

## Selected articles on international humanitarian Law

# The principles of universal jurisdiction and complementarity: how do the two principles intermesh?

**Xavier Philippe\***

Xavier Philippe is ICRC Legal Advisor for Eastern Europe in Moscow and Professor of Public Law at the Universities of Aix-Marseille III and Western Cape

### **Abstract**

*This article addresses the relationships between the principles of universal jurisdiction and complementarity and the difficulties in their implementation. Even if the two principles are well known, there are still a number of obstacles – legal and non-legal – to proper and better implementation. Moreover, universality and complementarity are quite often to be applied in a difficult political environment, keeping in mind that these principles have to deal with international and national constraints. The number of obstacles is such that the two principles face many challenges. This article advocates that the principle of complementarity represents one aspect of the principle of universality and should rely on its general acceptance to further its efficiency and implementation. In conclusion, the article explores some possible ideas to be developed to reach this goal.*

⋮⋮⋮⋮⋮

Can something original or new be discovered or asserted about the principles of universal jurisdiction and complementarity?<sup>1</sup> Many articles have been written on these heavily debated topics, and it is hard to believe that something new could be revealed. However, the controversy over the principle of complementarity that arose with the adoption of the Rome Statute in 1998, establishing the International Criminal Court (ICC), and the judicial proceedings against former heads of state

\* The article reflects the views of the author alone and not necessarily those of the ICRC.

such as Augusto Pinochet of Chile in the United Kingdom or Hissène Habré of Chad in Senegal have shown that something was changing, even though most such attempts have ended in failure. Moreover, various aspects of that issue – ranging from the compatibility of the ICC Statute with constitutional provisions to the immunity of heads of state and amnesty laws – have been considered recently by several constitutional courts.

There is a starting point that cannot be ignored when dealing with the subject of universal jurisdiction and complementarity: although these principles are extensively discussed, in practice there are still various international crimes that go unpunished despite the international obligation to prosecute those who committed them. In many cases the *aut dedere aut judicare* principle remains purely theoretical, and states that have courageously tried to implement the principles of universal jurisdiction and complementarity in a more systematic and concrete manner through their national legislation have not been long in realizing that the constraints of realpolitik or diplomacy clashed with the concept of universal jurisdiction. Unfortunately, political reasons have prevailed over legal reasoning in a number of cases! Sometimes one cannot help wondering whether discussions on the said principles are no more than an academic exercise without any tangible results.

By examining the meaning and implementation of the principles of universal jurisdiction and complementarity, this article seeks to evaluate the relationship between them, advocating that complementarity is a means of better enforcing the goal pursued by universal jurisdiction.<sup>2</sup> Until now only the goodwill of states could be relied on to guarantee their implementation in good faith, for no sanction mechanisms have been created to induce them, without their consent, to abide by their obligations. Will this situation now persist, considering the changes brought about during the past ten years by the ICC or the creation of ad hoc or mixed tribunals? Is there a new dynamic behind the principle of universal jurisdiction? Is the principle of complementarity a solution that will enable universal jurisdiction to be more pragmatically enforced? There are not necessarily any clear answers as yet to all these questions. Universal jurisdiction is still not always properly addressed by national legislations owing to the lack of proper enforcement provisions. Also, the ICC has not delivered any decision, leaving room for a ‘virtual content’ of the principle of complementarity.

1 This article does not claim to study in depth the principles of universal jurisdiction and of complementarity but to evaluate their relationships and practical implications. The amount of literature on these two principles is substantial.

2 This link is recalled in the preamble to the ICC Statute: (*aut dedere aut judicare* principle) ‘*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation’ (para. 4); (universal jurisdiction) ‘*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’ (para. 6); (principle of complementarity) ‘*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions’ (para. 10).

After a tentative definition of the terms ‘universal jurisdiction’ and ‘the principle of complementarity’, this article considers the relationship between them. It then underscores the obstacles to the enforcement of these principles, before ending with some possible remedies to minimize potential threats to the practical enforcement of universal jurisdiction.

## Definitions of the principles of ‘universal jurisdiction’ and ‘complementarity’

Even though the general meaning of these two principles is known, a definition of them provides a better understanding of their complexity and limits.

### Universal jurisdiction

#### *General meaning*

The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’.<sup>3</sup> This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim.<sup>4</sup> But the rationale behind it is broader: ‘it is based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim’.<sup>5</sup> Universal jurisdiction allows for the trial of international crimes<sup>6</sup> committed by anybody, anywhere in the world.<sup>7</sup> This

3 See e.g. Kenneth C. Randall, ‘Universal jurisdiction under international law’, *Texas Law Review*, No. 66 (1988), pp. 785–8; International Law Association Committee on International Human Rights Law and Practice, ‘Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences’, 2000, p. 2. It should be noted that the principle of universal jurisdiction is not per se limited to criminal jurisdiction and could be extended, for instance, to civil responsibility. This is e.g. the case in the United States with the Alien Tort Act (28 U.S.C. para. 1350) and the well-known decision *Filartiga v. Pena-Irala* 630F2d876 (2d Cir. 1980). However, considering the framework of this article, only universal jurisdiction linked to individual criminal responsibility will be considered.

4 The territorial link has been gradually overcome by two criteria allowing for extraterritorial jurisdiction, such as jurisdiction over crimes committed outside the territory by the state’s own nationals (active personality jurisdiction) or crimes committed against a state’s own nationals (passive personality jurisdiction). This later possibility has been challenged by some states.

5 Mary Robinson, ‘Foreword’, *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, 2001, p. 16.

6 International crimes are not precisely defined. There are offences recognized by international law as punishable by any country. Traditionally, piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law. After the Second World War, the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg set out international crimes issuing from both treaty law and customary law (crimes against peace, war crimes and crimes against humanity). Later, treaties and international conventions specified

derogation is traditionally justified by two main ideas. First, there are some crimes that are so grave that they harm the entire international community. Secondly, no safe havens must be available for those who committed them. Even though these justifications may appear unrealistic, they clearly explain why the international community, through all its components – states or international organizations – must intervene by prosecuting and punishing the perpetrators of such crimes. Universal jurisdiction is a matter of concern for everybody.

Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius,<sup>8</sup> and to the prosecution and punishment of the crime of piracy.<sup>9</sup> However, after the Second World War the idea gained ground through the establishment of the International Military Tribunal<sup>10</sup> and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. The Geneva Conventions of 1949 are paramount in this regard, providing in unmistakable terms for universal jurisdiction over grave breaches of those Conventions.<sup>11</sup> International crimes were no longer to remain unpunished. The idea that in certain circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle.<sup>12</sup> Later on, other international conventions and, to some extent, rules of customary law enlarged the principle's scope of application. This was confirmed by a number of cases, starting with the *Eichmann* case in 1961,<sup>13</sup> the *Demanjuk* case in 1985,<sup>14</sup> and more recently the *Pinochet* case in 1999<sup>15</sup> and the *Butare Four* case in 2001,<sup>16</sup> emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes. International law empowered and in certain cases mandated states to

various forms of prohibited behaviour recognized as international crimes. Principle 2 of *The Princeton Principles on Universal Jurisdiction* reads: 1. For purposes of these Principles, serious crimes under international law include (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture. 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law'. Robinson, above note 6.

