THE RELEVANCE OF UNIVERSAL JURISDICTION
IN THE COMPLEMENTARITY REGIME

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Foreword

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A big thanks to my family and friends for giving me perspective and the necessary breaks from the writing process. A special thanks to Mallory for proofreading this thesis. Of course I am solely responsible for any errors or inaccuracies.

Finally, to Christine just for being who she is. Thank you for keeping me sane.

In dedication to my late mother.
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>EHCR</td>
<td>European Convention on Human Rights</td>
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<td>FRY</td>
<td>Former Republic of Yugoslavia</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<td>ICJ</td>
<td>Statute of The International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ICC-ASP</td>
<td>ICC Assembly of State Parties</td>
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<td>ICC-OTP</td>
<td>Office of the Prosecutor, International Criminal Court</td>
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<td>ICC-PTC or PTC</td>
<td>ICC Pre-Trial Chamber</td>
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<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<td>Rome Statute</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1 Introduction

1.1 Topic
At present, there exists a somewhat tense relationship between the enforcement of international criminal law and the Westphalian-based system of relationships between sovereign states.\(^1\) This study examines the tension between the sovereignty and universality in international criminal law. This is done through examining the principle of complementarity, and particularly its relationship to prosecution based on universal jurisdiction. The principle of complementarity is one of the underlying admissibility principles for the International Criminal Court (Hereinafter: “The Court”), established by the 1998 *Rome Statute of the International Criminal Court*.\(^2\) This principle is expressed in the Preamble, Article 1 and Article 17.

1.1.1 Historical background
The enforcement of international criminal law can be divided into two categories, prosecution in other states based on universal jurisdiction, and prosecution through international criminal courts and tribunals. Both categories share a similar feature; they allow for an alternative judiciary when the primary prosecutor for some reason fails to enforce international criminal law.

The principle of universal jurisdiction provides the State with legitimate jurisdiction over a criminal act without requiring a territorial or national connection to the criminal act.\(^3\) Universal jurisdiction is a relatively modern legal principle. Prior to World War II, criminal

prosecution was an exclusive national matter, closely connected to the State and based on its territorial jurisdiction. However, its historical lines and its origins as a philosophical principle can be drawn back to the works of 17th century philosopher Hugo Grotius, and to the 19th century efforts to combat piracy in the high seas.

In the 1949 Geneva Convention the principle of universal jurisdiction was laid down for the grave breaches of enumerated war crimes. One early modern example of prosecution on the basis of universal jurisdiction can be found in the Eichmann case in Israel in 1961. The next turning point for universal jurisdiction came in 1998, with the Pinochet hearings in the United Kingdom and the adoption of the Rome Statute. This brought a revived focus on prosecuting international crimes.

International criminal law as a legal subject has evolved through the establishment of international institutions for prosecuting international crimes. Historical lines can be traced back to the prosecution of war crimes in the second half of the 19th century, starting with the Lieber Code issued in 1863 by President Lincoln, which attempted to codify the law of warfare. The modern development of international criminal law can roughly be divided into three periods. The first substantial development came in 1945, with the London

4 Cassese (2008) p. 27.
8 Arendt (1963)
9 House of Lords (United Kingdom). R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte. 3 WLR 1,456 (H.L. 1998).
Agreement and the creation of the criminal tribunals in Nürnberg and Tokyo.\textsuperscript{11} The tribunals were established to individually prosecute criminal activity by leaders of the Axis powers during World War II. The London Agreement set forth both a list of crimes subject to the tribunal, and general principles recognised as general and fundamental to international criminal law, such as the principle of legality and the presumption of innocence.\textsuperscript{12} An additional development in this first period was the adoption of the 1948 Genocide Convention\textsuperscript{13}, which defined the substantive rules for genocide as a crime.

The second period came in the early 1990s, with the establishment of the \textit{ad hoc} criminal tribunals, the International Criminal Tribunal for Rwanda\textsuperscript{14} and the International Criminal Tribunal for the former Yugoslavia.\textsuperscript{15} These two distinct tribunals were given a shared Appellate Chamber and Prosecutor, to provide uniformity in the enforcement of international judicial jurisdiction. These tribunals were also given primacy over the national courts in cases of conflict with concurrent jurisdiction. In the Former Republic of Yugoslavia, the on-going conflict in Bosnia made the national courts unlikely to conduct fair trials across ethnicities.\textsuperscript{16} In Rwanda, the depletion of the national legal system during and after the 1994 Rwandan Genocide left only 244 judges and a judicial system that comprised of only 1,800 people, preventing it from rendering justice.\textsuperscript{17}

The third period of the development of international criminal law started with the adoption of the Rome Statute in 1998 and its entry into force in 2002. On March 14, 2012 the first

\textsuperscript{11} Ibid. p. 15.
\textsuperscript{12} Ibid p. 15-20.
\textsuperscript{17} Sarkin (2001) p. 156.
conviction by the ICC marked “a milestone in the evolution of international criminal law”, as expressed by Ben Ferencz of the Nürnberg tribunal.\(^\text{18}\)

Contrary to the primary jurisdiction of the ICTR and ICTY, admissibility to the ICC is built on a principle of complementarity.\(^\text{19}\) This means that the prosecution by the ICC is subsidiary to national prosecution in cases where a national court is willing and able to prosecute. This ensures an effective prosecution, and establishes primary responsibility for enforcing international criminal law at the national level, as the ICC will never have institutional capacity to investigate and prosecute the massive amount of potential cases. At the same time, the principle ensures that the most serious of international crimes will not go unpunished.

1.1.2 Research question

The exercise of universal jurisdiction can potentially conflict with states’ sovereignty. The ICC, on the other hand, are complementary to national jurisdiction. One could therefore validly argue that the ICC should be the appropriate forum for prosecuting international crimes. This thesis studies the relationship between the ICC and universal jurisdiction. The research question is more specifically; what relevance can the exercise of universal jurisdiction have over the principle of complementarity?

The research question is relevant because of the potential conflict between the principles of universalism in prosecuting international crimes and the sovereignty of independent states, which must take into account different considerations. On one hand, some crimes are so harmful to the international community that they cannot go unpunished. On the other hand, the sovereign right for states not to have internal affairs interfered with is one of the core principles in international law. In this thesis I argue that universal jurisdiction can be an

\(^{18}\) Ferencz (2012)

\(^{19}\) As expressed in \textit{para} 10 in the Preamble and Art. 1 of the Rome Statutes.
relevant factor in international criminal law besides the ICC, as it partly supports and complements the enforcement of the conventional and customary framework.\textsuperscript{20}

Universal jurisdiction is a concept, while the ICC is an institution. The conceptual difference in prosecution based on the two respective regimes will therefore be a central part of this study. This study does not aim to conclude whether or not universal jurisdiction should be applied after the adoption of the Rome Statute, but rather examines the relevant differences in the two systems, and examines problematic issues and possibilities for the two regimes to co-exist and potentially act as catalysts.

The respective legal and theoretical foundations of universal jurisdiction and the principle of complementarity will be analysed in order to present issues of conflict in their context. The research question will be discussed by highlighting some procedural and subject-matter issues regarding the principle of complementarity, and by focusing on the role of the ICC as an incentive for national proceedings. Finally, issues where the exercising of universal jurisdiction can be relevant to complement the ICC regime will be analysed.

1.2 Method, structure and applicable law

1.2.1 Definitions

By using the term “international criminal law”, I am referring to a core of agreed treaty-based, and to some extent customary-based, norms that establish individual criminal responsibility for certain international crimes (see infra section 1.2.2).\textsuperscript{21}

An “international crime” is a crime that can be prosecuted by any country.\textsuperscript{22} A more specific definition was given by the subsequent Nürnberg trials in List and others, in which an international crime was defined as an act universally recognized as criminal, which is a

\textsuperscript{20} Hall (2010) p. 201.
grave matter of international concern that for some valid reason cannot be left within the exclusive jurisdiction of the State. In modern international criminal law, an international crime also entails personal criminal liability for violations of international customary rules and treaty provisions. A Head of State, foreign minister or diplomat enjoys immunity *ex officio* from personal criminal liability and personal immunity as long as he is serving.

