigative steps and can only happen once an investigation has formally opened.

(In exceptional cases if the ICC

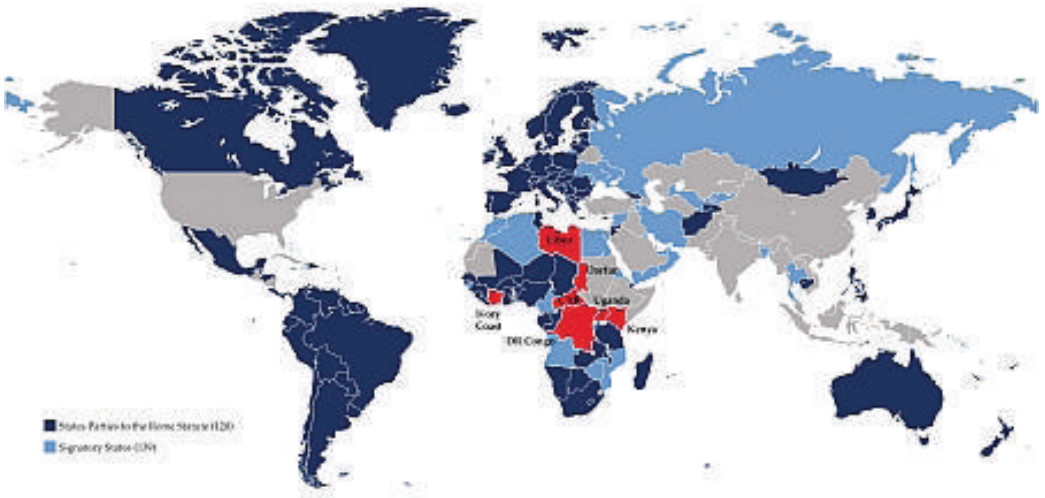
prosecutor thinks testimony will not be able to be taken later on, she can seek to take it during the preliminary examination at the seat of the court. But so far this has not been done). (See Rule 47 of the Rules of Procedure and Evidence.)

In addition to assessing the seriousness of the information, the prosecutor has to look into the question of national proceedings. But that assessment continues even after an investigation has been opened.

The OTP will also make field visits to states to talk directly to national authorities engaged in the investigation and prosecution of cases in order to understand as much as possible about those proceedings. On those missions, the OTP will usually also endeavor to meet with representatives of civil society and victims' groups to learn about their work and listen to their views.

On some occasions the analysis of national proceedings can take on a very detailed form. For example, in the Darfur situation in 2007 the OTP sent a large mission to Khartoum for a week, where it met in several long sessions with the judges of the specially created courts to hear what was being investigated and how.

As of April 2016 the OTP had made public preliminary examinations into 21 situations. Ten of them led to investigations. Three led to no investigation, and nine remain under examination: Afghanistan, Colombia, Honduras, Iraq, Guinea, Nigeria, Palestine, and Ukraine.



*ICC Preliminary Examination Map, March 2015. It does not show that Georgia is no longer in preliminary examination but an investigation has been opened. (ICC-CPI)*

As of March 2016 the OTP has four situations under what it calls Phase Three of the preliminary Examination Process—or “the admissibility phase.” This phase indicates that the OTP considers that there is a reasonable basis to believe that crimes within the jurisdiction of the court have been committed and attention turns to asking whether the national authorities are addressing the allegations raised in the information before the OTP.

The OTP publishes an annual update on its preliminary examination activities, which can be found on their website. (*See Further Reading.*)



## COLOMBIA SITUATION



*Colombian paramilitary chief Salvatore Mancuso (left) seen handing over his weapon and, on right, appearing in court to confess his crimes. (AP Image and Getty Image)*

**THE COLOMBIA SITUATION** has been under preliminary examination by the ICC since early 2004. The OTP wrote to the Colombian government in early 2005 informing it that it believed crimes against humanity may have been committed by various parties to the conflict between the state and the Revolutionary Armed Forces of Colombia (FARC), including members of state forces, FARC, and the paramilitary “Self-Defense” forces.

The ICC has jurisdiction over crimes against humanity alleged to have been committed in Colombia or by its nationals since November 1, 2002, when the Rome Statute became effective for Colombia. However, the ICC only has jurisdiction over war crimes in Colombia since November 2009. This is because Colombia made use of the reservation under Article 124 of the Rome Statute that allowed the court’s jurisdiction over war crimes not to take effect until seven years after the statute became effective.

In Colombia the OTP focused initially on the investigation and prosecution of demobilized paramilitary leaders under the country’s “Justice and Peace Law” (Law 975 of 2005) and ordinary criminal justice measures. The Justice and Peace Law allowed for a sentence of five to eight years’ imprisonment to be imposed if suspects who participated in the scheme were deemed to have confessed to all crimes they had committed. In several cases this included confessions to hundreds of murders.

While the process has helped to identify the location of the remains of thousands of victims, during the law's more than ten years of operation the criminal process has been completed for a very small number of those who have taken part in the scheme.

The OTP indicated in 2012 that combining the Justice and Peace process and the ordinary criminal justice process would diminish the focus on the prosecution of senior paramilitary leaders.

More recently the OTP has explained that its primary focus is on how the state is dealing with allegations of murder of civilians by state agents and crimes of sexual violence.

In a public report the OTP indicated that its focus regarding the FARC was not necessarily on seeing more prosecutions, because there had already been a great many (principally in absentia trials); rather, that it was concerned with appropriate sentences being imposed if the accused were apprehended. (See *Part Six below on complementarity and punishment.*)

As peace negotiations aimed at ending the conflict have progressed in Havana, the OTP has made a number of interventions on what it considers to be appropriate approaches to prosecutions and punishment. Its earlier position, that it only wanted to see appropriate sentences in relation to established convictions, appears to have been overtaken by events.



*Cuban President Raúl Castro (center), Colombian President Juan Manuel Santos (left), and the FARC Leader Timoleón Jiménez (Timochenko) in Havana, Cuba, September 23, 2015. In a joint statement, the parties said they had overcome the last significant obstacle to a peace deal by settling on a formula to compensate victims and punish belligerents for human rights abuses. (AP Photo/Desmond Boylan)*

The approach on prosecutions set out in the Havana process indicates a complex procedure with an ad hoc jurisdiction to be established for alleged crimes committed by FARC members (as well as other possible suspects, like businessmen). It appears unlikely that there will be any attempt to impose the sentences that arose from previous in absentia trials.

The new jurisdiction will take some time to set up and begin delivering decisions, so it seems likely that the OTP will be monitoring the FARC sentencing issue, and Colombia generally, for some time.

On the issue of allegations against state forces the OTP intimated in a public report in 2012 that it would consider opening an investigation if there was not more evidence of concrete progress on investigations involving senior officials implicated in crimes. (Almost 1,000 soldiers have been tried and convicted for serious allegations and have been sentenced to long prison terms. The OTP's concern seems to be that investigations do not yet target the most responsible.) Despite the apparent warning from the OTP report there is little public indication of tangible progress in investigating senior military officials to date.

## AFGHANISTAN SITUATION



**THE ICC** has jurisdiction over crimes committed in Afghanistan since May 1, 2003. Among other idiosyncrasies, the examination of the Afghan situation is interesting because of the issue of the so-called Article 98 Agreements that the US government, under President George W. Bush, entered into with a large

number of states, whereby neither party to the agreement would bring the other's current or former government officials, military, or other personnel (regardless of whether or not they are nationals of the state concerned) before the jurisdiction of the ICC. This was in relation to the United States' overt opposition to the ICC at that time. The agreements were one of a number of ways the United States sought to protect its nationals from the prospect of prosecution for alleged crimes committed on the territory of states that were subject to the Rome Statute.

The preliminary examination of the situation in Afghanistan was made public in 2007, and the country has been under review for over eight years. Among all of the OTP situations under review the Afghanistan situation is the most serious in terms of numbers by a significant margin. The OTP's report on examinations from 2015 indicates that almost 15,000 people have been killed and over 22,000 injured as a result of insurgent activities in the country.

The ICC report indicates that the OTP has information of alleged offences committed by government forces, including against over 5,000 detainees in government custody since 2007 who are alleged to have suffered "gruesome" abuse. Despite repeated requests for information on national proceedings the OTP says it has not received any reply from the Afghan government.

In relation to international forces the OTP has made it clear that it considers it would have jurisdiction over US nationals alleged to have committed crimes in Afghanistan were it to open an investigation. The OTP has referenced a number of reports by the US Department of Justice into allegations of US nationals committing crimes in Afghanistan.

The OTP reports do not explain why a situation of such gravity with little appearance of national proceedings has remained under examination for so long.

## The Role of the Pre-Trial Chamber and the Appeal Chambers

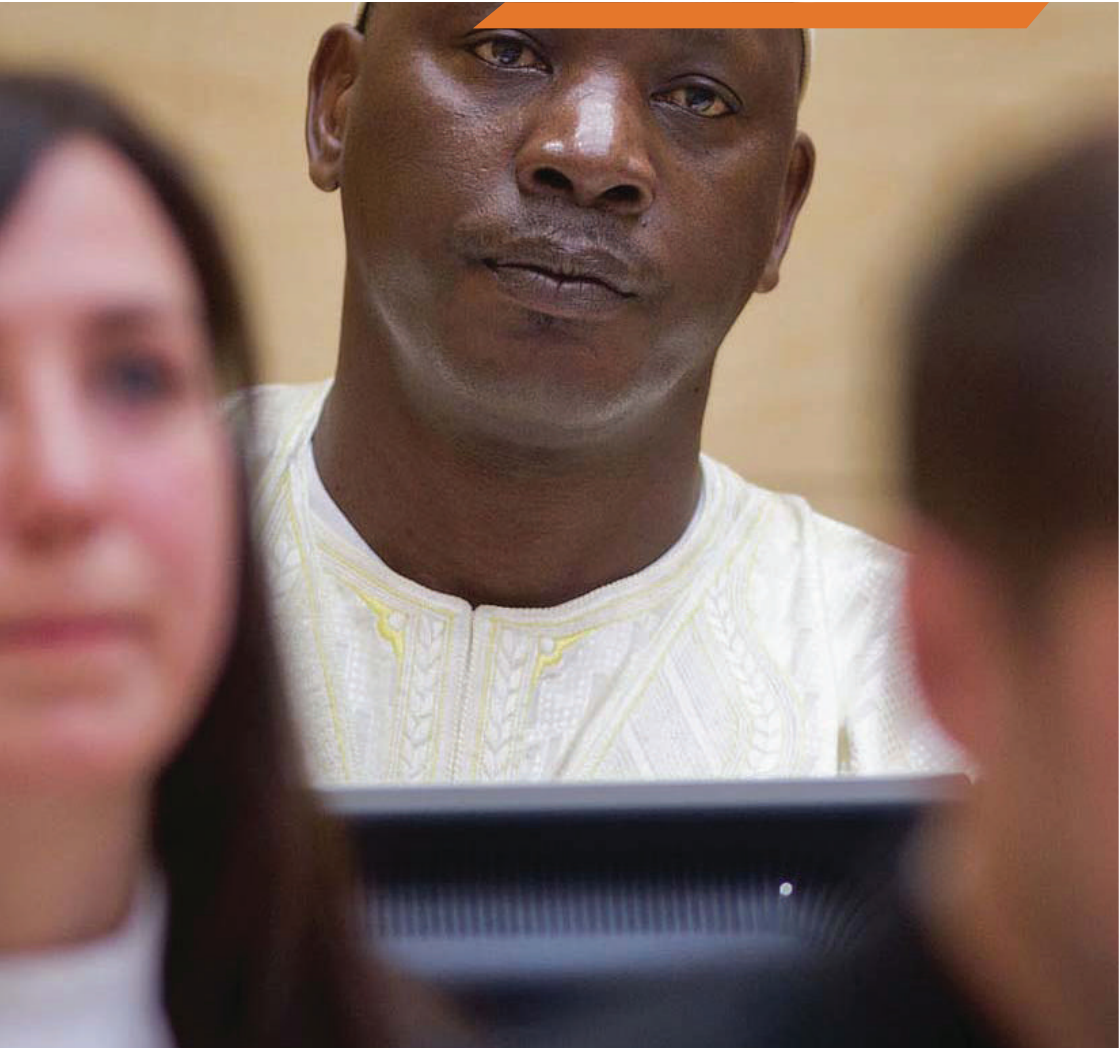
The initial decision to put a situation under preliminary examination is entirely up to the ICC prosecutor. The Pre-Trial Chamber becomes involved in a number of situations where a preliminary examination has been undertaken or is underway. These include:

- the decision to authorize the opening of a new investigation (*see the reference to proprio motu investigations above*)
- the decision to grant a warrant or summons requested by the OTP after an investigation
- decisions on a challenge on admissibility from the accused or a state with jurisdiction
- decisions to consider the issue of admissibility on its own initiative

The Appeals Chamber becomes involved if a party wants to challenge the decision of the Pre-Trial Chamber or the Trial Chamber. Because the Appeal Chamber is the final decision maker, decisions by its judges are ultimately the most important. We will look at some of those decisions later on.

## PART FIVE

# The Rules on Complementarity and What the ICC Has Said So Far



*In the ICC's first verdict, Thomas Lubanga is found guilty of conscripting and enlisting children under the age of 15 and using them to participate in hostilities, March 14, 2012. (ICC-CPI/ Evert-Jan Daniell/ANP)*

**T**he word *complementarity* does not appear anywhere in the Rome Statute. In fact, all of the things that come under the idea of complementarity are actually *admissibility* issues. Admissibility relates to whether or not a case can come before the court: that is, whether it is admissible.

