

III. ŽMOGAUS TEISĒS IR TEISĒSAUGA

THE PRINCIPLE OF COMPLEMENTARITY IN THE ROME STATUTE

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Abstract

This article deals with one of the most important and delicate issues of the mechanism of International criminal law. Necessity to clear up all issues connected with the principle of complementarity's is even greater since the Statutes of Tribunals for former Yugoslavia and Rwanda does not recognize such principle. There are several criteria for the Court when deciding on admissibility cases, which should be analyzed from the theoretical point of view. Yet, since there is no jurisprudence still, this question will, for sure, emerge again when the Court starts with first cases.

Introduction

All sovereign states are obliged to respect and protect norms (among the others) gathered in two huge parts of International public law – Human rights and Humanitarian law. Even if they are not parties of multilateral treaties they are still under power of international customs. There is no doubt on this matter nowadays. If doubts had existed, they were solved during the famous Nuremberg trial, which once again emphasized strength of customary norms.

It also means that states are obliged to incorporate in there national law norms which would regulate what happens if norms of International human rights law or Humanitarian law are breached. Mostly it was done trough-defining crimes that present violation of those two groups of international law. States are obliged to prosecute crimes committed as a breach of International human rights law and Humanitarian law.

Reality showed that this system does not function always and emerged necessity for an international court that will undertake prosecution for war crimes perpetrators. The need for an international court has been envisaged usually after world wars, as it happened after First World War - but with no success, than again after Second World War - with success, and in our not so far past, in nineties after wars in Yugoslavia and Rwanda. From the beginning of XX century international community has been aware of necessity for such a court and several times it looked like finally an agreement could be reached. And finally it happened at the beginning of XXI century.

Mr. Thomas W. Smith [1, 175–192] said: „The greatest novelty of the ICC is that it exists at all“. This sentence was addressed to the long history of attempts to make an international court with criminal-matter jurisdiction. But again there is another ironical aspect of the International Criminal Court that we nowadays have and that is the possibility that it may never precede. That is thanking to the principle of complementarities and it is not either good or bad by itself.

The Principle of Complementarity

What we are speaking first of when we speak about an institution or body is its jurisdiction. Defining jurisdiction we find out in what matter is that body going to proceed, for what period, over whom, and over which territory. Speaking in law terms we are defining jurisdiction *rationae materiae*, *rationae temporis*, *rationae personae* and *rationae loci*. But yet for the ICC to proceed, it is not enough just to clear out these issues, but also it is of utmost importance not to cross „vertical“ jurisdiction with the sovereign states, parties to the Rome Statute. Defining whether jurisdiction belongs to the ICC or to a State we speak about the admissibility of a case and the issue of admissibility is defined according to the principle of complementarity.

The Rome Statute clearly divides these two sets of elements that allow the ICC to proceed. To speak about admissibility it is necessary to know how jurisdiction is to be established, as far as the question of admissibility comes after the question of jurisdiction. But as far as this work is dedicated only to the principle of complementarity, no other mentions about jurisdiction will be posed.

The importance of the principle of complementarity can be realized with the first glance at the Statute. At the very beginning of it, at the Preamble, this principle is set out. Namely it is said: „... the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction“. At the Preamble it is also stressed that „it is duty of every State to exercise its criminal jurisdiction over those responsible for international crimes“ but also „that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured at the national level and by enhancing international cooperation“ and determination „to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes“.

If we read between the lines we can realize that the need for an international court is raised from the inability of states to prosecute war crimes perpetrators. But again, as the international community is organized according to the main principle - sovereignty of states, jurisdiction of the Court is framed with the jurisdiction of the States (parties to Statute), which will keep primacy in proceeding for war crimes. One can ask: „Why do we speak about that at all; isn't it the only way that individual responsibility can be challenged at the international level; isn't it undisputable?“ For all of these questions the correct answer should be - yes, but again ad-hoc Tribunals hold the completely opposite approach to that question and also jurisdiction over war crimes is universal.