“Sovereignty” is one of the core principles in international law. It is expressed in the UN Charter Art. 2 (1) as a founding principle for the UN and Art. 2 (7) as a principle prohibiting intervention in the domestic jurisdiction of states. Sovereignty is for the purpose of this study understood as a “legal status within but not above public international law”. It is a principle that can be balanced by other principles, such as universality. One important aspect of sovereignty for a State is control over its internal affairs, although subject to limitations imposed by international law.

Somewhat contrary to the principle of sovereignty is the principle of universalism. In here is embedded an idea that some norms are *erga omnes*, owed towards all. “Universal jurisdiction” can be defined as a principle, which allows for (permissive), or demands (mandatory), the prosecution for certain crimes, regardless of where the crime was committed or the nationality of the suspect or the victim, or where the suspect is held in

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custody.\textsuperscript{28} For a State to exercise universal jurisdiction, the crime does not have to have any discernible impact on the territory or security of the concerned State.\textsuperscript{29}

I will use the term “situation” for preliminary examinations and investigations, and “case” for pre-trial or trial proceedings.\textsuperscript{30} A referral by a State Party or the UN Security Council is therefore to be considered a “situation”.\textsuperscript{31} The differentiation of situations and cases reduces the possibility of states using complaints against specific persons for political gain when referring to the ICC, leaving the selection of cases to the Prosecutor’s discretion.\textsuperscript{32}

1.2.2 Scope and limits of the thesis

Regarding jurisdiction, this study is limited to criminal responsibility for international crimes, leaving out the possibility of claims based on universal civil jurisdiction.\textsuperscript{33}

The scope of “international crimes” in this thesis will apply only to the core crimes under the ICC, including genocide, crimes against humanity and war crimes.\textsuperscript{34} Typical international crimes that, at the present, fall outside the scope of the jurisdiction of the ICC are acts of terrorism and drug trafficking.\textsuperscript{35} State accountability for international crimes

\textsuperscript{28} Philippe (2006) s. 377.
\textsuperscript{29} Broomhall (2003) p. 106.
\textsuperscript{30} This is in accordance with the distinction in Art. 13 \textit{litra} (a) and (b), 14 (1) and 19 (3) of the Rome Statute.
\textsuperscript{31} Olasolo (2011) p. 394.
\textsuperscript{32} ICC Pre-Trial Chamber I. \textit{Prosecutor v. Lubanga and Ntaganda}. Annex II. Decision on the Prosecutor’s Application for a warrant of arrest, Article 58. 10 February 2006. ICC-01/04-01/07, para 21 og 31.
\textsuperscript{33} Donovan (2006) p. 142.
\textsuperscript{34} ICC Art. 5 (1). The crime of aggression is at present considered a core international crime, but as it has not yet been ratified as an amendment to the Rome Statute, the ICC have presently no jurisdiction over it.
\textsuperscript{35} Cryer (2007) p. 2.
will fall outside of the scope of this study.

Regarding complementarity, this study will not aim to present the whole picture regarding the admissibility to the Court through the procedural phases of complementarity, but rather extract some examples where they can shed light on the main research question of the study. Likewise, this study will not be able to encompass a comparative study of every state that have exercised universal jurisdiction, focusing instead on key states and key cases.

1.2.3 Legal sources

As international criminal law is a subset of international law, the same legal sources for international law also apply for international criminal law. One traditional listing of these sources can be found in the ICJ Statute Art. 38 (1), and includes treaties, customary international law and general principles of law recognized by civilized nations.\(^36\) As a subsidiary means for determining the law, Art. 38 (1) \textit{litra} (d) permits judicial decisions and legal writings of highly qualified scholars to be used. A similar listing of these sources of applicable law can be found in Art. 21 of the Rome Statute, which list the internal and external sources of applicable law for the Court. This thesis will use the Rome Statute as a primary source, with a main focus on Art. 17-20 on admissibility. Additionally, the Court’s Rules of Procedure and Evidence will also aid to form a supplemental basis for analysis.\(^37\)

As there have been only a few cases before the ICC to date, ICC case law remains a quantitatively limited source. Jurisprudence from the \textit{ad-hoc} tribunals for Rwanda and Yugoslavia will therefore be used where applicable for general interpretation. Although the rulings and decisions of the \textit{ad-hoc} tribunals are not of precedential character for the ICC,


\(^{37}\) ICC-ASP \textit{Rules of Procedure} (2002). According to Art. 51 (5) of the Rome Statute, the Statute is primary to the Rules of Procedure and Evidence, should different interpretations of a rule need to be harmonized.
they hold persuasive authority and can therefore shed light on issues of interpretation.\textsuperscript{38} Rulings by the International Court of Justice and its predecessor the Permanent Court of International Justice will also be used for the interpretation of general rules of international law.\textsuperscript{39}

As only one rule of interpreting the applicable law can be found in Art. 21 of the Rome Statute,\textsuperscript{40} the Vienna Convention on the Law of Treaties Art. 31-33 will be used to generally interpret the Rome Statute.\textsuperscript{41}

Secondary sources, such as legal literature by scholars and commentaries to the Statute, will also be used to answer the research question.

1.2.4 Structure

This study is structured so that Chapter 2 examines the conceptual differences between the jurisdiction of the ICC and the universal jurisdiction. As the Rome Statute differentiates between jurisdiction and admissibility, Chapter 3 will present the subject matter of the principle of complementarity. Chapter 4 will examine issues regarding that indicates a tension between the principles of complementarity and sovereignty. Chapter 5 will examine the advantages and shortcomings of the principle of complementarity to incite national proceedings and universal jurisdiction to act as complement to the ICC. In Chapter 6, some concluding remarks will be given.

\begin{flushright}
\textsuperscript{39} The ICJ has yet to elaborate on the provisions of universal jurisdiction.
\textsuperscript{40} Art. 21 (3) states that the interpretation of the Statute must be “consistent with internationally recognized human rights”.
\end{flushright}
2 Jurisdiction

2.1 Conceptual differences regarding jurisdiction

One aspect of this study is the concurrent jurisdiction of states prosecuting based on universal jurisdiction and the jurisdiction of the ICC. First and foremost, universal jurisdiction for international crimes (as defined in section 1.2.1) is primarily based in customary international law\textsuperscript{42}, whereas the jurisdiction of the ICC is based on treaty law, the Rome Statute. It can therefore be argued that the rules regulating the jurisdiction of the ICC are positively regulated in more detail than universal jurisdiction.

There are five traditional bases of jurisdiction in international law:

1. Territorial jurisdiction, when the crime was committed in the State’s territory.
2. Active personality, the nationality of the offender.
3. Passive personality, the nationality of the victim.
4. Protection of vital state interests.
5. Universal jurisdiction, some international crimes are believed to be of such importance, that jurisdiction can be exercised universally.\textsuperscript{43}

Nr. 2-5 can be exercised extraterritorial, meaning that a State can have a legitimate claim of jurisdiction outside of its normal territory.

There is a lack of hierarchy between concurrent jurisdictional claims for adjudication of international crimes between sovereign entities.\textsuperscript{44} I will come back to this in section 4.4


\textsuperscript{43} Schabas (2007) p. 58.
regarding horizontal complementarity. In the ICC regime, there exists such a principle of hierarchy between concurrent jurisdictional claims, which is the principle of complementarity. I will examine this further in section 3.1.

Jurisdiction can be separated into three different categories: legislative, judicial and enforcement jurisdiction. The ICC is a treaty-based international court and therefore enjoys no legislative jurisdiction in itself. When states prosecute based on universal jurisdiction, they exercise judicial or enforcement jurisdiction. The term “jurisdiction” for the matter of this study will therefore exclude legislative jurisdiction.

A related principal difference between the jurisdiction of the ICC and universal jurisdiction is that the Rome Statute distinguishes between jurisdiction and admissibility. If the ICC has jurisdiction over a case, the case must still be admissible in order for the case to be adjudicated. One part of the admissibility test is the complementarity principle. On the other hand, a State which have jurisdiction is in principle allowed to exercise that jurisdiction based on its sovereignty. I will therefore examine the principle of complementarity by itself in Chapter 3.

