TOAEP | Torkel Opsahl Academic EPublisher

Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

E-Offprint:

Patricia Pinto Soares, "Article 17 of the Rome Statute of the International Criminal Court: Complementarity – Between Novelty, Refinement and Consolidation", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels.

This and other books in our FICHL Publication Series may be openly accessed and downloaded through the web site http://www.fichl.org/ which uses Persistent URLs for all publications it makes available (such PURLs will not be changed). Printed copies may be ordered through online and other distributors, including https://www. amazon.co.uk/. This book was first published on 19 November 2015.

ISBN 978-82-8348-017-7 (print) and 978-82-8348-016-0 (e-book)

5

Article 17 of the Rome Statute of the International Criminal Court: Complementarity – Between Novelty, Refinement and Consolidation

Patricia Pinto Soares*

5.1. Introduction

The coming into force of the Rome Statute ('ICC Statute') and the establishment of the first permanent International Criminal Court ('ICC') are some of the most remarkable achievements in the history of international criminal law. The core of the functioning of the ICC is inextricably related to the principle of complementarity, often equated to a quasi-fascinating creation of the ICC Statute. On the basis of a historically based approach, this chapter will propose a different conclusion. It starts by scrutinising the principle of complementarity as enshrined in the ICC Statute as well as few creative examples of national implementing laws in relation to it.

The chapter then argues that complementarity as such is not a brand-new construction of the ICC Statute. To that effect, it follows an analysis of the setting on which the relationship between national and international jurisdictions concerning the prosecution of the most serious perpetrators of crimes under international law has been based, from the penalty provisions of the Treaty of Versailles to the *ad hoc* tribunals'

* **Patricia Pinto Soares** holds a doctorate from the European University Institute ('EUI'), Italy; a Master of Research in Law (EUI); postgraduate course in Economic and European Criminal Law and a law degree from the Faculty of Law, Universidade de Coimbra, Portugal. She has served as Human Rights Expert/Researcher to the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO). Formerly, she served as a legal officer at the Office of Legal Affairs, INTERPOL General Secretariat, and has interned at the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). She has been a research scholar at SAIS Johns Hopkins University in Washington, DC, and a lecturer in human rights law at the University Jean Moulin, Lyon 3, in France. The views expressed in this chapter are those of the author alone and should not be associated with, nor do they necessarily reflect the position of, the author's previous or current employer(s).

Completion Strategy. Also taken into account is the interplay between domestic and international jurisdictions established by the most relevant international criminal law treaties. On the basis of this assessment, it is submitted that complementarity is not a new creation of the ICC Statute. Rather, four models of complementarity are proposed, illustrated by historical and concrete examples.

Against this background, the chapter concludes that a more far-reaching concept of complementarity has for long been intrinsic to international criminal law: the principle of substantive complementarity. It proposes that this is a structural principle of core crimes law, comprising but going beyond the terms of complementarity under Article 17 of the ICC Statute. The legal nature of this principle is briefly assessed with a view to proposing an effective model of accommodation of national and international judicial competences. This model aims at ensuring that those most responsible for serious crimes of international concern are brought before an able and willing judicial system, thus assisting in closing the impunity gap.

5.2. The Principle of Complementarity as Enshrined in Article 17 of the ICC Statute

The principle of complementarity is mirrored in paragraph 10 of the Preamble and Article 1 of the ICC Statute.[1] The terms for the operation of complementarity *in concreto* are enshrined in Article 17 which establishes the parameters for the inadmissibility of cases before the Court. In accordance with this provision, when one of the crimes listed in Article 5 of the Statute is committed, the ICC will be empowered to *admit* cases if: 1) the competent states are inactive, unwilling or unable to *genuinely* investigate and prosecute; 2) the opening of proceedings would not contravene the *ne bis in idem* principle; and 3) the gravity threshold that justifies the

[1] Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/). Paragraph 10 of the Preamble determines that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Article 1 reinforces this:

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.

involvement of the ICC is verified. In this regard, this chapter is mostly concerned with the concepts of "unwillingness" and "inability".

5.2.1. Complementarity Standard

The negotiators of the ICC Statute rejected the model of the *ad hoc* tribunals whereby the ICC and domestic jurisdictions would work concurrently, with primacy afforded to the former in cases of conflict. There was no major controversy regarding the fact that the ICC should step back whenever municipal systems were capable and willing to carry out proceedings. Yet the difficulty remained of ensuring mechanisms able to guarantee the efficacy of the system drawn by the ICC Statute and to avoid deceitful manipulations of the principle of complementarity aimed at blocking the jurisdiction of the permanent Court.[2] The concepts of "unwillingness" and "inability" have then emerged. But the conundrum was not solved. The challenge remained of reconciling states' sovereignty with regard to their primary right to investigate and prosecute, and the full application of the principle of complementarity which would permit the ICC to step in when states cannot or do not intend to complete the process. To this already difficult starting point was added the fact that the ICC was not intended to function as a court of appeal to review domestic decisions. Therefore, because the ICC was to be the judge of the extent of its own competence, it was necessary to set forth the criteria upon which to infer states' unwillingness and inability as objectively as possible. Delegations finally managed to agree on the term "genuinely"[3] as the key to the inter-

[2] For an account of the work of the International Law Commission ('ILC') on the Draft Statute of the International Criminal Court see Herman von Hebel, "An International Criminal Court: A Historical Perspective", in Herman von Hebel, Johan G. Lammers and Jolien Shukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, TMC Asser, The Hague, 1999, pp. 22–31. See also on the steps towards the term "genuinely", John T. Holmes, "Complementarity: National Courts *versus* the ICC", in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. I, Oxford University Press, Oxford, 2002, pp. 670–74.

[3] The ILC Draft Statute had opted for the term "ineffective" and the Preparatory Committee supported the concept. However, states argued that it was too subjective; that is, it could permit the ICC to step in if it considered itself to be in a position to undertake better investigations or prosecutions that the state in question. For example, the ICC should not step in on grounds that the state was conducing proceedings slower than other states or the ICC itself in similar cases. For the same reason, "good faith", "diligently" and "sufficient grounds" were rejected.

pretation of the criteria that make complementarity a workable instrument.[4] The adverb "genuinely" is thus, in the framework of Article 17, the interpretative tool which permits both complementarity criteria (unwillingness and inability) to enforce the principle of complementarity. That is, cases will be admissible only whereas domestic systems did not or are not *genuinely* investigating and prosecuting. Article 17 reads as follows:

> 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.
>
> 2. 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

[4] The majority of delegates considered that this term, despite not having any precedent in legal usage, was the least subjective. On the one hand, it did not entail the *suspicious* scope of "inefficiency" and, on the other, it was more objective than "sufficient or reasonable grounds". Close to "genuineness" is "good faith" which was declined because it was considered to be narrower. As exemplified by Holmes, 2002, p. 674, see *supra* note 2: "a State may in good faith undertake an investigation, but it is apparent to the outside observer that an objective result cannot be achieved, possibly because the domestic judicial system is partially disabled". Accordingly, proceedings initiated by the state under such circumstances would not unveil *mala fide* but would lack genuineness.

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.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

The Article thus determines a two-step test whereby the Court may deem a case admissible and open proceedings if 1) competent states are inactive,[5] or 2) domestic proceedings have been, or are being, undertaken but the state is unwilling or unable genuinely to investigate and prosecute. When the first condition is satisfied, the "unwilling or unable" test is irrelevant and does not have a role to play in the assessment of admissibility.[6] Inactivity amounts to the total absence of proceedings or of any act that might lead to that effect independent of whether the state is generally an able and willing system.[7]

---

5 "Inactivity" as the rationale to support the opening of proceedings by the ICC results from the heading of Art. 17(1): "the Court shall determine that a case is inadmissible". The rule is that the Court might step in. The provision determines the terms upon which a case shall be deemed inadmissible rather than the opposite.

6 Darryl Robinson, "The Mysterious Mysteriousness of Complementarity", in *Criminal Law Forum*, 2010, vol. 21, no. 1, p. 67. Robinson explains in detail the two-step insight of Article 17 whereby inactivity undoubtedly dictates the admissibility of cases before the ICC (if gravity requirements are fulfilled). For the opposing view, considering that the Office of the Prosecutor and Chambers' decision according to which the inexistence of domestic proceedings falls within the scope of cases' admissibility is a manifestation of judicial activism, see William A. Schabas, "Prosecutorial Discretion v. Judicial Activism", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 731.

7 In the Katanga case, the Trial Chamber considered the case admissible because, *inter alia*, the challenge had been filed out of time. Yet, it explained that even if this had not been the

5.2.2. Unwillingness

Article 17(2) establishes that, of the following factors, at least one has to be verified for the case to be admissible: 1) intent to shield the person from criminal accountability; 2) unjustified delay in the proceedings; or 3) proceedings lacking independence and impartiality. These are the criteria that integrate and are expected to solidify *genuineness* as far as willingness is concerned. They have been criticised for one reason or another. On the one hand, it can be argued that the ICC is required to prove excessively demanding standards before being able to adjudicate a case and that it might be blocked by admissibility challenges for years and years. On the other hand, one may consider the argument that the openness of the criteria may permit abuses by the Court. In view of the delicate balance at stake, the system delineated was the best possible compromise.

There are some indicators of unwillingness that are more or less uncontroversial. Excessive delays in the handling of proceedings when compared to similar cases in the same country, previous sham trials concerning some of the accused in respect of a particular crime, and departures from the normal procedural rules usually applicable in the state are all indicative of the intent to shield individuals from justice.[8] In addition, when assessing admissibility conditions, the ICC is bound to take into account principles of due process recognised by international law.[9] Ac-

case, the ruling of admissibility would still prevail on the basis of a second form of unwillingness, not expressly stated in the ICC Statute: where a state "chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done". ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19 (2) (a) of the Statute, ICC-01/04-01/07-949, 12 March 2009, paras. 4–6, 9, 14 (https://www.legal-tools.org/doc/99f09e/). Accordingly, the Chamber directly resorted to the second stage of the two-step admissibility test, applying the dichotomy of "unwilling or unable" in the absence of proceedings. The Appeals Chamber endorsed the decision of the Trial Chamber on different grounds. It ruled that inactivity was the ground of the admissibility of the case against Katanga; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on Admissibility of the Case, ICC-01/04-01/07-1497 OA8, 25 September 2009 (https://www.legal-tools.org/doc/ba82b5/).

8 Holmes, 2002, p. 675, see *supra* note 2: "For example, bypassing the normal criminal (either civil or military) procedures by appointing a special investigator who is politically aligned with persons close to the accused could be also a determining factor".

9 See ICC Statute, Arts. 21(1)(c) and 33. The reference to the principles of due process recognised by international law was included during the Conference of Rome and aimed to stress that the Court should issue its decision on admissibility matters on the most objec-

cordingly, the establishment, for instance, of secret tribunals would not in principle impede the admissibility of the case.

In respect of Article 17(2)(b), which relates to unjustified delays in the proceedings, the Court should adopt an objective approach. While the ICC Statute does not provide guidance on the matter the usual length of similar proceedings in the relevant country compared to the prosecution in question is likely to be an effective indicator.[10] Finally, Article 17(2)(c) refers to the impartiality and independence of proceedings. The inclusion of "independence" and "impartiality" was done with the aim of ensuring fairness, equality and equity. Thus, the ICC can develop jurisprudence in the sense that *bona fide* proceedings may fall under the umbrella of this provision when, for instance, other procedural phases do not offer the same guaranties of due process. Again, the comparison of the actual case with the normal practice for similar offences may be useful. Likewise, it is possible to maintain that where a state's judicial system is affected and its substantial collapse appears only a question of time, Article 17(2)(c) calls for the adjudication of cases fulfilling gravity requirements so as to guarantee that current and future cases, which may be connected, will be submitted to fair and impartial proceedings. Nevertheless, it is important to note that these indicators are closely intertwined and their mutual relationship is permeated by some degree of overlapping.

5.2.3. Inability

Inability is a more objective concept. States were not as concerned about its possible impact on sovereignty. Inability was intended to address situations where the official structures of the state have collapsed. The destruction of the judicial system, the non-existence of courts, prosecutors or qualified legal personnel will lead, in principle, to the admissibility of

tive ground. See John T. Holmes, "The Principle of Complementarity", in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, Martinus Nijhoff, The Hague, pp. 53–54.

[10] Holmes, 2002, p. 676, see *supra* note 2:

> For example, if an investigation takes six months before charges are brought against an accused, this may not be an unjustified delay, if the national proceedings for similar, serious cases take approximately the same period of time. Conversely, proceedings which exceed the usual national practice and which are not convincingly explained may constitute an unjustified delay or even a shielding of the person from criminal responsibility.

cases on grounds of inability of the competent state. This notwithstanding, the need was felt to endow the ICC with more objective criteria as to make inability as precise as possible. In accordance with Article 17(3) inability may result from either: substantial or total collapse of national institutions. In the latter case, the incapacity of the state is obvious. In the former, some doubts may arise.[11] When asserting the incapacity of a specific judicial system, the ICC must ensure that at least one of the following factors is verified: 1) the state is unable to obtain the accused; 2) the state is unable to collect necessary evidence/testimony; or 3) the state is unable to otherwise carry out the proceedings.[12] The last factor is not a matter of mere factual determination thus allowing for a certain level of discretion by the Court which might be important when unforeseen circumstances arise.

Article 17(3) reads as follows:

> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or *unavailability* of its national judicial system, the State is unable to obtain the accused or the necessary evidence or testimony or otherwise unable to carry out its proceedings [emphasis added].

It would be pleonastic to consider that "unavailability" amounts, just like "total or substantial collapse", to physical or material factors, such as the lack of judges or judicial infrastructures. Rather, unavailability is a form of inability that refers to legal or procedural obstacles that prevent the state from *genuinely* administering justice.[13] Procedural unavail-

[11] The expression initially chosen by the Preparatory Committee and established in the Draft Statute was "partial". The term "substantial" was an innovation arising out of the Rome Conference. The intent was to avoid the ICC taking on jurisdiction when an internal conflict existed and the national judicial apparatus was only partially defeated. In these situations, the state could still be capable of ensuring investigation and prosecution, namely by transferring resources or allocating the trial to another place.

[12] Because, for example, there are no qualified law professionals.

[13] Markus Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", in *Max Planck Yearbook of United Nations Law,* 2003, vol. 7, no. 1, pp. 614–16; Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", in *Criminal Law Forum,* 2006, vol. 17, nos. 3/4, pp. 255–66. By contrast, if a state prosecutes murder as an ordinary crime rather than as a war crime, but the punishment reflects the gravity of the conduct, it seems that the admissibility test would be (or at least could be) satisfied.

ability includes, for instance, immunities determined by national law. Legal unavailability refers first to the lack of legal provisions applicable to the case in question such that courts are unable to "carry out its proceedings" genuinely.[14] It is also concerned with sentencing and the qualitative difference between ordinary and international crimes. *Genuineness* implies that, for the *bonus pater familias*, the accused has been submitted to a fair trial and, if found guilty, a proportional punishment.[15] It also requires that the judicature has applied the law in conformity with principles of international law. Accordingly, it is hardly convincing that a sentence of few months for the crime against humanity of murder could dictate a finding of inadmissibility by the ICC Chambers. In other words, while the adequate normative framework may exist in the national system it is necessary, in the assessment of a judicial system's availability, to take into account the policy and record of sentences usually applied to perpetrators in similar circumstances. Likewise, as noted by William A. Schabas, issues of unavailability may arise when the individual is prosecuted for an ordinary rather than international crime.[16]

---

[14] This view is consistent with the "same conduct" test applied by the ICC in different cases: that is, a case is inadmissible only where the same individual is facing domestic proceedings for the same conduct he or she is charged with before the permanent Court. For instance, the prosecutor decided to undertake proceedings against Lubanga for the crime of enlistment of children under 15 when he had already been indicted in the Democratic Republic of Congo for crimes against humanity, genocide and other offences under national law, including murder. ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06, 10 February 2006 (https://www.legal-tools.org/doc/59846f/). Further, it seems logical to infer that situations where the same individual is being prosecuted for different crimes at the national level cannot determine a ruling of inadmissibility because they fall under the scope of ICC Statute, Art. 89(4), see *supra* note 1. This provision determines a consultation mechanism whereby the forum state, after receiving a request of surrender of the individual, may approach the Court with a view to maintain jurisdiction.

[15] This does not require that victims agree with the sentence.

[16] William A. Schabas, *An Introduction to the International Criminal Court*, 2nd ed., Cambridge University Press, Cambridge, 2004, p. 88:

> There is some doubt about the application of complementarity and the ne bis in idem rule to situations where an individual has already been tried by a national justice system, but for a crime under ordinary criminal law such as murder, rather than for the truly international offences of genocide, crimes against humanity and war crimes. It will be argued that trial for an underlying offence tends to trivialize the crime and contribute to revisionism or negationism.

5.2.4. The Duty to Investigate and Prosecute in the ICC Statute

The previous discussion endeavoured to highlight that the purpose of the principle of complementarity is to fill gaps capable of leading to impunity while national courts maintain primacy concerning the exercise of criminal jurisdiction. Yet, what was not scrutinised is whether such primacy constitutes a true legal duty or a right. The purpose of this section is to address this question.

Scholars, states' representatives and courts diverge on the matter. The French Court of Appeals considered, in the *Gadaffi* case, that the ICC Statute imposes on ratifying states the duty to investigate and prosecute perpetrators of crimes under international law.[17] Belgium derived from the ICC Statute obligations of "jurisdictional character",[18] while South Africa held that "the Republic, […] in line with the principle of complementarity […] has jurisdiction and responsibility to prosecute persons accused of having committed a crime [listed in the Statute]".[19] Some countries banned amnesties from the national system so as to fully comply with the obligations under the ICC Statute. In contrast, a few states saw no incompatibility between the granting of amnesties and the Statute.[20]

Paragraph 4 of the Preamble of the ICC Statute affirms that the "the most serious crimes of concern to the international community as a whole must not go unpunished […] prosecution must be ensured by taking measures at the national level and by enhancing international co-operation". Paragraph 6 recalls the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The question remains regarding what the reach and legal nature of this duty is.

Before examining in detail paragraphs 4 and 6 of the Preamble, a preliminary question emerges: may a legal obligation be imposed in the Pre-

[17] France, Court of Appeals (Cour de Cassation), *In re Gadaffi*, 20 October 2000, *International Law Reports*, 2003, vol. 125, p. 462.

[18] Brussels, Tribunal of First Instance, *In re Sharon and Yaron*, 26 June 2002.

[19] South Africa, Implementation of the Rome Statute of the ICC, Act 27 of 2002, 16 August 2002 (http://www.justice.gov.za/legislation/acts/2002-027.pdf).