7 Géraud de La Pradelle, 'La compétence universelle', in Hervé Ascencio, Emmanuel Decaux and Alain Pellet (eds.), *Droit international pénal*, Éd. Pédone, Paris, 2000, p. 974.

8 See Grotius, *De Jure Belli ac Pacis*, 1625, Vol. II, Book II, Chap. XXI, para. 3, 1–2.

9 See for instance *United States v. Smith*, 18 US (5 Weat.) 153 at 161–2 (1820).

10 Under the London Agreement of 8 August 1945, Article 1 provided for the jurisdiction of the Tribunal for crimes having no precise geographical location and Article 4 for the jurisdiction of national courts over other war criminals. As Eric David puts it, this has more to do with judicial co-operation between states than with universal jurisdiction (*Le droit des conflits armés*, 3rd edn, Bruylant, Brussels, 2002, p. 722). However, within these provisions the spirit of universal jurisdiction (no safe haven for perpetrators of international crimes) was already present.

11 Also sometimes called grave breaches of international humanitarian law. See common articles GC I, Article 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146. See also the extension made by Article 85 of Additional Protocol I to the Geneva Conventions to the listed crimes.

12 See Supr. Ct of Israel, *Eichmann* case, at 298–300; Supr. Ct of Canada, *Finta*, 24 March 1994, ILR, 104, at 305.

13 *Eichmann* case, above note 12.

14 *Demanjuk v. Petrovsky*, US Court of Appeal, 6th Cir., 31.10.1985, ILR 79, 546.

15 House of Lords, 24 March 1999, [1999] 2 WLR 827 (HL).

16 Cour d'Assises de Bruxelles, 8 June 2001, available at <[http://www.asf.be/AssisesRwanda/fr/fr\\_VE](http://www.asf.be/AssisesRwanda/fr/fr_VE)> (last visited March 2006).

prosecute crimes that were regarded as harming the whole international community.

Nonetheless, implementation of the general principle remained difficult, as the principle of universal jurisdiction is an issue not only of international but also of national law. States are entitled to grant their own courts universal jurisdiction over certain crimes as a result of a national decision, and not only of a rule or principle of international law. Consequently, the universal jurisdiction principle is not uniformly applied everywhere. While a hard core does exist, the precise scope of universal jurisdiction varies from one country to another, and the notion defies homogeneous presentation. Universal jurisdiction is thus not a unique concept but could be represented as having multiple international and national law aspects that can create either an obligation or an ability to prosecute. It is therefore difficult to gain a clear picture of the overall situation.

### *Means of implementation*

The recognition of universal jurisdiction by the state as a principle is not sufficient to make it an operative legal norm. There are basically three necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes. If one of these steps is lacking, then the principle will most probably just remain a pious wish. Several attempts to identify the content and concrete meaning of universal jurisdiction have been made through meetings of experts.<sup>17</sup> In practical terms, the gap between the existence of the principle and its implementation remains quite wide.

From a comparative law perspective, states implement the principle of universality in either a narrow or an extensive manner.<sup>18</sup> The narrow concept enables a person accused of international crimes to be prosecuted only if he or she is available for trial, whereas the broader concept includes the possibility of

17 See e.g. 'Final report', above note 4. The following fourteen principles are usually accepted as the guiding principles on universal jurisdiction. They have been inspired by the Princeton principles, above note 5, and are also referred to by non-governmental organizations (NGOs) promoting the principle of universal jurisdiction. See Amnesty International, 'Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction', May 1999, AI Index: IOR 53/01/99: 1. State courts should be able to exercise jurisdiction over grave human rights violations and abuses and violations of international humanitarian law 2. No immunity for persons in official capacity 3. No immunity for past crimes 4. No statutes of limitation 5. Superior orders, duress and necessity should not be permissible defences 6. National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries 7. No political interference 8. Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest 9. Internationally recognized guarantees for fair trials 10. Public trials in the presence of international monitors 11. The interests of victims, witnesses and their families must be taken into account 12. No death penalty or other cruel, inhuman or degrading punishment 13. International co-operation in investigation and prosecution 14. Effective training of judges, prosecutors, investigators and defence lawyers.

18 See Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 285.

initiating proceedings in the absence of the person sought or accused (trial *in absentia*).<sup>19</sup> This deeply affects the way in which the principle is implemented in actual fact. International law sources often refer to the narrow concept,<sup>20</sup> but the decision to refer to the broader concept is quite often<sup>21</sup> a national choice. However, even though some states such as Belgium or Spain have made some efforts to give concrete effect to the principle of universal jurisdiction by amending their penal code, it has in most cases remained unimplemented, thus more theoretical than practical.

## Principle of complementarity

### *General meaning*

The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction.

This is nothing other than a principle of priority among several bodies able to exercise jurisdiction.<sup>22</sup> Within the framework of universal jurisdiction, the principle of complementarity – even if not new – regained some interest with the adoption of the Rome Statute in 1998, in which the principle of primacy of jurisdiction recognized in the statutes of the two earlier ad hoc tribunals, the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR respectively), was reshaped into a principle of complementarity for the benefit of member states.<sup>23</sup> As stressed by M. El Zeidy,<sup>24</sup> the principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law: when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.

The principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction, in other words on acceptance by the former that those who

19 On this issue of trial *in absentia* see the ICJ case *Democratic Republic of Congo v. Belgium*, Warrant Arrest 11 April 2000 Case, 14.02.02. ICJ Rep. 2002.

20 See, e.g., the four Geneva Conventions of 1949 and 1977 Additional Protocol I thereto regarding grave breaches of those Conventions (i.e. of international humanitarian law) or Article 7 of the Convention against Torture. The narrow concept seems to be given preference by a number of international treaties as being more realistic.

21 There are some exceptions, such as Regulation 2000/15 of the UN Transitional Administration in East Timor (UNTAET) (see Articles 2.1 and 2.2), but this regulation, dedicated more to a specific situation, is closer to a municipal law regulation than to an international instrument.

22 Bartram S. Brown, 'Primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals', *Yale Journal of International Law*, Vol. 23, p. 386. 1998.

23 But see, on the limited impact of this change: Michael A. Newton, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the ICC', *Military Law Review*, Vol. 167 (March 2001), p. 20.

24 Mohamed M. El Zeidy, 'The principle of complementarity: A new machinery to implement international criminal law', *Michigan Journal of International Law*, Vol. 23 (Summer 2002), p. 870.

have committed international crimes may be punished through the creation and recognition of international criminal bodies. The ICC Statute is of course an accurate illustration of this idea and probably the most sophisticated. The history of its adoption is a reminder of how states wanted to keep control of the situation and act as primary players, not as spectators, showing their concern for respect for the principle of sovereignty.<sup>25</sup> However, the promoters of international justice regarded the principle of complementarity as a means of giving the last word to the International Criminal Court when states fail to fulfil their obligations in good faith. This is probably where the balance lies in the principle of complementarity between the states and the Court.

