

# **The Principles of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?**

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## Abstract

The concepts of complementarity and Universal Jurisdiction as such raise various concerns, just in themselves. The combination of these concepts may be a very reasonable one, however, it tends to cause confusion and renunciation within the international community. The objective of the present work is to present very briefly the two different legal concepts and provide an analysis on their compatibility. In order to come to a result, the principle of complementarity is evaluated as both, an admissibility criterion and a State obligation and right, to primarily be able to deal with a case in their national legal system, acknowledging that criminal jurisdiction is situated in the heart of State's sovereignty. Universal Jurisdiction is brought into a relation with these two ideas of complementarity. This paper addresses possible solutions.

## A. Introduction

Paul Kagame, President of the Republic of Rwanda stated "lately, some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply such that a judgment from less powerful nations indicts those from the more powerful?"<sup>1</sup> This clearly critical, almost hostile approach towards Universal Jurisdiction may be representative for a contemporary suspicion in the spheres of the African Union.<sup>2</sup> It is, however, not a final argument against this concept. The recent establishment of a system of international criminal justice, which sooner or later will most probably mainly consist of the International Criminal Court (ICC), is built to deal with those *most responsible* for egregious crimes, mostly mass crimes. Accordingly, it leaves a huge gap between those most responsible and those innocent. The low-level perpetrators of these crimes can only be held responsible, if the national jurisdictions contribute their share. This is

<sup>1</sup> Address at the 'Facing Tomorrow Conference', Presidents Discussing Tomorrow, Jerusalem, Israel, (13 May 2008), found in C. C. Jalloh, 'Universal Jurisdiction, Universal Prescription?: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', 21 *Criminal Law Forum* (2010) 1, 1, 1.

<sup>2</sup> *Id.*, 2-4.

where the principle of complementarity comes into focus. It ensures that the ICC is nothing more and nothing less than an international court of “last resort”, supposedly stepping back where the States themselves can and want to deal with international crimes. Complementarity is a matter of admissibility in the Rome Statute, but also a guiding principle of the ICC’s relationship to the national jurisdictions. A recent example of the practical importance of the question of scope and nature of complementarity in relation to Universal Jurisdiction arose in Germany. A Rwandan national, living in France, was suspected of the commission of crimes against humanity in the Democratic Republic of Congo in 2009. The ICC investigated in this matter as did the German General Federal Prosecutor of the German Federal Court, basing the investigations on Universal Jurisdiction. With regard to the ICC’s investigations the Germany General Federal Prosecutor dismissed the investigation in accordance with § 153 f II 1 No. 4 *German Code of Criminal Procedure*.<sup>3</sup> Universal Jurisdiction, being a jurisdiction related concept, may be relevant on the level of determination of admissibility and in the finding of obligations of States. The core question to be raised in the present work is: How do the two principles mingle, is there a possibility of reconciling two possibly polar concepts? It was stated that with the establishment of the ICC the use of Universal Jurisdiction was only necessary in cases outside the scope of jurisdiction of the ICC.<sup>4</sup> This article considers three divergent positions, first, the principle of complementarity furthers/improves the use and implementation of Universal Jurisdiction, second, in the exercise of complementarity there is no room left for nationally prescribed Universal Jurisdiction,<sup>5</sup> or third, Universal Jurisdiction enforces the principle of complementarity effectively by increasing the number of potential National States that are able to deal with international crimes that were committed.

<sup>3</sup> German Federal Constitutional Court, Decision of 1 March 2011, 2 BvR 1/11, 31 *Neue Zeitschrift für Strafrecht* (2011) 6, 353, 354.

<sup>4</sup> S. García Ramírez, ‘Principio de Complementariedad en el Estatuto de Roma’, 4 *Anuario Mexicano de Derecho Internacional* (2004), 149, 154-156.

<sup>5</sup> Burke-White even argued that the establishment of the ICC as such leads to a reluctance of States to engage in proceedings under Universal Jurisdiction. W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008) 1, 53, 63.

In the following, the principle of complementarity and universal jurisdiction will be very briefly defined, however, these definitions do not claim to be academic and final definitions but to be understood as working definitions for the purposes of the present work.<sup>6</sup> After that the possible interplay between the two concepts is discussed and a conclusion is drawn.

## B. The Principles: Definitions

### I. Principle of Universal Jurisdiction

The principle of Universal Jurisdiction provides for jurisdiction of a State over certain crimes without requiring any of the normally required linkages,<sup>7</sup> such as commission on its territory,<sup>8</sup> nationality of either

<sup>6</sup> The difficult task of finding a final definition for the principles was – in relation to Universal Jurisdiction – even left open by the ICJ, as stated in a dissenting opinion to the *Arrest Warrant Case*; on the lack of a definition for Universal Jurisdiction: Jalloh, *supra* note 1, 6.

<sup>7</sup> *Princeton Principles*, Principle 1 (1), in ‘The Princeton Principles on Universal Jurisdiction’, available at [http://www.law.depaul.edu/centers\\_institutes/iharli/downloads/Princeton%20Principles.pdf](http://www.law.depaul.edu/centers_institutes/iharli/downloads/Princeton%20Principles.pdf) (last visited 28 January 2013), 28; Amnesty International, ‘Universal Jurisdiction: The Duty of States to Enact and Implement Legislation’ (2001), available at <http://www.amnesty.org/en/library/asset/IO53/002/2001/en/be2d6765-d8f0-11dd-ad8c-f3d4445c118e/ior530022001en.pdf> (last visited 28 January 2013), 11; B. Broomhall, ‘Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law’, 35 *New England Law Review* (2001) 2, 399, 400; J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), 467; D. Carreau, *Droit International*, 10th ed. (2009), 387, para. 1039 (he refers to the nationality requirements only); R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd ed. (2010), 44; M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (2008), 25; K. Ipsen, *Völkerrecht*, 5th ed. (2004), 663, para. 7; G. de La Pradelle, ‘La compétence universelles’, in H. Ascensio *et al.* (eds), *Droit international penal* (2000), 905, para. 1; M. E. Odello, ‘La Corte Penal Internacional y las legislaciones nacionales: Relación entre Derecho Internacional y derechos nacionales’, 1 *Foro: Revista de Ciencias Jurídicas y Sociales* (2005) 1, 295, 316; R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *Journal of International Criminal Justice* (2004) 3, 735 *et seq.*, 745; B. H. Oxman, ‘Jurisdiction of States’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VI (2012), 546, 552, para. 37; J. J. Paust *et al.*, *International Criminal Law: Cases and*

perpetrator or victim,<sup>9</sup> or the threat towards its national security.<sup>10</sup> Thus, it enables a State to prosecute a person under its jurisdiction no matter where or against whom the crime, was committed, independent of the perpetrator's nationality. Some understand Universal Jurisdiction to be limited to situations in which the perpetrator is present in the State that uses Universal Jurisdiction (*iudex loci deprehensioni/forum deprehensionis*).<sup>11</sup>

*Materials* (1996), 95; X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', 88 *International Review of the Red Cross* (2006) 862, 375, 377; L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003), 22 (phrasing it negatively).

