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The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace without Justice' to 'No Peace with Victor's Justice'?

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Abstract

This article discusses the possibility of the International Criminal Court's taking domestic investigations and prosecutions of crimes within its jurisdiction where states are unwilling genuinely to investigate or prosecute such crimes. In particular sustaining the admissibility of a case on the basis of the lack of impartiality or independence of national proceedings is subject to analysis. Whereas the lack of this due process guarantee is expressly considered in the Rome Statute as a ground for admissibility where it is meant to shield a person from criminal responsibility, it is not equally clear that a case can be declared admissible where domestic proceedings are or were unfairly conducted to the prejudice of the person concerned. On an analysis of the wording of the Statute, its object and purpose, and its 'preparatory works', the possibility of the Court's taking on domestic proceedings on the basis of their being intentionally unfair to the prejudice of a suspect or accused does not appear to have a strong legal basis. However, recent developments at the ICTY and the ICTR show the importance of such a possibility to the fulfilment of the mission entrusted to the ad hoc tribunals. This circumstance brings about crucial questions about the role of the International Criminal Court in the enforcement of international justice and its contribution to international peace and security.

Key words

admissibility; complementarity; fair trial; International Criminal Court; international justice; primacy; sham trials; unwillingness

The ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict.[1]

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1. R. H. Jackson, 'The Rule of Law among Nations', speech delivered on 13 April 1945, (1945) 31 *American Bar Association Journal* 290, available at http://www.roberthjackson.org/theman2-7-7-1.asp.

1. INTRODUCTION

The recent increase in the number of domestic prosecutions of international crimes must be regarded as a positive development in terms of bringing an end to impunity and offering redress to the victims of such crimes. However, it is important to note that there are cases where domestic national proceedings for international crimes have not been or are not being conducted independently or impartially or otherwise do not comply with international principles of due process. For instance, non-governmental organizations (NGOs), academics, and international bodies alike have voiced allegations of unfairness in relation to war crimes trials in the former Yugoslavia,[2] proceedings for genocide in Rwanda,[3] trials for crimes against humanity in Indonesia,[4] and, most recently, trials for war crimes and international terrorism in the United States.[5]

An analysis of these instances reveals that the lack of due process is usually alleged to have taken place on the basis of similar circumstances, such as the lack of impartiality or independence of the judges or a denial of the right to a defence. However, the effect of the alleged unfairness is not the same in every case. In some instances, the unfairness of the proceedings benefits the accused, in that he or she is unfairly acquitted or is given a disproportionately low sentence. For example, the alleged partiality of Indonesian judges and prosecutors is claimed to be the reason why the Ad Hoc Human Rights Court in Jakarta has acquitted 16 of the

2. See, e.g., Human Rights Watch, 'War Crimes Trials in the Former Yugoslavia' (1995), available at http://www.hrw.org/reports/1995/yugoslavia/), and 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro' (2004), available at http://hrw.org/reports/2004/icty1004/icty1004.pdf, 9–10 and 12–13. For Bosnia, see ICTY/OHR, 'Joint conclusions of the Working Group of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Office of the High Representative (OHR) regarding domestic prosecution of war crimes in Bosnia and Herzegovina', The Hague, 21 Feb. 2003, quoted in Amnesty International, 'Bosnia-Herzegovina: Shelving justice – war crimes prosecutions in paralysis', 12 Nov. 2003, EUR 63/018/2003, fn. 12; for Croatia, see Committee against Torture, 'Conclusions and Recommendations of the Committee against Torture: Croatia', UN Doc. CAT/C/CR/32/3 (2004), 2; for Kosovo, see OSCE Department of Human Rights and Rule of Law, 'Kosovo's War Crimes Trials: A Review', September 2002, available at http://www.osce.org/kosovo/documents/reports/human_rights/10_WarCrimesReport_eng.pdf (hereafter Kosovo's War Crimes Trials), 11. All Amnesty International documents cited in this article are available online at http://web.amnesty.org/library/. All UN documents cited are available online at http://documents.un.org/, unless otherwise indicated.

3. On the unfairness of trials before ordinary Rwandan courts, see Amnesty International, 'Rwanda: Unfair Trials, Justice Denied', 8 April 1997, AFR 47/08/97, and 'Rwanda: The Troubled Course of Justice', 26 April 2000, AFR 47/10/00, 3–5. On the unfairness of *Gacaca* trials, see Amnesty International, 'Gacaca: A Question of Justice', 17 Dec. 2002, AFR 47/007/2002, 34–40; and Gjilan District Court (Kosovo), Decision on Extradition Request, Case No. P.H.H. 2/2001, 6 June 2001 (on file with author) (Rwandan request for extradition of a member of the personnel of UNMIK denied on the grounds *inter alia* that the extradition could result in an infringement on the part of UNMIK authorities of Art. 6 of the European Convention on Human Rights, by exposing the individual in question to inadequate guarantees for a fair trial in *Gacaca* proceedings), affirmed by the same district court sitting in panel, Case No. KP. 66/01, 11 June 2001 (on file with author).

4. See Human Rights Watch, 'Justice Denied for East Timor: Indonesia's Sham Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of UN Action', 20 Dec. 2002, available at http://www.hrw.org/backgrounder/asia/timor/etimor1202bg.htm; and UNHCHR, Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of Human Rights in Timor-Leste, Report of the United Nations High Commissioner for Human Rights, 4 March 2003, UN Doc. E/CN.4/2003/37, paras. 52–55.

5. J. Hongju Koh, 'The Case against Military Commissions', (2002) 96 AJIL 337, at 338–9; J. Fitzpatrick, 'Jurisdiction of military commissions and the ambiguous war on terrorism', (2002) 96 AJIL 345, at 351–2; Amnesty International, 'A Deepening Stain on US Justice', 19 Aug. 2004, AMR 51/130/2004.

18 persons indicted in relation to the atrocities that took place in East Timor in 1999.[6] In contrast, in other cases the lack of procedural guarantees prejudices the accused and leads to unfair convictions or disproportionately harsh sentences. In Rwanda,[7] Bosnia and Herzegovina,[8] Croatia,[9] and Kosovo,[10] for instance, there have been cases where inter-ethnic bias has apparently guided the action of domestic authorities when indicting and convicting members of other ethnic groups for crimes allegedly committed during the Yugoslav and Rwandan conflicts.

The Rome Statute of the International Criminal Court[11] specifically addresses unjustified delay and lack of impartiality and independence in domestic criminal proceedings for genocide, crimes against humanity, and war crimes. Paragraphs 2(b) and (c) of Article 17 and paragraph 3(a) of Article 20 of the Statute list both circumstances as factors determining the 'unwillingness' of a state 'genuinely to carry out the investigation or prosecution'.[12] The same articles make it clear that if the International Criminal Court (Court, or ICC) finds that a state is 'unwilling' to investigate or prosecute in a particular case, the Court may adjudicate on such a case despite the existence of past or ongoing national proceedings. However, the wording of the Statute is not entirely clear as to the relevance of the 'sign' of the unfairness of the domestic criminal proceedings, explained above. It is not clear whether the Court can declare a case admissible only where the unfairness of domestic investigations or prosecutions is beneficial to the suspect/accused or can also do so where such unfairness is prejudicial to him or her. This article explores this particular feature of the admissibility regime set up by the Rome Statute, and tries to identify those instances that can be amenable to adjudication before the Court because the alleged offender has been or is being deprived of a fair trial at national level.

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6. Amnesty International and Judicial System Monitoring Programme, 'Indonesia & Timor-Leste: Justice for Timor-Leste: The Way Forward', 1 April 2004, ASA 21/006/2004, at 38, 43 and 47. For similar cases in Croatia, see Amnesty International, 'A Shadow on Croatia's Future: Continuing Impunity for War Crimes and Crimes against Humanity', 13 Dec. 2004, EUR 64/005/2004, 12. For Bosnia, see OSCE, 'War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles', March 2005, available at http://www.oscebih.org/documents/1407-eng.pdf (hereafter War Crimes Trials before the Domestic Courts of BiH), 37.
7. A. Obote-Odora, 'Competence of the International Criminal Tribunal for Rwanda', (1999) 6 *Murdoch University Electronic Journal of Law* 3, available at http://www.murdoch.edu.au/elaw/issues/v6n3/obote-odora63.html, paras. 85–89.
8. 'War Crimes Trials before the Domestic Courts of BiH', *supra* note 6, at 4.
9. OSCE, 'Supplementary Report: War Crime Proceedings in Croatia and Findings from Trial Monitoring', 22 June 2004, available at http://www.osce.org/documents/mc/2004/06/3165_en.pdf, 14. For particular cases, see Amnesty International, 'Short-changing Justice: War Crimes Trials in Former Yugoslavia', December 1998, EUR 64/10/98 (Mirko Graorac case); and 'Short-changing Justice: the 'Šodolovci' Group', 1 Dec. 1999, EUR 64/06/99 ('Šolodovci Group' case).
10. OSCE, 'Review of the Criminal Justice System: 1 February 2000–31 July 2000', available at http://www.osce.org/kosovo/documents/reports/justice/criminal_justice.pdf, 66–9. See also 'Kosovo's War Crimes Trials', *supra* note 2, at 54, where it is shown that panels composed only of local judges found the accused guilty as charged in 89 per cent of the cases they decided between July 2000 and May 2002, whereas panels composed of international judges found the accused guilty in only 15 per cent of the cases they decided during that time.
11. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 17 July 1998, corrected by *procès-verbaux* of 10 Nov. 1998, 12 July 1999, 30 Nov. 1999, 8 May 2000, 17 Jan. 2001 and 16 Jan. 2002 (hereafter Rome Statute or Statute), available at http://www.un.org/law/icc/statute/english/rome_statute(e).pdf.
12. For the consideration of these circumstances as related to the 'inability' of a state genuinely to investigate or prosecute (Art. 17(3) of the Rome Statute), see S. Zappalà, *Human Rights in International Criminal Proceedings* (2003), 6.

Our analysis proceeds in two stages. In stage one, after a brief introduction to the complementary character of the Court and the admissibility regime envisaged in the Rome Statute, a three-tiered approach is proposed to determine when the Court may consider the unfairness of criminal proceedings at the domestic level as a token of state 'unwillingness'. Our analysis of the wording of Articles 17 and 20 of the Statute, their object and purpose, and their 'preparatory works' concludes that the Court can take over national cases where the unfairness of national proceedings intentionally hampers the successful prosecution of a person. However, the Court could not do so where the irregularity of the proceedings is meant to assure the indictment or conviction of a person. In the second stage of our analysis, we take a look at the experience of the ad hoc tribunals with regard to unfair criminal proceedings in the former Yugoslavia and Rwanda and we build on it to discuss the consequences of the previous finding. Recent developments at the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) seem to evidence a change in emphasis from the oft-quoted paradigm of 'no peace without justice' to the most comprehensive one of 'no peace with victor's justice'. On the basis of these two findings, the article closes with some reflections on the role of the International Criminal Court and the articulation of its relationship with national jurisdictions.

2. ICC COMPLEMENTARITY AND UNWILLING STATES

The term 'complementarity' does not appear as such in any of the provisions of the Rome Statute. The only similar reference is to be found in the tenth paragraph of its Preamble and in Article 1, where it is stated that the International Criminal Court established under the Statute 'shall be complementary to national criminal jurisdictions'. On the basis of this language, taken from the preamble of the draft statute prepared by the International Law Commission (ILC), the word 'complementarity' has been coined to reflect an aspect of the relationship between the Court and domestic jurisdictions.[13] More specifically, the complementarity principle concerns the allocation of effective jurisdiction between domestic courts and the ICC in relation to the crimes envisaged in the Statute, determining that for such crimes (genocide, crimes against humanity, and war crimes) the ICC is to be a 'complement' to national jurisdictions;[14] that is to say, it is to 'supplement' national

13. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 6 Sept. 1995, UN GAOR, 50th session, Supp. No. 22, UN Doc. A/50/22 (1995) (hereafter 1995 Report of the Ad Hoc Committee), para. 29; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March–April and Aug. 1996), 13 Sept. 1996, UN GAOR, 51st session, Supp. No. 22, UN Doc. A/51/22 (1996) (hereafter 1996 Preparatory Committee Report, I), para. 153.

14. For the view that complementarity can also play a role in relation to the so-called 'internationalized' criminal jurisdictions, see M. Benzing and M. Bergsmo, 'Some Tentative Remarks on the Relationship between Internationalized Criminal Jurisdictions and the International Criminal Court', in C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (2004), 407 at 412; and F. Pocar, 'The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community', (2004) 2 *Journal of International Criminal Justice* 304, at 306.

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efforts to investigate and prosecute international crimes, rather than to 'supplant' them,[15] acting only on a 'subsidiary' basis.[16] From this perspective, the principle of complementarity implies on the one hand that the Court's intervention will be barred if national jurisdictions have the capacity and the will to prosecute crimes within the dormant jurisdiction of the Court. On the other hand, the principle recognizes that there may be situations where such capacity or will are absent and where the Court may exercise its jurisdiction to 'complement' state action.[17] Cases of state inaction clearly fall within the latter instance,[18] but cases where investigations or prosecutions are being or have been conducted at domestic level may also merit the Court's intervention. In particular, Article 17 of the Statute empowers the Court to take over an investigation and/or prosecution from a state if the Court determines that such state is 'unable or unwilling genuinely to carry out the investigation or prosecution'.[19]

In order to determine whether a state is unwilling genuinely to investigate or prosecute in a particular case, Article 17(2) of the Statute directs the Court to consider whether:

(a) domestic proceedings or the decision not to prosecute have been made for the purpose of shielding the person concerned from criminal responsibility;

(b) there has been an unjustified delay in domestic proceedings; and/or

(c) the domestic proceedings were not or are not being conducted independently or impartially.[20]

If the Court finds that any of these instances applies, it may declare the particular case to be admissible and exercise jurisdiction over it despite the existence of current or past investigations or prosecutions in relation to the same case at national level. Furthermore, pursuant to Article 20 of the Statute, a person tried domestically for conduct proscribed in the Statute as genocide, crimes against humanity, or war crimes may be subsequently tried by the ICC if any of the instances described in sub-paragraphs (a) or (c) above applies.[21]

Sub-paragraphs (b) and (c) above refer to instances where fundamental guarantees for a fair trial protected by customary international law, such as the expeditiousness,

15. J. Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 AJIL 404, at 414–15; M. M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Michigan Journal of International Law* 869, at 896.
16. W. W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', (2003) 24 *Michigan Journal of International Law* 1, at 89; and H. Olásolo, 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?', (2003) 3 *International Criminal Law Review* 87, at 97, prefer to use the term 'subsidiarity', in the consideration of the 'unwillingness' or 'inability' of the state concerned.
17. J. L. Bleich, 'The International Criminal Court: Report of the ILA Working Group on Complementarity', (1997) 25 *Denver Journal of International Law and Policy* 281, at 281.
18. ICC-OTP, 'Experts Group Reflection Paper for the Office of the Prosecutor: The Principle of Complementarity in Practice', 2003, available at http://www.icc-cpi.int/library/organs/otp/complementarity.pdf, para. 18.
19. Rome Statute, Art. 17(1)(a) and (b) ('Issues of admissibility').
20. Ibid., Art. 17(2).
21. Ibid., Art. 20(3) ('*Ne bis in idem*').

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the independence, or the impartiality of the proceedings, are at stake.[22] This is allegedly the case in most trials for international crimes indicated in section 1 above. Accordingly, the Court could exercise its jurisdiction over such cases and remove them from the action of domestic authorities provided that the crimes in question fall within the jurisdiction *ratione materiae*,[23] *temporis*,[24] *and personae/loci*[25] of the Court. However, Articles 17(2) and 20(3) further qualify the instances where the lack of an expeditious trial or the biased character of the proceedings may determine the unwillingness of a state under the Statute. In paragraph 2(b) and (c) of Article 17, as well as in paragraph 2(b) of Article 20, the Statute adds that such violations of the right to a fair trial must be 'inconsistent with an intent to bring the person concerned to justice'.[26] The obvious question arises as to how this reference to the 'intent to bring the person concerned to justice' may affect the determination of the admissibility before the ICC of national cases wanting the mentioned basic features of due process of law.