Even though the principle of complementarity can be identified elsewhere,<sup>26</sup> the Rome Statute symbolizes its implementation. First and foremost, the principle of complementarity is a means of attributing primacy of jurisdiction to national courts, but includes a 'safety net' allowing the ICC to review the exercise of jurisdiction if the conditions specified by the Statute are met. Second, the principle of complementarity in the ICC Statute is not only a general principle as stated in the preamble<sup>27</sup> and in Article 1, but also includes concrete means of implementation, for the Statute lays down conditions relating to the exercise of jurisdiction.<sup>28</sup> They allow the Court some scope for possible interpretations and could lead it to be regarded as an arbitrator.<sup>29</sup> The principle of complementarity will – beyond any doubt – leave member states free to initiate proceedings, but will also leave the ICC to decide whether the process has been satisfactory or not: 'There must be an impartial, reliable and depoliticised process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases and triggering the jurisdiction of the ICC when it is truly necessary.'<sup>30</sup> The responsibility therefore rests on the shoulders both of states and of the ICC. The challenge will be to strike the right balance!

### *The legal regime of the principle of complementarity within the International Criminal Court Statute*

As J. T. Holmes puts it, 'the implementation of the principle of complementarity generates two practical questions: (1) how does the Court become aware that there are conflicts between the exercising of its jurisdiction over a situation or case and

25 See e.g. Cassese, above note 18, p. 351.

26 Under the Statutes of the ICTY (Article 9) and the ICTR (Article 8), another version of the complementarity principle was adopted. National courts and the international tribunals were granted concurrent jurisdiction to try international crimes referred to in the Statutes, but in the event of dispute, the Statutes gave primacy to the international tribunals.

27 See preambular para. 10: 'The International Criminal Court ... shall be complementary to national jurisdictions.'

28 As described in Articles 17 f.

29 John 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*, Oxford University Press, Oxford, 2002, ch. 18.1, p. 672.

30 Brown, above note 22, p. 389.

the assertion and assumption of jurisdiction by a state? (2) what does the Court do when faced with such a conflict?<sup>31</sup> The principle of complementarity in the ICC Statute is not a mere statement. It entails a precise legal regime calling for the issue of jurisdiction to be evaluated by applying conditions of both substance and admissibility. First, the complementarity issue can be raised only if the crime falls within the conditions defined in Articles 5 to 8 of the Statute,<sup>32</sup> which oblige the ICC to examine substantive aspects of the crime in order to assert jurisdiction over a specific case. Second, the Statute requires the fulfilment and analysis of several conditions related to admissibility: ‘genuine investigation and prosecution’,<sup>33</sup> ‘unwillingness’ and ‘inability’ to prosecute.

The lack of a genuine national investigation and prosecution should be regarded as the core criterion for the exercise of jurisdiction by the ICC. If an international crime has been genuinely prosecuted and tried, the ICC should not have jurisdiction. However, the question remains of knowing what a ‘genuine prosecution’ is. It can be imagined that ‘genuine’ means real, not faked. This could, however, be subjective if not more clearly framed. For instance, can it be said that the national prosecution is not ‘genuine’ if it takes more time than it would before the ICC? The idea of the promoters of the principle of complementarity was in fact to make sure that international crimes would be effectively prosecuted and punished by states, but the word ‘genuine’ seemed more neutral than ‘effective’ or ‘efficient’.<sup>34</sup> It will be the prosecution’s responsibility to demonstrate a lack of genuine investigation or prosecution. It must be recognized that such an appreciation could remain open to discussion and has to be considered hand in hand with the other conditions of unwillingness and inability.

Unwillingness is quite simple to understand but is more complicated to evaluate. The meaning of ‘unwillingness to act’ was laid down in Article 17.2 of the ICC Statute.<sup>35</sup> This provision cites three criteria for determining whether

31 Holmes, above note 29, ch. 18.1, p. 671.

32 This limits implementation of the principle of complementarity to ‘the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression’ (Article 5.1). The crime of aggression must be excluded from the Court’s jurisdiction for the time being, as it is not yet defined (Article 5.2).

33 Article 17.1 of the ICC Statute provides criteria of admissibility linked to the principle of complementarity: 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.

34 See e.g. the analysis by J. T. Holmes comparing the ICC Statute with the ILC Draft Statute, above note 29, pp. 673–4.

35 Article 17.2 states: ‘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

unwillingness exists: (i) shielding a person from criminal responsibility; (ii) unjustified delay in the proceedings which is inconsistent with the intent to bring the person to justice; and (iii) proceedings not conducted independently or impartially and in a manner inconsistent with bringing the person to justice. These criteria could give a better idea of what unwillingness is, but they also are rather subjective in terms of appreciation. Consequently, the implementation process will also define their actual content. Unwillingness does, however, show a state's lack of a positive attitude towards prosecuting and trying perpetrators of international crimes. In some cases there will be no doubt, as the states concerned do not even want to conceal their non-intention to bring some criminals to justice. In other cases, however, a question of threshold will be unavoidable. The Court's responsibility will go as far as discussing all the elements in order to determine whether the unwillingness criterion is met. For instance, the existence of some form of immunity or amnesty could indicate unwillingness to prosecute or try the beneficiaries of those clauses. If a 'presumption of unwillingness' can be established in order to prosecute the perpetrators of such crimes, situations will have to be evaluated on a case-by-case basis, as there are many intermediate situations in which such immunities or pardons are not granted automatically and for any type of crimes.

Inability is defined under Article 17.3 of the ICC Statute<sup>36</sup> in more simple terms than unwillingness. It first includes the non-functioning of a judicial system to such an extent that investigations, prosecutions and trials of perpetrators are impossible. As underlined by certain scholars,<sup>37</sup> this is a fact-driven situation, since inability can be the result of the physical collapse of the judicial system (no more structures) or the intellectual collapse thereof (no more, or only biased, judges or judicial personnel). Inability also includes situations in which the conclusion of trials is impossible, that is, the judicial system can still function but cannot face the challenge of exceptional circumstances usually resulting from a crisis. Here, too, the threshold will be more difficult to evaluate, but will probably be reached when the number of cases to be heard manifestly exceeds the number with which the judicial system could usually cope in peacetime situations.

Article 17.2 of the Rome Statute also provides for two other admissibility criteria.<sup>38</sup> One is quite classic: it is the *non bis in idem* principle, according to which

decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice' (emphasis added).