[20] Declaration made upon ratification of the Rome Statute by Colombia, 5 August 2002. See also Trinidad and Tobago, International Criminal Court Act 2006, 24 February 2006, Section 13, concluding that the ICC Statute was not incompatible with the principle of unlimited discretionary prosecution.

amble of a treaty though no reference thereto is made in the *dispositif*?[21] There are different views on the matter and this chapter will not delve thoroughly with the question. It is contended that the Preamble may enshrine legal obligations. It is an integral part of the treaty concerned;[22] therefore no reason subsists to deny binding effect to a certain determination because it is placed in the Preamble rather than in the operative part.[23] Certainly, the legal force of obligations may vary between provisions as a result of how they are drafted but not as a result of where they are placed within the treaty.[24]

---

[21] Anja Seibert-Fohr contends that in spite of the terms of the Preamble, "there is no provision on prosecuting duties by States parties in the operative part of the Statute" which leads her to conclude that states are not under such a duty by virtue of the ICC Statute. Anja Seihbert-Fohr, "The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions", in *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, pp. 558–59.

[22] See Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(1) and 31(2). The Preamble has legal interpretative force. Determining the context and the purpose of the treaty, it sheds light on the rationale that should guide the enforcement of rights and obligations so as to serve the purpose of the legal text. In this sense see International Court of Justice ('ICJ'), *France v. United States of America (Case Concerning Rights of Nationals of the United States of America in Morocco)*, Judgment, 27 August 1952, ICJ Reports 1952, p. 196 (https://www.legal-tools.org/doc/ab79cf/); See also ICJ, *Columbia v. Peru (Colombian-Peruvian Asylum Case)*, Judgment, 20 November 1950, ICJ Reports 1950, p. 282 (https://www.legal-tools.org/doc/cb94fc/).

[23] Charles Rousseau, Droit international public: introduction et sources, vol. 1, Sirey, Paris, 1970, 87: "*On a parfois considéré le préambule des traités comme doué d'une force obligatoire inférieure à celle du dispositif. Mais c'est là une opinion isolée*". Furthermore, the term used in paragraph 6 is legal in nature – duty. Had the drafters intended to simply establish a moral duty other language could have been used. See, for example, United Nations Security Council, resolution 1593 (2005), 31 March 2005, UN doc. S/RES/1593 (2005), by which the Security Council referred the situation on Darfur to the ICC. While expressly stating that non-parties had no obligation under the Statute, the Security Council incentivised states politically and morally to co-operate with the Court. Paragraph 2 adopted the term "urges". For the opposite view see Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, Droit international public, LGDJ, Paris, 1980, p. 126, recognising interpretative relevance to the Preamble but "*il ne possède pas de force obligatoire*".

[24] As rightly pointed out by Jann K. Kleffner, there is no reason to accept that United Nations General Assembly resolution 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Art. 1, UN doc. A/Res/3/260 ('Genocide Convention') (https://www.legal-tools.org/doc/498c38/) binds states to "prevent and punish" genocide and reject the same effect to the obligation to "exercise its criminal jurisdiction" imposed on states by the ICC Statute's Preamble. Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, Oxford, 2008, p. 236. Accordingly, for their low specificity, particularly in respect of enforcement mechanisms, both provisions are bestowed upon with a low degree of normativity. See

Once asserted that the Preamble could determine obligations the question arises whether the "duty to exercise criminal jurisdiction" constitutes a positive legal obligation in view of the open scope of the language of paragraphs 4 and 6. That is to say, whether enshrined in the Preamble or in the *dispositive*, do provisions need to comply with parameters of certainty and precision in order to establish positive duties?

The duty to exercise criminal jurisdiction must be broadly understood. It cannot mean the obligation of any state party to prosecute.[25]

Kleffner, *id.,* pp. 238–40, concluding at p. 240 that the level of normativity "ultimately depends on the individual preambular provision in question". See, however, International Criminal Court, Office of the Prosecutor: "Informal Expert Paper: The Principle of Complementarity in Practice", 2003, p. 19, fn. 24, where it is sustained that the "preamble does not as such create legal obligations" (http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF).

[25] For the reasons explained, this chapter does not follow Kleffner's view who, after concluding that the provisions on admissibility merely establish the consequence for the failure of states to administer justice and not a specific obligation to do so, argues that a combined reading of ICC Statute, paragraph 6 of the Preamble and Art. 17 gives rise to the obligation to investigate and prosecute. Kleffner, 2008, p. 249, see *supra* note 24. States might indeed be under an obligation to investigate and prosecute but that will be a duty derived from treaty, customary law or a consequence attached to the *jus cogens* nature of the prohibition to commit the crime at stake. The obligation of a state party to investigate and prosecute through its domestic courts is not enshrined in the ICC Statute. To argue that it is, implies an overstretching of the language of the Statute. As a matter of policy, though, it would be extremely important if states interpreted the "duty to exercise criminal jurisdiction" as an obligation to prosecute for the ICC has neither the resources nor the mandate to investigate all crimes begging for a legal response. Furthermore, states' eager attachment to sovereignty is likely to lead them to do all within their reach, namely by undertaking criminal proceedings, so as not to be considered unwilling or unable. Yet, this will be a side effect of complementarity; not an obligation imposed by it. Finally, it could be argued that the spirit of the ICC Statute requires national systems to apply their maximum effort in administrating criminal justice in respect of the most serious crimes of international concern. Consequently, in light of the telos of the ICC Statute, states would be bound to investigate and prosecute crimes falling under their jurisdiction or even to adopt universal jurisdiction so as to comply with such an obligation. In point of fact, the spirit of the Statute is that mentioned above. The conclusion derived therefrom is not, however, automatic or necessary. In case of doubt or when the language of a given provision contravenes the purpose of the treaty, the interpretation shall be corrected in view of the spirit of the convention. However, neither the Preamble nor Article 17 lead to a system contrary to the main objective of the establishment of the ICC. The major goal of the ICC Statute is to ensure that perpetrators will not find safe havens. As explained below, compliance with such a purpose does not imply an immediate duty to investigate and prosecute. Rather, core crimes law, where the ICC system is to be integrated and in light of which it is to be interpreted, already provides the framework for securing accountability. An objective reading of the ICC Statute is of utmost importance to preserve the credibility and legitimacy of the ICC as well as to gain the confidence of those states that still perceive the Court with suspicion.

First, if that had been the intent of the provision it would have explicitly stated so. Second, there is no article in the entire ICC Statute determining such an obligation. Third, the Statute is to be read within the general framework of international criminal law. The duty to prosecute or extradite as defined in particular conventions is to be acknowledged and function in parallel to the ICC system. Likewise, extradition agreements which may require the custodial state not to prosecute but to extradite to a forum able and willing to carry out genuine proceedings is, as clarified by Article 98(1), fully in line with the ICC Statute. Fourth, to impose on every state the duty to prosecute would, in borderline cases, create complex positive conflicts of jurisdiction that would seriously obstruct rather than favour international criminal justice as intended by the Statute. Fifth, within the functioning of complementarity nothing precludes a state from being inactive because, for example, of the political, economic or social impact of a prosecution. What complementarity ensures is that, in such a case, inactivity will not always amount to impunity, provided that the admissibility conditions set forth in the Statute are satisfied. Likewise, a state may self-refer a situation to the ICC prosecutor without breaching the duty to exercise its criminal jurisdiction. Nor does the ICC Statute determine an obligation on the territorial and national states to investigate and prosecute.[26] The only obligation on these states created by the Statute is that, in the case of their unwillingness or inability to administer justice, they are bound to accept the jurisdiction of the ICC, co-operate with the latter and deal with its final ruling.

Criminal jurisdiction is a broad concept, including jurisdiction to prescribe, to adjudicate and to enforce. By concluding extradition treaties, for example, states are administrating their adjudicative jurisdiction. Nothing prevents states from establishing networks of international co-operation aimed at consolidating a more efficacious international criminal order. The same happens, though with different contours, when the ICC takes on a case based on unwillingness of the state. Here, it is the state in any case that exercises jurisdiction as the Court is nothing more and nothing less than a body established to exercise prosecuting and judicial powers in the name of states on the basis of their delegation of sovereign prerogatives. The ICC appears as a subsidiary institutional body that states

[26] Active personality and territoriality are the two jurisdictional grounds set forth in the ICC Statute, Art. 12, see *supra* note 1. See also the previous sections on Art. 12.

can resort to in order for it to exercise their (delegated) criminal jurisdiction. On the one hand, the ICC Statute reminds states of their duty to exercise their criminal jurisdiction and, on the other, it clarifies that it is through measures adopted at the national level and by enhancing international co-operation that such jurisdiction must be displayed. The ICC system – anchored on the principle of complementarity – represents a form of international co-operation with important repercussions at the national level. It is a specific concretisation of the duty of states to exercise criminal jurisdiction. In line with the above considerations, the duty to exercise criminal jurisdiction entails a right of choice, between prosecuting, extraditing or handing the case over to the ICC.

5.2.4.1. The Duty to Exercise Criminal Jurisdiction: What Addressees?

According to the *pacta tertiis* principle, the ICC Statute can only bind state parties. However, it can be argued that the duty to exercise criminal jurisdiction applies to all states. Three main arguments support this view. First, this duty is referred to in the Preamble and not in the operative part that is directly and exclusively addressed to the parties to the Statute. Second, the Preamble *recalls* the duty of *every state* to exercise its criminal jurisdiction. The term *recalling* discloses that such a duty pre-existed the Statute and therefore was compulsory for all states. Paragraph 6 resorts to the expression "every State" as opposed to "States party", the term used in the *dispositif* in respect of obligations created by the Statute and, consequently, directed only to the ratifying states. In addition, paragraph 6 of the Preamble refers to international crimes whereas the Statute embraces, within that broader category, only "the most serious crimes of concern to the international community as a whole". Accordingly, as the Statute cannot create obligations binding upon third states and the Preamble is referring to every state and crimes not comprised within the scope of the treaty, the duty to exercise criminal jurisdiction should be understood as a general "reminder" so that states recall their obligations beyond, and independent of, the ICC Statute.[27] In line with this approach, the "duty to

[27] For a detailed exposition of these arguments see Kleffner, 2008, pp. 243–47, *supra* note 24. See also the declaration of the delegate of Dominican Republic during the Rome Conference according to which "each State still has the duty to exercise its penal jurisdiction over individuals responsible for crimes of international significance". Dominican Republic: Proposal regarding the Preamble, A/CONF 183/13, in United Nations Diplomatic Con-

exercise its criminal jurisdiction" does not add anything new to the already pre-existing obligations under international law, for example, the duty to prosecute or extradite as enshrined in the Geneva Conventions or the duty impending on the territorial state to prosecute genocide and adopt all necessary measures to prevent this crime from going unpunished. In other words, the "duty to exercise criminal jurisdiction" is a mere restatement of pre-existing commitments as opposed to a new, more wide-reaching obligation. Yet, Jann K. Kleffner points out that the ICC Statute came to classify as crimes of serious international concern some offences, for example, forced pregnancy and attacks against cultural property,[28] that previously were not qualified as such. Accordingly, he holds that it is difficult to consider that the Statute did not alter in any manner, or rather added something to, the pre-existing obligations to prosecute core crimes.[29] It is submitted that the Statute does not alter treaty, customary or *jus cogens* obligations prior to the ICC Statute. With 123 ratifications at the time of writing, the effect of the ICC Statute on such obligations is that of strengthening and enhancing existing duties, namely by consolidating their customary status or driving treaty obligations towards that same result.

5.2.5. Implementing Complementarity

Most states party to the ICC Statute adopted implementing laws intended to incorporate into national legislation the complementarity scheme determined in the ICC Treaty. The solutions varied. While some countries established last resort universal jurisdiction with regard to the crimes listed in Article 5, others adopted more restrictive views whereby universal jurisdiction was conceived in view of a handful of crimes, namely on grounds of international treaties, and the ICC Statute was seen only as determining obligations based on the principle of territoriality and active personality. Others followed somewhat original solutions. This is the case, for instance, of Belgium, Spain and Germany.

ference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July 1998, Official Records, vol. III, Reports and Other Documents, 2002, p. 203, UN doc. A/CONF 183/13 (Vol. III).

[28] See ICC Statute, Arts. 2(f) and 7(1)(g), and Art. 8(2)(b)(ix) and 8(2)(e)(iv) respectively, *supra* note 1.

[29] Kleffner, 2008, pp. 243–47, *supra* note 24.

5.2.5.1. The Belgian Case

With the coming into force of the ICC Statute, it was necessary to articulate the principle of complementarity within the wider principle of universal jurisdiction in force in Belgium throughout the 1990s. In addition, there was significant pressure to adapt national law[30] to the *Yerodia* ruling, whereby the International Court of Justice ('ICJ')[31] reprimanded Belgium's rejection of immunity in respect of the Congolese Minister of Foreign Affairs, after a complaint presented by the Democratic Republic of Congo in respect of the arrest warrant issued by Belgian authorities against Abdoulaye Yerodia Ndombasi.[32] As a consequence, in 2003 the Belgian Legislature amended Article 5(3) of the 1993 Act relating to the Repression of Grave Breaches of International Humanitarian Law which now reads as follows: "International immunity attaching to the official capacity of a person does not preclude the applicability of this Act, other

[30] Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces Conventions [Law of 16 June 1993 concerning the Repression of Grave Breaches of the 1949 Geneva Conventions and their 1977 Additional Protocols], published in *Moniteur Belge*, 5 August 1993, F. 93-1856, pp. 17751–55, as amended by the Loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire [Law of 10 February 1999 relating to the Repression of Grave Breaches of International Humanitarian Law], published in *Moniteur Belge*, 23 March 1999, F. 99-809, pp. 9286–87. The 1999 Act excluded the application of immunities, including those derived from the exercise of official functions, to core crimes (Article 5(3)).

[31] ICJ, *Democratic Republic of the Congo v. Belgium (Case Concerning Arrest Warrant of 11 April 2000)*, Judgment, 14 February 2002, ICJ Reports 2002, p. 3 (https://www.legal-tools.org/doc/c6bb20/).

[32] *Ibid.*, p. 23, para. 54:

> The functions of a minister of foreign affairs are such that for the duration of his or her time in office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability are to protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duty.

The opinion of the ICJ was, furthermore, that customary law did not recognise any exception to this rule in respect of war crimes or crimes against humanity, *id.*, para. 58. In para. 61, however, the ICJ stated that the individual protected would not be able to invoke immunity's protection before an international court which does not recognise it in its Statute.

than within the limits established by international law".[33] The amendment leaves the way open to legal interpretation and integration.

Concerning the articulation between the principle of complementarity and universal jurisdiction, Belgium followed a cautious approach and introduced the so-called "inversion of the complementarity principle". The 2003 Act reaffirms universality of jurisdiction but articulates it with the jurisdiction of the ICC, the *ad hoc* tribunals and other national jurisdictions. Furthermore, in specific cases, the initiation of criminal proceedings is the exclusive competence of the public prosecutor. Civil parties cannot for example present a complaint to the investigative judge. According to Article 10(1)*bis* and 12*bis* (prosecution of international crimes under the principle of universality) of the Preliminary Title of the Criminal Code of Procedure, the prosecutor may refuse to initiate proceedings if

> the specific circumstances of the case show that is the interest of the proper administration of justice and in order to honour Belgium's international obligations, said case should be brought either before the court of the place in which the acts were committed, or before the court of which the perpetrator is a national, or the court of the place in which he can be found, and to the extent that said court is independent, impartial, and fair, as may be determined from the international commitments binding on Belgium and that State.[34]

There is no rule demanding that prosecutions held in other states be *genuine*. The requirement that foreign courts be impartial is not convincing either. It is not clear whether it is to be evaluated in respect of a given case or in general. If courts adopt the second view, the scenario is not very promising. Furthermore, the assessment of foreign courts' ability to proceed against the perpetrator shall take into account the "international commitments binding on Belgium and that State". There are reasons for scepticism concerning the Belgian legislative decision in view of the pressure made by the United States threatening to transfer the headquarters of

---

[33] Loi du 23 avril 2003 modifiant la loi du 16 Juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144*ter* du Code judiciaire [Law of 23 April 2003 amending Law of 16 June 1993 relating to the Repression of Grave Breaches of International Humanitarian Law and Article 144*ter* of the Judicial Code], published in *Moniteur Belge*, No. 167, 2nd Edition, 7 May 2003, p. 24846, Art. 4 ('2003 Act') (https://www.legal-tools.org/doc/120d0a/).

[34] *Ibid.*, English translation available in *International Legal Materials*, 2003, vol. 42, p. 1267.

NATO from Brussels unless Belgium altered its broad conception of universal jurisdiction (1999 Act).

Moreover, the Legislature opted to invert the rule of complementarity as enshrined in the ICC Statute; that is, the ICC is allowed to step in and proceed against core crimes perpetrators when states are unable or unwilling to do so. In light of the latest amendment to the 1993 Act, Belgian courts will be competent to prosecute core crimes committed abroad by foreigners against foreign victims only if the ICC does not undertake to bring a prosecution. Against this background, the Minister of Justice can refer the situation to the ICC and, if the prosecutor starts investigations, the Court of Cassation shall declare that the domestic courts lack jurisdiction to proceed. The government may also intervene to transfer cases elsewhere, particularly to the home country of the accused.[35] The Belgian approach makes the ICC a court of first instance and the Belgian courts, the courts of last resort activated when necessary to fill in the lacunae resulting from the functioning of the Court. To be precise, domestic courts will recover jurisdiction over core crimes whenever the ICC prosecutor decides not to issue an indictment, the indictment is not confirmed, or the ICC concludes not to have jurisdiction or the case is considered inadmissible.[36]

In conclusion, nothing prevents states from referring cases to the ICC or passing information to the prosecutor hoping that he will open an investigation. However, it would be worrying if the ICC starts to be generally seen as a court of first instance. A system where states recover jurisdiction at a later stage if the ICC does not take on a case is likely to be a waste of time and resources of the Court and lead to the loss of evidence because of the time spent by the ICC in making a decision, especially if it decides not to step in.

---

[35] See Human Rights Watch "Belgium: Questions and Answers on the 'Anti-Atrocity Law'", June 2003, p. 5.

[36] 2003 Act, Art. 7(2)(2), see *supra* note 33. In these cases, criminal proceedings could only be opened by the public prosecutor, the federal prosecutor or, alternatively, by the submission of a civil action or through the confirmation by the complainant of a civil action presented before to the original complaint.

5.2.5.2. The Spanish Case

The Law of Co-operation with the International Criminal Court ('LCICC')[37] was passed in Spain in 2003 to regulate the competence of national bodies and the main procedures to be followed when co-operating with the ICC.[38] The Spanish implementation of the ICC Statute also established the "inverted principle of complementarity", which is similar to the regime adopted by Belgium. Yet the Spanish system is particular for the significant jurisprudence of domestic courts on core crimes, universal jurisdiction and obligations directly derived from international law, which the LCICC came somehow to weaken.

On grounds of Article 23(4)[39] of the Judicial Power Organic Law,[40] courts considered that in order to activate Spanish jurisdiction on the basis

---

[37] Ley Orgánica 18/2003 de Cooperación con la Corte Penal Internacional [Law of Co-operation with the International Criminal Court], 10 December 2003 (https://www.legal-tools.org/doc/10f4d4/). A *ley orgánica* is one as such required by the constitution to regulate specific subject matters, for example, the organisation and competences of the judicial power. Usually, the adoption of an organic law is subject to extraordinary conditions such as absolute or qualified majority.