ICC judges have explained that complementarity addresses the rules by which a *conflict of jurisdictions* should be resolved. By a conflict of jurisdictions they simply refer to the situation of two different judicial systems (in this case, the ICC and a national court) arguing about which one has the right to deal with a particular case.

The most important sections of the Rome Statute dealing with admissibility are found in Articles 17–20 and Article 53. The most important of these is Article 17. We will discuss the different issues the court has dealt with in relation to it in some detail. But first we will look briefly at the other articles.

## Preliminary Admissibility Issues Under Article 18

Article 18 is about “preliminary rulings regarding admissibility.” Under this article a state can ask the prosecutor to hold off on (or *defer*) an investigation after she has decided to open one. The state has to show that it is already investigating issues that relate to the information provided by the ICC prosecutor on a particular situation. The prosecutor must defer to the request or seek the Pre-Trial Chamber’s authorization to authorize the investigation.

When the prosecutor begins a formal investigation after closing a preliminary examination she will not usually have a detailed sense of the cases she may bring. This is normal at the beginning of an investigation process.

When the prosecutor begins an investigation she must notify the states that may have jurisdiction over it. The notification should contain information about acts that may constitute crimes; and the state can ask for further information about them. However, the prosecutor will not be able to go into detail about the acts because she may not have yet decided which specific suspects and conduct to focus on. Still, there should be enough information to give the state a good idea of what kinds of incidents the ICC prosecutor will look at and, therefore, what kinds of incidents the state should be concerned with.



## SHOULD THE OFFICE OF THE PROSECUTOR BE “LESS PATIENT”?

Some commentators have expressed concern at the length of time the ICC Prosecutor has kept situations under preliminary examination. For example, Colombia has been under preliminary examination since 2004 and Afghanistan since 2007. In some of these cases it has been suggested that it would have been better to have opened an investigation and put the onus on the state to show that it was carrying out genuine investigations rather than wait as long as the ICC has.

If a state requests a deferral at this early stage it does not mean that it is investigating the *same case* as the ICC prosecutor—but, rather, it is meant to inform the court that the state is conducting investigations or prosecutions—or has completed investigations or prosecutions—in connection with the issues raised in the ICC prosecutor’s notification.

A state must inform the court of its national proceedings within one month of receiving the ICC’s notification. The prosecutor may agree to defer her investigation at the request of the state or apply to the Pre-Trial Chamber to authorize the investigation to go on.

If the prosecutor defers she can review the state proceedings after six months or sooner if there has been a significant change of circumstances. The state can also appeal any decision of the Pre-Trial Chamber authorizing the investigation.

*Internally displaced people living on the grounds of the main mosque in Bangui, the capital of the Central African Republic, April 5, 2014. (UN Photo/ Evan Schneider)*





Article 18 has not yet been invoked by any state where an investigation has been opened, so the court has not made any rulings about it yet.

## Article 19

This article sets out the rules for a state or an accused person who wants to challenge the admissibility of an ICC case. The difference between this article and Article 18 is that Article 18 does not require the state to show it is investigating the *same case* as the ICC prosecutor, as it does not know the precise case at that time. Article 19 requires a state or an accused to show specifically that *the same case is being addressed or has been addressed at the national level*.

When the prosecutor opens a preliminary examination she usually informs the state with jurisdiction over those matters and seeks information about the alleged crimes and any relevant proceedings going on in relation to them. There is generally little difference between the information that a state has in the preliminary investigation period and after an investigation is opened. Therefore, there are generally no real surprises for a state when an investigation is opened after a preliminary investigation.

### WHAT IS A CASE?

The idea of what a case is becomes extremely important in complementarity. In January 2006 the ICC identified a case as including “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.” That approach suggests three elements in the definition of a case: **suspects, incidents, and conduct**. In later cases the ICC has focused much more on suspects and conduct, implying that incidents were contained in *conduct*. However, we will see that the incidents continue to play a potentially important role in the court’s understanding of what a case is.

## The Limits of Complementarity: When Does a State Lose the Power to Decide What Should Be Investigated?

National authorities have two distinct phases of opportunity to prosecute serious crimes of interest to the ICC. In the period from the opening of the ICC’s preliminary



*Callixte Mbarushimana, alleged executive secretary of the Forces Démocratiques pour la Libération du Rwanda - Forces Combattantes Abacunguzi (FDLR-FCA, FDLR), behind his lawyers, at the opening of confirmation of charges at the ICC, September 16, 2011. (ICC-CPI/ ANP Jerry Lampen/ POOL)*

examination to the ICC prosecutor's notification that an investigation has been opened the national jurisdiction does not have to show it is investigating the same case as the ICC prosecutor because, again, at this stage there is *no case*.

The ICC has developed this approach over time and this is addressed in more detail later on. For the time being, we can say that the court requires that a national case mirror the ICC case in terms of suspects and conduct; and a central element of comparison is whether the same incidents in the ICC case figure in the national case.

The specific case being dealt with by the ICC only becomes apparent for the first time when the ICC prosecutor has substantially completed her investigation and asks the Pre-Trial Chamber to grant an arrest warrant or issue a summons.

It is possible, and has happened on a few occasions, that the Pre-Trial Chamber will not grant a warrant in precisely the terms requested by the prosecutor. It may disagree with the charges being brought against a particular suspect or the way the charges are framed.

Or the court may not agree to confirm the charges the OTP has brought. This has happened in four cases, where the court has entirely dismissed the charges brought at the stage of “confirmation of charges”: Abu Idriss Garda (Darfur), Calixte Mbarushimana (DRC), and Henry Kiprono Kosgey and Francis Kirimi Muthaura (Kenya). Remember, the confirmation of charges proceedings occur *after* a warrant has been granted—sometimes many months after.

The precise case may not become entirely settled until a number of proceedings have taken place. In the case of Sudanese President Omar Al Bashir the prosecutor wanted to charge him with genocide. The Pre-Trial Chamber did not agree, arguing that the prosecutor had shown insufficient evidence to justify the charge. It was only after the Appeal Chamber agreed with the prosecutor that there was sufficient evidence—and that the Pre-Trial Chamber had misapplied the level of proof needed to grant a warrant—that it became clear what the case consisted of.

## WHEN DOES A CASE BECOME A CASE?

When does the identification of suspects and their conduct become so clear that a case emerges?

***Is it when the prosecutor applies for a warrant?*** When the court issues a decision on the warrant. There can be a long time between application and decision and the court has on several occasions not granted everything the ICC prosecutor asked for.

***Is it when the charges are confirmed?*** The confirmation of charges occurs after the accused appears in court and the evidence to support the charges undergoes more scrutiny than at the warrant stage. Again, the contours of the case can change with regard to suspects, incidents, and the way in which suspects are said to have participated in them.

The case is something of a moving target. This can potentially have some impact on the decision of the challenger (the accused or a state) as to when to bring a challenge and on what grounds.

## A NARROWING WINDOW OF OPPORTUNITY

If a state does not seek a deferral within one month of notification it has missed the chance to challenge the case's admissibility until much later. It can effectively only bring a challenge once the prosecutor has finished investigating and it must challenge on the basis that it is already addressing, or has addressed, the same case.

There is a significant narrowing of what the state has to investigate if it waits until after Article 18's one-month notification period to challenge the case. After that it can only challenge a case's admissibility if it brings the *same case*. Before that it has more discretion regarding the particular suspects and incidents it focuses on and the structure and speed of the investigation, as long as it deals with issues connected to the same context and brings serious cases.

## Article 20: An Accused Cannot Be Tried Twice for the Same Thing (And Do National Authorities Have to Prosecute the Same Crimes as the ICC?)

Complementarity discussions sometimes overlook Article 20 and its importance. It is a common provision in national legal systems, and indeed a fundamental human right, that a person cannot be tried twice for the same thing. This has to do with: 1) fairness to individuals so they are not harassed by the state on multiple occasions; and 2) efficiency, to allow matters to be dealt with definitively rather than have them come back time and time again. It puts the onus on the state to make sure that it is able to prove that the person is guilty of what it alleges, but it only has one chance to prove it.

The Latin phrase *ne bis in idem* is an abbreviation of a longer phrase, meaning

“not twice for the same thing.” It is also well known as the “double jeopardy” rule in many jurisdictions.

The important part of article 20 from the point of view of complementarity is that the ICC cannot try a person who has been tried by another court in relation to “conduct also proscribed under articles 6, 7 and 8” of the statute—that is, for core crimes.

## What Is Important Is the Reference to Conduct

There has been a lot of campaigning and efforts since the ICC was created to encourage states to adopt *implementing legislation* that not only recognizes the ICC and the state's obligation to cooperate with it but also changes aspects of the state's criminal law so as to make them conform with the ICC's definitions of crimes (*see page 12*).

There are reasons why this might be desirable. It would help to have a common framework of definitions. It would be easier to apply jurisprudence from place to place and it might sometimes be easier to assess precisely what kinds of investigations are going on.

However, a state is under no obligation to have the same definitions of crimes as the ICC. More importantly, it is not whether a national jurisdiction is investigating or prosecuting a person with crimes as defined in the statute that matters. What matters is that the national proceedings relate to the same conduct that is outlawed by the Rome Statute being committed by the same individuals the ICC is looking at.

This is an important issue in understanding what it is that states are required to prosecute as states parties to the ICC. In some early cases it was even suggested that because the state in question did not have legislation with the same definitions of war crimes, genocide, and crimes against humanity as the ICC this rendered the state "unable" to prosecute the crimes because the criminal justice system was "unavailable." This is a wrong understanding of what the Rome Statute requires.

The court has made it clear in a number of cases that it is open to states charging individuals under *ordinary crimes* as long as those crimes capture the same conduct that is outlawed by the ICC under international crimes.

For example, the ICC may investigate a suspect for war crimes and crimes against humanity involving the murder of many people. Under international law a crime against humanity requires proof not only of the specific murders but also that they were carried out as a part of a widespread or systematic attack on the civilian population and that there was a plan or policy in place to commit the crimes. For a war crime to be proved, evidence has to be presented not only about the murders



*Villagers flee their homes in Sake, North Kivu province, DRC, as fighting erupts between government forces and rebel groups, April 30, 2012. (UN Photo/Sylvain Liechti)*

but that they occurred in the context of an armed conflict or were sufficiently closely connected to a conflict to be considered part of it.

It would be unnecessary at the national level to prosecute an accused for international crimes as long as he or she was prosecuted for the murders at the heart of the case. The other aspects are sometime referred to as *contextual* or *threshold elements*, but they do not relate to the nature of the conduct itself.

## Article 53(1)

Before turning to all-important Article 17, it is essential to note the existence of Article 53. This is the first article in the statute that deals with investigation and prosecution, rather than jurisdiction and admissibility. Article 53(1) says that having evaluated the available information, the prosecutor will initiate an investigation unless there is no reasonable basis to proceed. To determine whether there is no reasonable basis she must consider three issues: 1) Does the information indicate crimes within the jurisdiction of the court have been committed?, 2) Is the case, or would the case be, admissible under Article 17?, and 3) Would an investigation not be in the interests of justice?

When the OTP is completing a preliminary examination that has gone through all four phases it prepares a report for the ICC prosecutor called an *Article 53(1) Report* that answers these three questions and makes a recommendation on whether to open an investigation.

There are two other points worth mentioning about Article 53(1). From 2004 to 2007 many civil society groups and others observing the OTP's investigation in relation to the Lord's Resistance Army (LRA) in northern Uganda repeatedly suggested that it was not in the interests of justice. They felt it was making it difficult to negotiate an end to the conflict. However, it became clear as peace negotiations went on that the real issue was perhaps not about the interests of justice but rather how national measures of justice might form part of the negotiated deal. That is to say, the issue was more about complementarity than it was about the interests of justice. It became obvious that Joseph Kony, the leader of the LRA, had no real intention of negotiating in good faith and the talks fell apart. (The OTP has a policy paper on what it understands the idea of the interests of justice to be, details on which can be found in the Further Reading section.)

The second thing is that Article 53(1) requires that the case is or would be admissible under Article 17. This looks like a strange phrase, *would be admissible*. It seems to refer to the fact that the specific case has not yet been identified and so there remains a degree of conjecture about its precise detail.

## Complementarity: The Legal Rules So Far

Before turning to the ICC's rulings on issues arising from Article 17, it is worth noting in this regard that the question for the court is whether the case is inadmissible rather than admissible. Any challenge, therefore, focuses on proving that the ICC case is inadmissible.

Each section of the article sets out the conditions under which an ICC case may be found to be inadmissible. It then goes on to provide the exceptions under which the case would still be admissible even if there were national proceedings on the case.



## ARTICLE 17(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 has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- d. The case is not of sufficient gravity to justify further action by the Court

## Understanding Complementarity: The Two-Step Process

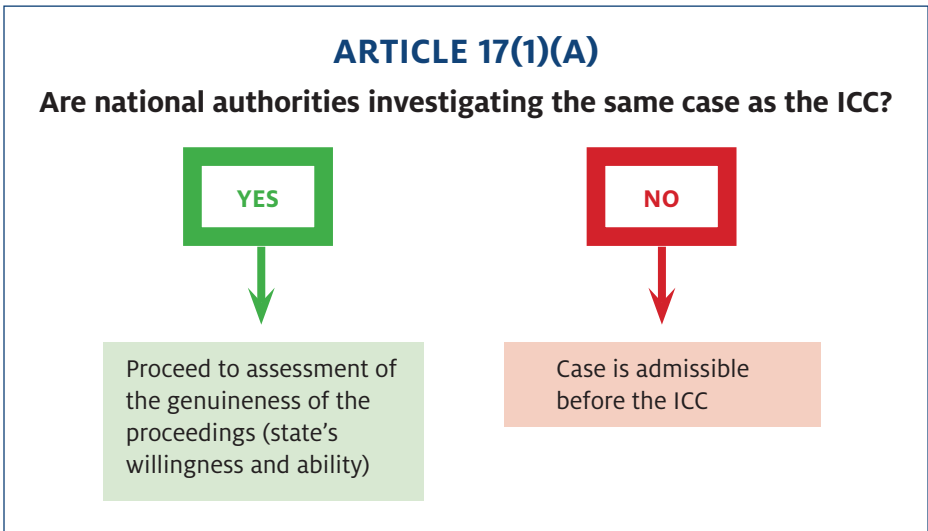
As can be seen from the excerpt above, Article 17(1) is structured to deal with three different factual scenarios: the first is where national authorities *are currently dealing with the same case as the ICC*; the second is where the national authorities *have investigated the same case and decided not to prosecute*; the third is where *the same case has been prosecuted at the national level*.

