Chapter IV: Complementarity – Related Provisions (Articles 18 – 20)

The principle of complementarity reconciles two competing features and jurisdictions. The first is the sovereignty of the State, which claims national jurisdiction over its citizens and crimes committed on its territory, even though these crimes are of an international character and may fall within international jurisdiction. The second feature functions only in exceptional circumstances and gives an international tribunal the ability to exercise jurisdiction over these heinous crimes. The ICC Statute’s procedural aspects either protect national sovereignty and domestic jurisdiction or strengthen the ICC’s jurisdiction.¹ The complementarity regime under the Rome Statute is not confined to the application of Article 17.² The procedural regime is governed by other related provisions under the Statute defined in Articles 18 – 20.³ Chapter IV of this book, like chapter III, studies these provisions in detail, highlights the gaps and offers some solutions. This chapter also engages in an in-depth examination of issues that have a direct effect on the procedural regime of Articles 18 and 19 of the Statute. This entails an examination of the impact of waivers of complementarity on the application of those Articles. The chapter concludes by challenging the classical idea of complementarity studied throughout Chapters III and IV, and instead shows that complementarity has a positive dimension that was not really contemplated by the drafters of the Statute.

1. Preliminary Rulings Regarding Admissibility in the Rome Statute Complementarity Model

Article 18 of the Rome Statute elaborates on the complementarity principle, as set out in Article 17, by providing a mechanism for preliminary rulings on admissibility. The provision was inserted by the Preparatory Committee and examined in depth

² Rome Statute, Art. 17.
³ Ibid., Arts. 18 – 20.
at the Rome Conference. It serves as a further procedural filter for the benefit of States’ sovereignty. The creation of a specific control aimed at evaluating the issue of admissibility when the Prosecutor decides to commence an investigation, at a very early stage, strengthens the first feature of complementarity. Such control precedes the procedure described by Article 19 relating to “challenges of the jurisdiction of the Court or the admissibility of a case”.

According to Article 18(1), when a State Party refers a situation to the Court and the Prosecutor identifies a reasonable basis for commencing an investigation or initiates an investigation proprio motu, the Prosecutor (The Jurisdiction, Complementarity and Cooperation Division (JCCD)) shall notify “all States Parties

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6 Rome Statute, Arts. 13(a), 14.

7 Ibid., Arts. 13(c), 15(3), 53(1). Article 53(1) reads: “The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; b) The case is or would be admissible under article 17; and c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”. If the Prosecutor determines that there is no reasonable basis for proceeding and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber. It should be noted, however, that where the Prosecutor acts proprio motu Article 15 applies, while in the case of referral by a State Party in accordance with Articles 13(a) and 14, Article 53 applies, and Article 15 does not. Thus, the question of a Pre-Trial Chamber authorization of the commencement of the full investigation becomes moot. In those situations, the Prosecutor proceeds directly to the consideration under Article 53(1). However, one might suggest that this does not preclude the Prosecutor from relying on the criteria set out in Article 53. This sounds logical, since Rule 48 clarifies the interplay between Articles 15 and 53 as follows: “in determining whether there is a reasonable basis to proceed with an investigation under Article 15, paragraph 3, the Prosecutor shall consider the factors set out in Article 53, paragraph 1(a) to (c)”. Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/1/Add. 1 (2000), Rule 48 [hereinafter ICC Rule]; see also ICC Rule 51. The criteria set out in Article 53 are the appropriate ones, and those which, inter alia, the Pre-Trial Chamber or the Trial Chamber will later rely upon at the jurisdiction and admissibility stages. Moreover, Article 53 provides a further opening for prosecutorial discretion, by incorporating a consideration of interests of justice into the Prosecutor’s final determination of whether actually to proceed with an investigation following authorization by the Pre-Trial Chamber under Article 15(4). In addition, Article 53 ensures an equal Prosecutorial burden in all triggering