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# AN OVERVIEW OF THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW

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## ABSTRACT

The Rome Statute of the International Criminal Court (ICC Statute)[1] established the International Criminal Court (ICC) with jurisdiction over international core crimes outlined in Article 5(1) of the Statute.[2] In the same vein, states within the international community have the duty to prosecute these core crimes under international customary law.[3] In effect, the jurisdiction of national courts runs concurrently with the jurisdiction of the ICC over these core crimes. This raises the issue of precedence of jurisdiction identified with the operation of previous ad hoc international criminal tribunals[4] which had primacy in the exercise of jurisdiction over national courts of states where they operated. The jurisdiction of the ICC is however founded on the principle of complementarity which gives primacy to national courts over the ICC. The principle of complementarity, though not necessarily a new concept, is expounded by the provisions of the ICC Statute. This article is an overview of the principle of complementarity as articulated in the ICC Statute. It examines the provision of Article 17 of the ICC Statute in relation to the jurisdiction of the ICC over international core crimes and the duty of state parties to prosecute these crimes. It concludes on the premise that the principle of complementarity has a few practical issues relating to its application and examines briefly the ongoing preliminary examination of the Nigerian situation by the ICC.

## INTRODUCTION

International criminal law can be concisely described as a body of rules and principles which establishes, excludes and regulates responsibility for crimes under international law.[5] It is significantly related to other areas of law such as international humanitarian law and human rights law. International criminal law recognises that certain crimes are of such serious gravity that they do not just concern the territory where they are committed but also the international community and as such they are regarded as crimes under international law. Crimes under international law are a part of international crimes even though quite distinct from other international crimes. Crimes under international law are directed against the interest and the fundamental values of the international community as a whole.[6] International crimes on the

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1 Adopted on 17 July 1998 in Rome and entered into force on 1 July 2002.

2 ICC Statute; these crimes include the crime of genocide, war crimes, crimes against humanity and the crime of aggression.

3 Gerhard Werle, *Principles of International Criminal Law* (2 ed., T.M.C Asser Press 2009) p.64.

4 The International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

5 Werle, (2009) op. cit. p.29.

6 Ibid. p. 31. Para. 4 and 9, Preamble of the ICC Statute 2002.

other hand are based on the provision of specific treaties which criminalise certain conducts and obliges state parties to such treaties to implement their provisions and exercise criminal jurisdiction over such crimes within their domestic legal system.[7] Crimes under international law are typically identified as war crimes, crimes against humanity, genocide and the crime of aggression.[8] These crimes are regarded as 'core crimes'[9] and every state is encouraged to prosecute these crimes under the principle of universal jurisdiction. Crimes under international law create direct individual criminal liability under international law.[10] In contrast with the international law principle which recognises state responsibility, international criminal law is founded upon the principle of direct individual criminal responsibility. Consequently, international criminal law establishes jurisdiction to investigate and prosecute individuals for crimes under international law.

The principle of direct individual criminal responsibility emerged from the establishment of international criminal tribunals.[11] This is marked by the establishment of the International Military Tribunal (IMT) at Nuremberg in Germany and Tokyo in Japan[12] in 1945 and 1946 respectively after World War II.[13] These Tribunals were established for the trial and punishment of major perpetrators of crimes which are regarded as international core crimes.[14] The principle of individual criminal responsibility under international law is built upon the Nuremberg principles developed from the judgement of the IMT.[15] Subsequently, ad hoc tribunals were established by United Nations (UN) Security Council after the Cold War in the 1990s. The International Criminal Tribunal for former Yugoslavia (ICTY) was first established by the UN Security Council [16] in 1993 for prosecution of perpetrators of serious violations of international humanitarian law during the internal conflict in the territory of the former Yugoslavia. Afterwards, the International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council[17] for the prosecution of perpetrators of international

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[7] William A. Schabas, *Introduction to the International Criminal Court* (3 ed. Cambridge University Press 2007) p.88; Werle, (2009) op. cit. p.42.

[8] Ian Brownlie, *Principles of Public International Law* (7 ed. Oxford University Press 2008) p.587; Werle, (2009) op. cit. p. 29. Article 5 (1) of the Rome Statute of the ICC. The jurisdiction of the ICC over the crime of aggression is only futuristic until the adoption of a definition is reached in accordance with Articles 121 and 123 of the Statute.

