1. Introductory remarks

The definition of the relationship between the International Criminal Court and national judicial systems was one of the major concerns during the long set of negotiations which led to the adoption of the Statute of the International Criminal Court in July 1998. Since the early discussions on the establishment of the ICC, it was clear to the drafters of the Statute that a permanent international criminal court would not effectively work without the support and the co-operation of states. In particular, it was necessary to carefully balance between, on the one hand, the need to respect states’ sovereignty – whose typical expression is the exercise of criminal prerogatives – and, on the other, the commitment of the international community to put an end to impunity for the perpetrators of the most serious crimes of international concern.

The outcome was the establishment of an international criminal court, complementary to national jurisdictions. Under the complementarity regime established in the Rome Statute, domestic courts retain primacy in the prosecution of the persons allegedly responsible for the commission of international crimes. The ICC is not intended to replace or substitute national enforcement mechanisms. Rather, it is designed to intervene only in case of failure of states to make their duty to prosecute effective, in order to fill the impunity gap left by the inaction or inappropriate actions of domestic courts. The ICC is therefore conceived...
as a Court of ‘last resort’, which should remain dormant until states fail to make their duty to prosecute effective.

The concrete modalities for the admissibility of cases before the Court are established in Article 17 of the Statute. In principle, the action of a state with jurisdiction over the case prevents the Court from intervening. However, the latter is entitled to step in if it finds that domestic proceedings are vitiated by unwillingness or inability genuinely to investigate or prosecute. On the contrary, the absence of corresponding proceedings at the national level renders the case admissible before the Court, subject to the gravity threshold as provided for in Article 17(1)(d).

During the negotiations for the adoption of the Rome Statute, the complementary nature of the Court was not questioned as such. However, the definition of the precise nature of the relationship between national and international

---

5 ICC Statute, Art. 17(1). On the so-called admissibility test, and, in particular, on the requirement that, for the admissibility of a case before the Court vis-à-vis domestic proceedings, the latter ‘encompass both the person and the conduct which is the subject of the case before the Court’, Prosecutor v Lubanga Dyilo, Decision on the Prosecutor’s request for a warrant of arrest, Article 58, Case No. ICC-01/04-01/06-8-Corr, PTC I, 24 February 2006, para. 38. This approach has been followed by the same Chamber in Prosecutor v. Muhammad Harun (“Ahmad Harun”) and Ali Abd-Al-Rahman (“Ali Kushayb”), Decision on the Prosecution Application under Article 58(7) of the Statute, Case No. ICC-02/05-01/07-1, PTC I, 1 May 2007, para. 24; by Pre-Trial Chamber III in Prosecutor v Bemba Gombo, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean Pierre Bemba Gombo, Case No. ICC-01/05-01/08-14-tENG,PTC III, 10 June 2008, para. 21; also Trial Chamber II referred to the ‘same person-same conduct’ requirement in Prosecutor v. Katanga and Ngudjolo Chui, Reasons for Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), Case No. ICC-01/04-01/07-1213-tENG, T.Ch. II.,16 June 2009, para. 81. On the concept of inaction and the relationship between action and assessment of unwillingness and inability, Prosecutor v. Katanga and Ngudjolo Chui, 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, Case No. ICC-01/04-01/07-1497, A.Ch., 25 September 2009, para. 78. On the meaning of ‘case’ within the context of the ICC Statute, see R. Rastan, ‘What is a case for the purpose of the Rome Statute?’, (2008) 19 Criminal Law Forum 435. This contribution focuses on the relevance of the recourse of domestic courts to ordinary crimes for the purpose of the admissibility of cases before the Court. Both the sufficient gravity threshold provided for in Article 17(1)(d) of the Statute and the exercise of discretion by the ICC Prosecutor in the selection of cases to be brought before the Court fall beyond the scope of this contribution.