The ICC has made it clear in a number of cases, which we will look at in a moment, that the structure of Article 17 means that a challenge of inadmissibility has to be dealt with in a *Two-Step Process*, with the purpose of establishing whether the same case already has been dealt with at the national level.

Understanding the Two-Step Process for complementarity is crucial. It must be understood that it asks slightly different questions depending on which of the three scenarios of Article 17(1)(a)-(c) applies. Let's look at the three scenarios in more detail below.

## Scenario One: Ongoing national proceedings relating to the same case as the ICC's are taking place at the national level

In relation to Article 17(1)(a) the first step of the Two-Step Process is to establish whether there are any *ongoing* proceedings in relation to the same case as the ICC. If the answer is YES, only then is it appropriate to ask whether the state is willing and able to carry out those proceedings genuinely. If the state is deemed willing and able then the case is inadmissible before the ICC. If deemed unwilling or unable the case is admissible before the ICC.

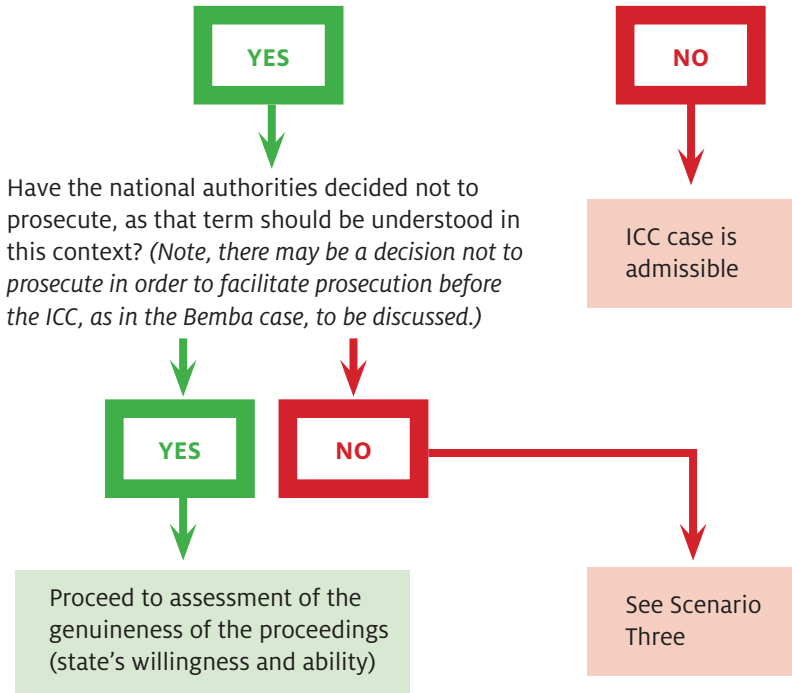


## Scenario Two: The state investigated the same case as the ICC and decided not to prosecute

Article 17(1)(b) deals with a different factual situation, one where the state has investigated the same case but decided not to prosecute. The first part of the Two-Step Process in relation to Article 17(1)(b) is answering a composite question in two parts: Has there been an investigation into the same case *and* did the state decide not to prosecute? If the answer to either part of the question is **NO** the ICC case is admissible. If the answer to *both* parts of the question is **YES** one looks at whether the state's decision not to proceed arose from unwillingness or inability.

## ARTICLE 17(1)(B)

Have national authorities investigated the same case as the ICC?



### Scenario Three: The same case has been prosecuted at the national level

Article 17(1)(c) deals with the situation where a prosecution in the national courts has taken place in relation to the same case as the ICC. If the ICC determines that such a prosecution has taken place, there will almost never be any need to consider the state's inability. Equally, there is no need to consider issues of delay, because the trial has already taken place. For that reason in this scenario the only basis on which an ICC case can still be admissible is where there has been a national prosecution on the same issue but with the intention to shield the accused (or hold a sham trial) or if it cannot be established that the case was conducted impartially and independently with the intent to bring the accused to justice.



*First appearance of Germain Katanga before the ICC, July 10, 2009. On March 7, 2014, Trial Chamber II found Katanga guilty as an accessory of one count of crime against humanity and four counts of war crimes committed during an attack on Bogoro, in Ituri, DRC. (ICC-CPI / Robert Vos)*

## The Katanga Appeal

The Two-Step Process, which emerges from the words of Article 17, was the subject of a detailed discussion on the case of Germain Katanga, of the DRC. Katanga was alleged by the ICC Prosecutor to be the Commander of the Front de Resistance Patriotique en Ituri (FRPI). He, along with Mathieu Ngudjolo Chui, was charged with murder, use of child soldiers, rape, sexual slavery, the intentional targeting of the civilian population, and pillaging. All of these crimes were alleged to have occurred in the context of an attack by troops under the command of Katanga and Ngujolo on the village of Bogoro in Ituri on February 24, 2003. The prosecution alleged that over 200 civilians were killed in the attack.

Katanga appealed the ICC Trial Chamber's decision on admissibility on a number of grounds. The relevant one for our purpose relates to the way in which the Trial Chamber assessed the position of the DRC in relation to national proceedings.

One element of contention was whether the DRC authorities had investigated, or were investigating, the Bogoro incident. The DRC authorities said that they were

not investigating the matter and documents referring to the incident were “merely procedural,” relating to the extension of Katanga’s detention in the DRC for a separate crime.

When the Trial Chamber came to look at whether Katanga’s case was inadmissible it invoked what we would describe as a short-hand, or “slogan,” version of admissibility. It said:

[A]ccording to the Statute, the Court may only exercise its jurisdiction when a State which has jurisdiction over an international crime is either unwilling or unable to complete an investigation, and if warranted, to prosecute its perpetrators.

The Trial Chamber went on to consider whether the DRC was unwilling to conduct proceedings on the Bogoro incident. It noted that the DRC had said formally it had no intention to investigate the incident but that it was committed to ending impunity and that it had not challenged the admissibility of the case before the ICC. The Trial Chamber concluded that the DRC was, therefore, clearly unwilling to proceed against Katanga in relation to the Bogoro incident. However, it concluded that the DRC’s unwillingness to investigate was, in effect, to enable the ICC to do so. The Trial Chamber went on to explain its view that there were two kinds of unwillingness: an unwillingness that was aimed at obstructing justice and an unwillingness that was aimed at ending impunity.

After, the Appeals Chamber noted that the Trial Chamber had misinterpreted Article 17(1):

Therefore in considering whether a case is inadmissible under Article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answer to these questions is in the affirmative that one has to look at . . . the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.



It ruled that the DRC was not investigating the Bogoro incident and had no intention of doing so. The correct way to understand this was not that the DRC was *unwilling* to investigate but that it was “inactive.” Therefore, in the absence of proceedings on the same case, the ICC case was admissible.

Katanga argued in his appeal that regardless of the conclusion that the DRC’s case was inactive, the state’s unwillingness or inability to pursue the case still had to be considered. The Appeals Chamber answered:

The aim of the Rome Statute is “to put an end to impunity” and “to ensure that the most serious crimes of concern to the international community as a whole must not go unpunished”. [The Appellant’s] interpretation would result in the situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and prosecute the case even though it has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court. Impunity would persist unchecked and thousands of victims would be denied justice.

### **ALERT: AVOID THE “SLOGAN” VERSION OF COMPLEMENTARITY**

If you were to ask most people with some knowledge of the ICC what was meant by the idea of complementarity, there is a good chance many of them would say precisely what the Trial Chamber said: that the ICC will act only if the state with jurisdiction is unwilling or unable to do so.

This is what some commentators have called “the slogan version of complementarity” (see notably *Darryl Robinson in Criminal Law Forum Vol 21 no 1, 2010 “The Mysterious Mysteriousness of Complementarity”*).

The slogan version does not understand the importance of the Two-Step Process. Only if you understand how the test works will you understand the right questions to ask about complementarity.

Katanga was ultimately acquitted of the charges of rape, sexual slavery, and using children under the age of 15 to participate actively in hostilities but was convicted as an accessory on the crimes of murder and attacking a civilian population, pillaging, and destruction of enemy property. He was sentenced to a total of 12 years' imprisonment. This was reviewed by the Appeal Chamber and reduced to 8 years and 4 months, as Katanga had already spent 6 and a half years in custody prior to conviction. He completed his sentence on January 18, 2016, but continues to be held in prison in the DRC awaiting trial for other allegations.



*ICC Trial Chamber III declares Jean-Pierre Bemba guilty of war crimes and crimes against humanity, March 21, 2016. The crimes were committed in CAR from on or about October 26, 2002, to March 15, 2003, by a contingent of Mouvement de Libération du Congo troops. (ICC-CPI)*

## The Interesting Case of Mr. Bemba

In December 2004 the CAR government referred the situation in its own country to the ICC prosecutor. The OTP's preliminary examination found that proceedings were going on in relation to matters of probable interest to the ICC.

Jean-Pierre Bemba had been the leader of one of the main armed political movements in the DRC conflict and had become one of four DRC vice presidents appointed under the transitional agreement to secure a peace deal. In 2003 he sent his forces

to CAR to support President Ange-Felix Patassé, who was facing a coup attempt by General Francois Bozizé. Patassé was defeated, and the new regime brought prosecutions against him and his accomplices for economic and violent crimes. Among his accomplices was Bemba. He and his men were accused of having committed rape and murder while in and around Bangui, the capital of CAR.

The ICC's preliminary examination continued until the CAR Cour de Cassation's April 2006 final decision indicating that the charges against Bemba should not be quashed but that the Public Prosecutor should take steps to have the ICC "seized" of the situation.

Bemba at the beginning of his ICC trial challenged the admissibility of the case. The Trial Chamber ruled that the judicial process in Bangui had stated that the charges against Bemba remained in place and that the Cour de Cassation had ordered the case to be brought to the attention of the ICC.

In practice the Central African government had already referred the situation of the entire country to the ICC; however, the procedural importance of the Cour de Cassation's decision was to indicate to the ICC Prosecutor that no proceedings would continue in the CAR in relation to Bemba.

In March 2016, the ICC found Bemba guilty of several charges of war crimes and crimes against humanity, including rape and murder.

Bemba's case is different from Katanga's in important ways. In Katanga's no investigation had taken place or was taking place at the national level. Therefore, the case was already admissible without looking at the issue of the state's willingness or ability to investigate or prosecute. In Bemba's case there had already been a national-level investigation, so it is important to remember that Scenario Two of Article 17(1) applies and that the first step of the Two-Step Process asks a composite question: Did the state investigate the same case as the ICC *and* was there a decision not to prosecute?

It is at this stage that the Bemba case becomes interesting. The Trial Chamber took the view that while the state had decided not to continue with proceedings, it was not in order to put an end to the criminal proceedings in relation to Bemba but

rather to *facilitate their continuation at the ICC*. Having answered the first part of the Two-Step Process in the negative, there was no need to look at whether the decision not to prosecute arose from inability or unwillingness.

The Appeal Chamber followed the position of the Trial Chamber in finding that CAR's decision not to prosecute Bemba was not a decision "not to prosecute" within the meaning of Article 17(1)(b).

This decision shows the consequence of a negative finding on the first composite question of the Two-Step Process. If the answer to the first part is NO, the finding is in effect that the national authorities are *inactive* and there is no need to go to the next step of assessing the genuineness of proceedings. This may look strange in relation to Scenario Two because proceedings were ongoing but were stopped in order to facilitate ICC action and, therefore, the Central African case became "inactive" for the purposes of Article 17.

## Understanding the Same-Case Test

As we discussed earlier, in order to make an ICC case inadmissible, a national authority has to show that it is dealing with a case that sufficiently mirrors the ICC case in terms of both suspects and conduct.

In the scheme of massive crimes, it is impossible to prosecute each and every act that occurs. There would simply be too much evidence and it would take too long to carry out the investigation and the trial. Instead, a prosecutor will try to select the strongest elements of a case to show who was in charge, who played what kinds of roles, how it was done, and what the result was.

The Same Suspect Test (that national authorities need to proceed against the same suspects identified in the ICC case) is not seen as complex or controversial as the Same-Conduct Test. This is because the policy of the ICC prosecutor—and a generally understood goal of the ICC—is to ensure that individuals who are *most responsible* for core crimes are held to account and punished. If people in positions of power and influence pay the price for their criminal acts, ending impunity—and thereby preventing serious crimes in the future—is done much more effectively.



*Kenyan President Uhuru Muigai Kenyatta at a conference to discuss the status of cooperation between the ICC Prosecution and the Kenyan Government, and other issues, October 8, 2014. Kenyatta was required to be present. (ICC-CPI)*

That said, the easiest way for national authorities to avoid serious accountability is to simply prosecute scapegoats, who often occupy low-level roles in the military or a paramilitary group.