[9] Werle, (2009) op. cit. p.29.

[10] Antonio Cassese, *International Criminal Law* (2 ed. Oxford University Press 2008) p.33.

[11] International Military Tribunal Judgement of 1 October 1946 in the Trial of German Major War Criminals. Proceedings of the International Military Tribunal , Nuremberg Germany Part 22, (1950) p.469.

[12] The Allies established two international criminal tribunals at Nuremberg in 1945 based the London Agreement of 1945 and The International Military Tribunal for the Far East in Tokyo.

[13] The establishment of the IMT is regarded as the first significant milestone in the birth of international criminal law. It is the first significant and successful attempt at prosecuting and punishing major perpetrators of crimes under international law.

[14] According to Article 6 of the IMT Charter the IMT had jurisdiction over crime against peace, war crimes and crimes against humanity committed in connection to war crimes. The principles of the Nuremberg trial later became the cornerstone of international criminal law.

[15] One of the best known quotes from the IMT Judgment reads that "crimes against international law are committed by men, not b abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". IMT Judgement of 1 October 1946 in the Trial of German Major War Criminals, Proceedings of the International Military Tribunal, Nuremberg Germany (op. cit.) p. 447.

[16] Resolution 827 of 25 May 1993 of the UN Security Council.

[17] Resolution 955 of 8 November 1994 of the UN Security Council.

crimes committed in Rwanda in 1994. These tribunals were vested with jurisdiction to investigate and prosecute crimes under international law. Crimes prosecuted by the ad hoc tribunals were regarded as crimes which 'affect the whole of mankind and shock the consciousness'[18] of the international community and prosecution were conducted as part of international effort to ensure that perpetrators of such crimes do not go unpunished.

Ultimately, international efforts at ensuring that the 'most serious crimes of concern to the international community' are not left unpunished culminated in the establishment of a permanent international criminal court. The International Criminal Court was established in 1998 by the Rome Statute of the International Criminal Court and vested with jurisdiction over core crimes under international criminal law.[19] The ICC is an international judicial body unaffiliated with the UN. The provisions of the ICC Statute are binding on states parties which are signatory to and have ratified it. Non-state parties may however adopt its provision or submit to its jurisdiction following the provisions of the Statute. Before the adoption and entry into force of the Rome Statute, certain crimes and legal principles embodied in the Statute had been recognized as crimes under international law, through international treaties, conventions and under international customary law. Thus, the ICC Statute incorporates substantial provisions of international customary law in respect of international core crimes such as war crimes, crimes against humanity and the crime of genocide which the states generally, have the duty to prosecute.[20]

## CRIMINAL JURISDICTION IN INTERNATIONAL LAW

Generally, international law recognises both territorial and extra-territorial principles for exercise of jurisdiction over international crimes. The territoriality principle recognises that a state has jurisdiction over crimes committed within its territory or crimes committed beyond its territory but has effect on its territory. The nationality principle is based on the concept that a state may exercise jurisdiction over crimes committed by its citizens regardless of where such crimes were committed and against whom they were committed. The passive personality principle rests the notion that a state may exercise jurisdiction over crimes based on the nationality of the victim of the crime irrespective of the nationality of the perpetrator or where the crime was committed.

The principle of universal jurisdiction is founded upon the premise that crimes under international law are directed against the interest of the international community as a whole. Thus, the international community is empowered to prosecute these crimes regardless of who committed them, where they were committed and the direct victims of such crimes.[21] International customary law acknowledges both territoriality principle and the principle of universal jurisdiction for crimes under international law.[22] Consequently, third states without



[18] *Prosecutor v Tadić* ICTY (Appeals Chamber) 2 October 1995 case no. IT-94-1-A.
[19] Article 5 of the ICC Statute (op. cit.).
[20] The provisions of the ICC Statute is a more or less restrictive provision with respect to international customary law. With the exception of the crime of aggression which is undefined in the ICC Statute. The Genocide Convention of 1948 already criminalised genocide as an international crime, so also the Geneva Conventions of 1949 and the additional protocols prohibited war crimes and crimes against humanity and state parties to these convention have obligation to prosecute these crimes.
[21] Werle, (2009) op. cit. p.64-65.
[22] Brownlie, (2008) op. cit. p.306; Werle, (2009) op. cit. p.67.

any special link to the crime may prosecute such crimes based on the principle of universal jurisdiction.