36 Article 17.3 states, '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' (emphasis added).

37 Holmes, above note 29, p. 677.

38 Article 17.1 states, '... (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'.

a person cannot be tried twice for the same crime. This does not call for any particular comment except that, according to the unwillingness criterion, the first trial should not be used by a state as a means to shield the perpetrator of an international crime. The second criterion is the gravity or seriousness of the crime, according to which only the most important crimes should be tried before the ICC. These two conditions seem logical and easy to understand. However, they offer another source of discretionary power to implement the principle of complementarity and shape the criminal policy of the ICC.<sup>39</sup>

While all these criteria still give rise to numerous uncertainties regarding their implementation, they do also give an idea of the possible concrete implementation of the principle of complementarity. More importantly, they illustrate how the ICC would be bound to make certain tests linking the issue of jurisdiction to those of admissibility and substantive law. Even though jurisdiction is independent from other conditions, they must be assessed in combination with it in order to be interpreted and applied.

### *The principle of complementarity within the national criminal system*

The principle of complementarity should not, however, be analysed only in the light of the provisions of the ICC Statute. Each national context must be taken into account, as it will influence the state's ability to exercise its jurisdiction over international crimes. This implies an analysis of national criminal justice systems to evaluate their ability to assert jurisdiction. Three elements should be examined: (i) the technical means offered by the state to prosecute these types of crime; (ii) the working methods of the criminal justice system; and (iii) the procedural rules and rules of evidence applicable to judicial proceedings. Without going into detail, it can logically be assumed that the inherent differences between legal systems will influence the way in which the principle of complementarity will be implemented. It will therefore not be uniformly applied. This must be acknowledged as a normal interaction between the international and national legal systems and taken into consideration.

Although simple to understand in definition, the principle of complementarity reveals its complexity in the confrontation with national systems. Conceived as a means of improving implementation of the principle of universal jurisdiction, the principle of complementarity enshrined in the ICC Statute was designed to transform into reality the prosecution of international crimes too often set aside for want of such means. Yet this must not obscure the remaining challenges and difficulties.

39 Discretionary power is shared between the Prosecutor's office, the Pre-Trial Chamber and possibly the UN Security Council. The role of member states in this debate will probably be limited in case of disagreement.

## The challenges faced by the principles of universal jurisdiction and complementarity

Even though the relationship between the principle of universal jurisdiction and the principle of complementarity can be understood from their definitions, a deeper analysis of their interaction, both theoretical and practical, remains necessary. This should lead to a better assessment of the current situation and allow the exact role to be played by the principle of complementarity in the near future to be evaluated.

### General acceptance of the principle of universal jurisdiction

Despite its inherent difficulties, the principle of universal jurisdiction remains widely accepted by states owing to the specific nature of international crimes. No state can officially uphold these crimes and the absence of punishment for them! This truly universal consideration is one of the main strengths of the principle. This being said, however, difficulties arise when it comes to its concrete implementation. Its precise meaning is to some extent vague, and its real legal implications continue to be discussed. Can it be deemed equivalent to a general principle of law entailing simply an ‘obligation to provide means’ that must be fulfilled? Or does it also include some operational guidelines to be followed by the international community as a whole? Have not general references to this principle outside the legal sphere – especially through the media or by its inclusion in politics – weakened its effectiveness?

Asking these questions shows how necessary it is to situate this principle within a more legal framework in order to determine its normative value. In seeking to identify the origin of universal jurisdiction, three possible sources can be considered: international agreements, international customary law and national law.

International conventions sometimes impose an obligation to prosecute and punish those who have committed international crimes.<sup>40</sup> This is the case in the Geneva Conventions through the notion of grave breaches of international humanitarian law.<sup>41</sup> The obligation is clearly stated in the conventions and

40 See, e.g., Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 4 Sept. 1956, 266 UNTS 3; International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted 30 Nov. 1973, 1015 UNTS 244; Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 Dec. 1970, 10 ILM 133; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature 23 Sept. 1971, 10 ILM 1151; International Convention against the Taking of Hostages, adopted 12 Dec. 1979, G.A. Res. 34/146, UN GAOR, 34th Sess., Supp. No. 99, UN Doc. A/34/819, 18 ILM 1456 (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, S. Treaty Doc. N. 100-20, 1465 UNTS 85. For more details, see H. Osofsky, ‘Foreign sovereign immunity for severe human rights violations: New directions for common law based approaches’, *New York International Law Review*, Vol. 11 (1998), p. 35.

41 Common articles GC I, Art 49; GC II, Article 50; GC III, Article 129; GC IV, Article 146: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the *grave breaches of the present Convention*

imposes on the contracting state a duty to act (obligation of result), but leaves the state to determine the means to enforce it. This can create some difficulties, as each national system is responsible for fulfilling this twofold obligation of both searching for the criminals concerned and bringing them to trial. The inclusion of universal jurisdiction in international conventions – provided that no reservations can be made – implies that the state has the duty and responsibility to enforce it but offers no guarantee that effective trials and punishments will indeed take place, since national legal systems apply different procedural and evidence rules.

Customary international law can also be a source for the recognition of universal jurisdiction when it comes to international crimes.<sup>42</sup> However, it just provides for the principle itself and does not necessarily contain precise directives or guidelines for the implementation of universal jurisdiction. This leads to a weaker practical normative constraint for the state, even though theoretically no value distinction should be made between customary and conventional provisions; between the two, there is only a difference of degree of precision in normative terms. Customary international law can be viewed in two ways. It can be seen as a general obligation to which conventions later give concrete effect through more precise obligations. It can also be seen as an extrapolation of conventional rules so widely accepted that non-party states consent to be bound by the principle as equivalent to a general rule. With regard to universal jurisdiction, this could be the situation of states which refuse to become party to a specific instrument for political reasons, but accept the substance of that principle. Combined rules of international customary law do provide support for the implementation of both universal jurisdiction and the

defined in the following Article. *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article...* (emphasis added).

42 'Rule 157: States have the right to vest universal jurisdiction in their national courts over war crimes', Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Vol. 1: Rules*, Cambridge University Press, Cambridge, 2005, p. 604. See also more generally chapter 44 of this study (pp. 568–621) dealing with rules related to war crimes. Here are the international customary rules that could be related to the exercise of universal jurisdiction: Rule 156: serious violations of international humanitarian law constitute war crimes; Rule 158: states must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects; Rule 159: at the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes; Rule 160: statutes of limitation may not apply to war crimes; Rule 161: states must make every effort to co-operate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.

principle of complementarity, but will not provide the state with precise guidelines or a ready-made course of action.

Universal jurisdiction can also be accepted by states as a voluntary commitment, within their municipal framework, to punish some crimes for which no general international obligation to do so exist. Universal jurisdiction then derives from a national commitment to the international community by one state that is, for instance, not party to certain conventions. To recognize universal jurisdiction in this way can create an asymmetrical obligation for some states. This could be the case of states not party to the ICC Statute, although under no international obligation to do so.