2.1.1 Jurisdiction of the ICC

Contrary to universal jurisdiction, the jurisdiction of the ICC is based on the territoriality and the nationality principle, founded in a treaty-based delegation of jurisdiction from its State Parties. This is a core difference in the two regimes. Jurisdiction over international crimes exercised by the ICC is therefore international jurisdiction, and not universal jurisdiction.

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46 Ryngaert (2011) p. 858.
A non-State Party can also give the Court jurisdiction over a specific situation by giving an *ad-hoc* declaration of jurisdiction. The lower threshold of what constitutes a “non-State Party” is presently not defined. In the case of the *ad-hoc* declaration of jurisdiction from Palestine, the Prosecutor decided that he was unable to interpret whether Palestine qualified as a state. For this study, a “non-State Party” will mean a declared and recognized sovereign state that is not State Party to the Rome Statute.

The UN Security Council can act under Chapter VII of the Charter of the United Nations and refer a situation in any state, including non-State Parties if the State is a member of the UN, for investigation by the ICC Office of the Prosecutor. This can be seen as a derived form of universal jurisdiction, if the crime is committed in a non-State Party’s territory, and the perpetrator is a national of a non-State Party.

The jurisdiction of the ICC can be divided in four categories, temporal, territorial, personal and subject matter jurisdiction.

The temporal jurisdiction prohibits the Court from exercising jurisdiction over crimes committed before the Statute entered into force 1 July 2002. This is closely linked to the principle of non-retroactivity *ratione personae* in Art. 24. Non-retroactivity of treaty provisions is also considered customary treaty law, codified in VCLT Art. 28. Crimes already committed or on-going at the time the treaty came into force are therefore not punishable. This narrow interpretation has been chosen even if the crimes committed were

47 Rome Statute Art. 12 (3).
49 Rome Statute Art. 13 litra (b).
50 Rome Statute Art. 11 (1).
51 Art. 24 (1) precludes criminal responsibility for conduct prior to the entry into force of the Statute.
criminally liable under treaty based or customary international law prior to the Rome Statute’s entry into force.\textsuperscript{52}

Rome Statute Art. 12 (2) \textit{litra a} addresses territorial jurisdiction and gives the Court jurisdiction over crimes regardless of the nationality of the suspect as long as the crime was committed on the territory of any State Party.\textsuperscript{53} Territorial jurisdiction therefore does not apply to non-State Parties.\textsuperscript{54} However, an \textit{ad-hoc} declaration given by a non-State Party or a Security Council referral can give the Court jurisdiction over non-State Parties.\textsuperscript{55} This was the situation when Security Council Resolution 1593 referred the situation in Sudan to the ICC for prosecuting international crimes committed in Darfur.\textsuperscript{56}

The active personality jurisdiction of the Court, as expressed in Art. 12 (2) \textit{litra b}, gives the Court jurisdiction over any national of a State Party. According to customary international law, this applies to those who do not benefit from immunity.\textsuperscript{57} But according to Art. 27, the Court is not barred from exercising its jurisdiction on grounds of immunity. The Court can exercise jurisdiction based on active personality regardless of where the crime was committed, which also includes non-State Parties.\textsuperscript{58} Personal jurisdiction can also be given to the Court on an \textit{ad hoc} basis by declaration by a non-member state, or by an UN

\begin{flushright}
\textsuperscript{52} It could be argued that a strictly procedural assumption of jurisdiction would in itself not come into conflict with the principle of substantive \textit{ex post facto} criminalisation. See Triffterer (\textit{ed.}) (2008) p. 539-545.
\textsuperscript{53} Rome Statute Art. 12 (2) \textit{litra a}.
\textsuperscript{54} This would be in violation of VCLT Art. 34 regarding non-consentual treaty obligations. See Triffterer (\textit{ed.}) (2008) p. 557.
\textsuperscript{55} Rome Statute Art. 12 (3). See also Schabas (2007) p. 75.
\textsuperscript{57} \textit{Ibid.} p. 558. See also ICJ \textit{DRC v. Belgium supra} note 25.
\textsuperscript{58} Rome Statute Art. 12 (2) \textit{litra b}.
\end{flushright}
Security Council decision.\textsuperscript{59} So far none of the cases the Court has opened have been based on active personality, although the Prosecutor has made inquiries regarding acts made by nationals of the United Kingdom, a non-State Party, during the invasion in Iraq.\textsuperscript{60}

The subject-matter jurisdiction of the Court is limited to the core international crimes listed in the Rome Statute Art. 5(1). Presently, these include genocide, war crimes and crimes against humanity. The crime of aggression is also within the Court’s jurisdiction, but is pending ratification of the amendment of the Rome Statute.\textsuperscript{61}

\subsection{Universal jurisdiction}

In classic international law, sovereignty prohibits State A to assert criminal jurisdiction over offences in State B by nationals of any other state than State A. However, some international crimes are omitted from this prohibition, on the basis of universal jurisdiction. Although there is no direct causal relationship, universal jurisdiction is founded on the premise that some norms are so universally endorsed, and the violations of those norms are so abhorrent, that they constitute an attack on the international community as a whole. They are therefore \textit{erga omnes}, or owed toward all. Some norms might also be considered \textit{jus cogens}, meaning that they are non-derogable and binding on all states. Genocide is an example of an \textit{erga omnes} norm, as confirmed by the ICJ in the \textit{Barcelona Traction} case.\textsuperscript{62} The prohibition of the crime of genocide is also a \textit{jus cogens} norm, meaning that it is non-derogable, and that every State is obligated to prevent the crime of genocide.\textsuperscript{63}

\begin{footnotesize}
\textsuperscript{60} Triffterer (ed.) (2008) p. 558.
\textsuperscript{61} ICC Assembly of State Parties. \textit{The crime of aggression}. RC/Res. 6. 11 June 2010.
\textsuperscript{62} ICJ \textit{Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)}. Second Phase. ICJ Reports 1970 3., \textit{para} 33.
\textsuperscript{63} ICJ \textit{Case Concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda)}. Jurisdiction of the Court and Admissibility of the Application. Judgment. 3 February 2006. ICJ Reports 2006 37, \textit{para} 64.
\end{footnotesize}
The classic view on jurisdiction in international law was formulated in the 1927 *SS Lotus* case. The question here was whether Turkey could prosecute a French sailor for negligence. The PCIJ found that any State might exercise universal jurisdiction, unless there is a specific rule preventing the State from doing so.\(^64\) This applies to judicial (and, for other purposes not discussed here, legislative) jurisdiction. For enforcement jurisdiction, the rule has been believed to be opposite.\(^65\) But state practice indicates that rather than relying on absence of prohibition, states have traditionally sought to ground the use of universal jurisdiction through positive law.\(^66\) In the ICJ *Arrest Warrant* case, two separate opinions in the Judgment also supported this view.\(^67\)

Universal jurisdiction can be permissive or mandatory, leaving the State either permitted or obligated to exercise jurisdiction.\(^68\) Examples of mandatory universal jurisdiction can be found in Art. 146 of the 1949 Fourth Geneva Convention, Art. 85 (1) of the 1977 Additional Protocol I, and Art. 5 and 7 of the 1984 Convention Against Torture. The obligation here is “*aut dedere aut judicare,*” meaning to either extradite or prosecute. Related to this obligation is the possible principle for subsidiarity in exercising universal jurisdiction. This is discussed further in Section 4.4.

