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The principle of complementarity of
the International Criminal Court and
the principle of universal jurisdiction

Graduate thesis
20 points

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Field of study: International Criminal Law

Semester: Autumn 2003

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Summary

This thesis examines and analyses the relationship between the principle of complementarity and the principle of universal jurisdiction. The establishment of the International Criminal Court provides for the first time in history a permanent international criminal institution. One of the most important principles on which the ICC is built upon is the principle of complementarity. The road towards the Rome Statute and the principle of complementarity has been long and the IMT, IMTFE, ICTY and ICTR have been established along it. These predecessors have influenced the negotiations and the creation of the ICC.

The International Law Commission contributed with the base for the discussions of the Rome Conference in 1998. At the end of the Rome Conference the Rome Statute of the International Criminal Court was adopted. On 1 July 2002 the International Court was created because the required amount of 60 State ratifications of the Rome Statute was reached.

The principle of complementarity is the compromise of the opinions of the negotiating States in the Preparatory Committees and during the Rome Conference. The principle defines the relationship between the ICC and national courts. When national courts are unwilling or unable to genuinely carry out investigations and prosecutions of the serious international crimes (genocide, war crimes and crimes against humanity), the ICC will do it instead. The thesis will also explore the operative parts of the complementarity regime.

Under the principle of universal jurisdiction, courts of any State have the right to try persons who have committed certain serious crimes, regardless of where the crimes were committed or the nationality of the perpetrators or victims. No link with the crime is needed, except for the nature of the crime. It must be a crime against all of mankind. The principle of universal jurisdiction is not firmly established in the international legal system, but it is becoming more and more accepted. It was suggested during the negotiations that led to the creation of the Rome Statute that the ICC should be endowed with universal jurisdiction. This did not happen. The principle of complementarity encourages States to implement universal jurisdiction over serious international crimes. By doing so, and investigating and prosecuting the violators of these crimes in good faith, States certify that they have priority over the ICC. If not, the principle of complementarity opens the doors to the jurisdiction of the ICC and it will investigate and prosecute instead.

Acknowledgements

The journey to finalizing this thesis has been long, and it also includes a move from Lund, Sweden, to Amsterdam, The Netherlands. I would never have made it without help and support. For your time and help, thank you so much:

Professor Ineta Ziemele, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden, for great supervision, flexibility and inspiration.

Miles Hogan, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden, for being a wonderful opponent, and helping me with the language.

Professor Christine Van Den Wyngaert, for waking my interest for this specific field of law.

Nina, for great friendship and help during all my years in Lund.

Michelle Mairet, for reading through the thesis and giving comments.

My wonderful family; Pappa, Mamma, Henrik, Hanna and Mormor for your love and care.

To Bart's parents, Paul and Yolande, and his sisters, Floor and Liselotte, for welcoming me with open arms into their family.

This thesis is dedicated to Bart. Without him it would never have been finished.

Table of Abbreviations

Doc	Document
GA	General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal located in Nuremberg
IMTFE	International Military Tribunal for the Far East located in Tokyo
NGO	Non-Governmental Organization
PrepCom	Preparatory Committee on the Establishment of an International Criminal Court
SC	Security Council
UK	United Kingdom
UN	United Nations
U.N.T.S.	United Nations Treaty Series
US	United States

1 Introduction

1.1 Introduction

Mass atrocities and gross violations of human rights such as war crimes, crimes against humanity and genocide affect the international community as a whole and there hence, exists a collective determination to fight the impunity of the perpetrators of these crimes. The determination of the international community to punish these perpetrators has triggered the emergence of forms of international criminal law enforcement, as exemplified by the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court, but at the same time these developments create tensions between governmental aspirations to protect State sovereignty and an independent and effective international criminal court. During the last 50 years the establishment of the International Criminal Court has been the most important and amazing event of the development in international criminal law. For the first time in history it provides a permanent international criminal institution. One of the most important principles on which the ICC is built upon is the principle of complementarity. According to this principle the crimes, which fall within the Rome Statute, shall primarily be investigated and prosecuted by national jurisdictions. Thus, the International Criminal Court can only assert its jurisdiction when the national courts are unwilling or unable to do so.

National courts can assert their jurisdiction over crimes based on different kinds of jurisdictions. Jurisdiction is often referred to as power exercised by a State over persons, property or events.¹ Jurisdiction can be defined as “the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially.”² The standard basis for jurisdiction is the territorial principle, under which States claim jurisdiction over crimes committed in their own territories.³ Extraterritorial jurisdiction is the jurisdiction, which States have over crimes that are committed abroad. The State can assert jurisdiction for a crime, which has occurred abroad if it has some connection to the case. The active nationality (personality) principle recognises that a State is allowed to prosecute its nationals for crimes committed outside its territory.⁴ On the basis of the passive nationality (personality) principle States may exercise jurisdiction over crimes committed abroad against one of their nationals. Under the protective

¹ Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, Seventh revised edition, London, 1997, page 109.

² Bassiouni, M. Cherif, *Crimes Against Humanity in International Criminal Law*, Second Revised Edition, The Hague, 1999, page 227.

³ Brown, Bartram S., ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, *The Yale Journal of International Law*, Vol. 23, no. 2, Summer 1998, page 391.

⁴ Malanczuk, *supra* note 1, page 111.

principle a State can claim jurisdiction over crimes committed abroad that are a threat to the security of the State.⁵ The principle of universal jurisdiction is the only principle that does not involve any direct link to the State where the case is prosecuted. It authorizes States with no connection to a crime to prosecute the accused persons on the basis that the crime is so serious that it offends all of mankind. Under the principle of universal jurisdiction “any State is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of the author or the victim.”⁶

The principle of complementarity shows that international prosecution alone by the ICC will not be enough to fight the impunity of perpetrators of gross human rights, so a heavy burden is put on national jurisdictions. For example, a serious international crime has been committed, and the States that have jurisdiction because of a direct link with the case are not willing or able to investigate or prosecute it. Other States may then do so instead by asserting a jurisdiction based on universality. The perpetrators of serious international crimes will then be punished regardless, and the international determination to not let these culprits go unpunished will be upheld.

1.2 Purpose

The aim of this thesis is to examine and analyse the relationship between the principle of universal jurisdiction and the principle of complementarity established in the Rome Statute of the International Criminal Court. The thesis will show the evolvement of the two principles and possible conflicts and links between them. It will explore the controversies and tensions surrounding the principles. First there will be a look into history to see how the daring project of creating an international criminal court emerged successfully. Thereafter the evolvement of the principle of complementarity and how this principle works will be explored. The principle of universal jurisdiction will then be presented and its role within customary international law will be examined. Moreover, a look at the discussions and negotiations regarding the two principles in the context of the Rome Statute will be included in the thesis.

1.3 Method, Theory and Material

The thesis contains a combined descriptive and analytical study on the relationship between the principle of complementarity and the principle of universal jurisdiction. The thesis is written with the underlying presumption that the primary responsibility of prosecuting fundamental crimes is the responsibility of States, but there is decreasing importance of State sovereignty. There also exists recognition of the international interest to

⁵ Malanczuk, *supra* note 1, page 111.

⁶ Cassese, Antonio, *International Criminal Law*, Oxford, 2003, page 284.

punish the perpetrators. This recognition justifies the functioning of an international criminal court and the jurisdiction based on universality.

In the thesis doctrine concerning the ICC, the principle of complementarity and the principle of universal jurisdiction are dealt with. Different legal instruments with the Rome Statute in the front are also examined to describe how complementarity is working. Reports and documents of the preparatory work that led to the creation of the Rome Statute and the principle of complementarity is explored. Conventions and State practice addressing the principle of universal jurisdiction and the doctrine interpreting them is looked at for establishing the development and functioning of universality.

1.4 Delimitations

Due to the limited scope of this thesis, immunities for gross human rights violations are only briefly mentioned. In examining universal jurisdiction the scope of this thesis is limited to the exercise of this principle in respect to genocide, crimes against humanity and war crimes. This is because these crimes are also the crimes that the International Criminal Court may assert its jurisdiction over. Torture that does not amount to a crime against humanity is also left out due to this. The crime of aggression is not examined further because it is still negotiated by the State parties of the Rome Statute.

1.5 Outline

Chapter two outlines the historical predecessors to the International Criminal Court by looking at the Leipzig, Nuremberg and Tokyo Trials, and examining the *ad hoc* Tribunals for the former Yugoslavia and Rwanda. Chapter three explores the development of the long road to Rome and the Rome Conference, which essentially established the International Criminal Court. The fourth chapter describes and analyses the evolvement and functioning of the principle of complementarity. Chapter five explores the principle of universal jurisdiction and whether the crimes within the Rome Statute are subjects of universality. Finally, chapter six summarises all the previous chapters and analyses and links the principle of complementarity with the principle of universal jurisdiction.

2 The predecessors to the International Criminal Court

2.1 History

The International Criminal Court (ICC) is the first permanent institution for international criminal justice. Its main goal is to hear cases concerning violations of the most serious crimes of concern to the international community as a whole. Before the creation of this permanent criminal court, there were *ad hoc* courts within this international criminal field and these courts have had a significant impact on the evolution of the International Criminal Court. Next to the ICC, these *ad hoc* courts still exist. Without these predecessors the world would probably not be ready for a permanent criminal court. To understand the future it is important to have knowledge about the past, particularly when it comes to letting serious crimes of concern to the international community as a whole remain unpunished. Since the end of World War I the international community has tried to create a permanent international court, and it is not until today that such a court has become a reality. The development of the ICC was a process that extended over almost a century. The road has been long and four *ad hoc* tribunals and five investigatory commissions⁷ have been established along it. These four tribunals are The International Military Tribunal (IMT) located in Nuremberg, the International Military Tribunal for the Far East (IMTFE) in Tokyo, the International Criminal Tribunal for the former Yugoslavia (ICTY) located in The Hague, The Netherlands, and the International Criminal Tribunal for Rwanda (ICTR) seated in Arusha, Tanzania.⁸

2.2 The Leipzig, Nuremberg and Tokyo Trials

The Leipzig, Nuremberg and Tokyo Trials laid the foundation for the establishment of the permanent International Criminal Court. World War I ended on 11 November 1918, and on 25 January 1919 the Preliminary Peace Conference started in Paris, France. The Conference established the Commission on the Responsibility of the Authors of the War and on

⁷ The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, investigating crimes occurring during World War I; the 1943 United Nations War Crimes Commission, which investigated German war crimes during World War II; the 1946 Far Eastern Commission, which investigated Japanese war crimes during World War II; the Independent Commission of Experts Established Pursuant to Security Council Resolution 780, to investigate violations of international humanitarian law in the former Yugoslavia and the Independent Commission of Experts Established in accordance with Security Council Resolution 935, the Rwandan Commission, to investigate violations committed during Rwandan civil war.

⁸ Bassiouni, M. Cherif, *The Statute of the International Criminal Court, A Documentary History*, New York, 1998, page 5 *et seq.*

Enforcement of Penalties, and a majority of this commission proposed for the creation of an *ad hoc* tribunal, managed by the League of Nations, for the prosecution and punishment of the perpetrators.⁹ The work of the Commission resulted in the Treaty of Peace Between the Allied and Associated Powers and Germany of the 28 June 1919. Accordingly, this treaty provided for *ad hoc* tribunals to bring to trial “persons accused of having committed acts in violation of the laws and customs of war.”¹⁰ These tribunals never came into existence because of the risk of political instability in Germany. Instead national prosecutions were performed in Leipzig in Germany. The Leipzig trials were not successful due to the fact that only a few persons were tried, and the sentences were regarded as relatively light.¹¹ The experience from the aftermath of World War I showed that political considerations had prevailed over international justice, but it can also be said that it established a basis for the development of international criminal law.¹²

The Nuremberg Trials started in November 1945 and the permanent seat of the tribunal was in Berlin, but the only trial was held in Nuremberg, part of the American occupation zone. The Court was composed of four judges from the victorious States and each State also appointed a Chief Prosecutor.¹³ The Tribunal had jurisdiction over crimes against peace, war crimes and crimes against humanity and they were included in Article 6 of the Charter of the Nuremberg International Military Tribunal of the 8 August 1945. Individual responsibility was established for these crimes.¹⁴ The judgment came on the 1 October 1946 and it included 22 convictions and among them eleven death penalties.¹⁵ The judges were convinced that the proceedings were based on universal jurisdiction over “acts universally recognised as criminal, which [are] considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.”¹⁶ The Supreme Commander of the Allied Powers, General *MacArthur*, signed a proclamation which established an “International Tribunal for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offences which include crimes against peace”(IMTFE) on the 19 January 1946. The IMTFE based its work on the same three categories of crimes as

⁹ Bring, Ove, *International Criminal Law in Historical Perspective, Comments and Materials*, Stockholm, 2002, page 13.

¹⁰ Treaty of Peace Between the Allied and Associated Powers and Germany, (Treaty of Versailles), 28 June 1919, Articles 227 and 228

¹¹ Bassiouni, *supra* note 8, page 7.

¹² Bring, *supra* note 9, page 15.

¹³ *Ibid.*, page 18.

¹⁴ Beigbeder, Yves, *Judging War Criminals, The Politics of International Justice*, The Hague, 1999, page 33.

¹⁵ Bring, *supra* note 9, page 19.

¹⁶ Joyner, Christopher C., ‘Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability’, *Law & Contemporary Problems*, Volume 59, no. 4, 1996, page 167.

the Nuremberg Charter, namely crimes against peace, war crimes and crimes against humanity.¹⁷

The Nuremberg Trial has been an important precedent and platform for the Tribunals for ex-Yugoslavia and Rwanda, and the creation of the International Criminal Court. It will continue to be so in the future as well.¹⁸ There has also been some criticism of the IMT. It has been argued that it was a one-sided victor's justice, because only the vanquished were to be tried, there were many procedural faults and *ex post facto* legislation when it came to the crimes against peace and humanity.¹⁹ The main critique has been that the creation of the Tribunal was not in conformity with customary international law, which would have required the negotiation of a treaty at an international diplomatic conference.²⁰

2.3 The ICTY and the ICTR

The International Criminal Tribunal for the former Yugoslavia (ICTY)²¹ and the International Tribunal for Rwanda (ICTR)²² were created on *ad hoc* basis by the UN Security Council (SC), acting under Chapter VII of the UN Charter,²³ with the purpose of restoring international peace and security in the former Yugoslavia and Rwanda. The Security Council had never before created a judicial organ,²⁴ and the members of the Security Council were able to assess the possible influence of such a tribunal on their own State sovereignty and conclude that it would be acceptable.²⁵ The possibility of a veto by any of the five permanent members of the Security Council could hinder the work of the Tribunals, and therefore their assessment of the creation of the Tribunals must have been that the Tribunals were not a significant threat to their State sovereignty.

The establishments of the ICTY and the ICTR have been the catalyst for the development of the ICC, and the enforcement of international criminal law has stirred into a new and more effective stage. The Tribunals' work showed that an international criminal judicial system is possible and necessary. Essentially the two Tribunals have legitimated the prosecution of

¹⁷ Beigbeder, *supra* note 14, page 47.

¹⁸ *The Statute of the Iraqi Special Tribunal* has many provisions that have their origin in the statutes and jurisprudence of the IMT, IMTFE, ICTY, ICTR and ICC. The Statute is available at www.cpa-iraq.org/human_rights/Statute.htm, last visited on 24 July 2004.

¹⁹ Beigbeder, *supra* note 14, page 49.

²⁰ Beigbeder, Yves, *Judging Criminal Leaders, The slow Erosion of Impunity*, The Hague, 2002, page 43.

²¹ Established by Security Council Resolution 827 of 25 May 1993, as amended by Security Council Resolution 1166 of May 1998.

²² Established by Security Council Resolution 955 of 8 November 1994.