[38] Ley Orgánica 15/2003 [Organic Law 15/2003], 25 November 2003 amended the Ley Orgánica 10/1995, 23 November 1995, of the Código Penal [Penal Code Law 10/1995] (https://www.legal-tools.org/doc/338859/) which had previously implemented the ICC Statute provisions concerning the definition of crimes and general principles enshrined therein.

[39] At the time, Article 23(4) read as follows:

> Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera el territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:
>
> a) Genocidio.
> b) Terrorismo.
> c) Piratería y apoderamiento ilícito de aeronaves.
> d) Falsificación de moneda extranjera.
> e) Los relativos a la prostitución.
> f) Tráfico ilegal de drogas psicotrópicas, tóxicas e estupefacientes.
> g) Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España.

With the reform of 2009, the provision was slightly altered. Ley Orgánica 1/2009, 3 November 2009, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985,

of universality it was necessary to prove that the case in question had not been previously investigated. This formulation is equated to the principle of subsidiarity of Spanish jurisdiction to other legal systems, which imposed on the claimant the onus to prove the necessity of Spanish intervention.[41] The LCICC reconceived the principle of subsidiarity of the Spanish jurisdiction in view of the competence of the ICC, by preventing, in the draft version of Article 7(2), national authorities from proceeding against suspects of crimes listed in the ICC Statute when committed abroad by foreigners. In such situations, the organ of state in question should merely notify the complainant of the possibility of informing the ICC's Office of the Prosecutor, in accordance with Article 13(c) of the Statute and Rule 15 of the Rules of Procedure and Evidence ('RPE'). Furthermore, the same provision disallowed judicial authorities from acting *ex officio* once aware that one of the core crimes had been committed abroad by foreigners.

This proposal was strongly criticised. On the one hand, it restricted the reach of universal jurisdiction as established in Article 23(4) of the Judicial Power Organic Law because it would not cover core crimes. One would have to arrive at the paradoxical conclusion that the coming into force of the ICC Statute would mean the end of universality of jurisdiction in Spain for core crimes. On the other hand, the regime was not in line with the principle of complementarity since it raised the ICC into a substitute of domestic jurisdictions rather than the complementary device it was envisaged to be. This notwithstanding, the LCICC was approved given that the majority of parliament concluded that the primacy of domestic jurisdiction in light of the ICC Statute referred only to crimes committed in Spanish territory or by Spanish nationals. A further paragraph was added granting the courts and the public prosecutor the power to adopt urgent provisional measures in order, *inter alia*, to preserve evi-

de 1 de julio, del Poder Judicial [Organic Law 1/2009, Reform Act of Procedural Legislation for the Implementation of a new Judicial Office, modifying Organic Law 6/1985, 1 July, on Judicial Power] ('Organic Law 1/2009').

40 Ley Orgánica 6/1985 del Poder Judicial [Organic Law 6/1985 on the Judiciary], 1 July 1985 (https://www.legal-tools.org/doc/881df4/).

41 See Sentencia de la Sala de lo Penal del Tribunal Supremo de 20 de mayo de 2003 (STS de 20 mayo de 2003) 712/2003 fundamento jurídico sexton [Supreme Court Judgment of the Criminal Chamber of the Supreme Court, 20 May 2003 (STS of 20 May 2003) 712/2003 Legal Basis]. The complainant has to present reasonable evidence that the crime has not been judicially handled previously in a genuine way.

dence. Furthermore, in an attempt to overcome the criticism that universal jurisdiction would be banned for those crimes that most stridently called for it, Article 7(3) was adopted which permits the submission of claims to the Spanish courts that were previously presented to the ICC if the latter did not accept the case, either because it decided not to proceed with an investigation or because there was a ruling of inadmissibility. In these situations, national authorities will be competent to investigate with a view to prosecution.

It could be argued that the Spanish law implementing the Statute is based on the premise that the ICC is likely to develop an investigative capacity and expertise in respect of core crimes that will place it in better position to proceed against the authors of crimes which reveal no link with Spain. Additionally, it ensured that national courts would still be able to step in where the ICC could not intervene. However, the negative outcome of the system adopted is not light. The lack of competence of the judicial structures to refer a situation to the ICC combined with the exclusive competence of the Council of Ministers to do so leads to incongruent results. In particular, courts and the public prosecutor might find themselves in the situation of knowing that a core crime was or is being committed but are rendered inert, thereby assisting the consolidation of perpetrators' impunity. The paradox is more stringent given that the Code of Criminal Procedure (Ley de Enjuiciamiento Criminal) is established on the principle of legality rather than the principle of prosecutorial discretion (unbridled or restricted).[42] In addition, even considering that the intention of the legislature was to give priority to better prepared structures, the solution adopted does not seem the most efficient, opening the way for evident waste of time and resources, which, besides affecting the budget and resources of the ICC, potentially undermines the decision of the case irreversibly because of the consequences for the collection and preservation of evidence.[43] Finally, the Spanish legislative option largely allows

[42] Ley de Enjuiciamiento Criminal [Code of Criminal Procedure], 14 July 1882, Arts. 105 and 299.

[43] An example: 1) *X* submits a claim before the Spanish prosecutor concerning the perpetration of one of the crimes listed in Article 5 of the ICC Statute, committed abroad by a person who is not Spanish (the prosecutor and judicial authorities are prevented from proceeding both *ex officio* and after an individual complaint); 2) the prosecutor informs the complainant that national authorities are not competent to intervene though the possibility exists to refer the case to the ICC; 3) the claimant tells the ICC prosecutor of the alleged crime; 4) the Office of the Prosecutor spends months or even years investigating the situa-

for the *politicisation* of core crimes prosecutions. In accordance with Article 7(1) of the LCICC the competence to refer a situation to the ICC lies exclusively with the government through the Council of Ministers (*Consejo de Ministros*), which is the body constitutionally responsible for Spain's foreign policy. Only the Minister of Foreign Affairs and the Minister of Justice are competent to propose a referral to the ICC to the Council of Ministers. The objective of this entitlement was likely to allow the political impact of a referral to the ICC on Spanish international relations to be assessed. There is, thus, a clear risk that referrals concerning "friendly" or "feared" states will be avoided. There is no space for judicial evaluation on the matter.[44]

On 25 June 2009 the Congress passed a bill amending Article 23(4) of the Law on Judicial Power and restricting the terms of operability of universal jurisdiction in Spain.[45] In the terms of the new amendment Spanish courts are competent to exercise universal jurisdiction over genocide, crimes against humanity and other serious crimes only when the perpetrator is in Spanish territory, victims are Spanish or there is some other relevant connection with Spain.[46] Article 1 of the Law determines

tion and context within which the alleged crime was committed; 5) in the end, the prosecutor decides not to proceed or admissibility procedures have been initiated and the Pre-Trial Chamber holds the case inadmissible; 6) the claimant starts again at the beginning of the cycle, submitting (probably years later) the same claim to the Spanish prosecutor who is finally entitled, in accordance with LCICC, Art. 7(3), to investigate with a view to prosecution This is all the more so the case in view of the fact that the LCICC was apparently drafted without the necessary attention towards the distinction made in the Statute between "situation" and "case". Significantly, when an individual refers a specific case to the ICC, the prosecutor will not solely investigate that case but also the entire situation in the context of which the crime was allegedly committed. The assessment of a "situation" is obviously more demanding in terms of time and resources. In the end, it might even be that the ICC prosecutor decides to proceed in respect of the situation but not of the actual case referred, for example, for questions of jurisdiction *ratione temporis* or because the gravity threshold is not met.

44 This scenario becomes more concerning if one recalls that the prosecutor will only proceed if there is reasonable evidence concerning the perpetration of a crime listed in Article 5 of the ICC Statute and admissibility criteria are satisfied; that is, parameters which political organs are not in the best position to assess. It is submitted that although it is hardly possible to "sweep way" political considerations out of international criminal law, the establishment of a comprehensive system where the prosecution of core crimes is almost entirely controlled by the executive is to avoid.

45 The Senate approved the bill on 15 October 2009 and it came into force on 3 November 2009, see *supra* note 39.

46 See Organic Law 1/2009, see *supra* note 39. According to Art. 1:

that national courts are competent only where no proceedings have been initiated in other countries or by an international court. Further, proceedings initiated in Spain will be suspended if there is notice that another state or an international court started investigating the same facts.[47] Yet, the Law did not amend Article 7(2) of the LCICC and the terms under which domestic authorities may proceed with an investigation over crimes listed in the ICC Statute. This remains a concerning shortcoming. It has also been claimed that the new law means the death of universal jurisdiction in Spain and an enormous retreat in the fight against impunity. Despite the somewhat suspicious motivations that furthered the reform project,[48] the final outcome is not as negative as it would seem at first sight. The requisite custody of the suspect is entirely in accordance with the principle of universal jurisdiction. Such requirement is nothing more than

> *Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos: a) Genocidio y lesa humanidad. b) Terrorismo. c) Piratería y apoderamiento ilícito de aeronaves. d) Delitos relativos a la prostitución y los de corrupción de menores e incapaces. e) Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes. f) Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores. g) Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España. h) Cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España. Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentren en España o que existen víctimas de nacionalidad españolas, y, en todo caso, que en el país del lugar donde se cometieron los hechos delictivos o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles*.

47 Ibid.: "*El proceso penal iniciado ante la jurisdicción española se sobreseerá provisionalmente cuando quede constancia del comienzo de otro proceso sobre los hechos denunciados en el país o por el Tribunal a los que se refiere el parágrafo anterior*".

48 See *Le Monde*, 28 May 2009, stating that the opening of proceedings against the former Israeli Minister of Defence and members of the military forces for crimes committed in Gaza led to considerable political pressure on Spain and the amendment of the law on universal jurisdiction. On 29 January 2009 preliminary investigations were opened into claims that a bomb attack in Gaza in 2002 warranted the prosecution of the former Defence Minister Binyamin Ben-Eliezer, among others. The investigation was halted on 30 June by a decision of a panel of 18 judges of the Audiencia Nacional (National Court).

a procedural element which promotes the efficient development of universality of jurisdiction. In particular, it will prevent Spain from opening never ending proceedings due to the absence of suspects. It is significant that Spanish law allows the opening of proceedings in *absentia* but the presence of the accused is indispensable in order to start a trial.[49]

5.2.5.3. The German Case

The 2002 Code of Crimes Against International Law ('CCAIL', Völkerstrafgesetzbuch) implemented the ICC Statute and adapted German substantive criminal laws to its provisions. The Code adopted the principle of universal jurisdiction, thus permitting the prosecution of core crimes even in absence of any link between the crime and Germany. In addition, the German principle of mandatory prosecution – *Legalitätsprinzip* – is applicable, with some exceptions, to prosecutions under the CCAIL.[50]

The most progressive feature of the CCAIL is the treatment reserved to universal jurisdiction, permitting the best co-ordination between the fight against impunity and an effective and realistic allocation of jurisdiction and resources. It created a sophisticated network that provides for a logical efficiency that does not undermine criminal accountability and takes advantage of all resources available under international law.

Article 1 of the CCAIL determines that the jurisdiction of domestic courts applies to all crimes defined therein "even when the offence was committed abroad and bears no relation to Germany".[51] On a second level, though, the exercise of universal jurisdiction is limited and regulated.

---

[49] Organic Law 6/1985, Art. 23(4), see *supra* note 40.

[50] Germany: Völkerstrafgesetzbuch (VStGB) [Code of Crimes Against International Law], 29 June 2002 ('CCAIL') (https://www.legal-tools.org/doc/fa8c3f/). Art. 3 of the CCAIL contains the new section 153(f) of the Criminal Procedure Code, 7 April 1987 (https://www.legal-tools.org/doc/19df38/), which refers to the principle of mandatory prosecution.

[51] The wording of CCAIL, Art. 1 was an explicit response to a German jurisprudential mainstream according to which universal jurisdiction could only be exercised by German courts in presence of the so-called "legitimising link". See Kai Ambos and Steffen Wirth, "Genocide and War Crimes in the Former Yugoslavia before German Criminal Courts (1994–2000)", in Horst Fischer, Claus Kreß and Sascha Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Arno Spitz, Berlin, 2001, pp. 778–83. Universal jurisdiction, like the non-application of statutory limitations, is not applicable to sections 12 and 13 of the CCAIL which deal with the so-called "less serious offences".

To be precise, there are some circumstances under which the prosecutor has the discretion to decide not to prosecute. This solution aims to avoid unnecessary duplication of efforts and to prevent national courts from remaining mired in cases impossible to prosecute for practical reasons.

Section 152(2) of the Criminal Procedure Code already enshrined the principle of mandatory prosecution. However, section 153(c) gave the prosecutor discretion to decide whether or not to proceed against suspects of crimes committed abroad. The CCAIL Act amended the Code of Criminal Procedure. Specifically, an addition was made to section 153 (c)(1) so as to extend the principle of mandatory prosecution to crimes committed abroad with the much narrower exceptions provided for in section 153(f), which became the only field where the discretion of the prosecutor has a role to play. Both sections 153(c) and (f) apply to crimes committed abroad. The exceptions to the principle of mandatory prosecution are set out in subsection (1) and (2) of section 153(f) which partially overlap. Subsection (1) applies to both national and foreign accused. Subsection (2) disciplines those cases where neither the perpetrator nor victims are German. According to subsection (1), the prosecutor does not need to prosecute if the "accused is not present in Germany and such presence is not to be anticipated". However, if the perpetrator is German, the discretionary principle only subsists if he is not present in German territory and he is not expected to be and, additionally, he is being prosecuted by the state of the nationality of the victim or before an international court. In cases covered by subsection (2), in order for the prosecutor to be entitled not to proceed it is necessary that: i) the accused be "beyond the reach of the German Executive"[52] (not present in Germany and not expected to be); *and* ii) the suspect be prosecuted outside Germany. In the latter case, the prosecutor is entitled to relinquish the prosecution if the suspect is within national territory but extradition or surrender procedures are in course and it is probable that they will succeed. This is so because in the case of proceedings abroad, the need for German intervention is less urgent.[53] It is important to note that these provisions are anchored on Article

[52] Steffen Wirth, "Germany's New International Crimes Code: Bringing a Case to Court", in *Journal of International Criminal Justice*, 2003, vol 1, no 1, p. 159.

[53] In respect of both subsections (1) and (2) it should be noted that the requirement on the expected presence of the suspect in German territory is not to be understood in restrictive terms. That is, it is not to be applied to the suspicion that the accused has bought a ticket to, or is planning to have a holiday in, Germany. It applies also, for example, to extradition

17 of the ICC Statute: only *genuine* proceedings are able to activate the discretion of the German prosecutor. In the case of proceedings led by states unwilling or unable to bring perpetrators to justice the principle of mandatory prosecution remains intact. Once again, it emerges that the objective of the German law is not the exercise of unbridled universal jurisdiction but to resort to it as the last available remedy to prevent impunity where all other mechanism have failed.[54]

The principle of mandatory prosecution binds the prosecutor to investigate but not to present charges. If by the end of the scrutiny of evidence he or she is not convinced that a crime has been committed he or she will dismiss the case. This notwithstanding, even when the prosecutor decides not to press charges it is possible, under certain conditions, to apply to court for a review of the decision (*Klageerzwingungsverfahren*).[55]

The relationship between the possibility of reviewing a prosecutorial decision not to prosecute and the discretionary faculties of the prosecutor under section 153(f) of the CCAIL are particularly important for the purpose of this study. In accordance with section 172(2) of the Code of Criminal Procedure the request for review is inadmissible if the dismissal

procedures that have been initiated and which may end with the delivery of the individual. *Ibid.*, p. 160.

[54] Although the legal framework created by the CCAIL is promising, the situation might be considerably different when extradition procedures are involved. In fact, while the prosecutor is empowered to, in certain circumstances, issue an international arrest warrant (No. 86 of the Guidelines for Dealings with Foreign States in Criminal Law Matters – *Richtlinien füe den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten*), the decision to issue an extradition request belongs to the Federal Ministry of Justice who shall decide with the consent of the Ministry of Foreign Affairs after a request has been submitted by the prosecutor (Section 74 of the Law on International Assistance in Criminal Matters – *Gesetz über die Internationale Rechtshilfe in Strafsachen*). The Ministries will certainly consider political issues, namely the relations with the requested state. The principle of mandatory prosecution may thus be hampered.

[55] It is, however, necessary that the person presenting the appeal is a direct victim (or, in case of death, someone closely related to him or her). The claim is to be presented to a "higher" prosecutor. If the case has been handled by the chief federal prosecutor, the superior entity in these circumstances is the Federal Minister of Justice. Some commentators argue that in such situations the appeal should be presented directly to the court. Indeed, in highly sensitive cases as those covered by the CCAIL, the interference of political considerations might subvert the entire spirit of the Code. There are further difficulties in these circumstances. For example, when the victim is not in Germany it might be difficult to determine what is the competent court in light of the German Criminal Code. For an appraisal of this and other procedural difficulties, see Wirth, 2003, pp. 163 ff., *supra* note 52.

of the case was based on the discretionary powers recognised to the prosecutor. Yet, in the exercise of his or her discretion the prosecutor is required to set out in the report to be sent to the person who reported the crime the reasons that led him or her not to press charges. This obligation is relevant since the discretion of the prosecutor functions on two separate stages and only the second is unreviewable. At the first level, the prosecutor must ensure that the conditions for the exercise of discretion are verified. Only then he or she can found the decision on the principle of prosecutorial discretion. The decision on whether those conditions have been verified in practice is not a discretionary one. If it is shown that the prosecutor did not correctly understand the *ratio legis* of section 153(f) or, for any reason, did not respect it the decision may be subject to review. Were the prosecutor to resort to section 153(f) because, for example, he or she was wrongly convinced that the suspect was facing criminal proceedings in other state, the decision would be reviewable because discretion was exercised where the necessary conditions were not fulfilled. The mere invocation of section 153(f) does not constitute irrefutable evidence or presumption *iure et iuris* of the lawful exercise of discretionary powers. Finally, there is the opportunity to complain to the supervising authority (*Dienstaufsichtsbeschwerde*). Again, if the prosecutor was the chief federal prosecutor the competent authority will be the Federal Minister of Justice. This mechanism permits any decision of the prosecutor to be challenged. It might be useful in some cases (especially because the Ministry of Justice is responsible for extradition requests) but it is not likely to be a very successful policy since the decision of the Minister is completely discretionary.

Importantly, section 28 of the ICC Statute Implementation Act (*Romstatutausführungsgesetz*)[56] established an efficient interaction between domestic courts and the ICC: it permits German proceedings to be discontinued and the suspect transferred to the ICC if the latter agrees *a priori* to prosecute. This mechanism reveals a comprehensive understanding of complementarity that reaches beyond what is strictly posited in the Statute of Rome. By demanding that the Court accepts the case before relinquishing jurisdiction, Germany sidestepped the drawbacks of the

[56] Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes, 17 July 1998, Bundesgesetzblatt I, 2144 (2002) [Act implementing the Rome Statute of the International Criminal Court].

Belgian and Spanish solutions and promoted a network of co-operation that is beneficial for both the ICC and the German judicial system.