<sup>8</sup> Known as principle of territoriality, providing for jurisdiction of the State on whose territory the crime was committed, see Cryer *et al.*, *supra* note 7, 40-41; Oxman, *supra* note 7, 549, paras 13-17; O'Keefe, *supra* note 7, 735 *et seq.*, 739.

<sup>9</sup> Principle of personality, either active (nationality of the perpetrator) or passive (nationality of the victim) nationality are relevant to establish jurisdiction, see Cryer *et al.*, *supra* note 7, 41-43; Oxman, *supra* note 7, 552, paras 34-36; O'Keefe, *supra* note 7, 735, 739.

<sup>10</sup> The 'protective principle', enabling a State to exercise its jurisdiction over foreigners, acting in foreign territory but threatening the national security, see I. Cameron, 'International Criminal Jurisdiction, Protective Principle', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol I (2012), 712, 712, para. 1 (in *id.*, 715, para. 13, the major difference between universal and protective principle is that the first protects values of the international community whereas the latter protects the National State's very own interests); Cryer *et al.*, *supra* note 7, 43; Oxman, *supra* note 7, 550-551, paras 27-28; O'Keefe, *supra* note 7, 735 *et seq.*, 739; Reydams, *supra* note 7, 22.

<sup>11</sup> National Legislations: Netherlands (*Internationals Crimes Act*, § 1 Art. 2 (1) (a), 19 June 2003, available in V. Santori (ed.), 'Domestic Implementing Legislation and Related Documents' (CD-ROM), in C. Kreß *et al.* (eds), *The Rome Statute and Domestic Legal Orders*, Vol. II (2005)); Canada (*Crimes Against Humanity and War Crimes Act 2000*, Sec. 6 (1), available in *id.*); Case law: ICJ, *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Separate Opinion of Judges R. Higgins, P. H. Kooijmans & T. Buergenthal, ICJ Reports 2002, 63, 76, para. 45; Scholars: Institut de Droit International (ed.), 'Universal Criminal Jurisdiction With Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes' (26 August 2005), available at [http://www.idi-iil.org/idiF/resolutionsF/2005\\_kra\\_03\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/2005_kra_03_fr.pdf) (last visited 28 January 2013), 2, para. 3 (b); C. C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59 *Law & Contemporary Problems* (1996) 4, 153, 165; G. Abi-Saab, 'The Proper Role of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 3, 596, 601; A. Cassese, 'Is the Bell Tolling for Universality?: A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 3, 589, 592; O'Keefe, *supra* note 7, 735 *et seq.*, 752-754.

Furthermore, it remains unclear to which crimes the concept relates. Initially it was only accepted in relation to piracy, the tendency today is, however, to extend it to more – international – crimes.<sup>12</sup>

The principle of Universal Jurisdiction is not undisputed.<sup>13</sup> There are treaties that contain or acknowledge the principle of Universal Jurisdiction,<sup>14</sup> it is found in various domestic legislations,<sup>15</sup> and claimed to

<sup>12</sup> *Princeton Principles*, Principle 2 (1), *supra* note 7, naming piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture; M. C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001) 1, 81, 151-152, 156 (arguing that it is the status of being “*ius cogens* crimes that implies that universal jurisdiction exists”); Odello, *supra* note 7, 316; Oxman, *supra* note 7, 552-553, paras 38-39.

<sup>13</sup> General overview of the discussion: S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2004); strongly against Universal Jurisdiction: G. P. Fletcher, ‘Against Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003) 3, 580; addressed and opposed by: A. Eser, ‘For Universal Jurisdiction: Against Fletcher’s Antagonism’, 39 *The University of Tulsa Law Review* (2004) 4, 955.

<sup>14</sup> Such as *International Convention for the Suppression of Counterfeiting Currency*, Art. 9, 20 April 1929, 112 L.N.T.S. 371, 379 (under condition of request of extradition); *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*, Art. 8, 26 June 1936, 198 L.N.T.S. 299, 311 (under condition of request of extradition); *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Art. 49, 12 August 1949, 75 U.N.T.S. 31, 62; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Art. 50, 12 August 1949, 75 U.N.T.S. 85, 116; *Geneva Convention Relative to the Treatment of Prisoners of War*, Art. 129, 12 August 1949, 75 U.N.T.S. 135, 236; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Art. 146, 12 August 1949, 75 U.N.T.S. 287, 386; *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Art. 28, 14 May 1954, 249 U.N.T.S. 215, 260; *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* Art. 5 (2), 10 December 1984, 1465 U.N.T.S. 85, 114 (containing primarily the *aut dedere aut iudicare* principle, as a secondary step, implicitly calls for Universal Jurisdiction).

<sup>15</sup> Such as: Belgium (*Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, Art. 7); Canada (*Crimes Against Humanity and War Crimes Act 2000*, Sec. 8, *supra* note 11); Germany (*Code of Crimes Against International Law*, § 1; *German Criminal Code*, § 6); New Zealand (*International Crimes and International Criminal Court Act 2000*, § 8 (1), available in Santori, *supra* note 11); Spain (*Ley Orgánica de Poder Judicial*, Art. 23 (4), available in Santori, *supra* note 11); United Kingdom (*International Criminal Court Act 2001*, § 68, available in Santori, *supra* note 11).

be accepted as customary international law.<sup>16</sup> Universal Jurisdiction sometimes is distinguished from the principle *aut dedere aut iudicare*, which is considered to be related, but not essentially the same.<sup>17</sup> The idea of this principle is basically that no State should shield alleged perpetrators of certain crimes from criminal responsibility but should either prosecute under their own (possibly also universal) jurisdiction or extradite to another place of jurisdiction.<sup>18</sup>

Although the rationale of Universal Jurisdiction is to close the gap of impunity for the commission of certain grave crimes,<sup>19</sup> its practical importance may be challenged, since diplomatic and policy reasons may pose serious obstacles to its practical use, or at least to its uniform “universal” use of and towards every State, which is sometimes challenged

<sup>16</sup> The PCIJ found in the S.S. Lotus case that the states were free to prosecute under universal jurisdiction as long as international law does not limit this broad jurisdiction, *Case of the S.S. Lotus*, PCIJ Series A, No. 10 (1927), 19 [Lotus Case]; recently and more explicitly found by Amnesty International, *supra* note 7, 11; Institut de Droit International, *supra* note 11, 2, para. 2; P. Benvenuti, ‘Complementarity of the International Criminal Court to National Criminal Jurisdictions’, in F. Lattanzi & W. A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (1999), 21, 25; Broomhall, *supra* note 7, 404-405 (referring to “permissive” Universal Jurisdiction); J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1 (2005), 604 (Rule 157): “State practice establishes this rule as a norm of customary international law with respect to war crimes committed in both international and non-international armed conflicts.”; Philippe, *supra* note 7, 386; C. L. Sriram, ‘Exercising Universal Jurisdiction: Contemporary Disparate Practice’, 6 *International Journal of Human Rights* (2002) 4, 49, 50; G. Werle, *Principles of International Criminal Law* (2005), 60, para. 174.

