13. CONCLUSIVE REMARKS

13.1. INTRODUCTION

This book has explained that the purposes of the Rome Statute can only be promoted within the framework of the complementarity principle, which governs the ICC’s exercise of jurisdiction. A thorough analysis of the principle’s procedural and material provisions has been undertaken in order to understand the implications of this framework, and the possibilities and the limitations that it establishes. The interpretation and analysis of the various provisions has been based on the terms’ linguistic meanings, the context in which they appear, the underlying purposes, the drafting history, statements and documents provided by the Office of the Prosecutor as well as a selected body of human rights law and jurisprudence. The latter source has been important due to the current lack of ICC jurisprudence applying the complementarity principle. The aim has been to find out when the ICC Prosecutor may use his investigative and prosecutorial powers and when he or she should do so, according respectively to the admissibility criteria and the rules on prosecutorial discretion. The discussion has included the complex issue as to whether the ICC may and should respect domestic alternatives to criminal justice such as truth commissions combined with amnesties.

This final chapter assesses how well the complementarity principle will promote the purposes that it is intended to promote: safeguarding sovereignty (13.2); enhancing national criminal proceedings (13.3); ensuring effective ICC interference (13.4); and ensuring an appropriate selection of situations and cases (13.5). Finally, the chapter will, as a “benchmark test”, ask whether a primary ICC would have been preferable (13.7).

13.2. SAFEGUARDING STATE SOVEREIGNTY

It has been explained how states’ perception of their sovereignty is constantly changing. Today, the question is not whether international judicial intervention can be justified, but when it is justified. The complementarity principle suggests an answer to that question. The length and thoroughness of the negotiations, the prominent place that sovereignty issues had in them and the fact that as of October 2007 105 out of 194 states have ratified the Rome Statute all seem to suggest that sovereignty is adequately safeguarded. States that hesitate to ratify the Statute may do so for other reasons than the ICC’s intrusiveness. Indeed, some non-states parties have expressed their satisfaction with the complementarity principle. The Department of Treaty and Law of the Chinese Ministry of Foreign Affairs has noted:

“In order to establish the authority of the International Criminal Court, build up the trust and confidence of all countries and […] realize the real universality of the Rome Statute, the Chinese Government is of the view that the operation of the
Court should strictly follow relevant principles based on which the Court was established, firstly of all, the principle of complementarity. The most important role of the International Criminal Court is expressed in that it promotes all countries to improve their domestic judicial systems and guarantees that all countries exercise jurisdiction over perpetrators of grave crimes according to their domestic judicial systems.  

While most commentators seem to find that sovereignty is adequately safeguarded, some commentators still argue that complementarity principle unduly infringes upon sovereignty. At times, the sovereignty argument has been used creatively, but equally unreasonably, such as in the words of this commentator:

“The ICC will also become an unavoidable participant in the national legal process. Indeed, because it will set precedents regarding what it considers [genuine] domestic criminal trials, the ICC will indirectly force states to adopt those precedents or risk having cases called up before the international court. That constitutes an unprecedented change in the sources of national lawmaking, one that diminishes the traditional notion of state sovereignty.”

Whether the complementarity principle duly respects state sovereignty is not easily measured. Not only are the implications of the principle complex, the legitimate scope of sovereignty also remains controversial. Below, some key points will be highlighted as to how the complementarity principle will affect state sovereignty.

13.2.1. The admissibility criteria and sovereignty

The complementarity principle is based on the recognition that states – for various reasons not limited to sovereignty considerations – should have jurisdictional priority. There is also a recognition that this priority should not be unchecked. Once the need for an international check is recognised, arguing that genuineness represents an intrusive threshold appears, at face value, unreasonable. Any lesser requirement would defeat even the most modest purpose.

Moreover, the “intrusiveness” of any interference with a state’s domestic affairs must be assessed in light of its legal basis and the nature of the values that are sought

1447 The reasons are not limited to sovereignty considerations; this book’s discussion has also elaborated the general advantages of national justice.