To date the issue of the same suspects has not been a complicating factor in any situation, except one, Kenya. With its cases, the ICC investigations focused on very senior government officials: sitting President Uhuru Muigai Kenyatta, Deputy President William Samoei Ruto, and former journalists Joshua arap Sang and Walter Osapiri Barasa.

In Kenya's admissibility challenges regarding the cases, it argued that it did not have to prosecute the same people as the ICC and could start at a very low level and build up cases from there. The Appeal Chamber said Kenya could pursue national proceedings against a broader range of suspects if it liked, but that if it did not include the persons identified by the ICC there was no *conflict of jurisdiction* and the ICC cases were still admissible. In truth great scepticism abounded about the sincerity of the Kenyan position. Now, five years later, in the absence of any serious national prosecution for even middle-ranked personnel, that skepticism seems justified.

In the case of Simone Gbagbo, Cote d'Ivoire argued that it was prosecuting the wife of the former president for serious crimes that rendered the ICC case inadmissible, but the ICC found that the information from the state did not indicate that the authorities were taking "tangible, concrete and progressive steps" to determine her criminal responsibility for the crimes alleged in the ICC case.



## THE SIMONE GBAGBO CASE

Simone Gbagbo is the wife of the former president of Cote d'Ivoire, Laurent Gbagbo. Laurent Gbagbo was transferred to the ICC in The Hague in December 2011. He is charged with Blé Goudé, a leader of the "Jeunes patriotes," in the violence that occurred around elections in 2010. The case against the former president and Goudé focuses on incidents that involved attacks on demonstrations and a market bombing that saw over 160 people killed as well as scores raped and injured. It also lists a number of other incidents where significant numbers of rapes, assaults, and killings took place.



*Forces loyal to former Ivorian President Laurent Gbagbo set fire to roadside shops in Attécoubé, a district of Abidjan, Côte d'Ivoire, after shutting down anti-Gbagbo protests, February 24, 2011. (UN Photo/Basile Zoma)*



*Simone Gbagbo, Cote d'Ivoire's former first lady, sits in the dock at the Court of Justice in Abidjan, at the start of her trial for crimes against the state, December 26, 2014. She was convicted for her role in the 2010-2011 post-election crisis. (Getty Images)*

While Laurent Gbagbo and Blé Goudé have been transferred to the ICC, Simone Gbagbo has been kept in the custody of the Ivorian authorities. Cote d'Ivoire has challenged the admissibility of the ICC case against Simone Gbagbo on the basis that she was being charged and prosecuted in Abidjan.

Indeed, Madame Gbagbo was convicted of three charges in relation to crimes against state security and sentenced to 20 years in prison on March 10, 2015. She was tried with 82 co-defendants by the Abidjan Cours d'Assises from December 26, 2014. Of the 79 accused who appeared before the court 18 were acquitted and discharged. The 61 other defendants were convicted and sentenced.

From the point of view of complementarity the main issue is that the Abidjan trial focused on crimes against the state—not attacks against civilians, with crimes of murder and rape, for example.

The Ivorian authorities first launched investigations into violent crimes without publicly announcing them. When the ICC issued a sealed indictment against Simone Gbagbo in February 2012, the Ivorian authorities soon announced that she would not be transferred to The Hague because she was already facing similar charges in Cote d'Ivoire. Cote d'Ivoire filed an admissibility challenge, which they lost in December 2014. Ivorian lawyers appealed the decision, arguing that the ICC had set “excessively stringent conditions” to demonstrate the existence of proceedings against Simone Gbagbo in national courts. In May 2015, the Appeals Chamber confirmed the decision of the Trial Chamber on the basis of the failure of the state to show that “concrete, tangible and progressive steps” were being taken in the national investigation.

## The Same-Case Test: Why Does It Matter?

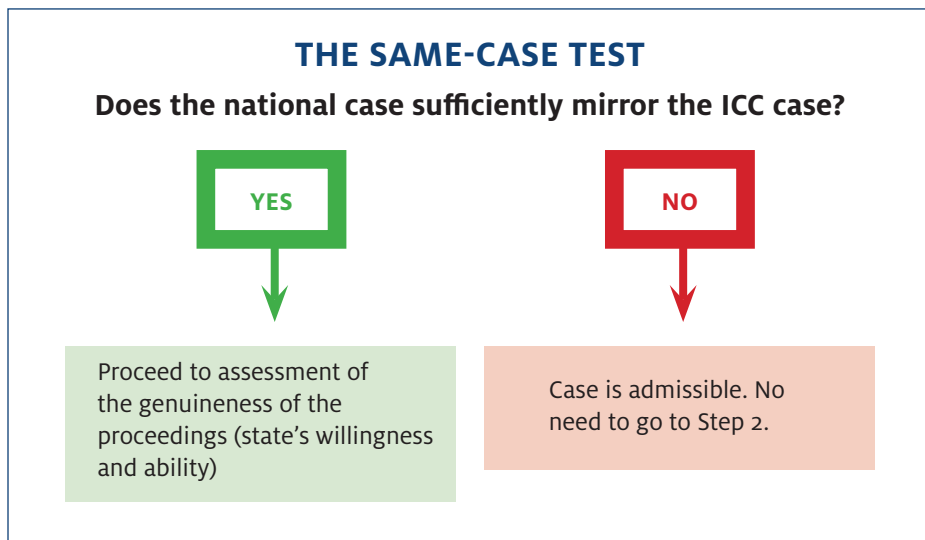
Again, the ICC is intended to act in situations where a large number of crimes have been committed, with hundreds and possibly thousands of incidents involving serious crimes. The prosecutor will have to choose which crimes to investigate. In most cases this will involve choosing incidents. (In some cases incidents are not so relevant. Thomas Lubanga was prosecuted for a policy of recruiting child soldiers rather than, for example, murder.) If a national authority does what the Rome Statute was set up to encourage it to do—that is, prosecute serious crimes in *good faith* so that even individuals with power and political influence face justice—it is important to know as clearly as possible what the ICC expects of the state in terms of pursuing justice for the same case.

Even if a state is acting in good faith there will almost always be significant constraints on a national authority. Financial resources are likely to be in short supply, and investigations may be logistically very challenging and expensive, especially in conflict and immediate post-conflict situations. Politically, any case against senior personalities will lead to tensions that in some cases may provoke demonstrations, riots, and even a crisis of stability. In short, the stakes for national authorities acting in good faith are often extremely high.

In these circumstances a national authority does not want to go through a good faith exercise, with all of the cost and risk mentioned above, only to be told that despite all of its efforts the ICC case will still go ahead because the national case is not sufficiently similar to the ICC’s case. Not only would such a decision imply a waste of time, money, and political capital (all of which may be in short supply), it may undermine the important objective of the complementary regime (established in the statute) of encouraging states to respond positively to their duty to investigate and prosecute, especially those in positions of power and influence.

## So, What Is Involved in the Same-Case Test?

The first thing to understand is that the Same-Conduct Test is different from the Two-Step Process. We answer the first question of the Two-Step Process—“Is the *same case* being dealt with at the national level?”—using the Same-Case Test. If it is found that, indeed, the same case in terms of suspects and conduct is being investigated, then it is necessary to answer the second question of the Two-Step Process: “Are the proceedings genuine?” In this way it can be seen that the Two-Step Process can, in effect, sandwich or bookend the Same-Conduct Test.



## Why Is That Difficult?

The Same-Case Test is not always difficult to carry out, but it can be. It raises questions about how much discretion national authorities should have about the specific things to be included in a case for an ICC case to be inadmissible. In a lot of circumstances the idea of the same conduct or same case raises no real difficulty. If the ICC is prosecuting Mr. A for committing the murder of Mrs. B by shooting her in the back in Town C on January 1, 2010, and the national prosecutor brings the same case in all of these particulars then there is no doubt that both courts are pursuing the same case.

However, given the nature of the crimes the ICC is set up to deal with, prosecutions rarely are as simple as the example given here. Most ICC cases so far have charged the accused as *indirect perpetrators* or *indirect co-perpetrators*. This means that they were not the individuals who carried out the final execution of the crime in question (like pulling the trigger, for example) but played a different role—usually planning or ordering the crime.

This makes a lot of sense, especially in cases where there is a degree of organization or structure through which crimes are carried out. The indirect perpetrator uses other people in the organization or structure to ensure that what he wants to be done is done—like a mass killing—but by law he is as guilty as if he had shot the victims himself.

This idea is a very useful way to capture the reality of how crimes are committed on a large scale in times of conflict or repression. It is relatively rare for the individuals who have ordered killings or widespread abuse against civilians to be physically present when all of the violations were carried out. Even if they are present in some locations, they cannot be present in all of them.

### A LOOK AT COMMAND RESPONSIBILITY

Ordering and planning crimes by superiors or commanders is not the same as *command responsibility*, although media reports sometimes assume it is the same thing.

Command responsibility refers to a very specific idea: that a commander knew about a crime to be committed by a subordinate, could have done something to stop it but failed to do so; or found out about a crime by a subordinate, could have punished it but failed to do so.

The challenge of the Same-Case Test arises where there are a large number of events or incidents involved in the plan or orders of the accused. A systematic plan to wipe out villages in a certain part of a country may take hundreds or thousands of soldiers to carry out. It may involve the killing of hundreds or thousands of people, the unlawful destruction of thousands of houses, and the rape and torture of many people. In short, the kinds of crimes we are talking about often happen on a very large scale and are committed by many different people, in many different places, with many different victims.

Allowing states a degree of choice in the selection of incidents could be important for a number of reasons. A national authority may be eager to prosecute but is unable to obtain all of the evidence because of a lack of resources or a lack of access; or it may be a simple case of what is sometimes called *judicial economy*—putting together a winnable case in the most efficient way possible.

Let's consider three situations that the ICC has dealt with so far to illustrate this point.

## DRC SITUATION



**The ICC** can only deal with crimes committed in DRC since 2002, when the DRC ratified the Rome Statute. This means that the vast majority of war crimes and crimes against humanity committed in the two enormous wars of the preceding decade are ineligible before the court. Nonetheless, huge numbers of crimes were still being committed after the peace deal negotiated in Sun City in April 2002 to end the second war, especially in Ituri.



The ICC has charged six people with crimes over the last 13 years. It has had to select incidents from a large universe of cases, especially more recent ones (from 2006 onwards) in the Kivus. Only a very small sample of the crimes committed in Ituri and the Kivus have been prosecuted by the ICC and many serious crimes have not been investigated either by the ICC or national authorities.

## DARFUR SITUATION

**In one of several cases** arising from the Darfur situation the ICC issued an arrest warrant for Sudanese President Al Bashir for genocide. In that conflict the United Nations estimates that between 300,000 and 400,000 people were killed, almost 3 million people displaced, and over 400 villages destroyed.



*A camp for internally displaced persons in Khor Abeche, South Darfur, was attacked by approximately 300 heavily armed men who set fire to dozens of homes and stole livestock from residents, March 26, 2014. (Mubarak Bako/UNAMID)*

In its application for a warrant the OTP set out the case for war crimes, crimes against humanity, and genocide, indicating the broad range of crimes committed by government forces through “hundreds of unlawful attacks” on towns and villages as well as other strategies designed to destroy specific ethnic groups.

To demonstrate the attacks it selected 14 incidents of attacks on villages and towns: four from 2003, two from 2004, none from 2005, one each from 2006 and 2007, and six from 2008. Most of these locations are found in the enormous territories of West and South Darfur.

The ICC Prosecutor chose to demonstrate a sample of a pattern of events or *course of conduct* by selecting less than perhaps 5 percent of the attacks that had allegedly occurred, with the majority of those incidents occurring in 2003 and 2004. This is not to criticize in any sense the choice of incidents, but there is no doubt that many other incidents were at least of similar gravity and might have been included but were not.

## LIBYA SITUATION

**The conflict in Libya** did not last as long as the two described above. Indeed, the OTP focused on incidents in the cases against Muammar Gaddafi, Saif al Islam Gaddafi, and Abdullah Al-Senussi that occurred from February 15–28, 2011. The three were charged with the crimes of murder and persecution as crimes against humanity.



*A crowd of demonstrators protest the ongoing use of weapons by rebel militias inside Tripoli, Libya, and the city's general atmosphere of lawlessness, December 7, 2011. The newly formed government is struggling to assert itself over disparate power actors. (UN Photo/Iason Founten)*

A good deal of the case against the accused focused on the policy of repression that was developed in response to the uprising. As indicated earlier, when bringing a charge in relation to a policy the issue of incident selection will not necessarily be of the same significance. However, to demonstrate the application of the policy the OTP identified attacks carried out by the Libyan security apparatus during this timeframe, notably in the towns of Tripoli, Misrata, and Benghazi. It pointed to attacks in six locations, “among others,” on February 25, when “up to one hundred people were killed;” it noted that the number of incidents and casualties remained unknown due to a cover-up operation that included the destruction of cemeteries, disruption of communications networks, and attacks on the press.

The information presented by the OTP in this case was in some ways less precise than in others. Although it tried to provide examples, it also clearly acknowledged that these were “incidents among others” and its list of incidents was not exhaustive.

In this investigation, as in Darfur, a sample of a pattern of events demonstrated a course of conduct. Again, the difficulty arises in situations where national authorities are faced with the prospect of prosecuting those responsible for the kinds of crimes that involve a large number of victims, direct perpetrators, and possibly very many different incidents where the crimes were committed.

## Why Does the ICC Insist on the Same-Case Test?

There are good reasons to carry out the Same-Case Test. In a narrow sense, it can be justified as the simple application of Article 17 to resolve *conflicts of jurisdiction*. That would be a *black letter law* explanation. In a broader sense, the aim is to make sure that states do not hide behind national proceedings that fail to address the most serious cases (in terms of suspects and conduct) but push them towards dealing with those cases—or have the ICC do it themselves.