<sup>17</sup> See Bassiouni, *supra*, note 12, 152-153.

<sup>18</sup> Amnesty International, *supra* note 7, 11; A. Abass, ‘The International Criminal Court and Universal Jurisdiction’, 6 *International Criminal Law Review* (2006) 3, 349, 353-355; M. P. Scharf, ‘Aut dedere aut iudicare’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. I (2012), 749, 749, paras 1-2; contested except for war crimes by J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008), 192.

<sup>19</sup> See Assembly of the African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, 30 June 2008 - 1 July 2008, Doc Assembly/AU/14 (XI), 1, para. 3; *id.*, *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, 1-3 February 2009, Doc Assembly/AU/3, para. 3; Bassiouni, *supra* note 12, 154; Broomhall, *supra* note 7, 401-403.

as being “neo-colonialism”.<sup>20</sup> It is hardly imaginable that an economically and/or politically dependent State initiated proceedings against a national of the more powerful State based on the principle of universal jurisdiction since this could and would be a cause for diplomatic casualties. Notwithstanding these difficulties, there are various cases in which the principle of Universal Jurisdiction has been used or acknowledged.<sup>21</sup>

## II. Principle of Complementarity

The principle of complementarity is mainly read in connection to the International Criminal Court’s jurisdiction, which is supposed to be complementary to the national jurisdictions. The basic idea of complementarity existed, however, already in the context of the treaty of Versailles in 1919, in which the Allies authorized the Germans to try some

<sup>20</sup> *Arrest Warrant Case (Democratic Republic of Congo v. Belgium)*, Separate Opinion of Judge S. Bula-Bula, ICJ Reports 2002, 100 (where the exercise of Universal Jurisdiction was described as “neo-colonial intervention”); Bassiouni, *supra* note 12, 154-155; G. Bottini, ‘Universal Jurisdiction after the Creation of the International Criminal Court’, 36 *New York University Journal of International Law and Politics* (2004) 2/3, 503, 505-506; Cryer *et al.*, *supra* note 7, 52; Jalloh, *supra* note 1, 4; Sriram, *supra* note 16, 51.

<sup>21</sup> *Prosecutor v. Duško Tadić a/k/a “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A (Appeals Chamber), 2 October 1995, para. 62; *Prosecutor v. Bernard Ntuyahaga*, Decision on the Prosecutor’s Motion to Withdraw the Indictment, ICTR-98-40-T (Trial Chamber), 18 March 1999; *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15 AR 72(E)/SCSL-2004-16-AR72(E) (Appeals Chamber), 13 March 2004, paras 67-71; Belgium: *Public Prosecutor v. Abdoulaye Yerodia Ndombasi et al.*, Chambre de mises en accusation of Brussels, 16 April 2002; International Arrest Warrant for *Hissène Habré* of 19 September 2005; Germany: *Public Prosecutor v. Tadić*, German Federal Court of Justice (*Bundesgerichtshof*), Examining Magistrate, 13 February 1994, 1 BGs 100/94, 14 *Neue Zeitschrift für Strafrecht* (1994) 5, 232; *Public Prosecutor v. Djajić*, Bayerisches Oberstes Landesgericht, 3 St 20/96, 23 May 1997, 51 *Neue Juristische Wochenzeitschrift* (1998) 6, 392; Israel: *Attorney General of Israel v. Adolf Eichmann*, Jerusalem District Court, Judgement of 12 December 1961, 36 ILM 18, 26, para. 12 says “the jurisdiction to try crimes under international law is *universal*.”; Spain: *Unión Progresista de Fiscales de España et al. v. Augusto Pinochet*, Audiencia Nacional, 5 November 1998, English translation in R. Brody & M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000), 95.

of the war criminals themselves in Leipzig, Germany.<sup>22</sup> In the following, complementarity will be discussed under two different aspects, first as an issue of admissibility before the ICC<sup>23</sup> (1.) and second as a State's right and obligation (2.). In addition, the basic rationale of complementarity is elaborated on (3.).

### 1. Art. 17 Rome Statute: Issue of Admissibility of Cases Before the ICC

The Rome Statute prescribes in Art. 17 that “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”.<sup>24</sup>

Accordingly, the Statute connects issues of admissibility with the (national) jurisdiction of States,<sup>25</sup> and grants primacy to the national jurisdiction as long as the State does not remain “wholly inactive”,<sup>26</sup> there is

<sup>22</sup> M. Bergsmo & P. Webb, ‘International Criminal Courts and Tribunals, Complementarity and Jurisdiction’, in R. Wolfrum (ed.), *The Max Planck Encyclopaedia of Public International Law*, Vol. 1 (2012), 688, 691, para. 12; M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), 11-18; General historical overview: *id.*, 11-154.

<sup>23</sup> Opposed by F. Mégret, ‘Why Would States Want to Join the ICC?: A Theoretical Exploration Based on the Legal Nature of Complementarity’, in J. K. Kleffner & G. Kor (eds), *Complementary Views on Complementarity* (2004), 1, 42 (stating that “admissibility is in fact also a deeply jurisdictional issue in its own right”); general overview of the ICC's approach to complementarity: N. N. Jurdi, ‘Some Lessons in Complementarity for the International Criminal Court Review Conference’, 34 *South African Yearbook of International Law* (2009), 28.

<sup>24</sup> *Statute of the International Criminal Court*, Art. 17 (1) (a), 17 July 1998, 2187 U.N.T.S. 3, 100 (emphasis added).

<sup>25</sup> Stigen holds the view that it is the international jurisdiction that is referred to in Art. 17 Rome Statute, rather than the national jurisdiction, which nevertheless “typically will be required”, Stigen, *supra* note 18, 190. His argument is not convincing, though, because it lacks authority and cannot be read into the Statute easily.

<sup>26</sup> J. K. Kleffner & G. Kor, ‘Preface’, in *id.*, *supra* note 23, V, V; supporting this:

no deficiency in the domestic investigation or prosecution or there is an attempt to shield a person from such “criminal responsibility from crimes within the jurisdiction of the Court”.<sup>27</sup> Often discussed among scholars is the question of a standard of the unwillingness or inability to genuinely carry out investigations or prosecutions,<sup>28</sup> however, more relevant to this work is the question of what kind of jurisdiction of the State is embraced.

*Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, ICC-01/04-01/06-8 (Pre-Trial Chamber I), 10 February 2006, para. 29; D. Robinson, ‘The Mysterious Mysteriousness of Complementarity’, 21 *Criminal Law Forum* (2010) 1, 67, 102; W. A. Schabas & S. Williams, ‘Article 17’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Note, Article by Article*, 2nd ed. (2008), 605, 615-616, para. 23; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 340-344 [Schabas, ICC Commentary]; supporting this: Office of the Prosecutor of the International Criminal Court (OTP), ‘Paper on Some Policy Issues Before the Office of the Prosecutor’ (September 2003), available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) (last visited 28 January 2013), 5 [OTP, Paper on Some Policy Issues]; J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 103-105 [Complementarity in the Rome Statute]; Stigen, *supra* note 18, 199-202.

<sup>27</sup> *Statute of the International Criminal Court*, Art. 17 (2) (b), *supra* note 24, 101.

<sup>28</sup> Providing some information: OTP, *Paper on Some Policy Issues*, *supra* note 26, 4; Assembly of State Parties to the International Criminal Court (ASP), *Report of the Bureau on Stocktaking: Complementarity – Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap*, ICC-ASP/8/51, paras 9-11; see also: Benvenuti, *supra* note 16, 42-46; Cryer *et al.*, *supra* note 7, 128-129; El Zeidy, *supra* note 21, 163-207, 222-235; J. T. Holmes, ‘Complementarity: National Courts versus the ICC’, in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (2002), 667, 674-678; F. Jessberger, ‘International v. National Prosecution of International Crimes’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), 208, 212; Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 126-158; El Zeidy, *supra* note 22, 163-170, 222-228; Schabas & Williams, *supra* note 26, 616, 623-625, paras 24 & 33; Schabas, *ICC Commentary*, *supra* note 26, 344-347; Stigen, *supra* note 18, 251-330.

## 2. As a State Obligation/Right

The principle of complementarity is implemented in paragraph 10 of the Preamble to the Rome Statute and in Art. 1 Rome Statute.<sup>29</sup> It needs to be clarified if the principle of complementarity provides for an obligation/duty on States, to investigate and prosecute crimes under their jurisdiction in addition to the right of a State to claim for priority in prosecuting a crime. Finally, it needs to be elaborated who is actually an addressee of the said principle.

### a) A State's Obligation?

The States' primacy in investigations and prosecution based on complementarity results in an actual right of complementarity or primacy of the States. The principle of complementarity could nevertheless also be read as an obligation of States to become active.<sup>30</sup> This is partly based on paragraph six of the Preamble, which contains the Member States' duty to "exercise criminal jurisdiction".<sup>31</sup> It was stated that "complementarity, as established and governed by the Rome Statute, *was meant* to [...] serve as 'a

<sup>29</sup> Namely "shall be complementary to national criminal jurisdictions".

<sup>30</sup> OTP, *Paper on Some Policy Issues*, *supra* note 26, 2; *id.*, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/04-01/07-1008-AnxA, 30 March 2009, 19 (note 24) [OTP, Informal Expert Paper]; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Art. 19 (2) (a) of the Statute, ICC-01/04-01/07-949 (Pre-Trial Chamber I), 11 March 2009, para. 48 [Situation in the Democratic Republic of the Congo, Defence Motion Katanga]; R. Kolb, *Droit international penal* (2008), 258; R. B. Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility', 10 *Criminal Law Forum* (1999) 1, 61, 64; W. A. Schabas, 'Complementarity in Practice: Some Uncomplementary Thoughts', 19 *Criminal Law Forum* (2008) 1, 5, 6 [Schabas, Complementarity]; contested by Broomhall stating "the Statute imposes no obligation on States Parties to prosecute the crimes it defines", Broomhall, *supra* note 7, 408.

<sup>31</sup> Cryer *et al.*, *supra* note 7, 127; Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 241-247; Schabas, *Complementarity*, *supra* note 30, 6; Schabas & Williams, *supra* note 26, 606, para. 1.

catalyst for compliance’.”<sup>32</sup> This assumption is nevertheless not possibly based on the mere words referring to complementarity in the Rome Statute, which explains that the jurisdiction of the ICC shall be “complementary” to national jurisdiction. However, it may be feasible to read the obligation and the corresponding right of complementarity of the States out of the notion of complementarity as such in conjunction with the State parties’ obligations to “cooperate fully” with the court as stipulated in Arts. 86 and 88 Rome Statute.<sup>33</sup> These provisions are supposed to relate to the cooperation between States and the court after a case has been declared admissible already. One might nevertheless read the complementarity – taking place before and instead of a prosecution by the ICC – into these norms and understand the principle of complementarity as a right and obligation of the State, which may oblige a State to actively exercise its national jurisdiction in the sense of an effective complementarity even if this means that the work of the ICC would not exist anymore. Accordingly, right and obligation of States to nationally pursue the end of impunity for the crimes listed in the Rome Statute exist. How strong these are practically will be determined by future practice.

b) Addressees of the Principle of Complementarity as a State’s Right/Obligation

Since the principle of complementarity is enshrined in the Rome Statute, one wonders if it can be expanded to non-member States to this treaty. As found above, complementarity is both, an obligation incumbent upon States and a right, accordingly the application of complementarity in its obligatory nature on third States would violate the rule that treaties cannot bind third States, as established in Art. 34 *Vienna Convention on the Law of Treaties* and reflected in customary international law.<sup>34</sup> On the other hand, the principle of complementarity as a **right** of States can be applied voluntarily by third States, which is likely because States will probably take

<sup>32</sup> F. Gioa, ‘Comments on Chapter 3 of Jann Kleffner’, in Kleffner & Kor, *supra* note 23, 105, 106.

<sup>33</sup> *Id.*

<sup>34</sup> *Kasikili/Sedudu Island Case (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, 1045, 1059, para. 18.

the chance to exercise their sovereign right of jurisdiction over persons within their jurisdictional scope, an **obligation** to do so will most probably not be accepted by third States. Hence, States that implemented Universal Jurisdiction within their national laws will also exercise this linkage for prosecuting persons but based on their sovereign decision to do so.

### 3. The Rationale Behind the Principle of Complementarity

The **rationale** of the principle of complementarity – as an obligation and right as well as a part of admissibility – needs to be carefully established. It might be manifold: on the one hand it avoids proceedings on the international level, where the access to evidence, witnesses and local investigation organs is complicated and distant in favor of the virtually closer jurisdiction of the National State;<sup>35</sup> on the other hand it ensures that State parties to the Rome Statute keep their sovereign right to try crimes committed under their jurisdiction;<sup>36</sup> another reason is to close the gap between the prosecution on the international level, which are still only dedicated to few individuals, and the prosecution of the National States in their own legal systems, in order to actively fight against impunity by prosecuting a higher number of perpetrators.<sup>37</sup> One may come to the

<sup>35</sup> OTP, *Paper on Some Policy Issues*, *supra* note 26, 2; *id.*, *Informal Expert Paper*, *supra* note 30, 3; Cryer *et al.*, *supra* note 7, 127; Schabas, *Complementarity*, *supra* note 30, 5.