Analysis of the sources of universal jurisdiction would thus appear to show that the principle is not self-sufficient enough to be implemented. It needs both general recognition and measures of implementation, or at least clear obligations to identify the duties of states. In this regard, it would be more accurate to consider that the principle of universal jurisdiction should be completed by legal norms giving precise grounds and designating the conditions or the exact nature of the obligations. This would give rise to multiple grounds for universal jurisdiction, or 'universal jurisdictions'. Each one would be a means in itself. This splitting of the principle of universal jurisdiction is necessary to create clearer state obligations. It is not in itself revolutionary to say this, but it could explain why the principle frequently remains so disappointing in practice. However, if international law were to make progress in formulating a concrete definition of those obligations, the discretionary power consubstantial with state sovereignty would still leave an incompressible margin of appreciation when it comes to final implementation of the provisions.

Another aspect often left out of the analysis of universal jurisdiction is its twofold belonging, to both international law and municipal law. Universal obligation entails a first duty for the state to organize – and if need be, to amend – its own legal system to make the exercise of universal jurisdiction possible by national courts. It must not be forgotten that universal jurisdiction is quite abnormal for national criminal courts, and that it could be difficult for judges to implement it without precise municipal provisions framing or organizing that empowerment. This aspect of universal jurisdiction can in fact impair the whole system or its efficiency if national legislation, most often statutory provisions, is not adopted. Universal jurisdiction can become – and sometimes is – a fake principle owing to a total or partial lack of enactment. It can even be problematic when the national constitutional text conflicts with universal jurisdiction obligations, as it could for instance with regard to immunities or the right to grant pardon; these are often included in a general manner and sometimes left to the discretion of the heads of state or government, although there should normally be exceptions where international crimes are concerned. Quite often, however, the clash between international and constitutional obligations does not take place because of the limited overlap of their respective scope. This does not mean that conflict between them cannot exist!

### *Relationship between the principle of universal jurisdiction and the principle of complementarity*

Within this general framework the principle of complementarity – as enshrined in the ICC Statute – should be considered as a safety valve allowing for rationalization and the improved efficiency of the principle of universal jurisdiction. The principle of complementarity first of all respects two functioning principles of international law, namely the principle of state sovereignty and the principle of primacy of action regarding criminal prosecutions.<sup>43</sup> Second, the principle of complementarity offers the state the right to exercise universal jurisdiction and to decide what to do with the perpetrator according to its own penal rules. As the President of the Rome Conference put it, referring to the penalties that could be imposed on those who commit international crimes, ‘... in accordance with the principle of complementarity between the Court (the ICC) and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws for crimes falling under the jurisdiction of the ICC’.<sup>44</sup> The principle of complementarity must be neither underestimated nor overestimated. It will not remedy all deficiencies in the efforts of the international community or individual states to try perpetrators of international crimes. It is intended to help states and the international community, through the Rome Statute, the better to enforce the principle of universal jurisdiction. It can be seen as a procedural tool allowing the international community to take back the initiative if states are unable or omit to exercise their jurisdiction. The principle of complementarity is intended to offer states and the international community a possible way out when the absence of trial or punishment for international crimes would be unacceptable. That possibility could have a deterrent effect on perpetrators who otherwise feel safe because they know that no prosecution will be conducted against them. It is not certain that effective prosecution will be initiated, but they will have to live with a permanent sword of Damocles over their heads ... Although this is probably not enough to stop those who commit war crimes, crimes against humanity, genocide or any other international crime, at least the mechanism does exist and should be backed up as a means of progress towards a better implementation of international humanitarian and human rights law.

43 This is an integral part of the ICC Statute. As outlined by some authors (see e.g. Kriangsag Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford, 2001, pp. 25 f.), this was not the case for the ICTY and the ICTR, since their statutes provided for primacy of the international ad hoc Tribunal and complementarity or at least concurrent jurisdiction for the national courts. Under the ICC Statute the system is inverted.

44 See Rome Conference press release L/ROM/22, 17 July 1998. The statement was made in relation to the possibility for states to impose the death penalty for these types of crimes. According to Article 80 of the Statute, this question is left to the state’s own legal system and is not affected by the ICC Statute; it is not directly connected to jurisdiction but shows how procedural aspects and the overall criminal justice system are linked to the issue of jurisdiction.

The principle of complementarity could also help to resolve some dilemmas that are not necessarily the result of legal failures but are related instead to diplomatic or political problems.

The principle of complementarity also offers an alternative solution to internal legal dilemmas. Even though universal jurisdiction is the responsibility of the state, the internal legal or political system can make the assertion of jurisdiction impossible for reasons outside the state's volition. If the state considers its jurisdiction impossible to exercise, the principle of complementarity offers a possibility of handing it over. Universal jurisdiction can then be regarded as initiated by states through an active use of that principle.<sup>45</sup> For instance, of the current cases brought before the ICC by the end of 2005,<sup>46</sup> three revealed the state's incapacity to prosecute people suspected of international crimes. In those cases (the Democratic Republic of the Congo, Uganda and the Central African Republic) the matter was referred directly to the ICC by the state, which considered that trials of such criminals before its own courts would be impossible; the latest case – Sudan – was referred to the Court by the UN Security Council. In all these cases the Prosecutor did not himself initiate the prosecutions, showing that the principle of complementarity cannot be seen as a one-way principle but rather as offering possibilities of co-operation between the state authorities and the ICC.

In terms of the overall situation, the principle of complementarity represents progress towards the prosecution of international crimes and should rule out any hope of safe havens for those who have committed them. Yet it would certainly be mistaken to see the principle of complementarity as a final remedy to the inadequacies of universal jurisdiction. It should instead be regarded as an interim stage in improving the situation rather than as a definitive achievement. It is a means, not a goal! Like any other means, it needs political will to be effective and efficient. Moreover, the principle itself is not without handicaps.

## The inherent limits to the principle of complementarity

There are both subjective and objective reasons for limiting the effectiveness of the principle of complementarity in enhancing the enforcement of universal jurisdiction. They cannot be ignored.

### Objective reasons

Objective reasons derive from both the international and the national system. Within the international legal system, two kinds of problems can be identified: the

45 As opposed to a 'passive use of the principle of complementarity' in which the state will not take any initiative if unable or unwilling to try the perpetrators of international crimes. A positive attitude will show the concern of states to try those criminals, seeking to find through the ICC the structure and means they do not have.

46 On these cases see <<http://www.icc-cpi.int/cases.html>> (last visited March 2006).

lack of precise definitions of international crimes, and the conditions of implementation of the principle of complementarity as defined in the ICC Statute.

The lack of precise definitions and enumeration of elements of international crimes may seem a rather surprising problem, since the list of crimes in the ICC Statute under Articles 6 to 8 is quite extensive and detailed. However, when one looks at the definition of crimes, qualification of the crime as international by the national judge can be difficult, as the specific elements qualifying the crime can be relatively inadequate compared with the national system. The dissemination by the Court of its own practice and case-law could help to close the gap, but this weakness cannot be ignored, especially in the present early stages of the Court's work.<sup>47</sup> A communication policy will be needed, for national judges are not accustomed to 'open definitions' or 'elements of crimes'. While the danger should not be exaggerated, there is a risk of disparity between states in their implementation and appreciation of definitions and elements of crimes that could create a disparate implementation of universal jurisdiction.

