

Complementarity

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National Sovereignty

- Art. 2.7 UN Charter
Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or
shall require the Members to submit such matters to settlement under the present Charter;
but this principle shall not prejudice the application of enforcement measures under Chapter VII.

'The UN and International Law

• CHAPTER III (Charter UN (1945))

ORGANS

– Article 7

- 1. There are established as the principal organs of the United Nations:
 - a General Assembly,
 - a Security Council, a
 - n Economic and Social Council,
 - a Trusteeship Council,
 - an **International Court of Justice**,
 - and a Secretariat.
- 2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter

San Francisco 1945/46



UN – International Criminal Court 1945

- International Law Commission:
 - Primary jurisdiction
 - Cross bordering crimes
 - The crime of genocide;
 - Crimes against humanity
 - War crimes;
 - The crime of aggression.
 - If ICC jurisdiction would collide with national statal competences,
 - The State should give in
 - And yield actions and powers to ICC
 - ICC would supersede national competences

UN - International Criminal Court 1994

- International Law Commission:
 - “Emphasizing further that such court is intended to be **complementary** to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective”
 - Complementarity is born....

Complementarity

- A Neologism,
born during the making of the ICC
The International Criminal Court
- A Indefiniendum,
for the sake of diplomacy
- A problem for practitioners
- Close to Subsidiarity



FAO building, Rome 1993 - 2000



ICC building, The Hague 2003 -

Complementarity as principle

- A defamation of the territorial or custodial state.
 - ICC can only wield its jurisdiction in case national jurisdiction is,
 - Not willing
 - Not available
 - Or will be ineffective
- Art. 1 ICCS:

“ICC shall be complementary to national jurisdictions”

Three interlinked issues

- Admissability
- Referral
- Willingness

Admissability

Article 17 ICCS

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is **inadmissible** where:
 - a. The case is being investigated or prosecuted by a State which has jurisdiction over it, **unless** the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - b. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, **unless** the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
 - d. The case is not of sufficient gravity to justify further action by the Court.

Willingness

1. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, 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 referred to in article 5;
 - b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - 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.

Referral

Art. 14 ICCS

Referral of a situation by a State Party:

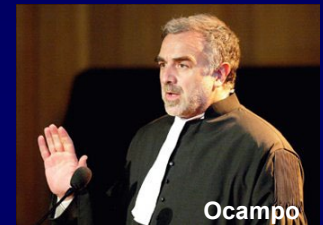
1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation of the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

The case of Charles Taylor would be perfect example of such referral



Statal Referral

- Was thought to be the main mechanism to trigger ICC jurisdiction from one to the other State.
- Examples since then,
 - Congo 2004
 - President Kabila requested the ICC Prosecutor Luis Ocampo to start investigations
 - The president admitted that,
 - National jurisdiction was neither available nor effective
 - The president of Uganda 2003
 - A comparable request



Referral by the UN Security Council

- A recent example: Dafur – Sudan
 - The UN Security Council overruled national Sudan jurisdiction, by referral of the ongoing humanitarian crimes to the ICC Prosecutor
 - Sudan contested heavily the legitimacy of the referral because,
 - Their national system had not collapsed,
 - They were capable of maintaining their own legal order,
 - The system was effective
- An intrusion on National Sovereignty (?)



UN envoy Jan Pronk



Statal Referral main triggering mechanism?

Article 5 ICCS

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Statal referral in ICCS: pure theory

Article 13

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a **State Party** in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the **Security Council** acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14

Referral of a situation by a State Party

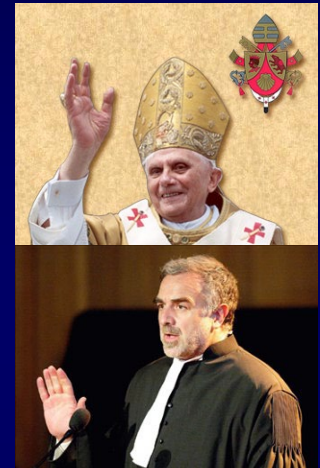
- 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
- 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

The Prosecutor acting “Proprio motu”

Article 15

Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.



The Pre Trial Chamber and the Prosecutor

Admissability
(art 13 a+b ICCS)

Trial

??
?

Complementarity

Jurisdiction and admissability without problems

- Chapter VII UN-CHARTER
 - Provides a non-complementarity
 - Provides primary jurisdiction
 - Status: UN organ
- Best known examples,
 - ICTR
 - ICTY



ICTRWanda



ICTYugo Slavia



The difference

- Ad hoc UN

- Absolute primary jurisdiction based upon mandatory rule
- National jurisdiction have to yield, irrespective of national interests.
- Conflicts over positive (national) jurisdiction will automatically end in a preference for UN-competences
- Admissability no discussion

- ICC in general




- Complementarity
- National jurisdiction first, national interests included
- Conflicts over positive national jurisdiction
 - Complicated
 - Slippery.
- Admissability,
 - Complicated
 - Slippery





A sting in the tail




- ICC has to determine in **non-UN-cases**
 - Non willingness ... contra productive
 - Non availability ... non existent
 - Non effectiveness ... unable
- ICC has no primary jurisdiction,
it needs legal assistance
it needs penal enforcement power
 - How to get assistance of a not-willing party?
 - How to find assistance were there is nothing available?
 - How to trust assistance if there is no effectiveness?