²³ *Charter of the United Nations*, signed on 26 June 1945, San Francisco, entered into force 24 October 1945.

²⁴ Brown, *supra* note 3, page 393.

²⁵ Jensen, Rod, 'Complementing Complementarity: The principle of Complementarity in the Rome Statute of the International Criminal Court', page 9, www.isrcl.org/Papers/Jensen.pdf, last visited on 24 July 2004.

international crimes, and contributed to increased public awareness of gross human rights violations, thus creating a considerable and solid jurisprudence, which was missing in the past.²⁶ Their creations raised the question of the suitable relationship between the jurisdiction of national courts and the jurisdiction of an international criminal court.²⁷

2.3.1 The primacy of the ICTY and the ICTR

Both Article 9 in the Statute of the ICTY²⁸ and Article 8 in the Statute of the ICTR²⁹, provide that each of these two international tribunals shall have concurrent jurisdiction with national jurisdictions to prosecute persons for serious violations of international humanitarian law in, respectively, the territory of the former Yugoslavia and in the territory of Rwanda, or committed by Rwandan citizens in neighbouring States. In the second paragraph of each article it is added that both tribunals shall have primacy over national courts. Primacy means that the Tribunals have the ability to request to the national courts to defer a specific case to the Tribunals at any stage of the procedure. There is a slight difference between the primacies of the two Statutes. The ICTY Statute declares that it has “primacy over national courts”³⁰ and the ICTR Statute states the ICTR has “primacy over the national courts of all States”³¹, and this change proposes a more absolute Security Council consensus regarding the concept of primacy.³²

The *Tadic* case is the first case in which an individual was indicted, tried and convicted by the ICTY, and it was also the first case that dealt with the concept of primacy.³³ *Tadic* was charged on several counts of crimes against humanity, war crimes and violations of the laws or customs of war.³⁴ After the deferral of the case and the transfer of *Tadic* to ICTY in The Hague, the deferral of the case was challenged. The Defence meant that there had been an unlawful establishment of the International Tribunal,³⁵ an unjustified primacy of the International Tribunal over competent domestic courts,³⁶ and that there existed a lack of subject-matter jurisdiction.³⁷ The

²⁶ Chaney, Jonathan J., ‘International Criminal Law and the Role of Domestic Court’, *The American Journal of International Law*, Volume 95, no. 1, 2001, page 122.

²⁷ Brown, *supra* note 3, page 385.

²⁸ *Statute of the International Tribunal for the Former Yugoslavia*, New York, 25 May 1993, as amended 13 May 1998. [Hereinafter ICTY Statute]

²⁹ *Statute of the International Tribunal for Rwanda*, New York, 8 November 1994. [Hereinafter ICTR Statute]

³⁰ ICTY Statute, *supra* note 28, Article 9(2).

³¹ ICTR Statute, *supra* note 29, Article 8(2).

³² Brown, *supra* note 3, page 402.

³³ *Ibid.*, page 403.

³⁴ *Prosecutor v. Tadic*, No IT-94-1-T (ICTY December 14, 1995) (*Tadic* and Borovnica indictments) (amended), available at www.un.org/icty/indictment/english/tad-2ai951214e.htm, last visited on 24 July 2004.

³⁵ *Prosecutor v. Tadic*, No IT-94-1 (ICTY October 2, 1995), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* [hereinafter *Appeals Decision on Jurisdiction*], pages 6-27, paras. 9-48, available at www.un.org/icty/tadic/appeal/decision-e/51002.htm, last visited on 24 July 2004.

³⁶ *Ibid.*, pages 28-38, paras. 49-64.

³⁷ *Ibid.*, pages 38-84, paras. 65-145.

attack on the primacy of the Tribunal was based on three issues: (1) that the primacy violated the competence of a State to establish domestic jurisdiction over crimes that have been committed on its territory,³⁸ (2) that the principle of State sovereignty has been violated,³⁹ and (3) that the transfer of the case from Germany violated the principle of *jus de non evocando* (the right to be tried by his national courts under his national laws).⁴⁰ The Appeals Chambers dismissed the argument of primacy of the Tribunal violating domestic jurisdiction and State sovereignty, and stated: “It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.”⁴¹ The Appeals Chamber also dismissed the claimed violation on the principle of *jus de non evocando*, concluding “[t]his principle is not breached by the transfer of jurisdiction to an international tribunal created by the Security Council acting on behalf of the community of nations.”⁴² Accordingly, the Appeals Chamber dismissed the second ground for appeal and held that primacy is an imperative tool for the functioning of an international tribunal:

“Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as “ordinary crimes” (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being “designed to shield the accused”, or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).”⁴³

One important reason for giving the Tribunals primacy over national jurisdictions is to avoid different courts exercising concurrent jurisdiction over an accused person. Chaos could be created if courts from several countries were authorized contemporaneously to initiate proceedings against the same war criminal from the Yugoslav conflict.⁴⁴ The purpose of the creation of the ICTY and the ICTR was to restore peace and security in the territories of Rwanda and the former Yugoslavia. The unwillingness or inability of the national authorities in the regions to prosecute the violators of serious international crimes was another contributing factor.⁴⁵ In resolution 827, which created the ICTY, the Security Council showed that its acts would put an end to the crimes being committed, to bring the responsible persons to justice and to contribute to the restoration and maintenance of peace. Since the ICTY and the ICTR have the specific and important tasks of helping to bring peace to the former Yugoslavia and Rwanda, it needs something more than concurrent jurisdiction. This is the reason why primacy over the jurisdictions of national courts is included in

³⁸ *Appeals Decision on Jurisdiction*, *supra* note 35, page 31, para 54.

³⁹ *Ibid.*, page 31, para 55.

⁴⁰ *Ibid.*, page 37, para 61.

⁴¹ *Ibid.*, page 35, para 58.

⁴² *Ibid.*, page 37, para 62.

⁴³ *Ibid.*, page 36, para 58.

⁴⁴ Brown, *supra* note 3, page 398.

⁴⁵ Pejic, Jelena, ‘Accountability for international crimes: From conjecture to reality’, *International Review of the Red Cross*, 2002, Volume 84, No 845, page 15.

the Statutes of the ICTY and the ICTR.⁴⁶ Directly after the approval of the ICTY Statute, France, the United States of America, the United Kingdom and the Russian Federation, which are four of the five permanent members of the Security Council,⁴⁷ made statements in which they tried to limit the primacy of the ICTY.⁴⁸ At the SC meeting establishing the ICTY and adopting the ICTY Statute, the US Minister of Foreign Affairs, *Madeleine Albright*, said, “it was understood that the primacy of the International Tribunal referred to in paragraph 2 of Article 9 only referred to the situations described in Article 10.”⁴⁹ Even the creators of the Tribunal wanted to limit the power of the Tribunal due to issues of State sovereignty, and without the ability to make these statements the Tribunals would probably not ever have been established.

2.4 Conclusion

Without the IMT, IMTFE, ICTY and ICTR the International Criminal Court would probably still be nothing more than an idea. These predecessors have influenced the creation of the ICC and the experiences of the predecessors have been the foundation of the negotiations for the Court. Their existence shows that there is a need for a permanent criminal court.

The Treaty of Versailles provided for an international tribunal, but none was created. Despite this, the basis for the further development of international criminal law was laid down. ICTY and ICTR catalysed the development of the ICC and intensified the debate of an international criminal court’s jurisdiction. The IMT was a part of the development of the principle of universal jurisdiction, because the judges considered that it was the basis for the proceedings. The Tribunals have primacy over national jurisdictions and it has been concluded in the *Tadic* case that this primacy is an imperative for an international tribunal to function correctly. The ICTY and ICTR, which are non-permanent institutions established by the SC, are quite limited in crimes, territory and duration. They do not have such an extensive influence on the national jurisdictions of its creators, and due to that the primacy over domestic courts was allowed. As long as other States are brought to justice, and there is no possibility for criminal responsibility for the own State, it is easier to approve the creation of tribunals such as the ICTR and ICTY. When the own State is in danger of becoming subject to a trial of an international criminal institution this approval disappears. This shows hypocrisy. The experiences of the primacy of the ICTY and ICTR affected and contributed to the relationship between the ICC and national jurisdictions. This was discussed and debated during the preparatory work of the ICC, the Rome Conference and finally concluded in the treaty establishing the ICC.

⁴⁶ Brown, *supra* note 3, page 394.

⁴⁷ The fifth member of the UN Security Council is China.

⁴⁸ Brown, *supra* note 3.

⁴⁹ Security Council SC/5624, 3217th Meeting 25 May 1993, Night summary, Take 5.

3 The development of the Rome Statute

3.1 Draft Code of Crimes against the Peace and Security of Mankind

The International Law Commission⁵⁰ was established by the General Assembly⁵¹ and the Statute of the International Law Commission states that the “Commission shall have for its object the promotion of the progressive development of international law and its codification”.⁵² The Commission consists of 34 members and they meet annually. The main task for the ILC is to prepare drafts on different topics of international law. When the ILC has finished preparing a draft on a specific topic, the General Assembly most often initiates an international conference of plenipotentiaries to develop the drafted articles into a convention, which is open for signing and ratification by States.⁵³ In resolution 177 (II) of 21 November 1947 the General Assembly asked the ILC to “(a) formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above.” The International Law Commission submitted the formulated principles and commentaries to the General Assembly, but the General Assembly saw problems with the definition of aggression in the proposed draft Code.⁵⁴ The General Assembly decided to establish a Special Committee to prepare a report on a draft definition of aggression, and tabled the draft Code until the Special Committee had finished its report.⁵⁵ The Definition of Aggression was not adopted until 1974.⁵⁶

The General Assembly waited even longer to take action on the draft Code, and in 1981 it asked the ILC to “resume its work with a view to elaborating the draft Code and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.”⁵⁷

⁵⁰ Hereinafter referred to as the ILC.

⁵¹ General Assembly Resolution 174 (II) of 21 November 1947.

⁵² *The Statute of the International Law Commission*, Article 1(1), available at www.un.org/law/ilc/texts/statufra.htm, last visited on 24 July 2004.

⁵³ United Nations Publications, *The work of the International Law Commission*, Fifth edition, New York, 1996, pages 6 *et seq.*

⁵⁴ The texts of the 1954 draft Code and Nuremberg Principles can be found in the Yearbook of the International Law Commission 1985, Volume II (Part Two), paras. 18 and 45 respectively.

⁵⁵ General Assembly Resolution 897 (IX) of 4 December 1954.

⁵⁶ General Assembly Resolution 3314 (XXIX) of December 1974.

⁵⁷ General Assembly Resolution 36/106 of December 1981.

The ILC provisionally adopted on first reading the draft articles of the draft Code of Crimes against the Peace and Security of Mankind in 1991.⁵⁸ Later that year the General Assembly invited the Commission to consider and analyse the issue raised in the Commission's forty-second session concerning the proposals for the establishment of an international criminal court or another international criminal trial mechanism and the question of an international criminal jurisdiction, all in the light of the draft Code.⁵⁹ This will be examined below. After a second reading of the draft articles, the Commission adopted the final text with 20 articles constituting the Code of Crimes against the Peace and Security of Mankind on 5 July 1996.⁶⁰

3.1.1 Draft Code of Crimes against the Peace and Security of Mankind and the establishment of jurisdiction

The International Law Commission suggested in the 1996 Draft Code that genocide, crimes against humanity, crimes against the United Nations and associated personnel, and war crimes are subject to universal jurisdiction. The Commission wanted the Code to be "based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court."⁶¹ This was because the Commission thought that it would give an effective implementation of the Code. Article 8 of the draft Code entitles State parties to exercise universal jurisdiction over the crimes in Articles 17 to 20, without prejudice to the jurisdiction of an international criminal court.

The article creates two different kinds of jurisdictions. The first jurisdiction is concurrent jurisdiction of national courts and an international criminal court and is valid for the crimes in articles 17 to 20. Those crimes are genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes.⁶² The second jurisdiction concerns the crime of aggression in article 16 and provides for an exclusive jurisdiction of an international criminal court.⁶³ The ILC made the decision to adopt a combined approach to the implementation of the Code based on the concurrent jurisdiction of national courts and an international criminal court for the crimes covered by the Code.⁶⁴ The recognition of the principle of the universal jurisdiction of the national courts of State Parties to the Code for the crimes in Articles 17 to 20 does not prevent the option of the jurisdiction of an international criminal court for those crimes. The question of which jurisdiction shall prevail was not addressed in the Draft Code, because that

⁵⁸ Yearbook of the International Law Commission 1991, Volume II (Part Two) pages 94 *et seq.* [Hereinafter YbILC (Vol II) (1991)]

⁵⁹ General Assembly Resolution 46/54 of 9 December 1991.

⁶⁰ *Draft Code of Crimes Against the Peace and Security of Mankind*, 1996, UN Doc. A/48/10. [Hereinafter the 1996 Draft Code]

⁶¹ YbILC (Vol II) (1991)], *supra* note 58, page 27, para 5.

⁶² Crimes against United Nations and associated personnel will not be considered because it is not a crime under the Rome Statute.

⁶³ The crime of aggression will not be considered because it is still under negotiation under auspices of the Rome Statute.

⁶⁴ YbILC (Vol II) (1991), *supra* note 58, page. 27, para 2.

would be considered in the statute of an international criminal court. The Draft Code was adopted before the Rome Conference and shows a part of the earlier debate on the drafting of the Rome Statute.

3.2 The Road to Rome

In the 1990s the waking of the political longing to create a permanent criminal court started to grow. Possible reasons for this desire were the increasing globalisation, the end of the Cold War, more public awareness of human rights and a growing weakness regarding the concept of State sovereignty.⁶⁵ The question of a permanent criminal institution was added onto the agenda of the United Nations in July 1989, because Trinidad and Tobago requested an item on the agenda regarding the creation of an international criminal court with jurisdiction over drug offences. The General Assembly requested the International Law Commission to report on the establishment of an international criminal court for the prosecution of individuals engaged in drug trafficking, running in parallel to the formulation of the Draft Code of Crimes against the Peace and Security of Mankind.⁶⁶ The ILC expanded the request and prepared a draft statute for an international criminal court that would have jurisdiction over all international crimes.⁶⁷ In subsequent resolutions the General Assembly invited the ILC to further regard the questions dealing with an international criminal jurisdiction, including the question of establishing an international criminal court.⁶⁸

In 1992 the General Assembly made a request to the ILC to undertake the elaboration of a draft statute for an international criminal court as a matter of priority,⁶⁹ and in 1993 the General Assembly asked the ILC to continue its work on the question of the draft statute of an international criminal court, with a view to elaborating a draft statute for such a court, if possible at the Commission's forty-sixth session in 1994.⁷⁰

The ILC presented a report with its draft statute for an international criminal court in 1994 to the General Assembly,⁷¹ and the Assembly set up an *ad hoc* Committee to review the substantive and administrative issues arising out of the ILC's draft statute.⁷² This *ad hoc* Committee met for two sessions in

⁶⁵ Farbstein, Susan Hannah, *The effectiveness of the exercise of jurisdiction by the International Criminal Court: The issue of Complementarity*, ECMI Working Paper # 12, Flensburg, 2001, page 13, available at www.ecmi.de/doc/download/working_paper_12.pdf, last visited on 24 July 2004.

⁶⁶ General Assembly Resolution 44/39 of 4 December 1989.

⁶⁷ Bassiouni, *supra* note 8, page 16.

⁶⁸ General Assembly Resolutions 45/41 of 28 November 1990 and 46/54 of December 1991, *supra* note 59.

⁶⁹ General Assembly Resolution 47/33 of 25 November 1992.

⁷⁰ General Assembly Resolution 48/31 of 9 December 1993.