One of the turning points in the evolution of universal jurisdiction was the *Pinochet* Judgment of the UK Judicial Committee of the House of Lords in November 1998, ruling that the former Chilean Head of State was not entitled to claim immunity from the jurisdiction of an English lower court. The English court was found to have jurisdiction

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\(^64\) PCIJ *Case Concerning S.S. Lotus (France v. Turkey)*, 7 September 1927 P.C.I.J. Series A No. 10. See also Cryer (2010) p. 45.
\(^65\) Ibid.
over an extradition request from Spain, facing charges for crimes against humanity and
torture committed while he was still Head of State.\textsuperscript{69} The decision on the lack of immunity
on the basis of customary international law was later overturned. However, a third ruling
based the extradition on the 1984 Convention Against Torture, instead of customary
international law.\textsuperscript{70} The \textit{Pinochet} Judgment is relevant to the application of universal
jurisdiction because it emphasised the primacy of national courts for prosecuting the most
serious international crimes. It also reaffirmed the principle that some crimes are so serious
that any state may claim jurisdiction and that national courts in regards to these
international crimes can therefore exercise judicial jurisdiction without any territorial
connection to the crime.\textsuperscript{71}

The subject matter of universal jurisdiction is provided both in customary international law
and international treaties. It is beyond the scope of this study to examine the crimes in their
fullest detail; however, a representation of the crimes is supplied to provide some legal
context. This study, which is limited to the international crimes as listed in the Rome
Statute Art. 5 (1) except aggression, will therefore not examine crimes that are subject to
universal jurisdiction but fall out of the Rome Statute, for example piracy and terrorism.
These are only referred to when they shed light on a specific question.

Crimes that can be tried on the basis of universal jurisdiction, as provided by treaty law,
include war crimes. The Geneva Conventions of 1949 established that persons alleged to
have committed or ordered grave breaches in international armed conflicts are subject to
“the jurisdiction of all State Parties”. The text of the treaty is limited to State Parties;
however, the Geneva Conventions are believed to have reached a status of customary law,
leaving war crimes applicable to voluntary universal jurisdiction. Art. 7 provide that the
State must extradite or “submit the case to its competent authorities for the purpose of

\textsuperscript{69} Sands (2003) p. 68.
\textsuperscript{70} \textit{Ibid.} p. 93.
\textsuperscript{71} \textit{Ibid.} pp. 69-70.
prosecution”. This indicates a somewhat weaker obligation to prosecute than the mandatory prosecution provided in the Genocide Convention Art. VI.

The Genocide Convention provides an obligation to “punish” those responsible for genocide, not just to investigate or prosecute. However, similar to the wording in the 1949 Geneva Conventions, Genocide Convention Art. VI does not establish a principle of universal jurisdiction but limits prosecution to State Parties and international criminal tribunals only; in other words, based on a territoriality principle. In the *Eichmann* trial, the defendant claimed that universal jurisdiction over genocidal crimes was inconsistent with Art. VI.⁷² This was dismissed by the Israeli court on the basis that universal jurisdiction over crimes of genocide had become customary international law in that the crime was of such a grave offence it had to be considered *delicta juris gentium*, a crime against the law of nations itself.⁷³ This was also a necessary basis for the Israeli court to have temporal jurisdiction to adjudicate in a case where the crime happened before Israel existed.

The term “crimes against humanity” lacks a uniform definition, and there exists no specific treaty for prosecuting based on universal jurisdiction. It is, however, considered to be customary international law.⁷⁴ Some crimes that generally fall under crimes against humanity also have a basis in treaty law. An example of this is the Torture Convention. In Art. 7 (1) it is provided an obligation for State Parties to prosecute or extradite alleged perpetrators of the crime of torture. This is also considered customary international law by the ICTY.⁷⁵

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⁷² Oliver (1962) p. 805.
⁷³ Oliver (1962) p. 808, para 12.
Regarding universal jurisdiction based on customary law, Stigen argues for a more conservative approach, finding grave breaches (i.e., war crimes) to be the only ICC crime that may be subject to universal jurisdiction based on customary law.\textsuperscript{76} However, the ICTR and the ICTY have both argued that the crimes within their subject matter jurisdiction, which also falls under ICC jurisdiction, are subject to universal jurisdiction.\textsuperscript{77} Stigen holds that these opinions are outside of the tribunal’s mandates. But on the other hand, the jurisprudence of the \textit{ad-hoc} tribunals holds considerable respect in the ICC reasoning.

\textsuperscript{76} Stigen (2008) p. 192.

3 Complementarity

3.1 The principle of complementarity

Admissibility to the ICC is based on a principle of complementarity. An alternative to this would be to base the jurisdiction of the ICC on universal jurisdiction, where a case would be admissible regardless of national proceedings. While the Rome Statute does not give a definition of the principle of complementarity, in general, complementarity is a state of being complementary, or serving to complete something else. A contextual interpretation of complementarity inferred from the other provisions of the Rome Statute suggests that the ICC can assume jurisdiction over certain crimes only when the Court is satisfied that domestic authorities are “unable” or “unwilling” to exercise jurisdiction through investigations or prosecution. This is one of the cornerstones of the ICC, manifested in the Preamble and Art. 1 of the Rome Statute. An ordinary meaning of the term “complementarity” can be interpreted as a condition where different parts relate to one another, and thereby supplies each other’s deficiencies, forming a unit. When applied to international law, complementarity can therefore be seen as a bridge between national and international jurisdiction.

78 Interpreting the Rome Statute in light of VCLT Art. 31 (2) suggests that the Preamble is an integral part of the treaty, and that the legal obligations manifested in the Preamble should be equal to the legal obligations in the main body of the treaty.

79 VCLT Art. 31 (1).


The State Parties have the primary responsibility for prosecution of international crimes. Only subsequently are they admissible to the ICC, given that they fall in under the jurisdiction of the Court. This principle is expressed in the Rome Statutes Preamble and Art. 1. The legal rule is further elaborated as an admissibility criterion in Art. 17 and 20, establishing the substantive criteria and material elements of the principle. Art. 18 and 19 contain rules regarding procedure (preliminary rulings on admissibility and procedure) when the jurisdiction of or admissibility to the ICC is challenged. The Prosecutor is to consider the admissibility of an investigation before he initiates an investigation.\textsuperscript{82} He must also consider the national judicial proceedings continually under the investigations and inform the PTC should a genuine national proceeding make the case inadmissible.\textsuperscript{83} The PTC is the competent body to rule on admissibility.\textsuperscript{84} A ruling on admissibility can be appealed to the Appeals Chamber.\textsuperscript{85}

The Court was never intended to impose judicial dominance over working domestic legal systems adhering to the international rule of law, as the ICC does not have the authority to initiate proceedings when domestic proceedings are in accordance with the Rome Statute.\textsuperscript{86} The principle of complementarity was a political trade-off made during the negotiations leading up to the adoption of the Rome Statute. This trade-off was necessary to receive the required amount of ratifications for the Statute to enter into force.\textsuperscript{87} The reason for including such a principle was to persuade states into giving the Court jurisdiction over certain crimes, while maintaining state sovereignty.\textsuperscript{88}

\textsuperscript{82} Rome Statute Art. 53 (1) \textit{litra} (b).
\textsuperscript{83} Rome Statute Art. 53 (2).
\textsuperscript{84} Rome Statute Art. 17 (1), confer Art. 18.
\textsuperscript{85} Rome Statute Art. 18 (4).
\textsuperscript{86} Newton (2011) p. 307-308.
\textsuperscript{87} Stigen (2005) p. 29.
Conversely, the ad-hoc tribunals for the Former Yugoslavia and Rwanda are not complementary to the respective national courts given the suspected lack of fair trials and capability (see also supra section 1.1.1). The Statutes for the ICTR and ICTY provide that while they recognise concurrent jurisdiction, the tribunals enjoy primacy over the national courts and may at any time “formally request national courts to defer to the competence” of the tribunals. In the Tadic case, the defence challenged the primacy of the ICTY. The Court rejected this challenge, holding that primacy would counter the danger that international crimes could be characterised as ordinary crimes, and thereby shielded by unfair national prosecution.

The principle of complementarity is on the one hand, founded on the respect for the sovereignty of the State, and on the other hand, a method of making international criminal prosecution more effective. Complementarity is practised by the ICC in two forms, a passive form and a positive form. The passive form is the traditional form, in which the Court remains passive until the State fails to investigate and prosecute. The positive form of complementarity, adopted and developed by the Prosecutor, is not only passive and reactive, but actively guides and encourages the national states to establish a working framework of legislation, thereby enabling the national states to prosecute international crimes domestically in accordance with the standards of the ICC. This will be further discussed in Section 5.1.1.