As stated earlier, the exercise of criminal jurisdiction over individuals at the international level significantly dates back to the period after World War II. The establishment of the International Military Tribunals[23] by the allied countries for trial of major 'war criminals whose offences have no particular geographical location'[24] is regarded as the first successful prosecution of international crimes by an international criminal tribunal. The IMT had exclusive jurisdiction over major perpetrators of crimes under international law but this did not preclude trial by national courts of respective countries for crimes committed within its territories.[25] While the international tribunals tried major perpetrators whose crimes cut across borders of a particular country, trial by national courts were for localised crimes.

The ICTY and ICTR also had concurrent jurisdiction with national courts in the exercise of jurisdiction over international crimes.[26] However, these ad hoc tribunals had precedence over national courts in exercising their jurisdiction. This principle may appear as a limitation on judicial sovereignty of the concerned states with respect to those international crimes. However, the ICC Statute acknowledges the fact that national courts of states where core crimes have been committed are capable of conducting criminal proceedings more easily and faster than international tribunal. Therefore, the Statute makes extensive provision for the principle of complementarity as a means of coordinating the jurisdiction between the two judicial authorities. While the principle of complementarity may not necessarily be a new concept in international criminal law[27], it is well expounded and promoted by the ICC Statute which gives primacy to national courts in the exercise of jurisdiction over core international crimes.

## THE PRINCIPLE OF COMPLEMENTARITY IN THE ICC STATUTE

One of the principal aims of the ICC Statute, as expressed in its preamble is to put an end to the culture of impunity with respect to 'the most serious crimes of concern to the international community'.[28] In pursuance of this aim, the Statute reaffirms 'the duty of every state to exercise its criminal jurisdiction' over the core crimes covered by the Statute and in the same vein confers the ICC with jurisdiction over these crimes.[29] States' duty to prosecute

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[23] The Allies established two international criminal tribunals at Nuremberg and Tokyo in 1945 based the London Agreement (Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis) of 1945.

[24] Ibid, Preamble and Article 1 of the London Agreement (Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis).

[25] Ibid, Preamble of the London Agreement. Final declaration of the Potsdam Conference of 2 August 1945 conferred jurisdiction on the Allied occupation courts over war crimes committed by Germans within the territory of the German Reich. Werle, (2009) op. cit. p.7.

[26] Article 9 and Article 8 of the ICTY and ICTR Statutes respectively.

[27] Xavier Philippe, 'The Principle of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?' (2006) (88) (262) *IRRC*, 380. Philippe observes that the principle of complementarity can actually be traced to the jurisdictional arrangement with the establishment of these Criminal tribunals and the national courts of the concerned states based on the he fact that the jurisdictional conflicts were resolved in favour of the international criminal tribunals. Mohammed M. El. Zeidy, *The Principle of Complementarity in International Criminal Law* (BRILL 2008) .

[28] Para. 5, Preamble of the ICC Statute 2002.

[29] Ibid, para. 6, Preamble and Article 1.

crimes under international law is an established and recognised principle of international customary law[30] which is also affirmed in the ICC Statute.[31] Thus, national courts of respective states parties and the ICC have concurrent jurisdiction over core crimes under international law. The Statute however states that the ICC shall be complementary to national criminal jurisdictions.[32] Consequently, the principle of complementarity relates to exercise of jurisdiction over core crimes under international law.[33]

This principle clarifies any ambiguity relating to precedence in the exercise of jurisdiction by the two authorities vested with jurisdiction. In the exercise of jurisdiction over core crimes, national court shall take precedence over the ICC. In essence, the principle of complementarity is a functional principle which gives primacy of jurisdiction to national courts of state parties over the ICC. However, where the former fails in its duty to prosecute, the latter's duty is invoked so as to end impunity.[34] Failure to prosecute is essentially marked by the broad term 'genuine unwillingness or inability' of states to prosecute, only then will the ICC jurisdiction be effectively triggered. Therefore, the ICC may prosecute in circumstances of 'genuine unwillingness or inability' by States to prosecute.

In effect, complementarity precludes the two authorities from exercising their jurisdiction over core crimes concurrently. While national courts have primary jurisdiction as a matter of first instance, the ICC only has complementary jurisdiction (Court of 'last resort').This however does not imply a hierarchical positioning of the two authorities vested with jurisdiction as superior to the other.