<sup>36</sup> OTP, *Informal Expert Paper*, *supra* note 30, 3; *Situation in the Democratic Republic of the Congo*, Defence Motion Katanga, *supra* note 30, paras 18-19; R. Cryer *et al.*, *supra* note 7, 127; El Zeidy, *supra* note 22, 159; Kolb, *supra* note 30, 259; Philips, *supra* note 30, 63-64; P. Sands, 'International Law Transformed? From Pinochet to Congo...?', 16 *Leiden Journal of International Law* (2003) 1, 37, 40; Schabas, *ICC Commentary*, *supra* note 26, 336; Schabas & Williams, *supra* note 26, 606, para. 1; Stigen, *supra* note 18, 15-18; L. Yang, 'On the Principle of Complementarity in the Rome Statute of the International Criminal Court', 4 *Chinese Journal of International Law* (2005) 1, 121, 122; García Ramírez, *supra* note 4, 151; Mégret, *supra* note 23, 23, who at the same time describes complementarity as "a potent threat to State sovereignty".

<sup>37</sup> OTP, *Informal Expert Paper*, *supra* note 30, 3; *Situation in the Democratic Republic of the Congo*, Defence Motion Katanga, *supra* note 30, para. 20; M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002), 55, para. 54; F. Jessberger & C. Powell, 'Prosecuting Pinochets in South Africa: Implementing the

conclusion that all of these reasons play a role for the implementation of the principle of complementarity into the Rome Statute.<sup>38</sup>

## C. The Interplay Between the two Principles

### I. Interplay Universal Jurisdiction/Complementarity as an Admissibility Issue Under Art. 17 Rome Statute

For a case to be admissible the requirements of Art. 17 Rome Statute need to be fulfilled. The possible interplay of complementarity and universal jurisdiction may be found in the wording of the Rome Statute only implicitly, when it refers to "a State which has jurisdiction over it". The State's jurisdiction could contain different ways of establishing such jurisdiction, including Universal Jurisdiction. Another issue is the question if the use of Universal Jurisdiction by a non-member State rendered a case inadmissible before the ICC.<sup>39</sup>

The analysis will be conducted on the basis of an example. For this purpose, the recent case of German arrests and prosecution under its

Rome Statute of the International Criminal Court', 14 *South African Journal of Criminal Justice* (2001) 3, 344, 347; Philips, *supra* note 30, 63-64; G. Strijards, 'The Institution of the International Criminal Court', 12 *Leiden Journal of International Law* (1999) 3, 671, 673.

<sup>38</sup> Sands, *supra* note 36, 40.

<sup>39</sup> Another question that arises is whether in case of a Security Council referral (Art. 13 (b) Rome Statute) the admissibility test of Art. 17 Rome Statute still applies. This is, however, unlikely to affect the relationship between complementarity and Universal Jurisdiction, therefore it will not be dealt with in more depth. The argument is made that the complementarity turns into being a "supremacy of the ICC" in such cases, see further: in favor of primacy: L. Arbour & M. Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in H. A. M. v. Hebel, J. G. Lammers & J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 129, 139-140 ("It must be expected that the Council will give the Court jurisdictional primacy vis-à-vis the relevant national judicial systems when it makes a referral as an enforcement action under Chapter VII. The Security Council's power to conduct international judicial intervention derives from the Charter and is unaffected by the ICC-Statute."); Kolb, *supra* note 30, 258; A. Zimmermann, 'The Creation of a Permanent International Criminal Court', 2 *Max Planck United Nations Yearbook* (1998), 169, 220; against primacy: Stigen, *supra* note 18, 240; Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 165-166.

nationally incorporated *Weltrechtsprinzip* (Universal Jurisdiction),<sup>40</sup> of two Congolese men who were allegedly members of the militia “*Forces Démocratiques du Libération de Rwanda*” and responsible for war crimes and crimes against humanity, one of them as a leader/commander will be used.<sup>41</sup> Since the Democratic Republic of Congo is a situation before the ICC the possible conflict between the two systems, the national and the international can be illustrated. Assuming that these two men were sought after by the ICC Prosecutor and there was a pending decision of admissibility before the ICC. Would the ICC be barred from exercising its jurisdiction due to the principle of complementarity?

### 1. Does the Complementarity in Art. 17 Rome Statute Embrace All Different Linkages of the Member States?

It is clearly stated that the State that has jurisdiction over the crime committed, may investigate and prosecute with primacy over the ICC. What is, however, not clear is which linking principle will be accepted by the ICC. There are different possible scenarios, either the ICC will strictly refer to its own – limited – way of jurisdiction or it will accept whichever linkages the National States implemented into their legal systems, may it embrace universal jurisdiction or not.<sup>42</sup>

#### a) Only Active Personality and Territoriality (as in Art. 12 (2) (a), (b) Rome Statute)

The jurisdiction of the ICC is limited to cases of territoriality and active personality, thus to crimes committed on the territory of a State party to the Rome Statute, or by a national of a Member State, Art. 12 (2) (a), (b)

<sup>40</sup> German *Code of Crimes against International Law (Völkerstrafgesetzbuch)*, § 1, *supra* note 15.

<sup>41</sup> German Federal Prosecutor General (ed.), ‘Press Release of 17 November 2009’, available at <http://www.generalbundesanwalt.de/de/showpress.php?themenid=11&newsid=347> (last visited 28 January 2012).

<sup>42</sup> Kleffner, *Complementarity in the Rome Statute*, *supra* note 26, 110-113.

Rome Statute.<sup>43</sup> This allows the assumption that the “framers” of the Rome Statute wanted to only accept these bases of jurisdiction in general, thus, also for the national jurisdiction mentioned in Art. 17 Rome Statute.<sup>44</sup> This may be because these are the most traditionally accepted ones or because this would constitute the strictest way of establishing jurisdiction. Lattanzi discusses the issue and concludes that

*“[i]l paraît donc plus cohérent avec l’exigence d’une répression effective des “crimes les plus graves qui touchent l’ensemble de la communauté international [...] que la complémentarité s’évalue seulement à l’égard de certaines juridictions nationales et en considération aussi des rapports que la Cour a avec les Etats les plus strictement reliés au crimes.”<sup>45</sup>*

#### b) All Jurisdictional Links Which Are Accepted by the State

Since the wording of Art. 17 Rome Statute is not precise on the issue of jurisdiction of the State, it also allows the assumption that States are actually free to prescribe whichever principle in respect of jurisdiction they may like, be it passive personality or – more important for the purpose of this paper – universal jurisdiction. According to this idea, the language of

<sup>43</sup> Leaving aside the possibility of a Security Council referral as foreseen in Art. 13 b) Rome Statute, and the acceptance of the ICC’s jurisdiction by a third State.