In spite of the potential of the CCAIL to ensure core crimes prosecution, its application by German prosecutors has not always been convincing. An example which elucidates how politics may overpower law is provided by the famous *Donald Rumsfeld* case.[57] The Stuttgart Court of Appeals found that the intention of the Legislature had not been to submit a decision of the prosecutor based on the principle of discretion (including section 153(f)) to the scrutiny of section 172(2) because otherwise the risk would arise of assisting an unbridled extension of Germany's jurisdiction which is questionable under international law. It rejected the argument of the complainants that when the pre-conditions to the exercise of discretion are not met the decision of the prosecutor can be overruled through the *Klageerzwingungsverfahren*. The complainants argued that at least three of the suspects were on German territory and temporary stays could be expected from others. Furthermore, extensive opinions from experts and factual evidence provided showed that the prosecutions in the United States that the federal prosecutor had referred to were not concerned with officials of high rank. The argument was accepted by neither the federal prosecutor nor the Court of Stuttgart.[58]

[57] On 10 February 2005 the federal prosecutor refused to open investigations against the former US Secretary of Defense Donald Rumsfeld and nine other suspects for alleged war crimes committed in the prison of Abu Ghraib, Iraq, from 2003 to 2005. Out of the 10 suspects at least three were present in Germany when the complaint was presented. The federal prosecutor justified its decision not to prosecute on the basis of section 153(f). He stated that the CCIAL established the principle of subsidiarity of German law in respect of crimes committed abroad which, combined with the principle of non-intervention in the affairs of foreign states, did not give competence to German authorities in the case in question. In the view of the prosecutor, this was so because the crimes were being investigated in the United States. The complainants and the civil rights organisation Centre for Constitutional Rights in New York as well as 17 victims from Iraq appealed the decision requesting that charges be brought against Rumsfeld and the other suspects or, at least, that investigations be initiated. The Stuttgart Court of Appeals found the request of review inadmissible. Decision of 13 September 2005, as cited in Wolfgang Kaleck, "German International Criminal Law in Practice: From Leipzig to Karlsruhe", in Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein and Peter Weiss (eds.), *International Prosecution of Human Rights Crimes*, Springer, Berlin, 2007, p. 105.

[58] The prosecutor interpreted section 153(f) of the CCIAL incorrectly in light of Art. 14 of the ICC Statute because he considered that the term "offence" should be understood as "situation" (the overall context in which the crimes in question and other similar cases had been committed) and not "case" (a specific crime attributed to specific individual(s)). By contrast, the provision should have been interpreted in light of Art. 17 of the ICC Statute

5.3. Comlementarity beyond the ICC Statute

The previous section analysed the principle of complementarity under the ICC Statute. It further highlighted some *sui generis* models of implementation of the principle of complementarity that somehow curbed the immediate understanding of complementarity. This section will propose a reading of complementarity which includes but goes beyond the principle of complementarity as enshrined in the ICC Statute. To that effect, it follows an assessment of the early and or close manifestations of what came to be the ICC complementarity principle.

5.3.1. Historical Assessment of the Interplay between National and International Jurisdictions

It was mostly in the aftermath of the Second World War that the coordination and possible division of labour between domestic and international jurisdictions became a pressing matter. However, one can already distinguish at the outset of the First World War elementary features of the principle of complementarity as crystallised in the ICC Statute. This historical analysis has been the focus of Mohamed M. El Zeidy's impressive study on complementarity.[59] Some of his findings will be highlighted and or scrutinised here for they are crucial to the argument of this work. It should be noted that El Zeidy's historical survey terminates with the establishment of the ICC. Instead, the analysis carried out herein expands beyond the borders of the ICC Statute.

With the end of the First World War, the international pressure to prosecute and punish those responsible for the atrocities committed during the conflict was significant. To that effect, the Allies established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('Commission on Responsibility'). The Commission on Responsibility was set up to investigate, assess evidence and identify perpetrators. This endeavour implied, *inter alia*, prosecuting the former Kaiser of Germany which gave rise to controversies vis-à-vis the

because, like Article 153(f), it deals with admissibility conditions while Art. 14 regulates one of the possible "trigger mechanisms" of the ICC jurisdiction. The term "offence" is used in section 153(f) but has no precedent in German law. See Kaleck, 2007, pp. 93 ff., *supra* note 57.

[59] Mohamed M. El Zeidy, The Principle of Complementarity in International Criminal Law: Origin, Development and Practice, Brill, Leiden, 2008, pp. 11–152.

principle of sovereignty. To pursue its mandate, the Commission on Responsibility established Sub-Commission III to determine which bodies were most appropriate to investigate and prosecute. The Sub-Commission held that individuals of enemy countries who had directly ordered the commission of crimes or, having that responsibility, failed to prevent them should be submitted to the jurisdiction of a high court, international in nature.[60] The proposal did not pass as Japan and the United States argued such a body to be unprecedented. Most important for the purposes of this study are the so-called penalty provisions of the Versailles Treaty: Articles 228 to 230.[61] According to these provisions, Germany agreed to

[60] The Tribunal should have been composed of 22 judges from different countries: United States, Portugal Romania, the British Empire, France, Italy, Japan, Belgium, Greece, Poland, Serbia and Czechoslovakia. See Carnegie Endowment for International Peace, *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919*, Pamphlet No. 32, 1919, pp. 58–60, 74.

[61] Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919 ('Versailles Treaty') (http://www.legal-tools.org/doc/a64206/). The provisions read as follows:

> Article 228:
>
> The German Government recognizes the right of the Allied and Associated Powers to bring before military Tribunals persons accused of having committed acts in violations of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a Tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associate Powers, or to such one of them as shall so request, all persons accused of having an act in violation of the laws and customs of war, who are specified either by name or by rank, office or employment which they held under the German authorities.
>
> Article 229:
>
> Persons guilty of criminal acts against nationals of one of the Allied and Associate Powers will be brought before the military Tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military Tribunals of the Powers concerned. In every case the accused will be entitled to name his own counsel.
>
> Article 230:
>
> The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders, and the just appreciation of responsibility.

deliver nationals suspected of war crimes to the Allies in order to be tried by Allied National Military Tribunals.[62] However, once the Commission on Responsibility issued a list of 895 suspects to be handed over,[63] the President of the German Peace Delegation in Paris refused to comply for it would be inconsistent with German sovereignty to deliver its citizens to be tried by foreign powers[64] and pleaded Germany's right to prosecute criminals before its own tribunals.[65] The Allies accepted the German offer to try some of the identified suspects before its Supreme Court in Leipzig. However, the Allies reserved the right to overrule German decisions in case they were unsatisfactory.[66] The scheme arising out of the aftermath of the First World War gave rise to what can be considered the prime example of the principle of complementarity as enshrined in the ICC Statute.[67] In the Allies' view,

> the offer of the German Government was compatible with the execution of Article 228 of the Treaty of Peace, and the Allied Governments accordingly decided […] to leave full and complete responsibility with the German Government [for] proceeding with the prosecution and judgement upon the understanding that the Allies would thereafter consider the results of these prosecutions and whether the German Government were sincerely resolved to administer justice in

---

62 Were the crimes to have affected victims from more than one nationality, Germany would submit suspects to the authority and jurisdiction of a Mixed Inter-Allied Military Tribunal. In case of crimes committed in the territory of another country, Germany agreed to submit suspects to the jurisdiction of the territorial state.

63 Document dated 3 February 1920. See El Zeidy, 2008, p. 14, fn. 41, *supra* note 59, noting a divergence in doctrine concerning the number of suspects.

64 *Ibid.*, p. 15.

65 Furthermore, the list included several military personnel. High-ranking military personnel publicly affirmed that they would not accept to stand trial before foreign 895courts, as it would run against soldiers' honour. See James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood, London, 1982, p. 121.

66 *German War Trials: Report of the Proceedings Before the Supreme Court in Leipzig*, His Majesty's Stationery Office, London, 1921, pp. 4 and 17 ('German War Trials'). See also El Zeidy, 2008, pp. 15–16, *supra* note 59.

67 This affirmation addresses exclusively elements of co-ordination between different jurisdictions whereby vis-à-vis unwillingness or inability of the primary jurisdiction to carry out proceedings, complementary jurisdictions would immediately be entitled to step in in order to administer justice. It is, however, different from the ICC complementarity model because there was no autonomous international court involved.

> good faith. If it should be shown that the procedure proposed by Germany did not result in just punishment being awarded to the guilty, the Allied Powers reserved in the most expressed manner the right of bringing the accused before their own tribunals.[68]

Even though the trials in Leipzig proved to be substandard, the Allied powers did not resort to the safety device of adjudicating proceedings to their "own tribunals". It was this inaction on the side of the Allies that prevented complementarity from properly working in practice.[69]

As had happened with Germany, the Allies prepared agreements similar to the Versailles Treaty with other enemy governments. Specifically, peace treaties were concluded with Turkey, Bulgaria, Austria and Hungary. The penalty clauses in these treaties reproduced to a significant extent the corresponding provisions of the Versailles Treaty.[70] When the Allies presented these four states with the list of suspects to be extradited, the reaction was identical to the one Germany had had.[71] In the end, the

---

[68] German War Trials, 1921, pp. 4, 17–18, see *supra* note 66. Clearly, the language of the Versailles Treaty, Art. 228 points to primacy of Allied courts. Although, so as to avoid internal disruption in Germany and control public sentiments of dissatisfaction, the Allies extended the scope of the relevant provision and ended up accepting the German offer. To that decision contributed legal difficulties within the domestic systems of the Allies since national law did not contemplated jurisdiction over crimes committed abroad, by foreigners and against foreigners.

[69] Claud Mullins, The Leipzig Trials: An Account of the War Criminals Trials and a Survey of German Mentality, Grafs Inn, London, 1921, pp. 24–26.

[70] Treaty of Peace between the Allied and Associated Powers and Austria, Saint-Germain-En-Laye, 10 September 1919, Art. 173 (reproducing Art. 228 of the Versailles Treaty); Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27 November 1919, Art. 118 (reproducing Art. 228 of the Versailles Treaty); Treaty of Peace between the Allied and Associated Powers and Hungary, Trianon, 4 June 1929, Art. 157 (reproducing Art. 228 of the Versailles Treaty); Treaty of Peace between the Allied and Associated Powers and Turkey, Sèvres, 10 August 1920, Art. 226 (reproducing Art. 228 of the Versailles Treaty). The *travaux préparatoires* of the agreements reveal indeed that the Allied powers understood Art. 228 of the Versailles Treaty as the standard that should guide the relationship between the Allied powers and enemies in respect of adjudication of war crimes' proceedings. "Article 228 […] should be taken by the Drafting Committee as the basis for the preparation of corresponding articles in the Treaties of Peace with Austria and with Hungary". See The Council of Four: Meetings of May 9: Notes of A Meeting Held at President Wilson's House in the Place des Etats-Unis, on Friday, May 9, 1919, at 4 p.m. (CF-4), reprinted in *Foreign Relations of the United States*, vol. V, 530, cited in El Zeidy, 2008, p. 19, see *supra* note 59.

[71] Hungary opposed the delivery of nationals to Allied Military Tribunals on the basis that it would be far too humiliating even for a defeated power. See Francis Déak, *Hungary at the*

Allies agreed to recognise the jurisdiction of national courts with the safety valve that permitted the adjudication of cases which did not appear to have been dealt with satisfactorily. Bulgaria and Austria achieved much better results than Germany.[72] The Turkish situation was notably different, mainly as a result of the international pressure to guarantee punishment of those responsible for the genocide against the Armenian people.[73] Generally, as before with the Versailles Treaty, the peace agreements represented a clear failure of complementarity which, although existing as law, was met with the lack of political will and the structural conditions necessary for it to be enforced.

In addition to the above-mentioned peace treaties, the aftermath of the First World War was prolific in other initiatives aimed at ensuring

Paris Peace Conference: The Diplomatic History of the Treaty of Trianon, Columbia University Press, New York, 1942, p. 235. Accordingly, Hungary requested to try its nationals before its own courts, a possibility already acknowledged to Germany. For an overview of the reactions of Austria, Bulgaria, Hungary and Turkey, see El Zeidy, 2008, pp. 20 ff., *supra* note 59.

72 Austria established the Commission of Inquiry within the Military Breaches of Duty which tried General Ljubicic and Lütgendorff for ordering killings of Russian and Serbian war prisoners. Conversely, in Bulgaria criminals were divided in two groups: the first, composed of former high officials and their responsibility for the war; the second, composed of minor criminals. Reportedly 534 people or submitted to trial for violating the laws of war. See Willis, 1982, pp. 156 ff., *supra* note 65.

73 The Allies were determined to prosecute and punish the responsible for the crimes committed against the Armenian people in 1915 and for the violations of the laws of war during the First World War, particularly in respect of the treatment given to prisoners. Trying to save the peace negotiations and maintain the sovereignty of the state as untouched as possible, Turkey passed legislation ensuring that the leaders of the Young Turk movement and the members of the Committee of Union and Progress would be subject of criminal proceedings for having led the Ottoman Empire to the First World War and for the killing and deportation of hundreds of Armenians. In 1919 few popular figures were tried and convicted which gave rise to a fervent movement of popular dissatisfaction. In view of this, the government released several prisoners. The police was ordered to suspend all arrests. The Allies reacted and deported Turkish prisoners to Malta to face trial. Yet, in 1921 these prisoners were released in exchange for British prisoners. The concern of the Allies with Turkish sovereignty led to the substitution of the Treaty of Sèvres, not yet ratified, by the Treaty of Lausanne, which had no provision on trials and punishment. Rather, it counted with an unpublicised annex which granted amnesty to Turkish officials. For a deeper analysis on the Turkish case see, *inter alia*, Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, Lynne Rienner Publishers, Boulder, 2004, pp. 55 ff.; Vahakn N. Dadrian, "The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime", in *University of West Los Angeles Law Review*, 1998, vol. 29, p. 43; El Zeidy, 2008, pp. 22 ff., *supra* note 59.

prosecution and punishment of war crimes. While a model of complementarity such as the one embodied in the Versailles Treaty did not emerge, it is possible to detect a commitment to articulate national and international jurisdictions in order to prevent loopholes able of creating safe havens for perpetrators of core crimes, as well as an effort (although not always successful) to set forth the legal landscape for the development of a complementary relationship between national courts and an international criminal court.

In 1920 the League of Nations established, on the basis of Article 14 of the Versailles Treaty, the Advisory Committee of Jurists to study the convenience of an international criminal court. Baron Édouard Descamps, President of the Committee, proposed that such a court should have jurisdiction over acts threatening "international public order", including offences to "the universal law of nations".[74] This proposal was rejected by the Third Committee of the Assembly of the League of Nations as states were not prepared at the time to bear further restrictions on their sovereignty.[75]

After the failure of the Advisory Committee, the International Law Association ('ILA'), from 1922 to 1924, analysed the convenience of establishing an international court competent to judge violations of the laws

---

[74] See Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16 June–24 July 1920, p. 500, cited in El Zeidy, 2008, p. 27, see *supra* note 59. Sustaining this view, Lapardelle argued:

> It was now a question of building up the future […] no one knew who would be the perpetrators of the crimes in the future, and therefore a Court could be constructed in abstracto. […] A stable judicial organization was required which could take action against those guilty of crimes against international justice, no matter what nation they belonged to.

Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16 June–24 July 1920, pp. 500–1, cited in *id*., p. 28.

[75] Records of the First Assembly of the League of Nations, Tenth Meeting of the Third Committee, 1920, p. 764., in Memorandum Submitted by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, United Nations General Assembly, New York, 1949, p. 11, UN doc. A/CN.4/7/Rev.1 ('Historical Survey of International Criminal Jurisdiction'):

> There is not yet any international penal law recognized by all nations and that, if it were possible, to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice. The Committee therefore considers that there is no occasion for the Assembly of the League of Nations to adopt any resolution on this subject.

and customs of war and acts contravening the laws of humanity.[76] The most important provision of the ILA's Draft Statute for the establishment of the court was Article 24.[77] It determined that during a conflict war criminals would be tried before their own military courts unless the state decided to submit the case to the international court. Charles Henry Butler was of the view that, during or after the war, the court should operate as a seat for appeals, always upon states' voluntary submission of cases.[78] Again, the proposals of the ILA did not progress further as states were not willing to restrict their sovereignty. In line with this view, during the 1925 Inter-Parliamentary Union Conference,[79] the main attempt was to reconcile sovereignty with the need of prosecuting human atrocities. To the scope of this work, the most relevant outcome of the mentioned Conference was Vespasien V. Pella's distinction between "interior" and "exterior" sovereignty. The latter was not absolute, for it was necessary to reconcile states' powers with the need to ensure harmony among nations. Exterior sovereignty was thus limited to the extent necessary to guarantee respect for other states' rights and the maintenance of order and international justice. Interior sovereignty would relate to the state action within

[76] For references on the 1922–1924 conferences of the International Law Association, see El Zeidy, 2008, pp. 31–34, *supra* note 59.

[77] International Law Association, Draft Statute for the Permanent International Criminal Court, Report of the Thirty-Third Conference, Stockholm, 8 September–13 September 1924, Art. 24 ('ILA Report'):

> The Court shall be open to the subjects or citizens of every state, whether belligerent or neutral, and whether during a war or after its conclusion. Provided always that no complaint or charge shall be entertained by the Court unless the complainant as first obtained the fiat or formal consent of the Law Officers, Public Prosecutor or Minister of Justice, as the case may be, of his own State.

[78] The court would thus determine "whether the national Court had properly executed justice in such a way as to satisfy the nation which claimed that the offence had been committed against its national". ILA Report, p. 103, cited in El Zeidy, 2008, p. 32, supra note 59. The expression "whether the national court had properly executed justice" seems to imply the concepts of unwillingness or inability revealing, on the one hand, a possible exception to the voluntarist approach, and, on the other, how the basic contours of complementarity as enshrined today in the Statute are not a brand novelty of the latter. However, Hugh H. Bellot was of the view that after the end of war, the international court should have exclusive jurisdiction over war crimes. ILA Report, *id*., pp. 76–77.

[79] The Inter-Parliamentary Union met in 1925 for its 23rd meeting in order to discuss the report prepared by Pella on Criminality of Wars of Aggression and the Organization of International Repressive Measures. See Report of the 1925 Inter-Parliamentary Union, XXIII Conference, Washington and Ottawa, 1–13 October 1925.

its territory where it would be the *dominus*. However, this realm of sovereignty also knew limitations as the state could not act contrary to the most "elementary precepts of humanity and to the customs unanimously recognized by the civilized world".[80] As to the interplay between domestic and international jurisdictions, Pella stressed that the need to repress international crimes required those states directly involved to be barred from carrying out criminal proceedings in order to "insure energetic repressive measures and also to avoid both excessive severity and culpable leniency".[81] In the quest for impartiality, exclusive jurisdiction of the international court over the abovementioned crimes was sought. The idea of complementarity rests on the recognition that sovereignty is not absolute and cannot be called upon whenever it contradicts international order and justice.

The emergence of terrorism in Eastern Europe led to a climate of political instability that was supported by Fascist Italy and Nazi Germany. In 1934, continuing the developments of the period immediately after the First World War, the Council of the League of Nations passed a resolution setting up a committee of experts to study international responses to terrorism.[82] The committee analysed the proposals and comments of several governments[83] and considered that the most appropriate response to terrorism was through the establishment of an international court, bestowed with concurrent jurisdiction in relation to domestic courts.[84] The interna-

[80] *Ibid.*, p. 101.