Tribunal's jurisdiction is based on the principle of Tribunals primacy. For sure such two completely opposite approaches in solving this matter shows us the inconsistency in inter-

national regulations and in international community itself. Reasons for that solution are to be found in political sphere and the moment and way of establishing both Tribunals, which are quite opposite to establishing the ICC.

There is another important principle, which should be stressed again when speaking of jurisdiction and admissibility. Jurisdiction to proceed for war crimes, crimes against humanity and genocide is universal. By that, the impact of principle of complementarity is not only between the ICC and a State whose citizen has committed a crime or on which territory a crime has been committed, but also between the ICC and any other State party to the Rome Statute. Sovereignty of States in this matter has been already diminished, much before the creation of the ICC, so there should be no reason to develop further on rivalry between States who aim to hold exclusive jurisdiction over their citizens and the ICC.

Article 1 of the Rome Statute establishes complementarity. Though it is not presented in the form of principle it is clearly said that the court „...shall be complementary to national criminal jurisdiction...“. There is no whatsoever the definition of the term complementary. But is really the existence of international body complement with the national court? That is it to be seen, most probably in not so far future, but the experience that we have from already existing courts (Tribunals) is that the international courts are usually in opposition to the national courts.

So, we can conclude that the principle of complementarity means that the ICC will proceed only in situation when national courts failed to do that. That also means that if States fulfil their obligations bona fide the ICC will never proceed. The ICC is not an appellate body; it is not possible to lodge a complaint to the ICC. The whole system is completely different from the traditional, hierarchical subordinating system that we know and its name is complementarity.

From the very beginning of ILC [2, 41–78] work, principle of complementarity has been imposed. There had been no discussion on whether or not this was the correct approach. But, as any other principle, this one also should have been defined further on so that it can be applicable and yet not opposite to other rules and principles. This was certainly one of the most delicate questions during the preparations of the Statute and also very complex from the point of preciseness so that it can assure no gap or intervening in internal affairs over acceptable limits, but again to provide and fulfil the ideal of justice. And debate on that issue has been carrying on up to the Rome conference.

The criteria

Major questions that arise out of principle of complementarity are – in what situations we can say that a State has failed to fulfil its obligation, how do we now that, who is to decide on this matter or in law terms when a case becomes admissible for the ICC?

First approach proposed by the ILC was that the Court should overtake the case in situations when national trial procedures „may not be available or may be ineffective“. This formulation was rejected as too vague. Other proposed terms such as ‘good faith’, or ‘sufficient grounds’ were also rejected.

The criteria for when the case is admissible for the ICC were found mainly in the words „inability“ and „unwillingness“ enriched with the adverb „genuinely“. According to the Article 17 of the Rome Statute the case will be admissible for the ICC if the State is unwilling or unable genuinely to carry out the investigation or prosecution or when the investigation has been carried out with result not to prosecute if decision not to prosecute aroused from unwillingness or inability of the State genuinely to prosecute. Besides these two major situations two more have been added. One is that the Court will not proceed if the convict has already been tried and that is according to the principle of ne bis in idem as defined in Article 20 and the other is that the Court will not proceed if the case is not of sufficient gravity to justify further action by the Court.

The criteria for admissibility of a case should be split up in three groups. The first group concerns investigation and prosecution. The second group concerns the trial. For the first group key words are – unwilling and unable genuinely. For the second group the key words are independent and impartial trial. And the third group is on Courts discretion based on assessment whether the case is of gravity that justifies further action by the Court.

Unwillingness and inability

As is mentioned before, the approach of Article 17 is based on the hypothetical situation that the State has commenced the investigation or prosecution. Key words for determining possibility for the ICC to assume jurisdiction are unwillingness and inability. Article 17 in paragraph 2 defines how unwillingness should be understood, and in paragraph 3 it addresses to the term of inability.

That the State is unwilling genuinely to carry on investigation or prosecution the Court will find out in three possible situations: (1) if the investigation or prosecution are sham; (2) if investigation or prosecution are undertaken with an „unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice“; (3) if the investigation or prosecution have not been conducted independently or impartially and are taken in the manner which is inconsistent with bringing the convict to the justice.