⁷¹ *Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court*, UN GAOR, 49th Sess., Supp. No 10, at 44, UN Doc. A/49/10 (1994). [Hereinafter 1994 ILC Draft]

⁷² General Assembly Resolution 49/53 of 9 December 1994.

1995, and after that it reported that there still were different views on the substantive and administrative issues among the participating States.⁷³ Therefore, in 1995 the General Assembly created a Preparatory Committee on the Establishment of an International Criminal Court (PrepCom),⁷⁴ which met in 1996, 1997 and it concluded its work in April 1998. The PrepCom had the task to prepare a widely acceptable consolidated text of a convention for an international criminal court. The PrepCom prepared such a draft statute,⁷⁵ and this was to be considered by a conference.

3.3 The Rome Conference

From the 15 June to the 17 July 1998, the Diplomatic Conference on the Establishment of an International Criminal Court was held at the headquarters of the Food and Agriculture Organization in Rome.⁷⁶ 160 States, 33 intergovernmental organizations and a coalition of 236 non-governmental organizations (NGOs) participated.⁷⁷ The draft statute contained 13 parts and they were divided amongst several working groups of the Committee of the Whole, which was in charge of the negotiation of the entire Statute. Parallel to the different working groups, negotiations and discussions were held amongst political and regional groups, which were the Non-Aligned Movement, the Arab Group, the Latin American and Caribbean Group, the European Union, the Western Europeans and others, and the “Like-minded states”. The “Like-minded States” consisted of a large number of States that were directing the process forward. They were aggravated by the fact that major powers were opposed to the creation of the ICC. The group grew fast and in the end it had approximately 54 members from different regions.⁷⁸ It organised itself as a useful and effective force within the negotiations and it contributed successfully to the creation of the ICC. Other States insisted on State sovereignty and extensive control of the Court and delayed the process.⁷⁹ This group was not as organised as the group of “Like-minded States” and it had more divided opinions.⁸⁰ The non-

⁷³ Miskowiak, Kristina, *The International Criminal Court: Consent, Complementarity and Cooperation*, Copenhagen, 2000, page 14.

⁷⁴ General Assembly Resolution 50/46 of 11 December 1995. *See also* Resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997.

⁷⁵ Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference, A/CONF.183/2, 14 April 1998.

⁷⁶ The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, UN. Doc. A/CONF. 183/9 (1998) [Hereinafter the Rome Conference].

⁷⁷ Arsanjani, Mahnoush H., ‘The Rome Statute of the International Criminal Court’, *The American Journal of International Law*, Volume 93, No. 1, January 1999, page 22.

⁷⁸ Including: Australia, Argentina, Belgium, Brazil, Brunei, Canada, Costa Rica, Chile, Croatia, Czech Republic, Denmark, Egypt, Finland, Germany, Ghana, Greece, Hungary, Italy, Ireland, Korea, Latvia, Lesotho, Liechtenstein, Lithuania, Malawi, Norway, Philippines, Portugal, Samoa, Senegal, Singapore, Slovenia, Solomon Islands, South Africa, South Korea, Spain, Sweden, Switzerland, Trinidad and Tobago, The Netherlands, the United Kingdom, Uruguay and Venezuela.

⁷⁹ Miskowiak, *supra* note 73, page 15.

⁸⁰ Including: Algeria, China, France, India, Indonesia, Iraq, Israel, Jamaica, Malaysia, Mexico, Nigeria, Pakistan, the Russian Federation and the United States.

governmental organizations played an important role during the negotiations at the Preparatory Committee and the Rome Conference by lobbying for their opinions among the delegations and creating pressure via the media.⁸¹ Two issues were heavily debated during the Conference in Rome. The first issue was the question about which crimes should fall within the jurisdiction of the court and the second issue was about the basis of the courts jurisdiction. This will be examined in the next chapter.

At the end of the Rome Conference the Rome Statute of the International Criminal Court⁸² was adopted by a non-recorded vote of 120 in favour, 7 against⁸³ and 21 abstentions. France, the United Kingdom and the Russian Federation supported the Statute, but the United States of America publicly announced that it had voted against it.⁸⁴ The Statue is a compromise between “Court-friendly” States and States that were against or sceptical towards the Court. The Rome Statute is a multilateral international treaty, and the Court will have the status as an independent international organization.⁸⁵ A minimum requirement of 60 ratifications were necessary for the Rome Statute to come into force and this is stated in Article 126 of the Statue. On 1 July 2002 it became a reality.⁸⁶ The Court is seated in The Hague in The Netherlands, but the Court can be seated elsewhere whenever it is desired.⁸⁷ The Rome Statute contains a preamble and 13 parts, including 128 articles. Three principles underlie the Statute. The first principle is the principle of complementarity. The second principle is that the Statute is created only to handle serious crimes of concern to the international community as a whole. The third and last principle is that the Statute should stay within the area of customary international law when possible, and the rationale for this principle was to make the Statute broadly acceptable.⁸⁸

3.4 Conclusion

The ILC has played an important role for both the development of universal jurisdiction over serious international crimes and the creation of the International Criminal Court. In its Draft Code of Crimes against the Peace and Security of Mankind the ILC proposed that certain serious international crimes should be subject to universal jurisdiction. The concurrent jurisdiction between States exercising universal jurisdiction and the

⁸¹ Arsanjani, *supra* note 77, page 23.

⁸² *Rome Statute of the International Criminal Court*, adopted and opened for signature 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF. 183/9, 17 July 1998, [Hereinafter referred to as the Rome Statute].

⁸³ Including: China, Libya, Iraq, Israel, Qatar, Yemen and the United States of America.

⁸⁴ Arsanjani, *supra* note 77, page 22.

⁸⁵ Jensen, *supra* note 25, page 3.

⁸⁶ For up-to-date ratification status, see Rome Statute Signature and Ratification Chart, available at www.iccnw.org/countryinfo/worldsignsandratifications.html, last visited on 24 July 2004.

⁸⁷ Rome Statute, *supra* note 82, Article 3.

⁸⁸ Arsanjani, *supra* note 77, pages 24-25.

jurisdiction of an international criminal court over serious international crimes was suggested and this shows that universal jurisdiction and an international criminal court can exist side by side. The establishment of universal jurisdiction over international crimes in national legislation will not hinder the establishment of an international criminal court. The solution as to how the relationship between these two different jurisdictions should be solved was left to the Statute establishing the permanent criminal court.

The International Law Commission's draft Code is linked with the Rome Statute of the International Criminal Court, because it is a part of the earlier debate on the creation of the ICC. The ILC expanded the request of an elaboration of a statute for drug trafficking from the General Assembly to also include other international crimes. This undoubtedly contributed to the development of the ICC. Without this initiative from the ILC, the ICC would not be where it is today. From this request it required six years for the international community to conclude a multilateral treaty, which would create, for the first time in history, a permanent international criminal court after ratifications by 60 States.

4 The principle of complementarity

4.1 The evolution of the principle of complementarity

An important question for the drafters of the Rome Statute was the Court's relationship to national courts. The general view was that the Court would be complementary to national jurisdiction, which would in turn resolve the issue regarding the relationship between the two.⁸⁹ The principle of complementarity is the compromise between the balance of State sovereignty and international criminal jurisdiction, which was reached following huge debates within the Preparatory Committees before and during the Rome Conference.⁹⁰ Some states wanted a permanent criminal court, but were against an organ that would threaten the sovereignty of States. Other States and many non-governmental organizations wanted the court to become a wide court with a basis of universal jurisdiction.⁹¹ States that were concerned with ensuring respect for State sovereignty and the primacy of national jurisdiction approved the provisions that dealt with complementarity because the provisions recognized and handled the concerns of these States. States and non-governmental organizations, which supported a strong court, were also relatively satisfied with the compromise.⁹²

One argument that was put forward during the work of the Preparatory Committee was that the International Criminal Court should have priority over national courts in prosecuting persons accused of the crimes within the Court's jurisdiction. When those jurisdictions make competing extradition requests, some States strongly supported that the ICC should have the same primacy of jurisdiction as the ICTY and ICTR.⁹³ This would be in accordance with the opinions of the judges in the *Tadic* case, being that when an international tribunal as the ICTY is being established, it must be endowed with primacy over national courts.⁹⁴ These opinions did not prevail over the one that the ICC should be a complement to national jurisdictions, and the principle of complementarity conquered. The question

⁸⁹ Holmes, John T., 'The principle of complementarity', in Lee, Roy S. (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague, 1999, page 41.

⁹⁰ Farbstein, *supra* note 65, page 51.

⁹¹ *Ibid.*, page 20.

⁹² Holmes in Lee, *supra* note 89, page 74.

⁹³ Statements in the Preparatory Committee on the Establishment of an International Criminal Court by the representatives of Australia, Jamaica, Norway and the Netherlands, UN Press Release L/2779 of 8 April 1996.

⁹⁴ *Appeals Decision on Jurisdiction*, *supra* note 35, page 36, para. 58.

that still had to be solved was “how, where, to what extent and with what emphasis should complementarity be reflected in the ICC-Statute”.⁹⁵

During the March-April session 1996 of the Preparatory Committee the first discussions of complementarity occurred.⁹⁶ The views were many and varying. The 1994 draft Statute set out the principle in the preamble, which was “emphasising further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.”⁹⁷ France and Israel wanted the court to operate when prosecution at the national level was not possible due to the non-existence or non-functioning of domestic jurisdictions. Morocco said that national jurisdiction should have primacy before the court, but if they were unable to play its proper role the court should step in. When it came to the issue of how complementarity should be implemented in the Statute France, Israel, Ireland, The Czech Republic, The Netherlands, China and the US wanted the principle of complementarity to be mentioned in the operative parts of the Statute itself. Finland required a “balanced approach” to complementarity. It argued that too much emphasis on safeguarding national jurisdictions would undermine the competence of the court.⁹⁸

During the 1996 PrepCom sessions there were many criticisms among the delegations about the unclear definitions of the principle of complementarity in the 1994 ILC Draft Statute.⁹⁹ Due to this and because Canada, Germany, Italy, Singapore and Japan submitted new proposals concerning this issue, the Chairman of the PrepCom asked in the beginning of the 1997 August session, the head of the Canadian delegation, Mr. *John Holmes*, to coordinate informal consultations on complementarity.¹⁰⁰ At the end of the August session the PrepCom approved the new coordinated draft article on complementarity. More provisions were added to this draft article and the terms “unwilling” and “unable genuinely” were born.¹⁰¹ The progress of complementarity continued during the Inter-Sessional Meeting in Zutphen,¹⁰² in the final draft,¹⁰³ and during the Rome Conference.

⁹⁵ Tallgren, Immi, ‘Completing the “International Criminal Order”’, *Nordic Journal of International Law*, Volume 67, No. 2, 1998, page 121.

⁹⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), United Nations General Assembly Official Records, Fifty-first Session, Supplement No. 22, A/51/22 (1996), paras. 36-41.

⁹⁷ 1994 ILC Draft Statute, *supra* note 71, Third paragraph, Preamble.

⁹⁸ Preparatory Committee on Establishment of an International Criminal Court, 11th Meeting, 1 April 1996.

⁹⁹ El Zeidy, Mohammed, ‘The Principle of complementarity: A new machinery to implement international criminal law’, *Michigan Journal of International Law*, Volume 23, Summer 2002, page 893.

¹⁰⁰ Holmes in Lee, *supra* note 89, page 894.

¹⁰¹ Decisions taken by the Preparatory Committee on the Establishment of an International Criminal Court at its forth Session held from August 4 to 15, 1997, A/AC.249/1997/L.8/Rev.1 (1997), paras. 10-11, Article 35(2).

¹⁰² Preparatory Committee on the Establishment of an International Criminal Court, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, U.N. Doc. A/AC.249/1998/L.13 (1998), paras. 41-43, Article 11.

4.2 The principle of complementarity in the Rome Statute

The principle of complementarity could be described as providing “the key for unlocking the doors to the ICC”,¹⁰⁴ because it establishes which cases will be admissible before the Court. The principle is one of the cornerstones of the ICC.¹⁰⁵ It defines the relationship between the ICC and national courts. When national courts are unwilling or unable to genuinely carry out investigations and prosecutions of the most serious crimes of concern to the international community as a whole, the ICC will do it instead.¹⁰⁶ Thus, the principle fills the gap.¹⁰⁷ There exist two underlying reasons for this direction and these are that (1) the ICC cannot deal with too many cases, and (2) respect for State sovereignty.¹⁰⁸ The first reason was due to the fact that it was considered healthy to leave the majority of cases concerning international crimes to national courts, which can correctly assert their jurisdiction based on a link with the case (territoriality, nationality) or on the principle of universality.¹⁰⁹

The crimes of most serious concern to the international community as a whole are the crimes that will be within the jurisdiction of the Court, and they are found in Article 5 of the Rome Statute:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.

The crimes have to be committed after the entry into force of the Statute and be committed by a natural person over the age of eighteen.¹¹⁰ The crime of aggression is still under negotiation at the ICC’s Preparatory Commission, though the State Parties cannot agree on a definition.¹¹¹ The ICC will exercise jurisdiction over the crime of aggression once it has been defined in accordance with Articles 121 and 123 of the Statute. Other crimes, like terrorism and trafficking of illicit drugs, represent serious problems for States. Therefore the Rome Conference adopted Resolution E in its Final

¹⁰³ Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 75, Article 15.

¹⁰⁴ Jensen, *supra* note 25, page 2.

¹⁰⁵ Holmes in Lee, *supra* note 89, page 73.

¹⁰⁶ Rome Statute, *supra* note 82, Article 1 and Article 17.

¹⁰⁷ Jensen, *supra* note 25, page 2.

¹⁰⁸ Cassese, *supra* note 6, page 351.

¹⁰⁹ *Ibid.*

¹¹⁰ Rome Statute, *supra* note 82, Articles 11, 24, 25 and 26.

¹¹¹ The International Criminal Court’s website, *ICC at a glance, Questions and Answers*, www.icc-cpi.int/php/show.php?id=faq#faq4, last visited on 24 July 2004.

Act. Because of this the issues of these crimes shall be taken up at a Review Conference, with the view to their final inclusion in the jurisdiction of the ICC.¹¹²

The principle of complementarity defers to States the primary responsibility for investigating and prosecuting the crimes set out in article 5 in the Statute.¹¹³ The ICC is complementary or subsidiary to national courts, and it is only under certain circumstances that the ICC is entitled to take over cases. First of all, it is up to the national jurisdictions to certify that justice will be accomplished and if they fail the ICC will assert jurisdiction over the case. If States fulfil their obligations under international law by investigating and prosecuting every crime set out in the Rome Statute, then the ICC via the principle of complementarity, recognising the primacy of national jurisdictions, will not have any cases to deal with.¹¹⁴ Complementarity is addressed in the Preamble and Article 1, and in greater detail in Articles 12 through 15 and 17 through 18.¹¹⁵ It is also dealt with in Article 19 and Article 20 of the Statute.

4.2.1 Complementarity in the Preamble and Article 1

The first meeting with the principle of complementarity is in the Preamble of the Rome Statute. Even though the Preamble is not within the operative part of the Statute, it shows the role of the Court and commitments of States.¹¹⁶ The Preamble says “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹¹⁷ This is to remind the international community that without action by States, the duty to prosecute will be transferred to the Court under the principle of complementarity.¹¹⁸

In the tenth paragraph of the Preamble the first clear reference to the principle of complementarity appears, and it is emphasizing that the International Criminal Court, established under this Statute, shall be complementary to national criminal jurisdictions.¹¹⁹ It proves that the principle is an important ingredient of the functioning of the ICC, and it is also the foundation for complementarity in Article 17 of the Rome Statute.¹²⁰ The principle of complementarity is also part of Article 1 of the Statute. This article states that an International Criminal Court has been established and that the Court “shall be a permanent institution and shall

¹¹² Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Done at Rome on 17 July 1998, (U.N. Doc. A/CONF.183/10), Final Act, Annex 1, Resolution E.