So far, there are very rare examples of the same case being prosecuted. In most cases we find that states are being found to be “inactive.” We have seen one example of a state, CAR, acting in good faith and making itself inactive in order to facilitate the admissibility of a case against Bemba.

In as much as the purpose of the ICC is to help end impunity for serious crimes, one must remember that before the ICC decides to open an investigation there has been a process—sometimes lasting years—of preliminary examination. During that period, as a result of OTP policy, the state in question knows that the ICC Prosecutor may be considering opening an investigation. (It will also have the opportunity to seek a deferral of an investigation under Article 18, as mentioned above, except in the case of a UN Security Council referral). The state has time to prepare its own investigations and show that there is no need for the

### LIBYA AS AN EXCEPTION



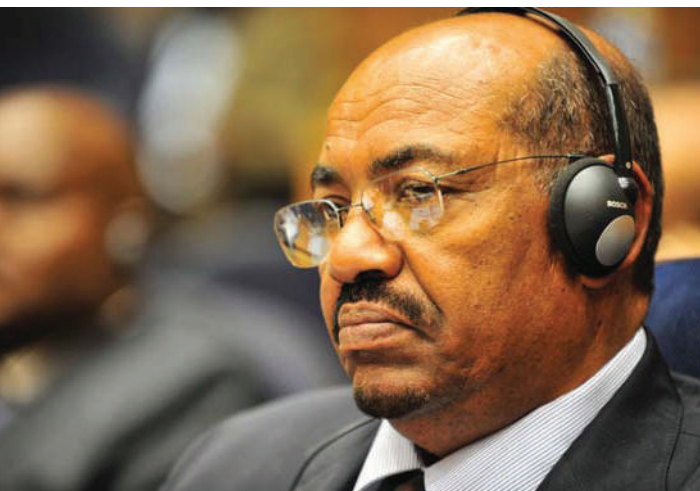
The one very obvious exception to lengthy preliminary examinations is the Libya situation. The ICC’s preliminary examination took less than one week from when the UN Security Council referred the case. The circumstances that gave rise to the referral changed materially in a short period of time with the overthrow of Muammar Gaddafi. In effect, none of the political and legal expectations that had informed the initial referral and decision to investigate remained in place. It is, therefore, perhaps unsurprising that it has been the cases from Libya that have invited the most interesting discussions on the use and nature of the Same-Case Test.

ICC prosecutor to act. There may be various reasons that a state does not do this, but it is extremely unlikely to be surprised when an investigation is opened; they have had substantial time to show that credible national proceedings are taking place.

Sometimes a power that has just prevailed in a conflict may be prepared to see the losers prosecuted but not people from their own side (as critics would say in the case of Cote d'Ivoire with Simone Gbagbo). Sometimes there may be political will to prosecute people from the military's low ranks, even of state forces, but not those who planned and ordered systematic crimes.

On the question of conduct one can look at the case of Darfur. During preliminary examination of that situation the Sudanese national authorities presented information that showed special tribunals had been established and had prosecuted a number of cases. Many of these cases might have been considered relatively serious in the local context, including, for example, the theft of cattle and sheep. These are not trivial matters in the affected communities, but they had nothing to do with allegations of massive war crimes, crimes against humanity, and genocide. That kind of prosecution obviously has no relevance for the admissibility of cases before the ICC.

These are the easy cases. The hard cases relate to prosecutions of the same kinds of things that the ICC is looking at, in relation to the same suspects.



*Sudanese President Omar Hassan Ahmad Al Bashir listens to a speech during the 20th session of The New Partnership for Africa's Development in Addis Ababa, Ethiopia, January 31, 2009. Al-Bashir is wanted by the ICC for genocide, war crimes, and crimes against humanity. (Jesse B. Awalt/US Navy photo)*

The real question in some commentators' minds is whether the ICC Appeals Court has gone further than it should have in some important cases. Has it gone beyond the idea of the Same-Case Test as a means to not only resolve conflict of jurisdictions? Has it developed an approach that undercuts the principle of complementarity? There are some arguments to support that criticism in one or two cases, and we will discuss them shortly.

## What Are the Legal Considerations?

To explain how the main legal issues have developed we can look at a few key cases.

### Thomas Lubanga Case

Thomas Lubanga was the head of a militia organization in the eastern province Orientale in the DRC. He had been under investigation by the ICC since early 2004. In 2005 an attack took place killing nine UN peacekeepers in a village called Ndoki. The international community was outraged and the UN Security Council passed a resolution calling on DRC authorities to take immediate action in respect of the warlords operating in the country. Shortly after, 10 so-called warlords, including Lubanga, were detained in Kinshasa.

It was never seriously suspected by anyone in authority in the DRC or the UN that Lubanga was involved in the Ndoki killings (he was not operating in the area), but he was clearly a powerful leader of a large militia force.

Lubanga spent a year in detention in Kinshasa before the ICC requested his transfer to The Hague. The ICC Prosecutor, in seeking an arrest warrant, explained that



*UN peace-keeping soldiers carry the coffins of the nine UN soldiers killed near Bunia, the capital of Congo's conflict-torn Ituri province, February 26, 2005. (UN Photo)*



although Lubanga was detained on charges of genocide and crimes against humanity (among other things) and his detention had been renewed several times, the possibility of his release could not be excluded.



Top: Thomas Lubanga, right, enters the courtroom at the International Criminal Court, on the opening day of his trial, January 26, 2009. (ICC-CPI/Michael Kooren, HO)

Bottom: MONUC doctors treat refugees who fled their homes following brutal militia fighting and massacres in Che, Ituri, DRC, February 4, 2005. (UN Photo/Christophe Bouliercac)

When considering whether to grant the arrest warrant for Lubanga, the Pre-trial Chamber recalled an earlier decision made in relation to victims' participation on proceedings where it defined the concept of a case as "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects" (Paragraph 21 of the decision of February 10, 2006). The Pre-trial Chamber went on to emphasize that "it was a *conditio sine qua non* for a case . . . to be inadmissible . . . that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."

Looking at the original definition of what was meant by a *case* referred to by the Pre-Trial Chamber, "specific incidents" are mentioned, but in summarizing its own previous decision the chamber only referred to a test that encompassed the *same persons* and the *same conduct*.

As discussed above, it is important that the state prosecute the same persons in order for the ICC case to be inadmissible.

If a national case is proceeding against a different person then it is a fairly simple issue of saying it is not the same case. Mat-

ters become more complicated in deciding what the same conduct means and to what extent it is necessary that the national cases address precisely the same incidents as those that form the basis of the ICC case.

## So, the Same-Suspect Test Seems Easy: What Is Meant by the Same Conduct?

The ICC's approach to the importance of *incidents* has not always been clear, meaning it is not always clear precisely what the court thinks a national case should look like if it is to successfully argue that the ICC case is inadmissible.

### “Substantially the Same Conduct”

In the case of William Ruto (currently the vice president of Kenya), which was dismissed in April 2016, the ICC Appeals Chamber introduced a new qualification to the idea that the same case had to encompass the same suspects and the same conduct. It said that “the national investigation must cover the same individual and *substantially* the same conduct as alleged in the proceedings before the Court” (emphasis added).

The introduction of the word *substantially* had not been argued for by any of the parties in the proceeding and, indeed, the Appeals Chamber initially seemed happy to repeat the previous formulation of the Same-Conduct Test. Because the Appeals Chamber is in effect the ultimate arbiter of what is the correct approach, the formal test became that of “substantially the same conduct.” The Appeals Chamber, however, did not explain what particular difference the qualification might make.

### The Al-Senussi and Gaddafi Cases (Libya)

When Muammar Gaddafi was murdered, two defendants were left in the OTP case relating to the Libya situation: Saif Al-Islam Gaddafi (Gaddafi's son) and Al-Senussi. Gaddafi's son was being held by a militia in the town of Zintan, beyond the control of the national authorities. Al-Senussi had been transferred to the official authorities after extradition.



*From left, ex-spy chief in Muammar Gaddafi's government Abdullah al-Senussi, ex-intelligence chief Buzeid Dorda, and ex-Prime Minister Baghdadi Mahmudi sit behind bars during a hearing at a courtroom in Tripoli, Libya, April 14, 2014. (Ismail Zitouny/Reuters)*

In the Gaddafi case the Pre-Trial Chamber said that what amounted to “substantially the same conduct” would have to be considered on a case-by-case basis, but that in his case it would have been inappropriate to expect the Libyan authorities to cover the exact same episodes set out in the ICC case, not least because these were not always exhaustively or clearly defined.

The chamber said that what mattered was not the particular incidents but the *underlying conduct* demonstrated in the incidents the Libyan authorities had selected. In practical terms the chamber said that the conduct identified by the OTP lay in Gaddafi's control of the Libyan state's security apparatus to “deter and quell by any means . . . the demonstrations of civilians which started on February 11, 2011.”

When the Appeal Chamber came to look at the case it said:

What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is

investigating. The Appeals Chamber considers that to carry out this assessment it is necessary to use as a comparator the underlying incidents under investigation . . . alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.

This statement from the Appeals Chamber seems to confirm that the selection of incidents remains potentially very important. In essence, it says that in many cases it is likely to be the *similarity of incidents* that will determine whether or not the same case is being prosecuted.

As it happens, in Gaddafi’s case the Pre-Trial Chamber found that because the Libyan authorities had not provided enough information to clearly show what it was actually investigating, it could not determine whether it was indeed the same case. The Appeals Chamber upheld the decision on this basis.

In the Al-Senussi case, the Pre-Trial Chamber again addressed the issue of *incident selection*. It noted that the relevant conduct in his case related to events in Benghazi between February 15–20, concerning his actions “to quell the revolution by any means necessary.” The Pre-Trial Chamber noted that because Al-Senussi’s alleged

*ICC Appeals Chamber confirms the admissibility before the ICC of the case against Saif Al-Islam Gaddafi, May 21, 2014. Judge Erkki Kourula, Presiding Judge on this appeal, read a summary of the decision in an open hearing. (ICC-CPI)*



conduct was “not shaped” by the incidents mentioned in the ICC’s decision to grant the warrant against him, there was no need for the Libyan case to proceed on the same incidents.

The Appeals Chamber in this case disagreed with the decision that specific incidents did not form part of what had to be examined in deciding whether the Libyan authorities were dealing with the same case. The Appeals Chamber said that the Pre-Trial Chamber position was “not in line with prior ICC jurisprudence.”

In both the Gaddafi and Al-Senussi cases it is clear the Pre-Trial Chamber was seeking to inject a limited degree of flexibility into the evaluation of what is meant by *substantially the same conduct* by recognizing the particularities of the Libyan situation; that in these particular cases the overlap of incidents between the ICC and Libyan cases was of much less significance than demonstrating the same underlying conduct.

The Appeals Chamber position, however, is that “incidents play a central role in the comparison” of national and ICC cases. That goes beyond saying they are just a relevant factor. It is clear that the Appeals Chamber will continue to see the overlap of incident selection as the key factor in many cases and that a genuine prosecution for similar underlying conduct in respect of different incidents may not be enough to make an ICC case inadmissible.

In the final analysis the Appeals Chamber view prevails, even if reasonable people can disagree about the approach they have taken and the implications it may have in the longer term.

PART SIX

# Crime, Punishment, and Genuine Proceedings



*A mural in Goma, DRC, warns of the penalties for rape. (Roberto de Vidol/IRIN)*



## Does a National Court’s Decision on Punishment After Conviction Have a Bearing on Determining If the Proceedings Are Genuine?

**T**he Rome Statute only explicitly deals with the issue of punishment in national proceedings in Article 80. According to that article, the rules on sentencing that apply to the ICC regarding its trials have no relevance for national laws relating to penalties.

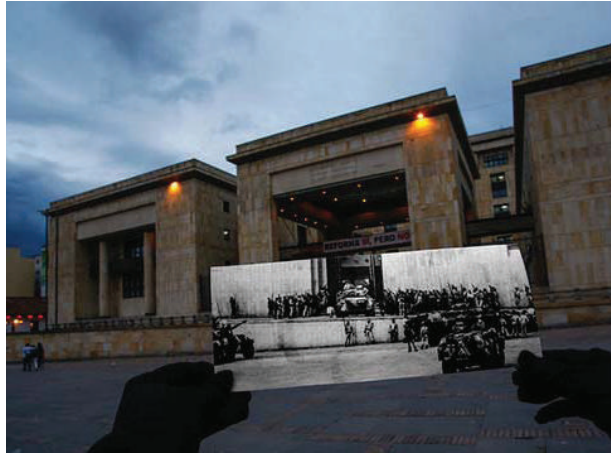
States had insisted that this provision be included for a specific reason: the ICC does not allow the death penalty. States that allowed the death penalty did not want to create the possibility of an argument that the Rome Statute forbade capital punishment in their own territories. While the motivation for Article 80 was to allow states to give more severe sentences than the ICC, it also means that national states are free to impose lighter sentences as well.

But, is punishment relevant in the question of a genuine national proceeding?

Punishment is an important issue that has come up in the context of the Colombian peace negotiations. (*See page 23–24 for more details.*) And in this regard, in 2013 the ICC Prosecutor sent a letter to Colombian officials indicating her view that whatever sentence was to be imposed on demobilized FARC and paramilitary members it had to be proportionate to the offences in question, and not illusory. In particular, it specified that any sentence that allowed a complete suspension of punishment would indicate that the proceedings were not genuine.