All three situations are in fact the explanation of the term unwillingness, but there is also the term genuinely which shouldn't be forgotten. The term genuinely raised the proposed criteria to the even higher level. According to that, a State could have undertaken steps to bring the convict to the justice, but genuinely the State is not willing to sentence and punish those persons. In any of possible three situations, State is performing law procedure aware of its obligation under both domestic and international law, but from some other reasons a perpetrator is not to be sentenced. Reasons for that can vary from person to person and they usually depend on the political reasons.

There can be cases when unwillingness is obvious. John Holmes [3, 667–686], for example, says that if there are bypassing the normal criminal procedure, or if special investigator who is politically aligned is appointed or if some secret tribunals are established – than it would be obvious that a State is unwilling genuinely to bring a perpetrator to justice.

But, it is not hard to imagine that if a State is genuinely unwilling to punish a perpetrator, than there are lots of ways to do that, which won't be so obvious. John T. Holmes [3, 675] says: „However, the underlying premise of the complementary regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases“. From this point of view it seems that it would be very hard for the Prosecutor to assume jurisdiction in situations when a State is not cooperating, when a State is trying to shield a convict and not to cross limitation of non-interference.

In situations like described necessity for ICC to assume the jurisdiction emerges, but that is not so easy job for the Prosecutor to carry on. Formulations of Article 17 (2) are quite vague, imprecise and left lots of space for arbitraries. That is of course, problematic from the point of the Prosecutor but also from the point of view of States.

First on the list way to show unwillingness is shielding. How to realize that the State is shielding a person, how to base that on firm evidences? The Prosecutor is titled to ask for information on the proceedings from the State, but on the other hand the State is not obligated to supply the Prosecutor with all relevant information (Article 19 (11)). If the State is about to shield the possible perpetrator, than it is likely to expect that State will express exactly the same attitude toward the Prosecutor. It is not so difficult, if wanted, to hide information from international body that is far from original evidences. Simply, with hiding the crucial evidences it is very easy to convince that there is no ground for further investigation or

prosecution. This approach is again based on the cooperation between states as States-parties to the Statute and the ICC and their acting according to the principle of bona fide. But, since the first presumption is attempt of the State to conduct proceeding in the opposition to the principle of bona fides it is even less possible to expect the State will act toward the international Prosecutor in respect of the principle bona fides.

Unwillingness can be demonstrated when the investigation or prosecution are conducted with „unjustified delay“. Key word in determining unwillingness is unjustified delay and it brings us again to the area where impreciseness and arbitrariness can be met. During the preparation of the Rome Statute word „undue“ delay was proposed, but again replaced with the term „unjustified“ as more precise. Since the delay can be justified and since it does not necessarily reveal unwillingness it is more precise to use the term unjustified. Only if the delay is justified it should be left some more time to the State to continue the investigation or prosecution. That also means that the term unjustified is not to be understood only in terms of time. Time factor is included in this criterion since the term delay incorporates pass of time. Again it was not possible to limit matter of time in terms of months or years since the procedure vary from state to state. So if the time is running out, investigation or prosecution stands still, but with reason which is justified, the Prosecutor is not likely to determine admissibility of the case before the ICC. Yet, since the question of admissibility is on sole Prosecutor discretion it is up to the Prosecutor to define whether the delay is justified or not. Closer explanation of the term-unjustified delay is that in circumstances it is inconsistent with intent to bring the person concerned to justice. If we pose this question hypothetically no doubts are to be aroused if the situation in the state is normal but authorized organs are not proceeding, as it should be in normal situations. But if the situation in the state is turbulent is it justified or not to postpone proceedings on war crimes? Since there is no objective factors for the Prosecutor to rely on in circumstances as described, the solution for this situation is to be found elsewhere. It would be again on the Prosecutor to decide on „circumstances“ since they can justify delay or make the delay unjustified. If the situation in a State is turbulent or otherwise makes it difficult for a State to handle the case, than it is excellent that there is the ICC to proceed on breaching of law. Here we come again at the starting point of this premise and that is willingness. Yet a State could be willing but not capable to continue with the proceeding and that is the reason, which postponed the investigation or prosecution. Here question of unwillingness stands different than in situation if the investigation or prosecution have been commenced but with the hidden aim to shield perpetrator. So, in the other possible situation unjustified delay does not necessarily mean unwillingness, it can also point out to the inability. But since there is opportunity for the ICC to decide on terms of inability at the end it is not of utmost importance will it be based on unwillingness or on inability.