¹¹³ Jensen, *supra* note 25, page 1.

¹¹⁴ Holmes, John T., ‘Complementarity: National Courts *versus* the ICC’, in Cassese, Antonio; Gaeta, Paola and Jones, John R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, Oxford 2002, page 667.

¹¹⁵ Farbstein, *supra* note 65, page 52.

¹¹⁶ *Ibid.*

¹¹⁷ Rome Statute, *supra* note 82, The sixth paragraph, Preamble.

¹¹⁸ Farbstein, *supra* note 65, page 52.

¹¹⁹ Rome Statute, *supra* note 82, Preamble.

¹²⁰ Farbstein, *supra* note 65, page 52.

have power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.”¹²¹

4.2.2 Complementarity in Article 12

The Statute makes a distinction between the two related terms: jurisdiction and admissibility. Jurisdiction deals with the legal conditions of the ICC’s work, in terms of subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*), space (jurisdiction *ratione loci*), and over individuals (jurisdiction *ratione personae*). The preconditions to the enforcement of jurisdiction are the important foundation for the principle of complementarity. The ICC must first establish that it has jurisdiction over a particular case and then the principle of complementarity will conclude if the Court can initiate proceedings in that case. The ICC has the obligation to satisfy its jurisdiction over a case, but may, on its own motion, consider the issue of admissibility, and this is concluded in Article 19 of the Rome Statute. The article deals with challenges to the jurisdiction of the Court or the admissibility of a case. Questions of and challenges to the jurisdiction and the admissibility can be raised by the Court, the accused, a State with jurisdiction over the case, a State from which acceptance of jurisdiction is required under Article 12, or the Prosecutor.¹²²

Article 12 of the Rome Statute deals with the so-called “inherent” or “automatic” jurisdiction over the crimes in the Statute and outlines the preconditions to the enforcement of jurisdiction. This article was one of the most controversial during the negotiations in Rome. It has close ties with Article 5 on subject matter jurisdiction, Article 13 on the enforcement of jurisdiction and with Article 17 on admissibility. These articles deal with the delicate balance between State sovereignty and the proper functioning of the ICC. The concept of “inherent” or “automatic” jurisdiction is not clear. “Automatic” jurisdiction implies that additional consent of the Court’s jurisdiction is not necessary once States have consented to the Court’s creation. “Inherent” means that there is no need for State consent because the jurisdiction is already a natural and permanent part of the Court. It is a complicated concept, but when talking about “inherent” or “automatic” jurisdiction, it refers to the Court’s competence to try a suspect without having to depend on various States consenting to its jurisdiction.¹²³

A key difference with the predecessors to the ICC is that the Court is created with the consent of those who will themselves be subject to its jurisdiction.¹²⁴ The draft history of Article 12 shows how divided these negotiating parties were.¹²⁵ During the Rome Conference some States wanted the Court to be able to investigate and prosecute a suspect without

¹²¹ Rome Statute, *supra* note 82, Article 1.

¹²² *Ibid.*, Article 19(1)-(3).

¹²³ Miskowiak, *supra* note 73, page 20.

¹²⁴ Schabas, William, *An introduction to the International Criminal Court*, Cambridge, 2001, page 54.

¹²⁵ Farbstein, *supra* note 65, page 53 *et seq.*

first having to obtain State consent. They wanted “inherent” jurisdiction of the Court. Other States emphasised that the Court should be obliged to seek State consent in every case.¹²⁶ The sixth and final session of the Preparatory Committee on the Establishment of an International Criminal Court from 16 March to 3 April 1998, was significantly concerned with questions of jurisdiction. Four different approaches for the acceptance of the jurisdiction of the ICC were discussed:

- (1) Each State party would be able to choose to or not to accept the jurisdiction of the ICC over all or some of the crimes within the Court’s jurisdiction.
- (2) State consent regime, that certain States, for example the custodial State, territorial State and the nationality (active and passive) States, would have to give their consent before the ICC could exercise its jurisdiction in a specific case.
- (3) Each State party would accept the “inherent” or “automatic” concurrent jurisdiction of the ICC by ratification of the Statute for all the core crimes and for every situation that the ICC investigates or prosecutes.
- (4) The ICC would exercise universal jurisdiction over the core crimes, just as its State parties can do under international law.¹²⁷

Approach (3) prevailed and was implemented in Article 12(1), which provides that “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” This shows that the ICC has “inherent” or “automatic” jurisdiction, which is approved by States. There exist preconditions to this jurisdiction. It was agreed upon in paragraph 2 of Article 12 that the ICC may exercise its jurisdiction if one of the crimes in Article 5 has been committed on the territory of a Party to the Statute (regardless of the nationality of the offender), or if the accused person is a national of a State that has signed and ratified the Statute. The Statute extends the definition of territory to include crimes onboard a vessel or aircraft. If the acceptance of a State not Party to the Statute is required under 12(2), that State can accept the exercise of jurisdiction in respect to the crime in question on *ad hoc* basis.¹²⁸

Due to the preconditions to the exercise of the Court’s jurisdiction several cases would fall outside the scope of the Court’s jurisdiction. Acceptance of the Court’s jurisdiction by the custodial State or the State of the victim (passive personality principle), does not give the ICC jurisdiction. Accordingly, if neither the territorial State nor the nationality State are parties to the Rome Statute or do not consent on an *ad hoc* basis and if there is no Security Council referral, violators of the Article 5-crimes do not have

¹²⁶ Miskowiak, *supra* note 73, page 26 *et seq.*

¹²⁷ Hall, Christopher Keith, ‘The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court’, *The American Journal of International Law*, Volume 92, 1998, page 549.

¹²⁸ Rome Statute, *supra* note 82, Article 12(3).

to be concerned about falling within the jurisdiction of the ICC. This will be the situation even if these perpetrators would be in the custody of a State party to the Statute or of a State whose nationals have been killed by the perpetrator.¹²⁹ An example to show this is:

“A Chilean general suspected of having committed torture in Chile as part of a widespread practice (a crime against humanity) arrives in Denmark. If:

- (a) Chile, as both the territorial state and the state of nationality of the suspect, is not a party to the Statute, and does not accept the Court’s jurisdiction with respect to the crimes in question; and then even if
- (b) Denmark as the custodial state is a party to the Statute or consents to the International Criminal Court’s jurisdiction in the particular case;

The question of the general’s guilt *cannot* be tried before the Court.”¹³⁰

Danish courts would have jurisdiction over the case and would have to extradite or try the general because Denmark has ratified the Torture Convention.¹³¹ However the ICC would not be competent to consider the case.¹³² The reasons for that will be elaborated on below.

It is not always necessary that non-party States accept the jurisdiction of the ICC for its nationals to become subjects to trials in front of the Court. Paragraph 12(2) states that if either the territorial State *or* the State of which the person accused of the crime is a national, accepts the jurisdiction of the Court, the Court can exercise its jurisdiction. If an accused person, who is a national of a State that has not accepted the Court’s jurisdiction, is captured in a State Party to the Statute or in a State that has accepted the Court’s jurisdiction with respect to the alleged crime, this person could be subject of a trial before the ICC, if one of these States is the territorial State, or have accepted the Court’s jurisdiction on *ad hoc* basis.¹³³ A possible example is:

“An American serviceman has committed war crimes of a serious nature on a large scale in Iraq. If:

- (a) the United States has failed to genuinely prosecute him for the crimes; and
- (b) neither the United States nor Iraq is a party to the Statute but Iraq decides to accept the Court’s jurisdiction with respect to the crime in question; then

the Court would have jurisdiction over the case.”¹³⁴

The example will be elaborated more in detail below. The US feared this scenario, and this is one of the reasons why the US is one of the seven

¹²⁹ Kaul, Hans-Peter, ‘The Continuing Struggle on the Jurisdiction of the International Criminal Court’, in Fisher, Horst; Kre , Claus; Lüder, Sascha Rolf (eds.), *International and National Prosecution of Crimes under International Law, Current Developments*, Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Band 44, Berlin, 2001, page 25.

¹³⁰ Miskowiak, *supra* note 73, page 25.

¹³¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature by General Assembly Resolution 39/46 of 10 December 1984, 1465 U.N.T.S. 85. For ratification status, *see* untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp, last visited on 24 July 2004.

¹³² Miskowiak, *supra* note 73, page 25.

¹³³ *Ibid.*, page 26.

¹³⁴ *Ibid.*

countries in the world voting against the Treaty for an International Criminal Court.¹³⁵ On 31 December 31 2000, the US Ambassador-at-large for War Crimes Issues, *David J Scheffer*, signed the Rome Statute, but the US has still not ratified it. Before the enforcement of the Rome Statute in July 2002, the US started a campaign against the ICC in which it claimed that the Court could be used as an instrument for politically motivated prosecutions against nationals of the United States. One part of this campaign is to conclude bilateral immunity agreements with countries to prohibit the surrender of US citizens to the Court. The US claims that these bilateral agreements are based on Article 98 of the Rome Statute.¹³⁶ This article exists to prevent possible discrepancies that can come out of previous existing agreements, which obliges States to return foreign nationals when a crime allegedly has been committed, and cooperate with the Court. The second paragraph of the article deals with these possible discrepancies in accordance with the principle of complementarity, though it gives the country of the accused the first opportunity to investigate and prosecute an alleged crime of genocide, war crimes or crimes against humanity.¹³⁷ Several legal experts mean that the bilateral agreements sought by the United States are contrary to the intention of the Rome Statute's drafters, to the language of Article 98 itself and to the overall purpose of the ICC.¹³⁸ It is up to the ICC to decide if these agreements are valid or not, but most likely the Court will declare them invalid because it seems that the United States has used the opening in Article 98 in a way that was not meant by the drafters of the Statute.

There is one exception to the "inherent" or "automatic" jurisdiction of the Rome Statute. Article 124 of the Rome Statute says that when becoming a party to the Statute, notwithstanding paragraph 1 and 2 of article 12, the State can declare that it "for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory." A State is therefore able to opt out of the war crimes jurisdiction of the Court when it comes to its nationals or crimes committed on its territory for seven years after the Statute enters into force for that State. It is indeed a strange situation that is created when a State that is not a party to the Rome Statute can be subject of the jurisdiction of the ICC for war crimes, but a State party can opt out of war crimes. The result is that States not parties to the Statute can be more bound by the ICC's jurisdiction than State parties to it.¹³⁹

¹³⁵ Scharf, Michael P., 'The ICC's jurisdiction over the nationals of non-party States: A critique of the U.S. position', *Law and Contemporary Problems*, Volume 64, Winter 2001, page 68.

¹³⁶ Coalition for the International Criminal Court's website, 'US and the ICC', www.iccnw.org/documents/usandtheicc.html, last visited on 24 July 2004.

¹³⁷ Coalition for the International Criminal Court's website, 'U.S. Bilateral Immunity or so-called "Article 98" Agreements', www.iccnw.org/pressroom/factsheets/FS-BIAsSept2003.pdf, last visited on 24 July 2004, page 3.

¹³⁸ *Ibid.*

¹³⁹ Miskowiak, *supra* note 73, page 30.

4.2.3 Complementarity in Article 13

During the Rome Conference the majority favoured a strong and independent Prosecutor, but with some limitations to hinder power abuses. This was based upon the fear that complaints from States and referrals from the Security Council would not be enough for the Court to represent the international community as a whole. These States wanted the ICC Prosecutor to have the same independence as the Prosecutor of the ICTY and ICTR to commence investigations, when a State or the Security Council had brought a situation to the Prosecutor's attention.¹⁴⁰ This direction was implemented in Article 13 of the Rome Statute and therefore is the ICC able to exercise its jurisdiction by referrals from States or the Security Council through the Prosecutor, or through *proprio motu* investigations initiated by the Prosecutor. Article 13 outlines the conditions for referral to the Prosecutor by the Security Council, acting under Chapter VII, of a situation in which one or more of the crimes in Article 5 appears to have been committed. When the Security Council refers a situation, the Court's powers concerning territorial and nationality limitations on jurisdiction in Article 12 increases. No State consent is required, not even from nationals of States not party to the Statute. The ICC is then fully capable of exercising jurisdiction over the case, in a similar manner to the permanent *ad hoc* Tribunals as the ICTY and the ICTR.¹⁴¹

The Prosecutor can initiate *proprio motu* investigations by analysing the seriousness of received information and concluding that it is reasonable to continue with an investigation, and he or she shall submit a request for the authorization of an investigation to the Pre-Trial Chamber.¹⁴² Several *proprio motu* investigations will be commenced due to information given to the Prosecutor by victims.¹⁴³ There are three aspects that the Prosecutor must consider when determining whether there is a reasonable basis for starting an investigation, and they are: (1) that a crime within the Court's jurisdiction has been or is being committed; (2) that the case would be inadmissible under the complementarity regime in article 17; (3) and that the case would serve the interests of justice.¹⁴⁴ The second aspect, that the case would be inadmissible under the complementarity regime under article 17, shows the importance of the principle of complementarity, even in the commencement of the proceedings.¹⁴⁵ The *proprio motu* role of the Prosecutor certifies that cases come before the Court, because States can be reluctant for different reasons to make complaints before the Court, and that

¹⁴⁰ Hall, Christopher Keith, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', *The American Journal of International Law*, Volume 92, 1998, page 132.

¹⁴¹ Mirceva, Stojanka, Global Policy Forum, 'Why the International Criminal Court is Different', page 5, www.globalpolicy.org/intjustice/icc/2004/0126different.htm, last visited on 24 July 2004.

¹⁴² Rome Statute, *supra* note 82, Article 13(c) and Article 15.

¹⁴³ Holmes in Cassese, Gaeta and Jones (eds.), *supra* note 114, page 680.

¹⁴⁴ Rome Statute, *supra* note 82, Article 53.

¹⁴⁵ Holmes in Cassese, Gaeta and Jones (eds.), *supra* note 114, page 680.

one of “the big five” in the Security Council can use its veto-power. Article 13 is an important element of the jurisdiction system and the complementarity regime. The Court may exercise jurisdiction over the Article 5-crimes under this article, and it balances between State sovereignty and the imperative trigger mechanisms that permits the ICC to exercise jurisdiction over cases involving gross human rights violations.¹⁴⁶

Another challenge for the Prosecutor is Article 18 of the Rome Statute, which deals with preliminary rulings regarding admissibility. It contains a lengthy list of factors that the Prosecutor must find existent before initiating an investigation. An example of such a factor is the requirement that all State Parties and those States, which would normally exercise jurisdiction over the crimes concerned, will be submitted information at an early stage about the referral of a situation to the Prosecutor by a State party, and that the Prosecutor has concluded that a reasonable basis exists to start an investigation or the Prosecutor has initiated a *proprio motu* investigation.¹⁴⁷ This article establishes an extra step on the complementarity regime, which occurs before a specific case has been recognized.¹⁴⁸ Article 18 is based on a proposal from the US.¹⁴⁹ The US feared being faced with politically motivated Prosecutor and had the opinion that it was logical that “when an investigation of an overall situation is initiated, relevant and capable national governments be given an opportunity under the principle of complementarity to take the lead in investigating their own nationals or others within their jurisdiction.”¹⁵⁰ This article can be explained “as a further procedural filter to the benefit of States’ sovereignty.”¹⁵¹

4.2.4 Complementarity in Article 17

The Rome Statute’s Article 17 deals with issues of admissibility and is the anchor of the complementarity regime. The article explicitly refers to the Preamble and Article 1, and it takes care of the practical operation of the principle of complementarity. Article 17 establishes that the ICC cannot assert its jurisdiction over a case, when a State is investigating or prosecuting the crimes in Article 5 in good faith, which thus demonstrates that the Court is complementary to national criminal jurisdictions.¹⁵² Paragraph (1)(a) of Article 17 states that a case is inadmissible, when “[t]he case is being investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution”. Paragraph (1)(b) gives another reason for declaring a case inadmissible, and that is if the case has been investigated

¹⁴⁶ Farbstain, *supra* note 65, page 63.