[81] *Ibid.,* p. 106.

[82] Report to the Council on the First Session of the Committee, 30 April–8 May 1935, League of Nations doc. C.184.M.102.1935V, p. 2, containing the resolution establishing the committee of experts.

[83] For an account on the discussion held during the meetings see El Zeidy, 2008, pp. 44–56, *supra* note 59; Antoine Sottile, *The Problem of the Creation of a Permanent International Criminal Court*, Kraus, Nendeln, 1966, pp. 16–22.

[84] League of Nations, Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937, Art. 3, Part I(2) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations doc. C.548.M.385.1937.V ('League of Nations Convention') read as follows:

> 1. In the cases referred to in Article 10 of the Convention for Prevention and Punishment of Terrorism, each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own tribunal, to send the accused for trial before the Court.

tional court was envisioned as a default jurisdiction as opposed to having exclusive jurisdiction over acts of terrorism. Again, the jurisdiction of the court was optional, with all the shortcomings that implies. The different views of states led the committee of experts to decide to elaborate two different drafts: one on the prevention and punishment of terrorism and the other on the creation of an international criminal court. In spite of views to the contrary,[85] the Convention for the Creation of an International Criminal Court maintained the abovementioned concept of concurrent jurisdiction: the state had the ability to choose between trying criminals before its own courts, extraditing them or resorting to the international criminal court.[86] The Convention for the Prevention and Punishment of Terrorism featured a regime based, subject to certain conditions, on the duty to extradite or prosecute.[87] The 1937 League of Nations Conventions never entered into force.[88]

It is after the beginning of the Second World War that the most explicit materialisation of complementarity can be found. El Zeidy argues that the London International Assembly of 1941 was the first body, even if not an official one, to propose a true complementary scheme between national and international courts.[89] The Assembly met to discuss the methods to pursue criminal accountability for atrocities committed during

> 2. A High Contracting Party shall further be entitled, instead of extraditing, to send the accused for trial before the Court if the State demanding extradition is also a party to that Convention.

See also El Zeidy, 2008, p. 47, *supra* note 59.

85 India argued that it opposed such a court as the country had the proper mechanisms to deal with terrorism. The United Kingdom stated it would not support the court for it was a premature solution to which the international community was not yet prepared. Many countries expressed similar views. See *Observations by Governments on the Draft Convention for the Prevention and Punishment of Terrorism, and Draft Convention for the Creation of an International Criminal Court*, Series I, League of Nations Document A.24.1936. V., 4-10.

86 League of Nations Convention, Art. 2.

87 League of Nations, Convention for the Prevention and Punishment of Terrorism, Geneva, 16 November 1937, Arts. 8, 9 and 10, Part I(1) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations doc. C.548.M.385.1937.V ('Convention on Terrorism'). The regime enshrined in the Convention on Terrorism was also grounded on the *aut dedere aut judicare* principle.

88 The Convention on Terrorism was ratified only by India while the Convention for the Creation of an International Criminal Court received no ratification at all.

89 El Zeidy, 2008, p. 59, *supra* note 59.

the war. One of the most intricate issues on the table was that of the competence of an international court. It was argued that the court would never be able to judge all cases.[90] Therefore, domestic courts would necessarily maintain a fundamental role in administering criminal justice (with the exception of Germany because of the issue of impartiality) whereby only the most serious crimes were to fall under the jurisdiction of the international judicial body.[91] Delegates were opposed to a court with exclusive jurisdiction on grounds that it would become inoperative due to the amount of cases and that states linked to the crime were the *forum conveniens*. Nonetheless there was agreement regarding the fact that perpetrators should not escape justice as had happened after the First World War. The London Assembly ended in 1943 with the submission of a draft convention for the establishment of an international criminal court.[92] Articles 3 and 4 maintained the idea of a subsidiary court of last resort.[93] Its jurisdiction was defined by an all-encompassing clause determining that the court could step in where states were not in the position, or willing, to un-

[90] London International Assembly, Commission II on the Trials of War Criminals, TS 26/873, p. 232.

[91] Marcel de Baer, the Belgian jurist, stated that only those cases in relation to which "a trial by a national court is impossible or inconvenient, should be tried by an international or United Nations Court", London International Assembly, Commission I for Questions Concerned with the Liquidation of the War, TS 26/873, p. 282.

[92] Draft Convention for the Creation of an International Criminal Court, London International Assembly, Commission I for Questions Concerned with the Liquidation of War, TS 26/873, pp. 324–25.

[93] *Ibid.*, Art. 3:

> 1. As a rule, no case shall be brought before the Court when a domestic Court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.
> 2. Accused persons in respect of whom the domestic Courts of two or more United Nations have jurisdiction, may however, by mutual agreement of the High Contracting Parties concerned, be brought before the Court.
> 3. Provided that the Court consents, any crime as defined in Article 2 may be brought before the International Criminal Court, either by national legislation of the State concerned, or by mutual agreement, of the High Contracting Parties concerned in trial.

Article 4(1):

> Each H.C.P. shall be entitled, instead of prosecuting before its own Courts a person residing or present in his territory who is accused of a war crime, to commit such accused for trial to the I.C.C.

dertake proceedings. The guiding principle of the system was still that of consent without which unwillingness and inability could not cause the jurisdiction of the international court to apply. There was no safety valve for cases where criminals were intentionally shielded from justice.

In 1941, at the request of the Belgian Minister of Justice, another body, the International Commission for Penal Reconstruction and Development, was established with a scope similar to that of the London International Assembly.[94] During the discussions regarding the type of judicial body best suited to administer justice, the proposal for an international tribunal with residual competence covering exclusively those crimes over which none of the Allies had jurisdiction gained considerable support. The corresponding report was submitted to the appropriate authority of each Allied government. El Zeidy considers this proposal reflected the main features of the principle of complementarity as determined in the ICC Statute because it included the primacy of national courts at the same time that the international court could be resorted to where domestic courts could not undertake proceedings. Yet, as in previous examples, there was no safety net for unwillingness; the entire regime was based on states making a voluntary appeal to the international court and it is debatable whether such a model truly corresponds to complementarity.[95]

In October 1943 the United Nations established the War Crimes Commission ('UNWCC'), which was mandated to investigate war crimes committed by the Axis powers during the Second World War and reflect on the possible creation of a judicial body competent to try war criminals. Within this framework, the United States presented a draft convention for the establishment of an inter-Allied court,[96] which became the starting point for future discussion and development within the UNWCC.[97] The inter-Allied court was expected to handle cases that did not fall under the jurisdiction of states or that states decided, for any *sufficient* reason, to

[94] Conference held in Cambridge on 14 November of 1941. See Historical Survey of International Criminal Jurisdiction, *supra* note 75.

[95] See *infra* section 5.3.2.

[96] United Nations War Crimes Commission ('UNWCC'), Draft Convention on the Trial and Punishment of War Criminals, SC II/11, 14 April 1944 (https://www.legal-tools.org/doc/8a326d/).

[97] As a consequence, the Commission submitted a new draft. See UNWCC, Draft Convention for the Establishment of a United Nations War Crimes Court, C50(1), 30 September 1944 (https://www.legal-tools.org/doc/36ed23/).

submit to the court. Still, the state continued to be the single authority entitled to make the decision regarding its own unwillingness or incapacity.[98] In the end, the idea of an inter-Allied court was abandoned; instead, the proposal for a mixed military tribunal to deal with the crimes committed by the Axis was preferred because it would permit faster proceedings.[99] The ground was prepared for the International Military Tribunal ('IMT') at Nuremberg.

The competence of the Nuremberg Tribunal was very specific: to prosecute those most responsible for war crimes, crimes against humanity and crimes against peace committed during the Second World War. The division of labour between it and national courts was based on the gravity of crimes and the rank of the perpetrator. In accordance with the 1943 Moscow Declaration, referred to in the London Agreement,[100] crimes with no specific geographic location would fall within the jurisdiction of the Military Tribunal. The majority of cases were to be dealt with by domestic jurisdictions on the basis of the principle of territoriality. Accordingly, either the state where the crime had been committed or the Allies in their respective zones of occupation were to undertake proceedings.[101]

---

98 On the work of the UNWCC see United Nations War Crimes Commission Progress Report, C.48, 12 September 1944; UNWCC, Progress Report Adopted by the Commission on 19th September 1944, C48(1), 19 September 1944 (https://www.legal-tools.org/doc/33d034/); UNWCC, Questions as to the Jurisdiction of the Proposed Court, SC II/23, 29 June 1944 (https://www.legal-tools.org/doc/4ad25e/); UNWCC, Explanatory Memorandum to Accompany the Draft Convention for the Establishment of a United Nations War Crimes Court, C58, 6 October 1944, (https://www.legal-tools.org/doc/f941b0/).

99 UNWCC, Suggestions to Accompany the Recommendation for the Establishment of Mixed International Tribunals, C59, 6 October 1944 (https://www.legal-tools.org/doc/6c92a5/). The inter-Allied court was also opposed on grounds of the Moscow Declaration, signed at the Tripartite Conference, Moscow, 19–30 October 1943, which required middle-ranking German criminals to be tried before national courts.

100 Agreement for the Prosecution and Punishment of the Major War criminals of the European Axis, 8 August 1945, in Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, vol. I: Official Documents, IMT, Nuremberg, 1947, pp. 8–9 ('London Agreement') (https://www.legal-tools.org/doc/844f64/), which established the IMT.

101 The Allied Control Council, as the legislative body with competence over the whole of Germany, passed Control Council Law No. 10 providing for "the punishment of persons guilty of war crimes, crimes against peace, crimes against humanity", aimed at setting a common foundation for the administration of criminal justice. Control Council Law No. 10, 20 December 1945, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, October 1946–April 1949*, vol. XV: *Procedure, Practice and Administration*, US Government Printing Office, Washington, DC, 1949, pp.

In 1946 the United Nations General Assembly requested the Economic and Social Council to "undertake the necessary studies with a view to drawing up a draft convention on the crimes of genocide".[102] Pursuant to resolution 260 (III) of 9 December 1948, the General Assembly, on the basis of the draft convention prepared by the *Ad Hoc* Committee, approved the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention').[103] Article VI of the Genocide Convention determines that genocidal acts can be tried either by domestic courts or by an international tribunal bestowed with jurisdiction to that effect; however, it does not explain the nature of the relationship between domestic and international jurisdictions. The *travaux préparatoires* show that, as in the past, there were three main groups of states: 1) those favouring the exclusive jurisdiction of the international tribunal as it could not be expected that states endeavoured to prosecute such a politically sensitive crime;[104] 2) those supporting exclusive domestic jurisdiction;[105] and 3) those tending towards a system capable of efficaciously coordinating national and international jurisdictions whereby the international tribunal would be a last resort seeking to fill the gap left by incapable or unwilling states. The secretariat favoured an international court with optional jurisdiction in some cases and compulsory jurisdiction in others. It proposed two alternative models: either a court with jurisdiction over all international crimes or a special court with limited jurisdiction over genocide. The court would have jurisdiction where states were unwilling to prosecute or extradite, or when genocide had been committed

23–28 (https://www.legal-tools.org/doc/ffda62/). Thereafter, it was the responsibility of Allies and states to give effect to Control Council Law No. 10 within their controlled territories.

[102] United Nations General Assembly resolution 96 (I), The Crime of Genocide, 11 December 1946, UN doc. A/Res/96(I) (https://www.legal-tools.org/doc/44b386/).

[103] Genocide Convention, see *supra* note 24. The *Ad Hoc* Committee was established by ECOSOC resolution 117 (VI), Genocide, 3 March 1948, UN doc. E/734.

[104] This was the position of France which did not rely on states to prosecute genocide. Chile was of the same view. Ad Hoc Committee on Genocide, Summary Record of the Seventh Meeting, 12 April 1948, UN doc. E/AC.25/SR.7 ('Ad Hoc Committee on Genocide, Seventh Meeting'), in Hirad Abtahi and Philippa Webb (eds.), *The Genocide Convention: The Travaux Préparatoires*, vol. 1, Martinus Nijhoff, Leiden, 2008 p. 782 ff.

[105] *Ibid.* This was the view held, for example, by the Soviet Union, Venezuela and Poland.

with the support of the forum state.[106] The United States proposed that the international tribunal had jurisdiction solely when the territorial state could not or had failed to act.[107] Close to the principle of complementarity as determined in the ICC Statute, the Uruguayan delegation supported a model whereby the international court would gain jurisdiction when the territorial state failed to effectively punish perpetrators; yet, in such cases, the jurisdiction of the court would not be automatic but dependent on a referral by any of the parties to the Genocide Convention.[108]

Following the Second World War, the International Law Commission ('ILC') played a fundamental role on the design of models intended to co-ordinate national and international jurisdictions. A major effort was undertaken towards the creation of a code of offences against the peace and security of mankind.[109] The 1951 Draft Code did not elaborate any enforcement model because initially the mandate of the ILC was only directed at the definition of crimes.[110] The 1954 Draft Code did not include any considerable innovation in respect of an international criminal court. It is important to note that between 1949 and 1950 the ILC met periodically to discuss the question of international criminal jurisdiction. The General Assembly decided to establish a Committee separated from the ILC to analyse the desirability of an international criminal court and prepare preliminary draft conventions on the latter establishment.[111] In 1952

[106] United Nations Economic and Social Council, Draft Convention on the Crime of Genocide, Comments on Article IX, UN doc. E/447, in *ibid.*, p. 245; Historical Survey of International Criminal Jurisdiction, *supra* note 75.

[107] Ad Hoc Committee on Genocide, Seventh Meeting, in Abtahi and Webb, 2008, pp. 786 ff., see *supra* note 104.

[108] Ad Hoc Committee on Genocide, Summary Record of the Ninety-seventh Meeting, 9 November 1948, UN doc. A/C.6/SR.97, *ibid.*, pp. 1669 ff. Uruguay: Amendments to the Draft Convention on Genocide (E/794), UN doc. A/C.6/209, *ibid.*, pp. 1963 ff.

[109] United Nations General Assembly resolution 177 (II), Formulation of the Principles Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 21 November 1947, which led to the Nuremberg Principles being adopted by the ILC at its second session, 5 June–29 July 1950; International Law Commission ('ILC'), Report, A/1316 (A/5/12), 1950, part III, paras. 95–127, *Yearbook of the International Law Commission*, vol. II, 1950, pp. 374–78 (https://www.legal-tools.org/doc/5164a6/).

[110] ILC, Draft Code of Offences against the Peace and Security of Mankind, in *Yearbook of the International Law Commission*, vol. II, 1951, pp. 134–37.

[111] United Nations General Assembly resolution 489 (V), International Criminal Jurisdiction, 12 December 1950.

the Committee published its report.[112] Arising out of the Draft Statute was again a system based on the voluntary activation of the court's jurisdiction; yet no safety net was accorded to cases where perpetrators were intentionally shielded from justice.[113] The establishment of an international criminal court was again reviewed by the 1953 Committee on International Criminal Jurisdiction.[114] The system that emerged was very similar to the one suggested in 1951, underlining the residual competence of the international judicial body, always dependent on the voluntary submission of cases. Again, the project of an international criminal court was curtailed.[115]

The matter was seriously explored again in the early 1980s when the ILC recognised the problem of having a code on the most serious crimes under international law without the necessary machinery to enforce it.[116] Therefore, discussing the implementation of the future Code of Offences against the Peace and Security of Mankind, the ILC was necessarily driven to the creation of an international criminal court. It was proposed that national and international jurisdictions should coexist "side by side", based on the *aut dedere aut judicare* principle.[117] Some states con-

[112] Report of the Committee on International Criminal Jurisdiction on its Session held from 1 to 31 August 1951, UN General Assembly Official Records, 7th sess., suppl. no. 11, UN doc. A/2136.

[113] Article 26 and 27 barred the jurisdiction of the court in all cases where both the state of nationality and territory had not given their consent, by convention or specific agreement or declaration. As clarified by the Secretary-General, the jurisdiction of the court would be in principle "optional" and states were under "no obligation" to refer cases to the international court. Summary Record of the Third Meeting, 1st sess., UN doc. A/AC.48/SR.3; Summary Record of the Seventh Meeting, 1st sess., UN doc. A/AC.48/SR.7. See also Memorandum of the Secretary-General submitted on 2 July 1951, UN doc. A/AC.48/1.

[114] In 1952 the General Assembly appointed a different Committee mandated to study the creation and impact of an international criminal court, its relationship with the UN and its organs, and to explore the draft submitted by the 1951 Committee on International Criminal Jurisdiction. See UN doc. A/2186, para. 3(a) and (b), 63.

[115] The General Assembly, recognising the close relationship between an international judicial body and crimes against the peace and security of mankind decided to postpone the consideration of the Draft Statute until the report was seen by the Special Committee working on the definition of the crime of aggression. United Nations General Assembly resolution 898 (IX), International Criminal Jurisdiction, 14 December 1954.

[116] ILC, Report of the International Law Commission on the Work of its Thirty-Fourth Session, 3 May–23 July 1982, UN General Assembly Official Records, 37th Session, suppl. no. 10, 1982, UN doc. A/37/10 (https://www.legal-tools.org/doc/499f5d/).

[117] *Ibid.*, p. 275.

sidered that the proper system should be based on the duty to prosecute or extradite which would function exclusively between states. This, however, did not seem the most plausible response, particularly in view of the reluctance of states to extradite nationals and the problems arising out of revolutionary governments which could condemn former adversaries with the support of the law.[118] Recognising the political sensitivity of the issue, a provision was included asserting the duty to extradite or prosecute while clarifying that the system thereby determined did not jeopardise the future establishment of an international criminal court.[119] It is worth noting the statement of the Special Rapporteur Doudou Thiam affirming that the most

> logical solution of the problem would be an international criminal jurisdiction, but in the absence of such an institution, and pending a decision on the advisability of establishing it […] the best solution in the present circumstances was still reliance on the principle of universal jurisdiction.[120]

This statement acknowledges the potential of universal jurisdiction and the *aut dedere aut judicare* principle to work in concert so as to decrease impunity of international crimes. However, the proposal of the Rapporteur did not manage to gather sound support. States were unwilling to try perpetrators for such politically sensitive crimes and much less to extradite their nationals and submit them to foreign jurisdictions.[121] Again, some insisted on compulsory international jurisdiction capable of guaranteeing equality and impartiality.[122] Others continued defending the role of national courts at least for a transitional period.[123] It was against this back-

[118] ILC, Summary Records of the Meetings of the Thirty-Seventh Session, 6 May–26 July 1985, *Yearbook of the International Law Commission*, vol. 2, p. 11, 1985 (https://www.legal-tools.org/doc/26eb9b/).

[119] ILC, Fourth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, Art. 4(1) and (2), *Yearbook of the International Law Commission*, vol. 2, part 1, 1986, p. 82, UN doc. A/CN.4/398.

[120] ILC, Summary Records of the Meeting of the Thirty-Ninth Session, 4 May–17 July 1987, *Yearbook of the International Law Commission*, vol. 1, 1987, p. 6.

[121] ILC, Summary Records of the Meetings of the Fortieth Session, 9 May–29 July 1988, *Yearbook of the International Law Commission*, vol. 1, 1988, pp. 67, 100, 275.