The third criterion is based on the breach of independence and impartiality of the proceedings. Article 17 (2) (c) defines that if the proceedings are not being conducted independently or impartially, and they are being conducted in a manner, which, in the circumstances, is inconsistent with intent to bring the person concerned to justice than the ICC can assume the jurisdiction. As in previous two criteria adoption of the terms such as independence and impartiality are suitable to be misused from the Court, but also to leave the room to the States to avoid their duties. If influence on organs authorized to lead investigation or prosecution is obvious enough, than Prosecutor's job would not be difficult. But if influenced individuals had guided from some hidden post or the influence and that is not obvious enough the situation is getting more complicated and delicate. Close to this question is again question on how far can Prosecutor go with interfering in internal affairs in a State and on what objective factor the „circumstances“ should be asset?

The other criterion on which admissibility of the ICC can be established is inability of a State to undertake the proceedings. According to the Article 17 (3) inability is to be based on total or substantial collapse or unavailability of national judicial system which make a

State unable to obtain the accused or necessary evidence and testimony or otherwise unable to carry out its proceedings. This formulation contains three possibilities for the Court to lean on. The first is total collapse, the second substantial collapse and the third is unavailability of national judicial system. Each of them is to be resulted in inability of a State to (1) obtain the accused, (2) obtain necessary evidence and testimony or (3) otherwise unable to carry on with the proceedings. It appears that question of inability is based on more objective qualifications than unwillingness. The first two criteria are highly objective, they are to be established on firm facts – whether a State obtained an accused, evidence or a testimony or not. It should be obvious when a State has problems to obtain the accused or evidences or testimony. But again the third possibility „otherwise“ leaves lots of room to the Court when making determination. There is no closer explanation what is meant with the term „otherwise“. Again, we must underline vagueness of this concept. It leaves the Court possibility to determine it on any fact and call it „otherwise“. On the other hand, it was inevitable to include such broad concept since collapse or unavailability of judicial system can be revealed in various ways. It should be stressed that the Prosecutor is not to determine that there is collapse or unavailability of judiciary but that there is inability to proceed due to the collapse or unavailability of judiciary. It is obvious that inability to proceed can be shown in many various ways. Yet, the paragraph 3 has chosen to emphasize lack of accused, evidence and testimony and all other possible situations to call „otherwise“. It should have been defined in more precise words, or at least to provide the Prosecutor and the Court with some directions. With the definition that we have situation is quite imprecise.

There is another question arising from both criteria. Does Article 17 cover situations when there is no investigation and no prosecution? Unwillingness is most obviously expressed if authorized organs have not started investigation at all. Yet, paragraph 2 of Article 17 addresses only to the situations when either investigation has been undertaken or both investigation and prosecution. It appears that only paragraph 3 of Article 17 addresses to the possibility that there is lack of motions from a State. But than it is inability, not unwillingness. On the other hand a State should take the burden of obvious „unwillingness“ or it is even better to say take responsibility for not fulfilling duties that are on it according to the national and international law. Yet, there is no such ground for responsibility in law terms, but it can be at least responsibility in moral terms.

The influence of ne bis in idem principle

Principle *ne bis in idem*¹ is incorporated in the Rome Statute. It is defined in Article 20 and is firmly connected with the issues of admissibility. To say in the most simple way the principle *ne bis in idem* means that a person can be tried only once for the same accusation. In the light of our topic that would mean that the ICC can't try a person if already tried by other (national) court.