## DIMENSIONS OF THE PRINCIPLE OF COMPLEMENTARITY

The principle of complementarity as established by the ICC Statute may be viewed from three different perspectives. First, the principle of complementarity may be viewed as an admissibility principle as enunciated in Article 17 of the Statute. Article 17 refers to the conditions for the admissibility of cases by the ICC. Apart from the provisions of Articles 12 - 14 which covers the condition for exercise of jurisdiction by the ICC, Article 17 states circumstances where the ICC may determine that a case is admissible before it. This is in pursuance of the principle of complementarity which is the basis of ICC's jurisdiction over core crimes. Ordinarily, admissibility is crucial to the exercise of jurisdiction over any matter or cause of action. A court will not exercise jurisdiction over a matter where such matter is inadmissible, admissibility therefore works hand in hand with jurisdiction.



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[30] Werle, (2009) op. cit. p.69. Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) 9 December 1948 in respect of the crime of genocide. Articles 129 of the (Geneva) Convention for the Amelioration of the condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) and 146 of the (Geneva) Convention Relative to the protection of Civilian persons in the Time of War (Geneva Convention IV) of 12 August 1949 in respect of war crimes.

[31] Ibid.

[32] Para. 10, Preamble and Article 1 of the ICC Statute op. cit.

[33] Benzing observes that although the ICC Statute does not expressly use the term 'complementarity', it has however been adopted by many authors. Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) (7) (1) *Max Planck UNYB* 592.

[34] Philippe, op. cit. p.381.

Secondly and more relevant to this paper, complementarity applies to the exercise of jurisdiction over core crimes. Flowing from the provisions of the preamble and Articles 1 and 17 of ICC Statute, the principle of complementarity basically qualifies the underlying circumstances of the nature of the jurisdiction of the ICC. The jurisdiction of the ICC can only be triggered in respect to the core crimes on the bedrock of the principle of complementarity. Without the principle of complementarity, the jurisdiction of the ICC is best described as 'letters without the spirit'

The principle of complementarity also operates in respect of co-operation of state parties with the ICC on the provisions of the ICC Statute. First, the functional operation of the principle of complementarity depends largely on the cooperation of states with the ICC. National courts of states have first instance in exercising jurisdiction over core crimes. The jurisdiction of the ICC over core crimes can only be triggered where a state is either 'unwilling or unable' to investigate or prosecute. Consequently, apart from the trigger mechanisms highlighted in Articles 12-15 of the ICC Statute, it is the duty of the ICC to monitor situations in states where core crimes have been committed in order to ascertain that such states have complied with their duty to prosecute and the goals of the Statute are achieved.

In circumstances where a case is held admissible, the ICC may only exercise its jurisdiction successfully with the co-operation of the state. The operation of the ICC depends largely on state cooperation. Investigation and other procedural requirement for prosecution by the ICC will involve the state cooperation. Issues bothering on interview of victims, evidence gathering, and enforcement of arrest warrants also require the cooperation of states with the ICC. Thus, the functional operation of the principle of complementarity requires cooperation of states with the ICC.

As a jurisdictional principle, the principle of complementarity is founded upon and implemented through Article 17 of the ICC Statute-Substantive Provision - Article 17 of the ICC Statute

Article 17 embodies the substance of the principle of complementarity. Quite rightly, the heading of the Article is on the admissibility of cases before the ICC, it however forms the statutory basis of the principle of complementarity. Article 17 (1) identifies four circumstances where a case will be inadmissible before the ICC and by inference proscribes the ICC jurisdiction in such circumstances.

First, where a state has initiated investigation or prosecution of any of the core crimes, such case will be inadmissible before the ICC. Thus, even though the ICC is a competent authority vested with jurisdiction over the same matter, it shall not entertain such matter except such state is 'genuinely unwilling or unable' to carry out investigation or prosecution.[35] Secondly where a state decides after investigation not to prosecute the perpetrators of core crimes, such case will be inadmissible before the ICC. ICC may only entertain such case where the decision of the state not to prosecute is a result of the state unwillingness or inability to genuinely prosecute. A case will be inadmissible before the ICC where it would amount to double jeopardy for the perpetrator of the crimes involved in such case. This Article is read in conjunction with the provisions of Article 20 of the ICC Statute which upholds the principle of 'ne bis in idem'. The principle of 'ne bis in idem' is a Latin term used to express the principle of legality that prohibits instituting legal action in respect of the same conduct twice (double

[35] Article 17 (1) (a).

jeopardy).[36] In effect, the Statute recognises and upholds the principle of legality. Ordinarily where a state has tried and convicted or acquitted a perpetrator, the ICC shall not exercise its jurisdiction over the same perpetrator for the same conduct which forms the basis of the crimes within ICC's jurisdiction.[37] Article 20 however subjects this provision to the 'genuine willingness and ability' test stated in article 17 (2).