ICC...shall be complementary to national criminal jurisdiction

-  Lack of cooperation of Government X...
-  Lack of willingness of Government X
-  Lack of power to provide for legal assistance
of X-Justice authorities

-  Who will provide the evidence – acceptable !
 -  Willingness
 -  Availability
 -  Effectiveness

- When provided,
 -  The Pre Trial Chamber might confirm the findings
Complementarity is applicable! Next?

If Complementarity is applicable

- Arrest, surrender of the accused
(Chapter IX ICCS)
- 👉 Which country will use its penal enforcement power to assist
 - 👉 The collapsed country X ?
 - 👉 The bordering country?
 - 👉 Third countries?
 - 👉 The host country to ICC?
 - 👉 Construction of a sub-organ of ICC?
- 👉 Status of ICC

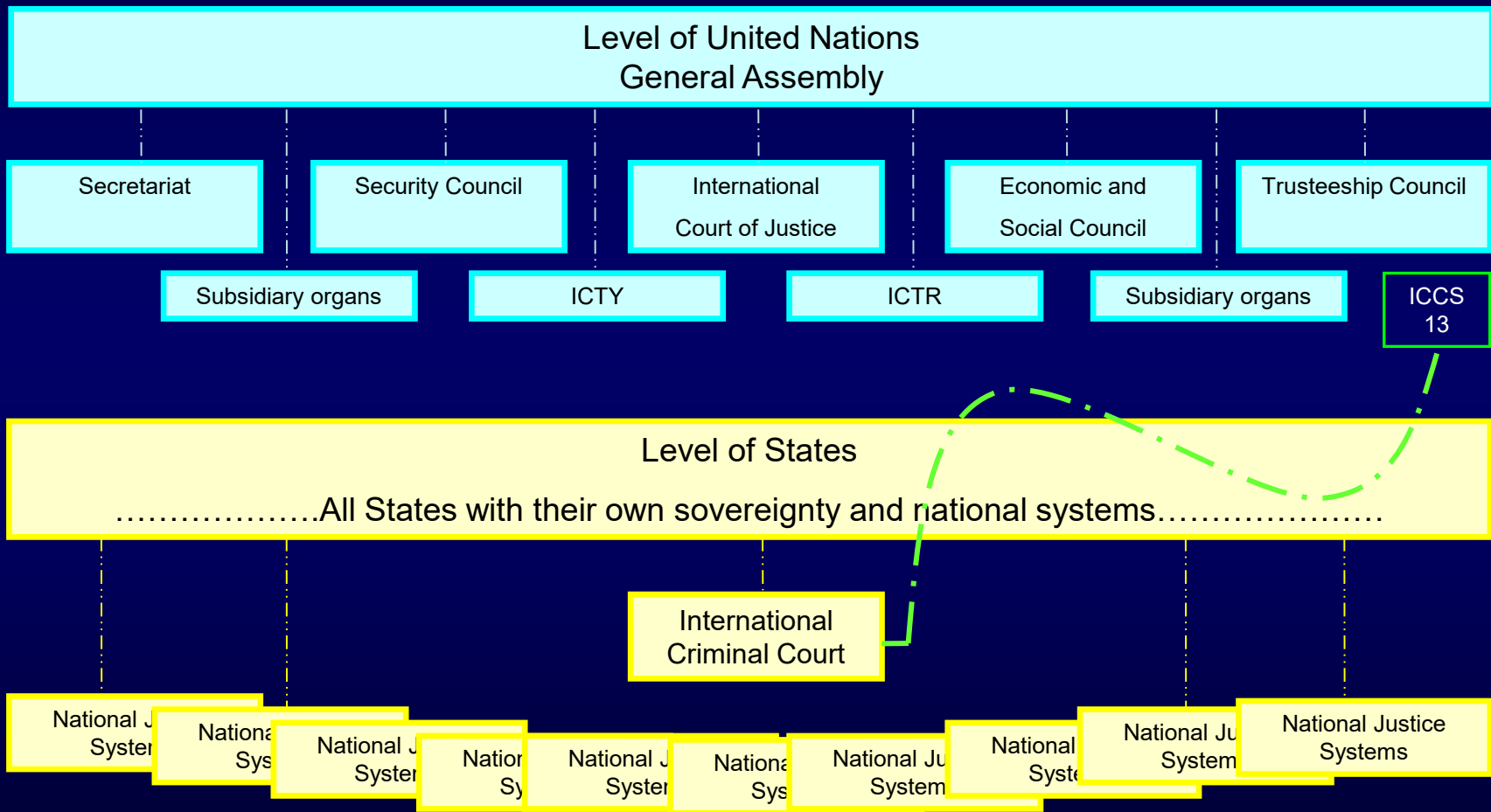
Status of ICC

- 1945 ICC
 - A sub-organ of the UN
 - Primary jurisdiction
- 1994
 - UN International Law Commission
 - Abolished the primary jurisdiction
 - Invention of Complementarity
- 1998
 - Roman Applause,
USA goes controversial towards definitions of crimes
 - ICC scope limited
 - ICC a Cuckoo's egg, genetic UN,
 - Older Sister ICTY not recognised as jurisdictional example
 - parental upbringing by Member States



David Scheffer Amb USA

A sketch of hierarchies



ICC

- The fight against Humanitarian crimes needs a easy going and competent ICC
 - Easy going,
by keeping it as small as possible
 - Competent,
by making it a sub-organ of the UN
 - Don't spill time
 - Humanity needs ICC



Complementarity

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In cooperation with

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