[122] *Ibid.*, p. 68.

[123] *Ibid.*, pp. 114, 281–82.

drop of constant division[124] that the General Assembly decided to invite the ILC to study the matter further.[125]

In the 1990s the ILC, directly mandated by the General Assembly,[126] continued its work on the establishment of an international criminal court. The 1993 Draft Statute of an International Criminal Code merely stated that the tribunal should be able to prosecute a person for acts constituting crimes referred to in the Statute "if the previous criminal proceedings against the same person for the same acts was really a 'sham' proceedings, possibly even designed to shield the person from being tried by the Court".[127] In respect of the precise extent of the court's jurisdiction, opinions continued to be divided.[128] The 1994 Draft Statute refers for the first time to *complementarity*. The concept developed into the model established in the ICC Statute.[129]

Out of the context of the establishment of a permanent international criminal court, in the early 1990s the United Nations Security Council established the *ad hoc* Tribunals specific to the former Yugoslavia and Rwanda with precise geographic and chronological mandates. The corresponding Statutes determined the concurrent jurisdiction of the Tribunals and domestic jurisdiction with primacy to the former in case of conflict.[130]

---

[124] ILC, Summary Records of the Meetings of the Thirty-Fifth Session, 3 May–22 July 1983, *Yearbook of the International Law Commission*, vol. 1, 1982, pp. 15–39, 151.

[125] United Nations General Assembly resolution 44/39, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes, 4 December 1989, UN doc. A/Res/44/39.

[126] See United Nations General Assembly 44/32, Draft Code of Crimes against the Peace and Security of Mankind, 5 December 1989, UN doc. A/Res/44/32; Resolution 44/39, see *supra* note 125.

[127] ILC, Report of the International Law Commission on the Work of its Forty-fifth Session, 3 May–23 July 1993, UN General Assembly Official Records, 48th supp. no. 10, Art. 45, Commentary, p. 121, UN doc. A/48/10 (https://www.legal-tools.org/doc/f3681f/).

[128] *Ibid.*, commentary 3.

[129] ILC Draft Statute for an International Criminal Court with commentaries, Text Adopted by the ILC at its Forty-sixth Session, 2 May–22 July 1994 (https://www.legal-tools.org/doc/390052/). See also *supra* section 5.2.

[130] Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by resolution 827, Art. 9 ('ICTY Statute') (*https://www.legal-tools.org/doc/b4f63b/*); Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by resolution 955, Art. 8 ('ICTR Statute') (*http://www.legal-tools.org/doc/8732d6/*).

Later, a new form of co-ordination between national and international jurisdictions emerged (much as a response to criticism related to the *ad hoc* Tribunals) with the establishment of the so-called hybrid tribunals, such as for Special Panel for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') and the Special Court for Sierra Leone. While they are characterised by having national and international staff, and applying both international and domestic law, they enjoy primacy over the courts of the relevant country in respect of crimes falling under their mandate.[131]

5.3.2. Reconceptualising Complementarity

After a detailed examination of complementarity in international criminal law, El Zeidy originally proposed four main complementarity models. The first is what he calls "optional complementarity",[132] according to which a state party to the convention establishing an international court *could* refer the case if it concluded, for whatever reason, it was unable or unwilling to administer justice. Resorting to international jurisdiction would be strictly optional. States' inactivity did not immediately trigger the jurisdiction of the international court.[133]

The second model – "friendly or amicable complementarity" – would be that emerging from the IMT Charter of the Nuremberg Tribunal, reflecting

> a complementary relation between the Nuremberg International Military Tribunal and national courts. Yet, each jurisdiction focused on different types of offenders. The international Military Tribunal dealt with the major war criminals while the mid-to lower rank criminals were dealt with by national courts.[134]

---

[131] See *infra* section 5.3.3.

[132] El Zeidy, 2008, p. 133, see *supra* note 59. El Zeidy includes in this model the regimes proposed by the 1990 and 1992/1993 Working Groups, and the ninth and eleventh reports of the Special Rapporteur as they also proposed an "optional concurrent and complementary regime inspired by the 1953 model".

[133] Material examples of this model could be found in the 1937 League of Nations Convention for the Creation of an International Criminal Court, Geneva, 16 November 1937. El Zeidy includes in this model the 1951 and 1953 Drafts elaborated by the two Committees on International Criminal Jurisdiction (appointed by the UN) as they submitted a very similar regime with slightly different technical modalities (*opting in* clauses).

[134] El Zeidy, 2008, pp. 133–34, see *supra* note 59.

The main feature is that the applicability of international jurisdiction is not dependent on the failure of domestic jurisdiction but is instead based on a division of labour.

As the third model, El Zeidy refers to the regime proposed by the 1994 ILC Working Group for the establishment of an international criminal court, which is based on the optional system determined in the first model but added an admissibility test to be carried out by the international court at the time of the referral.[135] This system did not include any safety net for cases of unwillingness of the state to investigate and prosecute. Finally, the fourth model corresponds to the one presently set out in the ICC Statute. El Zeidy points out that such a system derives, with different technicalities, from the first and second models to the extent that when faced with state unwillingness or inability the court is entitled to step in. In the words of El Zeidy the jurisdiction of the court is simultaneously compulsory and optional: compulsory because if the admissibility conditions are satisfied there is no need for states' referral; optional because the state may prefer to resort directly to the court through a self-referral.

Notably, El Zeidy highlights how complementarity is not a novelty of the ICC Statute, rather being the result of several previous and lengthy developments undergone by international criminal law. However, it is herein contended that not all the systems he considers as complementarity models actually integrate complementarity.

El Zeidy defines complementarity in the following terms:

> Complementarity is perceived in international criminal law as a principle that defines and organizes the relationship between domestic courts and the permanent International Criminal Court (ICC). The principle of complementarity provides national courts with primacy to exercise jurisdiction over the core crimes defined under the ICC Statute. Only when national courts manifest 'unwillingness' or 'inability' to adjudicate on an alleged crime may the International Criminal Court step in to remedy the deficiencies resulting from the failure of one or more States to fulfil their duties.[136]

After engaging in a scrupulous scrutiny of the origin and development of complementarity, El Zeidy restricts its notion to the terms of the

[135] *Ibid.*, p. 134.
[136] *Ibid.*, p. 4.

Statute. He then starts from the definition provided for in the ICC Statute to pursue his analysis. Accordingly, it seems he only acknowledges traits or antecedents of complementarity inasmuch as there is a strong similarity with the principle of complementarity as framed in the ICC Statute; that is, where international jurisdiction is called to complete, top to bottom, domestic jurisdiction. In this chapter, a different methodology is adopted. The analysis starts with no axiomatic references. The core of the principle of complementarity as mirrored in the ICC Statute is that it intertwines domestic and ICC jurisdiction in an efficient manner in order to optimise efforts, thus ensuring that core crimes perpetrators will not find safe havens. The history of core crimes law demonstrates, however, that the primacy of domestic courts is not the only solution concerning the effective co-ordination of national and international judiciaries in the fight against impunity. As a result, the primacy of national courts is not herein considered as the core feature of complementarity broadly understood even though it is essential to the principle of complementarity as defined in the ICC Statute.

On the basis of the evolution of core crimes law since the First World War,[137] one realises that in critical times where the international community was struck in its fundamental values, there was (though not always) a common response to somehow rebuild the basis of civilisation, preserve its confidence on essential values and guarantee its safety. To that effect, the international community has furthered efforts to prevent serious crimes from going unpunished. The solutions presented repeatedly insisted on the establishment of an international criminal court.[138] The question at stake was how to best co-ordinate the relationship between both sets of jurisdiction, with sovereignty concerns repeatedly preventing the creation of an international court.

After the First World War the proposals for the establishment of a high court were not included in the Versailles Treaty. However, the penalty clauses determined that criminals would be tried by military tribunals

[137] Focusing primarily on the emergence of complementarity with the framework of the ICC Statute, see also Kleffner, 2008, pp. 70–98, *supra* note 24.

[138] In spite of the fact that an international judicial body was repeatedly called for when massive atrocities were at stake, history is riven with episodes where such a solution was not popular. For example, Winston Churchill, the then British Prime Minister, was of the view that Nazi leaders should be executed without a trial. It was mostly due to the efforts of the United States and its commitment to moral principles that the IMT was established.

of the power most affected by the criminal conduct. With the refusal of Germany to abide by Articles 228–230 of the Versailles Treaty, the Allied powers determined that where Germany did not provide for satisfactory trials, their military tribunals would adjudicate cases. The compensatory, *rectior* complementary, mechanism was determined by the principles of territoriality, passive personality or protective interest. Clearly, there was a complementary rationale underpinning this solution: though safeguarding German sovereignty *ab initio*, other domestic jurisdictions would, in case of Germany's failure to act, complete its work thus forming a "balanced whole" capable of ensuring accountability for perpetrators of such serious crimes. The jurisdictional relationship is placed at a strict horizontal level.

In the aftermath of the Second World War, the IMT represented the joint exercise of Allies' jurisdictional prerogatives.[139] The model was based on the *a priori* conclusion that trials by the defeated powers would not genuinely respond to the demands of the international community. The lack of impartiality emerging out of strong public feelings of dissatisfaction and repugnance in Germany for the Allied powers led to an aprioristic finding of unwillingness of the Axis to carry out genuine proceedings. The IMT had exclusive jurisdiction over the gravest crimes committed by the highest-ranking officials responsible for ordering the criminal acts. The IMT was not complementary to national jurisdiction in the sense of the ICC Statute. Yet, albeit with different contours, a complementary interplay between the IMT and domestic courts is evident: both were doing their share in a common project intended to apply justice to the gravest crimes. To complete the action of the IMT, the zonal tribunals were engaged in prosecutions of war criminals as were domestic courts. They heard cases on grounds of well-established principles of international law, in particular territoriality. Accordingly, there was a top-to-bottom complementary relationship between the IMT and domestic courts where the former was called upon to act where national jurisdiction could not, on the one hand, and a complementary horizontal interplay between national orders which, on the basis of territoriality or passive personality, were bringing perpetrators to justice beyond the jurisdiction of the IMT, on the other. Moreover, the jurisdiction of domestic courts is conceivable as a form of bottom-up complementarity vis-à-vis the Nuremberg Tribunal.

[139] These considerations are applicable to the International Military Tribunal for the Far East.

The Statutes of the *ad hoc* Tribunals established the primacy of the latter vis-à-vis national courts because, as in the IMT context, an aprioristic determination of inability, in the case of Rwanda, and unwillingness, in respect of the former Yugoslavia, to administer justice was made.[140] The RPE as well as the practice of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') reveal that such priority worked as safety device to ensure that sham trials and other mechanisms of deceit would not defeat the mandate of the tribunals, the efficiency of proceedings and the good administration of justice in respect of other cases.[141] In keeping with this view, states continued, where appropriate, to exercise criminal jurisdiction over crimes committed during the conflict in the former Yugoslavia and the genocide in Rwanda.[142] The primacy regime defined in the Statutes of

[140] The distinction between *a priori* and *a posteriori* determined unwillingness and inability is assessed in reference to the establishment of the international tribunal. That is, when the Tribunals were established there was already clear evidence of Rwanda's incapacity and the former Yugoslavia's unwillingness to undertake genuine criminal proceedings. Once established the Tribunals did not give states, particularly those of the former Yugoslavia, a "second chance" to prosecute, intervening only whereas the state had failed to do so.

[141] ICTY Statute, Art. 9, see *supra* note 130, determines that:

> 1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
> 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, adopted 11 February 1994, IT/32 ('ICTY, Rules of Procedure and Evidence'). Rules 8 to 13 expound on the primacy of the ICTY. Rule 9 determines three circumstances upon which the prosecutor is allowed to ask the Trial Chamber to issue a formal request of deferral: 1) the act investigated by the domestic jurisdiction is being classified as an ordinary crime; 2) the national proceedings are a sham; and 3) the matter is closely related – factually or legally – to investigations or prosecutions before the international tribunal.

[142] This was the case, for example, of Belgium, Switzerland and Germany. See, for example, Switzerland, Tribunal Militaire, *Prosecutor v. Fulgence Niyonteze*, Trial Judgment, Division 2, Lausanne, 30 April 1990; followed by Tribunal Militaire d'Appel 1A, *Prosecutor v. Fulgence Niyonteze*, Appeals Judgment, Geneva, 26 May 2000; followed by Tribunal Militaire de Cassation, Cassation Judgment, 27 April 2001. For an analysis of this case, see Luc Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives*, Oxford University Press, Oxford, 2003, pp. 196–200. See, for example, Belgium, *Public*

the *ad hoc* Tribunals was the result of a very specific set of circumstances and the immediate need to neutralise considerable threats to international peace and security. While the primary responsibility and prerogative of states in exercising the *jus puniendi* were always acknowledged, the international community stepped in through the *ad hoc* Tribunals so as to supplement the role of states when they failed to take action. The ICTY was aware of its temporary character and that it would not maintain the support of states for a long period. Accordingly, in 2000 Judge Claude Jorda, then President of the ICTY, and his colleagues designed what is known as the Completion Strategy, a plan of action which aimed to transfer proceedings to national judiciaries as soon as possible. The Security Council, through resolution 1503 (2003), called upon both the ICTY and ICTR "to take all possible measures to complete investigations by the end of 2004, to complete all trials activities at first instance by the end of 2008, and to complete all work in 2010".[143] Obviously, the implementation of the Completion Strategy cannot amount to allowing for impunity of core crimes or overlooking fundamental rights, namely those of due process, which the Tribunals are bound to respect. The ICTY has developed, particularly through amendments to the RPE, a framework of co-operation with the judiciary of Bosnia and Herzegovina in order to allow proceedings to be transferred. However, the Tribunal continues to supervise the development of such cases in order to ensure fairness and due process.[144] Rule 11*bis* establishes the power of the prosecutor to request the Referral Bench to revoke its referral order if evidence exists which reveals that the case is not being handled in accordance with human rights and standards

Prosecutor v. Higaniro et al., 2001. For an account of this case see Reydams, *id.*, 109–12; for other relevant Belgian case law, pp. 112–18. See also Germany, *Prosecutor v. Nikola Jorgić*, 3 StR 215/98, 1999. For an analysis of this case see Reydams, *id.*, pp. 152–55. In the words of Fausto Pocar, former President of the ICTY: "the Tribunal, from its inception, was established to exercise primary jurisdiction only for a short period and because of the inability of local judiciaries to deliver justice or ensure a future of peace to the region"; Fausto Pocar, "Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 655.

[143] United Nations Security Council resolution 1503, 28 August 2003, UN doc. S/Res/1503. Later, United Nations Security Council resolution 1534, 26 March 2004, UN doc. S/Res/1534 (2004) urged the *ad hoc* Tribunals to implement the Completion Strategy by the dates established in resolution 1503, but did not create an obligation to that effect.

[144] The Office of the Prosecutor monitors the proceedings transferred through the Organization for Security and Co-operation in Europe.

of due process. In these circumstances the ICTY will take on proceedings again. The ICTY has also been proactive in enhancing co-operation efforts with domestic jurisdictions in order to put its expertise at the latter's disposal.[145] This framework discloses the logic underpinning core crimes law in general, and the complementary models of co-ordinating national and international jurisdictions, in particular. The key standard is the *genuineness* of criminal proceedings: perpetrators of core crimes should face justice at the same time that internationally recognised human rights are respected. Accordingly, the *ad hoc* Tribunals cannot defer cases to national systems without guarantees of their willingness and ability to investigate and prosecute. For those situations where the genuineness of proceedings is doubtful, the *ad hoc* Tribunals maintain (even if it leads to extending the time-frames determined in Security Council resolutions) the role of correcting failings and closing lacunae in national legal orders.[146] These considerations are fully applicable to the ICTR.

The so-called hybrid tribunals can be conceived of as a derivation of the *ad hoc* Tribunals. Their legitimacy is far less controversial as they include national and international personnel and jointly apply national and international law. However, as with the *ad hoc* Tribunals, they are established in respect of a specific situation to which their jurisdiction is limited. They are emergency institutions, either determined directly by the Security Council or under a request to that effect addressed to the Security Council by interested states.[147] Their role is again to step in where states

[145] Pocar calls this strategy one of "continued legacy building" rather than a "completion strategy" as it "effectively means returning cases back to where they belong, but only after ensuring that local institutions once again have become ready, willing and able to manage them"; Pocar, 2008, p. 661, see *supra* note 142.

[146] For an overview of the completion strategy, see, Erik Møse, "The ICTR's Completion Strategy – Challenges and Possible Solutions", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 667.

[147] See United Nations, Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003 (https://www.legal-tools.org/doc/3a33d3/). The third introductory paragraph states that following a request to that effect presented by the Government of Cambodia to the United Nations the latter would assist and co-operate with Cambodia by the establishment of the Extraordinary Chambers of the Courts of Cambodia. See also Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (https://www.legal-tools.org/doc/797850/). The second introductory paragraph states that the Security Council requested the Secretary General to negotiate

are incapable or reluctant to ensure genuine investigations and prosecutions.

Alternative forms of justice, like truth and reconciliation commissions and other similar institutions are also relevant for the ongoing analysis. These mechanisms are fundamental components of the transitional justice discourse and, hence, crucial in societies' effort to recover from post-conflict scenarios. Such alternative mechanisms of justice intend to promote the determination of the truth to facilitate national reconciliation, enforce the right to historical memory and provide some form of vindication to victims. Inextricably related to this is the debate peace versus justice. It would be far too ambitious to thoroughly address this matter here. Still, it is submitted that some of these mechanisms crystallise an accommodation of competences that intends to prevent impunity for those most responsible for crimes under international law. Adopting a micro (rather than macro) systemic perspective, one may find, in some of their models, the same intent to establish safeguards to ensure that the most serious crimes of international concern will not go unpunished. In East Timor, for instance, the Community Reconciliation Panels were required to refer important evidence in respect of serious crimes to the Office of the Prosecutor.[148] The strength of this commitment is not always the same. For example, the Truth and Reconciliation Commission for Sierra Leone had the power to make all recommendations as deemed appropriate – notably of a legal nature – to achieve its purpose, including "preventing the repetition of the violations or abuses suffered [and] addressing impunity".[149] In any event, one realises that truth and reconciliation commissions aim to provide some form of justice when the judicial apparatus of the state is unable or unwilling to genuinely administer justice. In situations of widespread and systematic violence, the number of perpetrators is often so high that it is nearly impossible to bring all to justice. Importantly, however, it should be borne in mind that this chapter relates exclusively to the most serious crimes of concern to the international community as a whole. There is a consolidated trend in international law contending that the duty

with Sierra Leone the establishment of a special court to prosecute those responsible for serious violations of international law.

148 United Nations Transitional Administration in East Timor, Regulation No. 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001, Section 27.5 (http://www.legal-tools.org/doc/afd3d9/).