Lastly, where a case is not of 'sufficient gravity' to justify the exercise of the ICC's jurisdiction, then such case will be inadmissible. This provision is not only ambiguous but also appears rather superfluous. The Statute does not make further provision for what would amount to 'sufficient gravity' or the threshold of measurement of the term. As would be seen later in this paper this provision is one of the practical problems of the implementation of the principle of complementarity.

Article 17 (1) subjects the admissibility of case to states' 'genuine willingness or ability' to prosecute. The provision of Article 17 generally suggests that even though a state has initiated investigations or even court proceedings in respect of core crimes within the Statute, such case may however be admissible before the ICC where such state is found genuinely 'unwilling or unable'. The wording of the Article suggests that this general requirement is disjunctive, it suffices if a state is genuinely unwilling without being unable or vice versa. It appears that ICC shall administer the admissibility test on a case by case basis and not based a general evaluation.[38] The provision of Article 17 (1) raises questions about the definition of 'genuine willingness and ability' of a state to investigate or prosecute.

Article 17 (2) and (3) provides a statutory test of 'unwillingness and inability' of a state to investigate or prosecute respectively. It however does not provide for what would amount to 'genuine' willingness or inability. This suggests that even where a state meets the requirement for unwillingness or inability, such unwillingness or inability may be 'ingenuine'.[39]

Article 17 (2) identifies three factors which circumscribe the unwillingness of a state to prosecute. Primarily, the ICC has the duty of determining a state's 'unwillingness or inability' to investigate or prosecute. The ICC shall consider any of the three determiners in the light of the principles of due process recognized by international law. Any one of the three situations of unwillingness is sufficient for the ICC to conclude that a state is unwilling to investigate or prosecute. All the situations laid out by the Statute suggests that a state must have initiated some proceedings purportedly aimed at fulfilling its duty to prosecute international core crimes within its territory. Such proceedings could be concluded or ongoing. Generally, unwillingness of a state to investigate and prosecute is measured by the standard and quality of state proceedings.



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[36] The equivalent of this provision is expressed as '*autra fois acute*' in common jurisdictions, which precludes that double jeopardy for an accused person.

[37] Articles 6-9 of the ICC Statute expressly provide for the underlying individual acts and conducts which constitute the core crimes provided in Article 5 (1) of the Statute, subdivided into almost 70 subordinate crimes. It also provides for and structural elements of these crimes.

[38] Benzing, op. cit. p.603.

[39] Benzing suggests that the word 'genuine' should be read in reference to state's investigation or proceedings and not necessarily the phrase 'unwillingness or inability'. In effect, the word genuine qualifies state's investigation or prosecution brings it in line with Statute's requirement for effective prosecution. Benzing, op. cit. p.605.

First, state proceedings aimed at shielding perpetrators of core crimes from criminal responsibility will amount to unwillingness to prosecute.[40] A state will be regarded as unwilling where "proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility" for core international crimes. The unwillingness of the state is therefore measured by considering its intention behind proceedings or decisions in respect of international core crimes. The practical difficulty of this requirement is based on its subjectivity. The intention of a state may not be ascertainable by mere consideration of the overt action or inaction of a state. Even though such determination is made subject to the principles of due process in international law, it appears more as a subjective test than an objective one.