89 ICTY Statute Art. 9 (2) and ICTR Statute Art. 8 (2).
90 Prosecutor v. Dusko Tadic, supra note 74.
92 The legal basis for positive complementarity can be found in Art. 93 (10) of the Rome Statute.
3.2 Complementarity as a condition for admissibility

Rome Statute Art. 17 (1) imposes three tests for admissibility to the court: the complementarity principle (litra (a) and (b)), a rule of double jeopardy (litra (c)) and an assessment of sufficient gravity of the crime (litra (d)). These will be examined separately, with a main focus on complementarity.

3.2.1 Article 17 (1) litra (a) and (b)

Complementarity can be said to serve three distinct purposes. First and foremost is the before-mentioned prevention of impunity. Second, to create a division of labour between the Court and national jurisdictions. Third, complementarity should ensure that State Parties effectively abide to the primary duty to investigate and prosecute international crimes.

The principle of complementarity renders a case inadmissible if two cumulative criteria are met. First, the prosecuting State must have jurisdiction over the case. As mentioned in section 2.1 of this thesis, this includes universal jurisdiction. Second, the State must be both “willing” and “able” to genuinely investigate or prosecute the case.

Article 17 of the Rome Statute states that the primary jurisdiction of a State can only be appealed if the State is considered “unwilling” to prosecute genuinely. According to Art. 17 (2) litra (a) a State can be found “unwilling” if domestic authorities are shielding a suspect from prosecution. A State can also be found “unable” to investigate or prosecute. The ordinary meaning of the words “unable” and “unwilling” indicates that there is a higher threshold for “unable” than “unwilling”. This is also supported by the definition of inability in Art. 17 (3), where it is stated that to determine inability, the Court must consider whether the State is unable to obtain the either the accused or evidence, or is otherwise unable to

95 Art. 17 (1) litra (a) and (b), c.f. (2) litra (a).
96 Art. 17 (1) litra (a) and (b).
carry out proceedings because of a collapse in the judicial system. “Unwilling” also implies a subjective element, reflected in the State’s policy.97

One situation that may be considered “unwillingness” is where a State has genuinely exercised its jurisdiction, but on narrower grounds of material or mental elements of the crimes in its national legislation than is provided for in the Rome Statute.98 This could lead to de facto impunity since the crime is not punished domestically, but would have been prosecuted by the ICC, had the case been admissible. This may not be limited to blatant omissions of certain crimes, but one example could be where national legislation does not include the full range of crimes, such as Art. 7 (1) litra (g) regarding sexual offences or the use of child soldiers in Art. 8 (2).99

Another form of “unwillingness” could be intended or unjustified delays in the proceedings.100 This could be due to a lack of impartiality and independence in the States’ prosecution. But delays or a lack of due process could only be considered “unwilling” if the delay as such is grave enough to be inconsistent with bringing the accused to justice.101 In this respect, a certain margin of appreciation must be given, due to the wide differences between the legal systems of different states.

The text in Art. 17 does not explicitly mention “inactivity” as a condition for admissibility. This argues initially that inactivity does not satisfy the admissibility test. However, in the Lubanga case, the PTC ruled that “remained inactive” was equalled to “unwilling” and “unable” within the meaning of Art. 17 (1).102 The Pre-Trial Chamber further stated that the

100 Rome Statute Art. 17 (2) litra (b). See also Stigen (2005) p. 124.
102 Ibid.
inactivity must “encompass both the person and the conduct which are the subject of the case before the Court.”\textsuperscript{103} In the \textit{Katanga} case, the Court considered inactivity in the context of unwillingness, instead of adding it as a third unwritten criterion in addition to “unable” and “unwilling”.\textsuperscript{104}

Complementarity is a question the Court may need to revisit, as a State can affirm its jurisdiction even after the ICC proceedings have commenced. This can hypothetically open up for the possibility of using national proceedings to derail the ICC.\textsuperscript{105} However, the genuineness of the national proceedings must also be considered during a subsequent admissibility test. This was the issue in \textit{Kony} case, where the Appeals Chamber of the ICC found that the case remained admissible because the Court found it speculative whether Kony could be tried in Uganda.\textsuperscript{106}

The word “genuinely” in \textit{litre} (a) and (b) was chosen over the word “effectively” so that it would not be interpreted in such a way that a case would be admissible if the ICC could prosecute more effectively, i.e. that the national criminal proceedings were merely slow.\textsuperscript{107} An ordinary meaning of the word “genuine” implies that it is something sincere, which can


\textsuperscript{105} Cassese (2011) p. 534.


\textsuperscript{107} Cryer (2007) p. 128.
be interpreted as a purpose of bringing the accused to justice.\textsuperscript{108} This interpretation emphasises the State’s right and duty to prosecute, in accordance with the purpose of the Rome Statute as expressed in the Preamble. This interpretation also gives the states a wide margin of appreciation in selecting the measures for prosecuting.

In both Art. 17 (1) \textit{litra} (a) and (b) concerning jurisdiction the word “State” is used instead of “State Party,” indicating that any State may initiate an investigation or prosecution for the admissibility before the ICC. Second, the Rome Statute does not contain any rule of priority in between jurisdiction of different states, meaning that the ICC will have to yield if any State assumes genuine proceedings of a crime that otherwise fall in under the jurisdiction of the ICC, so long as the State itself has jurisdiction over the matter.

An objective interpretation of the term would indicate that it is referring to jurisdiction under international law, including universal jurisdiction.\textsuperscript{109} Interpreting Art. 17 (1) \textit{litra} (a) and (b) in the light of the Preamble of the Rome Statute \textit{para} 6, the duty to exercise criminal jurisdiction lies on “every State”. Hall argues that this must include every form of jurisdiction, as there are no explicit limitations on the form of jurisdiction mentioned in the Preamble.\textsuperscript{110} Such an interpretation would also be consistent with the purpose of the Rome Statute, as expressed in the Preamble, which is to end impunity.\textsuperscript{111} On the other hand, Stigen argues that the State must identify a positive rule under international law, treaty based or customary, allowing for universal jurisdiction over a crime. Stigen argues further that there must exist a positive rule, treaty based or customary, which an ICC crime is subject to.\textsuperscript{112}

\begin{thebibliography}{9}
\bibitem{110} Hall (2010) p. 211.
\bibitem{111} Hall (2010) p. 212.
\bibitem{112} Stigen (2008) p. 192.
\end{thebibliography}
Although there exists no formal hierarchy between the admissibility criteria of complementarity, double jeopardy and gravity, the Pre-Trial Chamber used complementarity as the first part of the test when testing the application’s admissibility in the *Lubanga* case.\(^{113}\)

### 3.2.2 *Ne bis in idem*

The rule of *ne bis in idem*, or double jeopardy, in Art. 17 (1) *litra* (c) supports the principle of complementarity. A case is inadmissible to the ICC if the person has already been tried before another court. This is also a general rule of law accepted in most national legal systems.\(^{114}\) The same principle can also be found in other international human rights treaties, such as ICCPR Art. 14 (7) and ECHR Protocol No. 7 Art. 4. This admissibility criterion is linked with the subject matter of the *ne bis in idem* rule in Art. 20 (3). The rule applies only if the conduct the person is accused of is identical to the national proceedings. What constitutes same conduct will be examined in Section 4.3 and 4.4.

One exemption from the *ne bis in idem*-principle can be found in Art. 84 (1) of the Rome Statute. This article provides that a revision of the final Judgment of conviction or sentence can be made on the grounds of new evidence, that decisive evidence has been proven false, or that one of the judges committed an act of serious misconduct.

### 3.2.3 *Sufficient gravity*

Article 17 (1) *litra* (d) of the Rome Statute imposes “sufficient gravity” as an admissibility criterion. Even if the crime were otherwise admissible, it must also be of a “sufficient gravity” to be prosecuted by the Court. Neither the Rome Statute nor the Rules of Procedure and Evidence define “gravity”.