<sup>44</sup> German Federal Constitutional Court, *supra* note 1, 354; M. Henzelin, *Le principe de l’universalité en droit penal international* (2000), 447, para. 1419: “Le défaut majeur du Statut est cependant que le Préambule ne dit pas clairement que les Etats, compétent à titre complémentaire pour poursuivre et juger les crimes décrits, *le sont selon le principe de l’universalité*. Rien ne laisse en effet entendre que le Statut n’envisage pas tout simplement que les Etats soient compétents pour poursuivre et juger les crime décrits *selon leur compétence actuelle*, territorial, personnelle et de protection.” (emphasis added and footnotes omitted); Schabas, *ICC Commentary*, *supra* note 26, 340.

<sup>45</sup> F. Lattanzi, ‘Compétence de la Cour pénale internationale et consentement des Etats’, 103 *Revue Générale de Droit International Public* (1999) 2, 425, 431; whereas it was also held that “[t]he principle of complementarity obligates the Prosecutor to defer to national legal systems where the State that *normally* exercises jurisdiction is in the process of investigating or prosecuting the crime” leaving the character of said jurisdiction less clear (emphasis added); I. Stegmiller, *The Pre-Investigation Phase of the ICC* (2011), 284.

the Rome Statute seems to give the discretion to States regarding which principle of jurisdiction they believe are convincing and applicable under this concept. The jurisdiction of a State could easily have a very broad scope, including Universal Jurisdiction. The idea of including the nationally prescribed Universal Jurisdiction in the jurisdiction referred to in Art. 17 Rome Statute was supported by scholars.<sup>46</sup> *Arbour* even uses the term of “compulsory” Universal Jurisdiction based on the Rome Statute that obliges the Member States to implement Universal Jurisdiction within their national legislations, which leads to the assumption that it falls under the concept of jurisdiction in the sense of Art. 17 Rome Statute.<sup>47</sup> Further, it was found that because of the ICC’s limited ability to try *all* perpetrators, in combination with the concerned States’ expected unwillingness and inability to prosecute, “the sole choice remaining will often be between universal jurisdiction and impunity.”<sup>48</sup>

### c) Discussion

Owing to the lack of clear wording and clarifying jurisprudence on this issue, a deeper analysis is necessary. The dual understanding of “jurisdiction” finds some argumentative support and consequently the examination requires special scrutiny. Relying primarily on a systematic interpretation, the provisions of Arts. 1 and 17 Rome Statute and the Preamble thereto would need to be seen in the context of the Rome Statute as a whole and in relation to the other provisions dealing with jurisdiction. Under this approach, the accepted jurisdictional links, territoriality and active personality as addressed in Art. 12 (2) a) and b) Rome Statute, establish a rather clear system of accepted links of jurisdictions. Here, the Rome Statute is cautious and conservative concerning the developments in general international law, which would probably accept some more links to establish jurisdiction. In this line of argumentation, one needs to conclude

<sup>46</sup> In the context of Art. 19 Rome Statute: C. K. Hall, ‘Article 19’, in Triffterer, *supra* note 26, 637, 649-650, paras 13 & 14; generally: E. David, ‘La Cour pénal internationale’, 313 *Recueil des Cours de l’Académie de Droit International* (2005), 325, 348-349; W. A. Schabas, *ICC Commentary*, *supra* note 26, 340.

<sup>47</sup> L. Arbour, ‘Will the ICC have an Impact on Universal Jurisdiction?’, 1 *Journal of International Criminal Justice* (2003) 3, 585, 586-587.

<sup>48</sup> Broomhall, *supra* note 7, 409.

that the system of the Rome Statute is coherently strict in providing the court with jurisdiction and it may be considered as being more coherent with this system to only accept the named links for jurisdiction within the national legal framework as well. Another argument in favor of this conclusion is that the assumption that within one treaty a specific term such as “jurisdiction” is used in one rather than in various different meaning.<sup>49</sup> This requires understanding “jurisdiction” in Art. 12 Rome Statute in the same way as in Art. 17 Rome Statute. Such a holistic approach is nevertheless difficult to maintain in regard to the Rome Statute, which was drafted by different groups dealing with different parts of it, hence the group that was in charge of the Jurisdiction within Art. 12 must not necessarily have been in charge for the wording of Art. 17 Rome Statute.<sup>50</sup>

There may be, however, other provisions that systematically point into another direction: Art. 18 Rome Statute stating that “the Prosecutor shall notify all States Parties and those States which [...] would normally exercise jurisdiction over the crimes concerned” in case there is enough basis to start investigations. Further, Art. 19 (2) c) and d) Rome Statute distinguish between those States that have jurisdiction over a case in accordance with Art. 12 Rome Statute and those having jurisdiction over a case “on the ground that it is investigating or prosecuting the case” which allows the conclusion that there are other jurisdictional links accepted generally by the Rome Statute, than only those of Art. 12, as e.g. the passive personality principle.<sup>51</sup> In conclusion, the systematic approach would probably point at a more restrictive jurisdiction for States, at least excluding Universal Jurisdiction, even though there is no definite answer that does not leave a slight ambiguity. Accordingly, the result of this interpretation is that the ICC could still exercise its jurisdiction over the two arrested men, not accepting the Universal Jurisdiction exercised by Germany as being covered by the

<sup>49</sup> Referred to as “Principle III: integration – that treaties are to be interpreted as a whole” M. Fitzmaurice, ‘The Practical Working of the Law of Treaties’, in M. D. Evans (ed.), *International Law*, 3rd ed. (2010), 172, 183.

<sup>50</sup> W. A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (2007), 19-20.

<sup>51</sup> Hall, *supra* note 46, 649, para. 13, even including Universal Jurisdiction; D. D. N. Nsereko, ‘Art. 18’, in Triffterer *supra* note 26, 630-631, para. 9.

scope of Art. 17 Rome Statute as long as the principle of *ne bis in idem* does not prevent it from doing so.<sup>52</sup>

Using a teleological interpretation would require to regard the object and purpose of the principle of complementarity for the admissibility before the ICC. Here, the above mentioned rationale of the principle may help in order to evaluate the content: if one considers the remaining sovereignty for the States the main reason behind complementarity, it is essential to conclude that it is within the States' free discretion to prescribe Universal Jurisdiction within their national systems and apply it to those who possibly could be dealt with by the ICC. Hence, the Congolese men could be arrested and tried by Germany, without involving the ICC. A strong hint towards this approach is the general reluctance within the Rome Statute to restrict States in their sovereignty too much.<sup>53</sup> The fight against impunity as part of the rationale of complementarity does not clearly hint towards either of the possibilities because in the light of the end of impunity it does not matter if a case is tried by the ICC or the national legal systems, as long as there is criminal accountability. Under considerations of numbers, nevertheless, the ICC will not be able to deal with all perpetrators, thus the implementation of Universal Jurisdiction with the rationale of ending impunity could be relevant in those cases, where the ICC is "overloaded" with cases and the "classical" jurisdictional States are "unwilling" or "unable" to prosecute.<sup>54</sup> Considering the practical implications i.e. the close nexus to evidence, victims and witnesses and also to the concerned societies as the rationale renders it illogical to use Universal Jurisdiction instead of trying the perpetrators in front of the ICC.<sup>55</sup> However, the rationale behind the complementarity is manifold and can therefore not be reduced to one of the named aspects. With the teleological interpretation there is hence no clear outcome, although the reasoning of practical consequences might be – practically seen – very important.