Benzing posits that the reference made to principles of due process in international law is to ensure that the ICC is more objective in evaluating the proceedings conducted by national courts.[41]

The second test of unwillingness is based on unjustified delay in state proceedings aimed at encouraging impunity.[42] A state will be regarded as unwilling where "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". As observed above, this requirement also appears more subjective in nature than objective. It requires an examination of the underlying intention of the state. In addition, the Statute makes no provision for what may constitute 'unjustified delay, the meaning is within the discretion of the ICC to determine.[43] In determining the meaning of 'unjustified delay' the ICC may have to grapple with the applicable standard of assessment, whether cases will be assessed in reference to specific states in line the legal practice within their criminal justice system or general principles will be made applicable to all states. 'Unjustified delay' in this context is not just mere 'undue delay' but requires a stricter threshold.[44] This raises questions relating to procedural issues such as the length of time for investigation or proceeding and due process.

The third provision relates to state proceedings conducted without 'independence and impartiality with the aim of protecting perpetrators from criminal liability. A state will also be regarded as unwilling where it conducts proceeding which are not independent and impartial in order to protect perpetrators from criminal liability. "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 may be interpreted to include requirement that the criminal justice system of state parties should be independent and impartial. Criminal proceedings before their national courts should be subject to the applicable principles of fair hearing and human rights standards.[45]



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[40] Article 17 (2) (a).
[41] Benzing, op. cit. p. 606.
[42] Article 17 (2b).
[43] Lijun Yang, 'On the Principle of complementarity in the Rome Statute of the International Criminal Court' (2005) (4) (1) *CJIL*, 123.
[44] Benzing, op. cit. p.610.
[45] This includes presumption of innocence of the accused and non-retroactivity of criminal laws.

Article 17 (3) outlines three circumstances of states' inability to investigate or prosecute. The situations outlined by the Article for determining states' inability is quite clear and less ambiguous. With the exception of the *generic* provision marked by the phrase 'or otherwise unable to carry out its proceedings',[46] the criteria for determining states inability is more objective than the test for 'unwillingness of states'. Inability of a state is marked by a total or substantial breakdown of the national judicial system of a state. A total or substantial breakdown could imply destruction of physical courts structure or rooms, lack of substantive laws or judges resulting from devastating situations like the Rwandan genocide. This could result from an internal armed conflict or a repressive and dictatorial government which had devastating effect on the judicial system of the state.

A state will also be regarded as unable to investigate or prosecute core crimes where the accused is unavailable or the state to gather evidence and testimony. The Statute does not proffer additional condition for determining unavailability of an accused person. However this may be a question of facts rather than law. A general inference based on available facts in each situation. An accused person may be unavailable by reason of death. Ordinarily, an accused who is at large, indisposed and unable to attain trial may be regarded as unavailable. It is however doubtful if this is would fall within the intent of the provisions of Article 17.

Article 17 (3) makes a general provision for other conditions which may render a state unable to carry out proceedings. This is a wide provisions to cover circumstances not anticipated by the Statute but may render a state 'unable to investigate or prosecute'. It is therefore at the discretion of the ICC to determine state's inability to prosecute based on the circumstance of each case. This provision may cover situation where a state lacks the required substantive criminal law provisions and other mechanisms to carry out genuine investigation and prosecution. For a state party to the ICC like Nigeria, which has no implementing legislation incorporating the core crime or the provisions of the ICC Statute on the core crimes within its domestic legal system, it may likely fall within the 'category of unable states'

Overall, the requirement of 'genuine unwillingness or inability' is the hallmark of the principle of complementarity as articulated in the ICC Statute.[47] In practice, the operation of the principle rest on the interpretation of the phrase especially in determining admissibility of cases by the ICC.

## THE RELEVANCE OF THE PRINCIPLE OF COMPLEMENTARITY

### Domestication and Prosecution of International Core Crimes

The principle of complementarity encourages domestication of the core crimes and national prosecution of these crimes. ICC Statute [redacted] states' duty [redacted] crimes under international law. The duty to prosecute necessarily presupposes that states must have the legal and judicial mechanisms to fulfil their duty to prosecute and give life to the intent of the Statute. Primary competence and authority to investigate and prosecute lies with states.

States, whether party to the ICC or not, need to domesticate the core crimes within their national criminal justice system in order to exercise criminal jurisdiction over such crimes. This is especially true for states who do not have existing provisions in their laws in respect of the crimes. It is not mandatory that such provisions should be a direct incorporation of the

[46] Article 17 (3).
[47] Werle, (2009) op. cit. p.88.

provisions of the ICC Statute, it could take the form conventional international law provisions in respect of those crimes.