3. The unfairness of domestic criminal proceedings as a token of the unwillingness of states before the ICC

In order to ascertain the meaning of Article 17(2)(b) and (c), regard must be paid to Article 21 of the Rome Statute, which determines the law to be applied by the Court. Pursuant to this article, Article 17(2) must be interpreted in the light of the Rules of Procedure and Evidence and the Elements of Crimes; applicable treaties and the principles and rules of international law; and general principles of law derived from national laws of legal systems of the world.[27] Since the Statute is an international treaty, the governing principles for interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties appear to be relevant 'principles and rules of international [customary] law' applicable pursuant to Article 21(1)(b) of the Statute.[28]

Article 31(1) of the Vienna Convention provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

22. A. Cassese, *International Criminal Law* (2003), 395. For the right to an independent and impartial tribunal, see Universal Declaration of Human Rights, GA Res. 217, UNGAOR, 3rd session, at 72, 10 Dec. 1948, UN Doc. A/810 (1948), Art. 10; International Covenant on Civil and Political Rights, GA Res. 2200 (XXI), UNGAOR, 21st session, Supp. No. 16, at 52, 16 Dec. 1966, UN Doc. A/6316 (1966) (hereafter ICCPR), Art. 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, 4 Nov. 1950 (hereafter ECHR), Art. 6(1); American Convention on Human Rights, OAS Treaty Series No. 36, at 1, 22 Nov. 1969, OAS Off. Rec. OEA/Ser. A/16 (hereafter ACHR), Art. 8(1); African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981) (hereafter ACHPR), Art. 7(b); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977, Art. 75(4); Rome Statute, Art. 67(1). For the right to trial without undue delay or within a reasonable time, see ICCPR, Arts. 9(3) and (4), and 14(3)(c); ECHR, Art. 6(1); ACHR, Art. 8(1); ACHPR, Art. 7(1); Rome Statute, Art. 67(1)(c).
23. Rome Statute, Art. 5 ('Crimes within the jurisdiction of the Court').
24. Ibid., Art. 11 ('Jurisdiction *ratione temporis*').
25. Ibid., Arts. 12(2) ('Preconditions to the exercise of jurisdiction') and 124 ('Transitional Provision').
26. Ibid., Arts. 17(2)(b)(c) and 20(2)(b).
27. Rome Statute, Art. 21(1) ('Applicable law').
28. W. A. Schabas, *An Introduction to the International Criminal Court* (2001), at 74. See also 'The Principle of Complementarity in Practice', *supra* note 18, Annex 2.

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the treaty in their context and in the light of its object and purpose'.[29] Furthermore, Article 32(1) indicates that

> recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.[30]

Following these provisions, a literal, contextual, and teleological interpretation of Article 17(2)(b) and (c) is provided below, paying due regard to the 'preparatory works' of the provision. It must be noted that such interpretation does not intend to shed light on all the unclear issues that may be identified in Article 17. More modestly, what is sought is to determine how this provision regulates the consideration by the Court of domestic proceedings which fall short of the mentioned due process guarantees for admissibility purposes and, more concretely, whether the 'sign' of the unfairness of the proceedings (beneficial or prejudicial to the suspect/accused) is relevant to such assessment by the Court.

3.1. Ordinary meaning of the terms in Article 17(2)(b) and (c)

A literal interpretation of Article 17(2) indicates that the fact that domestic proceedings have been subject to an 'unjustified delay' or were or are not being conducted 'independently or impartially' is not enough for the Court to find that the state conducting such proceedings is unwilling to investigate or prosecute. In addition to the existence of such delay, partiality, or lack of independence, Article 17(2)(b) and (c) call on the Court to consider whether such circumstances are 'inconsistent with an intent to bring the person concerned to justice'. Since 'intent' refers to the aim, meaning or purpose of something or somebody, the introduction of this clause adds an element of subjectivity to the analysis of the Court under both paragraphs: the Court must eventually consider the aim behind the fact of domestic proceedings being delayed without justification and/or conducted in a partial or non-independent manner. The inclusion of the word 'inconsistent' in both sub-paragraphs seems to empower the Court to rely on inferences from the factual circumstances under analysis to carry out this subjective assessment. Accordingly, a case could be declared admissible for adjudication in The Hague if the Court can determine on the basis of the factual circumstances that the aim of the unfair proceedings cannot be 'to bring the person concerned to justice'.

The key question is therefore what the Statute means by 'intent to bring the person concerned to justice'. A literal interpretation of the words in their ordinary meaning is not unequivocal. On the one hand, these words may be read to refer to the 'intention to bring the person concerned before a judge to face trial'.[31] This interpretation is quite straightforward and seems to be the one most consistent

29. Vienna Convention on the Law of Treaties (hereafter Vienna Convention), 23 May 1969, 1155 UNTS 331, 340, Art. 31(1) ('General Rule of Interpretation').
30. Ibid., Art. 32 ('Supplementary means of interpretation').
31. *The Oxford English Dictionary* (2001) explains the phrase 'bring someone to justice' as 'arrest and try someone in court for a crime'.

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with other authentic versions of the Statute.[32] However, the expression can also be interpreted as referring to the 'intention to hold somebody accountable', to determine the criminal responsibility of someone. The difference between these two interpretations can be coined in 'justice' being seen as the process whereby criminal responsibility is determined ('trial') or as the upholding of what is just as a result of such process ('accountability').[33]

The context of sub-paragraphs 2(c) and (d) does not assist in determining which of the two interpretations above is to be preferred. On the one hand, the chapeau of Article 17(2) mandates the Court to 'hav[e] due regard to the principles of due process recognized by international law' when determining the unwillingness of a state under Article 17. The assessment of these principles is especially relevant and effective if the word 'justice' in sub-paragraphs 2(c) and (d) is read to mean 'trial'. The Court could then find that an 'intention to bring the person concerned to justice' is lacking if negligence cannot explain that the trial of that person does not conform to principles of due process, such as when proceedings are delayed without justification or are not conducted independently or impartially. On the other hand, Article 17(2)(a) seems to match the second possible meaning of 'justice' in sub-paragraphs (c) and (d) in that it specifically identifies the 'purpose of shielding somebody from criminal responsibility' as an illegitimate intent that determines the unwillingness of a state. This sub-paragraph refers to the intent to prevent a person from being held accountable for a crime, that is an interpretation of 'justice' as a result rather than as a process.

Confronting the possible readings of the 'intent to bring the person concerned to justice' with the broader context of sub-paragraphs (c) and (d), the same doubts persist. The criteria set forth in paragraph 2 of Article 17 are meant to be considered by the Court in order to determine that a state is 'unwilling . . . genuinely to carry out the investigation or prosecution' at hand under paragraph 1 of the same article. Therefore the interpretation of the lack of an 'intent to bring the person concerned to justice' must be consistent with the idea of a prosecution or investigation not being carried out 'genuinely'. However, the literal meaning of 'genuine' – 'having the supposed character, not sham or feigned'[34] – can accommodate the two meanings of 'justice' indicated above. Investigations or prosecutions that intentionally lead to a trial lacking due process guarantees of expeditiousness and impartiality can be said not to be genuine in the same way as proceedings which are deliberately biased and delayed to shield a person from criminal responsibility.[35] In fact, the

32. See, e.g., the French ('l'intention de traduire en justice la personne concernée') and Spanish ('la intención de hacer comparecer a la persona de que se trate ante la justicia') versions of Article 17(2)(b) and (c).
33. Merriam-Webster's *Dictionary of Law* (1996) defines 'justice' *inter alia* as 'fair, just, or impartial legal process' and as 'the administration of law; especially: the establishment or determination of rights according to law or equity' (citations omitted).
34. *The Oxford English Dictionary* (2001). *Black's Law Dictionary* (1999) defines 'genuine' *inter alia* as 'authentic or real; something that has the quality of what it is purported to be or to have'.
35. 'The Principle of Complementarity in Practice', *supra* note 18, Annex 2, para. 23 ('It was extremely important to many States that proceedings cannot be found "non-genuine" simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards. The issue is whether the proceedings are so inadequate that they cannot be considered "genuine" proceedings').

many synonyms proposed by commentators to explain the meaning of the word 'genuinely' could be read into any of these two situations.[36]

Finally, consideration of other articles in the Statute offers no definitive assistance.[37] As commented above, Article 20(3) is especially relevant because it provides the Court with the possibility of trying a person who has already been tried by another court if the proceedings in the prior court '(a) Were for the purpose of shielding the person concerned from criminal responsibility; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law'. However, the wording of this article can also accommodate the two interpretations of Article 17(2) identified so far. Sub-paragraph (a) is phrased in the same terms as Article 17(2)(a) and sub-paragraph (b) refers without further elaboration to the same standard used in Article 17(2)(b) and (c) ('and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'). The only remarkable difference between both articles is the use of the word 'otherwise' in Article 20(3)(b), which might be read to mean that sub-paragraph (b) does not convey but only exemplifies the idea in sub-paragraph (a), that is the purpose of shielding the person concerned from responsibility. However, it is not possible to confirm this interpretation with other authentic versions of the text, such as the French and Spanish ones, which use no such word. The same observation is valid in relation to the fact that in the Spanish version of Article 20(3)(b) the lack of intent to bring the person concerned to justice appears to be an independent ground for retrial, separate from the lack

36. For a case where proceedings are not genuine because fair trials guarantees are deliberately disregarded, suitable synonyms of 'genuinely' are 'properly' (P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (1999), Vol. 1, 21 at 43), 'legitimately' (Bleich, *supra* note 17, at 284), 'duly' (ibid., at 286), 'fully' (ibid., at 287) and 'regularly' (ibid., at 287). For a case where proceedings are not genuine because investigations or prosecutions are intentionally biased and delayed to shield somebody from criminal responsibility, suitable synonyms of 'genuinely' are 'effectively' (Amnesty International, 'Making the Right Choices: Report on the International Criminal Court, Part I', 1 Jan. 1997, IOR 40/01/97, at 12, following the ILC Draft Statute; the same proposal was suggested during the negotiations of the Genocide Convention, see El Zeidy, *supra* note 15, at 879), 'efficiently' (K. Ambos, 'Sobre el Fundamento Jurídico de la Corte Penal Internacional. Un Análisis del Estatuto de Roma' [About the Juridical Basis of the International Criminal Court. An Analysis of the Rome Statute], in K. Ambos and O.J. Guerrero (eds.), *El Estatuto de Roma de la Corte Penal Internacional* [The Rome Statute of the International Criminal Court] (1999), 98, at 112), 'in good faith' (M. Bergsmo, 'The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11 to 19)', (1998) 6 *European Journal of International Crime, Criminal Law and Criminal Justice* 29, at 35; L. Arbour and M. Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in H. A. M. von Hebel *et al.* (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 129 at 131 and 139; Bleich, *supra* note 17, at 285–6; J. S. Borek, 'The Proposed International Criminal Court', in P. J. Cullen and W. C. Gilmore (eds.), *Crimes sans Frontières: International and European Legal Approaches* (1998), 73 at 78; B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 90, and S. A. Williams, 'Article 17: Issues of Admissibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), 383 at 392), 'adequately' (Arbour and Bergsmo, *supra*, at 130; Benvenuti, *supra*, at 25; Bleich, *supra* note 17, at 287, 291; S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', (1998) 23 *Yale Journal of International Law* 383, at 397, 424, and Williams, *supra*, at 388), 'appropriately' (Schabas, *supra* note 28, at 67), 'credibly' (Brown, *supra*, at 386) and 'really' (El Zeidy, *supra* note 15, at 900).

37. Doctrinal writings indicate that the 'context' for interpretation under Art. 31 of the Vienna Convention is the treaty as a whole, not merely a paragraph, an article, a section, or a part of the treaty. See Sir I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), 127; D. Nguyen Quoc, P. Daillier, and A. Pellet, *Droit international public* (1992), 252–3.

of independence and impartiality in the proceedings. In the French and English versions of this article both elements are clearly linked with the conjunction 'and' instead of 'or'.

In conclusion, a literal interpretation of sub-paragraphs (b) and (c) is not decisive as to whether the sign of the unfairness suffered by a person tried domestically for crimes contained in the Statute has an impact in the possible admissibility of his or her case before the ICC. If the word 'justice' in those paragraphs is read as 'trial', the sign of the unfairness is irrelevant, since sub-paragraphs (b) and (c) read in their context would determine the admissibility of national proceedings which are deliberately conducted in an unfair manner. However, if 'justice' is read as 'accountability', the sign of the unfairness suffered by the person is relevant to the admissibility of a case. If the lack of due process assists in the person not being held accountable, the case will be admissible, whereas the same will not hold if the unfairness contributes to the accused being declared criminally responsible.

3.2. The object and purpose of the Statute

Pursuant to Article 31 of the Vienna Convention, the interpretation given to Article 17(2)(b) and (c) in accordance with the ordinary meaning of their words must take account of the object and purpose of the Rome Statute. The fifth and ninth paragraphs of the Preamble of the Statute clearly indicate that the immediate object and purpose of the treaty are the establishment of an international criminal court 'with jurisdiction over the most serious crimes of concern to the international community as a whole', in order to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[38] In accordance with this purpose, Article 1 states that the Court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in th[e] Statute', and Articles 54 and 64 empower the Prosecutor and the trial chamber respectively to investigate and conduct trials in relation to such crimes. From this point of view, the unfairness of domestic proceedings at the national level is not per se relevant to the purpose of the Court, but only when such violation of fundamental human rights amounts to one of the crimes contained in the Statute.[39]

However, the last paragraph of the Preamble also indicates that the Court 'shall be complementary to national criminal jurisdictions'.[40] As explained in section 2 above, this means that the criminal court established by the Statute is intended to complement, supplement, or assist the work of national jurisdictions conducting criminal proceedings. The sixth paragraph, 'recalling' that is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes,

38. Rome Statute, Preamble, paras. 5 and 9.
39. Rome Statute, Arts. 8(2)(a)(vi) (war crime of denying a fair trial in the context of an armed conflict of international character), and 8(2)(c)(iv) (war crime of sentencing or execution without due process in the context of an armed conflict not of an international character), based on Art. 129 *in fine* of Geneva Convention III, Art. 147 of Geneva Convention IV and Art. 85(4)(e) of Additional Protocol I. See also Rome Statute, Arts. 7(1)(h) (crime against humanity of persecution), and 7(1)(j) (crime against humanity of apartheid); and *United States of America v. Alstötter et al.* ('Justice trial'), Judgment, 3 Dec. 1948, (1948) 3 TWC 1, 6 LRTWC 1, 14 ILR 278.
40. Rome Statute, Preamble, para. 10.

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suggests that this complementary character of the Court refers to the exercise of domestic jurisdiction over the crimes contained in the Statute. Absent any further explanation in the Preamble, it could be argued that the Court is to provide assistance to improve the criminal legal system of the state exercising its jurisdiction over the crimes contained in the Statute, or even to increase the protection of the rights of the persons affected by the relevant criminal legal system in the circumstances. However, the preamble of the Rome Statute does not make explicit any purpose other than the one stated above: to put an end to impunity. Accordingly, it can be concluded that the complementarity of the Court is meant to assist states in their primary responsibility of ensuring that those responsible for international crimes are investigated and prosecuted, thus putting an end to impunity.

If Article 17(2)(b) and (c) are to be read in the light of the object and purpose of the Statute as identified above, that is the establishment of an international criminal court that is complementary to national criminal jurisdictions in order to put an end to impunity, it is apparent that the preferred meaning of the expression 'intent to bring the person concerned to justice' must be the one referring to the 'intent to hold somebody accountable' (result) rather than simply the 'intent to bring the person concerned before a judge to face trial' (process). It is where the former intent is missing on the part of states that the Court must intervene in order to hold the person accountable and put an end to impunity. It follows from this interpretation that not all violations of due process at the domestic level would be admissible before the Court under Article 17(2)(b) and (c). Instead, the Court would be meant to intervene only in cases where the unfairness of the proceedings revealed an intent to prevent a person being held accountable for crimes contained in the Statute, that is where the proceedings are delayed without justification or are not conducted impartially in order to maintain a situation of impunity. In this sense, paragraphs (b) and (c) of Article 17 would be concrete examples of the more general principle enunciated in paragraph (a) of the same provision, and the traditional understanding of due process of law would be turned upside down: the human rights mentioned in Article 17(2) would not read as standards for the Court to protect the individual against possible abuses by the state, but as standards for the Court to prevent state authorities from shielding an individual from justice.

