

## Justice in conflict: Principle of complementarity or principle of competition?

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**Summary:** *The establishment of a permanent international criminal court was a necessity and the fear of it infringing on a state's sovereignty was real and ever present. As a result of this fear the International Criminal Court could not be awarded primary jurisdiction, and a compromise had to be reached in which it would operate under a regime of complementarity. This article focuses on the Simone Gbagbo case, as the first woman to be charged by the Court, with the object of nuancing the principle of complementarity in the various stages of an international criminal trial and the extent to which it portrays the tension of state sovereignty, tracing it from its infant historical or rudimentary practices to the current practice and making the necessary recommendations. All of this will be done by contextualising it all within the Côte d'Ivoire situation, particularly as it relates to complementarity. The article makes recommendations that focus on how and why the ICC should avoid seeking to dictate and impose its prosecutorial strategy on the domestic officials so as to avoid a crisis of its legitimacy being questioned, and the state's refusal to cooperate with the Court. It concludes with the caution that when the practices of the ICC and its Prosecutor make charging decisions for the state and embrace undermining the prosecutorial discretion of the domestic authorities, then the principle of complementarity will have been officially decimated and the principle of complementarity officially birthed.*

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## 1 Introduction

The former Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, once said that 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'.<sup>1</sup> Resonating throughout this statement is the principle of complementarity. It has been said that '[t]he long term viability of the ICC depends upon an implementation of the complementarity principle that preserves cooperative synergy between the Court and domestic jurisdictions'.<sup>2</sup> This synergy is important because of the original premise around the relationship between criminal law and the obligation that rests on a state. The rights and obligations bestowed upon a sovereign state by the criminal justice system are vital. Crimes are punished by the state because the victim of a criminal act is not the only victim of the act.<sup>3</sup> Criminal law is premised on the idea that criminal conduct violates the rights of the community at large, or causes harm to the community and, as such, the state should take on the responsibility of prosecuting criminals on behalf of the community.<sup>4</sup> It therefore is crucial to every sovereign state to have this right of theirs respected, and for other states, as well as the international community, to respect them enough not to interfere in their process of carrying out this responsibility towards their populace. This, however, is not limited to crimes affecting the populace of the state but also foreigners who commit crimes within a state's jurisdiction. 'According to the doctrine of state sovereignty each state has the right to exercise its jurisdiction over crimes committed in its territory – known as the territoriality principle.'<sup>5</sup> Depending on one's perspective, international criminal justice either challenges this notion of sovereignty or augments it. It may be seen as a challenge since it permits entities other than the state to exercise jurisdiction over crimes committed in the territory of the state. Alternatively, it augments sovereignty because it permits the exercise of jurisdiction where the state is not in the position to

1 Office of the Prosecutor, ICC, Informal Expert Paper 'The principle of complementarity in practice' (2003), <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> (accessed 23 August 2019).

2 MA Newton 'The complementarity conundrum: Are we watching evolution or evisceration?' (2010) 8 *Santa Clara Journal of International Law* 119.

3 CR Snyman *Criminal law* (2002) 14.

4 As above.

5 MM El Zeidy 'The principle of complementarity: A new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 870.

exercise such jurisdiction. One cannot help but formulate a third view of it being a system in competition with the domestic jurisdiction, thereby the notion of state sovereignty.

If international criminal law was a river, it would be the murkiest water through which one would have to sail. This is to be attributed to the fact that it is tainted by politics, the classist system involved among states in the international community and the fierce need to protect a state's sovereignty from the threat of being disregarded by it. It is through all of this that the ICC has to figure out how to sail swiftly through this river. It has to do so in such a manner that it does not interfere with 'the regular functioning of national institutions'.<sup>6</sup> There needs to be a guard against the national institutions being forced to function in a manner that mirrors the ICC. The complementarity regime of the Court is a compromise reached to protect the domestic jurisdiction and state sovereignty. This means that the national authorities are well within their right to determine their prosecutorial strategy, including the crimes to charge the accused with. The ICC is an institution that promises to safeguard and respect this above right with its complementarity regime.

The principle of complementarity has been the subject of much academic research. This is because the international community now has its very first permanent international criminal court.<sup>7</sup> The road leading to the creation of the ICC, understandably, was an extremely rocky one. This is due to the fact that this Court could potentially put in jeopardy the right of every state to prosecute their own nationals under the personality principle, or to prosecute nationals or non-nationals who committed a crime within their borders under the territoriality principle, or even to prosecute non-nationals who committed serious crimes against nationals under the passive personality or protective principle.<sup>8</sup> The sovereign right to prosecute; whether under the territoriality, personality or passive personality principles, is well-established in international law and highly valued by states.<sup>9</sup>

The ICC is a court of last resort with supranational jurisdiction. The ICC is complementary to the domestic jurisdiction and, as such, where the local officials are pursuing a matter genuinely, the

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6 As above.

7 A Olsson 'The principle of complementarity of the International Criminal Court and the principle of universal jurisdiction' unpublished graduate thesis, University of Lund, 2003 10.