\(^{113}\) *ICC Prosecutor v. Lubanga and Ntaganda* supra note 103 para. 30.

In the *Lubanga* case, the Pre-Trial Chamber considered the gravity test mandatory, by interpreting the phrase “shall determine” in Art. 17 (1). It is the conduct subject to prosecution that must be “especially grave”. In both the *Lubanga* and the *Ntaganda* cases, the PTC considered two factors that could constitute “especially grave”: that the conduct was of a systematic or large scale and the amount of international concern caused in the international community. In the *Ntaganda* case, the conduct was found to be inadmissible due to a lack of gravity, but was later overturned by the Appeals Chamber of the ICC. The Appeals Chamber refused the consideration of international concern, but did not elaborate further on the merits of gravity.

Sufficient gravity reserves for the Court only the most serious of crimes committed, which underpins the complementarity principle.

### 3.3 Prosecutorial discretion

In addition to complementarity, a second aspect of admissibility is the prosecutorial discretion given to the Office of the Prosecutor. According to Art. 53 (1) *litra* (c) and (2) *litra* (c) of the Rome Statute, the Prosecutor is permitted to investigate a situation, and prosecute an individual, only if it serves the “interests of justice”. Although a legal criterion, this allows for considerable political maneuvering. Judicial control by the Court is applied only if the Prosecutor decides not to prosecute solely on this basis. The

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115 *ICC Prosecutor v. Lubanga and Ntaganda* supra note 103 para 41-45.
117 *ICC Prosecutor v. Lubanga and Ntaganda* supra note 103 para 46.
118 *ICC Appeals Chamber Prosecutor v. Lubanga*. Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence". 13 October 2006. ICC-01/04-01/06-568, *para* 42.
120 Rome Statute Art. 53 (1) - (3). See also Greenawalt (2009) p. 133.
gravity of a case,\textsuperscript{121} serves as an important factor for determining whether a case serves “the interests of justice”.\textsuperscript{122} Other factors for interpreting the “interests of justice” may be the interests of the victims of the crime and the case’s potential impact on a domestic peace process or other justice mechanisms.\textsuperscript{123}

\textsuperscript{121} Rome Statute Art. 17 (1) \textit{litra} (d).

\textsuperscript{122} Stigen (2005) p. 98.

\textsuperscript{123} ICC-OTP (2007) p. 6-8.
4 The tension between complementarity and sovereignty

This Chapter will discuss some general issues that may be argued to create friction in the relationship between the ICC and domestic investigations and prosecutions, hereunder universal jurisdiction. This allows the more specific discussion in the next Chapter to be put in its context of the tension between universality and sovereignty.

4.1 Principal differences in the site of trial

The primary site for a trial is *locus delicti*, the place of the crime. In the course of history, this has been the norm for post-conflict justice. There are also several valid arguments for preferring a case to be held before a national court instead of an international court. One important factor is that the victims live or lived in the State where the crime was committed. Cost-efficiency of the prosecution will almost certainly be higher if the proceedings are held before a court in the State in which the criminal acts occurred.\(^{124}\) This is because of the lesser amount of resources needed to physically procure witnesses and collect evidence. Another advantage of having trials against international crimes in the respective domestic location is the focus on the individual perpetrator, rather than having the impression that the State is being punished. This loss of sovereignty in criminal proceedings leads to a form of international shaming, which may be a political cost for the State. Additionally, national proceedings often enjoy greater legitimacy in the society where the crimes took place as they come from within the society itself. Especially in poorer societies, national proceedings will have a greater impact on the community compared to the lack of media and information about international proceedings and the institutional distance between the society and the ICC or tribunal, a key argument in post-

conflict Rwanda.\textsuperscript{125} National proceedings can also help in this way to promote reconciliation in a post-conflict society.\textsuperscript{126}

International crimes can have a vast scale, and resources are often limited post-conflict. If the territorial State where the crimes was committed is unable to apply post-conflict justice, because the State is unable or unwilling to hold trial, or because the perpetrators have fled, one alternative is to initiate criminal proceedings by investigating or prosecuting in another State. There has traditionally been little interest for prosecuting foreign individuals for crimes committed with no nexus to the neutral State. Often there is at least a colonial tie to the states afflicted, as in the cases of the Guatemala Genocide in Spain and the Batare Four in Belgium. This lack of interest for serving universal interests proves that trials for international crimes in neutral states are somewhat utopian.

The third alternative is to hold the trial at the ICC in Hague. This alternative serves neutrality and independence, and is important for minimizing the feeling of victor’s justice. However, at the same time, the institutional and geographic distance between the victims and the Court might fail to contribute to their feelings of participation in post-conflict justice. The Court is also dependant on compliance from the states involved to secure evidence and witnesses, and to apprehend the indicted.

\textbf{4.2 Self-referrals}

One of the three initial trigger mechanisms for the exercise of ICC jurisdiction is the state referral.\textsuperscript{127} Art. 14 allow “a State Party” to refer a situation to the prosecutor for investigation. State referrals can be regarding other states or a self-referral, where a State Party refers a situation where the crimes have been committed in its own territory or by its

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{125} Wielenga (2011) p. 15.
\item\textsuperscript{126} Broomhall (2003) p. 84.
\item\textsuperscript{127} Rome Statute Art. 13 \textit{litra} (a) and Art. 14. The other two trigger mechanisms are a referral by the UN Security Council in Art. 13 \textit{litra} (b), and the Prosecutor’s independent initiation of investigation \textit{(proprio motu)} in Art. 13 \textit{litra} (c) and Art. 15.
\end{enumerate}
\end{footnotesize}
own subjects. A self-referral to the ICC is made when the State considers that prosecuting a specific matter in a national court would be politically harmful to national interests and therefore claims an inability to investigate and prosecute the matter. The principle of complementarity might therefore come into conflict with certain aspects of the use of self-referrals. Self-referrals can potentially be used to shield political interests from domestic prosecution. One question relevant in this study is to which extent the complementarity principle allows for states that may be able and willing to investigate and prosecute situations themselves to refer to the ICC. Another aspect of this question will be discussed in Section 5.1.3.

Today, international crimes are not necessarily perpetrated by states, but rather often by insurgents, like the LRA in Uganda, or by terrorist groups. States can therefore be both perpetrators and victims, and the ability of self-referral is therefore an important tool for failed states unable to prosecute crimes that fall under their jurisdiction. This is especially important where the society is deeply divided, as in Uganda and Rwanda.

As of today, three self-referrals, the Democratic Republic of Congo, Uganda and the Central African Republic, have resulted in an ICC investigation. The Prosecutor, as a matter of enhancing the legitimacy of the early investigations, has welcomed the use of self-referrals. For example in the case of the DRC, it was argued that the Prosecutor preferred a state referral to exercising his own independent power of investigation.

Self-referrals can be interpreted in two different ways. A narrow interpretation of Art. 14 in the context of complementarity would lead to inadmissibility if the State itself is able and

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130 ICC. Situations and cases. Available at: http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations Last accessed: 13/02/12.
willing to investigate.\footnote{132} This was the reasoning of the defence counsel in the Katanga case.\footnote{133} A positive interpretation would on the other hand allow for admissibility by self-referral if the ICC is not in competition with the domestic prosecution. Given that the objective for the complementarity principle is to be an incentive for national proceedings, it therefore favours a positive interpretation of self-referrals.\footnote{134} In this way, potential ICC proceedings could also act as an incentive for states to exercise their jurisdiction.\footnote{135}

Assuming that the Rome Statute allows for a positive interpretation of state referrals, the next question is whether self-referrals act as waivers of complementarity for the admissibility of a case. If the State itself wishes for the ICC to prosecute, it seems plausible that the test for admissibility is redundant. However, such waivers of complementarity would be inconsistent with the right of the Prosecutor to investigate other or additional persons than the referral of the situation indicates.\footnote{136} Should the Prosecutor indict additional persons, the admissibility would have to be tried for the cases in the subsequent indictment. For the sake of consistency, the rule should apply to the original self-referral as well. Kleffner argues that there exists no room for such waivers at the present.\footnote{137}

Waiving complementarity by self-referring situations would also be counter-effective as an incentive for the right and duty of states to act as primary prosecutors of international crimes.\footnote{138} The State could easily divert proceedings by referring the case to the ICC.