As defined by the ICC Statute in Articles 1, 15 and 17 to 19, the principle of complementarity is precisely framed through various conditions of implementation. This should allow for better implementation. However, appreciation of the said conditions could, as mentioned above, be quite difficult to assess: what exactly is meant by 'unwillingness' or 'inability' to prosecute? These open terms leave the prosecution authority with discretionary power to decide on their content and framework of application. They are sufficiently broad to leave room for a selection of cases to be brought before the Court and to regard the principle of complementarity as a tool to define a 'criminal policy'. This is not abnormal *per se*, as the definition of a criminal policy is consubstantial to any prosecution authority, but it does mean that the principle of complementarity will be unavoidably selective.<sup>48</sup> Moreover, the discretionary power of the Prosecutor will be reviewed by the Pre-Trial Chamber, leaving room for the exercise of another discretionary power. To this picture should be added the fact that the Security Council may also initiate proceedings leading to indictments,<sup>49</sup> thus allowing for the introduction of yet another appreciation of the principle of complementarity. This could lead to a fragmentation of the meaning of the principle of complementarity by different types of appreciation.

Within the national legal systems there are also objective difficulties that cannot be ignored: the definition of international crimes in domestic legislation should be in line with their definition at the international level. This is an obvious requirement and, although a certain amount of time is always needed for

47 The case-law of the ICTY and ICTR will obviously help as a tool of reference. However, from a purely legal point of view, it must be recalled that the ICC will be free to adopt or reject the reasoning of the *ad hoc* tribunals. They have an interpretative value, not a normative one.

48 For example, cases could be chosen not according to the crimes but to the ease of gathering evidence or the ability to conduct successful prosecutions.

49 See Article 13(b) of the ICC Statute.

adaptation, it should be done as quickly as possible. But this is not always the case, and some international crimes are still differently defined in the two legal systems. For instance, some war crimes are nationally qualified as crimes against humanity, or genocide is sometimes considered as a crime against humanity. This matter should be addressed, and the communication role of the ICC will be important in terms of proposals to resolve the dilemma. It is once again evident here that the principle of complementarity is linked to the substance of the law. There could be some serious contradictions in implementation of the principle of complementarity, even if states want to respect it, since they can disagree on the conditions of implementation by arguing that some crimes are not covered by the Statute.

Another objective risk of disagreement on the principle of complementarity lies in the inherent differences between national legal systems. Even if international crimes are defined in the same way at the international and national level, differences in criminal procedure and admissibility of evidence may lead to divergences of appreciation. For instance, if one person is accused of an international crime but insufficient evidence is gathered or the rules for a fair trial are not met, national judges may be reluctant or refuse to prosecute the accused. They would comply with their national judicial framework, but not necessarily with the international requirement. Would the ICC accept such a situation, or would it initiate proceedings on grounds of unwillingness or inability to prosecute war criminals? Whatever the situation may be, this risk must not be underestimated and there is currently no solution for such a potential conflict. The idea could perhaps be to have special, common rules of procedure and/or evidence for such international crimes to ensure a harmonized approach. But such is not yet the case today!

Immunities and pardons granted at national level, although banned for perpetrators of international crimes owing to the very nature of those crimes, still raise questions regarding the principle of complementarity. Whereas a general amnesty can never be an obstacle to trials of perpetrators of international crimes before the ICC, there are a number of intermediate situations where these issues will in practice weaken the principle of complementarity. Although amnesties are prohibited for certain international crimes, for example torture, they may be granted individually at national level within the framework of a quasi-judicial process. Quite often these immunities are constitutionally granted to heads of states or high-level state officials in a general manner and without any restriction.<sup>50</sup> How will these cases be regarded by the ICC? It is difficult to say! However, the ICC, through the Office of the Prosecutor, may also consider such situations and decide that it is in the interest of justice not to try certain perpetrators.<sup>51</sup> Another possible issue related to the principle of complementarity would be the case of a perpetrator of international crimes who is tried by a national court, convicted and subsequently granted pardon. In such a case, it could be difficult for the Court to

50 See the *Yerodia case (DRC v. Belgium: The Warrant of Arrest from the 11th of April 2000 Case)*, ICJ, 14 February 2002), where this issue was discussed.

51 See Article 53.2 of the ICC Statute.

show that the conditions for admissibility laid down in Article 17 of the ICC Statute are met.<sup>52</sup>

### *State structures and the influence of political regimes on the possible indictment of perpetrators of international crimes*

The constitutional system of a state may give complete independence to the judicial power. There is consequently a risk of disagreement between the various authorities on the prosecution of an international crime. Even if the executive or legislative authorities are in favour of prosecuting an international criminal, there could be some disagreement from the point of view of the judiciary. The reverse is also true, as was illustrated by the Belgian situation with regard to implementation of the law on universal jurisdiction: although amended in 1999, the relevant 1993 Act proved embarrassing for the authorities.<sup>53</sup> Since an investigation must be initiated when there are allegations of international crimes, the judicial authority is bound to do so. This should favour the prosecution of international crimes, but in terms of the principle of complementarity there are two contrasting risks. The first is a possible deadlock between the state authorities, leading to a crisis between the state and the ICC if the national judiciary sticks to its own rules. The second is a possible reluctance of the executive authority (government) to intervene that could complicate their diplomatic relations. In either case, these risks could increase the difficulties in the relationship between the Court and the state.

### *National judicial structures*

The national judicial system can also be a source of complications if the jurisdiction of international crimes is assigned to specific courts, or on the contrary granted to ordinary courts. International crimes are often first and foremost crimes *mala in se* (acts which are wrong or immoral in themselves), meaning that they can frequently be tried directly under a more general indictment.<sup>54</sup> Second, if international crimes fall within the framework of an armed conflict, exclusive jurisdiction could be granted to military courts that

52 See Holmes, above note 29, p. 678. The hypothetical case described by Holmes is quite interesting. The author suggests that if a perpetrator has been prosecuted, tried, punished and later pardoned, it would be very difficult in certain cases to offer evidence that Article 17 conditions had not been met when the trial took place before the national court.

53 Even though the principle of complementarity was not at stake in the *DRC v. Belgium* case (above note 50), the limits of *universal jurisdiction v. realities of diplomacy* showed up. The ICJ did not expressly examine the issue of universal jurisdiction *in absentia*, and it could hardly be said that the decision sets aside this issue. However, the case itself as well as some other indictments against politicians known worldwide led to the amendment of the 1993/1999 Act on Universal Jurisdiction in 2003. See David, above note 10, p. 817; M. Halberstam, 'Belgium's universal jurisdiction law: Vindication of international justice or pursuit of politics?', 2003 *Cardozo Law Review*, Vol. 25, p. 247.