8 El Zeidy (n 5) 870.

9 As above.

Court will not get involved. This sounds simple enough to expect a harmonious relationship between the national jurisdiction and the international criminal justice system. However, this has proven not to be the case for a number of reasons, both political and legal. One of the legal issues that has presented itself is that there is a thin line between the ICC being complementary to the domestic jurisdiction or being in competition with it. When the Court sees it fit to dictate to the national officials on the exact charges with which the accused should be charged, then the ICC is officially in competition with the domestic jurisdiction. There are several ways in which one sees the competitive nature in the operation of the principle of complementarity of the ICC. This has led to the African Union (AU) having problems with the ICC, and one of the issues that the AU has identified has been the lack of deference to domestic jurisdictions.<sup>10</sup> The AU's call for deference can be seen through at least two lenses. First, in respect of the situation in Sudan, the AU has called the application of article 16 deferral of the investigations into and prosecution of the then President of Sudan in order to give the AU and other African bodies such as Intergovernmental Authority on Development (IGAD) a chance to resolve the matter in accordance with the recommendations made in the Mbeki Panel Report.<sup>11</sup> This approach was followed in the Kenyan situation.<sup>12</sup> Second, also in the case of Kenya, the AU has supported the Kenyan argument for non-admissibility of the cases against the President of Kenya, on the grounds that Kenya is willing and able to prosecute crimes against humanity perpetrated in the course of election violence.

In the Rome Statute there is no mention of the national institutions functioning in a manner that mirrors the ICC. This means that the national authorities are well within their rights to determine their prosecutorial strategy, including the crimes to charge the accused with. This was somehow discarded, forgotten or overlooked by

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- 10 The 28th ordinary session of the Assembly of the African Union, <https://au.int/en/newsevents/20170130/28th-ordinary-session-assembly-african-union> (accessed 10 December 2017).
- 11 Decision of the Meeting of African State Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII), Addis Ababa, Ethiopia, 1-3 July 2009 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc. PSC/AHG/COMM.1 (CCVII) 29 October 2009 5; see also C Jalloh, D Akande & M du Plessis 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *African Journal of Legal Studies* 8. See also African Union Report of the African Union: High-Level Panel on Darfur (AUPD) 29 October 2009, PSC/AHG/2(CCVII), <https://www.refworld.org/docid/4ccfde402.html> (accessed 23 May 2023).
- 12 AU Summit Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Assembly/AU/Dec.334 (XVI), January 2011 para 6; see also D Tladi 'When elephants collide it is the grass that suffers: Cooperation and the Security Council in the context of the AU/ICC dynamic' (2014) 7 *African Journal of Legal Studies* 381.

the Court in the *Simone Gbagbo* matter. This article focuses on the case study of Simone Gbagbo. Simone Gbagbo is the former first lady of Côte d'Ivoire. She is the first woman to ever be investigated and sought for prosecution by the Court. It is interesting to note that the ICC did not have her on their radar because of her specific conduct. They imputed her husband's conduct on her and decided that whatever evidence used against him could also be used against her. According to the Prosecutor:<sup>13</sup>

[I]n all the circumstances, the conclusions of the Chamber in its Decision on [the Application for a warrant of arrest with respect to Mr Gbagbo] are equally applicable to the present Application as regards the contextual elements of the alleged crimes against humanity, along with the underlying acts it is suggested were committed by the pro-Gbagbo forces.

Besides being the first woman to be charged by the Court, Mrs Gbagbo's ICC case, rather than that of her husband, is of interest as the state genuinely did prosecute her. She was charged domestically and those charges differed from those with which she was charged by the ICC. This was rightfully the case because the state had access to evidence that links her to her specific crimes instead of only associating her with her husband's conduct. The ICC did not wish to accept this strategy; it wanted the domestic charges to be a replica of their charges. A spirit of competitiveness is detectable from the Court in it seeking to dictate to and almost force a prosecutorial strategy on the state.

The complementarity regime is affected by the discrepancies in the end goals of the international criminal justice and the domestic jurisdiction. This is what was at stake in the former first lady's case and that is the interest of this article. In dealing with such an issue, a balance has to be struck between two differing goals. The first is the goal of the Ivorian court to prosecute the former first lady, and the second is the goal of the ICC in pursuing this case. It is important to note that Côte d'Ivoire was one of the first states to sign the Rome Statute, on 30 November 1998, becoming the one hundred and twenty second state party to ratify the Statute.<sup>14</sup> On 15 February 2013 the state delivered the deposit of instrument of ratification of the Rome Statute.<sup>15</sup> Like many African states, the state welcomed

13 *The Prosecutor v Simone Gbagbo*, Public redacted version – Decision on the Prosecutor's Application Pursuant to Article 58 for a Warrant of Arrest Against Simone Gbagbo, 2 March 2012, ICC-02/11-01/12-2-Red para 19.

14 The States Parties to the Rome Statute, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed 14 November 2017) shows that majority of the members of the Rome Statute are African states.

15 As above.

the establishment of the Court. One would have thought that this would warrant a healthier relationship between the two jurisdictions instead of this hostility and competitiveness.

This article examines the complementarity regime of the ICC and assesses its implementation in the Simone Gbagbo matter. It then makes recommendations on how and why the ICC should avoid seeking to dictate to and impose their prosecutorial strategy on the domestic officials so as to avoid a crisis of their legitimacy being questioned and the state refusing to cooperate with the Court. It concludes with the caution that when the practices of the ICC and its Prosecutor make charging decisions for the state and embrace undermining the prosecutorial discretion of the domestic authorities, then the principle of complementarity will have been officially murdered and the principle of competition officially birthed.