Opposing this interpretation, it could be argued on the basis of some articles of the Statute that its object and purpose are not simply to establish an international criminal court that assists national systems in bringing an end to impunity. Article 21(3) mandates the Court to apply and interpret the law (the Statute included therein) in a manner 'consistent with internationally recognized human rights', and Articles 55 and 67, *inter alia*, provide for the conduct of proceedings in accordance with the highest international human rights standards. These provisions suggest the object and purpose of the Statute to be a qualified one, namely the establishment of an international criminal court to investigate and prosecute international crimes in a fair manner. Pursuant to this interpretation it can be argued that the complementarity character of the Court is meant to assist states not merely in putting an end to impunity, but in doing so in a fair manner. Reading Article 17(2)(b) and (c) in the light of this purpose, the expression 'an intent to bring the person concerned to

justice' would refer not only to the idea of accountability for international crimes, but also to the process whereby those responsible are held to account. Cases of domestic investigations or prosecutions for crimes contained in the Statute could then be admissible under Article 17 if the manner in which such proceedings were or are being conducted is inconsistent, for instance, with the right to a trial without undue delay before an independent and impartial tribunal.

In conclusion, the consideration of the object and purpose of the Statute does not shed definitive light on whether the sign of the unfairness suffered by a person tried domestically for crimes within the jurisdiction of the Court has an impact on the possible admissibility of his or her case before the ICC. Whereas it is apparent that the purpose of the Statute is to establish a court that complements national action to hold accountable those responsible for any of the crimes contained in the Statute, it can be argued that the manner in which such accountability is declared at the national level also matters to the Statute.

3.3. 'Preparatory works' of Article 17(2)(b) and (c)

The ordinary meaning of the terms in their context and in the light of the object and purpose of the Statute leads to two divergent interpretations of Article 17(2)(b) and (c). On the one hand, this provision may be read to indicate that the Court will not exercise its jurisdiction over domestic proceedings for crimes contained in the Statute where the lack of due process is not intended to shield somebody from criminal responsibility. On the other hand, albeit perhaps not as evidently, this article can also be construed as empowering the Court to take over domestic proceedings intentionally lacking due process of law regardless of the sign of such irregularity.

Given the 'ambiguous or obscure' meaning of Article 17(2)(b) and (c) pursuant to a literal, contextual, and teleological interpretation of its terms, the preparatory works of this provision may be considered in order to determine its meaning.[41] However, it is apparent that the 'preparatory works' of a treaty do not refer to the agreement between the parties at the time when or after it has received authentic expression in the text, and as such they cannot have the same authentic character as the elements considered under the 'general rule' of interpretation (the ordinary meaning of the words in their context, object and purpose of the treaty, etc.).[42] In order somehow to mitigate this concern, the preparatory works of Article 17(2)(b) and (c), and to a more limited extent of Article 20(3), are considered below in chronological sequence. The purpose is to ascertain how the terms of agreement on this article changed throughout the negotiations, from the first draft of the article proposed by the ILC to the official signature of the Statute in Rome. In this way, the preparatory works, albeit necessarily previous to the conclusion of the final agreement, may provide guidance as to content of the latter.

41. Vienna Convention, *supra* note 29, Art. 32 ('Supplementary means of interpretation').
42. Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session, 4 May–19 July 1966, ILC Yearbook 1966, Vol. II, Draft Articles on the Law of Treaties, UN Doc. A/CN.4/SER.A/1966/Add.1, paras. 219–220.

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3.3.1. Draft statutes of the International Law Commission

In 1993 the ILC decided that the draft articles proposed by the Working Group on a draft statute for an international criminal court should be transmitted to governments for comments.[43] On the basis of such comments, the ILC adopted a draft statute for an International Criminal Court in 1994 and recommended that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of the Court.[44] Current Article 17 of the Rome Statute has its origins in Articles 35 ('Issues of admissibility') and 42 ('*Non bis in idem*') of the draft statute prepared by the ILC in 1994. The relevant paragraphs of both articles read:

> *Article 35*
> *Issues of admissibility*
>
> 1. The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:
>
> (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) is not of such gravity to justify further action by the Court.
>
> *Article 42*
> *Non bis in idem*
>
> 2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:
>
> (a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or
>
> (b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.[45]

In drafting Article 35, the ILC does not appear to have ruled out altogether the possibility of the ICC exercising jurisdiction on the ground that national proceedings for crimes within the jurisdiction of the Court lack due process guarantees to the detriment of the accused. In its commentary on this article, the ILC vaguely stated that 'the grounds for holding a case to be inadmissible are, in summary, that the crime

43. Report of the International Law Commission on the Work of Its Forty-Fifth Session, 3 May–23 July 1993, UN GAOR, 48th session, Suppl. No. 10, UN Doc. A/48/10 (1993), Annex, Section B, Draft statute for an international criminal tribunal and commentaries thereto (hereafter 1993 ILC draft statute).

44. Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994, UN GAOR, 49th session, Supp. No. 10, UN Doc. A/49/10 (1994), Part II.B.I.5, Draft Statute for an International Criminal Court (hereafter 1994 ILC draft statute).

45. Ibid., Arts. 35 and 42(2). Article 42 was an almost verbatim copy of Article 45 ('Double jeopardy (*non bis in idem*)') of the 1993 ILC draft statute, *supra* note 43, at 121–2.

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in question has been or is being duly investigated by any [of the] appropriate national authorities or is not of sufficient gravity to justify further action by the Court. In deciding whether this is the case, the Court is directed to have regard to the purposes of the Statute as set out in the preamble'.[46] As reflected in the Preamble, some of those purposes were 'to *enhance* the effective suppression and prosecution of crimes of international concern' and to 'complement national criminal justice systems in cases where such trial procedures may not be available or may be *ineffective*'.[47]

By contrast, the ILC clearly limited the scope of the Court's action on cases where the person had already been tried at the domestic level. According to the Commission, Article 42(2)

> reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a 'sham' proceeding, possibly even designed to shield the person from being tried by the Court. The Commission adopted the words 'the case was not diligently prosecuted' on the understanding that they are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question. Paragraph 2(b) is designed to deal with exceptional cases only.[48]

As indicated by the Commission,[49] Article 42(2) was drafted drawing heavily on Article 10 ('*Non bis in idem*') of the ICTY Statute. However, it is interesting to note that the wording of Article 10 does not clearly rule out the possibility of the ICTY retrying a person already tried by a domestic court on the basis that the trial was biased *against* the accused. Sub-paragraph 2(b) of this article refers to a situation where 'the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted'.[50] As such, it could be read as providing for ICTY action in a scenario where the domestic lack of independence and impartiality prejudices the accused.[51] The UN Secretary-General, when commenting on this article, broadly

46. 1994 ILC draft statute, *supra* note 44, at 106, para. 91.
47. Ibid., preamble, paras. 2 and 4 (emphasis added).
48. Ibid., 119, para. 91. The commentary on Article 45 of the 1993 ILC draft statute, *supra* note 43, at 121, argued the need for this provision by reference to some of the war crimes trials in national courts after the First and Second World Wars. The commentary on Article 12 of the 1996 draft Code of Crimes against the Peace and Security of Mankind ('*Non bis in idem*'), equally drafted on the basis of Article 10 of the ICTY Statute, conveyed the same idea as Article 42(2) of the 1994 ILC draft statute. See Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994, UN GAOR, 49th session, Supp. No. 10, UN Doc. A/49/10 (1994), Part II.B.II, Draft Code of Crimes against the Peace and Security of Mankind, 180, para. 160; and Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996, UN GAOR, 51st session, Supp. No. 10, UN Doc. A/51/10 (1996), Part II.D, Draft Code of Crimes against the Peace and Security of Mankind, available at http://www.un.org/law/ilc/reports/1996/chap02.htm, 67, para. 50.
49. 1994 ILC draft statute, *supra* note 44, at 117, para. 91.
50. Statute of the International Criminal Tribunal for the former Yugoslavia, UN Security Council Resolution 827 (1993), 25 May 1993, UN Doc. S/RES/827 (1993) (hereafter ICTY Statute), available at http://www.un.org/icty/basic/statut/stat11-2004.htm, Art. 10(2)(b).
51. In favour of this interpretation see Lawyers Committee for Human Rights, 'Prosecuting War Crimes in the Former Yugoslavia: the International Tribunal, National Courts and Concurrent Jurisdiction: A Guide to Applicable International Law, National Legislation and its Relation to International Human Rights Standards (IV)', May 1995, which suggests 'guidelines according to which national war crimes trials should be carried out in order to assess whether there are reasons for deferral to the competence of the Tribunal or for the retrial

stated that the principle of *non bis in idem* should not preclude a subsequent trial before the ICTY where 'conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts'.[52] In fact, during the elaboration of the ICTY Statute some national proposals limited the intervention of the Tribunal to situations of 'sham' trials,[53] but others provided for the action of the Tribunal in order to remedy situations of lack of due process of law, irrespective of its 'sign' (beneficial or prejudicial to the accused).[54] It must also be noted that no comments on this sensitive matter were entered after the vote on the resolution whereby the ICTY Statute was adopted, even though some states showed their concern about the ICTY encroaching on national judicial sovereignty and provided restrictive interpretations of its primacy over national courts.[55]

In short, the 1994 ILC draft statute clearly expressed the fact that the complementary function of the Court was meant to address *at least* situations of 'sham' trials, that is national proceedings intended to shield those responsible from criminal responsibility, and relied on the wording of the ICTY Statute referring to a domestic lack of independence and impartiality. However, it was not clear in the ILC draft whether cases of lack of due process to the detriment of the accused also fell within the Court's complementary function.

3.3.2. Texts discussed in the Ad Hoc Committee

Pursuant to the adoption by the ILC of its draft statute in July 1994, the UN General Assembly decided to establish an Ad Hoc Committee in December the same year 'to review the major substantive and administrative issues arising out of the draft

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of the case by the Tribunal', cited in D. Beane, 'The Yugoslav Tribunal and Deferral of National Prosecutions of War Criminals', *ASIL Insight*, Sept. 1996, available at http://www.asil.org/insights/insight4.htm.

52. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S/25704, 17, para. 66.

53. Recommendations of the Organisation of the Islamic Conference on the establishment of an ad hoc International War Crimes Tribunal for the territory of the former Yugoslavia, 5 April 1993, UN Doc. A/47/920*, S/25512*, Annex, Art. III(9); United States Draft charter of the international tribunal for violations of international humanitarian law in the former Yugoslavia, 12 April 1993, UN Doc. S/25575, Annex II, Art. 12.

54. France, Possible provisions for the Statute of the Tribunal, 10 Feb. 1993, UN Doc. S/25266, Annex V, Art. IX(4); Italy, Commission of War Crimes and Crimes against Humanity Committed in the Former Yugoslavia: Statute of the Tribunal for War Crimes and Crimes against Humanity Committed in the Territory of the Former Yugoslavia, Annex I, 17 Feb. 1993, UN Doc. S/25300, Art. 3(1) and Annex II, explanatory notes to Article 3; Canada, Canadian comments with respect to United Nations Security Council resolution 808 (1993) and the creation of an ad hoc tribunal to try charges of war crimes in the former Yugoslavia, 14 April 1993, UN Doc. S/25594, Annex, paras. 2–3; International Meeting of Experts on the Establishment of an International Criminal Tribunal, 1 April 1993, UN Doc. S/25504, at 13 ('The international community should not be prepared to tolerate unfair trials of "victor's justice" in relation to some offences. According to this view, the ad hoc tribunal must have at least preferential, if not exclusive, jurisdiction in relation to offences committed in the territory of the former Yugoslavia. An issue hitherto not addressed was raised as to what role, if any, the ad hoc tribunal should have in the case of an unfair trial by a national court of a member of an ethnic minority sentenced to death'.); The Netherlands, Observations of the Government of the Kingdom of the Netherlands on the establishment of an international ad hoc tribunal for the prosecution and punishment of war crimes in the former Yugoslavia, 4 May 1993, UN Doc. S/25716, Annex, at 5. For the ICTR, see Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), 4 Oct. 1994, UN Doc. S/1994/1125, Annex, paras. 136–137.

55. Provisional verbatim record of the three thousand two hundred and seventeenth meeting, 25 May 1993, UN Doc. S/PV.3217, at 11 (statement by France), 16 (United States of America), 18–19 (United Kingdom) and 46 (Russian Federation).

statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries'.[56] Before the Ad Hoc Committee started its work, the ILC draft statute was discussed in the Sixth Committee of the General Assembly in February 1995. The discussion already showed the tension between state sovereignty and the demands of international justice which is at the core of the complementarity regime of the ICC. Delegations showed concern that the draft statute seemed to place the ICC in a superior position vis-à-vis national courts, and challenged the exceptions to the *non bis in idem* principle provided for in Article 42(2), as had happened with the 1993 draft.[57] Even the proposed provision concerning 'sham' trials in a national court was seriously questioned as derogation from the principle of territorial sovereignty. The possibility that the ICC would review decisions taken by national courts was not accepted, and a more co-operative approach was demanded from the Court so that it would not take over the functions of national courts or disregard their judgments or decisions.[58]

The comments on the 1994 ILC draft statute submitted by states to the Ad Hoc Committee between March and July 1995 reproduced many of the concerns of the Sixth Committee, in particular regarding Article 42(2) of the draft.[59] However, some states did agree on the possibility of the Court reviewing national proceedings. The differences among these countries lay with regard to the particular grounds on which the Court could take over a case pursuant to such review. On the one hand, Switzerland, the United States, Libya, and the United Kingdom only envisaged this possibility for the case of 'sham' trials at national level, that is cases where the lack of due process was meant to shield a person from criminal responsibility.[60] In particular, the United States argued that under *both* Articles 35 and 42 the Court should respect domestic decisions as an 'effective' exercise of national jurisdiction if it could not show 'bad faith' on the part of the national authorities.[61] On the other hand, France suggested a wider role for the Court. It should be able to exercise jurisdiction whenever it deemed it necessary in cases where a *de jure* or *de facto* situation involved a 'denial of justice'.[62] As reflected in the French text, the Court

56. UN General Assembly Resolution 49/53, 9 Dec. 1994, UN Doc. A/RES/49/53, para. 2.
57. Comments of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court, 18 Feb. 1994, UN Doc. A/CN.4/458/Add.1, at 9 (New Zealand); 11 March 1994, UN Doc. A/CN.4/458/Add.2, at 20 (Yugoslavia); 25 March 1994, UN Doc. A/CN.4/458/Add.3*, at 2–3 (Chile), and 9 (Germany).
58. Report of the International Law Commission on the Work of Its Forty-Sixth Session (1994), Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Forty-Ninth Session, Addendum, 22 Feb. 1995, UN Doc. A/CN.4/464/Add.1, paras. 8, 159–60.
59. Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General, 20 March 1995, UN Doc. A/AC.244/1, at 10–11 (China); 30 March 1995, UN Doc. A/AC.244/1/Add.1, at 4 (Czech Republic), and 6 (Sudan).
60. Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53, *supra* note 59, UN Doc. A/AC.244/1, at 18 (Switzerland); 31 March 1995, UN Doc. A/AC.244/1/Add.2, at 10 (United States); 3 April 1995, A/AC.244/1/Add.3, at 3 (Libya); and Summary of observations made by the Representative of the United Kingdom of Great Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995, 7 April 1995, Press Release No. 32/95 (on file with author), at 9.
61. Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53, *supra* note 60, UN Doc. A/AC.244/1/Add.2, at 21–2.
62. Ibid., at 5.

could supersede national courts if the partiality of the domestic authorities because of internal or external conflict prejudiced the accused, for instance.[63]

The discussions during the April session of the Ad Hoc Committee only produced agreement as to the need to incorporate in Article 35 the inadmissibility grounds deriving from the principle of *non bis in idem* (Article 42(2)) and to improve the drafting of Articles 35(b) and 42(2)(b). Both articles gave rise to divergent interpretations and were considered by some delegations as too vaguely formulated and as involving subjective assessments.[64] The final report of the committee after the August session reiterated these conclusions and stressed the reluctance of states to empower the Court to pass judgment on the impartiality or independence of national courts.[65] The grounds for intervention by the Court were not further detailed.