54 'A murder remains a murder!' This occasionally explains the reluctance of some states to bring in line their legislation when they become party to treaties relating to international crimes. However, the specific nature of international crimes must be acknowledged, as it could influence the gravity of the crime. This is why a specific, separate category of offences needs to be established for these crimes in

could be tempted to moderate or mitigate the sanction for such a crime. The question will then not be about the 'genuine prosecution or trial' but about the difference of approach of ordinary courts and military courts. This issue was central to the *Calley* case,<sup>55</sup> in which the reduction of sanction by the Appeal Court raises the question of unwillingness to try the accused. If such a case were to be heard today, how would the principle of complementarity come into play? Does it mean that the possible severity of the sanction will influence the issue of jurisdiction? It might well do so, considering that the appreciation made by a military court could incorporate a more indulgent understanding of the situation of the accused.

Another type of challenge faced by the principle of complementarity lies in the diversity of procedures for extradition and judicial co-operation between states. Extradition and judicial co-operation are obviously aimed at improving the enforcement of universal jurisdiction. However, even though there are some examples of regional co-operation, extradition and judicial co-operation are still mainly based on bilateral relationships between states. Consequently, there can be differences between the conditions set in the respective texts. One usual dilemma is the exclusion of extradition for political crimes. This should normally have no effect on international crimes, but in a number of cases the argument could be used to prevent the extradition from taking place, and differences of appreciation between the authorities can weaken the judicial process. Another side-issue is the discretionary power granted to the executive to decide whether the extradition is appropriate. This is far from being a purely theoretical issue, as was shown by the *Pinochet* case.<sup>56</sup>

### Subjective reasons

Not only are subjective difficulties linked to legal aspects of the relationship between universal jurisdiction and the principle of complementarity; they will obviously also influence the implementation of those principles and therefore cannot be ignored. Like the objective reasons, subjective reasons are of both an international and an internal nature.

### *International law reasons*

An adequate definition of international crimes and adherence to the Rome Statute will not be sufficient to ensure the prosecution of those crimes. One of the very first conditions for an efficient prosecution of international crimes is the existence

order to avoid mixing them up with ordinary crimes. If such confusion were to arise, it would undoubtedly have repercussions on universal jurisdiction and the principle of complementarity.

55 *United States v. William L. Calley, Jr*, US Court of Military Appeals, 21 December 1973, 22 USCMA 534 (1973).

56 Above note 15. Despite the British judiciary's approval of extradition for the former Chilean head of state, the government did not act on it for medical reasons.

of an efficient judicial system, that is, functioning courts with competent judges. But this is not always the case, especially after an armed conflict or crisis has disrupted the country. An assessment should be made in such conditions, but chances are high that both universal jurisdiction and the principle of complementarity will be blurred if viable structures are lacking. The danger will increase as the number of crimes rises. It should not be underestimated, for although there is always the possibility of setting up an ad hoc system (international or mixed), this will depend on the will of the international community. If the ICC is left with the principle of complementarity alone – and provided that the country concerned will co-operate – its role will probably be confined in practice to a small number of cases, with no guarantee that investigations will be possible and sufficient evidence gathered. The ICC cannot compensate for the deficiencies of states or the international community on a large scale.

There is also a high risk of unequal treatment between states that could lead to bargaining between them, especially those not party to the Rome Statute. Considering that international crimes are theoretically subject to universal jurisdiction but cannot necessarily be tried in practice,<sup>57</sup> how effective will the principle of complementarity actually be? Inequality can be the result of contradictory needs for the state. If, for instance, it is a developing country, adherence to the ICC Statute or concluding an agreement under Article 98 thereof can be a means of negotiating economic support in exchange. International relations and politics should not be ignored in this debate. They clearly play a part beyond the adherence of states to general principles. The risk of creating ‘prosecution-proof zones’ for perpetrators of international crimes, with few means of compelling the state to comply with its ‘universal jurisdiction’ obligations, is considerable. The strength of states and the positions they adopt have an obvious influence here.<sup>58</sup>

Another subjective aspect has to do with the overall political situation of each country. It must be kept in view, for the nature of political regimes, depending on the type of separation of powers and the existence of checks and balances (authoritarian or democratic regime), will also affect the implementation of the two principles. Historically, the principle of complementarity is quite new compared with the often long-standing relations between states. Therefore to ignore the individual and global situation of each state and the effect on it of the implementation of the principle of complementarity would be unrealistic. For example, the proximity of two countries could make trials for international crimes difficult if such prosecutions would have too deep and negative an impact on relations between those countries, leading to a crisis that could be worse than the trials themselves. Beyond official speeches in favour of prosecutions and

57 Due to the pressure of other states making their economic support conditional on non-co-operation with the relevant institutions.

58 See Henry J. Steiner, ‘Three cheers for universal jurisdiction – or is it only two?’, *Theoretical Inquiries in Law*, Vol. 5 (2004), pp. 201 f. and 229 f.

co-operation with international bodies, there is a geopolitical dimension that cannot be ignored and could create a high risk of inaction.

The attitude of the international community must not be overestimated either. Behind the official consensus that international criminals should be brought to trial, *realpolitik* resurfaces and the situation is viewed differently. The power granted to the UN Security Council to refer a matter to the Court<sup>59</sup> serves as an example. It could be seen as another positive aspect of the principle of complementarity being applied to give greater concrete effect to the universality principle, and has moreover been used in the case of the Darfur situation in Sudan. Yet this example must not obscure the high risk of selectivity in the international community's approach to international crimes. Even if there was a comprehensive assessment of international crimes worldwide, the working methods and rules of procedure of the Security Council could lead to a selective approach in terms of the proceedings that could be initiated by the ICC. If such proceedings were to be detrimental to the interests of some member states, it would be very hard to obtain their consent regardless of the nature of the crimes. It is enough for them to be permanent members of the Security Council, and the situation can be blocked. Also, there is a 'threshold of concern' that must be reached for the international community to feel concerned and take up the matter. Unfortunately, international crimes are evaluated here according to their number and visibility. If they are not sufficiently high-profile or are committed only sporadically, the risk of lack of interest and hence inaction could likewise be high.

The legal rules deriving from the principle of complementarity should normally lead to the prosecution of perpetrators of international crimes. However, the practical application of that principle will probably be impaired by the necessity for the Court to define its criminal policy. Logically, and according to statements already made by the Office of the Prosecutor and the ICC President,<sup>60</sup> the Court will target those most responsible for international crimes – sometimes referred to as the 'big fish' – thus mainly top officials and military leaders quite often inaccessible to national courts owing to their positions and to national statutes of limitation or immunity, although such statutes are not applicable to international crimes.<sup>61</sup> However, this is not enough to ensure the adequate suppression of such crimes. If they are committed by a number of people in a certain country and the ICC is requested by referral, in one way or another, to try perpetrators who were at the top, those lower down will probably escape prosecution despite having committed international crimes, if that country's

59 See Article 13 of the ICC Statute on the exercise of jurisdiction: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: ... (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

60 See P. Kirsch's presentation of the first report to the General Assembly of the United Nations [UN Doc A.60/177], available at <<http://www.icc-cpi.int/press/pressrelease/120.htm>> (last visited March 2006).