## 2 Principle of complementarity

The Rome Statute establishes a Court that must be 'complementary to national criminal jurisdictions',<sup>16</sup> and even though the Statute does not go further to define what it means with this requirement, it has been stated that 'the term has come to encompass both the nature of the relationship between national courts and the ICC, and the specific application of those provisions relating to admissibility'.<sup>17</sup> The nature of the relationship between the Court and domestic jurisdictions encourages the exercise of jurisdiction by states. This basically is the notion of complementarity as the 'big idea': the idea that domestic jurisdictions are primary, and the ICC is subsidiary to them. There then is the notion of complementarity as an admissibility requirement. Complementarity as an admissibility requirement serves as a mechanism of how the Court was to apply this principle of complementarity as a big idea.<sup>18</sup> These mechanisms are found in articles 17, 18 and 19 of the Rome Statute, which is where the distribution of jurisdictional competence is to be found in the Rome Statute.

The principle of complementarity arguably is the most important feature of the ICC. The international criminal justice system has been commended for its 'evolution from a state-centred system, obsessed

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16 Preamble to and art 1 Rome Statute.

17 L Yang 'On the principle of complementarity in the Rome Statute of the International Criminal Court' (2005) 4 *Chinese Journal of International Law* 121-122.

18 O Solera 'Complementarity jurisdiction and international criminal justice' (2002) 84 *International Review of the Red Cross* 170.

with the preservation of sovereignty, to a system concerned with the human condition'.<sup>19</sup> The principle of complementarity embodied in the Rome Statute<sup>20</sup> sets a good balance because it also provides a solution to the new reality brought on by globalisation, which is that people's lives have become connected, meaning that whatever happens in one region also in a sense affects another region. This necessitated an active international jurisdiction while the national jurisdiction remained supreme. The complementarity regime is meant to assist the officials of the ICC to achieve this extremely sensitive balance of the national interests and the interests of the international system.

According to Newton the objective of the principle of complementarity is

to preserve the power of the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but balances that supranational power against the sovereign right of states to prosecute their own nationals without external interference.<sup>21</sup>

The ICC has stated that article 17 of the Rome Statute calls 'for the state and the Court to complement each other and work in unison'.<sup>22</sup> The same could be said for article 19 as it also strives to achieve the same goal as that of article 17. These two articles have been the pillar of the majority of the admissibility challenges that have been heard by the Court.

Simone Gbagbo's domestic trial began in December 2014 and she was convicted and sentenced to 20 years' imprisonment in March 2015.<sup>23</sup> At first glance the genuine and successful domestic case marks a major victory for the Court's complementarity regime. It had the potential of portraying what it means for the international and domestic jurisdiction to work together and for the latter to be complemented. The ICC was to prosecute two persons, Mr Laurent Gbagbo and Mr Blé Goudé, accused of committing

19 D Tladi 'A horizontal treaty on cooperation in international criminal matters: The next step for the evolution of a comprehensive international criminal justice system' (2014) 29 *South African Public Law Journal* 368.

20 Art 17 of the 1998 Rome Statute of the International Criminal Court (Article 17).

21 MA Newton 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court' (2001) 167 *Military Law Review* 26-27.

22 Dissenting Opinion of Anita Usacka J, 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*, *Gaddafi and Al-Senussi* (ICC-01/11-01/11-547-Anx2), Appeals Chamber, 1 May 2014 (Dissenting Opinion of Anita Usacka J).

23 M Caldwell 'Ivoriens divided over Simone Gbagbo conviction', dw.com, 10 March 2015, <http://www.dw.com/en/ivorians-divided-over-simone-gbagbo-conviction/a-18305986> (accessed 25 September 2021).

international crimes. The state would proceed with the case against Simone Gbagbo. What no one anticipated was the ICC insisting on continuing with this case because the state did not adopt its prosecutorial strategy. Everyone expects that the ICC would be involved in the principle of complementarity being given life at every stage of the proceedings. Instead, what one witnessed in this case was the birth of the principle of competition. The Prosecutor of the ICC charged Simone with crimes against humanity, murder, rape, other inhumane acts, and persecution.<sup>24</sup> The prosecutorial strategy of the local authorities differed from that of the Court. Domestically Simone was charged with crimes of disturbing the peace, organising armed gangs, and undermining state security.<sup>25</sup> The Prosecutor of the ICC felt strongly about this case being eligible to be heard by the Court. This was a result of the domestic charges not meeting the threshold of the 'substantially the same conduct' test.<sup>26</sup> This is the test that was adopted by the Appeals Chamber in the Kenyan cases.<sup>27</sup> This test is proving to be problematic especially in the context of the Simone Gbagbo matter. On 19 July 2021 Pre-trial Chamber II handed down its decision on the Prosecutor's request to vacate the effect of the warrant of arrest issued against Ms Simone Gbagbo.<sup>28</sup> The Prosecutor indicated the reason for filing this request as follows:<sup>29</sup>

It has reviewed the evidence supporting the case against Ms Simone Gbagbo in light of both the majority and minority decisions in the Trial Chamber's No Case to Answer decision, as well as the Appeals Chamber's Judgment. It has done so pursuant to its duty under regulation 60 of the Regulations of the Office of the Prosecutor. Upon completion of that review, the Prosecution has concluded there is no reasonable prospect that it could prove the case against Ms Simone Gbagbo to the necessary evidentiary threshold should the warrant of arrest be executed.