3.3.3. Texts discussed in the Preparatory Committee

In December 1995 the UN General Assembly decided to establish a Preparatory Committee 'to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries'.[66] The Committee met in March–April and August 1996, and submitted its report to the General Assembly in September the same year. Thereafter the Assembly extended the mandate of the Committee so that it met in February, August and December 1997, with a final session in March–April 1998.[67]

The first debate on Articles 35 and 42 took place in the eleventh to fourteenth meetings of the Committee, on 1 and 2 April 1996.[68] Three days beforehand, the United Kingdom tabled a lengthy discussion paper on complementarity where a revised draft Article 35 was proposed:

> (1) A case is inadmissible before the court if –
> CURRENT NATIONAL INVESTIGATION INTO INCIDENT
> (a) matters which include or comprise those in respect of which the complaint has been made are being investigated by a state with jurisdiction over them, unless the Court is satisfied that, in all the circumstances
> (i) there has been and continues to be unconscionable delay in the conduct of the investigation, or
> (ii) the investigation was instituted, or has been and is being conducted, in a way which clearly indicates an absence of good faith;

63. Ibid.
64. Summary of the Proceedings of the Ad Hoc Committee during the Period 3–13 April 1995, 21 April 1995, UN Doc. A/AC.244/2, paras. 48, 88 and 106.
65. 1995 Report of the Ad Hoc Committee, *supra* note 13, paras. 41, 43, 45, 162, 177 and 180.
66. UN General Assembly Resolution 50/46, 11 Dec. 1995, UN Doc. A/RES/50/46, para. 2.
67. UN General Assembly Resolution 51/207, 17 Dec. 1996, UN Doc. A/RES/51/207, para. 4.
68. 1996 Preparatory Committee Report, I, *supra* note 13, para. 8.

PENDING NATIONAL PROCEEDINGS RELEVANT TO INCIDENT

(b) proceedings relating to any matter which includes or comprises those matters in respect of which the complaint has been made are pending before any court in a state with jurisdiction over any such matter or an extradition request or request for international co-operation made by such a state is under consideration in another state unless the Court is satisfied that, in all the circumstances

(i) there has been and continues to be unconscionable delay in the conduct of the proceedings or the consideration of the request, or

(ii) the proceedings were instituted or are being conducted, or the request is being considered, in a way which clearly indicates an absence of good faith;

PAST NATIONAL PROCEDURES

(c) the matters in respect of which the complaint is made have been investigated by a state with jurisdiction over them and that state has decided not to prosecute the accused or to prosecute him for an offence which is not an offence listed in article 20, a prosecution there has been discontinued or the accused has been acquitted, pardoned or convicted, unless the Court is satisfied that, in all the circumstances

(i) the national decision was not made in good faith, or

(ii) where the accused was convicted of an offence other than one listed in article 20, or was acquitted of or pardoned in respect of any offence, the proceedings were not instituted, or the prosecution conducted, in good faith;[69]

The British paper is relevant because it proposed for the first time an unambiguous understanding of both articles. It was the British view that the ICC should intervene only where no decision could be taken by reason of the breakdown of the domestic criminal justice system or, more relevantly, where national decisions 'are designed to shield serious offenders from the requirement to account for their actions'. In coherence with this view, the paper criticized Article 42(2)(b) of the 1994 ILC draft statute, understanding that 'subparagraph (b) goes wider than is desirable in allowing consideration to be given to an aspect of the fairness of national proceedings (the rights of the accused) which go wider than the objective of the article'.[70] In order to reflect these views, the paper proposed a single revised Article 35 on admissibility, where the only criteria were the existence of 'unconscionable delay' or the conduct of the proceedings in a way that indicated 'an absence of good faith' on the part of national authorities.[71]

During the four meetings, the delegations of, *inter alia*, Italy, Venezuela, Indonesia, Ukraine, Mexico, and Argentina pointed out that the terms of Articles 35 and 42 of the ILC draft required a proper definition.[72] China and Israel raised concerns that on the basis of such articles the ICC could impinge on the prerogatives of

69. United Kingdom, Discussion Paper, International Criminal Court: Complementarity, 29 March, para. 16, revised draft Art. 35(1) (original capitals in the margins) (on file with author).
70. Ibid., paras. 2 and 18.
71. Ibid., para. 16.
72. For a summary of these meetings, see 'Preparatory Committee on International Criminal Court Discusses Complementarity between National, International Jurisdictions', 1 April 1996, UN Press Release L/2771; 'Jurisdiction of Proposed International Criminal Court Discussed in Preparatory Committee on Its Establishment',

national jurisdictions. In turn, Tunisia and India manifested their fears that national courts in developing countries might be overridden under the pretext that they could not adequately undertake prosecutions and that the international court would become an appellate court of domestic tribunals. Eventually consensus appeared to emerge on the convenience of limiting the role of the ICC *only* to those situations where national authorities were carrying out or had carried out 'sham' proceedings, that is national proceedings intended to shield those responsible from criminal responsibility. The delegations of *inter alia* the United Kingdom, the United States, Canada, Australia, South Africa, Switzerland, Slovenia, Finland, and France agreed that the intervention of the Court was warranted where there was a lack of 'good faith' on the part of national authorities giving rise to 'sham' proceedings. It is relevant to note that France expressly agreed on this limitation to the role of the Court, clearly opposed to its earlier ideas of the Court intervening in any situation involving a 'denial of justice', even if prejudicial to the accused. In this regard, the delegations of Finland, Slovenia, and Greece referred to the former Yugoslavia and pointed out that some crimes, such as the crime of aggression, could not possibly be tried impartially by national courts. For these delegations the Court should have a role in those situations regardless of the 'bad faith' of the domestic authorities.

The draft summary of the discussion, issued on 4 April, reflected all these views in detail.[73] There was agreement that the words 'unavailable' and 'ineffective' referring to national proceedings in the Preamble of the ILC draft needed to be further defined and that the risk of perpetrators going unpunished in 'sham' trials should be expressly tackled in the Statute.[74] However, it was pointed out that there would always be a perception problem in respect of core crimes: some crimes could not be tried domestically because of their very nature and it would be difficult to believe that national courts could be fair and impartial.[75] In order to alleviate the subjectivity of this assessment, the United Kingdom proposed that Article 35 make use of the more objective criterion of the lack of 'efficiency' of national proceedings (as juxtaposed to the intention to 'shield' the accused), relying on the notions of 'absence of good faith' and 'unconscionable delay'.[76] Alternative proposals barred ICC intervention where 'there is a reasonable prospect [likelihood, significant likelihood, significant prospect] that the accused will be tried'.[77] In the case of Article 42, a similar solution was proposed to specify that a person could be retried by the ICC only where national

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2 April 1996, UN Press Release L/2772; 'Preparatory Committee on International Criminal Court Continues Considering Complementarity between National, International Jurisdictions', 2 April 1996, UN Press Release L/2773. These press releases are available online at http://www.un.org/News/Press/archives.htm.

73. Proceedings of the Preparatory Committee during the Period 25 March–12 April 1996, Draft Summary, 4 April 1996, UN Doc. A/AC.249/CRP.4 (on file with author). The draft was elevated to definitive without amendment and included in Summary of the Proceedings of the Preparatory Committee during the Period 25 March–12 April 1996, 7 May 1996, UN Doc. A/AC.249/1, paras. 109–138. The latter summary was subsequently included in the 1996 Preparatory Committee Report, I, *supra* note 13, paras. 153–174 (where only paragraphs 159 and 160 are new additions).

74. 1996 Draft Summary, *supra* note 73, paras. 7, 10 and 11.

75. Ibid., paras. 6 and 18.

76. Ibid., para. 12.

77. Canada, Issues of Admissibility, 1 April 1996 (on file with author), Art. 35(d). The proposals were compiled in an annex to the draft summary. See Complementarity: A compilation of concrete proposals made in the course of discussion for amendment of the ILC draft statute, 8 April 1996, UN Doc. A/AC.249/CRP.9/Add.1 (on file with author).

proceedings were 'manifestly' intended to shield him or her from criminal responsibility.[78] A proposal contained in the compilation of September 1996 was even more explicit in its terms and provided for a retrial at the ICC where the national decision 'failed to take account of all facts contained in the submission or the proceedings were conducted in the state concerned by evading the rule of international law for the manifest purpose of relieving the persons concerned of criminal responsibility'.[79] The United States proposed that a vote of two-thirds of the members of the Court would be required before the Prosecutor could investigate and prosecute a case already tried at the domestic level under Article 35(1)(c) of the United Kingdom proposal.[80]

The discussion on the substance of Articles 35 resumed in August 1997, within the recently formed Working Group on Complementarity and Trigger Mechanism, during the fourth session of the Preparatory Committee.[81] On 5 August five new proposals on Article 35 were tabled, primarily based on the alternative to the ILC draft statute proposed by the United Kingdom in 1996.[82] The documents from Japan, Singapore, Korea, and Canada and Germany simply suggested minor changes in the wording of Article 35 to reduce the subjectivity of the terms, introducing expressions such as 'diligently investigated', 'undue delay', 'ineffective way' or 'manifestly unjust' which were eventually substituted by the expression 'genuinely'.[83] In contrast, the Italian proposal radically departed from the United Kingdom proposal in that it mandated the Court to assess whether the fundamental rights of the accused were respected by national authorities:

> 2. In deciding on issues of admissibility under this article, the Court shall consider whether:
> . . .
> (ii) the said investigations or proceedings have been, or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility, *or were or are conducted with full respect for the fundamental rights of the accused*;
> . . .[84]

78. Ibid., para. 19.
79. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of proposals), 13 Sept. 1996, UN GAOR, 51st session, Supp. No. 22, UN Doc. A/51/22 (1996) (hereafter 1996 Preparatory Committee Report, II), at 202, Art. 42(2 *bis*)(3).
80. United States of America, Proposed Amendments Pertaining to Principle of Complementarity: ILC Draft Statute for International Criminal Court, April 1996 (on file with author), para. G.
81. The Working Group on General Principles of Criminal Law did not consider the issue of *ne bis in idem* in relation to decisions of national courts. The procedural aspects of complementarity were discussed in the Working Group on Procedural Matters. See 1996 Preparatory Committee Report, II, *supra* note 79, at 86 (Art. D) and 159 (Art. 35), respectively.
82. Proposal by Japan on Article 35, 5 Aug. 1997, Non-Paper/WG.3/No.2 (on file with author); Canadian-German draft proposal on complementarity, 5 Aug. 1997, Non-Paper/WG.3/No.3 (on file with author); Draft Proposal by Italy on Article 35, 5 Aug. 1997, Non-Paper/WG.3/No.4 (on file with author); Draft Proposal by Singapore on Article 35 – Addition to the United Kingdom Formulation, 5 Aug. 1997, Non-Paper/WG.3/No.5 (on file with author); Draft Proposal by Republic of Korea on Article 35, 5 Aug. 1997, Non-Paper/WG.3/No.6 (on file with author).
83. J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 41 at 50.
84. Draft Proposal by Italy on Article 35, *supra* note 82, Art. 35(2)(ii) (emphasis added).

The Italian text is the only formal proposal to our knowledge that granted the Court the possibility of exercising jurisdiction on the basis of a lack of due process per se in national proceedings for crimes within the jurisdiction of the Court. Unlike other proposals, the expression was not qualified by the intention to shield the accused from international criminal responsibility, an eventuality which was provided for separately. Accordingly, the Court could also take over national proceedings where the unfairness of the proceedings was prejudicial to the accused.

It is not possible to ascertain how the Italian proposal was actually received or whether it was discussed further at all. However, the Italian text did not form part of the final draft Article 35 resulting from informal discussions with the delegations. The criteria for a determination of 'unwillingness' in the draft article read:

> 3. In order to determine unwillingness in a particular case, the Court shall consider 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 as set out in article 20;
> . . .
>
> (b) there has been an undue 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.[85]

It is interesting to note that sub-paragraphs (b) and (c) in the final draft were drafted in a way which appears to indicate more clearly than previous proposals that the domestic procedural unfairness at hand needs to be linked to the lack of intent to bring the person concerned to justice in order to be relevant to the Court. Whereas the Italian and even the British documents referred to the undue delay, the lack of impartiality or independence, '*or*' the purpose of shielding the person from responsibility, the text approved in August 1997 provided for the consideration of undue delay '*which* . . . was inconsistent with an intent to bring the person concerned to justice' and of proceedings 'not being conducted independently or impartially *and* . . . being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.

In fact, the co-ordinator of the Working Group has written that 'many delegations believed that procedural fairness should not be a ground for the purpose of defining complementarity',[86] not even under the category of the 'inability' of the state genuinely to investigate or prosecute in relation to which it was first proposed.[87]

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85. Article 35: Issues of admissibility, 13 Aug. 1997, UN Doc. A/AC.249/1997/WG.3/CRP.2 (on file with author), Art. 35(3) (footnotes omitted).
86. Holmes, *supra* note 83, at 50.
87. Williams, *supra* note 36, at 394. However, the Commission of Inquiry on Darfur seems to include these instances within the 'inability' of states genuinely to investigate or prosecute. See Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004) of 18 Sept. 2004, 1 Feb. 2005, UN Doc. S/2005/60, para. 586.

Accordingly, the reference to 'undue delay' was added 'relating to a delay which would result in the perpetrator not being held to account'.[88] Likewise, a reference to the 'manner' in which the proceedings were or are being conducted at the national level was eventually maintained because it emerged during the negotiations that, as it stood, Article 35 did not provide for cases where the state does not intend to shield somebody from criminal responsibility but individuals manipulate the conduct of the proceedings to ensure that the accused is not found guilty (for example, engineering a mistrial or deliberately violating the defendant's rights by tainting evidence or testimony).[89] Sub-paragraph (c) was introduced 'even though it may appear to duplicate the two other criteria of shielding or undue delay'.[90] The human rights mentioned in the article would therefore not read as standards for the Court to protect the individual against possible abuses by the state, but as standards for the Court to prevent state authorities from shielding an individual from criminal responsibility.

In its report at the end of the August session, the Working Group on Complementarity and Trigger Mechanism recommended to the Preparatory Committee the text of Article 35 quoted above for inclusion in the draft consolidated text of a convention for an international criminal court.[91] During the inter-sessional meeting in Zutphen in January 1998, the text of the article was introduced in the draft statute as Article 11, without any modification.[92]

With regard to the principle of *non bis in idem*, in August 1997 it was decided to defer consideration of Article 42 to the last session of the Preparatory Committee.[93] In January the following year Article 42 was renumbered Article 13 and moved to Part 2 of the Statute (Jurisdiction, Admissibility and Applicable Law) 'because of its relationship to jurisdiction and admissibility'.[94] In March 1998, delegations borrowed from the compromise on complementarity achieved the previous year, and agreed on a very similar text to that of Article 35:

> 3. No person, who has been tried by another court for conduct also proscribed under article 5, shall be tried by the Court unless the proceedings in the other court:
> . . .
> (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> (b) otherwise were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[95]

88. Holmes, *supra* note 83, at 50.
89. Ibid., at 51.
90. Ibid.
91. Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 Aug. 1997, 14 Aug. 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, Annex I, at 2.
92. Report of the Inter-Sessional Meeting from 19 to 30 Jan. 1998 in Zutphen, the Netherlands, 4 Feb. 1998, UN Doc. A/AC.249/1998/L.13 (hereafter 1998 Zutphen Draft Statute), Art. 11[35].
93. Holmes, *supra* note 83, at 56.
94. 1998 Zutphen Draft Statute, *supra* note 92, Art. 13[42], at 47.
95. Draft Statute for the International Criminal Court: Part 2. Jurisdiction, admissibility and applicable law, Article 13. *Ne bis in idem*, 31 March 1998, UN Doc. A/AC. 249/1998/CRP.20 (on file with author), Art. 13(3) (footnotes omitted).