¹⁴⁷ Rome Statute, *supra* note 82, Article 18(1).

¹⁴⁸ Holmes in Cassese, Gaeta and Jones (eds.), *supra* note 114, page 681.

¹⁴⁹ Proposal Submitted by the United States of America: Preliminary rulings regarding admissibility, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/WG.3/DP.2.

¹⁵⁰ Scheffer, David J., ‘The United States and the International Criminal Court’, *The American Journal of International Law*, Volume 93, No. 12, 1999, page 15.

¹⁵¹ El Zeidy, *supra* note 99, page 906.

¹⁵² Farbstain, *supra* note 65, page 64.

by a State that 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. A third ground for determining whether a case is inadmissible if the accused person already has been subject to a trial for the same offence, and a fourth ground is if the case is not of such gravity that it is justified for the ICC to try it.¹⁵³ Since Article 17 states that “the Court shall determine that a case is inadmissible”, it is up to the Court to determine, based upon its interpretation and application of the Statute, whether a State is willing and able to carry out the investigation or prosecution. The two terms “unwilling” and “unable” are explained in paragraph 2 and 3 of Article 17, but it falls totally within the competence of the Court as to how to interpret the term “genuinely”.¹⁵⁴ The term “genuinely” is linked to both the “unwillingness” and the “inability”, because the Court must be satisfied that the willingness or ability to investigate or prosecute a case was not genuine.¹⁵⁵

A national justice system is unwilling, when it publicly assumes the inquisitorial and prosecutorial roles without a genuine intention to fulfil in reality, or when it indulges in a sham trial just to bar the accused from further trials because of the rule of double jeopardy.¹⁵⁶ Unwillingness also arises when there has been an unjustified delay in the proceedings, which actually shows that the national authorities do not intend to bring the accused person to justice, when there exists no independence or impartiality in the proceedings or in any other case when the manner reveals that there is no intent to bring the accused to justice.¹⁵⁷ A good example of when unwillingness is likely to arise is when a government that has committed gross human rights violations is still in power.¹⁵⁸ The underlying premise for inability in the Statute is the situation of a collapse of the institutions, including the judicial ones, of a State. The State can be willing to investigate or prosecute, but it does not have the ability to do so.¹⁵⁹ A State is unable to carry out the investigation or prosecution, when it cannot obtain the accused person, necessary evidence and testimony or any other reason for inability. Another example of when a State is unable to investigate and prosecute is when national legislation makes it impossible for the judge to initiate proceedings against an accused person because of, for example, an amnesty law or a statute of limitation.¹⁶⁰ Inability will also be likely to occur when there is anarchy or serious turmoil within a State, and in situations in which the government does not have control over its police.¹⁶¹

¹⁵³ Rome Statute, *supra* note 82, Article 17(1)(c) and (d).

¹⁵⁴ Schabas, *supra* note 124, page 67.

¹⁵⁵ Holmes in Cassese, Gaeta and Jones (eds.), *supra* note 114, page 674.

¹⁵⁶ Schabas, *supra* note 124, page 68.

¹⁵⁷ Cassese, *supra* note 6, page 352.

¹⁵⁸ Miskowiak, *supra* note 73, page 48.

¹⁵⁹ Holmes in Cassese, Gaeta and Jones (eds.), *supra* note 114, page 677.

¹⁶⁰ Cassese, *supra* note 6, page 352.

¹⁶¹ Miskowiak, *supra* note 73, page 48.

A State can never totally ascertain that its nationals will not become subjects to trials in other States, and due to that it cannot be assured that its nationals will not become subject of a trial in front of the ICC. Because Article 17 uses the term “State” and not “State Party”, the article can be applied to States that are not part of the Rome Statute. Back to the American serviceman in the example above, who is accused of committing war crimes on the territory of Iraq. He is captured in Iraq. The ICC would not have jurisdiction over the case because neither the US nor Iraq have ratified the Rome Statute. This situation changes if Iraq decides to accept the jurisdiction of the Court over war crimes on an *ad hoc* basis due to Article 12(3). If Iraq is unwilling or unable to genuinely investigate or prosecute the case, the principle of complementarity steps in and the ICC has jurisdiction over the US national.

The US could block the enforcement of jurisdiction by the ICC by making sure that the crimes in Article 5 of the Rome Statute are crimes within its national criminal legislation. After that, if necessary, it can investigate and prosecute in good faith every potential breach of those crimes within its own legislation. By doing this, the US ascertains that none of its citizens will become subject to trial in front of the Court, because the principle of complementarity makes the case inadmissible before the Court. The US argued that even if they carry out an investigation, as a non-party to the Statute, the ICC could decide under the principle of complementarity that this investigation was not genuine and initiate its own investigation, despite the fact that the US is not obliged to cooperate with the Court because it has not ratified the Rome Statute.¹⁶² The US has little to fear here. If the US is investigating and prosecuting violations of the crimes in Article 5 in good faith, it will be very hard, almost impossible, for the ICC to prove that the US is unwilling or unable, and the principle of complementarity will not provide the ICC with jurisdiction.

The American serviceman commits war crimes in a State that has ratified the Rome Statute, and thereafter he escapes to Iraq where he is captured. Iraq has accepted the jurisdiction of the ICC on *ad hoc* basis for the crime in question. The ICC would not have jurisdiction over the American serviceman if Iraq claims jurisdiction over the case on the ground that the crime is provided for in an international treaty and that the suspect is present on the territory of Iraq, or on the ground of universality. If it is proved that Iraq is willing and able to conduct a proper and fair trial the ICC may not exercise its jurisdiction because of the principle of complementarity.¹⁶³ If Iraq is unwilling or unable to investigate or prosecute the case, the big question is if the complementarity principle applies to the exercise of the principle of universal jurisdiction and other extraterritorial jurisdictions, or if it only applies to the exercise of territorial jurisdiction? The Rome Statute does not specify which kind of national system the Court should consider in this situation. It is up to the Court to answer this, and the answer will have a

¹⁶² Scheffer, *supra* note 150, page 19.

¹⁶³ Cassese, *supra* note 6, page 352.

huge impact on the exercise of universal jurisdiction.¹⁶⁴ Most likely the answer will be that the principle of complementarity applies when the territorial State or the State of the nationality of the suspected perpetrator are parties to the Rome Statute or when a State consent to the Court's jurisdiction on an *ad hoc* basis or there is a Security Council referral. If not, Denmark could transfer the Chilean general in the example above to ICC, and that would be to far-reaching and against the intention of the drafters of Rome Statute. The ICC will only have jurisdiction if the crime was committed on the territory of a State party or if the criminal is a national from a State party. The American serviceman will not be subject to a trial on the basis of universality in front of the ICC.

4.2.5 Complementarity in Article 20

Article 20 is serving another ground for inadmissibility, the principle of *ne bis in idem*. It is a natural consequence of the principle of complementarity in Article 17, because it also hinders the Court from exercising its jurisdiction when a domestic court already has asserted its jurisdiction. Article 20 deals with cases that have already been tried, while Article 17 handles investigations and prosecutions. The first paragraph of Article 20 states "except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court." There is two exceptions to this provision: if the proceedings were for the purpose of shielding the person concerned, or if the proceedings were not otherwise conducted "independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."¹⁶⁵ This provides the Court with indirect guidelines to supplement those given in Article 17 to define complementarity, because the paragraph deals with unwillingness to investigate and prosecute the crimes referred to in article 5 of the Statute.¹⁶⁶ It will be a challenge for the Prosecutor to meet this test in order to initiate an investigation.¹⁶⁷

4.3 Conclusion

The principle of complementarity fills the gap when national jurisdictions are unwilling or unable to investigate perpetrators of genocide, crimes against humanity, war crimes and aggression, because it provides the ICC with the competence to investigate or prosecute instead. The principle is the

¹⁶⁴ Universal Jurisdiction Information Network, 'What is Universal Jurisdiction? Relationship with the International Criminal Court', www.universaljurisdiction.info/index/78781,78003, last visited on 24 July 2004.

¹⁶⁵ Rome Statute, *supra* note 82, Article 20(3).

¹⁶⁶ Miskowiak, *supra* note 73, page 49.

¹⁶⁷ Gillhoff, Nikola, 'National State and International Criminal Justice – How much sovereignty has to be transferred?', in Roggemann, Hedwig; Sarcevic, Petar, (eds.), *National Security and International Criminal Justice*, The Hague, 2002, page 99.

outcome of the struggle between “Court-friendly” and “Court-unfriendly” States. The operative parts of the principle contain provisions that will facilitate the Court’s work ensuring that gross human rights violators do not go unpunished but also of provisions that will make this work much harder. Before declaring a case admissible the ICC must establish that it has jurisdiction over the specific case.

The “Court-unfriendly” States were successful in the negotiations over the complementarity regime because of many reasons. One reason is the possibility to reserve from war crimes according to Article 124. Other reasons are the standstill on aggression and the many challenges for the Prosecutor before launching the investigation. Their biggest victory was a jurisdiction limited to crimes committed on the territory of State parties or by nationals of States parties. This limitation precludes many cases from the ICC’s jurisdiction, and contributes to the impunity for the perpetrators of serious international crimes.

The “Court-friendly” States also had successes. One is that the Prosecutor can initiate *proprio motu* investigations, which makes him strong and independent. Another success is that nationals of a non-party State can become subject of a trial before the ICC. For instance if a national of a non-party State commits a crime on the territory of a State party or on the territory of a State which accepts the ICC’s jurisdiction in respect to the crime in question on *ad hoc* basis. If that State is unwilling or unable to investigate or prosecute the non-party State national, the principle of complementarity provides the ICC with jurisdiction instead. The US has tried to prevent that nationals of non-party States can become subjects to the ICC’s jurisdiction by concluding bilateral agreements with States, which prohibits the surrender of US nationals to the ICC. If these bilateral agreements are accepted and followed, it will be proof that the principle of complementarity is not as strict as it first seemed. This is due to the fact that in that case there exists a way to totally prevent the Court from exercising jurisdiction over nationals from a specific State. Time will tell if these agreements are valid or not, because it is the ICC that has to decide this. Probably the Court will reach the conclusion that the bilateral agreements are against the meaning of Article 98 and the Rome Statute itself. Then the ICC can even have jurisdiction over US nationals and over nationals from other States that have not ratified the Rome Statute. This is in accordance with the determination of the international community to fight the impunity of perpetrators of gross human rights violations.

States can hinder the ICC from declaring a case admissible by being willing and able to investigate and prosecute the crimes within the jurisdiction of the Court. This is in accordance with Article 17 of the Rome Statute. This core provision of the principle of complementarity will probably create a lot of case law, because it will be hard for the Court to prove that a State is unwilling or unable. The admissibility article will not only be the instrument to block the enforcement of the Court exercising jurisdiction over nationals of non-party States, but will also contribute to the fight against impunity

because the ICC will only be blocked if a State investigates or prosecutes in good faith. Even if a case has already been tried the principle of complementarity can make the case available for the ICC if the proceedings are not performed in good faith. This is another provision for the fight against impunity because not even a conviction can protect perpetrators of gross human rights violations. If a State is willing and able to prosecute a person suspected of having committed the core crimes of the Rome Statute, the complementarity regime offers a high wall of protection that the national criminal jurisdictions have absolute priority. This is positive because otherwise the ICC would have to deal with too many cases. That would probably make it impossible to investigate and prosecute every gross human rights violator.

5 The principle of universal jurisdiction

5.1 The evolution of the principle of universal jurisdiction

Piracy is often mentioned as the most ancient crime to offend the interest of all mankind. Together with brigandage (banditism), war crimes and slave trading, they have been the first crimes discussed as being subjects of universal jurisdiction. Universal jurisdiction over piracy on the high seas began to be asserted by States in the 16th century. Piracy is now codified in the 1982 Convention on the Law of the Sea, and it is widely accepted that States may assert universal jurisdiction over piracy.¹⁶⁸ The concept of universal jurisdiction over international crimes has been seriously discussed since the Nuremberg Trials.¹⁶⁹ Parallel to the trials of major war criminals by the Nuremberg Tribunal, national courts would try lower level criminals. More than 1000 trials against persons accused of crimes against peace, war crimes or crimes against humanity in Europe were performed by Allied national tribunals after World War II under the authorisation of the Allied Control Council Law No. 10.¹⁷⁰ The trials were partly based on universal jurisdiction. Because of lost political will many governments in Western Europe decided after a while to prevent further prosecutions of these kind.¹⁷¹ The exception was Germany and Israel, and an example is the famous *Eichmann* case.¹⁷²

A revival of prosecutions of suspected perpetrators of genocide, crimes against humanity and war crimes committed in Europe during World War II living in Australia, Canada, the United Kingdom, the United States and other Western countries, occurred in the 1980s due to public opinion. This public pressure led to some prosecutions based on universal jurisdiction in Australia (*Polyukhovich*,¹⁷³), Canada (*Finta*¹⁷⁴) and the United Kingdom

¹⁶⁸ Broomhall, Bruce, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of law*, Oxford, 2003, page 23.

¹⁶⁹ Sharma, Vishnu Dutt, 'International Crimes and Universal Jurisdiction', *The Indian Journal of International Law*, Volume 42, 2002, page 142.

¹⁷⁰ Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and humanity, 20 December 1945.

¹⁷¹ Amnesty International's website, 'UNIVERSAL JURISDICTION: The duty to enact and enforce legislation, Chapter Two – The evolution of the practice of universal jurisdiction', page 44 *et seq.*

web.amnesty.org/library/index/engior530042001?OpenDocument, last visited on 24 July 2004.

¹⁷² *Attorney-General of the Government of Israel v. Adolph Eichmann*, (12 December 1961) 36 I.L.R. 18 (Isr. Dist. Ct. – Jerusalem), *aff'd* (27 May 1962) 36 I.L.R. 277 (Isr. Sup. Ct.).

¹⁷³ *Polyukhovich v. The Commonwealth of Australia and Another*, 14 August 1991, 172 *Commonwealth Law Reports* 501 F.C. 91/026.

¹⁷⁴ *R. v. Finta*, Supreme Court of Canada, 24 March 1994, 1 *S.C.R.* 701.

(*Sawoniuk*¹⁷⁵). A parallel development was the adoption of treaties that imposed an *aut dedere aut judicare* duty on State parties to extradite or prosecute. This development had its basis in an increasing concern about politically motivated attacks on civilians and civilian objects (terrorism).¹⁷⁶ Except from this, the exercise of universal jurisdiction for gross human rights violations has been sleeping in the treaty provisions until recently. The growing public concern about the atrocities committed in the former Yugoslavia and Rwanda, the growing successful work of the ICTY and ICTR and the establishment of the ICC, has contributed to the implementation of legislation by several States that enables them to prosecute persons on the basis of universality.¹⁷⁷ This State practice of the principle of universal jurisdiction will be examined in this chapter.