24 *Warrant of Arrest for Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber III, 29 February 2012 (Gbagbo Arrest Warrant).

25 'Ivory Coast's former first lady Simone Gbagbo jailed' *BBC News* 10 March 2015, <http://www.bbc.com/news/world-africa-31809073> (accessed 3 December 2021).

26 *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber I, 11 December 2014 (Gbagbo Admissibility Decision).

27 See, eg, the 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*, Muthaura, Kenyatta, and Ali (ICC-01/09-02/11 OA) Appeals Chamber, 30 August 2011 (Kenyatta Appeals Judgment).

28 *Situation in the Republic of Côte d'Ivoire in the case of the Prosecutor v Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber II, 19 July 2021 (Gbagbo's withdrawal matter).

29 *Situation in the Republic of Côte d'Ivoire* (n 28) para 6; the judgment quotes the application submitted by the Prosecutor titled *The Prosecutor v Simone Gbagbo, Request to Vacate Arrest Warrant*, 15 June 2021, ICC-02/11-01/12-89-Conf-Exp para 6 (Prosecutor's request).



This reason does not even attempt to solve the complementarity issues raised by this case.

## 2.1 Admissibility

At the heart of the Court's complementarity regime are the admissibility requirements. The admissibility requirements dictate when the Court will be competent to exercise its jurisdiction in a particular case. These are not guidelines to be applied by the judges only. The Prosecutor of the ICC also has the obligation to constantly bear the guidelines in mind from the stage of determining whether or not to open an investigation. Interestingly, it should be noted that the notion of complementarity as a 'big idea' might lead to competition of jurisdiction and thus raise the issue of distribution of jurisdictional competence. The judiciary bodies, just as its political counterparts, will be fallible to constantly exerting its powers on others, even the power they do not possess.

The main provision in respect of the ICC's complementarity regime is contained in article 17, especially article 17(1), which states:<sup>30</sup>

- (1) Having regard to paragraph 10 of the preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) the case been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
  - (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) the case is not of sufficient gravity to justify further action by the Court.

This article sets out the conditions under which an international criminal case will be admissible, that is, the conditions under which the Court may exercise jurisdiction. Put differently, this provision concerns the distribution of jurisdiction between the ICC and national jurisdictions. Key to the admissibility framework is the idea that the Court may only exercise its jurisdiction to prosecute a matter where

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30 Rome Statute.

the national authorities have failed to deal with the matter.<sup>31</sup> This ensures that the manner in which the Court operates remains true to the intentions of the drafters of the Rome Statute, which was that the Court should be a court of last resort.<sup>32</sup> The notion of the Court being one of last resort is achieved by the objective standards set out by the provision to ensure that the Court is forced to respect the primary right and responsibility that lies with states to investigate and prosecute international crimes.<sup>33</sup> Benzing states that the principle of complementarity was created to offer a balance between the right and responsibility of every sovereign state to exercise jurisdiction and the realisation that, for the effective prevention of such crimes and impunity, the international community has to step in to ensure that these objectives are reached and retain its credibility in the pursuance of these aims.<sup>34</sup> The article 17 admissibility requirements in the Rome Statute seek to promote this objective.<sup>35</sup>

Article 17 provides an exhaustive list for the requirements of inadmissibility, that is, if none of the elements mentioned in the provision exists in a specific matter, the case will be admissible.<sup>36</sup> Put differently, if one of the elements is present in a particular case, such a case will be deemed inadmissible. Article 17(1)(a) of the Rome Statute provides that a case is inadmissible where 'the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution'.

In the first part of this provision it is clear that in order for a state to argue against the admissibility, there needs to be some sort of action on their part after the commission of a crime of international concern. It therefore is insufficient for a state to approach the Court with an admissibility challenge and claim an intention to start looking into the matter. The Rome Statute encourages states to take positive steps against any atrocities committed. This is an essential requirement as the ICC is a court that has as its primary aim the combating of any impunity.<sup>37</sup> An admissibility challenge can be raised even if the state investigating or prosecuting is not a state party. The

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31 Art 17 Rome Statute.

32 P Seils 'Handbook on complementarity: An introduction to the role of national courts and the ICC in prosecuting international crimes' (2016) *International Centre of Transitional Justice* 2.

33 Seils (n 32) 3.

34 M Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against Impunity' (2003) 7 *Max Planck Yearbook of United Law* 600.