Finally, the texts of both articles were incorporated without any modification to the draft statute sent to the Rome Conference, as Articles 15 ('Issues of admissibility') and 18 ('*Ne bis in idem*').[96]

3.3.4. Texts discussed in Rome

During the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference),[97] only two changes relevant for our purposes were made to Article 15. First, the phrase 'having due regard to the principles of due process recognized by international law' was introduced in the chapeau of the article. This was the result of a proposal submitted by Mexico on 24 June 1998 to include the expression 'in accordance with the norms of due process recognized by international law' in sub-paragraph (c).[98] It appears that the inclusion was meant to limit the discretion of the Court to determine unwillingness under such a sub-paragraph, which did not contain any objective criteria on which the Court could base its findings. Since similar concerns arose in relation to the other sub-paragraphs of the article, the co-ordinator proposed the inclusion of a reference to the 'principles' in the chapeau of the article.[99] Second, the expression 'undue delay' was changed to 'unjustified delay', on the basis of the same concerns and as proposed by Mexico.[100]

Article 18 was changed only to incorporate the reference to the 'norms of due process recognized by international law' which had been included in Article 15 as 'principles'. The purpose was also to make the criteria in Article 18(3)(b) more objective.[101]

The final statute adopted on 17 July 1998 included both provisions as Articles 17 ('Issues of admissibility') and 20 ('*Ne bis in idem*'). The subsequent *procès-verbal* of rectification of the text corrected minor errors in both articles, without affecting their meaning.[102]

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96. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, Draft Statute for the International Criminal Court, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, Arts. 15 and 18.
97. UN General Assembly Resolution 52/160, 28 Jan. 1998, UN Doc. A/RES/52/160, para. 3.
98. Revised Proposals Submitted by Mexico, 24 June 1998, UN Doc. A/CONF.183/C.1/L.14/Rev.1 (on file with author), at 2. The proposal was included in Discussion Paper Bureau, Part 2. Jurisdiction, Admissibility and Applicable Law, 6 July 1998, UN Doc. A/CONF.183/C.1/L.53, Art. 15(3)(c); and Bureau Proposal, Part 2. Jurisdiction, Admissibility and Applicable Law, 10 July 1998, UN Doc. A/CONF.183/C.1/L.59, Art. 15(3)(c).
99. Holmes, *supra* note 83, at 53–4. However, the reference to the 'principles of due process' has also been read as expanding the scope of Article 17. See M. A. Newton,'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', (2001) 167 *Military Law Review* 20, at 66, who argues that this expression gives a wide margin of discretion to the prosecution to meet the admissibility criteria. Similarly, Schabas, *supra* note 28, at 68, argues that this expression suggests an assessment of the quality of justice from the standpoint of procedural and even substantive fairness.
100. Revised Proposals Submitted by Mexico, *supra* note 98, at 2.
101. Holmes, *supra* note 83, at 59.
102. Rectification of the Statute and transmission of the relevant procès-verbal, Depository Notification C.N.577.1998.TREATIES-8, 10 Nov. 1998 (correction made to the English version of Article 20); Depository Notification C.N.604.1999.TREATIES-18, 22 July 1999 (corrections made to the English version of Article 20 and to the French version of Articles 17 and 20); Depository Notification C.N.1075.1999.TREATIES-28, 30 Nov. 1999 (corrections made to the Spanish version of Article 20); Depository Notification C.N.266.2000.TREATIES-8, 8 May 2000 (corrections made to the Spanish version of Article 17). These documents are available online at http://www.un.org/law/icc/statute/99_corr/corr.html.

3.4. Conclusion

The ordinary meaning of the terms in Article 17(2)(b) and (c) considered in their context is not decisive as to whether the 'sign' of the unfairness of domestic proceedings for crimes contained in the Statute affects the admissibility of a case before the ICC. The expression 'inconsistent with an intent to bring the person concerned to justice' can be read as providing for the intervention of the Court where domestic authorities do not intend to hold to account those responsible for international crimes, as expressly indicated in Articles 17(2)(a) and 20(3)(a). Pursuant to this interpretation, the 'sign' of domestic unfairness is relevant, because a case will be admissible before the ICC only if the possible result of the lack of due process at national level is that those responsible for crimes within the jurisdiction of the Court remain unpunished. However, Article 17(2)(b) and (c) can also be read to give expression to an additional and more 'procedural' consideration of the word 'justice'. If emphasis is put not only on the potential results of national proceedings for international crimes but also on the way in which they are conducted, domestic cases delayed without justification or wanting the required impartiality or independence will be admissible before the Court regardless of the favourable or detrimental consequences for the accused of such a lack of due process.

The consideration of the object and purpose of the Statute does not assist further in deciding which of these interpretations must be preferred. The first and more restrictive interpretation is consistent with the apparent object and purpose of the Statute, namely the establishment of an international criminal court that complements national efforts to put an end to impunity for international crimes. The second and broader reading of Article 17(2) can also find support in the object and purpose of the Statute if the human rights obligations of the ICC are taken into account. From this perspective, the purpose of the Statute would be to establish a court that complements state action not merely to bring an end to impunity but to bring an end to impunity in a fair manner.

However, the 'preparatory works' for Articles 17(2)(b) and (c) and 20(3) clearly show that the drafters of the Statute favoured the intervention of the ICC only when the irregularity of the domestic proceedings was intended to shield the person concerned from criminal responsibility. As shown above, although the 1993 and 1994 ILC draft statutes clearly favoured the intervention of the Court in case of domestic 'sham' trials, that is trials intended to shield a person from criminal responsibility, the vague language used in the 1994 draft left open other possible grounds for ICC action. In fact, during the discussions in the Ad Hoc and the Preparatory committees, some delegations favoured the intervention of the Court when domestic proceedings for crimes within the jurisdiction of the Court were biased to the detriment of the accused person, especially in the case of the crime of aggression. However, the 'preparatory works' clearly show that national delegations had very serious concerns about the ICC impinging on national courts and focused mainly on the converse situation, that is domestic proceedings intended or manipulated to shield persons from international criminal responsibility. [103] As a result, whereas a rapid consensus

103. Holmes, *supra* note 83, at 50. For examples of this situation see the so-called 'suicide tactics' in BiH, UNMBIH, Judicial System Assessment Programme (JSAP), Political Influence: The Independence of the Judiciary

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emerged on the need for the Court to intervene in the case of the latter scenario, no action was taken on a proposal whereby the domestic violation of the fundamental rights of the accused would have determined the admissibility of the case before the Court, regardless of its favourable or detrimental consequences for the accused. It is apparent that national delegations were willing to give up their sovereignty to put an end to impunity, but did not favour a review by the Court of the procedural manner in which such an objective was accomplished at domestic level. In fact, the reference to the international principles of due process in Article 17(2) was introduced in Rome to reduce somewhat the subjectivity inherent in any assessment of the intent of the domestic authorities, and therefore to limit any possible intervention of the Court in domestic proceedings.

Pursuant to this analysis, and in accordance with Article 32 of the Vienna Convention, the stricter interpretation of Article 17(2)(b) and (c) proposed above should be preferred. It is therefore submitted that the expression 'inconsistent with an intent to bring the person concerned to justice' in Articles 17(2)(b) and (c) and 20(3)(b) should be considered simply as another formulation of the general rule set out in sub-paragraph (a) of both articles, that is 'the purpose of shielding the person concerned from criminal responsibility'. Sub-paragraphs (b) and (c) should be seen as 'objective' indicators of the existence of such purpose and, together with the 'principles of due process of law recognized by international law' mentioned in the chapeau of Article 17(2), they should be standards enabling the Court to prevent state authorities from shielding an individual from criminal responsibility rather than to protect the person concerned against possible abuses by the state. Accordingly, a 'genuine' investigation or prosecution under Article 17 would be one aimed at holding a person to account for a crime, regardless of the possible existence of a domestic lack of due process prejudicial to the person concerned.

A conclusion similar to this was apparently reached during the third session of the Assembly of States Parties to the Rome Statute held in The Hague in September 2004. The Special Working Group on the Crime of Aggression discussed the report of its inter-sessional meeting held the previous summer, when complementarity and admissibility with regard to the crime of aggression were considered. The report indicated that Article 17(2)(c) of the Statute 'might be interpreted to give jurisdiction to the Court in situations in which a "victorious" state would prosecute individuals without due regard to their rights'.[104] It is interesting to note that the same scenario was suggested by Greece during the first session of the Preparatory Committee in 1996.[105] And, as happened then, the majority of states attending the meeting in The Hague apparently agreed that the ICC would not have jurisdiction over

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in Bosnia and Herzegovina, Thematic Report IX, Nov. 2000, available at http://www.esiweb.org/bridges/bosnia/JSAP_RepIX.pdf, at 26, 37–8, 50, and 65.

104. Note by the Secretariat, containing the report of the 'Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 21 to 23 June 2004', 13 Aug. 2004, ICC Doc. ICC-ASP/3/SWGCA/INF.1, available at http://www.icc-cpi.int/library/statesparties/ICC-ASP-3-SWGCA-INF.1-_crime_of_aggression_-_English.pdf, para. 25. The report is also reproduced in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third Session, The Hague, 6–10 Sept. 2004, ICC Doc. ICCASP/3/25 (Advanced copy), Proceedings, Annex II, available at http://www.icc-cpi.int/library/statesparties/ICC-ASP-3-25-Annexes_English.pdf.

105. See text accompanying note 72 *supra*.

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such situations, arguing that the Court was never conceived as a court of appeals for national jurisdictions.[106] Accordingly, states parties to the Rome Statute could not refer a situation to the Court in order to prevent another state from unfairly prosecuting its nationals[107] and, similarly, victims of unfair national proceedings for international crimes could not get their cases heard in The Hague through the initiation of a *propio motu* investigation by the Prosecutor.[108]

From another perspective, it is important to note that the ICC clearly lacks the means to address human rights violations in the area of due process *as such*. In situations as the one above, the Court could only step in in lieu of a national jurisdiction in respect of specific cases and try them in The Hague, but could not sanction the state or otherwise affect its general practice in the area of due process. From this point of view, to argue that the Court is meant to act as a human rights court in such circumstances would amount to affirming that the Rome Statute is 'a treaty embodying a compromise attempted but not actually achieved',[109] that is a treaty establishing a court meant to act as a human rights monitoring body but which does not enjoy the means of a fully fledged human rights court. It is clear that the principle of effectiveness could not assist when interpreting the Statute: states simply did not provide the Court with the necessary means of addressing generally the lack of due process in domestic proceedings for international crimes.[110]

Accordingly, in a domestic war crimes case where extraordinary summary proceedings are being followed, the accused is not given the chance to submit crucial pieces of exculpatory evidence, and the court is clearly biased against the accused could not be taken over by the ICC on the basis of the lack of due process alone. At most, the ICC could assert its jurisdiction over the case if it were shown that the unfair trial of the person concerned meant that the person actually responsible for the prosecuted crime was not held to account. In other words, the Court could take over a case of lack of due process prejudicial to the accused only where the unfair proceedings are arranged in order to blame the person concerned for crimes actually committed by others, shielding the latter from criminal responsibility. It is, however, apparent that such instances are far from being the majority and often difficult to prove.

106. M. Rwelamira, 'The Assembly of the States Parties to the International Criminal Court: Special Attention to the Crime of Aggression', Supranational Criminal Law Lecture, TMC Asser Institute, The Hague, 21 Oct. 2004 (on file with author).
107. Rome Statute, Art. 14 ('Referral of a situation by a State Party').
108. Ibid., Art. 15 ('Prosecutor').
109. Sir H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 227.
110. For an application of this reasoning in another context, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 Feb. 1995, Dissenting Opinion of Judge Shahabuddeen, [1995] ICJ Rep. 6, available at http://www.icj-cij.org/icjwww/idocket/iqb/iqbjudgments/iqbtocjudgment(s).htm, para. IV(i). The parties had agreed under the Doha Minutes on the possibility of submitting their dispute to the Court, but the Court could not make the agreement more effective by recognizing a right of unilateral application on which the parties had not agreed.

4. THE ICTY AND ICTR EXPERIENCE: FROM ENDING IMPUNITY TO MONITORING THE FAIRNESS OF PROCEEDINGS IN THE BALKANS, RWANDA, AND BEYOND

Since the ICC has only just been established, it is not possible to confront our conclusions as to the interpretation of Article 17(2)(b) and (c) with the actual practice of the Court. As an alternative, it may be interesting to consider the findings above in the light of the law and practice of the ICTY and the ICTR.[111] Admittedly, it cannot be said that these tribunals constitute a 'precedent' for the determination of the unwillingness of a state as envisaged in the Rome Statute, since they are endowed with primacy over national criminal justice systems and need not show that such a circumstance exists in order to exercise jurisdiction.[112] Yet Articles 10(2)(b) and 9(2)(b) of the ICTY and ICTR Statutes, respectively, provide some grounds for the primacy of both tribunals as exceptions to the *non bis in idem* principle that, as explained above, served as the basis of current Articles 17 and 20 of the Rome Statute and that resemble, though are not identical to,[113] the grounds for unwillingness in Article 17(2)(a) and (c):

> 3. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
> . . .
> (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[114]

The similarity between the ICTY and ICTR articles on the *non bis in idem* principle and Article 17(2)(a) and (c) of the Rome Statute is especially relevant because the wording of the former was incorporated verbatim in ICTY and ICTR Rule 9(ii) as a ground for both tribunals to request national authorities to defer *ongoing* proceedings to the competence of the international tribunals:

> Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:
>
> (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
>
> (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

111. For an analysis of provisions similar to Articles 17 and 20 of the Rome Statute in the legal systems of 'internationalized' criminal jurisdictions, see J. K. Kleffner and A. Nollkaemper, 'The Relationship between Internationalized Courts and National Courts', in Romano *et al.*, *supra* note 14, 359 at 373–6.

112. ICTY Statute, Art. 9(2); Statute of the International Criminal Tribunal for Rwanda, UN Security Council Resolution 955 (1994), 8 Nov. 1994, UN Doc. S/RES/955 (1994) (hereafter ICTR Statute), available at http://www.ictr.org/ENGLISH/basicdocs/statute.html, Art. 8(2). See also Arbour and Bergsmo, *supra* note 36, at 131; and Brown, *supra* note 36, at 397.

113. M. Boot, *Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (Genocide, Crimes against Humanity, War Crimes)* (2002), at 61; El Zeidy, *supra* note 15, at 885.

114. ICTY Statute, Art. 10(2). The wording of Art. 9(2) of the ICTR Statute is the same except for the reference to the International Tribunal.

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal, the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.[115]

In these circumstances, it is relevant to consider the way in which the ICTY and the ICTR have exercised their primacy over national jurisdictions, in particular in order to determine how they have addressed those situations where national proceedings for international crimes fall short of due process guarantees to the detriment of the suspect/accused.

4.1. Primacy over national jurisdictions to ensure accountability[116]

Up to June 2005 the ICTY has made use of its primacy under Article 9(2) of the Statute to request deferrals from national jurisdictions on six occasions,[117] and the ICTR has taken over four domestic proceedings on the basis of the equivalent provision of its Statute, Article 8(2).[118] It appears that no use has been made so far of the possibility of retrying a person who has already been tried domestically.

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115. ICTY Rule 9. The wording of ICTR Rule 9 was the same until 5 June 1997, when it was completely redrafted to redirect the action of the tribunal to the key figures in the genocide. See J. R. W. D. Jones and S. Powles, *International Criminal Practice* (2003), paras. 5.57–5.59.

116. Although ICTY primacy was never intended to preclude or prevent the exercise of jurisdiction by national courts (see Report of the Secretary-General, *supra* note 59, para. 64), it has sometimes resulted in persons being shielded from domestic prosecution. See, e.g., Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, Case No. IT-02-55-MISC.6, 4 Oct. 2002, para. 38; and *Prosecutor v. Deronjić*, Plea Agreement, Case No. IT-02-61-PT, 29 Sept. 2003, para. 11(e). Cited ICTY motions, decisions, orders, transcripts and plea agreements are available online at http://www.un.org/icty/cases/indictindex-e.htm, unless otherwise indicated.

117. Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Duško Tadić, Case No. IT-94-1-D, T. Ch. I, 8 Nov. 1994 (on file with author); Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Republic of Bosnia and Herzegovina Concerning Crimes Committed Against the Population of Lasva River Valley, Case No. IT-95-6-D, 11 May 1995; Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić and Mica Stanisić, Case No. IT-95-5-D, 16 May 1995 (on file with author); Decision in the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Federal Republic of Yugoslavia in the Matter of Drazen Erdemović, Case No. IT-96-22-D, T. Ch. II, 29 May 1996 (on file with author); Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer the Pending Investigations and Criminal Proceedings to the Tribunal in the matter of Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić, Case No. IT-95-13-D, 10 Dec. 1998; Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, *supra* note 116. For an overview of these decisions, see Jones and Powles, *supra* note 115, paras. 5.66–5.78.

118. Decision in The Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal: The Kingdom of Belgium in Respect of Elie Ndayambaje, Joseph Kanyabashi and Alphonse Higaniro, Case No. ICTR-96-2-D, 11 Jan. 1996; Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Alfred Musema (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), Case No. ICTR-96-5-D, 12 March 1996; Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Radio Television Libre des Mille Collines Sarl (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), Case No. ICTR-96-6-D, 12 March 1996; Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Théoneste Bagosora (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), Case No. ICTR-96-7-D, 17 May 1996; *Prosecutor v. Ndindiliyimana*, Decision on the Prosecutor's Motion for Deferral, Case No. ICTR-2000-56-1, 2 March 2000. For an overview of these decisions, see Jones and Powles, *supra* note 115, paras. 5.79–5.81. Cited ICTR motions and decisions are available online at http://157.150.221.3/, unless otherwise indicated.

It is important to note that in all these cases the relevant ICTY or ICTR chamber has granted the Prosecutor's application that a formal request be made to the national court for deferral to the competence of the ad hoc tribunals on the basis of Rule 9(iii) common to both tribunals,[119] introduced *ex novo* by the judges on the basis of the primacy of the ICTY and the ICTR.[120] The Prosecutor has consistently used this subparagraph as the basis for his or her requests, arguing *inter alia* that the parallel conduct of domestic proceedings on a case investigated by the ICTY or the ICTR may have a negative impact on the witnesses, give rise to *non bis in idem* issues and end up in conflicting decisions on the same facts.[121] In only one case has the ICTY Prosecutor made additional use of Rule 9(ii), relative to the lack of impartiality or independence of the domestic proceedings. When in 1998 a military court in Belgrade started proceedings against those indicted in the *Vukovar* case, the Prosecutor argued that a request for deferral should be made because such proceedings 'would merely be a sham in order to put off the International Community, in order to reduce the pressure that is being placed upon them because of their failure to comply with their international obligations', and because 'five minutes after the pressure from the International Community eases on the Federal Republic of Yugoslavia, these three accused persons w[ould] be released and . . . any order made w[ould] not be genuine'.[122]

Therefore the practice of the ICTY and the ICTR so far shows that the primacy of both tribunals has not been argued as a means to remedy those situations where a person tried domestically for international crimes is prejudiced by the lack of due process. In fact, the ad hoc tribunals have only made pronouncements on the need of primacy over national courts in order to avoid persons being shielded from international criminal responsibility:

> indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being 'designed to shield the accused', or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)). If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.[123]

Despite these findings, it can be argued that the ICTY has made use of its primacy over national jurisdictions to prevent situations where the domestic lack of due process is detrimental to the accused, albeit on a different legal basis. The possibility

119. Even in the *Ndindiliyimana* case, *supra* note 118, decided at a time where ICTR Rule 9(iii) had already been amended, the Prosecutor's request was granted on the basis of the said rule.

120. Brown, *supra* note 36, at 396–7.

121. See, for all, Application by the Prosecutor for a Formal Request for Deferral by the Kingdom of Belgium in Respect of Colonel Théoneste Bagosora, Case No. ICTR-96-7-D, 15 May 1996, paras. 3.1 and 3.2.

122. *Prosecutor v. Mrkšić, Radić and Šljivančanin*, Transcript of 9 Dec. 1998, Case No. IT-95-13-D, at 22–3. The Chamber eventually granted the request but only on the basis of Rule 9(iii). See Jones and Powles, *supra* note 115, para. 5.72.

123. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 Oct. 1995, para. 58.

that the parties to the conflict in the former Yugoslavia sought 'judicial revenge' by trying members of the enemy factions for international crimes in an unfair manner materialized shortly after peace was agreed, and led to the signature of the Rome Agreement, informally known as the 'Rules of the Road'.[124] Pursuant to this agreement, no faction in the former Yugoslavia could prosecute members of opposing groups for serious violations of international humanitarian law unless the ICTY had previously confirmed the existence of sufficient evidence for a prima facie case according to international standards.[125]

The Human Rights Chamber of Bosnia and Herzegovina (HRC), established by the Dayton Peace Agreements,[126] found that the function of the ICTY under the Rules of the Road was not only limited to preventing arbitrary arrests or ensuring that the exercise of the right to freedom of movement within Bosnia and Herzegovina (BiH) was not obstructed by such arrests, but was also aimed 'at ensuring that the necessary prosecution of persons suspected of serious violations of international humanitarian law is carried out in accordance with international standards, not only at the ICTY in The Hague, but also and especially before the courts in Bosnia and Herzegovina, where these crimes took place'.[127] Nonetheless, it must also be noted that the HRC also declared that the possible intervention of the ICTY in domestic proceedings pursuant to Rule 9(ii) of its Rules of Procedure and Evidence was meant for a much more limited purpose than the determination of the fairness of such proceedings, the latter being a function reserved to the HRC which could not conflict with the concurrent jurisdiction of the ICTY.[128]

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124. Rome Agreement, 18 Feb. 1996, available at http://www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/default.asp?content_id=6093.
125. Ibid., Art. 5. Though the review of domestic war crimes prosecutions is not strictly within the mandate of the Prosecutor, the first Prosecutor of the ICTY, Richard Goldstone, agreed to administer the operation of Art. 5. On 1 Oct. 2004, the review of war crimes cases was taken over by the BiH Prosecutor's Office. See War Crimes Trials before the Domestic Courts of BiH, *supra* note 6, at 6 and 47.
126. The Human Rights Chamber was established by Art. II of Annex 6 (Agreement of Human Rights) of the General Framework Agreement for Peace in Bosnia and Herzegovina (known as the 'Dayton Peace Agreements') of 14 Dec. 1995, available at http://www.ohr.int/dpa/default.asp?content_id=374, as part of a Commission on Human Rights, also composed by the Office of the Ombudsman, which was to assist the Republic of Bosnia and Herzegovina, the Federation of Bosnia i Herzegovina and the Republika Srpska (Art. I) in securing to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to the Annex (Art. II.1). International judges were the majority in the Chamber (Art. VII). The mandate of the HRC ended on 31 Dec. 2003 and since then the Constitutional Court of BiH has become the principal court to adjudicate on human rights applications (Art. XIV).
127. *V.Č. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits, Case No. CH/98/1366, 9 March 2000, para. 75. The plenary Chamber implicitly endorsed this opinion when it confirmed the Second Panel's finding that a violation of the 'Rules of the Road' must be understood as a violation of Art. 6 of the European Convention on Human Rights (right to a fair trial). See *V.Č. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Decision on Review, Case No. CH/98/1366, 9 Nov. 2000, para. 18. For an example of the role of the Rules of the Road in preventing biased prosecutions, see *Velimir Pržulj v. the Federation of Bosnia and Herzegovina*, Decision on Admissibility and Merits, Case No. CH/98/1374, 13 Jan. 2000, paras. 132 and 135. Cited HRC decisions are available online at http://www.hrc.ba/database/searchForm.asp.
128. *V.Č. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Decision on Request for Review, Case No. CH/98/1366, 12 May 2000, para. 19 ('Accordingly, the power of the ICTY to examine the impartiality and independence of criminal proceedings before courts in the Federation is of a different nature and serves a completely different purpose than that of the Chamber and can in no way conflict with the Chamber's

It is remarkable in any event that the ICTY did not consider that its role under the Rules of the Road required any monitoring of the domestic proceedings once the domestic indictment had been reviewed and accepted by the tribunal.[129] The tribunal did not even consider that the Rules demanded its intervention in cases where the domestic indictment was changed after receiving ICTY approval, although the Supreme Court of the Federation of Bosnia and Herzegovina subsequently found that the Rules of the Road had been violated in such a case.[130]

In conclusion, although the legal wording and the 'preparatory works' of the ICTY and ICTR Statutes can be read as providing for the intervention of the Court not only where domestic proceedings are intended to shield the accused from criminal responsibility but also where the lack of due process is detrimental to the accused,[131] the ad hoc tribunals have not even considered taking over domestic proceedings in the latter situation.[132] However, this situation appears to be about to change drastically as a result of the 'completion strategies' of both tribunals.

4.2. Primacy over national jurisdictions to avoid unfair trials

Since 2001 both the ICTY and the ICTR have developed so-called 'completion strategies' in order to wind up their operations by 2010.[133] A 'critical' component of

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jurisdiction'.). In para. 20, the HRC went on to state, 'Nor has it been submitted that the ICTY has been examining the impartiality and independence of the Cantonal Court in Sarajevo in the applicant's trial. Accordingly, even if the Chamber's jurisdiction could in the abstract concur with the jurisdiction of the ICTY, it certainly does not so in the case at hand'.

129. The ICTY OTP has, however, monitored some trials in the former Yugoslavia where it has provided evidence to domestic authorities. For the case of Mirko Norac, convicted in Croatia for war crimes in March 2003, see ICTY Outreach Programme, 'Trial against Mirko Norac', *View from The Hague*, 2 June 2004, 6, available at http://www.un.org/icty/bhs/outreach/articles/eng/Art.-040602e.htm.

130. *Prosecutor v. Goran Vasić*, Appeal decision, Federation of BiH Supreme Court, Kž-106/02, 29 May 2003, cited in 'War Crimes Trials before the Domestic Courts of BiH', *supra* note 6, at 49.

131. See *supra* note 54 and corresponding text.

132. As a minor exception, in the Request for Deferral to the Former Yugoslav Republic of Macedonia, *supra* note 116, the Prosecutor argued that it would be more appropriate to conduct the investigations and proceedings at the ICTY because Macedonian national law, by contrast to the Rules of the Tribunal, does not provide for the protection of witnesses (paras. 13 and 18), an aspect which is related to the fairness of the proceedings.

133. See UN Security Council Resolution 1503 (2003), 28 Aug. 2003, UN Doc. S/RES/1503 (2003); and UN Security Council Resolution 1534 (2004), 26 March 2004, UN Doc. S/RES/1534 (2004). The ICTY completion strategy can be found in 'Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts', 10 June 2002, UN Doc. S/2002/678 (hereafter ICTY completion strategy I); 'Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004)' and 'Assessment of Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004)', 21 May 2004, UN Doc. S/2004/420 (hereafter ICTY President completion strategy II and ICTY OTP completion strategy II , respectively); 23 Nov. 2004, UN Doc. S/2004/897 (hereafter ICTY President completion strategy III and ICTY OTP completion strategy III , respectively); and 25 May 2005, UN Doc. S/2005/343 (hereafter ICTY President completion strategy IV and ICTY OTP completion strategy IV, respectively). For the ICTR, see 'Completion strategy of the International Criminal Tribunal for Rwanda', 12 Aug. 2003, Annex to UN Doc. A/58/269 (hereafter ICTR completion strategy I); 3 Oct. 2003, UN Doc. S/2003/946 (hereafter ICTR completion strategy II); 30 April 2004, UN Doc. S/2004/341 (hereafter ICTR completion strategy III); 19 Nov. 2004, UN Doc. S/2004/921 (hereafter ICTR completion strategy IV); and 23 May 2005, UN Doc. S/2005/336 (hereafter ICTR completion strategy V). For a detailed analysis of the elaboration of the ICTY strategy, see M. Bohlander, 'Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts', (2003) 14 *Criminal Law Forum* 59. For an overview of the design and development of the ICTY and ICTR completion strategy up to June 2004, see D. Raab, 'Evaluating

such a strategy is the referral of cases of 'intermediate- and lower-rank accused' to national jurisdictions,[134] since such referrals will ease the backlog of both tribunals and will therefore allow for the trial of those 'most senior leaders suspected of being most responsible' within the tight schedule set by the UN Security Council.[135] According to the latest figures available, the ICTY Prosecutor expects 17 cases involving 62 suspects for which an indictment has not been confirmed to be referred to national courts in Bosnia and Herzegovina, Croatia, and Serbia and Montenegro,[136] together with ten cases involving 19 accused who have been formally indicted by the ICTY.[137] It is expected that the actual transfer of the latter cases will be completed in 2005.[138] In the case of the ICTR, the Prosecutor has indicated that the cases of approximately 45 suspects will be transferred to national jurisdictions, including 13 accused indicted by the Tribunal.[139] Requests for referral are expected for late 2005,[140] but the actual transfer of ICTR indictees is not envisaged for this year,[141] pending the adoption of necessary measures by Rwanda and the identification of other countries willing and able to try ICTR cases.[142] By contrast, 15 dossiers requiring further investigation have already been handed over to Rwandan authorities and ten more

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the ICTY and its Completion Strategy', (2005) 3 *Journal of International Criminal Justice* 82, at 84–8, and D. A. Mundis, 'The Judicial Effect of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals', (2005) 99 AJIL 142, at 142–7.

134. UN Security Council Resolution 1503 (2003), *supra* note 133; ICTY President completion strategy II, *supra* note 133, para. 20; ICTY President completion strategy III, *supra* note 133, para. 6; ICTY OTP completion strategy III, *supra* note 133, para. 27.
135. See Statement by the President of the Security Council, UN Doc. S/PRST/2002/21, 23 July 2002; UN Security Council Resolution 1503, *supra* note 133, para. 7; and UN Security Council Resolution 1534, *supra* note 133, para. 3. According to the schedule explained in these documents, all trial activities at first instance should be completed by the end of 2008 and the tribunals should finish all of their work by the end of 2010. As planned in the schedule, investigations at both tribunals were concluded by 31 Dec. 2004.
136. Address by Ms Carla del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, 8 Oct. 2003, UN Doc. S/PV.4838, at 10, also included in ICTY press release JL/P.I.S./791-e; ICTY OTP completion strategy IV, *supra* note 133, para. 15. Cited ICTY press releases are available online at http://www.un.org/icty/latest/latenews-e.htm.
137. ICTY OTP completion strategy III, *supra* note 133, para. 11; Address by Ms Carla del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, 29 June 2004, UN Doc. S/PV.4999, at 14, also included in ICTY press release CT/PIS/863e; War Crimes Trials before the Domestic Courts of BiH, *supra* note 6, at 10; ICTY OTP completion strategy IV, *supra* note 133, paras. 12 and 14. At the time of writing, one case involving one accused has been referred to Bosnia and Herzegovina and seven cases involving 14 accused are being considered for referral by specially appointed trial chambers. See *infra* notes 172 and 174.
138. Address by Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, 23 Nov. 2004, UN Doc. S/PV.5086, at 29, also included in ICTY press release JP/P.I.S./918-e; and 13 June 2005, UN Doc. S/PV.5199, at 8, also included in ICTY press release TM/MOW/976e.
139. ICTR completion strategy V, *supra* note 133, paras. 7 and 37; Address by Mr. Hassan Bubacar Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda, to the UN Security Council, 13 June 2005, UN Doc. S/PV.5199, at 15.
140. Address by Mr Hassan Bubacar Jallow, 13 June 2005, *supra* note 139, at 15.
141. ICTR completion strategy I, *supra* note 133, para. 28; ICTR completion strategy II, *supra* note 133, para. 28; Address by Mr Hassan Bubacar Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda, to the UN Security Council, 29 June 2004, UN Doc. S/PV.4999, at 18. At the time of writing, there are no applications for transfer before any chamber.
142. Address by Mr Hassan Bubacar Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda, to the UN Security Council, 23 Nov. 2004, UN Doc. S/PV.5086, at 14 and 31; Comments by Mr Hassan Bubacar Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda, to the UN Security Council, 13 June 2005, UN Doc. S/PV.5199, at 39.

are intended to follow shortly.[143] One additional case file has been transferred to a European jurisdiction and the resulting trial is expected to commence shortly.[144]

The completion strategies of the tribunals envisage the referral to domestic authorities of cases for which an indictment has been confirmed and of pre-indicted cases.[145] The legal basis for the referral of cases of the former sort to national jurisdictions is Rule 11 *bis* common to both tribunals, titled 'Referral of the Indictment to Another Court' and which allows for referrals only 'after an indictment has been confirmed' and, since February 2005, 'prior to the commencement of trial' at the ad hoc tribunals.[146] The wording of Rule 11 *bis* as originally adopted by the ICTY in 1997 provided only for the 'suspension' of an indictment if national authorities were 'prepared' to prosecute the accused.[147] In order to accommodate the Rule to the needs of the completion strategy,[148] current Rule 11 *bis* was adopted by the ICTR in July 2002 and amended by the ICTY in September the same year.[149]

For our purposes, the relevance of Rule 11 *bis* lies in its paragraph (F), pursuant to which

> At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned the Referral Bench may, at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.[150]

Rule 11 *bis* (F) refers to Rule 10, which in turn indicates that the trial chamber may issue a formal request for deferral if it appears to it that such deferral is appropriate 'on any of the grounds specified in Rule 9'.[151] The question arises as to the possible scenarios in which the ICTY and the ICTR may make use of Rule 11 *bis* (F) to call a case back after referring it and as to the grounds of Rule 9 on which such request for deferral may be made.