The ICC Prosecutor, acknowledging the Colombia situation presented new terrain, focused on two aspects of Article 17(2). On the one hand she argued that a very light or illusory sentence could be understood as shielding the accused from criminal responsibility in the meaning of Article 17(2)(a). On the other, she argued that such a sentence would fall foul of Article 17(2)(c), which requires that proceedings be conducted “independently and impartially,” “with an intent to bring the person concerned to justice.”

*View of the Palace of Justice in Bogotá, Colombia, overlaid with a historical photo of the 1985 siege of the Supreme Court by the M-19 guerrilla group. More than 100 people, including 12 Supreme Court Justices, died during the final assault and military raid on the palace. In 2010, retired Colonel Alfonso Plazas Vega was sentenced to 30 years in prison for his role in at least 11 enforced disappearances after the siege. (Centro Nacional de Memoria Histórica)*



This is an interesting argument, but it is not without its difficulties. With regard to the first argument, Article 17 talks about shielding the accused from criminal responsibility. In most contexts the idea of establishing *criminal responsibility* is understood to refer to the determination of guilt or innocence. Indeed, most countries separate the proceedings for the determination of a sentence from the determination of guilt. It could be argued that the ordinary meaning of Article 17(2)(a) refers to the issue of determining guilt or innocence. If a state holds a trial designed to ensure the accused is acquitted it would be a sham. But it is not so clear that the same can be said of a trial where the accused is convicted but receives a very light sentence.

The difficulty with the second argument is that it requires that two things be shown: first, that the proceedings were not independent and impartial; and second, that (underlying those flaws) the intention was to avoid bringing the accused to justice.

Regarding the first part, the primary thing that needs to be shown is that the punishment that was imposed by a national court demonstrates that the court lacked independence and impartiality. Yet, if the court imposes a sentence prescribed by law that has passed legislative and judicial scrutiny (as is the case in Colombia), it is difficult to see how that could constitute the court's acting without independence or impartiality. Indeed, the opposite would appear to be true: if the court failed to impose a sentence prescribed by law there would be serious grounds for concern about its independence and impartiality.



*Afghan National Police officers provide security at Dai Kundi Central Prison in Nili, Afghanistan, August 11, 2009. (UN Photo/Eric Kanakstein)*

Leaving aside these legal difficulties, further questions emerge. What would happen if a genuine trial took place and the accused was sentenced to 10 years in jail—a serious sentence—but five months later, after a general election, a new president came in and decided to pardon the convicts in a gesture of national reconciliation. (Note this is not a fantastical situation: something similar happened in Argentina under President Carlos Menem.) It would surely be very difficult to argue that the trial had not been genuine.

It is easy to understand why the ICC prosecutor made her argument, to ensure that what she considered to be an acceptable sentence might be imposed. Many people might feel that if the Colombian peace process successfully establishes a justice program with very light sentences that other countries will be able to cite it as a precedent in the future, thus undermining the aims of the ICC.

There is a real difficulty in that Article 17 does not explicitly address punishment, while opening the door for the development of an interesting debate on the purposes and modes of punishment in diverse and politically complex situations. So far, ICC judges have not had to deal with this issue. Time will tell whether they agree that Article 17 is silent on the issue or if they think the court is implicitly entitled to consider punishment in assessing genuineness.

## PART SEVEN

# The Ability to Conduct National Proceedings



*Courtroom in Tripoli, Libya, during the trial of Al-Saadi Muammar Gaddafi, November 1, 2015. He is charged with the first-degree murder of a former trainer at Tripoli's Al-Ittihad football club in 2005. (AP Photo/Mohamed Ben Khalifa)*

**A**rticle 17(3), which covers the state’s ability to conduct national proceedings in accordance with national laws, does not simply require proof that there has been a total or substantial collapse of the system or that the system is “unavailable.” It requires proof that the collapse or unavailability of the system means proceedings cannot be carried out there.

In general, it is worth noting that aside from the serious destruction of a state’s infrastructure and ongoing significant instability, the ICC may find that a state is able to conduct genuine proceedings. This is the obvious conclusion from the Appeals Chamber’s decision in the Al-Senussi case described in some detail above (*see pages 59–62*). The question is whether a specific investigation and trial can take place. Even in extremely unstable conditions that may be possible. Similarly, it may be true that the legal system as a whole is weak, but again the question is whether the case of interest to the ICC can be conducted there, not whether the system as a whole would be given a seal of approval.

The only situation so far that has looked closely at this issue is Libya. (However, it has to be said this was done in a way that caused some confusion. Although the Pre-Trial Chamber found that Libya was unable to prosecute due to the lack of availability of the system in Gaddafi’s case, the Appeals Chamber found that this was not the basis for dismissing the admissibility challenge. Rather, it failed due to a lack of evidence sufficient to demonstrate the contours of the case at the national level.)

The chamber took note of attempts made through national and international efforts to make Libya as a whole more secure, particularly the operation of the justice system. However, the court found that due to ongoing problems the Libyan system was “unavailable” to try serious cases, in the sense that the accused could not be obtained. (Gaddafi was and is held by a militia force.) The chamber also found that the security context meant that testimony could not be obtained and that the Libyan courts were “otherwise unable to carry out proceedings” because of the serious problems surrounding the appointment of defense counsel.

Al-Senussi, unlike Gaddafi, was in the custody of the official authorities, so the custody of the accused was not an issue. The focus of the debate in his admissibility challenge centered on two things: the question of the accused’s access to defense counsel and the overall guarantees of a fair trial.

It was agreed by all parties that Al-Senussi had not been provided with defense counsel in the national case up to the point of his challenge. The Appeal Chamber held that this did not in itself render Libya unable to carry out genuine proceedings. It rejected the defense argument that the national case was likely to be fatally harmed as a result of these fair trial violations. The chamber said that the fact that a trial may be abandoned or the accused may be acquitted did not mean that a process was not genuine. Losing a case as a result of a due process violation could be perfectly consistent with a genuine prosecution attempt.

The Appeals Chamber noted that the major differences between the Gaddafi and Al-Senussi cases were that Al-Senussi was in official custody and the guarantees of defense counsel being provided for Al Senussi could be relied on more easily.



## PART EIGHT

# Challenging Admissibility: Who Can Do It and When?



*Kenyan Deputy President William Samoei Ruto, during an ICC status conference in the case against him and journalist Joshua Arap Sang, May 14, 2013. The case was dismissed on April 5, 2016, due to insufficient evidence. (ICC-CPI)*

## Who Can Challenge?

Under Article 19, states with jurisdiction and suspects can challenge the admissibility of an ICC case. As we saw in the Libya situation, the Libyan state challenged the Gaddafi case while Al-Senussi, the accused, challenged his own case. Likewise, we have seen the Kenyan state challenge early on in the proceedings regarding that situation along with the accused at a later stage. This also happened in the case of Simone Gbagbo with a challenge by Cote d'Ivoire.

In addition to states and suspects, the court is entitled to determine the admissibility of a case on its own initiative. (There is a further provision that a state that is not a state party to the statute but that has accepted the jurisdiction of the court under Article 12 can also challenge.)

### POSSIBLE CHALLENGERS

- Suspects
- A state with jurisdiction over the case
- The court in reviewing the issue of admissibility on its own initiative

## What Does a Challenge Have to Show?

A challenge to admissibility has to show that national proceedings demonstrate that progressive, concrete, and tangible steps are being taken to bring the most responsible to justice. This was made clear by the Appeals Chamber when it dealt with the Ruto case from Kenya and Simone Gbagbo case from Cote d'Ivoire.

Not only does there have to be evidence of progressive, concrete, and tangible steps, but these steps also have to be shown with sufficient clarity and through sufficiently reliable and authoritative information (what the court refers to as *probative value*). The lack of such information in the Gaddafi challenge, for example, meant that the court could not establish that the same case was being investigated. The court had given Libya three chances to provide that information. When the Libyan state offered to open its file up to clearly show what it was doing the court said that it was for the state to bring the evidence, not to invite the court to look at it after having failed to provide it after three opportunities.

A challenge cannot be theoretical or based on a plan of action. It has to be about concrete steps that have already been taken. The court has made this clear, in particular in the challenges brought by Kenya; it is no use telling the court what will be done. A challenge can only be successful on the basis of showing what is being done or what has been done.

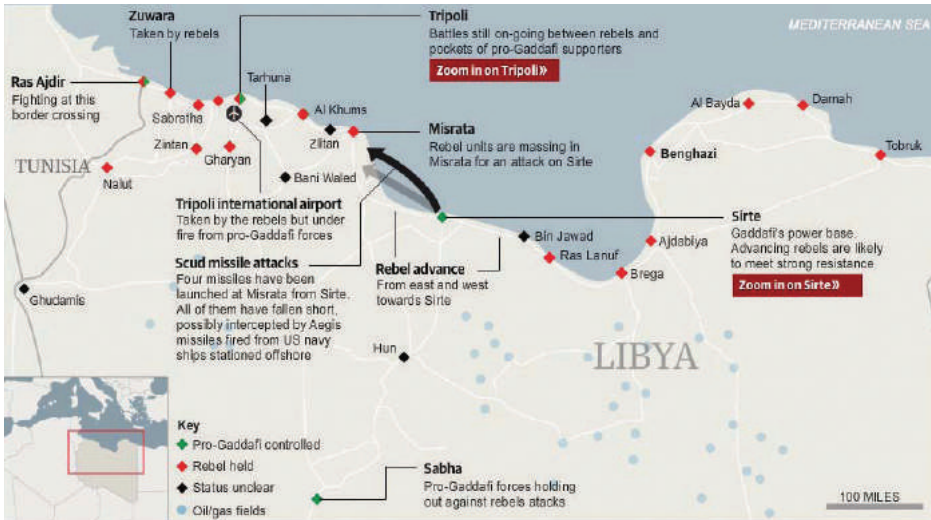
## What Kind of Proof Would Show that the State Is Taking Steps?

The ICC has established that the evidence has to show that concrete steps to investigate or prosecute alleged crimes have taken place or are taking place. Challenges cannot rely on “mere assertions.”

The Libyan cases went into a great deal of discussion about what kind of information was helpful or could be relied on in these circumstances. On the one hand, it was found that copies of parts of the prosecutor’s files were indeed useful and could be treated as valid. It found, for example, that summaries of evidence prepared by the national prosecutor were of some *probative value*, even if they were not technically parts of the file in the cases being developed.

In the Al-Senussi case the Pre-Trial Chamber also considered a letter from Libya’s prosecutor that set out the steps that had been taken in relation to the Gaddafi investigation, including, for example, that investigators had over 30 witness testimonials and telephone call recordings. While the OTP recognized potential overlaps in the Gaddafi and Al-Senussi cases, it found that this letter shed no direct light on the Al-Senussi investigation.

In a challenge brought by Cote d’Ivoire in the Gbagbo case, the OTP found that the state’s documentation did not show an investigation was following concrete, tangible, and progressive steps, but rather an investigation that was “sparse and disparate.” Even taking all of the information together the ICC was unable to understand the national case with sufficient clarity. It repeated the same view it had taken in the Gaddafi case, saying, “If a State is unable to clearly indicate the contours of its national investigation, the State cannot assert that there exists a conflict of jurisdiction with the Court.”



Map, “Libya unrest: Fighting continues in Tripoli,” August 26, 2011. (*The Guardian*)

In short, the ICC evaluates any information that the state provides that casts light on the nature and quality of its national investigations. The fact that the information may have been specifically prepared for the admissibility challenge does not render it invalid. Likewise, summaries rather than complete copies of interviews may be of some value. The issue for the ICC is whether it believes the information helps to establish with sufficient clarity the contours of the national case and the concrete steps the state has taken to develop it.

## When Can a Challenge Be Made?

Under Article 19(4) the Rome Statute says that a challenge on admissibility can be made only one time and must be made before the start of the trial. The ICC may allow more than one challenge in exceptional circumstances or after the trial has begun or if it is argued that the accused has, in fact, already faced trial for the same matters.

Article 19(5) adds that a state challenge must be made at the “earliest opportunity.” (This is not necessary for the accused.)

The rules on the timing of a challenge present a number of interesting questions, especially for a state. The first is, when does a case become sufficiently clear for a state to bring a challenge? And when is the earliest opportunity?

In the Kenya cases involving the now president and vice president (Kenyatta and Ruto, respectively) the Appeals Chamber found that if a state challenged “prematurely” it could not expect to be afforded an opportunity to amend its challenge at a later stage.

The timeline in the Kenya situation is interesting:

<b>March 31, 2010</b>	Pre-trial Chamber authorizes opening of an investigation by the Office of the Prosecutor
<b>March 8, 2011</b>	Pre-trial Chamber decides by majority to summon the suspects to the ICC
<b>March 31, 2011</b>	Kenya submits admissibility challenge
<b>April 4, 2011</b>	Pre-trial Chamber’s decision regarding Kenya’s application
<b>April 21, 2011</b>	Kenya files additional materials in support of challenge
<b>April 28, 2011</b>	Additional parties, including OTP, file responses to Kenya’s challenge
<b>May 13, 2011</b>	Kenya files response
<b>May 30, 2011</b>	Pre-trial Chamber issues decision rejecting Kenya’s challenge

The thrust of Kenya’s challenge related to same-suspect/same-conduct issues (see pages 46–47). However, the ICC rejected the argument and reiterated that a challenge had to show that the same case was being investigated nationally. A challenge that produced no such information would have no prospect of succeeding. The fact that Kenya decided to challenge the admissibility of the case before taking steps to carry out an investigation into the same case was a choice it made that it could not expect the ICC to remedy.