35 Rome Statute.

36 Benzing (n 34) 601-605.

37 Seils (n 32).

only requirement is that such a state must have jurisdiction.<sup>38</sup> For a successful admissibility challenge it needs to be shown that the state investigating or prosecuting has jurisdiction over the crimes. Benzing states:<sup>39</sup>

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

The final part of article 17(1)(a) provides an 'exception to inadmissibility'<sup>40</sup> and is the most contentious part of the provision. It is this part that is the root of most of the issues that have been taken up against the Court. Regardless of the fact that a state with jurisdiction over a matter has investigated or prosecuted it, the Court may still be able to exercise its competence to hear the matter if the state is 'unwilling or unable genuinely to carry out the investigation or prosecution'.<sup>41</sup> The Court's interpretation of the above quote is vital to its image as an independent legal institution. In the inquiry as to a state's unwillingness, the Court should always assess a case independently instead of formulating a general standard. However, this is not the case with the inability requirement as that has to do with the state of the judicial system.<sup>42</sup> This final requirement in the provision means that a state will not get away with initiating proceedings to protect suspects from being held accountable. States are being held to a certain procedural standard and if their effort does not meet it, the ICC would be entitled to exercise jurisdiction. This is set out in article 17(2) of the Rome Statute which provides as follows:

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

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

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

39 Benzing (n 34) 602.

40 As above.

41 As above.

42 As above.

- (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

A state may also be found to be unable to carry out an investigation or prosecution. This situation is dealt with in article 17(3) of the Statute.<sup>43</sup> 'The notion of inability was inserted to cover situations where a state lacks a central government due to a breakdown of state institutions (ie the situation of a failed state), or suffers from chaos due to civil war or natural disasters, or any other event leading to public disorder.'<sup>44</sup>

Article 17(3) reads as follows:

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

The provision sets out three possible scenarios of inability, and the final one 'serves as a generic term capturing all other possible situations'.<sup>45</sup> For a state to be said to be unable to proceed with a matter, it has to be evident that the specific state's judicial system is completely or at least partially inoperative. This is the case where the government has lost control over their territory to such an extent that the administration of justice has broken down.<sup>46</sup>

This admissibility provision, a central element of complementarity, is meant to ensure that the ICC respects the general rule that states have the first right and responsibility to exercise their criminal jurisdiction over international crimes in accordance with the principle

43 Rome Statute.

44 Benzing (n 34) 613.

45 As above.

46 As was stated by the Court in the *First Gaddafi case*, although the same Chamber went and contradicted itself in *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi* ICC-01/11-01/11, Pre-Trial Chamber, 11 October 2013 when it found the matter to be inadmissible before them even though they stated that Libya had no control over the administration of justice in their country and the lack of legal representation of the accused in the domestic proceedings.

of sovereignty. In other words, states retain the primary right to investigate or prosecute, and only in certain cases may the ICC intervene. 'In order to implement the complementarity principle, the ICC Prosecutor and judicial chambers must respect and adhere to the Statute's admissibility criteria.'<sup>47</sup> In order to determine the issue of admissibility, the Rome Statute requires the Court to first ask four questions. First, the Court must ask whether the case is being investigated and/or prosecuted by a state with jurisdiction.<sup>48</sup> Second, where there is no ongoing prosecution or investigation, it should be enquired whether a state has investigated and concluded that there is no basis to prosecute.<sup>49</sup> Third, it should be established whether the accused has already been prosecuted for what they are being charged with.<sup>50</sup> Lastly, the gravity of the case should be probed before the Court may proceed with the case.<sup>51</sup> Should the above enquiries produce affirmative responses, 'the accused or the state normally challenges the admissibility of the matter but the Court may, *sua sponte*, raise the issue of admissibility'. Similarly, the 'ICC Prosecutor must, *sua sponte*, raise the issue of admissibility'.<sup>52</sup> The most contentious test of the admissibility provision of the Statute is the unwillingness and inability of a state with jurisdiction to investigate or prosecute a matter.<sup>53</sup>

### 3 Situation in Côte d'Ivoire

The presidential elections in Côte d'Ivoire were initially scheduled for 2005 but instead were moved to November 2010. In those elections Alassane Ouattara won. Laurent Gbagbo, the man he was up against in the elections, could not handle the defeat. He made accusations of electoral fraud having been committed and claimed that the Constitutional Council, which was constituted of his supporters, found that he had actually won the elections. All of this sparked the 2010 to 2011 post-election violence which in turn led to the second civil war in 2011. The UN set up a Commission to look into the situation and found that Simone Gbagbo, together with her husband and his close political alliances, had played an essential role in the planning of the violent attacks committed during the 2010-2011 post-election violence. It was determined that they had a hand in the commission of crimes such as murder, rape

47 El Zeidy (n 8) 897-898.

48 Art 17(1)(a) Rome Statute.

49 Art 17(1)(b) Rome Statute.

50 Art 17(1)(c) Rome Statute.

51 Art 17(1)(d) Rome Statute.

52 El Zeidy (n 8) 898.

53 El Zeidy (n 8) 899.

and other forms of sexual violence. The ICC acted on the findings of this Commission and charged Simone Gbagbo with the exact crimes that the Commission determined had been committed.<sup>54</sup> The Pre-Trial Chamber also aligned itself with the findings of the Commission when it found that there were reasonable grounds to believe that the Gbagbos and their inner circle exercised joint control over the crimes that were committed during this period.<sup>55</sup> Simone was also investigated, prosecuted and sentenced for her conduct during this period at the national level. She was charged with crimes that mirrored those that she faced at the international level, but she was essentially facing a greater case. The ICC ordered the national authorities to surrender Simone Gbagbo to them, but the national authorities refused to surrender the former first lady because of the state having instituted domestic proceedings against her.<sup>56</sup> These domestic proceedings were successfully instituted to the point of reaching a conviction. The sentence passed down by the Abidjan court in fact was double that which the prosecution sought in this matter.<sup>57</sup> In 2018 the President of Côte d'Ivoire pardoned 800 people, including the former first lady, Simone Gbagbo, who was serving a 20-year sentence for her role in the deadly post-election violence of 2010.<sup>58</sup>