5.2 The principle of universal jurisdiction

Under the principle of universal jurisdiction, courts of any State have the right to try persons who have committed certain serious crimes, regardless of where the crimes were committed or the nationality of the perpetrators or victims. The principle relies on at least two ideas: (1) that some crimes are so heinous that they offend the interest of all mankind (the nature of the crime), and (2) these crimes are often committed by States or those in control of a State, and due to that the perpetrators most probably will go unpunished by the territorial State.¹⁷⁸

If States feel obliged to prevent the perpetrators of serious crimes against the whole mankind, problems may arise if several States assert jurisdiction over the same cases, and above that the International Criminal Court also want to be part of the game. There has to be some principles that resolve these conflicts of concurrent jurisdiction. When several States assert jurisdiction over the same case on the basis of universality a problem arises. Princeton University has proposed a solution to this problem. The Princeton Principles on Universal Jurisdiction is created and formulated to help clarify prosecutions for serious crimes under international law in national courts based on universal jurisdiction, without links to the more traditional jurisdictions based on the active and passive personality principles.¹⁷⁹ The principles are not legally binding; they are only guidelines that are distributed to government officials, judges and legislators around the world as a resource for those seeking to extend international justice. They are

¹⁷⁵ *R. v. Sawoniuk*, United Kingdom, Court of Appeal (Criminal Division), decision of 10 February 2000, in [2000] 2 *Criminal Appeals Reports* 220.

¹⁷⁶ Amnesty International's website, *supra* note 171, pages 10-12.

¹⁷⁷ Kamminga, Menno T., 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', *Human Rights Quarterly*, Volume 23, 2001, page 941.

¹⁷⁸ Sadat, Leila, *The International Criminal Court and the Transformation of International Law: Justice for the new millennium*, United States, 2002, page 109.

¹⁷⁹ *The Princeton Principles on Universal Jurisdiction*, Princeton Project on Universal Jurisdiction, Program in Law and Public Affairs, Princeton University, Princeton, New Jersey, 2001, page 11.

intended to help guide national legislative bodies seeking to enact implementing legislation, to aid judges who may be required to construe universal jurisdiction, and to otherwise assist in promoting international criminal accountability. The principles can be regarded as a tool of guidance for States, which want to implement universal jurisdiction in its legislation. In the future it is possible that the principles can become part of customary international law if many States choose to follow the principles. Principle 8 of the Princeton Principles deals with resolution of competing national jurisdictions. It says that when more than one State that assert jurisdiction over a person, and the custodial State's base for jurisdiction is universality, that State shall, when deciding to prosecute or extradite, base its decision on a balance of the following:

- (a) multilateral or bilateral treaty obligations;
- (b) the place of commission of the crime;
- (c) the nationality connection of the alleged perpetrator to the requesting state;
- (d) the nationality connection of the victim to the requesting state;
- (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
- (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
- (g) the fairness and impartiality of the proceedings in the requesting state;
- (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
- (i) the interests of justice.¹⁸⁰

If the custodial State does not want to prosecute itself under the principle of universal jurisdiction, it has to consider which State is best suited to investigate and prosecute the case, and extradite the suspected person to that State. The Princeton Principles gives reasonable guidelines of how the custodial States will make its choice.

Universal jurisdiction relies on national authorities to enforce prohibitions under international law. However, history has shown the reluctance of these authorities to do so. This reluctance depends on the fact that cases under universal jurisdiction can be expensive and difficult to adjudicate, can create controversies on both the national and international arenas and can be of little importance and connection with the exercising State.¹⁸¹ Another reason for this reluctance is that States involved in armed conflict abroad are not so eager to prosecute their own military and political personnel. A State can also be reluctant to prosecute other States' personnel, because this could potentially draw attention to their own gross human rights violations.¹⁸² Universal jurisdiction can be abused, for example the principle

¹⁸⁰ *Princeton Principles on Universal Jurisdiction*, Principle 8 - Resolution of Competing National Jurisdictions, *supra* note 179, page 32.

¹⁸¹ Broomhall, *supra* note 168, 2003, page 105.

¹⁸² Cassese, Antonio, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", *European Journal of International Law*, Volume 9, 1998, page 580.

can be used to hassle political leaders with politically motivated prosecutions or for purposes and aims contrary to criminal justice.¹⁸³

Treaties with a regime of universal jurisdiction usually define a crime and then oblige all State parties to the treaty, when a suspect comes within their borders, to investigate and, if necessary, to prosecute or to extradite the suspect to a State party that is willing to do so instead. This is the obligation *aut dedere, aut judicare*, the duty to extradite or prosecute. When a State has entered into such a treaty it has this obligation. This is a regime of jurisdictional rights and obligations between the signing and ratifying States of that specific treaty,¹⁸⁴ so this form of jurisdiction is not really universal. It can be referred to as universality by treaty, and it is a restricted universal jurisdiction. Absolute universal jurisdiction provides a State with the ability to “prosecute persons accused of international crimes regardless of their *nationality*, the place of commission of the crime, the nationality of the victim, and even of *whether or not the accused is in custody or at any rate present in the forum State*.”¹⁸⁵

5.3 The International Criminal Court and universal jurisdiction

During the fourth session of the Preparatory Committee Samoa made the statement that, “since all states could exercise universal jurisdiction over core crimes without the consent of any other state, all state parties could cede this universal jurisdiction to the ICC.”¹⁸⁶ During the Rome Conference the US strongly objected that the base for the Court’s jurisdiction should be based on the principle of universal jurisdiction, because then the US would be inhibited from participating in multinational peace operations, including humanitarian missions and interventions.¹⁸⁷ Despite discussions the question as to whether the international criminal court would be able to exercise the same universal jurisdiction over genocide, crimes against humanity and war crimes as a State party to the Statute, was left unanswered. During the Sixth Session, Germany submitted a proposal in an informal discussion paper which suggested that since universal jurisdiction allows States to prosecute crimes within the subject matter jurisdiction (genocide, crimes against humanity, war crimes and aggression) of the Court, the Court should have the same ability as a State party. Germany meant that each State that becomes a party to the Statute would automatically accept the jurisdiction of the ICC, and that States not party to the Statute may accept the jurisdiction of the Court for the core crimes if these States agree to cooperate fully with the ICC without delay or exception. Germany argued that under international law all States are able

¹⁸³ Princeton Principles on Universal Jurisdiction, ‘Introduction to Principles’, *supra* note 179, page 25.

¹⁸⁴ An example of such a treaty is the Torture Convention, *supra* note 131.

¹⁸⁵ Cassese, *supra* note 6, page 286.

¹⁸⁶ Hall, *supra* note 140, page 131.

¹⁸⁷ Bring, *supra* note 9, page 34.

to exercise universal jurisdiction over genocide, crimes against humanity and war crimes and therefore:

“there is no reason why the ICC -established on the basis of a Treaty concluded by the largest possible number of States- should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. . . . Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims, and the place where the crime was committed. This means that, like the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial State or any other State has accepted the jurisdiction of the Court.”¹⁸⁸

During the preparatory procedure and the Rome Conference, Amnesty International lobbied for the Court to have universal jurisdiction over the crimes in the Rome Statute. It argued that:

“Since it is uncontested that each of the three core crimes is a crime of universal jurisdiction, permitting any state to bring to justice those responsible for such crimes without the need for consent by any other state,..., it necessarily follows that each state party may consent to the court exercising that universal jurisdiction without the need for the consent of any other state, including states which are not state parties to the statute.”¹⁸⁹

“To complement the national courts effectively, the court should at least be able to exercise the same universal jurisdiction in any case as a state party has to bring the suspect to justice and, to the extent that such state jurisdiction may be lacking, the statute should fill any gap.”¹⁹⁰

There are some problems with these suggestions of universal jurisdiction. Firstly, there is the question as to whether States can transfer the universal jurisdiction to an international court, and secondly, the question if the crimes of the Rome Statute are subject to universal jurisdiction according to international law.¹⁹¹ There is no widely accepted agreement in international law about which crimes are covered by the principle of universal jurisdiction.¹⁹² It could be argued that there is a steady trend towards the permanent use by States of universal jurisdiction for prosecuting perpetrators for serious international crimes. In the following chapters it will be examined if genocide, crimes against humanity and war crimes are, or are not, regarded as subjects of universal jurisdiction, according to

¹⁸⁸ Extract from Informal Discussion Paper submitted by Germany to the sixth session, of the Preparatory Committee on the Establishment of an International Criminal Court, held from 16 March to 3 April 1998, UN Doc. A/AC.249/1998/DP.2. The extract is available in Hall, *supra* note 127, page 550.

¹⁸⁹ Amnesty International’s website, ‘The International Criminal Court: Making the Right Choices – Part V: Recommendations to the diplomatic conference’, May 1998, AI Index: IOR 40/10/98, page 21, www.amnesty.it/campaign/icc/library/aidocs/IOR401098_2.html, last visited 24 July 2004.

¹⁹⁰ Amnesty International’s website, ‘The International Criminal Court: Making the Right Choices – Part I: Defining the crimes and permissible defences and initiating a prosecution’, London, January 1997, AI Index: IOR 40/001/97, page 8, www.amnesty.it/campaign/icc/library/aidocs/IOR400197.html, last visited on 24 July 2004.

¹⁹¹ Miskowiak, *supra* note 73, page 33.

¹⁹² *Ibid.*, page 34.

customary international law. If these crimes are recognized as *jus cogens* norms then the universality of jurisdiction is applicable to them. To define customary international law it is necessary to examine State practice and *opinio juris*. *Opinio juris* means that States hold the conviction that certain behaviour is permitted under international law.¹⁹³ Statements (*opinio juris*) and action (State practice) of universal jurisdiction will be looked at.

5.4 Transfer of universal jurisdiction

An important question is whether universal jurisdiction can be delegated to a treaty-based collective international court such as the ICC. To answer this question one needs to examine if States are allowed under international law to agree on such a treaty. The *Lotus* case is famous for its pronouncements upon the area of extraterritorial jurisdiction. The Permanent Court of International Justice concluded:

“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”¹⁹⁴

If applying this important and famous judgment to the creation of the ICC the conclusion would be that if there is no treaty or any rule of customary international law that prohibits States to collectively agree upon an establishment of an international criminal court to fulfil the responsibility of not letting perpetrators of serious international crimes go unpunished. Then a State is also allowed to transfer such a person, who is found on the territory of that State. There is no known treaty or rule of customary law that prohibits this kind of agreement, so it is allowed for States to do so.¹⁹⁵

¹⁹³ Malanczuk, *supra* note 1, page 44.

¹⁹⁴ *S.S. Lotus (France v. Turkey)*, Judgment No.9, 1927, P.C.I.J. Series A No. 10, Section III.

¹⁹⁵ Paust, Jordan J., ‘The reach of ICC Jurisdiction over Non-Signatory Nationals’, *Vanderbilt Journal of Transnational Law*, Volume 33, 2000, page 1 *et seq.*

When the IMT was set up France, Great Britain, the US and the Soviet Union agreed to a tribunal on these terms. Germany could not complain against the creation of the IMT and its jurisdiction because the States had only "done together what any of them might have done singly."¹⁹⁶ The Tribunal was created and it did prosecute Germans despite the fact that the crimes were not committed within the territories of the creating States.¹⁹⁷ The General Assembly has declared in a resolution that States shall create bilateral and multilateral instruments to help each other in prosecuting war crimes and crimes against humanity, and that this could also be required for the duty to "detecting, arresting and bringing to trials persons suspected of having committed such crimes".¹⁹⁸ The UN Commission of Experts on the Former Yugoslavia has concluded in a report to the Security Council that "States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal."¹⁹⁹ Due to the fact that a State can be part of the creation of a criminal institution like the IMT and that it can surrender any person on its territory accused of having committed serious international crimes to it, then a State also can be part of the establishment of the ICC and transfer its universal jurisdiction to the ICC.²⁰⁰ The complementarity regime in the Rome Statute restricts this. It is only when a crime has been committed on the territory of a State party or by a national of a State party that the ICC can assert its jurisdiction. Even if there is a possibility under international law to transfer States' universal jurisdiction to an institution such as the Court, the treaty that established the Court does not allow it. States cannot wave its right to rely on the complementarity regime.

5.5 Universal jurisdiction and genocide

Genocide is considered to be a serious crime under international law and subject to universal jurisdiction by the Princeton Principles,²⁰¹ and under the draft Code of Crimes against the Peace and Security of mankind.²⁰² The GA has declared that genocide is an international crime.²⁰³ Article 6 of the 1948 Genocide Convention provides that violators of genocide must be tried by the territorial State or by an international criminal tribunal:

¹⁹⁶ Opinion and Judgment, International Military Tribunal at Nuremberg (1st October 1946), *reprinted in* Paust, Jordan J., *et al*, *International Criminal Law: Cases and Materials*, North Carolina, 1996, pages 900-904.

¹⁹⁷ *Ibid.*

¹⁹⁸ General Assembly Resolution 3074 (XXVIII) of 3 December 1973.

¹⁹⁹ Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274 (1993) *reprinted in* Morris, Virginia; Schraf Michael P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, A Documentary History and Analysis*, Volume II, New York, 1995, page 311.

²⁰⁰ Paust, *supra* note 195, page 2.

²⁰¹ Princeton Principles on Universal Jurisdiction, Principle 2 – Serious Crimes Under International Law, *supra* note 179, page 29.

²⁰² 1996 Draft Code, *supra* note 60, Article 17.

²⁰³ General Assembly Resolution 96(1) of 11 December 1946.

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.²⁰⁴

This article has given rise to the argument that genocide is not subject to universal jurisdiction, and therefore have not so many States gone beyond the Convention and implemented universal jurisdiction for genocide in their legislation.²⁰⁵ The article does not preclude the use of universal jurisdiction by an international criminal tribunal, if such would be created.²⁰⁶ States, which are not parties to the Genocide Convention, are not explicitly prohibited by the Convention from exercising universal jurisdiction over persons accused of having committed genocide. Genocide is a type of offence against international law, and this opens the way to universal jurisdiction to prevent impunity for a crime of universal concern.²⁰⁷ So all in all, the article has been interpreted as concluding the minimum duties for States when genocide occurs, and that universal jurisdiction for genocide is permitted.²⁰⁸ Over one hundred States have ratified the Genocide Convention.²⁰⁹ The ICJ has concluded: “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*” and “that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”²¹⁰ In the *Barcelona Traction* case the ICJ concluded that genocide is an obligation *erga omnes* involving rights which all States have a legal interest in protecting.²¹¹ In the *Siderman* case a US Court concluded that genocide was *jus cogens* norms.²¹²

Two Bosnian Serbs, *Novislav Djajic* and *Nikola Jorgic*, were prosecuted and convicted in Germany for crimes against Muslims committed in former Yugoslavia. *Djajic* was convicted in May 1997 for his role in aiding and abetting in the killing of Muslims in Bosnia 1992.²¹³ He was acquitted of having been an accessory to genocide, because the Bavarian court was

²⁰⁴ Convention on the Prevention and Suppression of the Crime of Genocide, adopted and opened for signature by General Assembly Resolution 260 A (III) of 9 December 1948, entered into force 12 January 1951, 78 U.N.T.S 277.

²⁰⁵ McKay, Fiona, ‘The Redress Trust: Universal jurisdiction in Europe, Criminal Prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide, Seeking Reparation for Torture Survivors’, 30 June 1999, the United Kingdom, page 8, available at www.redress.org/documents/unijeur.html, last visited on 24 July 2004.

²⁰⁶ Princeton Principles on Universal Jurisdiction, ‘Commentary’, *supra* note 179, page 47.

²⁰⁷ *Restatement of the Law (Third), The Foreign Relations Law of the United States*, American Law Institute, Minnesota, 1987, Comment b. on section 404, p.254.

²⁰⁸ Scharf, *supra* note 135, page 86.

²⁰⁹ For ratification status, see www.unhchr.ch/html/menu3/b/treaty1gen.htm, last visited on 24 July 2004.

²¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996 (II)*, page 616, para. 31.

²¹¹ *Barcelona Traction, Light and Power Company, Ltd.*, Judgment, *I.C.J. Reports 1970*, page 32.

²¹² *Siderman de Blake v. Republic of Argentina*, 965 F. 2nd 699, 715 (9th Cir. 1992).