<sup>52</sup> The principle of *ne bis in idem* was raised by the Defense in *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum to Defence Reply to the Observations of the Prosecutor and of Legal Representatives of the Victims on the Application Challenging the Admissibility of the Case, ICC-01/05-01/08-752-Corr (Pre-trial Chamber III), 14 April 2010, para. 24 (4).

<sup>53</sup> As found *supra* B. II. 2 and B. II. 3. regarding the ICC's jurisdiction.

<sup>54</sup> Amnesty International, *supra* note 7, 5; Broomhall, *supra* note 7, 409.

<sup>55</sup> Generally on the practical problems of the use of Universal Jurisdiction: *id.*, 412-414.

There are two further points that need to be discussed: first there is the possibility that the ICC could be more effective in prosecuting and trying a case because there might be situations in which the ICC as an international court has simply more authority to obtain the necessary information and cooperation and second, based on human rights considerations proceedings in front of the ICC might be the more favorable and desirable solution for the accused, since the system of the ICC grants the accused a certain minimum standard regarding fair trial guarantees which could be disregarded in some States’ legal systems, maybe especially in those which did not ratify the Rome Statute.<sup>56</sup> These minimum standards regarding a fair trial might even be part of the requirement of being genuinely willing and able to conduct investigations and eventually proceedings since efficiency of these proceedings logically includes minimum human rights standards, e.g. a confession that is achieved by torture hardly suffices the standard of efficient proceedings. Additionally, the international proceedings also guarantee for a public observance of international media.<sup>57</sup> Assuming that the Congolese men were arrested in a State that earns unfortunate fame for a system of ill-treatment and human rights violation during judicial proceedings, the prevalence of the ICC proceedings would be beneficial to the accused. Accordingly, this is another reason against the use of Universal Jurisdiction within the scope of Art. 17 Rome Statute. Even considering that the ICC is able to seize the case in accordance with Art. 17 (2) Rome Statute if the proceedings do not respect the “principles of due process recognized by international law” the application of universal jurisdiction at first leaves the concerned person in the situation where a due process is not provided for. Further, the ICC might be reluctant to seize cases which are already dealt with via Art. 17 (2) Rome Statute due to political and policy reasons.

Another argument in favor of implementing the Universal Jurisdiction into national jurisdiction referred to in Art. 17 Rome Statute is the Lotus principle which states that as long as international law does not prohibit something, it may be applied,<sup>58</sup> which means in the present discussion that as long as there is no internationally recognized prohibition of Universal Jurisdiction, the States may use it and the ICC would be obliged to respect this as national jurisdiction. This argument can be contended by the

<sup>56</sup> See *infra* C. I. 2.

<sup>57</sup> Principles 9 and 10 of Amnesty International’s 14 Principles on the effective exercise of Universal Jurisdiction try to make sure that such situation does not occur.

<sup>58</sup> *Lotus Case*, *supra* note 16, 19.

assumption that the Member States to the Rome Statute waived the use of this right.

There also could be a situation of concurrence between the ICC and two States wishing to deal with a case by using Universal Jurisdiction. Applied to the example: Germany has the men, Belgium wants them, in order to try them and the ICC conducts investigations as well. How to solve that? Wouldn't it be reasonable to ask Universal Jurisdiction-using Germany and Belgium to step back? In such situation a rule of subsidiary jurisdiction for at least the one State that does not have hold of the respective accused and thus would need to conduct in absentia proceedings in favor of the *forum deprehensionis* State would appear to be a reasonable solution.<sup>59</sup> No matter how the concurrence is solved between the States, the ICC would need to accept the principle of complementarity although it might be a diplomatic solution to allow the ICC to step in.

#### d) Conclusion

As a concluding answer to the question which forms of jurisdictional linkages are envisaged in Art. 17 Rome Statute for the States' jurisdictions it needs to be underlined that there is no clearly set standard of the ICC itself. The issue is still open and may come up in the future. Considering that the ICC still is a relatively young institution it might be important for it to acquire new cases. On the other hand – considering the geographical scope the ICC already has – its prosecutor won't be short of work in the near future and necessarily will restrict its work to those cases that concern the "big fish" and it will try to find agreements and solutions with the States. Also the policy paper on complementarity in its general tone is rather suggesting a broad understanding of the concept; hence, most probably there are not going to be clashes between the ICC and States that use Universal Jurisdiction. Accordingly, the tendency goes – as also seen in the national jurisdictions, accepting one by one the Universal Jurisdiction – towards accepting Universal Jurisdiction within the national framework and accepting it as well as a prevailing national jurisdiction, also, because the

<sup>59</sup> As done in Belgium, see: M. Rau, 'Das Ende der Weltrechtspflege?: Zur Abschaffung des belgischen Gesetzes über die universelle Verfolgung völkerrechtlicher Verbrechen', 16 *Humanitäres Völkerrecht* (2003) 4, 212, 213.

end of impunity is the *raison d’être* of the ICC as such. Thus, as long as one generally accepts the existence of Universal Jurisdiction, Art. 17 Rome Statute encompasses the notion of Universal Jurisdiction, if a Member State prescribed it within its national law earlier. With the help of the above mentioned example: the two Congolese men, arrested by the German Federal Prosecutor General will be tried within the German legal system and the ICC could not get hold of them, even if it would try to.

## 2. Does the Complementarity as an Admissibility Criterion Also Cover the Use of Universal Jurisdiction by Non-Member States?