Côte d'Ivoire appeared before the ICC on 1 October 2013 to challenge the admissibility of the case against Simone Gbagbo as the local authorities were pursuing a case against the same suspect for the same crime.<sup>59</sup> In this motion Côte d'Ivoire made the following submissions: First, it was argued that the national authorities were investigating the same case as the Court. This meant that the 'same conduct/case' test was fulfilled.<sup>60</sup> Second, the national justice system was investigating a more complex matter as it was broader in nature.<sup>61</sup> Third, the 'unwillingness' factor was dealt with, and it was argued that the domestic proceedings were not instituted to shield

54 *Warrant of Arrest for Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber III, 29 February 2012 (Gbagbo Arrest Warrant).

55 As above.

56 *Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, Simone Gbagbo* (ICC-02/11-01/12), Pre-Trial Chamber I, 11 December 2014 (Gbagbo Admissibility Decision).

57 M Caldwell 'Ivoriens divided over Simone Gbagbo conviction', *dw.com*, 10 March 2015, <http://www.dw.com/en/ivoriens-divided-over-simone-gbagbo-conviction/a-18305986> (accessed 3 December 2021).

58 R Maclean 'Ivory Coast President pardons 800 people including ex-first lady' *The Guardian* international edition, 7 August 2018, <https://www.theguardian.com/world/2018/aug/07/ivory-coast-president-pardons-800-people-ex-first-lady-simone-gbagbo> (accessed 29 November 2021).

59 Gbagbo Admissibility Decision (n 56).

60 Gbagbo Admissibility Decision (n 56) para 12.

61 Gbagbo Admissibility Decision (n 56) para 13.

Mrs Gbagbo. Finally, it was argued that any delays were justified<sup>62</sup> and the inability concern was moot. This was based on the fact that the post-electoral crisis led to the failure of the judicial system, but in time, and especially on 3 December 2012, all the national courts and judicial institutions started to operate regularly. A special investigative unit established in July 2011 started working on Mrs Gbagbo's case.<sup>63</sup>

Prosecution made the following submissions: First, it argued that the evidence adduced was not sufficient to prove that the 'same conduct' was applied, and especially: '[the admissibility challenge does not] cover all aspects of the offences which are the subject of the case before the Court'.<sup>64</sup> Second, Côte d'Ivoire did not provide the Court with direct evidence pointing out concrete and progressive investigative steps taken against the accused.<sup>65</sup> Lastly, the Pre-Trial Chamber should not proceed to the 'genuineness' element, because the 'same conduct' test has not been satisfied.

The Pre-Trial Chamber reiterated that the challenging state 'bears the burden of proof to show that the case is inadmissible' and has to provide sufficient evidence that investigations are ongoing and cover the same case as the case before the Court.<sup>66</sup> Article 17(1)(a) requires that 'the case is being investigated', which means that 'concrete and progressive investigative steps' were being undertaken.<sup>67</sup> In this case the Court found that the 'evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes' was insufficient. The state should have presented documentation that could prove that the investigation or prosecution was ongoing. These included factors such 'directions, orders and decisions issued by authorities in charge ... as well as internal reports, updates, notifications or submissions contained in the file arising from the [case]' as this is the only way that the 'same conduct' requirement has been met.<sup>68</sup> The 'same case' requirement will be fulfilled when the applicant presents evidence that 'is strong enough to establish the [accused's] criminal responsibility'.<sup>69</sup> 'Sufficient investigation' will be proved when the exact parameters of the investigation being carried out both by the prosecutor and by the state have been clearly set out for the Court.<sup>70</sup> The Court

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62 Gbagbo Admissibility Decision (n 56) para 14.

63 Gbagbo Admissibility Decision (n 56) para 15.

64 Gbagbo Admissibility Decision (n 56) para 17.

65 Gbagbo Admissibility Decision (n 56) para 18.

66 Gbagbo Admissibility Decision (n 56) para 28.

67 Gbagbo Admissibility Decision (n 56) para 30.

68 Gbagbo Admissibility Decision (n 56) para 29.

69 Gbagbo Admissibility Decision (n 56) para 31.

70 As above.

has not embraced a generic rule but rather adopts a case-by-case approach when dealing with this requirement. The parameters of the international criminal case require that the 'same suspect' and 'same conduct' before the ICC must be the same one that is the subject of the domestic case.<sup>71</sup> The state has to meet this requirement from the outset of their proceedings. The Court requires that this 'must be clear even during an investigation and irrespective of its stage'.<sup>72</sup> The ICC was dismissive of the added economical charges for the 'same case' requirement analysis, even though she was 'essentially accused, and committed to trial'<sup>73</sup> for the said charges. Inadmissibility of the case was not found even though the Court found that the domestic officials initiated proceedings for the same crimes as those before the Court.<sup>74</sup> This challenge was rejected and the state was ordered to surrender Simone Gbagbo with immediate effect.<sup>75</sup> The Court's decision was based on the fact that Côte d'Ivoire had not taken the necessary steps to convince the Court that they indeed were genuinely able and willing to investigate and prosecute Simone Gbagbo for the international crimes that she had committed.