²¹³ *Public Prosecutor v. Novislav Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997.

unable to establish the required intent to destroy, in whole or in part, a national, racial, religious or ethnically distinct group. *Jorgic* was convicted in September 1997 for genocide and murder committed in Bosnia 1992 by the Düsseldorf High Court.²¹⁴ Universal jurisdiction for genocide is provided for the Article 6.1 of the German Penal Code. The German Court concluded that despite the fact that Article 6 of the Genocide Convention does not explicitly provide for universal jurisdiction, the article does not exclude it. This and because the ICTY Statute also included jurisdiction over genocide, to which Germany had established a co-operation law, the Court said that there was no prohibition in international law for prosecution.²¹⁵ The Düsseldorf High Court also sentenced another Bosnian Serb, *Maksim Sokolovic*, in 1999 for having inflicted severe ill treatment on Muslims in Serbia. He appealed, and for the first time the German courts seemed to accept the exercise of universal jurisdiction without a link to Germany. Before, the German courts required some kind of link between the suspect and Germany, for example long-term residency or employment in Germany.²¹⁶ This State practice supports the view that the offence of genocide is subject to universal jurisdiction.

5.6 Universal jurisdiction and crimes against humanity

The Rome Statute codifies for the first time crimes against humanity in a multilateral treaty.²¹⁷ Article 7 defines crimes against humanity as a number of acts, like murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance of persons, apartheid and “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”²¹⁸ The acts should be “committed as a part of a widespread or systematic attack directed against any civilian population with the knowledge of the attack.”²¹⁹ Its definition does leave out a nexus to armed conflict, and because of that it clarifies that crimes against humanity may be committed in both peace- and wartimes.²²⁰

There are some national cases that can be regarded as evidence that crimes against humanity are to be considered as crimes against international law and against the international community as a whole. They are not restricted to the territorial jurisdiction. Two examples are the *Eichmann* case²²¹ and the *Demjanjuk* case²²². In the *Eichmann* case it was made clear that Israel intended to prosecute and punish those involved in the atrocities against

²¹⁴ *Public Prosecutor v. Nikola Jorgic*, Oberlandesgericht Düsseldorf, 26 September 1997.

²¹⁵ McKay, *supra* note 205, page 30.

²¹⁶ Kamminga, *supra* note 177, page 968.

²¹⁷ Princeton Principles on Universal Jurisdiction, ‘Foreword’, *supra* note 179, page 15.

²¹⁸ Rome Statute, *supra* note 82, Article 7.

²¹⁹ Rome Statute, *supra* note 82, Article 7(1).

²²⁰ Pejic, *supra* note 45, page 22.

²²¹ *Israel v. Eichmann* (27 May 1962), *supra* note 172, pages 298-304.

²²² *Demjanjuk v. Petrovsky*, 776 F.2d 571, (6th Cir. 1985) reprinted in 79 *ILR* 538.

Jews during World War II. The Israeli Supreme Court did not only rely on the principle of universal jurisdiction, but also on the protective principle and the passive personality principle. The alleged war crimes and crimes against humanity were considered to be *delicta juris gentium*. The Court concluded that there existed a connection between the offences of which *Eichmann* was accused of and the State of Israel, even though Israel did not exist when the offences were committed.²²³ International law scholars consider that crimes against humanity have *jus cogens* character, and they are crimes of universal jurisdiction.²²⁴ Both the Princeton Principles and the Draft Code against Peace and Security of Mankind,²²⁵ applies universal jurisdiction for crimes against humanity.²²⁶

Isolated acts that fall under crimes against humanity can be regarded as subjects of universal jurisdiction. Torture, which under the most serious of circumstances, amounts to a crime against humanity has been recognised by over one hundred States as a subject of universal jurisdiction by ratifying the UN Convention against Torture.²²⁷ Article 5 in the Torture Convention expressly provides for universal jurisdiction:

“Each State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8...”

This is supported by Article 7(1), which provides that:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found, shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

A prosecutor must consider offences in the same way as if the crimes have been committed in the prosecutor’s own State.²²⁸ Some States have implemented universal jurisdiction over torture in their national legislation, and one example is The Netherlands.²²⁹ In the *Furundzija* case the ICTY acknowledged that every State is entitled to investigate, prosecute, and punish or extradite persons accused of torture, who are present on a State’s

²²³ Kamminga, *supra* note 177, page 942-943.

²²⁴ Meron, Theodor, ‘International Criminalization of Internal Atrocities’, *American Journal of International Law*, Volume 89, 1995, page 558; Paust, Jordan J., ‘Applicability of International Criminal Laws in the former Yugoslavia’, *American University Journal of International Law and Policy*, Volume 9, pages 521-522; Dinstein, Yoram, ‘International Criminal Law’, *Israel Yearbook on Human Rights*, Volume 55, 1975.

²²⁵ 1996 Draft Code, *supra* note 60, Article 18.

²²⁶ Princeton Principles on Universal Jurisdiction, Principle 2 – Serious Crimes Under International Law, *supra* note 179, page 29.

²²⁷ Torture Convention, *supra* note 131.

²²⁸ *Ibid.*, Article 7(2).

²²⁹ 1988 Act implementing the Torture Convention (*Uitvoeringswet folteringverdrag*), Article 5, in Gerritsen, Marius Teengs, ‘Jurisdiction’, in Swart, Bert and Klip, André (eds.), *International Criminal Law in the Netherlands*, Utrecht, 1997, page 69. Other examples are the French *Code de Procédure Pénale*, available at www.legifrance.gouv.fr/html/codes_traduits/code_penal_soman.htm, last visited on 24 July 2004, Article 689-2 and the *British Criminal Justice Act* (1988), Article 134(1).

territory. The ground for this is the *jus cogens* character conferred by the international community on the prohibition on torture.²³⁰ An argument could be put forward that since torture has *jus cogens* character, perpetrators of torture committed in non-Party States to the Torture Convention can be prosecuted in another State on the basis of universal jurisdiction. An example of this is the prosecution in the United Kingdom of a national from Sudan accused of having committed torture. Sudan has not ratified the Torture Convention. In September 1997 a doctor, *Mohammed Ahmed Mahgoub* was prosecuted in Scotland for alleged acts of torture in Sudan, and Sudanese refugees in the UK had raised the allegations. The doctor was the first person in the UK to be prosecuted of torture under Section 134 of the Criminal Justice Act. The charges were dropped in May 1999, and the reason was due to the prosecutorial lack of evidence.²³¹ If torture as a single act is subject to universal jurisdiction, an argument may be made that a widespread and systematic practice of torture, which is a crime against humanity, will also be a subject of universal jurisdiction. Torture is one of the crimes that are under the umbrella of crimes against humanity. The argument could be extended that all crimes of humanity are subject to universal jurisdiction when single acts reach a certain level of gravity.²³²

5.6.1 The *Pinochet* case

A famous case, which deals with universal jurisdiction and torture, is the *Pinochet* case. In October 1998 *Pinochet* visited London for medical treatment. A Spanish court, which had been investigating violations during *Pinochet's* regime in Chile since 1996, issued an international arrest warrant for his arrest in London pending (provisional) a request for *Pinochet's* extradition to Spain. In October 1998, a full formal request for his extradition was submitted to UK authorities containing charges of murder, torture, hostage taking and conspiracy between 1973 and 1990. *Pinochet* was arrested in London 16 October 1998.²³³ The English High Court set aside the first provisional warrant, but found the second warrant valid because it dealt with offences, which constituted extradition crimes, and was subject to extraterritorial jurisdiction both in Spain and UK.²³⁴ The Chilean government protested, and The High Court upheld this view when it ruled that *Pinochet* was, as a former head of State, immune from prosecution. The ruling was appealed to the House of Lords, and the Law Lords concluded that *Pinochet* was not entitled to claim immunity because torture was not part of the official functions of a Head of State for which he

²³⁰ *Prosecutor v. Anto Furundzija*, ICTY, Case (IT-95-17-T), 10 December 1998, paragraph 156, page 45, available at www.un.org/icty/furundzija/trialc2/judgement/index.htm, last visited on 24 July 2004.

²³¹ McKay, *supra* note 205, page 45.

²³² International Committee of the Red Cross' website, State consent vs. Universal jurisdiction, 10-12-1997, page 3, available at www.icrc.org/Web/Eng/siteeng0.nsf/iwpList320/F4607C74CA18E5F5C1256B66005C27D5, last visited on 24 July 2004.

²³³ Beigbeder, *supra* note 20, pages 153 *et seq.*

²³⁴ Cases CO/4074/87 and CO/4083/98, High Court of Justice Divisional Court, United Kingdom, 28th October 1998.

otherwise would have immunity. This judgment was however set aside because one of the judges was active within Amnesty International and thereby impartial. On 24 May 1999, the House of Lords found on a majority of 6-1 that Pinochet could not claim immunity.²³⁵ The House of Lords strongly confirmed the principle of universal jurisdiction, and in the decision Lord *Browne-Wilkinson* concluded:

“If the states with the most obvious jurisdiction ... do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.”²³⁶

The *Pinochet* case contributed to the establishment of the principle of universal jurisdiction over gross human rights violations. It can be said that no torturer can feel free of leaving his own jurisdiction because there is the possibility of criminal prosecution anywhere in the world.²³⁷

5.7 Universal jurisdiction and war crimes

War crimes can be divided into two categories, (1) grave breaches of the four Geneva conventions of 1949²³⁸ and First Additional Protocol of 1977²³⁹, and (2) serious violations of Common Article 3 of the Geneva Conventions, Second Additional Protocol of 1977²⁴⁰ and other serious violations of the laws and customs applicable in armed conflicts not of an international character. The first category consists of, for example, wilful killing, torture or inhumane treatment and wilfully causing great suffering committed during an international armed conflict. The exercise of universal jurisdiction over these crimes is obligatory:

“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

²³⁵ McKay, *supra* note 205, pages 45-46.

²³⁶ *R. v. Bow Street Stipendiary Magistrate and others, ex parte Ugarte Pinochet*, United Kingdom, House of Lord, judgment of 24th March 1999, in 1999 2 *WLR* 827, page 841.

²³⁷ Sharma, *supra* note 169, page 150.

²³⁸ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 U.N.T.S. 135 and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 U.N.T.S. 287. (All four Conventions entered into force 21 October 1950.)

²³⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3.

²⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 609.

trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”²⁴¹

The second category of war crimes has traditionally not been regarded as crimes subject to universal jurisdiction. It could be argued that this view is no longer valid. The ICTR can try serious violators of common Article 3 to the Geneva Conventions and of Additional Protocol II.²⁴² The ICTY was not empowered with this but in the *Tadic* case the Tribunal concluded that customary international law justifies that the Tribunal exercise jurisdiction over war crimes, regardless of whether they occurred within an internal or an international armed conflict.²⁴³ Article 8 of the Rome Statute states that serious violations of common Article 3 are war crimes under the jurisdiction of the Court, and the lengthy list of war crimes in the article also includes grave breaches of the Geneva Conventions of 12 August 1949 and Protocol I, other serious violations of the laws and customs in international armed conflict and other serious violations of the laws and customs of war in a non-international armed conflict. This article can be regarded as a source for which crimes can be qualified as war crimes under customary international law, and a consequence could be that those crimes are subject to universal jurisdiction and could be try tried by domestic courts on the basis of this principle.²⁴⁴ An authoritative and legally binding list of which war crimes are customary law and subject to universal jurisdiction does not exist, but State practice points in the direction that at least war crimes under the four Geneva Conventions of 12 August 1949 and the First Additional protocol have gained this character. Time will reveal if the other categories in Article 8 of the Rome Statute will also be in possession of this character.

The Princeton Principles and the draft Code against Peace and Security of Mankind,²⁴⁵ recognises war crimes as subject to universal jurisdiction.²⁴⁶ More than 180 States have ratified the four 1949 Geneva Conventions and almost 150 States have ratified the Additional Protocol I of 8 June 1977.²⁴⁷ Since the ratification many States have adopted national legislation with reference to the four Geneva Conventions that provide for universal jurisdiction over war crimes by their national courts,²⁴⁸ and other States have implemented universal jurisdiction over war crimes in their national laws without referring to the Geneva Conventions.²⁴⁹ This development of

²⁴¹ Geneva Conv. (I), Article 49; Geneva Conv. (II), Article 50; Geneva Conv. (III), Article 129; Geneva Convention (IV), Article 146, *supra* note 238.

²⁴² ICTR Statute, *supra* note 29, Article 4.

²⁴³ *Appeals Decision on Jurisdiction*, *supra* note 35, page 81, para. 134.

²⁴⁴ Kamminga, *supra* note 177, page 948.

²⁴⁵ 1996 Draft Code, *supra* note 60, Article 20.

²⁴⁶ Princeton Principles on Universal Jurisdiction, Principle 2 – Serious Crimes Under International Law, *supra* note 179, page 29.

²⁴⁷ For ratification status, *see*

www.icrc.org/ihl.nsf/WebNORM?OpenView&Start=1&Count=150&Expand=52.1#52.1, last visited on 24 July 2004.

²⁴⁸ For example: the Geneva Conventions Act of Australia (1957, amended 1991), the Geneva Conventions Act of Canada (1965), the Geneva Conventions Act of India (1960).

²⁴⁹ For example: The Spanish *Ley Orgánica 6/1985 de 1 de Julio, del Poder Judicial*, Article 23(4); the Canadian *Criminal Code*, as Amened by Bill C-71 (1987), Section 7

national legislation with universal jurisdiction over war crimes has caused many cases in which individuals have been prosecuted for war crimes in a State other than the one in which the crime allegedly took place. For example, Denmark prosecuted a Yugoslav citizen for crimes against civilians committed during the armed conflicts in the Balkans and he was sentenced under Geneva Conventions III and IV,²⁵⁰ and there exists other national trials with similar character.²⁵¹ In the *Kadic vs. Karadzic* case²⁵², a civil claim was made in relation to war crimes allegedly committed by a former Yugoslav national during the armed conflicts in the former Yugoslavia. The US District Court concluded that pursuant to the American *Alien Tort Compensation Act*, the universality principle could also give jurisdiction to national courts in civil claims of war crimes and other violations of international humanitarian law.²⁵³ Many international law scholars have recognised the principle of universal jurisdiction over war crimes.²⁵⁴

5.8 Implementation

As mentioned in chapter 4.2.1, the Preamble in the Rome Statute recalls a duty of every State to prosecute serious international crimes. It was intentionally left ambiguous, because of the dispute as to whether there is a duty on the basis of universal jurisdiction or on a territorial or national basis.²⁵⁵ The Rome Statute does not have a provision that openly authorizes states to implement universal jurisdiction for the crimes within the jurisdiction of the ICC, and accordingly a duty to establish universal jurisdiction cannot be followed from the Statute. One can assume that the provisions that define the crimes within the Court's jurisdiction, Articles 6-8 will "take a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law, and may thus become a model for national laws to be enforced under the principle of

(3.71); and the British *Law of War on Land (being Part III of the Manual of Military Law (1958), Chapter XIV, Paragraph 637, at 180.*

²⁵⁰ *The Prosecution v. Refik Saric*, Danish High Court, Eastern Division, Third Chamber, case no. S-3396-94, decision 25 November 1994.

²⁵¹ For example: *Polyukhovich v. Australia*, *supra* note 173; Tribunal de Bruxelles, Chambre du Conseil, *Ordonnance du 22 juillet 1996*, Journal des Procès No. 310 (20 Septembre 1996); Tribunal Militaire de Cassation (Switzerland), *Décision du 8 juillet 1996, Considérant 2(a).*

²⁵² *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995).

²⁵³ *Ibid.*, at pages 240-243, *see also* comment in the *Restatement of the Law (Third), The Foreign Relations Law of the United States*, American Law Institute (1987), Comment b. on section 404, page 255.