In the same decision the Appeals Chamber noted that once an arrest warrant or summons was issued there was a great degree of specificity and it was clear what a state would have to show if it was to successfully challenge the case. But this is not entirely straightforward. On a number of occasions the ICC has not agreed to grant what the OTP has asked for, either in terms of the charges or the suspects. One can, therefore, at least say that a case is not what the ICC prosecutor says it is but what the judges say it is.

ICC judges have a say not only in determining the matters for which a warrant may be granted, they also determine the specific details of the case at a later stage in the confirmation of charges proceedings. In the case of Callixte Mbarushimana from DRC, the accused was arrested by France and transferred to the ICC in January 2011. Eleven months later he was released after the court refused to confirm the charges against him. (As noted earlier, the court has dismissed four cases in their entirety at the confirmation of charges stage.)

If the DRC had wanted to challenge the Mbarushimana case, when was its earliest opportunity to do so? When the warrant was granted? When he first appeared in the ICC courtroom? Or at the confirmation proceedings? This is not an easy question to answer in light of the Appeals Chamber's position on what a national authority has to investigate in order to show that its case "sufficiently mirrors" the ICC case.

It could be said that a state should bring a case as soon as it knows what the OTP is investigating, which becomes clear with the warrant application. But would it be wise to devote time and resources to the investigation of incidents that Pre-trial Chamber judges decided should not form part of the case going forward? It could be argued that a prudent state should not challenge admissibility until the confirmation of charges, when it knows exactly what the ICC case will be.

Again, the issue of the nature of the opportunity to be afforded to a challenging state came up in the Simone Gbagbo case. The initial challenge was made on September 30, 2012, and the Pre-trial Chamber allowed further representations to be made on February 25, 2014, and again on October 10, 2014.

In both the Gaddafi case and the Simone Gbagbo cases the respective state was given generous opportunity to provide detailed information about the nature of the



national proceedings being conducted. Perhaps the reason these states were given more time than Kenya was the fact that they had the person being investigated by the ICC in their custody and there was at least an indication of some potentially relevant proceedings going on. None of this was apparent in the Kenya cases.

As mentioned earlier, despite the generous amount of time afforded to both Libya and Cote d'Ivoire neither was able to persuade the court that the same case was being investigated. In Libya's case the evidence lacked specificity and *probative value* (essentially not the right kind of information and not clear enough information). In the Gbagbo case it was not the lack of clarity or weight but the lack of indications that the state was taking appropriate steps.

## PART NINE

# What Should National Prosecutors Do?



*Congolese military and civilian magistrates at a conference organized by ICTJ in Goma, North Kivu, to discuss a national strategy for prosecuting international crimes in national courts, June 26, 2015. (ICTJ)*

**T**his section looks briefly at the best approach for national prosecutors dealing with serious crimes that may be of interest to the ICC.

The first thing to note is that national prosecutors control what can be investigated to a much greater degree in the stages prior to the opening of an investigation by the OTP. As has been discussed, once an ICC investigation is opened the national case will have to follow very closely whatever it is the OTP has decided to focus on, in order to have that case declared inadmissible.

However, to satisfy the ICC that there is no need to even open an investigation it is necessary to show that serious crimes within the jurisdiction of the court are being investigated or have been investigated—and that those investigations have focused not only on low- and mid-level participants but also high-ranking officials and influencers who may be reasonably described as having the greatest responsibility for the crimes.

In order to do this convincingly a number of steps may be of assistance.

- 1 Because the prosecutor will be faced with a large universe of cases and potential suspects, in most circumstances, he or she should undertake a mapping exercise** to understand the scale and nature of the alleged crimes, where and when they may have occurred, and whether the mapping allows inference for potential hypotheses about which groups were likely to have participated in the acts in question. (In practice this requires a policy decision by the leadership of the prosecuting authority, like the Attorney General.)
- 2 Mapping is first and foremost a tool to determine how to address the scale of the crimes in question.** The information used in the mapping does not have to satisfy any legal standards. It is an internal working document to assist decision making. That said, the information should be based on reliable sources, which may include the press, nongovernmental organizations, commissions of inquiry, and complaints, etc.
- 3 The prosecutor should be able to devise a work program on the basis of the mapping exercise, identifying which areas should be prioritized in the investigations.** Ideally a working document should be able to be produced that explains

what the mapping exercise found (in general terms) and why the decision was made to prioritize certain lines of inquiry, types of cases, or types of suspects.

- 4 There is no rule that a prosecutor must decide to prioritize types of cases or types of suspects, but the ICC will not be involved in cases that do not concern war crimes, crimes against humanity, or genocide. It will also not be involved in cases that do not, in most cases, address those bearing the greatest responsibility.** If the national prosecutor does not indicate that these issues have been addressed the work will be of little value in helping the OTP to decide not to open an investigation. An example of the kind of document that might be useful was the Executive Directive published by the Attorney General of Colombia in 2012, which set out his criteria for prioritizing certain kinds of investigations and the basis for developing them.
- 5 The prosecutor has to develop a workforce capable of carrying out the investigation,** once a mapping exercise has been carried out and a program of work has been devised on defensible selection criteria (possibly including the OTP's focus, for example, on the number of victims, the nature of the crime, any particularly aggravating circumstances, and the impact of the crime(s) in question).
- 6 Investigations have to be able to show the link in the commission of the crime between those who carried it out and those making the plans and decisions.** Experience shows that national prosecution authorities are rarely used to investigating incidents that are a form of organized crime. The nature of organized crime is both to divide labor and obfuscate the role of superiors in the structure. Not only are such investigations often more complex than ordinary criminal investigations, requiring a particularly proactive and creative approach, the fact that powerful people may be the suspects can mean that the appetite to address the issues may be limited due to fear or intimidation.
- 7 A team to investigate this kind of organized crime (sometimes called *system crimes*) has to be brave and supported politically, at least within the prosecutor's office.** The team must be empowered technically so that it understands how to investigate complex issues, develop different lines of inquiry, and circumvent attempts to obstruct investigations.

- 8 Investigators will have to do much more than explain what happened at the scene of the crime in the investigation of organized crimes, such as war crimes and crimes against humanity.** In many ways the role of investigators and the prosecutor is to explain how the machine worked, not just what results it produced.
- 9 The investigators will need to produce supporting information and analysis** that shows how the group or organization was structured; how its members communicated; how orders were transmitted; what means of logistics were at its disposal; how operations were reported back up the line of command, what kind of munitions and materials were available, how they were acquired and how they were distributed; what kind of discipline existed in the structure; were breaches of internal discipline known about; were they punished; and evidence of detailed command and discipline, if any.
- 10 The range of issues to be investigated will vary from place to place, but the point is that looking at a broad range of issues allows investigators to understand the structure, the issues of command and control, as well as specific plans and operations.** This allows the investigators to build up a series of important inferences even where suspects do not cooperate or seek to obstruct investigations. It also widens the scope of potential providers of information beyond those that the suspects will be easily able to identify and control.
- 11 All of these ideas are what are sometimes referred to as a kind of intelligence-led investigation.** It does not rely on the cooperation of suspects and eyewitnesses alone but builds up a picture of the structure through a much more complex and proactive process.
- 12 The development of such a team is not necessarily difficult or prohibitively expensive.** It may be possible to carry out very effective investigations with relatively small teams. The investigations teams of the OTP often has only a handful of lawyers and 10–15 investigators. The issue is to have the right people, with the right support, following a clear plan of action, based on a sound understanding of the kind of investigation needed.



*The Justice and Peace Courtroom of Colombia's High Tribunal of Bogotá, finds José Barney Veloza García (alias "H.H."), paramilitary commander of the United Self-Defense Forces of Colombia, guilty of illicit recruitment of children, murder of protected persons, enforced disappearance, torture of protected persons, and other acts, October 30, 2013. (ICTJ)*

To the extent that a national prosecutor can show that a mapping exercise has been carried out, a prioritization or selection process has been followed, and a team of trained and empowered investigators is following the lines of inquiry established by those processes, it will be in a much stronger position to persuade the ICC that there is no need to open an investigation. Ultimately, of course, it will depend on the effective results of those processes. But effective results are more likely to occur if the steps outlined above are taken into account.

\* Much of what is described above is set out in greater detail in a document written by Paul Seils and Marieke Wierda for the UN Office of the High Commissioner for Human Rights, "Rule of Law Tools for Post-Conflict States" (2005), which can be downloaded at [www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf](http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf)



## PART TEN

# What Should Civil Society Do?



*Maya Ixil women listen to the trial of former Guatemalan military dictator José Efraín Ríos Montt for genocide and crimes against humanity, in Guatemala's High Risk Court, April 2011. (James Rodriguez/Mimundo.org)*

Civil Society organizations can play many vital roles in the pursuit of justice for serious crimes, but they may differ in their approach depending on the legal system in question. Civil Law traditions allow for victims to play a more active role in investigations, prosecutions, and trials through their representatives than common law traditions.

Experience tends to show that even with moderately well-intentioned national justice institutions, such as the police or prosecution, without the significant help of civil society organizations (and sometimes the pressure of them too) the chances of progress tend to be low.

## Documentation of Violations

Organizations can help to collect information about alleged violations. Because of the complexity of the cases that are likely to be brought relating to core crimes, organizations should try to focus on a number of things.

First, they should try to put information together in as organized a fashion as possible. Catalogues of allegations are useful but the less organized they are, the less likely they are to be used.

They should undertake efforts to understand the systems and structures that may have been responsible for the crimes. If they can provide such information they can help orient national authorities and perhaps even identify experts to assist in investigations. This is also an important way of breaking down the potential fears of national authorities in approaching powerful institutions like the military.

At the same time, organizations should understand something about the issue of patterns of conduct. Patterns simply relate to the location, frequency, and methods or characteristics (*modus operandi*) of an attack or an event. If information shows that there is a genuine pattern it can sometimes be helpful to present that in as sophisticated a way as possible. It at least requires investigative forces to acknowledge a hypothesis and perhaps even to follow it up.

Of course, the degree to which civil society groups can develop sophisticated inves-



*Screenshot of the website of the Center for Documentation of Violations in Syria, which has been monitoring human rights violations in Syria since April 2011.*

**Filter by**

Province   Sex   Display   Found Date   Disappearance date

Start Date   End Date   This Date   Start Date   End Date

Show All   Show All   Show All

Name   Mother's Name   Family Status   Area   Missing Place   Occupation   Notes

Missing (2503)   Beginning 2 3 4 5

Name	Disappearance date	Found Date	Sex	Province	Area
Mohammad al-Abdan	2016-03-05	0000-00-00	Adult - Male	Aleppo	
Bahri Omer	2019-03-04	0000-00-00	Adult - Male	Aleppo	Jarablus, Ghandourh

tigations and analysis themselves depends on their resources, but civil society organizations have played a significant role in providing future key players in criminal justice issues. In Guatemala, Claudia Paz y Paz, the Attorney General responsible for overseeing the prosecution of former dictator José Efraín Ríos Montt for genocide, had worked for many years in a national nongovernmental organization (a think tank). In Peru one of the prosecutors who tried former President Alberto Fujimori had considerable experience in national nongovernmental organizations.

## Representing Victims

Civil Society organizations often occupy an important position of trust with victims. Almost all of them take that very seriously and respect the victims they represent. The cases they take on or are involved in are the cases of victims, not of the organizations themselves. It is essential that there is trust and confidence between the victims and the organizations. That means proper communication and no decisions being taken on case strategies without the informed agreement of the victims.

*The community of Granada, Antioquia, in Colombia, hang pictures of their missing or killed loved ones in the Salón del Nunca Más (Never Again Hall), 2013. (ICTJ)*



Organizations with more resources can sometimes help to offer technical assistance in investigating and prosecuting authorities, as long as any potential conflict of interests are resolved. That can be in terms of facilitating training opportunities. Experience shows that training should focus on technical aspects of the job at hand—how to build a case, how to conduct analysis, how to preserve evidence, and how to develop a case actively rather than react passively or not at all, how to present evidence to its best purpose in a trial.

## **Advocacy, Campaigning, and Lobbying**

Civil Society organizations can also be effective mobilizers of support and pressure nationally and internationally through appropriate means of traditional and social media. This also includes lobbying international partners as well as regional and international organizations.

PART ELEVEN

# What Should the International Community Do?



*Leading international actors from the judicial, rule of law, and development sectors convened in New York, for the third Greentree Conference on Complementarity, hosted by ICTJ, October 25-26, 2012. (ICTJ)*

**F**rom 2010–2012 the International Center for Transitional Justice, with the support of Denmark, South Africa, UN Development Programme, and Sweden, held a number of international conferences aimed at better understanding the role of states and international agencies in supporting national prosecutions. The conferences included representatives of many states and organizations. (A report on this work is included in the Further Reading section.)

A number of core issues that emerged in the different international meetings have been reinforced as these meetings have continued to take place with a more local focus in Abidjan and in Kinshasa in more recent years.

Key issues have included:

- The need for timely and comprehensive needs assessment missions to be undertaken to identify what skills and structural issues must be addressed
- As much coordination as possible between international donors to ensure that recipient states are not either overwhelmed to the point where they cannot absorb offers of assistance or where they are put in the difficult position of being offered the same thing from different quarters
- The need to ensure that capacity-building initiatives are both well focused and sustainable
- Ensuring that addressing the serious crimes of the past form part of the broader commitment to re-establishing trust in the rule of law more generally in the country. This implies making sure that work on the rule of law is not artificially seen as a solely prospective enterprise, but that building trust in the rule of law means addressing past crimes
- Addressing the issue of political will as positively as possible with interested states and offering support in countries where there were seen to be difficulties in proceeding with cases. It was noted that it will not always be enough to provide “developmental” assistance but that sometimes some kind of political encouragement may also be of use
- States and organizations recognized the importance of prioritizing cases in states with limited resources. Because only a limited number of cases can be dealt with



it is important not only for states investigating cases to understand how to frame prioritization processes but also that states with an interest in supporting them also understand these processes and support them.