Submitting auto-referrals to a complementarity test for admissibility also reduces the incentive to use ICC referrals for domestic political gains. This was the case in the referral in the *Situation in Uganda*, where Uganda referred the leaders of the LRA insurgents only, despite the conflict being two-sided. Without the possibility of striking out cases that are politically motivated on grounds of admissibility, the Court could end up as a hostage in a domestic political situation.

The Appeals Chamber has come a long way towards clarifying the extent in which self-referrals are permissible under the Rome Statute. The decision in the *Katanga* case established that self-referrals are consistent with the object and purpose of the ICC, which is to end impunity for international crimes. It is therefore permissible to self-refer situations where the State is willing and able to process, but the Court reserves a right to test for admissibility.

### 4.3 Prosecution of ordinary crimes

International crimes under the Rome Statute Art. 5 (1) subsume elements which also constitutes as crimes in domestic criminal codes. Prosecution of ordinary crimes can therefore try the same conduct as a international trial. However, there is a chance that prosecution of ordinary crimes fail to address all the aspects of the crime as identified in the Rome Statute. The next question is therefore, to which extent can domestic prosecution of ordinary crimes fulfil the complementarity principle?

Rome Statute Art. 17 (1) *litra c* provides that a case is inadmissible if “the person concerned has already been tried for conduct which is the subject of the complaint”. This applies to the crimes listed under Art. 6 through Art. 8 of the Rome Statute. If the person has been finally convicted or acquitted for a specific conduct, a re-trial is prohibited,

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without consideration of the adequacy of the domestic punishment.\textsuperscript{143} This is an expression of the so-called \textit{ne bis in idem}-principle.\textsuperscript{144}

One implication of the \textit{ne bis in idem}-principle is that international prosecution of the same conduct as previously tried in a domestic trial is prohibited. For example, trying a specific count of murder, perpetrated within the context of an international crime, would be prohibited when the person had already been tried in his home country or in a neutral State. However, by separating the crime from the specific conduct, international prosecution could occur without breaching the obligation not to prosecute the same conduct.\textsuperscript{145} For instance in the case of murder, one could imagine the ICC prosecuting a hypothetical proceeding rape or for a second count of murder, if it fits within the context of an international crime.

The \textit{Lubanga} case has provided some factors for interpreting this question. One of the admissibility questions was whether the national investigations carried out by the DRC precluded the ICC’s jurisdiction under Art. 17 (1) \textit{litra} a.\textsuperscript{146} In 2006, the Pre-Trial Chamber found that DRC national judicial system had changed in 2004 and since then two arrest warrants for Lubanga had been issued, some of which could be for crimes within the jurisdiction of the Court, and that the DRC was therefore no longer “unable” to prosecute, as the Prosecutor stated in 2004. However, the PTC decided that the national proceedings did not “encompass the conduct that constitutes the basis of the Prosecution’s Application”.\textsuperscript{147} The Court reasoned that the DRC arrest warrants did not encompass the responsibility for conscripting and using child soldiers, and therefore the DRC was not

\begin{flushleft}
\textsuperscript{143} Stigen (2008) p. 336. \\
\textsuperscript{144} Rome Statute Art. 17 (1) \textit{litra} (c), confer Art. 20. \\
\textsuperscript{145} Sedman (2010) p. 261-262. \\
\textsuperscript{146} ICC Prosecutor v. Lubanga and Ntaganda supra note 103, para 30. \\
\textsuperscript{147} \textit{Ibid}. paras 36-37.
\end{flushleft}
“acting in relation to the specific case before the Court.”\textsuperscript{148} This indicates a somewhat narrow interpretation of the principle of \textit{ne bis in idem}, as the specific conduct is separated from the crime as a whole. A similar interpretation of the principle can be found in ICTY jurisprudence, where crimes in separate villages were found to be separate conduct, and that the \textit{ne bis in idem}-principle only applied for crimes committed in the village of Glogova on 9 May 1992.\textsuperscript{149}

Domestic prosecution of ordinary crimes can therefore to a certain extent fulfil the complementarity principle in Art. 17, on the condition that the domestic prosecution encompass the specific conduct in the specific case before the ICC. This applies both to the State with territorial or personal jurisdiction, and states prosecuting based on universal jurisdiction.

4.4 \textbf{Horizontal complementarity}

The principle of complementarity in the Rome Statute imposes a vertical causal relationship between national proceedings of any State and the ICC. Horizontally, Article 90 of the Rome Statute imposes a priority rule for a State Party who is in custody of a person suspected of international crimes when it receives competing requests for extradition between a State Party and the ICC in accordance with Art. 89. Art. 90 of the Rome Statute also distinguish between competing requests from a State Party and a non-State Party; however, this is limited to extraditions only. For situations regarding jurisdiction, and extraditions outside of the jurisdiction of the Court, the Rome Statute is naturally silent regarding regulating claims of concurrent jurisdictions between different states. As there exists no principle for interpreting a hierarchy among concurrent forms of jurisdiction in treaty law, the next relevant question for this study is therefore to which extent there exists such a principle in customary international law.\textsuperscript{150}

\textsuperscript{148} \textit{Ibid.} paras 38-39.


\textsuperscript{150} Ryngaert (2011) p. 858.
When multiple states claim to have jurisdiction to prosecute an international crime, some will have a stronger nexus to the crime than others. An example of this can be where a State exercising universal jurisdiction is in custody of a foreign alleged offender, but the territorial State or the State of which the offender is a national, also wishes to prosecute. Horizontal complementarity refers to a situation when a third-party State that wants to prosecute based on universal jurisdiction, are required to defer its prosecution in favour of a State with a stronger nexus with the international crime. One condition is that the State with the stronger nexus is able and willing to investigate and prosecute.

A classic interpretation of international law is that states have a wide measure of appreciation when it comes to jurisdiction. However, limits to this margin of appreciation may exist and states may be obligated to restrain the exercise of their jurisdiction.\(^{151}\) This Westphalia-based system of sovereign equality was emphasized in the *SS Lotus* case.\(^{152}\) Furthermore, there must exist some positive rule for limiting the sovereign right for states to exercise the jurisdiction they hold.\(^{153}\)

Undermining a potential principle of horizontal complementarity is the lack of a transnational *ne bis in idem*-principle.\(^{154}\) This principle has been codified in human rights treaties such as the ICCPR Art. 14 (7) and ECHR Protocol No. 7 Art. 4, however it is not considered applicable at a transnational level when universal jurisdiction is applied.\(^{155}\)


\(^{152}\) PCIJ *SS Lotus supra* note 64 pp. 18-19.

\(^{153}\) Ryngaert (2010b) p. 4.

\(^{154}\) Ryngaert (2010b) p. 7.

\(^{155}\) Ibid.
One factor that may support the argument that states consider themselves bound by a customary rule is the degree of domestic legislation implementing a rule of horizontal complementarity. Germany and Belgium are two countries which have codified a principle of horizontal complementarity into their national criminal codes. ¹⁵⁶ To a certain degree, there exists some relevant case law on this specific subject.

One case that has been used as an example of horizontal complementarity is the 2005 German Abu Graib case. The question there was whether the respective German court could prosecute alleged international crimes committed by American military personnel. The German federal prosecutor applied Art. 17 directly as a form of subsidiary universal jurisdiction. The prosecutor could then apply a rule of prosecutorial discretion in the German Code of Criminal Procedure, where prosecution of a suspect of international crimes can be suspended if another State is prosecuting and is exercising jurisdiction based on the territoriality, nationality or passive personality principle. The reason for this was to end proceedings, because the situation had been dealt with in the United States. ¹⁵⁷ The 1994 Tadic case in also indicated a will to defer to other jurisdictions with a stronger nexus to the crime, although it deferred to an international tribunal and not a prosecution based on universal jurisdiction. ¹⁵⁸

Many states are dualistic, meaning international law has to be domestically enacted in order to be given effect in the domestic legal system. Some are also purely monist, incorporating all treaties by simply ratifying them. But most states can be considered a combination, giving some treaty provisions direct effect. One example of this is New Zealand, which has sector monism for ICC crimes, giving the relevant provisions direct effect based on

¹⁵⁷ Ibid.
universal jurisdiction.\textsuperscript{159} However, Art. 17 is a procedural rule relating to ICC-specific competences and, therefore, giving direct effect to Art. 17 in domestic law would be problematic \textit{de lege ferenda}. For the principle to be applicable in domestic legislation, the substantial principle of complementarity would have to be lifted out of the procedural rule, and then implemented domestically.