²⁵⁴ For example: Green, Leslie C., *The Contemporary Law of Armed Conflict*, Manchester, 1993, page 282; Brownlie, Ian, *Principles of Public International Law*, Oxford, 1990, page 305; David, Eric, *Principles de droit des conflits armés*, Brussels, 1994, pages 592 *et seq.*

²⁵⁵ Boot, Machteld, *Genocide, crimes against humanity, war crimes: nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court*, Antwerp, 2002, page 55.

universality of jurisdiction.”²⁵⁶ However, if all the crimes in the Rome Statute would be subject to universal jurisdiction, then there would exist a duty to prosecute these crimes. This duty would then follow from customary international law, not from the Rome Statute explicitly. This has not become a reality. Despite if the crimes in the Statute are not subject to universal jurisdiction, some of them derive from, or correspond to, treaties, which put a duty on its signatories to either prosecute or extradite (*aut dedere aut judicare*) a suspected person on its territory. If States are not able to exercise jurisdiction over a person who has committed the crimes in Article 5 because of lacking legislation, the States are only obliged to implement the restricted form of universal jurisdiction, *aut dedere aut judicare*, if they have ratified these treaties.

If all of the core crimes within the jurisdiction of the International Criminal Court are, or could potentially be interpreted as being crimes of universal jurisdiction, this may encourage States to provide for universal jurisdiction for these offences in their national legislation. The articles in the Rome Statute have their foundation in international conventions, customary law and general principles, some of which exceed many national criminal and penal codes.²⁵⁷ The principle of complementarity will make it more likely that parties to the Statute will try to maintain jurisdiction over prosecutions that may be within the ICC’s competence. The principle is created to facilitate an environment that encourages and expands the prosecutions of international crimes in national courts and, at the same time, strengthens national jurisdictions.²⁵⁸ States will implement legislation that covers the crimes in Article 5 of the Statute, because many States will be reluctant to accept the possibility that the ICC might take on prosecutions that could have been brought before national courts. By implementing such legislation, and prosecuting the violators of the Article-5 crimes in good faith, States hinder that the ICC will declare a case admissible before it.²⁵⁹ Many States have when adopting legislation implementing the Rome Statute, also adopted legislation providing their courts with universal jurisdiction over genocide, war crimes and crimes against humanity.²⁶⁰

5.8.1 An example of extensive implementation of universal jurisdiction in national legislation

²⁵⁶ Meron, Theodor, ‘Crimes under the Jurisdiction of the International Criminal Court’, in Hebel, Herman A.M. von; Lammers, Johan G.; Schukking Jolien (eds.), *Reflections on the International Criminal Court*, The Hague, 1999, pages 47-48.

²⁵⁷ Gillhoff, *supra* note 167, page 98.

²⁵⁸ Mirceva, *supra* note 141, page 3.

²⁵⁹ Charney, Jonathan I., ‘Editorial comments, International Criminal Law and the Role of Domestic Courts’, *The American Journal of International Law*, Volume 95, No. 1, 2001, page 123.

²⁶⁰ For example: The Canadian Crimes against Humanity and War Crimes Act, R.S.C., 2000, chapter 24, available at laws.justice.gc.ca/en/, last visited on 24 July 2004; the British International Criminal Court Act, 2001, chapter 17, available at www.hmsso.gov.uk/acts/acts2001/20010017.htm, last visited on 24 July 2004.

Belgium was the first country that changed its law in accordance with the Rome Statute. The law,²⁶¹ which was enacted in 1993 and amended in 1999, gave Belgium absolute universal jurisdiction over the crime of genocide, crimes against humanity and war crimes. The law was the broadest interpretation of universal jurisdiction in the world, and was one of the most progressive of its kind.²⁶² When Belgium introduced the new law, the Belgian government accentuated the fact that Belgium could prosecute those accused of serious international crimes even after the ICC starts to function, because of the complementary role of the Court.²⁶³ The law enclosed all the crimes in Article 5 of the Rome Statute, did not require the presence of the suspect within Belgian territory for prosecution to be initiated and did not recognize immunity for State officials. Article 7.1 of the law said “[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.” The law made Belgian courts an arena for international prosecutions. In June 2001 four Rwandan nationals were tried and sentenced for the crime of genocide under the law.²⁶⁴ After this trial a number of cases charging sitting leaders were filed, and because of that the Belgian government came under diplomatic pressure, mostly from Israel and the US. Examples of the sitting leaders that were charged were *George W. Bush, Tony Blair, Ariel Sharon, Yasser Arafat, Fidel Castro* and *Saddam Hussein*.²⁶⁵

In February 2002, the ICJ ruled that Belgium could not issue a warrant for the arrest of the incumbent Minister of Foreign Affairs in the Democratic Republic of Congo, *Abdulaye Yerodia Ndobasi*, because according to the ICJ, under customary international law, Ministers of Foreign Affairs, as well as heads of States, are immune from arrest by foreign jurisdictions whilst in office. An investigating judge in Belgium had charged *Yerodia* with genocide, war crimes and crimes against humanity on the basis of the 1993 law, amended 1999, which provided for universal jurisdiction.²⁶⁶ The question regarding universal jurisdiction was initially part of Congo’s application to the ICJ, but it was not included in the final submissions to the Court, so the ICJ concluded:

“As a matter of logic, the second ground [immunity] should be addressed only once there has been a determination of the first [the existence of universal jurisdiction], since it is only

²⁶¹ *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977*. For English version see: “Act concerning the Punishment of Grave Breaches of International Humanitarian Law”, 10 February 1999, *International Legal Materials*, Volume 38, 1999, page 918. (English translation and introductory note giving a brief legislative history of the 1999 law by Sims, Stefaan and Van der Borgh, Kim)

²⁶² *Ibid.*, Introductory note, page 3.

²⁶³ *Report of the Justice Commission*, in McKay, *supra* note 205, page 20.

²⁶⁴ Beigbeder, Yves, *supra* note 20, page 116.

²⁶⁵ Global Policy Forum, ‘Belgium to Curb War Crimes Law’, www.globalpolicy.org/intljustice/universal/2003/0623belg.htm, last visited on 24 July 2004.

²⁶⁶ Human Rights Watch World Report 2002, ‘International justice’, page 14 www.hrw.org/wr2k2/internationaljustice.html, last visited on 24 July 2004.

where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction.”²⁶⁷

The ICJ made its decision regarding immunities on the assumption that Belgium did have jurisdiction to issue the arrest warrant. The issue of universal jurisdiction was elaborated by a number of judges in separate opinions. In the joint separate opinion of Judges *Higgins, Kooijmans* and *Buergenthal* it was asked whether States are entitled to exercise universal jurisdiction over persons accused of serious international crimes who have no connection with the forum State and are not present within the State’s territory. They did not find any established practice indicating the exercise of universal jurisdiction, but they did not find evidence that *opinio juris* prohibits such jurisdiction. They noted that universal jurisdiction to investigate crimes may not only be exercised when a suspect is present in the forum State on the basis of the *aut dedere aut judicare* principle, even though some treaties require the presence of a person for prosecution, such legislation “cannot be interpreted *a contrario* so as to exclude a voluntary exercise of a universal jurisdiction.”²⁶⁸ They also concluded:

“If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal cooperative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.”²⁶⁹

After examining State practice and literature, the eminent Judge *Christine Van den Wyngaert* concluded in her dissenting opinion:

“Article 7 of Belgium’s 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens. It is not in conflict with the principle of complementarity in the Statute for an international Criminal Court.”²⁷⁰

Judge *Koroma* declared that he thought that universal jurisdiction is available for war crimes and crimes against humanity.²⁷¹ Four of the 16 members of the Court explicitly concluded that international law prohibits Belgium from issuing an arrest warrant on the basis of universal jurisdiction for a crime committed abroad when the accused person was not on the territory.²⁷²

²⁶⁷ *Case concerning the arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, General List No. 121 (International Court of Justice) I.C.J. Rep. (2002) (judgment), para. 46 [Hereinafter referred to as *Arrest warrant case*]

²⁶⁸ *Ibid.*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 57.

²⁶⁹ *Ibid.*, para. 58.

²⁷⁰ *Ibid.*, Dissenting opinion of Van den Wyngaert, para. 67.

²⁷¹ *Ibid.*, Separate opinion of Koroma, para 9.

²⁷² *Ibid.*, Declaration de M. Ranjeva; Separate opinion of President Guillaume; Separate opinion of Judge Bula-Bula; Opinion Individuelle de M. Rezek.

Belgium's universal jurisdiction law was abolished in August 2003, and replaced with more restricted amendments to the Criminal Code. This was mostly because the US Defence Secretary *Donald H. Rumsfeld* had threatened Belgium that it risked its status as host to NATO's headquarters if it did not withdraw the 1993 law, and because of the argument that Belgium cannot judge the whole world.²⁷³ Under the new amended law Belgian courts will only have jurisdiction over serious international crimes if the accused is Belgian or has had his primary residence in Belgium for at least three years at the time the crimes were committed, or if Belgium is required by treaty to exercise jurisdiction over the case. A small amount of ongoing cases that have progressed, for example the cases concerning the genocide in Rwanda, the killing of Belgian priests in Guatemala and the complaints against the former dictator in Chad, *Hissène Habré*.²⁷⁴

5.9 Conclusion

There is a long way to go before the principle of universal jurisdiction is firmly established in the international legal system. The different rudiments of State practice show the gradual acceptance of universal jurisdiction over serious international crimes as more and more permitted under international law. Several countries feel compelled to either punish or extradite because of the Rome Statute and the principle of complementarity as the fight against impunity for gross human rights violators takes another step forward. The State practice can be regarded as an experiment to find the most proper tool to prohibit persons who have committed gross human rights violations from going unpunished. Universal jurisdiction over war crimes, genocide and torture as a single act has moved longer in its way towards becoming customary international law than universal jurisdiction over crimes against humanity. War crimes, genocide and torture have also been implemented in other treaties than the Rome Statute. The act by States to implement universal jurisdiction in their legislation might be a necessary step to establish customary international law. Time will tell, but it points in that direction. If universal jurisdiction over the four core crimes in the Rome Statute is customary international law, a State is allowed to transfer a part of this to an international criminal court. This is hindered by the complementarity regime, which only allows the ICC to exercise jurisdiction over crime committed on the territory of a State party or by a national of a State party.

If the Court in the *Yerodia* case had included the issue of universal jurisdiction in its judgment, and ruled that the Belgian law was in accordance with international law, States would be allowed to establish and exercise jurisdiction over anybody anywhere at the same time. This would probably lead to chaos because every State in the world could initiate

²⁷³ Beigbeder, *supra* note 20, page 166.

²⁷⁴ Human Rights Watch's website, Human Rights News, 'Belgium: Universal Jurisdiction Law Repealed', www.hrw.org/press/2003/08/belgium080103.htm, last visited on 24 July 2004.

prosecutions over the same case. The restricted way of universal jurisdiction, *aut dedere aut judicare*, would be a better path to take. If States implement this in their national legislations the chaos would be prevented, but the fight against impunity would go on. If the custodial State for some reason does not prosecute it has to extradite to another State that is willing to do so instead. If that is impossible, the ICC is available to certify that perpetrators of gross human rights will not go unpunished.

6 Conclusion

The same institutions have affected both the principle of complementarity and the principle of universal jurisdiction. The IMT, the IMTFE, the ICTY and the ICTR have contributed to the creation of the Rome Statute and the principle of complementarity. The public concern about the atrocities committed in the former Yugoslavia and Rwanda, the ICTY, the ICTR and the creation of the ICC have contributed to the waking up of universal jurisdiction. The primacy of the ICTY and ICTR was not given to the ICC. Instead, the ICC got a different character compared to the jurisdictions of the ICTY, the ICTR and national courts because of the implementation of the complementarity regime, which is unique to the ICC. The Tribunals are *ad hoc* institutions and limited in territory, crimes and duration. Despite this, its creators tried to limit the primacy of the ICTY and the ICTR. Therefore it is not surprising that when the International Criminal Court was created, which would affect its creators even more, it was thus not be given primacy over national courts. To protect State sovereignty it was important for many States that national jurisdictions would have primacy over an international criminal court. Accordingly, in the treaty establishing the Court, the solution to the relationship between national jurisdictions and the jurisdiction of this new international court was given, and the name of the solution was complementarity!

The complementarity regime gives national jurisdictions primacy. The complementarity principle only provides the ICC jurisdiction when national jurisdictions are unwilling or unable to investigate or prosecute. Most of the time States will be able and willing to do so. Because of the ICC will not have any jurisdiction for acts of war crimes, genocide and crimes against humanity committed before its entry date, 1 July 2002, it is up to national court to make sure that these perpetrators will not be left unpunished. Doing so, and upholding their primacy, they can assert their jurisdiction under international instruments, which provides for universal jurisdiction and maybe also under customary international law.

Under international treaties States are obliged to implement universal jurisdiction over certain serious international crimes. In the future these crimes could become part of customary international law. Some State practice and *opinio juris* point in this direction. If this becomes a reality, States have an obligation to prosecute these crimes. If a State has the obligation to implement universal jurisdiction over a specific crime but has also signed the Rome Statute, the State should first and foremost investigate and prosecute violators of this crime itself. If for some reason the State is unwilling or unable to do so, the ICC does it instead. A problem with this could be that States, via the principle of complementarity, hand over cases to the ICC that they, according to the principle of universal jurisdiction, should prosecute themselves, but they do not have the energy or interest to do so.

The complementarity regime hinders the transfer of universal jurisdiction from States to the ICC, but it encourages the implementation of universal jurisdiction in national legislation. The Rome Statute does not impose any obligation on State Parties to prosecute the crimes in Article 5 of the Rome Statute on a universal or any other basis. Instead, the complementarity regime provides an incentive for States to investigate or prosecute these crimes, by providing a complementing criminal institution, which will do so when States fail. The Rome Statute has given rise to a trend of legislative reforms in countries, because of the principle of complementarity. Even though the principle only provides for jurisdiction over crimes committed on the territory of a State party or by nationals of State parties, the use of universal jurisdiction is shining through. It is impossible for the ICC to deal with every case concerning the crimes within the jurisdiction of the Court when the territorial State of the crime or the national State of the accused for some reasons are unwilling or unable to prosecute in a genuine manner. Then, instead of letting impunity prevail, universal jurisdiction is the answer. Universal jurisdiction could be an effective tool to discourage and prevent serious international crimes by increasing the chance of prosecution and punishment of the perpetrators and reducing impunity for these crimes.

To fulfil the international determination to fight the impunity for gross human rights violators, the ICC is not enough. States will have to consider extending their jurisdictional bases and provide for universal jurisdiction for genocide, crimes against humanity and war crimes in their national jurisdiction. States may want to be able to exercise jurisdiction over their own nationals or for crimes committed within their own territory, but also over non-nationals, who have committed crimes on foreign territory and otherwise would not be punished. States are not obliged to do so, but it is possible that they choose to implement universal jurisdiction for the crimes within the jurisdiction of the ICC, because if a suspected person were found on the territory of those States, they would then be able to exercise jurisdiction if they wanted to. The principle of complementarity opens up for the use of universal jurisdiction in national legislation.

The rationale for both principles is to fight impunity. The principle of complementarity gives the ICC ability to prosecute a serious international crime when national jurisdictions cannot. It fills the gap. The principle of universal jurisdiction provides for jurisdiction when there is no other link with a committed crime except that it is against the interest of all mankind. The perpetrator could go unpunished if States with links to the committed crime do not want to prosecute. This principle fills the gap between impunity and punishment. A system of international criminal justice has begun to emerge in which both the International Criminal Court with the principle of complementarity and national courts with the principle of universal jurisdiction have a significant role to play in the fight against impunity for perpetrators of gross human rights.

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