Côte d'Ivoire impugned the decision and claimed in the second instance that (i)(a) an overly rigorous criteria for the determination of the existence of investigation/prosecution was applied when national investigations would not be sufficient for this requirement to be fulfilled; (b) the 'same person/same conduct' test requires a purely formal examination of the domestic case; (c) the Court applied this test incorrectly when it restricted itself to a few incidents when comparing international proceedings and the domestic proceedings;<sup>76</sup> (ii)(a) the national investigation of the 'same conduct' both before courts is sufficiently cited; (b) the ICC failed to look at the investigation that the authorities made in its entirety.<sup>77</sup>

This appeal was completely rejected for not showing how the first Chamber erred in its findings. Simone Gbagbo has not been arrested and the case remains at the pre-trial stage. In her country she was tried and convicted for undermining state security and sentenced to 20 years' imprisonment. She also stood a second trial for war crimes

71 Gbagbo Admissibility Decision (n 56) para 33.

72 Gbagbo Admissibility Decision (n 56) para 34.

73 Gbagbo Admissibility Decision (n 56) paras 47-48.

74 Gbagbo Admissibility Decision (n 56) paras 50-56.

75 Gbagbo Admissibility Decision (n 56) para 61.

76 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* Case ICC-02/11-01/12 OA, 27 May 2015 para 48 (Gbagbo Appeal case).

77 Gbagbo Appeal case (n 76) para 81.



and crimes against humanity where she was acquitted as a result of the serious violations of due process.

On 15 June 2021 the Prosecution withdrew its application for an arrest warrant against Simone Gbagbo and submitted to the Pre-Trial Chamber judges a request to vacate the warrant of arrest issued against her.<sup>78</sup> On 19 July 2021 the Pre-Trial Chamber granted the Prosecutor's request and ordered that the warrant of arrest against Mrs Gbagbo ceases to have effect.<sup>79</sup>

## 4 Recommendations

In international law we have the principle of good faith in terms of which parties are expected to act in utmost good faith in their interaction with all facets of international law, both public and private international law. The principle of good faith in international law has been given life in two ways. First, it is to be found in *pacta sunt servanda*, the rule that 'agreements must be kept', which is an exhibition of honesty and loyalty. Second, it operates as a rule of interpretation, especially statutory interpretation. According to article 26 of the Vienna Convention on the Law of Treaties, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. In the absence of any supranational authority, states have nothing to rely upon for the due fulfilment of international obligations but their trust in the good faith of the other parties.<sup>80</sup> In the *Nuclear Tests* case the International Court of Justice ruled:<sup>81</sup>

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation. Thus interested states may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

This principle is an essential interpretation tool where ambiguity, vagueness and an interpretation that could lead to absurdity exists. It is a problem that the ICC has not employed it in the context of the principle of complementarity. The principle of complementarity is not defined in the Rome Statute. Thus, there is vagueness: The current interpretation that is being employed is leading to absurdity

<sup>78</sup> Prosecutor's request (n 29).

<sup>79</sup> Gbagbo's withdrawal matter (n 28).

<sup>80</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155 331, <https://www.refworld.org/docid/3ae6b3a10.html> (accessed 20 April 2023) (Vienna Convention).

<sup>81</sup> *Nuclear Tests Case (Australia v France)* (Merits) [1974] ICJ Rep 253.

and due the unclear definition there is ambiguity surrounding the principle of complementarity. Not only could the principle of good faith assist in interpreting the principle of complementarity but it could also be a good tool in formulating a test to resolve the different interests between the ICC and the domestic criminal jurisdictions in prosecuting a case. This test would not conflict with the Rome Statute; instead it would comply with both the Rome Statute and the Vienna Convention. The test should also seek to determine the 'unwillingness' and, if necessary, 'inability' of a state to prosecute a matter. The current admissibility tests formulated by the Court are good on paper and embody the principle of complementarity in theory. However, one cannot dismiss the application and interpretation problem that is destroying their comparability with the complementarity regime of this Court.

I propose that the current tests remain on condition that an extra leg be added to their enquiry, which is the principle of good faith. The international jurisdiction and the domestic criminal jurisdiction should be required to have a relationship that is based on good faith, that is, a relationship that imposes a moral behavioural standard of honesty, loyalty and reasonableness to both actors in the international criminal justice system. Adding an inquiry as to whether the domestic authorities are acting with utmost good faith will assist in making the inquiry into 'unwillingness' and 'inability' more powerful, thereby doing away with the need to impose the Court's prosecutorial strategy on the domestic officials.