149 Sierra Leone, The Truth and Reconciliation Commission Act 2000.

of states to prosecute is binding only in respect of those most responsible for international crimes.[150] This is to say that truth and reconciliation commissions may play an important role in gathering evidence against the perpetrators of core crimes, pass the information to the investigative and prosecuting authorities, thus assisting – in their complementary role that henceforth arises – in the administration of justice and implementation of the principle of complementarity (as long as the domestic judiciary is willing and able to carry out proceedings). This notwithstanding, these considerations may only be taken as a starting point for further scrutiny since – the argument could be made (and it is indeed often so argued) – the urgency in pacifying the country and halting atrocities may justify general amnesties. If the latter were to represent the honest and informed agreement of the majority of the people affected, it would seem difficult to argue that the interests of justice could overrun a democratic decision. Another issue, however, is whether while being a legitimate and valid option in certain circumstances, alternative forms of justice that do not provide for the possibility of prosecution may be integrated within the scope of complementarity broadly understood. As better explained below, this is not the case whenever the administration of criminal justice is not foreseen or is merely an option.

Outside of the context of (quasi-)judicial bodies, states have since the Second World War taken on proceedings to ensure criminal accountability for perpetrators of core crimes when the crime was committed

[150] See Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", in *Yale Law Journal*, 1991, vol. 100, no. 8, p. 2599, arguing that states may discharge their international obligations by prosecuting

> those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations […] provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.

See also United Nations Security Council resolution 1329, 30 November 2000, UN doc. S/Res/1329 (2000) in which the Security Council acknowledges "the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors". The Statute of the Special Court for Sierra Leone, 16 January 2002, Art. 1(1) conversely limits the jurisdiction of the Court to "persons who bear the greatest responsibility for serious violations" (http://www.legal-tools.org/doc/aa0e20/).

abroad, on the basis of either more traditional jurisdictional grounds (for example, passive personality) or universal jurisdiction.[151]

The most relevant treaties on core crimes law set forth, implicitly or explicitly, a jurisdictional network aimed at filling in legal and institutional gaps capable of leading to *de facto* impunity. Certainly, the solutions enshrined therein must be assessed in light of the social and political context that preceded their coming into force. While the 1948 Genocide Convention referred to a possible international tribunal, it did not go further on the issue because of states' rigid understanding of sovereignty. Nevertheless, the Genocide Convention commits states to adopt the necessary measures to prevent genocide from going unpunished. In borderline cases, these measures might include the adoption of universal jurisdiction, whose final goal is to make up for the failure of states connected to the crimes in assuring prosecution and punishment. The 1984 Convention against Torture requires states to provide for universal jurisdiction.[152] The Geneva Conventions codify the duty to extradite or prosecute in respect of grave breaches.

Once examined the solutions set up to prevent impunity, and recalling the analysis carried out in the previous sub-section which drew attention to different proposals of interplay between national and international jurisdictions (as opposed to focusing on the models actually implemented by the international community), the question which arises is whether all these models and proposals fall under the umbrella of complementarity.

The *New Oxford Dictionary of English* defines complementarity as "a relationship or situation in which two or more different things enhance or emphasize each other's qualities or form a balanced whole".[153] According to the *Oxford American Dictionary & Thesaurus*, "complementary" is an adjective referring to two or more parts that combined form "a whole

[151] For a comprehensive account of case law on universal jurisdiction, see Reydams, 2003, pp. 86–219, *supra* note 142.

[152] United Nations General Assembly resolution 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, 10 December 1984, UN doc. A/Res/39/46 ('Convention against Torture') (https://www.legal-tools.org/doc/326294/).

[153] *New Oxford Dictionary of English*, Oxford University Press, Oxford, 1999, p. 375 ('NOED').

or […] improve each other".[154] The *New Oxford Thesaurus of English* clarifies that in order for one thing to complement another it needs to "add" something to it in a way that "completes it"[155] and makes it "perfect".[156] It is submitted that complementarity refers to the combination of national and international jurisdictions in such a manner that they form a "balanced whole", completing each other and making the system established – at least potentially – "perfect". Abstractly, complementarity corresponds to the optimal point where the interests of sovereignty and those of international criminal justice reconcile themselves in an operative way able to ensure satisfying levels of guarantee to legitimate claims of states, on the one hand, and the international community, on the other. Technically, complementarity grasps the interplay between national and international jurisdictions in such a manner that, while paying deference to the principle of sovereignty, guarantees safety devices which will allow for the criminal accountability of perpetrators of core crimes when states reveal themselves to be unwilling or unable to undertake genuine criminal proceedings. This is the vector common to the actual solutions the international community gradually came to adopt and enforce with regard to core crimes accountability. "Unwillingness" and "inability" have been, as in the ICC Statute, the criteria that operate and implement complementarity, and "genuineness" has been the standard upon which to evaluate states' willingness and ability. This study contends that unwillingness and inability are not only defined *ex post facto* as emerging from the Statute. The ICTY was established because of the unwillingness of national authorities to ensure criminal accountability. The ICTR was created as response to the collapse of the Rwandan judicial apparatus. The ECCC were set up as a result of the inability (or arguably the unwillingness) of the Cambodian government to pursue genuine criminal accountability of former Khmer Rouge leaders. Also, in Nuremberg, cases were excluded from the jurisdiction of national courts when their extreme gravity or delicate political sensitivity gave rise to an aprioristic presumption that states were neither willing nor able to carry out proceedings. The jurisdiction of

[154] *Oxford American Dictionary & Thesaurus*, 2nd ed., Oxford University Press, New York, 2009, p. 250 ('OADT').

[155] *New Oxford Thesaurus of English*, Oxford University Press, Oxford 2000, p. 170.

[156] Webster's Third New International Dictionary of the English Language, Unabridged, Merriam-Webster, Springfield, MA, 1993, p. 464.

the IMT was thus based on an *ex ante* ruling on unwillingness and inability.

Further, within the scope of complementarity it is to be combined not only vertical jurisdictional networks (domestic courts in relation to international tribunals and vice versa) but also horizontal jurisdictional relationships, that is, between different states, such as those arising from the Geneva Conventions and the *aut dedere aut judicare* principle as determined therein.

Certainly, one can maintain that, within the available possibilities, recognising primacy to national courts is the one which truly corresponds to complementarity. However, this conclusion is based on a methodology that takes as its starting point an axiomatic view of the principle of complementarity as presented in the ICC Statute. Here, in order to identify the rationale underpinning complementarity, an inductive analysis was followed. It departed from the comprehensive study of the evolution of core crimes law, concrete responses of the international community to the perpetration of core crimes that were actually enforced (or at least adopted as law) and the interplay between domestic and international jurisdictions seeking to reconcile sovereignty and criminal justice.

5.3.3. The Principle of Substantive Complementarity

Against this background, it is important to distinguish between the principle of complementarity as enshrined in the ICC Statute and complementarity as the overreaching concept that covers all models of interaction between national and international criminal jurisdictions, which, while protecting the core of sovereignty, provides for safety valves that aim to prevent impunity for perpetrators of core crimes. The term complementarity appears as the most adequate to express this comprehensive interplay as it grasps the essence of this relationship: national and international criminal jurisdictions interact so as to "complete each other" and give rise to the most "perfect" international criminal law order possible. This perfection is embodied by the concept that core crimes perpetrators will not go unpunished. In other words, perfection is equated to the absence of the denial of justice; that is,

> a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper admin-

> istration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice.[157]

Importantly, this perfection is only potential as it will depend on states enforcing the existing legal framework.

As revealed by the historical survey regarding the origins and development of complementarity,[158] the relationship between national and international jurisdictions was not always vertical. Nor was it always directed from top to bottom. The evolution of core crimes law since the First World War mirrors a reciprocal interplay between the national and international systems, whereby one can distinguish a multidirectional relationship intertwining different domestic and international jurisdictions, mutually filling in each other's gaps and guiding their efforts with a view to decreasing impunity. I refer to this relationship as *substantive complementarity* and further propose it as a structural principle of core crimes law.[159] The *Collins English Dictionary* defines substantive as "relating to, containing, or being the essential element of a thing", "having independent function, resources, or existence", that which is "solid in foundation and basis".[160] The *Cassell Concise English Dictionary* defines substantive as what has or pertains "to the essence or substance of anything; inde-

---

[157] "The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners", Supplement: Codification of International Law, in *American Journal of International Law*, 1929, vol. 23, no. 2, p. 134, cited in Francesco Francioni, "The Rights of Access to Justice under Customary International Law", in Francesco Francioni (ed.), *Access to Justice as a Human Right*, Oxford University Press, Oxford, 2007, p. 11.

[158] See *supra* section 5.3.1.

[159] I have chosen the term complementarity rather than subsidiarity to describe this principle for it better expresses the relationship intertwining national and international jurisdictions. First, subsidiarity operates only in one direction (from the higher authority to the lowest) while complementarity operates in different ways (from the international level to complete domestic systems, from national systems to fill in gaps of the international judicial apparatus, and between different states so as to prevent the establishment of safe havens where international jurisdiction cannot be triggered). Second, subsidiarity is usually used in respect of systems where the intervention of the higher authority is dependent on state consent or a complaint presented by another state. Complementarity is a more structured manner of implementing subsidiarity. That is, the latter presupposes that cases will be heard at the lowest level of authority able of efficaciously administering justice. Yet, whereas states are unwilling or unable to do so, the ICC is competent to step in independently of the consent of states or a complaint presented by any other subject of law.

[160] *Collins English Dictionary*, Collins, London, 1980, p. 1449 ('Collins Dictionary').

pendently existing, not merely implied, inferential or subsidiary"; it is the adjective of the noun "substance", which in turn means "the essence, the essential part, […] main purpose, […] solid foundation"; "the permanent substratum in which qualities and accidents are conceived to inhere".[161] Substance is the "most important or essential part or meaning".[162]

Complementarity as proposed here has a "firm basis in reality and [thus it is] important [and] meaningful".[163] It is not taken from isolated sources; rather it is the essence of core crimes law. It embodies the very purpose of the latter. It exists independent of actions or omissions. To reject it is to reject the whole system of core crimes law.[164] It is important to distinguish that the methodology used here – that is, analysing the development, sources and mechanisms of core crimes law and from these inferring the principle of substantive complementarity – does not mean that substantive complementarity exists because it was determined or created by those factors. The inductive exercise allows it to be revealed, but its existence is derived from – it is part of – the fundamental nature of core crimes law. It represents the common theme interlacing the system, bestowing upon it logic, coherence and consistency and therefore the tools necessary to pursue its goals. Without such an operation, core crimes law becomes an obsolete system for there are no guarantees of enforcement and systems lacking mechanisms to react to derogations of primary norms present an insurmountable flaw.[165] It is fair to argue that enforcement is the permanent challenge of international law. While this is true, core crimes law deals with peremptory prohibitions for which international law already provides mechanisms capable of ensuring prosecution.[166] The

[161] *Cassell Concise English Dictionary*, Cassell, London, 1989, pp. 1322–23 ('Cassell Dictionary').

[162] OADT, p. 1304, see *supra* note 154.

[163] *Concise Oxford English Dictionary*, Oxford University Press, Oxford, 2002, p. 1430.

[164] In the view of Thirlway, no state can derogate from a principle which is so "bound up with the essential nature of international law that is would be impossible to exclude it without denying the existence of international law". H.W.A. Thirlway, *International Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law*, Brill, Leiden, 1972, p. 110.

[165] It is important to bear in mind that the actual application of punitive sanctions is one thing and the potential for punishment is quite another. The efficacy of a legal system is dependent on both the potential for enforcement and effective application of sanctions in due cases.

[166] This is the case of the *aut dedere aut judicare* principle, the ICC, the *ad hoc* Tribunals and treaty law requiring prosecution of international crimes.

principle of substantive complementarity expresses and gives a material form to the articulation of those mechanisms. It determines on states an obligation of result – to exhaust all legal resources in order to guarantee criminal accountability – but it does not establish any prescribed means of doing so. Therefore, states are entitled to adopt different strategies in order to achieve the result determined.

Substantive complementarity thus defines a duty "as opposed to giving the rules by which such things are established".[167] Accordingly, the ICC Statute established the primacy of national courts vis-à-vis the ICC while the *ad hoc* Tribunals enjoy primacy in circumstances of conflict with domestic jurisdictions. Conversely, some of the states parties to the ICC Statute opted for relinquishing jurisdiction, under some circumstances, in favour of the ICC, and recovering it only where the Court does not step in and proceed. Others established universal jurisdiction at an early stage. In all these cases the difference in the approaches adopted is the level of compromise but the intrinsic principle is the same: substantive and multidirectional complementarity between domestic and international jurisdictions in order to prevent impunity. In keeping with this view, the principle of complementarity enshrined in the ICC Statute does not constitute a new concept; the innovation concerns the codification of a new version (level or stage) of complementarity in respect of a certain system. Nor should the Statute-based principle of complementarity be seen as the final and perfect model of the relationship between domestic and international jurisdictions. Evidence of this fact is the model adopted by states such as Germany, Spain or Belgium, which, when implementing the ICC Statute, elected (via different means) that the domestic courts be the last resorts instead of the ICC. That is, while the ICC Statute states it is the ICC that should complement national jurisdictions, these countries determined bottom-up complementary models where, independent of the shortcomings analysed in section 5.3.5, domestic courts are called upon to cover the gaps in the functioning of the permanent Court. Substantive complementarity is a principle that developed spontaneously as a response to the demands of core crimes law and the international community. It progressively flourished among opposing views, claims and legal principles. The ICC Statute shed light on the importance of co-ordinating municipal and international jurisdictions so as to prevent impunity. For dec-

[167] Definition of "substantive" in OADT, p. 1304, see *supra* note 154.

ades, despite the scourge of two world wars, there was not a consolidated conscience of core crimes, both in the sense of awareness of their devastating implications and the sense that such acts are contrary to elementary considerations of humanity. In time, courts with a more internationalist approach started, as that conscience strengthened, to undertake the role of *longa manus* of the international community. The more this international conscience consolidates, the more complementary jurisdictional models will develop.

The evolution of core crimes law shows a progressive effort from the international community to set forth safety nets to compensate for the failure of domestic legal orders. The safety valve envisaged was always intended to overcome the unwillingness or inability of states. The historical survey provided above is illustrative of this intention. That is to say, like complementarity, unwillingness and inability are not a brand-new creation of the ICC Statute. Different terms have been used over the course of years. Yet they always referred to the same problem: the technical incapacity or perversity of states which caused fair and impartial proceedings to be impeded.[168] Unwillingness and inability can be determined *ex post facto* as in the ICC Statute, that is after the failure of states to administer justice *in concreto*: *stricto sensu* unwillingness and inability. They can likewise be determined *ex ante*, presumed from a range of relevant facts which evidence the probable or factual reluctance to act: *lato sensu* unwillingness and inability. Unwillingness and inability *latu senso* underpinned the jurisdiction of the IMT and *ad hoc* Tribunals. They would be the rationale for the establishment in the future of an international criminal court with exclusive jurisdiction over specific core crimes the gravity and aggressive nature of which gives rise to concerns regarding states' diligence.

Against the previous analysis, substantive complementarity is not equated to all forms of allocation of jurisdiction. The former is included within the latter; yet they are essentially different. El Zeidy includes within the principle of complementarity models of co-ordination between do-

[168] During the 1922–1924 meetings of the International Law Association to discuss the establishment of an international criminal court, Charles Henry Butler argued that the Court should function as seat of appeal and determine "whether the national Court had properly executed justice in such a way as to satisfy the nation which claimed that the offence had been committed against its national". ILA Report, p. 103, see *supra* note 77, cited in El Zeidy, 2008, p. 32, *supra* note 59.

mestic courts and an international criminal tribunal where submission of cases to the latter would be strictly optional. In other words, in the case of clear unwillingness there is no safety net capable of ensuring that perpetrators will not escape justice. This inclusion – it is submitted – cannot be accepted if one follows the analytical approach reflected in this chapter. It takes as starting point of the theoretical construction the top-to-bottom vertical model posited in the ICC Statute configuring it as static, rigid and absolute without evaluating it in light of the entire framework of core crimes law. Furthermore, the core of complementarity is fixed within that vertical interplay without any evaluation of the purpose underpinning the principle of complementarity as framed in the ICC Statute. Importantly El Zeidy acknowledges early in his study that:

> These are misconceptions [to consider the principle of complementarity exclusively in reference to the ICC Statute and its negotiations], and this work aims to correct such assertions. […] [T]he notion of complementarity is manifestly not the product of the 1994 International Law Commission's work. Nor is it the sole outcome of any recent work on the subject during the 21st century. It is an idea that developed over a long period of time until it was inserted into the 1998 Rome Statute. […] [T]he concept of complementarity has been re-shaped and has emerged in different guises.

Yet, the system laid down in the ICC Statute integrates complementarity precisely because it raises the ICC into the realm of being able to prevent impunity in respect of the specific system established by the Statute. Certainly, given the limited resources of the Court and its lack of universal acceptance, it will not be able to fill in all the gaps. This notwithstanding, the ICC moves core crimes law towards that result. In a world where states fully complied with their obligations, the ICC would close crucial loopholes. It is submitted that no system without a safety net can be subsumed into complementarity because they do not fulfil its axiological and logical foundations. Such systems determine particular forms of allocation of jurisdiction between national and international judicial bodies. They *might* compose a regime of *de facto* complementarity (if states investigate and prosecute or voluntarily refer the case to the competent international court) but technically they do not. The same considerations are valid in respect of "opting in" regimes. The international community is not yet prepared to trust in the voluntary submission of cases to an international court. Such a scheme would be selective and unequal depend-

ing on the suspects, states involved and political and economic repercussions of undertaking criminal proceedings or triggering international jurisdiction. Furthermore, it is doubtful in terms of law because as an approach it reveals a double standard. On the one hand, states would recognise and accept the legitimacy and jurisdiction of the Court and, on the other, they would later decide on a case by case basis whether the jurisdiction previously accepted was legitimate *in concreto* in spite of unwillingness *and* inability conditions being fulfilled. This regime may have politically reasonable explanations but under the scrutiny of law it is inconsistent and illogical.