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143. ICTR completion strategy V, *supra* note 133, paras. 7 and 37; Address by Mr Hassan Bubacar Jallow, 13 June 2005, *supra* note 139, at 15.
144. Address by Mr Hassan Bubacar Jallow, 13 June 2005, *supra* note 139, at 15.
145. ICTY OTP completion strategy II, *supra* note 133, para. 30; ICTY OTP completion strategy III, *supra* note 133, para. 12; ICTR completion strategy IV, *supra* note 133, para. 36; ICTR completion strategy IV, *supra* note 133, para. 37.
146. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, adopted on 11 Feb. 1994 (hereafter ICTY Rule(s)), as amended through 11 Feb. 2005, UN Doc. IT/32/Rev.34 (2005), Rule 11 *bis*; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, adopted on 29 June 1995 (hereafter ICTR Rule(s)), as amended through 21 May 2005, UN Doc. ITR/3/Rev.15 (2005), Rule 11 *bis*. ICTR Rule 11 *bis* does not limit the referral to cases for which a trial has not started at the ICTR. Cited ICTY and ICTR Rules and their amendments are available online at http://www.un.org/icty/legaldoc/procedureindex.htm and http://www.ictr.org/ENGLISH/rules/index.htm, respectively.
147. ICTY Rule 11 *bis* ('Suspension of Indictment in case of Proceedings before National Courts'), as adopted on 12 Nov. 1997, UN Doc. IT/32/Rev.12 (1997).
148. See Address by Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security Council, 23 July 2002, ICTY press release JDH/P.I.S./690-e; and Statement by the President of the Security Council, *supra* note 135.
149. ICTR Rule 11 *bis*, as adopted on 6 July 2002, UN Doc. ITR/3/Rev.12 (2002); ICTY Rule 11 *bis*, as revised on 30 Sept. 2002, UN Doc. IT/32/Rev.25 (2002).
150. ICTY Rule 11 *bis* (F). A similar paragraph was already included in the previous version of ICTY Rule 11 *bis* in order to revoke an order for the suspension of the ICTY indictment pending proceedings at the national level. The content of current ICTR Rule 11 *bis* (F) is identical in substance to the ICTY one.
151. ICTY Rule 10(A). ICTR Rule 9(A) uses a stricter wording and mandates the Trial Chamber to issue the request for deferral if 'paragraphs (i), (ii) or (iii) of Rule 9 are satisfied'.

It is apparent that the practice of the ICTY and the ICTR explained above concerning the application of Rule 9 is not particularly relevant to this question, since the 'implications for investigations or prosecutions before the Tribunal' referred to in ICTY Rule 9(iii) and ICTR Rule 9(ii) are consented to through the initial referral to the national authorities and in any event should not be frequent, given that only cases of 'intermediate- and lower-rank accused' are being considered for referral to domestic jurisdictions. Following the practice of both tribunals so far, it seems to be more likely that ICTY Rule 9(ii) and ICTR Article 9(2)(b) are used to call back a referred case if the domestic proceedings in the relevant national jurisdiction are considered to be a 'sham' trial, intended to shield the accused from criminal responsibility.

Notwithstanding these possibilities, the relevance of the completion strategy for our purposes is that pursuant to it for the first time both tribunals are considering the exercise of their primacy in order to remedy a domestic lack of due process which, instead of favouring the accused, is detrimental to him or her. In fact, the ICTR Prosecutor has recently stated that

> the Tribunal always retains primacy over these [referred] cases, so when we transfer the cases we have to put in place a monitoring mechanism to ensure that the standards of a fair trial are being observed. We retain the right to take the cases back to the Tribunal if we are not satisfied that the standards are being observed. It is important to note that element.[152]

The submission that the ad hoc tribunals may use ICTY Rule 9(ii) or ICTR Article 9(2)(b) not only to avoid sham trials but also to regain control over referred cases which are being tried unfairly to the detriment of the accused, is supported by the status of the criminal justice system of some of the potential candidates to receive cases from the ICTY and the ICTR, and by the object and purpose of the 'completion strategies' of both tribunals.

4.2.1. The criminal justice system of states candidates to receive referred cases

The possible exercise of primacy over national jurisdictions to call back cases where the accused is prejudiced by the lack of a fair trial at the domestic level will be determined by the human rights record of the countries to which the accused may be eventually referred for trial. In the case of the ICTY, the completion strategy has involved the creation of a special war crimes chamber within the State Court of BiH which will be responsible for trying those cases referred to Bosnian authorities under Rule 11 *bis* and for supervising the war crimes trials of less sensitive and lower-rank accused conducted at the cantonal and local level pursuant to the Rules of the Road.[153] In order to ensure that the proceedings of this newly established chamber are fair, the Bosnian authorities have passed pertinent legislation in co-operation with the High Representative. Moreover, a temporary component of international judges and prosecutors has been included in the chamber to ensure its impartiality.[154] In these

152. Comments by Mr Hassan Bubacar Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda, to the UN Security Council, 29 June 2004, UN Doc. S/PV.4999 (Resumption 1), at 18.
153. War Crimes Trials before the Domestic Courts of BiH, *supra* note 6, at 10.
154. Address by Judge Claude Jorda, 23 July 2002, *supra* note 148; Address by Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN General Assembly, 28 Oct. 2002, ICTY

circumstances the ICTY president has reiterated his opinion that it is not likely that the justice provided by the Sarajevo war crimes chamber merits the intervention of the tribunal on the grounds of being biased against the accused.[155]

However, it is apparent that the two panels of the special war crimes chamber will not be in a position to deal with all the cases which can potentially be referred to BiH.[156] As a result, local and cantonal courts in BiH that may not be impartial will also adjudicate cases referred by the ICTY.[157] A perhaps greater possibility for unfair trials exists in Croatia and in Serbia, where a judicial body or legislation similar to the Bosnian ones is non-existent.[158] The ICTY President, for example, stated in June 2004 that 'some courts in the former Yugoslavia continue to suffer from deficiencies in their ability to conduct trials in accordance with fundamental fairness and due process'.[159] In the case of Rwanda, the present political situation, with a Tutsi-led government,[160] and the perceived inability of the judicial system to handle thousands of local cases connected with the genocide, also cast serious doubts on the fairness of the trials that may be conducted there pursuant to an ICTR referral.[161]

In order to tackle the possibility that a deficit in due process persists in the judiciaries of the area where the crimes under adjudication were committed, ICTY Rule 11 *bis* was amended in June 2004 to allow for the referral of cases 'to the authorities of a State having jurisdiction and being willing and adequately prepared to accept such a case'.[162] ICTR officials have already made reference to the possibility

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press release JDH/P.I.S./707-e and to the UN Security Council, 29 Oct. 2002, ICTY press release JDH/P.I.S./708-e; C. Jorda, 'The Major Hurdles and Accomplishments of the ICTY: What the ICC Can Learn from Them', (2004) 2 *Journal of International Criminal Justice* 572, at 576.

155. Statement by President Meron on Establishment of Special War Crimes Chamber in Bosnian State Court, 13 June 2003, referred to in ICTY press release JL/P.I.S./761-e; Address by Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, 29 June 2004, UN Doc. S/PV.4999, at 6, also included in ICTY press release JL/PIS/862e.

156. Address by Judge Claude Jorda, 23 July 2002, *supra* note 148; Raab, *supra* note 133, at 94–5; War Crimes Trials before the Domestic Courts of BiH, *supra* note 6, at 10.

157. ICTY OTP completion strategy III, *supra* note 133, para. 32. For the relationship between the BiH Prosecutor and Bosnian local courts, see War Crimes Trials before the Domestic Courts of BiH, *supra* note 6, at 17.

158. See, e.g., ICTY President completion strategy II, *supra* note 133, para. 29; Address by Judge Theodor Meron, 29 June 2004, *supra* note 155, at 6.

159. Address by Judge Theodor Meron, 29 June 2004, *supra* note 155, at 5. See also K. Zoglin, 'The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?', (2005) 27 *Human Rights Quarterly* 41, at 72.

160. See Obote-Odora, *supra* note 7, paras. 89 and 91.

161. See ICTR completion strategy III, *supra* note 133, para. 38; Address by Mr Hassan Bubacar Jallow, 29 June 2004, *supra* note 141, at 19; and ICTR completion strategy V, *supra* note 133, para. 39. The ICTR Prosecutor has proposed the establishment of a domestic court that will handle the cases when they are transferred, and is waiting for reforms in respect of guaranteeing fair trials. See Address by Mr Hassan Bubacar Jallow, 23 Nov. 2004, *supra* note 142, at 31; and 13 June 2005, *supra* note 139, at 15–16.

162. Comments by Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, 29 June 2004, UN Doc. S/PV.4999 (Resumption 1), at 15. The original text of ICTY Rule 11 *bis* in 1997 referred to the 'Suspension of Indictment in case of Proceedings before National Courts' 'of the State in which an accused was arrested' (UN Doc. IT/32/Rev.12, 12 Nov. 1997); a further amendment of the Rules in 2002 changed Rule 11 *bis* into the present 'Referral of the Indictment to Another Court' and allowed referral to the state 'in which the accused was arrested', or 'in whose territory the crime was committed' (UN Doc. IT/32/Rev.26, 12 Dec. 2002). Finally, in 2004, Rule 11 *bis* (A)(iii) was added as a third option to include any state 'having jurisdiction and being willing and adequately prepared to accept such a case' (UN Doc. IT/32/Rev.31, 10 June 2004). Two years earlier the ICTR had already included in its Rule 11 *bis* ('Referral of the Indictment to another Court') the possibility to refer a case 'to the authorities of any State that is willing to prosecute the accused in its own courts' (UN Doc. ITR/3/Rev. 12, 6 July 2002). ICTR

of referring cases to countries where the accused reside[163] or to those exercising universal jurisdiction.[164] Without discussing the appropriateness of such a measure, it is apparent that the amendment to Rule 11 *bis* opens the door for the referral of cases to countries not connected with the referred crimes and where an unfair prosecution to the detriment of the accused is therefore more likely than the accused being shielded from international criminal responsibility.

From this perspective, it is apparent that the ICTY and the ICTR may be faced with situations where domestic proceedings for referred cases do not comply with international standards of fairness, to the detriment of the accused.

4.2.2. The object and purpose of the referral of cases to national jurisdictions

One of the main concerns regarding the referral of cases to national jurisdictions is the level of guarantees for fair trial existing in the countries where the crimes investigated by the ICTY and the ICTR took place. The documents detailing the completion strategies of both tribunals clearly indicate that the most important condition that must be satisfied for the referral of cases is the ability of national courts fully to conform to internationally recognized standards of human rights and due process in the trials of referred persons.[165] The presidents and prosecutors of both institutions have repeatedly stressed this idea in their speeches to the UN Security Council and the General Assembly, and have even referred to the need to consider the condition of detention facilities and the treatment of detainees.[166]

Admittedly, in the conception phase of the completion strategy this requirement for domestic fairness for the referral of cases appears to have been approached from the perspective prevalent in the Rome Statute, namely as a standard enabling the tribunals to prevent state authorities from shielding an individual from criminal responsibility, rather than as a standard enabling the protection of the individual against possible abuses by the state.[167] Accordingly, the powers under Rule 11 *bis* (F) were suggested as a remedy for situations where domestic authorities would

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Rule 11 *bis* was amended in 2005 to match the ICTY formula in this regard (UN Doc. ITR/3/Rev.15, 21 May 2005).

163. Address by Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda, to the UN General Assembly, 26 Nov. 2001, UN Doc. A/56/PV.62, at 19; and to the UN Security Council, 27 Nov. 2001, available at http://www.ictr.org/ENGLISH/speeches/pillay271101sc.htm; ICTR completion strategy I, *supra* note 133, para. 28.

164. Address by Judge Navanethem Pillay, President of the International Criminal Tribunal for Rwanda, to the UN General Assembly, 28 Oct. 2002, available at http://www.ictr.org/ENGLISH/speeches/pillay281002ga.htm; and to the UN Security Council, 29 Oct. 2002, available at http://www.ictr.org/ENGLISH/speeches/pillay291002sc.htm. The ICTR Prosecutor has already identified seven national jurisdictions other than Rwanda as potential recipients of cases, three of them European. See Address by Mr Hassan Bubacar Jallow, Chief Prosecutor of the International Criminal Tribunal for Rwanda, to the UN Security Council, 29 June 2004, *supra* note 141, at 18; and 13 June 2005, *supra* note 139, at 15.

165. ICTY completion strategy I, *supra* note 133, para. 32; ICTY President completion strategy II, *supra* note 133, para. 22; ICTY President completion strategy IV, *supra* note 133, para. 13; ICTR completion strategy III and IV, *supra* note 133, para. 39; ICTR completion strategy V, *supra* note 133, para. 40.

166. Address by Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the UN General Assembly, 27 Nov. 2001, ICTY press release JDH/P.I.S./641-e; Address by Judge Claude Jorda, 29 Oct. 2002, *supra* note 154; Address by Judge Theodor Meron, 29 June 2004, *supra* note 155, at 6, and 23 Nov. 2004, *supra* note 138, at 30; Comments by Mr Hassan Bubacar Jallow, 29 June 2004, *supra* note 152, at 18.

167. Address by Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN General Assembly, 26 Nov. 2001, UN Doc. A/56/PV.62, at 7, also included in ICTY press release JDH/P.I.S./640-e.

not try the referred person on all the charges included in the referred indictment.[168] The only object and purpose of the completion strategy by that time appeared to be the prevention of impunity for those accused who cannot be tried before the ad hoc tribunals and must be referred back to national jurisdictions.

However, more recent assessments of the completion strategy suggest that the objective is not only to ensure that national jurisdictions put an end to impunity, but also that they do so in a fair manner. In fact, ICTY Rule 11 *bis* was amended in June 2004 to make the referral of a case conditional on the judges 'being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out',[169] an amendment which, according to the ICTY President, 'ensures that cases will not be referred to jurisdictions that do not observe the minimum guarantees of procedural fairness and international human rights'.[170] Accordingly, the power to call back cases under Rule 11 *bis* is now perceived as a remedy for unfair trials, regardless of the beneficial or prejudicial 'sign' of such unfairness for the accused.[171]

Confirming the latter approach to the completion strategy, in their first decision to refer a case under Rule 11 bis, ICTY judges considered not only whether the alleged criminal responsibility of the accused could be fully established before the domestic courts of Bosnia and Herzegovina, but also whether such courts might be ethnically biased against the accused (a Bosnian Serb), whether the accused would be tried without undue delay, and whether his right to obtain the attendance and examination of witnesses would not be unduly hindered. After dismissing the defendant's concerns in this regard,[172] the Referral Bench suggested that their powers to call the referred case back could be exercised to remedy a domestic lack of due process prejudicial to the accused.[173]

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168. ICTY completion strategy I, *supra* note 133, para. 40. See also Address by Ms Carla del Ponte, 8 Oct. 2003, *supra* note 136, at 10.