Concerning the question whether a case is admissible before the ICC under the principle of complementarity even if there was a non-member State that exercised its nationally prescribed Universal Jurisdiction over that same case, the exemplifying case needs to be modified regarding the prosecuting State. Hence, it needs to be assumed that it was a non-member State, e.g. China that prosecuted the two men and still the ICC’s Prosecutor prepares the prosecution of them in front of the ICC. First, as found above, the principle of complementarity binds Member States to the Rome Statute,<sup>60</sup> this even more if it is applied to the admissibility test of complementarity, which is a rather procedural rule of the Statute. If nevertheless China decides to prosecute with Universal Jurisdiction, the above raised concern of minimum standard of procedures comes up again. This, because especially for those States that did not join the Rome Statute, the international standard that was established by that treaty is not obligatory and therefore the advantage for the accused to be under the jurisdiction of the ICC rather than a random other State is a real argument against the acceptance of the exercise of the third States’ Universal Jurisdiction by the ICC. Further, the application of the admissibility test of Art. 17 in its full fledged version, deciding about “inability” and “unwillingness” of the third State would constitute a violation of that third States’ sovereignty since that State never accepted the ICC’s and the Rome Statute’s authority to evaluate the efficiency of that State’s domestic legal system. Any decision of the ICC on the admissibility test would violate – at

<sup>60</sup> See *supra* B. II. 2. b).

least indirectly – the principle of *par in parem non habet iurisdictionem*. However, the role of the ICC as being a court of last resort would lead to the conclusion that even the third State’s action would suffice to trigger inadmissibility.<sup>61</sup> Additionally, some practical considerations would also render it less important that the ICC deals with such a situation: justice is already done and there are presumably many other cases the ICC will be asked to deal with. Hence, the exercise of Universal Jurisdiction by China *e.g.* would be enough to block the ICC from declaring a case admissible.

## II. Interplay of the Principles Regarding the States’ Obligation/Right to Complementarity

It was mentioned that “[t]he main burden of enforcing international criminal law will in future rest not with the International Criminal Court and probably not with the countries of commission, but with *third* States willing to prosecute.”<sup>62</sup> This presupposes for such cases where the third State uses Universal Jurisdiction, that its use and the right and obligation to complementarity are compatible. In the following it will be analyzed if there is an obligation of the State to prosecute a case if the only possible basis is Universal Jurisdiction (1.) and whether the use of one State’s Universal Jurisdiction can be considered a violation of another State’s right to complementarity (2.).

### 1. Is There an Obligation of the State to Investigate/Prosecute if Only Universal Jurisdiction Can Be Applied?

As it was concluded above that there is an obligation on the members to the Rome Statute to prosecute the crimes envisaged by the Statute in their national legal systems arising out of the principle of complementarity.<sup>63</sup> At this point, it needs to be evaluated if this obligation to nationally prosecute

<sup>61</sup> David, *supra* note 46, 348-349.

<sup>62</sup> Werle, *supra* note 16, 69, para. 200 (emphasis added).

<sup>63</sup> See *supra* B. II. 2. a).

the Rome Statute's crimes is also tailored at the prosecution under Universal Jurisdiction. In short: can the complementarity of the Rome Statute oblige Member States to prescribe Universal Jurisdiction? Now, taking up the aforementioned example, is Germany not only able to prosecute the Congolese militia men with primacy over the ICC but rather obliged? One could argue that there is no such notion as obligatory Universal Jurisdiction under international law and therefore there is no obligation under the principle of complementarity to prosecute crimes using only Universal Jurisdiction.<sup>64</sup> There was, nevertheless also mentioned that "although the ICC Statute *does not oblige* states to exercise extraterritorial, in particular universal, jurisdiction over the international crimes in question, the system of international justice envisaged by the ICC Statute *will work* effectively *only* if states extend their jurisdiction to crimes committed extraterritorially."<sup>65</sup> This could be backed up with legal opinions holding for an obligatory use of Universal Jurisdiction, which then, under the above concluded obligation to prosecute as encompassed by complementarity in the Rome Statute, would be obliging members to the Statute to prosecute alleged crimes under Universal Jurisdiction nationally. Acknowledging the lack of strength of the obligation of complementarity as such, since not based on the mere wording of the Statute,<sup>66</sup> it would be an extension of the Statute to assume that there is an obligation on States to use Universal Jurisdiction to comply with their complementarity demands vis-à-vis the Rome Statute. As a conclusion, a State, such as Germany in the example, is not obliged but rather allowed to prosecute an alleged perpetrator under Universal Jurisdiction, since there is no internationally recognized obligation to implement Universal Jurisdiction into their legislative system, even if there may be a trend towards such implementation in some States.<sup>67</sup>

<sup>64</sup> Philippe, *supra* note 7, 379.

<sup>65</sup> Jessberger & Powell, *supra* note 37, 349.

<sup>66</sup> See *supra* B. II. 2. a).

<sup>67</sup> Rau, *supra* note 59, 214.

## 2. Can the Use of Universal Jurisdiction Cause a Clash Between Willing States and Violate the Right to Complementarity of a State?

Using the above cited example, it needs to be clarified if the use of Universal Jurisdiction by Germany establishes a violation of the right of complementarity of another State, e.g. Belgium which also wanted to prosecute the arrested men for the alleged crimes committed in the DRC. Even under the assumption that Belgium is not obliged to prescribe Universal Jurisdiction nationally, if complementarity entails a State's right, the exercise by Germany factually prevents Belgium from doing so itself. In this hunt for possible prosecution it is necessary to balance the different interests and to elaborate a strategy of who would have priority in the prosecutions. This problem was not discussed before in relation to complementarity and Universal Jurisdiction, it does seem to be reasonable, though, to consider the State of presence of the alleged perpetrators (*forum deprehensionis*) the privileged State to prosecute the perpetrators. Thus, the possible concurrence for the right to deal with criminals will probably be solved on the basis of practical considerations.

## D. Conclusion

Finally, the statement of President Kagame is not reflecting the complete legal truth about Universal Jurisdiction and its use; it does nevertheless contain a little grain of truth – especially on the international relations level. Drawing a conclusion on the above raised question of how the two concepts work in relationship to each other, how they interplay, one needs to come to the result that the concepts are consistent with each other and help enforcing each other based on the above found reasons. By including nationally prescribed Universal Jurisdiction into the national jurisdiction referred to in Art. 17 Rome Statute the number of States that could nationally deal with a case increases, which thereby supports the idea that the ICC is a court of last resort. Also the use of Universal Jurisdiction of non-member States fulfils the inadmissibility criterion of art. 17 Rome Statute.

Concerning the obligation and the right evolving from complementarity, the use of Universal Jurisdiction cannot be obligatory on the States. Furthermore, the use of Universal Jurisdiction by one State is not

violating another State in its right to also use their right to complementarity, because in such situations some rule of subsidiary jurisdiction need to be applied. Although the present work leads to the conclusion that Universal Jurisdiction could and probably should be a major part of international criminal law, it is necessary to present some doubts concerning the practical implementation of this concept without being "biased" towards certain States or applying it in a "neo-colonial" manner. The basic idea of fighting impunity might need Universal Jurisdiction and States that are willing to implement and use it. It needs to be handled with caution regarding political stability and peaceful and friendly relations between the prosecuting and the "prosecuted" States. There are also situations, in which the ICC would do good in declaring a situation admissible for itself, instead of relying on Universal Jurisdiction of a State. This in cases where the judicial guarantees are not complied with, or the accused is not present and the Universal Jurisdiction is used in its *in absentia* version.