Through various forms of international aid and development, many states have a direct stake in seeing their money used well. Many governments provide generously for rule of law and access to justice programs. States do not have difficulty in providing support for the enhancement of the justice system looking forward. They are sometime less comfortable investing in efforts to deal with past atrocities, especially if they are enmeshed in diplomatic and political environments with individuals that may be implicated in past violations.

It is important that states adopt a position that sees a coherent thread in the rule of law that runs from the past to the present and future. We cannot expect people to have confidence in their national systems if their main experience of them is of committing massive crimes or failing to guarantee their rights. It is important that states invest comprehensively in their justice systems, supporting efforts to address both systematic abuses of the past as well as current and future needs.

How they can do this varies. It may include the secondment of qualified staff who can relate well to the local context and customs. It may also be through financial aid or technical assistance in more limited ways.

States offering support should ensure that there is coordination, that there is no duplication of efforts (or parallel systems), and that there is no confusion in the messages being put forward. In this regard coordination with civil society organizations is also helpful.

There are some potentially positive examples of states coming together to develop targeted assistance packages for the justice system as a whole. Uganda saw a positive example of this in its Justice Law and Order Sector, but this waned significantly due to serious questions about Uganda's commitment and transparency in carrying out justice measures. Still, the principle was a good one.

PART TWELVE

# What Should the ICC Do?



*The ICC outreach team conducts a workshop with Acholi religious leaders in Gulu, Uganda, to bolster understanding of the court's mandate and provide updates about the northern Uganda situation, April 22, 2009. (ICC-CPI)*

**T**he ICC Prosecutor has a mandate to investigate and prosecute cases that national states are not prosecuting. There does not appear to be an explicit mandate for the prosecutor to offer technical assistance to states—that is, to help them to develop technical skills. Still, under its two prosecutors to date the OTP has engaged in exercises of what it calls technical assistance.

Whether this is an appropriate or prudent use of resources is a matter of debate. On the positive side it can do much to enhance relations, build a positive network of professionals, and show the ICC as something other than an outside presence “breathing down the neck” of states.

On the other hand, a lack of a clear mandate, limited resources, and a very demanding case load might suggest that time and effort should focus on investigations and prosecutions at the ICC itself.

One cannot be too artificial about these things, and on occasion such exercises may have a particular benefit or justification. But the idea that the OTP should invest significantly in capacity building efforts both misunderstands its mandate and the reality of its time and resources.



# Conclusions



*Guatemala's High Risk Court finds former military dictator José Efraín Ríos Montt guilty of genocide and crimes against humanity against the indigenous Mayan Ixil, April 18, 2013. The Constitutional Court of Guatemala later overturned the conviction, and his retrial began in January 2015. (Sandra Sebastián/Plaza Pública)*

**T**his handbook sets out to explain the context from which the idea of a complementary court emerged and the objectives of such a structure. The Rome Statute aims to contribute to ending impunity for atrocities. The ICC is one part of that process, but it is the last line of defense. The first line of defense is the national justice system, and that is an important element of what the Rome Statute set about trying to support and reinforce.

Time has a tendency to make legal matters more complicated rather than simpler. Sometimes contexts throw up problems no one could have anticipated (like the Libya referral followed by the murder of Muamman Gaddafi), which, in turn, requires lawyers and judges to have to think about things from perhaps a different perspective. Also, as with every treaty, issues later emerge that seem not to be clearly covered. For example, when does a trial begin? When does a case become a case? These issues are of some importance in relation to when admissibility challenges can be made.

We have seen that an issue not explicitly addressed in the statute turns out to be extremely important: what exactly constitutes a case and how much does a national case have to look like the ICC case. In particular, how much does a national case have to follow the same incidents of the ICC investigation in order to “sufficiently mirror” it? Some of these issues are very technical; they may not be of great interest to non-lawyers; but if they are understood it helps everyone, especially civil society and national prosecutors, to focus on the real issues.

For national efforts to be effective there are a number of relatively clear steps that can be taken to show that they are indeed serious about high-level prosecutions. This includes putting together the right kinds of teams, mapping alleged crimes, selecting the correct issues for investigation, maintaining effective communications with victims and the public (to earn their trust, but not harm a suspect’s presumption of innocence), and conducting focused, proactive, courageous investigations. These steps do not necessarily require spending huge sums of money. The clearer the vision of the prosecutions service, the easier it should be to secure international support for these efforts.

In the final analysis, it will be the quality of national efforts improving in the next 10 to 20 years that will determine the overall success of the project embodied in the Rome Statute. The ICC and the notion of admissibility presents the means for the international community to ensure that states keep trying and to step in when states either do not try or their efforts are not genuine.

# Further Reading

## On the Struggle Against Impunity

Louis Joinet, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees*, E/CN.4/Sub.2/1997/20, June 26, 1997.

## On the Two-Step Process

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## On Cases and Situations

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### **The OTP and Preliminary Examination**

ICC website containing all of the OTP’s reports on admissibility and preliminary examination in English, French, and Spanish, [www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx)

### **On the Role of the International Community**

ICTJ and UNDP, “Supporting Complementarity at the National Level: An Integrated Approach to Rule of Law” (2011), [www.ictj.org/sites/default/files/ICTJ-Global-Greentree-Two-Synthesis-Report-2011.pdf](http://www.ictj.org/sites/default/files/ICTJ-Global-Greentree-Two-Synthesis-Report-2011.pdf)

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Justice Law and Order Sector Transitional Justice Working Group [Uganda], “Formal Criminal Jurisdiction Consultations on the Uganda ICC Bill and the War Crimes Division of the High Court: A Summary of Workshops Conducted in Entebbe, Gulu, Mbale, and Mbarara 27 July 2009–7 August 2009” (2009).

# Glossary of Terms

<b>Admissibility</b>	Addressed in Articles 17–20 of the Rome Statute of the International Criminal Court; determines whether a case that falls within the <i>jurisdiction</i> ( <i>see below</i> ) of the ICC meets additional requirements; considers issues of complementarity and gravity.
<b>Case</b>	The combination of specific suspects engaged in specific conduct.
<b>Command (or Superior) Responsibility</b>	Refers to the role of military (or civilian) superiors who knew about a serious crime committed by a subordinate and, while able to do something about it, failed either to prevent it beforehand or punish it afterwards. (It is not the same thing as a commander ordering, planning, or otherwise participating in a crime.)
<b>Complementarity</b>	A subset of admissibility that provides rules to resolve “conflicts of jurisdiction,” whether the case should proceed before national courts or the ICC.
<b>Conduct</b>	What suspects do that amounts to an alleged crime.
<b>Conflict of Jurisdiction</b>	When two court systems claim to have the right to deal with the same case.
<b>Contextual or Threshold Elements</b>	For war crimes, it has to be shown that the crime was committed in the context of an international or internal armed conflict or was sufficiently connected to the conflict (nexus); an armed conflict is more than a riot or sporadic violence but implies a degree of organization on the part of opposing sides and a level of intensity.

<b>Core Crimes</b>	War crimes, crimes against humanity, and genocide. (The ICC cannot deal with the crime of aggression until the relevant provisions are activated by the state members.)
<b>Direct Perpetrator</b>	The person who participates directly in the execution of a crime; for example, by pulling the trigger.
<b>Gravity</b>	The case has to be of sufficient gravity to justify further action by the ICC. The case cannot be for minor incidents.
<b>Indirect (co-)perpetrator</b>	A person “working behind” the direct perpetrator; for example, planning or ordering the crime.
<b>Office of the Prosecutor</b>	Independent organ of the ICC responsible for preliminary examination, investigation, and prosecution.
<b>Organs [of the ICC]</b>	The Presidency, the Chambers of the Court, the Office of the Prosecutor, and the Registry.
<b>International Crimes</b>	Includes the core crimes of genocide, war crimes, and crimes against humanity as well as crimes such as piracy and drug trafficking.
<b>Jurisdiction</b>	Criteria used to determine if the ICC can deal with an issue. There are three bases: 1) that the crime was committed after a certain date (time); 2) that the person who committed the crime was a national of a state party to the Rome Statute or committed it on the territory of a state party (personal); 3) that the crime was one of the core crimes (subject matter).
<b>Ordinary Crimes</b>	Anything other than international crimes. This means murder and rape, for example, but without the need to prove the contextual or threshold elements mentioned above.
<b>Pre-trial Chamber</b>	The chamber that deals with most of the initial arguments on admissibility/complementarity.

- Same-Case Test** The ICC requires that for a case to be inadmissible, a national jurisdiction must prove that it is addressing a case that “significantly mirrors” the ICC case. This means that the conduct addressed in the national case must be substantially the same as that set out in the ICC case in terms of suspects and conduct.
- Situation** The situation refers to a universe of possible cases. States or the UN Security Council can refer a situation to the prosecutor but cannot tell the ICC prosecutor which particular cases to prosecute.
- Two-Step Process** The first question addressing complementarity is always to ask if the same case is being dealt with by a national jurisdiction. If it is not, the case is admissible before the ICC. Only if the same case is being dealt with does the second step ask whether the national proceedings can be considered genuine. This is done by asking specific questions about the willingness and ability of national authorities to investigate and prosecute crimes. (*See Article 17(1) of the Rome Statute, page 38*).

# ICC Cases

The handbook refers to a number of ICC cases. For those who wish to study them in greater detail, the full judgments can be found on the ICC website.

## Pre-Trial Chamber I – Lubanga

*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, International Criminal Court, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, (Feb. 24, 2006), [www.icc-cpi.int/iccdocs/doc/doc236260.PDF](http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF)

*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, International Criminal Court, Warrant of Arrest, (Feb. 10, 2006), [www.icc-cpi.int/iccdocs/doc/doc191959.PDF](http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF)

## Appeals Chamber – Lubanga

*The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, International Criminal Court, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, (Dec. 14 2006), <https://www.icc-cpi.int/iccdocs/doc/doc243774.pdf>

## Pre-Trial Chamber I – Katanga

*The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, International Criminal Court, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, (July 6, 2007), [www.icc-cpi.int/iccdocs/doc/doc344056.PDF](http://www.icc-cpi.int/iccdocs/doc/doc344056.PDF)

## Appeals Chamber – Katanga

*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. Icc-01/04-01/07, International Criminal Court, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009

on the Admissibility of the Case, (Sep. 25, 2009), [www.icc-cpi.int/iccdocs/doc/doc746819.pdf](http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf)

### **Trial Chamber III – Bemba**

*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, International Criminal Court, Decision on the Admissibility and Abuse of Process Challenges, (June 24, 2010), [www.icc-cpi.int/iccdocs/doc/doc899684.pdf](http://www.icc-cpi.int/iccdocs/doc/doc899684.pdf)

### **Appeals Chamber – Bemba**

*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, International Criminal Court, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, (Oct. 19, 2010), [www.icc-cpi.int/iccdocs/doc/doc955029.pdf](http://www.icc-cpi.int/iccdocs/doc/doc955029.pdf)

### **Pre-Trial Chamber II – Ruto**

*The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, International Criminal Court, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, (May 30, 2011), [www.icc-cpi.int/iccdocs/doc/doc1078822.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf)

### **Appeals Chamber – Ruto**

*The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, International Criminal Court, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, (Aug. 30, 2011), [www.icc-cpi.int/iccdocs/doc/doc1223118.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1223118.pdf)

### **Pre-Trial Chamber I – Gbagbo**

*The Prosecutor v. Simone Gbagbo*, Case No. ICC-02/11-01/12, International Criminal Court, Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo, (Dec. 11, 2014), [www.icc-cpi.int/iccdocs/doc/doc1882718.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1882718.pdf)



## **Appeals Chamber – Gbagbo**

*The Prosecutor v. Simone Gbagbo*, Case No. Icc-02/11-01/12, International Criminal Court, Judgment on the Appeal of Côte d’Ivoire Against the Decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s Challenge to the Admissibility of the Case against Simone Gbagbo”, (May 27, 2015), [www.icc-cpi.int/iccdocs/doc/doc1976613.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1976613.pdf)

## **Pre-Trial Chamber I – Al-Senussi**

*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, International Criminal Court, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, (Oct. 11, 2013), [www.icc-cpi.int/iccdocs/doc/doc1663102.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf)

## **Appeals Chamber – Al-Senussi**

*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, International Criminal Court, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the Admissibility of the Case Against Abdullah Al-Senussi”, (July 24, 2014), [www.icc-cpi.int/iccdocs/doc/doc1807073.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1807073.pdf)

## **Pre-Trial Chamber I – Gaddafi**

*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, International Criminal Court, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, (May 31, 2013), [www.icc-cpi.int/iccdocs/doc/doc1599307.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf)

## **Appeals Chamber – Gaddafi**

*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, International Criminal Court, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled “Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi”, (May 21, 2014), [www.icc-cpi.int/iccdocs/doc/doc1779877.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1779877.pdf)

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What is the relationship between national justice systems and the International Criminal Court (ICC)? How should national justice systems investigate allegations of serious international crimes (war crimes, crimes against humanity, and genocide) and when is the ICC entitled to intervene? This handbook provides an introduction to these themes. It is aimed at those seeking to familiarize themselves with the ICC and the “complementarity” regime. The handbook explains the legal and political logic of complementarity and how the ICC has interpreted its role so far. It sets out what national prosecutors, civil society, and international actors can do to ensure national justice systems meet their obligations to pursue justice where international crimes may have been committed.