169. ICTY Rule 11 *bis* (B) *in fine*, as amended on 10 June 2004, UN Doc. IT/32/Rev.31 (2004). In April 2004 the ICTR judges had already included as a requirement in ICTR Rule 11 *bis* that the Chamber could 'satisfy itself that the accused will receive a fair trial with due process in the courts of the State concerned' (UN Doc. ITR/3/Rev.14, 24 April 2004). In May 2004, the ICTY President had already reported that 'Although not explicitly mentioned in the Rule, the ability of the accused to receive a fair trial in accordance with due process and international human rights norms is a significant additional factor. Trial Chambers are unlikely to refer cases to jurisdictions in which the accused might not be accorded a fair trial . . . The Tribunal is of course committed to supporting the achievement of credible war crimes trials that meet international norms of due process in all States of the former Yugoslavia'. See ICTY President completion strategy II, *supra* note 133, paras. 22–23. The need for assurances that the death penalty will not be imposed or carried out was introduced in ICTR Rule 11 *bis* (C) in 2005 (UN Doc. ITR/3/Rev.15, 21 May 2005).

170. Address by Judge Theodor Meron, 29 June 2004, *supra* note 155, at 5. Similar comments were made by the ICTR President, Judge Møse, and the ICTR Prosecutor, Mr Hassan Bubacar Jallow, on the same date. The latter also made the transfer conditional on the accused not suffering a greater penalty than he would otherwise have been exposed to at the tribunal itself. See *supra* note 141.

171. See C. Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', (2004) 2 *Journal of International Criminal Justice* 516, at 518–19; ICTY OTP completion strategy II, *supra* note 133, para. 30; Comments by Mr Hassan Bubacar Jallow, 29 June 2004, *supra* note 152, at 18.

172. *Prosecutor v. Stanković*, Decision on Referral of Case under Rule 11 *bis* (Partly Confidential and *Ex Parte*), Case No. IT-96-23/2-PT, 17 May 2005, paras. 27–29 and 67 (ethnic bias); 77 (undue delay) and 86 (availability of witnesses). At the time of writing the decision is under appeal.

173. Ibid., paras. 67–68. The Referral Bench ordered the Prosecutor to ensure that international monitoring of the domestic proceedings takes place and that the reports from the monitoring organisation are made available to the Bench on a regular basis.

Similarly, in the other ICTY cases for which a decision on referral is still pending,[174] the judges have already demonstrated their intention to assess not only whether the accused could be found responsible at the domestic level under the mode of liability pleaded in the ICTY indictment (especially command responsibility)[175] for all indicted crimes[176] or whether domestic tribunals could be biased in favour of the accused,[177] but also whether the right of the accused to a defence,[178] to have a trial without undue delay,[179] and to call witnesses would be guaranteed in the event of a referral pursuant to Rule 11 *bis*.[180] In fact, some of the accused in these cases have opposed the eventual referral, arguing the animosity towards them of the domestic courts, the risk of a delay in the proceedings, and potential problems in calling defence witnesses.[181] Some others have clearly expressed their hopes that the tribunal will make use of Rule 11 *bis* to call back a case if the rights of the defence are violated.[182] Other questions of fairness to the accused have also been put forward, such as whether a case can be referred to national authorities for trial under Rule 11 *bis* if the ability of the accused to enter a plea and to stand trial cannot be, or has not been, determined.[183]

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174. As of 1 July 2005, Prosecutor's requests for referral under Rule 11 *bis* are under consideration in seven cases: *Prosecutor v. Mejakić, Gruban, Fuštar and Knežević*, Case No. IT-02-65; *Prosecutor v. Ademi and Norac*, Case No. IT-04-78; *Prosecutor v. Janković and Zelenović*, Case No. IT-96-23/2; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I; *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1; and *Prosecutor v. Sredoje Lukić and Milan Lukić*, Case No. IT-98-32. On 9 Feb. 2005, the Prosecutor moved to have the case of *Prosecutor v. Mrkšić, Radić and Šljivančanin*, Case No. IT-95-13/1, referred to the authorities of Croatia or of Serbia and Montenegro, but on 30 June 2005 the Referral Bench granted the Prosecutor's motion to withdraw the request for referral of the indictment. For the reasons of the withdrawal, see Address by Ms Carla del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the UN Security Council, 13 June 2005, UN Doc. S/PV.5199, at 13, also included in ICTY press release CDP/MOW/977-e.
175. *Prosecutor v. Mejakić, Gruban, Fuštar and Knežević*, Decision for Further Information in the Context of the Prosecutor's Request under Rule 11 *bis* (with confidential annex), Case No. IT-02-65-PT, 9 Feb. 2005, paras. II.1 (Bosnian Government), II.2 (Prosecutor) and II.1 (Defence); *Prosecutor v. Ademi and Norac*, Order for Further Information in the Context of the Prosecutor's Request under Rule 11 *bis*, Case No. IT-04-78-PT, 20 Jan. 2005, paras. 2 (Croatian government), and 2 (Prosecutor); *Prosecutor v. Janković and Zelenović*, Decision for Further Information in the Context of the Prosecutor's Motion under Rule 11 *bis*, Case No. IT-96-23/2-PT, 15 April 2005, paras. II.1 (Bosnian government), II.1 (Prosecutor) and II.2 (Defence); *Prosecutor v. Rašević and Todović*, Decision for Further Information in the Context of the Prosecutor's Motions under Rule 11 *bis*, Case No. IT-97-25/1, 14 April 2005, paras. II.1 (Bosnian government), II.1 (Prosecutor), and II.1 and 2 (Defence).
176. *Prosecutor v. Rašević and Todović*, *supra* note 175, paras. II.2 (Bosnian government), II.2 (Prosecutor), and II.1 and 3 (Defence).
177. *Prosecutor v. Ademi and Norac*, *supra* note 175, paras. 7 (Croatian government), 8 (Prosecutor) and 7 (Defence).
178. *Prosecutor v. Mejakić, Gruban, Fuštar and Knežević*, *supra* note 175, paras. 6 (Bosnian government) and 5 (Defence); *Prosecutor v. Ademi and Norac*, *supra* note 175, paras. 6 (Croatian government), 8 (Prosecutor) and 4–6 (Defence); *Prosecutor v. Janković and Zelenović*, *supra* note 175, para. II.6 (Defence); *Prosecutor v. Rašević and Todović*, *supra* note 175, para. II.7 (Defence).
179. *Prosecutor v. Mejakić, Gruban, Fuštar and Knežević*, *supra* note 175, para. 7 (Bosnian government); *Prosecutor v. Janković and Zelenović*, *supra* note 175, para. II.5 (Defence); *Prosecutor v. Rašević and Todović*, *supra* note 175, para. II.6 (Defence).
180. *Prosecutor v. Mejakić, Gruban, Fuštar and Knežević*, *supra* note 175, paras. 4 (Prosecutor) and 3 (Defence); *Prosecutor v. Ademi and Norac*, *supra* note 175, paras. 6 (Prosecutor) and 3 (Defence); *Prosecutor v. Janković and Zelenović*, *supra* note 175, para. II.4 (Defence); *Prosecutor v. Rašević and Todović*, *supra* note 175, para. II.5 (Defence).
181. *Prosecutor v. Mejakić, Gruban, Fuštar and Knežević*, Transcript of 3 March 2005, Case No. IT-02-65-PT, at 157–59, 167–9 and 182–3.
182. *Prosecutor v. Ademi and Norac*, Transcript of 17 Feb. 2005, Case No. IT-04-78-PT, at 27.
183. *Prosecutor v. Vladimir Kovačević*, Order on the Prosecutor's Request for Referral to National Authorities under Rule 11 *bis*, Case No. IT-01-42/2-I, 20 Jan. 2005, paras. 2(b) (Prosecutor) and 2 (Defence).

Pursuant to this view, the object and purpose of the completion strategies explains that the exercise of primacy may be conceived as a remedy for situations where the referred person is prejudiced by the domestic lack of due process. However, it is not certain that such an exercise of primacy will ever take place. Whereas the ICTY Prosecutor has shown a clear preference for referring cases and adopting 'intrusive international monitoring' measures of the consequent domestic trials pursuant to Rule 11 bis (D)(iv),[184] the preferred approach of the judges and the ICTR Prosecutor seems to be to wait for the required fair trial standards to be reached at the domestic level before referring the case (or even considering its referral),[185] so that the need to call the case back for reasons of unfairness is less likely to arise.[186] Already in 2000, for instance, the political climate and safety concerns were put forward by ICTY judges to rule out the referral of cases to the states in the Balkans.[187] In any event, it is apparent that the tribunals will have to deal not only with the normative dimension of the referral (domestic legislation, jurisprudence, procedures, and norms), but also with the empirical dimension, involving an assessment of the context and the actual handling of the referred case.[188]

Finally, it is also important to note that the exercise of primacy for these purposes does not extend to cases where domestic proceedings on the referred case(s) have concluded, since Rule 11 *bis* (F) limits the possibility to call back referred cases to 'any time . . . before the accused is found guilty or acquitted by a court in the State concerned'. It remains to be seen whether the ad hoc tribunals will interpret the exceptions to the *non bis in idem* principle contained in Articles 10(2)(b) and 9(2)(b) of their respective statutes in conformity with Rule 11 *bis*.

4.3. From 'no peace without justice' to 'no peace with victor's justice'?

The ICTY and the ICTR have not yet made use of their primacy over national jurisdictions in order to remedy domestic trials that are unfair to the detriment of the accused. However, the experience of the ad hoc tribunals on the referral of cases to national jurisdictions may mark an important change in the way in which international criminal tribunals consider the domestic enforcement of international criminal law. The completion strategies explained above seem to show that it does

184. ICTY OTP completion strategy III, *supra* note 133, para. 27; *Prosecutor v. Ademi and Norac*, Request by the Prosecutor under Rule 11 *bis* (Partly Confidential: Attached Schedules to Annex I Filed Confidential), Case No. IT-04-78-PT, 2 Sept. 2004, para. 15. On 19 May 2005, OSCE agreed to co-operate with the OTP in monitoring cases transferred to the countries of the former Yugoslavia. See ICTY OTP completion strategy IV, *supra* note 133, para. 11.

185. See Address by Judge Theodor Meron, 29 June 2004, *supra* note 155, at 6, and 23 Nov. 2004, *supra* note 138, at 30. For the same opinion, see Mundis, *supra* note 133, at 158. See also ICTR completion strategy IV, *supra* note 133, paras. 38 and 39; and ICTR completion strategy V, *supra* note 133, para. 40. The ICTR Prosecutor will make alternative proposals to the Security Council if it is eventually not possible to transfer cases to national jurisdictions.

186. ICTY President completion strategy II, *supra* note 133, para. 29; ICTY OTP completion strategy II, *supra* note 133, para. 32.

187. Current state of the International Criminal Tribunal for the Former Yugoslavia: future prospects and reform proposals, Report submitted by Judge Claude Jorda, President, on behalf of the judges of the Tribunal, 14 Sept. 2000, UN Doc. A/55/382-S/2000/865, paras. 53 and 56.

188. See 'Consultants' Report to the OHR: The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina', May 2002, at 10–12, cited in Bohlander, *supra* note 133, at 70. See also 'The Principle of Complementarity in Practice', *supra* note 18, para. 33.

not suffice that states adjudicate international crimes domestically and bring an end to impunity for this kind of crime; it is also necessary to consider the conditions in which international crimes are adjudicated at national level, especially in situations of widespread inter-ethnic violence, in order to avoid trials conducted unfairly to the detriment of the accused.[189]

It is important to note that the consideration of the fairness of domestic proceedings for international crimes is not a mere policy decision taken by the ad hoc tribunals. On the contrary, such consideration is necessary to make sure that national courts effectively contribute to the purpose behind the establishment of both tribunals, namely 'the restoration and maintenance of peace' in the region.[190] The ICTY and the ICTR experience confirms the idea, already expressed by the Security Council and underpinning relevant peace agreements, that there can be no peace if national proceedings for international crimes do not afford a fair trial to the accused.[191] The emphasis seems therefore to be shifting from the famous adage 'no peace without justice', meaning that there can be no peace without bringing an end to impunity for international crimes, to the more accurate one of 'no peace with victor's justice', meaning that it is equally important for domestic peace and reconciliation that impunity is brought to an end in a fair and impartial manner.

5. Conclusions

The ordinary meaning of the terms in Article 17(2)(b) and (c), considered in their context and in the light of the object and purpose of the Statute, is not decisive as to whether the 'sign' of the lack of due process in domestic proceedings for crimes within the jurisdiction of the Court has an impact on the admissibility of a case before the ICC. If the object and purpose of the Statute is the establishment of an international criminal court that complements national efforts to put an end to impunity for international crimes, only domestic proceedings which are delayed or are not impartial or independent in order to shield the person concerned from criminal responsibility are relevant to the ICC. On the contrary, if the Statute is meant to establish an international criminal court that complements state action to bring an end to impunity *in a fair manner*, cases of domestic proceedings for genocide, crimes against humanity, or war crimes lacking due process guarantees

189. According to data received by ICG, in Jan. 2002 there were some 5,500 individuals under investigation for war crimes in the Federation of Bosnia and Herzegovina, while 278 had actually been accused. In the Republika Srpska, approximately 700 new investigations were under way. See International Crisis Group, 'Courting Disaster: The Misrule of Law in Bosnia & Herzegovina', ICG Balkans Report No. 127, 25 March 2002, available at http://www.icg.org/library/documents/report_archive/A400592_25032002.pdf, at 31.

190. UN Security Council Resolution 827 (1993), *supra* note 50; ICTY President completion strategy III, *supra* note 133, para. 6; Jorda, *supra* note 154, at 575.

191. See, e.g., Annex 6 of the 'Dayton Peace Agreements', *supra* note 126, whereby an 'Agreement on Human Rights' was concluded in order to ensure *inter alia* that the right to a fair trial could be enjoyed without discrimination. See also Security Council Resolution 1315 (2000), 14 Aug. 2000, UN Doc. S/RES/1315 (2000), on the establishment of the Special Court for Sierra Leone, where the Council reaffirmed that 'persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice *in accordance with international standards of justice, fairness and due process of law*' (emphasis added).

may be admissible as such before the ICC, regardless of the prejudice or benefit of such lack of due process for the person concerned.

The 'preparatory works' of Articles 17 and 20 show that the drafters of the Statute favoured the intervention of the ICC only when the irregularity of the domestic proceedings was intended to shield the person concerned from criminal responsibility. The human rights mentioned in Article 17(2) were not read as standards for the Court to protect the individual against possible abuses by the state, but as standards for the Court to prevent state authorities from shielding a person from accountability. This is confirmed by the fact that the ICC clearly lacks the means to address human rights violations in the area of due process *as such*, being only empowered to step in in lieu of a national jurisdiction in respect of specific cases. Sovereignty concerns and the fear that the ICC may impinge on national courts seem to be the reasons behind this decision.

It appears, therefore, that the ICC can take over cases where the domestic lack of due process prejudices the suspect or accused, only if the unfair proceedings are meant to blame the person concerned for crimes actually committed by others, shielding the latter from criminal responsibility. The violation of due process of law is not per se a ground for admissibility before the ICC.

However, the experience of the ICTY and ICTR shows that domestic peace and reconciliation may be dependent not only on the fact that impunity is brought to an end, but also on the manner in which this objective is accomplished. Following this view, the completion strategies of both tribunals envisage the exercise of primacy over domestic cases which are not conducted in a fair manner, even if the lack of due process is not meant to shield the person concerned from criminal responsibility. If the ICC is equally meant to make an effective contribution to 'the peace, security and well-being of the world',[192] it is apparent that action needs to be taken as well in relation to situations and cases where persons do not enjoy a fair trial for crimes contained in the Rome Statute. In such scenarios, the ICC can only advance its cause by acting as a model for compliance with international obligations of due process, in the hope that this may on its own encourage states to act in a similar way when prosecuting international crimes.[193] In order to complement the Court's contribution to international peace and security, it is therefore necessary that other mechanisms be established to guarantee the fairness of domestic proceedings for international crimes.

192. Rome Statute, Preamble, para. 3.
193. *See* Borek, *supra* note 36, at 78; Burke-White, *supra* note 16, at 92; Benvenuti, *supra* note 36, at 32; and Broomhall, *supra* note 36, at 104.