Although the principle *ne bis in idem* is incorporated in most national legal systems and in numerous international treaties, there is no one definition and one and same practical influence of this principle. The Rome Statute has established [4, 705–729] this principle in respect of different levels of law – international and national, which brings us to even more delicate sphere. One should bear in mind that this principle crosses with other principles – sovereignty of states, interference of the ICC in national procedure and issue of admissibility. That is why it is necessary to be even more precaution when applying this principle.

As for the influence of this principle to the issue of admissibility, Article 20 (3) provides possibility for the ICC to assume jurisdiction even if trial at the national level has already

¹ Expression *ne bis in idem* is used in this version in the Rome Statute. But, the same principle can be found under names *non bis in idem* (as is used in Statutes of both ad-hoc Tribunals) and also with little differences the same meaning is covered with the expression *res iudicata*.

been completed. Of course, to remind the readers, this is in respect of the crimes prescribed within the Statute, namely genocide, war crimes and crimes against humanity¹.

The ICC will be able to assume jurisdiction if the trial has been conducted (1) with the purpose to shield a person or (2) if the trial has not been conducted independently or impartially in accordance with the norms of due process recognized by international law and if circumstances show that the trial was inconsistent with an intent to bring a person to justice.

The criteria used in this rule are basically same as criteria set out to determine unwillingness. That leads us again to the same questions and reveals all impreciseness of formulations used. It is not difficult, when a situation is clear and circumstances allow an easy and unequivocal conclusion. But if the trial has been conducted in the usual manner it would be very difficult to draw a line over which the ICC can not go, unless to breach a principle of non-interference in domestic affairs.

Possibilities for a State to shield a convict are numerous. A State can conduct a fair trial, sentence a convict, but at the end to declare amnesty, parole or any other possibility that law provide to release that person. In such a situation the ICC is powerless.

Yet, there is another serious lacuna, which can make this situation even more complicated. The ICC does not provide a rule that would regulate what happens if before a national court a person has been tried and sentences for an ordinary crime (for example murder). There is no doubt that this is not just pure oversight. The Statutes of ad-hoc Tribunals both regulate this delicate situation. Nevertheless, for the sake of truth, it must be cleared out that this stipulation suppose that all national legislation have exactly the same provision in respect of genocide, war crimes and crimes against. But that is not situation, those crimes are regulated differently even in the Statutes of Tribunals and the Rome Statute [5, 67–80].

One possibility to exceed this situation is possibility to name the trial for an ordinary crime as a sham trial. But, again that is one more issue that is extremely difficult to define on theoretical level.

Gravity of a case

Article 17 (1) (d) provides one more criterion for the ICC in admissibility cases. The ICC shall determine that a case is inadmissible if it is not of sufficient gravity to justify further action by the ICC.

This formulation inevitably pushes us back to the origins of the Court and to the question what was wanted to be required with establishing this Court? One of explanations, for example, is given by William Schabas. He says: „The International Criminal Court, like its earlier models at Nuremberg, The Hague and Arusha, is targeted at the major criminals responsible for large-scale atrocities. Most of its „clientele“ will not be actual perpetrators of the crimes, soiling their hands with flesh and blood. Rather, they will be „accomplices“, those who organize, plan and incite genocide, crimes against humanity and war crimes“ [6, 81].

If we accept this view and role of the ICC as presented by W. Schabas than Article 17 (1) (d) is coherent with this explanation. On the other hand, at the Preamble it is said (par.11): „Resolved to guarantee lasting respect for and the enforcement of international justice (...)“. But, it seems that there is a contradiction at the Rome Statute itself. There is one more Article that justifies opinion presented by W. Schabas. Article 53 (1) dedicated to initiation of investigation allows the Prosecutor to decide whether he or she will initiate an investigation. Article 53 (1) (c) reads as follows: „Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice“.

¹ For some unknown reason this article does not address to the crime of aggression.

But again, crimes defined within the Rome Statute are considered as the most serious crimes. Is it possible to say that one commitment of genocide is less serious than some other commitment of genocide? If an act can be defined as genocide, crime against humanity or war crime, than it should be, by itself, of sufficient gravity to be tried by the ICC.