The ICC should consider refraining from dictating to the state what crimes with which to charge the accused. Any action taken to genuinely combat impunity should meet the threshold of making a matter inadmissible before the Court. This is essential for the state's transitional justice efforts. After a conflict it is important for the populace to see that the new authorities are not afraid to deal with those that caused the conflict. This is more vital for transitional issues rather than for sovereignty. This is so because the doctrine of state sovereignty no longer is the gatekeeper that states envisioned it would be. Circumstances have forced the hand of the international community to prioritise the fight against impunities over the medieval idea of protecting and upholding the doctrine of state sovereignty at all costs. Embracing a criminal system that would threaten a state's sovereignty was a challenge, and instead of working through that with states, the international bodies chose to impose it on states. International criminal law would first strip the state of its primary right to prosecute and punish certain war crimes, as can be seen with the Nuremberg Tribunal, the Tokyo Tribunal, the International Criminal

Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The international criminal justice system embraced the concept of victor's justice and operated in that way. This is what makes the ICC different. The ICC was not imposed on states. It is a court that states chose to be affiliated with, and even though some states that chose to not be affiliated with the Court found their matters before the Court, the above statement still stands. It is a court of which the terms were negotiated and only signed into existence when an agreement was reached.

The Rome Statute neither explicitly refers to a principle of complementarity, nor does it define what complementarity is. However, it does set out when and how the ICC can hear a matter, which serves to tell us that this Court was created to be a court of last resort. The Court has a greater duty to clarify in its jurisprudence all this vagueness and the omission in the Statute. The case of Simone Gbagbo illustrates how the Court misses to embrace the opportunity to do just that. The manner in which the Court chose to interpret the 'same person/same conduct' case in this case is just leading the Court to a slippery slope. There are many questions that this case brings to mind, one of them being whether there are now two types of criminal justice systems. This case makes it clear that if the state charges an accused with domestic crimes instead of international crimes, the ICC still has competence to exercise its jurisdiction.

The situation in Côte d'Ivoire illustrates that either the prosecutorial strategy of the office of the Prosecutor is followed by the local authorities or else it will not be recognised by the Court as an effort to get justice for the victims. This is a problem that needs to be resolved urgently. This is a court that is complementary; it is neither primary nor is it in competition for the exercise of jurisdiction. How the Court interprets the admissibility requirements should be in a manner that ensures that the principle of complementarity is constantly being abided by.

Usacka J made the recommendation that the judges relax the 'same conduct' requirement much more than the Appeals Chamber has already done. She acknowledges that although there needs to be a

nexus between the conduct being investigated and prosecuted domestically and that before the Court, this 'conduct' and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the

Court and also does not need to include the same acts attributed to an individual under suspicion.<sup>82</sup>

Stahn argues for the Court to adopt a 'conditional admissibility' regime. This is to assist states that challenge admissibility of their matters before the Court by setting benchmarks for the state to meet within a certain period.<sup>83</sup> Finally, Robinson has proposed that the Assembly of States amend the Rules of Procedure and Evidence to juridify the consultation and sequencing process, requiring the Court to prioritise a genuine national proceeding based on different conduct.<sup>84</sup> Criminal law is a system that became necessary to prevent mob justice and self-help so that the state was given the responsibility to get justice, because a crime was no longer viewed as a wrong against a specific individual but rather as a wrong against the entire society. This is the reason why the primary responsibility to try crimes lies with the state within whose jurisdiction the crime was committed. Therefore, the duty lies with Côte d'Ivoire to get justice for their citizens for the crimes that the state recognises as those that have been committed against its society. The ICC does not seem to understand or chooses not to embrace their subsidiary status in the system, and all that it entails.

## 5 Conclusion

The principle of utmost good faith operates in a manner that seeks to bridge the gap between the different jurisdictions and should not be divorced from the application of the principle of complementarity by the ICC. The complementary nature of the ICC is absolute. In Africa, at least, the Court is rapidly losing its legitimacy as an independent institution; it is no longer seen as an independent judicial institution. The dark history of colonisation plays a major role in the conclusions drawn by many African states, but the epic failure in the interpretation and application of the principle of complementarity by the Court also plays its own part. The manner in which the Court has decided to deal with questions of admissibility and, essentially, complementarity is problematic. It is with all this in mind that one supports the idea that the ICC should not allow a case to appear before it if the state is genuinely prosecuting the same suspect regardless of the fact that the crimes are not the same or if the national prosecuting authority

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82 Dissenting Opinion of Anita Usacka J (n 22).

83 C Stahn 'Admissibility challenges before the ICC from quasi-primacy to qualified deference?' in C Stahn (ed) *The law and practice of the International Criminal Court* (2015) 253-254.

84 D Robinson 'Three theories of complementarity: Charge, sentence, or process?' (2012) 53 *Harvard International Law Journal* 181-182.

does not have the same prosecutorial strategy as the office of the Prosecutor. This is essential to the respect for a state's sovereignty, which is an element of an independent state for which a majority of the states in the Global South fought. Any decision of the Court that may be perceived as undermining that character of the state will be met with hostility. When the Court requires the state to institute proceedings against the same suspect for the same crime as the one being pursued by the Court, it essentially is taking away from the state the power to institute criminal proceedings in compliance with their constitution and legal system. It also does not assist in equipping the state to acquire resources to realise optimum protection from human rights violations within their domestic jurisdiction.

The ICC should have found the *Simone Gbagbo* case to be inadmissible because even though Côte d'Ivoire did not charge her with the same crimes as the Court, they did charge her. The country was genuinely willing and able to bring her to justice, and having her trial held in the local court has also done wonders for the legitimacy of the new leaders now in office. The strict requirement that the Court has for admissibility do not make sense when one takes into consideration that the successful trial and conviction of a suspect is highly dependent 'on the Court and the state complementing each other by working in unison'.