61 As a reminder, universal jurisdiction over international crimes should not entail the application of any national provisions on immunity or amnesty and, in a general manner, no statute of limitation whatsoever.

criminal justice system is in practice unable to try them. This is one of the limitations to the implementation of the principle of complementarity. The inability clause in Article 17 of the ICC Statute could be useless if the ICC, too, is unable to try the offenders because of their number – a risk that is far from hypothetical! No classic solution can be foreseen for such a difficulty. Not only will the ICC's criminal policy be at stake, but also the overall criteria mentioned above. A combination of them could seriously impair not only the effectiveness of the principle of complementarity but also the implementation of universal jurisdiction as a whole.<sup>62</sup>

### *Subjective national reasons*

There are other subjective reasons, linked to national factors, which create difficulties for implementation of the principle of complementarity. Some of these are given below.

First, the specific cultural characteristics of each state must be taken into consideration. Knowledge of this dimension could prove crucial for the efficient curbing of international crimes. Relations between authorities, the ability of witnesses to speak, the disinclination of the population to co-operate, priority given to the process of reconciliation and reconstruction ... there are many factors that could make application of the principle of complementarity more difficult in practice.<sup>63</sup> The situation, for instance, in the Balkan states or more symptomatically in Cambodia shows an obvious earlier and perhaps continuing reluctance – to say the least – to hold trials and to settle accounts with the past. There is never an official refusal, but an organization of priorities. The immediate priorities of states are not necessarily those of the international community, just as those of victims are not necessarily those of the state. International and constitutional laws are clear on these priorities, but not necessarily the international and national decision-makers.

Second, the means provided to implement universal jurisdiction and the principle of complementarity may be insufficient. Even though the decision to prosecute has been made at the international level, there are foreseeable difficulties. Investigations are one example. Proper investigations are needed to hold a trial, but how will an international officer carry them out? Will he or she use an interpreter? What about the reliability of information, of the translation, and so on? There are many concerns in that regard. Such difficulties are not impossible to overcome, but altogether the ICC's success in doing so will depend not only on co-operation by state officials but also on actual access to the requisite information. This shows the part played in dealing with these issues by the Court's relationship with the state, and the need for a positive, constructive attitude by the two if constructive results are to be achieved.

62 On the obstacles to the exercise of universal jurisdiction, see 'Final Report', above note 3, p. 10.

63 See in this regard John Dugard, 'Possible conflicts of jurisdiction with truth commissions', in Cassese et al., above note 29, ch. 18.3, p. 693.

## Conclusion

The relationship between universal jurisdiction and the principle of complementarity is not a revolutionary topic and the contents of this article are intended only to foster debate. By identifying more clearly the role and responsibilities of each player it may be possible to propose some courses of action to make things work better. Here are some ideas to share.

First of all, it seems necessary to identify clearly – in a practical manner – the role that should be played by the ICC. From the wording of the Statute, the role of both the states and the Court appears evident. But this will probably not be enough to ensure that the principle of complementarity will work in practice. The ICC is an autonomous international institution, established under the auspices of the United Nations. Member states must assume responsibility for ensuring the Court's future success. To that end, the Assembly of States Parties to the ICC Statute could use its central position and policies to explore the following avenues. First, it could propose to states a certain harmonization of definitions and working procedures in order to enhance their efficiency and lead to a greater equality between them of prosecutions and trials. It would for instance be conceivable that, for the prosecution of international crimes, some derogation could be made to the national criminal procedure act or code so that differences between legal systems could be reduced. The organs of the ICC should aim at helping the states, not at combating them. This is not mere words. It includes implementation of the Statute *and* a strong communication policy both of member states and of the Court's institutions. Even though the ICC has not yet handed down verdicts, its contacts and communications hitherto seem to indicate that it is following this idea through. Second, the Assembly of States Parties, without interfering in the internal affairs of states, could also formulate and propose some guidelines on practical steps to improve enforcement of the universality principle. This should be done in consultation with member states, but also the entire international community. Third, the Assembly of States Parties and the ICC, later through its case-law, could also play a federative role between states – not to impose solutions but to convince them that universal jurisdiction is a necessary course to take. This would, moreover, make it possible to bring ICC non-member states into the picture and to continue a universal dialogue.

A second idea could be to give more responsibilities to regional international organizations in the initiation and follow-up of prosecutions of international crimes. The current situation is quite often this: international crimes are committed; states are unable or politically unwilling to try international criminals who committed their crimes abroad; the ICC does not have sufficient grounds to initiate the proceedings; and the crime remains unpunished. Such a situation is more the result of a lack of a proper body that could combine two attributes: a knowledge of the specific context, and sufficient independence to speak on behalf of several states sharing the burden of responsibility among themselves. Regional political organizations could be a possible solution, as they meet these two conditions. It would have to be understood that they would not

play this role themselves, but would take responsibility for passing on the initiative to one member state that would either organize the prosecution and trial on behalf of that community of states or refer the matter to the Security Council. Obviously such a solution would require deeper thought, but it would have the advantage of using already existing institutions to give concrete effect to the universality principle and ultimately to enforce the principle of complementarity more effectively.

Finally, the role of sanctions in the implementation of the principle of complementarity cannot be overlooked. Although both are usually seen as separate and without any link, it should be remembered that justice is often seen to be done through sanctions and, more precisely, criminal sanctions. It would be necessary to rethink the judicial process as a chain in which each element is needed to carry on the process to the end. If the principle of complementarity is regarded only as a clause attributing jurisdiction, understanding of it will be incomplete. If sanctions are seen as a separate issue, assertion of jurisdiction will not be properly understood. Even more than sanctions, the whole issue of justice is at stake here. Rethinking universal jurisdiction and the principle of complementarity can only be a multidimensional process without any single answer. A combination of solutions, ranging from national truth and reconciliation processes through national prosecutions to mixed or international criminal prosecutions for perpetrators who bear the greatest responsibility, should be examined and implemented. This is obviously the starting point of another debate to follow the one currently under way...

The principle of complementarity is without doubt an advance towards the greater efficiency of universal jurisdiction. An attempt has been made in this article to show a number of interrelated considerations that should be dealt with if the international community wants to better address that issue. It must, however, be borne in mind that in the end, and despite the best-designed instruments, only the will of states and the international community will make a difference. Justice and dignity for the victims are the underlying objectives of each word of this contribution, and should not be bypassed by the idea that universal jurisdiction is a mere dream for academics or idealists. Only concerted efforts will lead to a change of attitude. A simple message on universal jurisdiction and the principle of complementarity should be sent to all those concerned by its implementation: 'Don't think or talk too much about it. Just do it!'