The principle of substantive complementarity mirrors a more sophisticated version of the traditional *aut dedere aut judicare* principle. In final instance, it determines that the state holding custody over the perpetrator, whenever international jurisdiction cannot be triggered, must either prosecute or extradite to a country willing and able of *genuinely* administering justice. Where extradition is not possible and the state of custody does not have any closer link to the crime, it shall prosecute on the basis of universal jurisdiction. It is the combined action of the duty to extradite or prosecute and universal jurisdiction that provides the ultimate safety net able to ensure criminal accountability and thus respect for the rationale which underpins complementarity.[169] In practice, there is consid-

[169] The relationship between the *aut dedere aut judicare* principle and universal jurisdiction has been advocated in different historical moments and codified as such by law. The terms of their interplay have yet varied throughout the years. For a detailed account see Reydams, 2003, pp. 28–42, *supra* note 142. The medieval city-states in Italy, while recognising the primary competence to punish to both the territorial and domicile state, defined the jurisdiction of the custodial state to prosecute and punish in respect of *vagabondi*, a power later extended over murderers, robbers and exiles. The Spanish scholar Covarruvias considered it unfair to subject only these criminals to the reach of the custodial state. Based on natural law, he contended that the custodial state should either extradite or prosecute all dangerous criminals. This appears to be the origin of the maxim *aut dedere aut judicare*. Reydams, *id.*, p. 29. In 1883 the Institute of International Law passed a resolution with important impact on universal jurisdiction; Institute of International Law, Munich Session, 1883, reprinted in *Annuaire de l'Institut de Droit International*, vol. 7, 1883–1885. It proposed that whenever the territorial state could not be identified and extradition was not possible the custodial state should administer justice. Clearly, the jurisdiction of the forum *defensionis* was complementary to that of states closer related to the crime. As for the rationale underpinning the solution adopted, the members of the Institute of International Law were divided. While some argued that the right to punish derives from the duty of states to maintain internal public order, others found the justification in natural law and the idea of universal justice. See the commentary on Article 10 by von Bar and Brusa, cited in Maurice Travers, *Le droit pénal international et sa mise en oeuvre en temps de paix et en*

temps de guerre, vol. 1: *Principes. Règles générales de compétence des lois répressives*, Librairie du Recueil Sirey, Paris, 1920, p. 130. In the nineteenth century several countries included universal jurisdiction in their codes with the contours proposed by the Institute of International Law; that is, universal jurisdiction in respect of all extraditable crimes whenever states with a narrower link to the crime did not wish (for example, because they did not request extradition or denied an invitation to that effect made by the custodial state) or could not (for example, because extradition could no be granted) undertake proceedings. See Article 10 of the Resolution, as translated in Reydams, 2003, p. 30, fn. 12, *supra* note 142, which reads as follows:

> Every Christian State (or recognizing the legal principles of Christian States), which has custody over an offender may try and punish him when notwithstanding prima facie evidence of a serious crime and culpability, the locus delicti cannot be determined, or when the extradition of the culprit, even to his home State, is not granted […] or is considered dangerous. In this case, the court will apply the most favourable law to the accused, taking into account the probable place of the crime, the nationality of the accused, and the law of the forum State.

This idea of complementary intervention of the custodial state was made clear by Henri Donnedieu de Vabres's work, where he established a rigid hierarchy of jurisdictional grounds: firstly competent was the territorial state, followed by the state where the criminal resided when he committed the crime and, finally, the custodial state. Universal jurisdiction was a last resort:

> A State, which in these circumstances prosecutes a foreigner, does not vindicate a foreign right of its own. […] It steps in, in default of any other State, to prevent in the interest of humanity an outrageous impunity. […] Therefore, its intervention has a very subsidiary character and cannot take place unless the state has physical custody over the offender. The exercise of universal jurisdiction is, just like the practice of extradition, the negation of the right of asylum.

Henri Donnedieu de Vabres, *Les principes modernes du droit pénal international*, Librairie du Recueil Sirey, Paris, 1928, p. 135. A similar understanding is seen in resolutions adopted by authoritative bodies, such as the 1927 Warsaw Conference for the Unification of Penal Law, the resolution of the 1932 Hague International Congress of Comparative Law; the 1935 Draft Convention on Jurisdiction by Harvard Research in International Law. By contrast, Travers categorically rejected universal jurisdiction as a device through which states would represent the international community, yet accepted the subsidiary jurisdiction of the custodial state based on sovereignty arguments:

> The example of an offender peacefully enjoying the benefits of his misdeeds encourages criminality and the possibility of an offender taking refuge in a state with the certainty that its penal law will not be applied would attract riffraff to hospitable countries, necessarily impacting their social order. […] Extradition and expulsion are inadequate remedies for this double danger because the first is not always feasible and the latter does not produce a sufficiently moralizing effect

Travers, *id.*, pp. 77–76, in Reydams, *id.*, pp. 32–33. Kopek Mikliszanki further developed the *aut dedere aut judicare* principle and better articulated it with universal jurisdiction. As

erable evidence sustaining this substantive conception of complementarity. States such as Holland, Spain, Belgium and Germany provided, in different ways, for the jurisdiction of their courts on the basis of universality whenever States with a closer link to the crime are unwilling or unable to prosecute and the ICC is not in the condition to step in and undertake proceedings.[170] There is also important domestic jurisprudence in this regard. The *Scilingo* case is an extremely illustrative example of the combined action of the duty to prosecute or extradite and universal jurisdiction.[171] Spanish courts applied universal jurisdiction to the prosecution of crimes

opposed to Travers, Mikliszanki maintained universal jurisdiction as a primary right of every state, at least as far as *delicta juris gentium* were concerned:

> An offence should always never remain unpunished; the possibility to cross borders should not shield the common criminal from punishment. He has to know that wherever he goes he will be held responsible. It is thus the duty of the custodial State to supply an inadequacy of the territorial State and the State of nationality of the offender. […] What then is the principle of universality of the right to punish? It is the principle according to which every penal norm, far from being limited to a certain territory, is eminently international (*interétatique*), or rather supranational (*supraétatique*). In the administration of justice, the administration of the perpetrator or the victim and the place of commission are irrelevant… Extension of the validity of the penal norm to all countries and individuals is the basic idea behind the universalist repressive system. […] It follows that jurisdiction based on the universal principle is not subsidiary at all, does not supply an inadequacy of another more competent jurisdiction to avoid impunity, but is an independent and primary right…Indeed, in the system of universal repression […] the perpetration of the offence triggers the equal competence of all criminal courts, but only the judge of the place of arrest may actually exercise jurisdiction.

Kopek Mikliszanski, "Le système de l'universalité du droit de punir et le droit pénal subsidiaire", in *Revue de science criminelle et de droit pénal comparé*, 1936, vol 1, pp. 331–33.

[170] Even the United States has been adapting its internal law in a manner consistent with the principle of substantive complementarity. To be exact, since the coming into force of the ICC Statute the United States adopted a series of statutes on serious crimes under international law whereby it provides for universal jurisdiction *in presentia*. This is the case, for example, with the 2008 Child Soldiers Act, the 2007 Genocide Accountability Act and the 2009 Human Rights Enforcement Act. The statutes do not elaborate on the interplay between American and foreign jurisdiction but it would not be unreasonable to admit that courts adopted some criteria to undertake cases, namely on the basis of Section 402 and 403(a) of the Restatement (third) of US Foreign Relations Law.

[171] Spain, Audiencia Nacional, Sala de lo Penal, *Adolfo Francisco Scilingo Manzorro*, Judgement, 16/2005, 19 April 2005 (https://www.legal-tools.org/doc/d042b3/).

against humanity even though it was not provided for by a domestic norm in respect of this type of crime. The notion of "subsidiary necessity of Spanish jurisdiction" was applied as to suppress gaps in accountability in respect of the most serious international crimes. The Constitutional Court endorsed this view,[172] and, on the basis of this jurisprudence, proceedings were initiated against the former President of the People's Republic of China JIANG Zemin for the genocide of the Tibetan people.[173]

The most relevant treaties on core crimes also pay tribute to substantive complementarity as the tool to ensure criminal accountability by the link it establishes between different domestic and international jurisdictions. The Geneva Conventions explicitly enshrine the duty to prosecute or extradite,[174] and they permit the exercise of universal jurisdiction and urge states to adopt all necessary measures to prevent and repress the crime, here foreseen the establishment of a competent international judicial body.[175] The Convention against Torture establishes the *aut dedere aut judicare* principle;[176] and the Apartheid Convention promotes universal jurisdiction.[177] Against this background, the following three models of complementarity are proposed.

First, there is vertical complementarity, which is divided into "ascending complementarity", "descending complementarity" and primacy. It is vertical because it presupposes an international judicial body, which rulings are binding on states. Descending complementarity includes models of co-ordination between domestic and international jurisdictions

[172] Spain, Tribunal Constitucional, *Rios Montt et al*., Guatemala Generals Case, Decision (*Sentencia*), STC 237/2005, 26 September 2005 (https://www.legal-tools.org/doc/381d6a/).

[173] Spain, Audiencia Nacional, Sala de lo Penal, *Jiang Zemin et al*. (Tibet case), 196/05, 10 January 2006, para. 1.

[174] See the Common Articles of the Geneva Conventions, 1949. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, Art. 50; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 146.

[175] Genocide Convention, Arts. 1, 5 and 6, see *supra* note 24.

[176] Convention against Torture, Art. 5, see *supra* note 152.

[177] United Nations General Assembly resolution 3068 (XXVIII), International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, Art. V (https://www.legal-tools.org/doc/d9644f/).

where the international body is called to fill in from top to bottom the gaps caused by the imperfect functioning of national systems. This is the case with the system put in place by the ICC Statute. The regimes determined by the Spanish implementing law of the Statute provides an example of ascending complementarity, where domestic courts gain competence to fill in from the bottom up gaps which have emerged from the functioning of the ICC. Primacy is portrayed in the Statutes of the *ad hoc* Tribunals, the latter having priority over domestic courts. The difference between primacy and descending complementarity lies in the authoritative power of the international tribunal to assert its jurisdiction independent of any evidence *in concreto* of the unwillingness or inability of states to undertake genuine proceedings. Clearly, the rules determined in the corresponding Statutes need to be respected. The decision falls within the discretionary power of the international body but it is not an arbitrary one.[178]

The second model is horizontal complementarity, which consists of the interplay between different domestic jurisdictions. The pre-eminent example is given by the functioning of the *aut dedere aut judicare* principle as established, for example, in the Geneva Conventions.

Finally, there is multidirectional complementarity which involves the combined action of horizontal complementarity and vertical complementarity in either of its forms. This model emerges, for example, from the Belgian and German implementing laws of the ICC Statute, determining that domestic courts will be competent to prosecute where states with closer links to the crime have not undertaken proceedings and the ICC is not taking on the case. It was further seen in the post-Second World War period when domestic and zonal tribunals engaged in proceedings in parallel to the IMT. In addition, it can be identified by the fact that national courts decided cases relating to the conflict in the former Yugoslavia and the genocide in Rwanda at the same time that the corresponding *ad hoc* Tribunals were handling other criminal files.

The different versions or levels of complementarity referred to in respect of each model can be subdivided in active and negative complementarity. In the first case, the state or institution with a complementary function ought to step in to close impunity gaps when the bodies immediately competent failed to do so. In the second case, the judicial body is

[178] In this sense, decisions by the *ad hoc* Tribunals need to comply with the conditions set forth in, for example, ICTY, Rules of Procedure and Evidence, Rule 9, see *supra* note 141.

required to refrain from any action inasmuch as the judicial body immediately competent or more closely related to the crime is already genuinely investigating or prosecuting or is in a better position to do so.

5.3.4. The Nature of the Principle of Substantive Complementarity

The principle of substantive complementarity is not only important from a theoretical viewpoint that permits the evolution and purpose of the system of core crimes law to be understood. Rather, its principal importance lies in the practical impact it may have in the administration of criminal justice, particularly by solving positive and negative conflicts of jurisdiction that strongly influence investigation and prosecution of the most serious crimes of international concern. Inevitably, the consequences of the principle of complementarity will much depend on its legal nature.

The principle of substantive complementarity is here proposed with a two-fold nature. First, it is a general principle of international law in the sense of Article 38(1)(c) of the ICJ Statute. Second, it is a structural principle of core crimes law. While a principle of law may simultaneously appertain to both categories, the main difference between a principle of law in the terms of Article 38(1)(c) and a structural principle of law is that the latter is intrinsic to the very idea and logic of the system being appraised while the former derives from specific material sources.[179]

General principles of law are abstract constructions formulated – namely – by induction from a set of legal concepts, rules or norms sharing the same axiological core. General principles of law in the sense of Article 38(1)(c) should be submitted to a contemporary approach concerning their formation. The practice of international judicial bodies plays a crucial role in the development of principles of core crimes law. International and hybrid tribunals have been established in order to fill in gaps arising from the functioning of domestic jurisdictions, whether being considered individually or in relation to the jurisdiction of other states. At the same time, states have continued to operate side-by-side with international tribunals by handling cases that did not fall under the competence of international bodies or that could not be pursued at the international level be-

[179] Statute of the International Justice, annexed to the Charter of the United Nations, 24 October 1945, Art. 38(1)(c) (http://www.legal-tools.org/doc/a0bb78/). Formal sources consist of authoritative procedures of law-making determined by the international legal system. Material sources address the foundations of the binding authority of international norms.

cause of a lack of resources or due to the limitations of the tribunals' mandate.

The foundation of core crimes law today reveals a network of jurisdictional interplay that mirrors the principle of complementarity as proposed here. While some of the most significant treaties regulating responses to core crimes determine, as a minimum standard, the obligation of the territorial state to prosecute, they further require states to adopt the necessary measures to prevent perpetrators from going unpunished.[180] This, in line with a logical reading of the law, requires, and has in practice resulted in, the duty to prosecute or extradite and the exercise of universal jurisdiction. Other relevant conventions specifically determine the *aut dedere aut judicare* principle thus causing universal jurisdiction to be exercised by the custodial state when extradition is unfeasible.[181] With the establishment of international tribunals, the jurisdictional interplay between states was combined with international jurisdiction thus elaborating what can be seen as refined versions or developments of the duty to extradite or prosecute. Against this background, substantive complementarity as general principle of international law is inferred from 1) the *aut dedere aut judicare* principle, 2) the exercise or admissibility of universal jurisdiction as *ultima ratio* (as it nowadays generally exists in domestic laws), 3) the terms of the principle of primacy of the *ad hoc* and hybrid tribunals over domestic courts, and 4) the complementary nature of the ICC. This view is supported by the fact that some states party to the Statute have defined their jurisdiction in a manner that faithfully adheres to the principle of substantive complementarity. While a few states have specifically codi-

[180] See, for example, Genocide Convention, Art. 6, *supra* note 24, determining the obligation of the territorial state to administer justice, while Art. 5 determines the obligation of the contracting parties to adopt "necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3".

[181] See, for example, Convention against Torture, Art. 5(2), *supra* note 152. Certainly, there are crimes for which no such specific obligation is defined. Crimes against humanity, for instance, are not the subject of a comprehensive convention determining the applicable regime. However, they have been generally characterised as part of *the most serious crimes of concern to the international community as a whole*. The integration of this typology of crimes in the Statutes of the *ad hoc* tribunals, hybrid tribunals and the ICC Statute further endorses the extension of the regime applicable to core crimes. Importantly, crimes against humanity are generally accepted as violations of peremptory norms from which derives to the custodial state the obligation to act in order not to assist and condone the breach, becoming itself an accomplice of the derogation of fundamental values.

fied the terms of the relationship between national courts and the ICC by electing the former, instead of the Court, as courts of last resort, the majority of the parties to the Statute have not regulated that relationship in the same way. Rather they have determined their courts to have universal competence in the case of core crimes committed abroad, by foreigners against foreign victims when states with a closer link to the crime are unwilling or unable to undertake proceedings. In so doing, they acknowledged the ICC as the last resort while restating their commitment to prosecute core crimes, usually if the accused is present in their territory. Even though the latter group of states does not establish the primacy of the ICC, in practice it is likely to be inevitable, as states with no direct link to the crime will not, in principle, oppose to a request of the ICC to undertake the case.

In addition to the understanding of substantive complementarity as general principle of international law, it is contended that it constitutes one of the most central principles of core crimes law; technically, it is a structural principle of this branch of international law. Structure is "the supporting or essential framework; the manner in which a complex whole is constructed, put together, or organically formed".[182] The *New Oxford Dictionary* defines structural as that "relating to, or forming part of the structure of a building or other item". Structure is the "arrangement of and relations between the parts or elements of something complex". Structural is thus what relates to the "arrangement of and relations between the parts or elements of a complex whole".[183] From a chemical perspective, a *structural* formula shows "the composition and structure of a molecule […] the structure is indicated by showing the relative positions of the atoms in space and the bonds between them".[184] Substantive complementarity indicates the co-ordination and relationship between different and essential components of the international criminal system.

Accordingly, as the legal principle it is, substantive complementarity has the potential of providing powerful guidance in the resolution of positive and negative conflicts of jurisdictions, especially in filling in lacunae, integrating legal/statutory uncertainties, and eventually bestowing upon courts a legal tool that permits for some corrective interpretation of

[182] Cassell Dictionary, p. 1316, see *supra* note 161.

[183] NOED, p. 1844, see *supra* note 153.

[184] Collins Dictionary, p. 1442, see *supra* note 160.

lege ferenda without which – in borderline situations – one may be confronted with situations of ultimate denial of justice.

5.4. Conclusion

The evolution of core crimes law since the Versailles Treaty unveils, on the one hand, the effort of the international community towards the prosecution and punishment of core crimes' perpetrators and, on the other, a growing multidirectional complementarity between national and international jurisdictions which, while respecting states' prime prerogative in the exercise of the *jus puniendi*, assures safety valves able to guarantee that in case of states' failure to act perpetrators, will be brought to justice.

The combined analysis of different legal sources and mechanisms permits one to discern the principle of 'substantive complementarity' as a main pillar of core crimes law. The principle of substantive complementarity imposes on the state of custody the duty to investigate with a view to prosecution perpetrators of core crimes – if necessary on grounds of universal jurisdiction – when extradition is not feasible and international judicial bodies cannot step in. This obligation is peremptory inasmuch as by allowing the perpetrator to live free in its territory, the custodial state would be condoning, assisting and perpetuating a breach of *jus cogens*. Therefore, the obligation to stop such a breach (owed to the international community of states) is binding upon the state of custody as a derivation of the principle of territoriality because only it is in the position to exercise coercive powers over the perpetrator. The principle of substantive complementarity is a binding principle of substantive law, which assists law enforcers in the resolution of positive and negative conflicts of jurisdiction.

Substantive complementarity takes the nature of a structural principle of core crimes law, deriving its existence from the *ratio existenti* of this system. It is a principle which has developed and keeps on developing within the sphere of a rather recent and intricate branch of law. Although its main foundations have been set forth it is now required that law enforcers apply it in practice, thus promoting its widespread recognition and hopefully contributing to its progressive customary consolidation.

FICHL Publication Series No. 23 (2015):

Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

This fourth volume in the series Historical Origins of International Criminal Law concentrates on institutional contributions to the development of international criminal law rather than taking a chronological (Volumes 1 and 2) or doctrinal (Volume 3) approach. It analyses contributions made by institutions such as the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, INTERPOL, the International Association of Penal Law, the Far Eastern and Pacific Sub-Commission, and internationalised fact-finding mandates. It considers the role played by some jurisdictional principles and work methods of international and national institutions. Part 4 also looks at wider trends in the development of international criminal law

The contributors include Wegger Christian Strømmen, LING Yan, Anuradha Bakshi, ZHU Wenqi, Volker Nerlich, David Re, LIU Daqun, Serge Brammertz, Kevin C. Hughes, Patricia Pinto Soares, Mareike Schomerus, Seta Makoto, Natalia M. Luterstein, Hilde Farthofer, Itai Apter, Md. Mostafa Hosain, Helge Brunborg, Mutoy Mubiala, Yaron Gottlieb, Mark A. Lewis, Marquise Lee Houle, Tina Dolgopol, Rahmat Mohamad, Barrie Sander, Furuya Shuichi, Chris Mahony, ZHANG Binxin and the editors.

In his foreword, Wegger Christian Strømmen notes that the four-volume project "draws our attention to the common legacy and interests at the core of international criminal law. By creating a discourse community with more than 100 scholars from around the world, [CILRAP] has set in motion a wider process that will serve as a reminder of the importance of the basics of international criminal law".

ISBN: 978-82-8348-017-7 (print) and 978-82-8348-016-0 (e-book).