By incorporating formulations of Article 17 (1) (d) and Article 53 (1) (c) the Prosecutor has been supplied with huge discretionary power. Dilemma whether to grant the Prosecutor such a broad power or not was marked with two opposite approaches. The rivalry emerged between two opposite concepts. Whether to give the preference to the ideal of absolute justice or to stick with more realistic approach where it is obvious that only one international criminal court will not be able to prosecute all crimes that it possibly should. The other concept prevailed and after negotiations between States at the Rome conference, it was decided to allow the Prosecutor to decide which case deserves Court's attention, trial and sentence.

Conclusion

This article was aimed to discuss on one of the most important issues of the Rome Statute – relation between national courts and International court. The complementarity regime is the corner stone of whole mechanism that should provide the end of impunity for violations of human rights law and humanitarian law.

Again, this whole work is prevailing with questions and no answers.

It should be stressed once again that the complementary is one of the most delicate issues of the Rome Statute. From the point of view of the author of this text it will remain delicate even when applying it. From that reason it should have been defined in more precise terms, in terms, which would leave less room for both the Court and States to misuse their powers. It could be said that such sharp mark given to the Statute is given to early, in the period when the Court has not yet started to proceed. For sure, crystallization of this whole principle will go on at the same time with their applying. And we should believe that the Court would do that bona fide. At the end its reputation will be based on this question.

The other danger that is coming from mentioned impreciseness is hard job that is in front of the Prosecutor and the Court. It won't be easy to meet the criteria set out in Article 17. Also there will be always lots of possibilities for States, if wanted, to block Court's work. That by itself can disturb fulfilment of the purpose of the Court's existence, punishment of those who violated the law.

To conclude, the Court can find itself in situations when his actions are either blocked or based on decisions, which can be marked as subjective, arbitrate, or violation of its power.

To avoid all possible negative developments in future Court's work there is also scope for precise interpretations by the Court, either in the Court's regulations or its jurisprudence.



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Papildomi principai Romos statute

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Pagrindinės sąvokos: Romos statutas, papildomumo, leistinum, nepasiruošimo, nesugebėjimo, nepriklausomumo, nešališkumo, orumo principai.

SANTRAUKA

Straipsnyje nagrinėjamos problemos sietinos su Tarptautinio kriminalinio teismo procesine veikla taikant papildomus principus bylose, susijusiose su Romos statuto normų teisėtumo pažeidimais. Tarptautinės baudžiamosios teisės ir baudžiamojo proceso mechanizmo veikimas siejamas su žmogaus teisių apsaugos bei pažeidžiamumo atvejais, kurie akivaizdūs buvusioje Jugoslavijos valstybėje (dabar Serbija ir Juodkalnija).

Straipsnyje išskiriami kriterijai, kuriais turėtų vadovautis Tarptautinis tribunolas ir Tarptautinis kriminalinis teismas priimdami sprendimus bylose dėl Romos statuto normų pažeidimų. Manytina, kad aiškios teisminės praktikos nebuvimas skatina ieškoti teorinių ir mokslškai pagrįstų teiginių dėl Tarptautinio kriminalinio teismo nagrinėjamų Romos statuto bylų.

Straipsnyje diskutuojama galimybė įtvirtinti valstybės nacionalinėje teisėje ir tarptautinėje teismų praktikoje tokius teisingumo vykdymo principus, kurie papildytų vienas kitą ir kuriais vienodai galėtų vadovautis tarptautiniai teismai (tribunolai) ir prokuratūros institucijos.

Straipsnyje daroma išvada, kad Tarptautinis kriminalinis teismas, nagrinėdamas bylas dėl Romos statuto pažeidimo, galėtų dažniau taikyti vienas kitą papildančius principus priimant sprendimus. Šiuo atveju Tarptautinio kriminalinio teismo sprendimai turėtų būti diskretiški, nepaveikiami skirtingų valstybių ir tinkamai vykdomi. Kita vertus, Tarptautinis kriminalinis teismas privalo nuolat aiškinti priimamus sprendimus ir sukurti teismų praktiką tarptautinėje jurisprudencijoje.