Complementarity acknowledges and respects national judicial system hence encouraging domestic prosecution of international core crimes. Usually, territorial states are the most strongly affected by international core crimes committed within their territory. The direct victims of such crimes are the civilian population residing within the territory of the state and usually, plundered or damaged properties are located within such state. In effect, it is the peace and security of the state that is mostly violated. Consequently, most of the evidence of the alleged crimes and usually the perpetrators would be found within the territory of the state. It is therefore easier and faster to gather evidence required for prosecution.

Also, it is cheaper and more convenient for states to prosecute core crimes directly in their own courts. National courts enjoy territorial proximity to victims and the crime scene. Also, proceedings by national courts may be faster and less costly for easier enforcement of warrants and court judgments.[48] On the other hand, the ICC as an international court located at The Hague in the Netherlands may not be able to effectively exercise its jurisdiction over core crimes committed within a state without the cooperation of that state. State must cooperate with the ICC from the initiation of preliminary investigation to assisting in the interview and participation of victims in the Court proceedings and most importantly assist in enforcement of warrants and orders of the ICC. The principle of complementarity therefore affirms territoriality as the basis of states' jurisdiction over core crimes by encouraging national prosecution by state parties.

## FIGHT AGAINST IMPUNITY FOR CRIMES INTERNATIONAL LAW

Complementarity promotes the fight against impunity for crimes under international law. National courts must not just make a shallow attempt at investigating or prosecuting the core crimes but they must also do so genuinely and not just as a 'show trials'. Otherwise, the ICC will make a declaration of 'genuine unwillingness or inability' thereby triggering its jurisdiction over such crimes. Thus, where states fail to prosecute due to 'unwillingness or inability', the ICC will exercise its complementary jurisdiction to prosecute. Genuine investigation or prosecution by national courts absolutely proscribes ICC's jurisdiction over the same matter. As such, ICC will not proceed to prosecuting any case without effectively determining the admissibility of such case irrespective of the trigger mechanisms highlighted in the Statute. Article 19 (1) of the Statute provides that the ICC must satisfy itself that it has jurisdiction over a case brought before it.[49] Theoretically, the substantive provisions on the principle of complementarity discourages the culture of impunity and advances the idea that perpetrators of crimes under international law will have no safe haven.

[48] Ibid. p. 83. First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant To UNSCR 1593 (2005) on the difficulty of effecting the warrant of arrest against the Sudanese President Omar Hassan Ahmad Al Bashir and three others. Available at <http://www.icc-cpi.int/iccdocs/otp/21st-report-of-the-Prosecutor-to-the-UNSC-on-Dafur_%20Sudan.pdf> (Accessed 3rd June 2016).

[49] Article 19 makes extensive provision for challenge of the jurisdiction of the ICC with respect to the admissibility of cases. State parties may challenge the admissibility of a case on the provisions of Article 17 of the Statute. Article 18 equally requires the ICC prosecutor to inform a state in confidence of a referral from the UN. This effectively allows a state assert its jurisdiction or demonstrate sufficient willingness to prosecute.

## STATE SOVEREIGNTY

State Sovereignty is a trite principle of international law which accords respect to a state and its ability to make decisions in respect of its territory without any external or foreign interference. Whereas, the principle of universal jurisdiction may appear as a limitation to state sovereignty, complementarity affirms state sovereignty by giving states first instance in the prosecution of core crimes. The principle of complementarity affirms the judicial sovereignty of 'willing and able' states with respect to the core crimes. As long as states are willing and able to efficiently prosecute core crimes under the Statute, the ICC is precluded from interference.

While this principle clearly upholds states' judicial sovereignty, the other divide of it is the role of the ICC as an arbiter with authority to evaluate the manner in which a state exercises its judicial sovereignty in fulfilling its duty to prosecute core international crimes. Thus, while states are free to determine how they discharge their duty to prosecute, the ICC is also free to determine whether the states' duty to prosecute is properly discharged in line with the intent of the Statute or not.

## PRACTICAL LIMITATIONS TO IMPLEMENTATION OF THE PRINCIPLE OF COMPLEMENTARITY

Article 17 is the statutory backbone of the principle of complementarity in the ICC Statute. While Article 19 expressly states that it is the duty of the ICC to determine the admissibility of a case before it,[50] one big question raised by the provision of Article 17 is the precise threshold for the operation of the conditions for admissibility.[51] In principle, the ambiguity of some of terms and phrases used to qualify the provisions of Article 17 and the subjective nature of their interpretation is one of the practical limitations to complementarity. As stated earlier, Article 17 describes in broad terms 'genuine unwillingness or inability to prosecute' through the subjective test of the intention of the state actions. It does not state whether the ICC shall be restrictive in its interpretation or may make recourse to the other factors not expressly stated in the Statute. It is however doubtful if the ICC can rely solely on the provisions of the Statute in practice.[52]

Article 17 (1) (b) makes reference to a state's 'decision not to prosecute' but makes no express provision on what would amount to a proper decision by a state not to prosecute. It is not yet clear what the position of the state amnesties and pardon is, in relation to this provision and whether they amount to proper decision not to prosecute? In addition it is uncertain whether non-judicial mechanisms[53] of dealing with mass criminal atrocities which constitute crimes under international law stand as a proper alternative to prosecution as envisaged by the provision of Article 17 (1) (b).

One of the conditions laid out in Article 17 (1) (d) in determining admissibility of a case by the ICC relates to 'sufficient gravity' of the case. The problem raised by this provision is in respect of the complementary nature of the ICC jurisdiction and the provision of Article 5

[50] Article 19 (1) of the ICC Statute.
[51] Benzing M. concludes that the precise threshold for the admissibility condition will be developed by case laws as the ICC continues in its operations.
[52] Benzing, op. cit. p.606.
[53] Transitional justice mechanisms such Truth Commissions, reparations and non-prosecutorial mechanisms. Werle, (2009) op. cit. p. 75; 77.

(1). First, the Statute does not define 'sufficient gravity', it therefore remains within the discretion of the ICC to determine what it means. Ordinarily, Article 5 (1) clearly spells out the crime over which the ICC may exercise its jurisdiction. It states that these crimes are of 'most serious crime of concern to the international community'. However, the sufficient gravity test appears to raise an additional requirement of 'grievousness' of crimes under international law.

## CONCLUSION

The principle of complementarity relates to exercise of jurisdiction over core international crimes. National courts enjoy primacy over the ICC in the exercise of jurisdiction over international core crimes and this fosters national prosecution and state sovereignty. Complementarity emphasizes the duty of states to prosecute crimes under international law within their domestic criminal jurisdictions. Therefore, a state will not only declare its intention to prosecute or make mere investigation but it is also obliged to prosecute core crimes in its domestic courts. In order to fulfil its obligation to prosecute it shall ensure that these crimes are domesticated and that its courts have jurisdiction over them.

The principle of complementarity also presupposes that a state must not just be seen to carry out proceedings purportedly aimed at fulfilling its duty to prosecute, it must also do so 'judiciously and judicially'

While the principle of complementarity sets a paradigm shift from the jurisdictional principle of previous ad hoc international criminal tribunals and obviates difficulties experienced by the ad hoc tribunals, it has its own inherent practical problems.

Complementarity raises deeper issues relating to its procedural framework in determining unwillingness and inability of a state to prosecute. The practice of the ICC in respect of the cases emanating from the situation countries it is currently handling may be a viable area of research in respect of the practical application of the test of admissibility. The Nigerian situation is of practical relevance in this respect.

Nigeria is a state party to the ICC Statute in 2001[54] and has been under preliminary examination by the Office of the Prosecutor (OTP) of the ICC since 2010, following the recurrent systematic attacks by the Boko Haram insurgent group in the North-eastern part of the country.[55] Although the OTP issued a report stating that crimes against humanity and possibly war crimes had been committed within the Nigerian territory[56], Nigeria may not have taken significant steps in exercising its jurisdiction over these crimes as envisaged by the ICC Statute. Hence the OTP has initiated the third phase of its preliminary examination to determine admissibility of the Nigerian situation before the ICC. The considerations relate to the applicable admissibility test and procedure in respect of the Nigeria situation in line with the provision of the ICC Statute.

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[54]ICC report on Nigeria Available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/nigeria/Pages/nigeria.aspx> (Last Accessed 3rd June, 2016)

[55] Ibid.

[56]New OTP Report on On-going Preliminary Examination of the situation in Nigeria – 06/08/2013 Available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/pages/new-otp-report-on-on-going-preliminary-examination-of-the-situation-in-nigeria.aspx> (Last Accessed 3rd June, 2016).