In the case of \textit{Belgium v. Senegal}, the dispute was due to a lack of prosecution by Senegal of former President of Chad, Hissene Habré.\textsuperscript{160} Habré had fled to Senegal in 1990 and was accused of being responsible for torture and political killings. Senegal failed to prosecute Habré and refused to extradite him to Belgium based on a lack of jurisdiction. Belgium saw this as a violation of Art. 5 (2) of the Torture Convention in failing to incorporate the necessary provisions to enable Senegal to prosecute based on universal jurisdiction, a violation of Art. 6 (2) regarding preliminary inquiries, and a violation of Art. 7 (1) regarding prosecution or extradition of any person alleged to have committed torture.\textsuperscript{161} Belgium therefore primarily asked that the ICJ order Senegal to submit the case to its competent authorities and subsequently demanded extradition to another jurisdiction.\textsuperscript{162} At the time of writing, the ICJ has yet to rule in the case; however, the questions in the hearing regarding the \textit{erga omnes} right to enforce the Torture Conventions obligations by any State based on universal jurisdiction when another State have a stronger jurisdictional claim

\textsuperscript{159} Broomhall (2003) p. 116-117.

\textsuperscript{160} ICJ Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Application instituting proceedings. 19 February 2009. ICJ Reports 2009 58.

\textsuperscript{161} Art. 4 of the Torture Convention encompass both attempts, complicity and participation in torture.

based on the physical presence of the defendant, may shed light on the applicability of a potential customary principle of horizontal complementarity.\textsuperscript{163}

In Spain, the 2000 \textit{Guatemala Genocide} case provided support for arguing that there existed a rule of horizontal complementary in Spanish legislation. The \textit{Audiencia Nacional} court reasoned that universal jurisdiction was complementary to territorial jurisdiction, and found that Guatemala could not be found unwilling to investigate and prosecute the massacre.\textsuperscript{164} The Court based its holding on an interpretation of the Genocide Convention Art. 6 and consideration of the subsidiary principle found here to be a part of a \textit{jus cogens} rule of horizontal complementarity for universal jurisdiction. The amendment of the Spanish Organic Law of the Judicial Branch\textsuperscript{165} in 2009 narrowed the general applicability of universal jurisdiction in Spain by requiring a specific interest for prosecution based on universal jurisdiction, although it cannot be considered to narrow the findings of a principle of horizontal complementarity in Spain.

Germany, Spain and Belgium are three examples of states that find a principle of horizontal complementarity desirable, even if they do not presently consider it binding on state practice.\textsuperscript{166} There are several examples of national proceedings in Spain with little or no regard to the stronger nexus to the crime, or willingness in investigating and prosecuting in other states.\textsuperscript{167} One such example is the indictments of Rwandan officials in 2008, where it was believed that because of the strong ties the suspects had to the sitting government, Rwanda would not prosecute willingly. Another example can be found in the investigations

\textsuperscript{163} ICJ \textit{Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)}. Oral Proceedings. 16 March 2012. CR 2012/5, p. 41.


\textsuperscript{165} 2009 Judiciary Act (Ley Orgánica del Poder Judicial) (Spain).

\textsuperscript{166} Ryngaert (2010b) p. 23.

\textsuperscript{167} \textit{Ibid.} p. 24.
after the Israeli bombing of a Palestinian residential building in 2002, where the Spanish judge disregarded the Israeli Supreme Court’s ruling in the matter. It is therefore tempting to conclude that a dismissal of a matter often leads to a conclusion of unwillingness in the third party state.

International case law has yet to rule on the matter. In the 2002 ICJ Arrest Warrant case, the joint separate opinion of Judges Burgenthal, Higgins and Kooijmans referred to a principle of horizontal complementarity. The principle was not further elaborated, and because the majority opinion of the ICJ only addressed immunity in the merits of the case, the referral to the principle of horizontal complementarity must be seen as an obiter dictum. Because of the omission of the question of horizontal complementarity on the merits of the case, the question is considered to be undecided.

In the 2003 application to the ICJ by the DRC, one of the claims was that the exercising of universal jurisdiction based on the UN Torture Convention Art. 5 (2) was complementary to the exercising of territorial or active/passive personality jurisdiction based on Art. 5 (1). As the parties came to an agreement in 2010, there is no ruling on the merits of horizontal complementarity.

The limited case-law indicates a lack of state practice. It must be granted that customary law have previously been established on a thin basis, if the opinio juris is consistent. But

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168 Ibid.
in the case of the traditionally coherent view on limiting jurisdiction in international law, strong arguments in favour of horizontal complementarity must be made for it to be considered customary law. It is therefore instead regarded as a principle of which prosecuting states can consider. As discussed infra in Section 5.2, giving this principle too much weight can create unwanted consequences.

There are albeit no compelling reasons de lege ferenda for different standards for competing jurisdictions with the ICC and third party states. This argument is further underpinned if the third party states are State Parties to the ICC. However, it is not clear that this is a consistently wanted development and that states feel obligated to adhere to such a principle, and opinio juris has not been proven cohesive on the subject. In conclusion, there exists no principle of horizontal complementarity in customary international law.
5 Universal jurisdiction and complementarity as catalysts?

This Chapter will first examine the role the principle of complementarity can have as a catalyst for national proceedings, hereunder the exercise of universal jurisdiction. Section 5.2 and infra will examine the relevance and potential universal jurisdiction presently have in the context of the ICC complementarity regime, and then in Section 5.2.1 – 5.2.3 discuss issues that acts as obstacles for universal jurisdiction to complement the impunity gaps in the ICC regime.

5.1 Complementarity as a catalyst for universal jurisdiction

5.1.1 Positive complementarity as an incentive for national proceedings

The principle of complementarity was intended to act as an incentive for national proceedings, partly by restraining the sovereignty of those states that do not genuinely prosecute international crimes themselves. This “sovereignty cost” functions as a positive incentive for those countries to prosecute. The “sovereignty cost” is a form of political shaming, used when states measure the political and financial costs and benefits of domestic and international prosecution of crimes. One way for the ICC to manipulate this cost-analysis is to reduce the cost of domestic prosecution by enabling the domestic legal system to prosecute international crimes through practical assistance and legislative help, the process of positive complementarity. One relevant question is therefore to what extent positive complementarity can contribute to national proceedings.

A basic form of positive complementarity includes legal training and adaptation of domestic law, as was done in Uganda to help national prosecution of crimes committed

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174 Ibid.
during the conflict between the government and the LRA.\textsuperscript{175} This is reinforced by the legitimacy the complementarity principle enjoys as it reaffirms the sovereignty of states.\textsuperscript{176} The principle of complementarity therefore, gives national proceedings a distinction of willingness and ability.\textsuperscript{177} Another way could be to increase the political cost of international prosecution, for example through public threats of prosecution where states linger. It is however not certain that the stick would be preferable to the carrot in this case, as the Prosecutor has shown himself to rely on state cooperation.

According to Art. 93 (10) \textit{litra} (a) of the Rome Statute, the Court may cooperate and assist State Parties that investigate or prosecute crimes within the Court’s jurisdiction. The Office of the Prosecutor has adapted this into the principle of positive complementarity. For example, should two or more states wish to prosecute a specific case, the Office of the Prosecutor, acting in accordance with the principle of positive complementarity, may assist states in determining who is the most appropriate to take jurisdiction.\textsuperscript{178} Positive complementarity includes enabling states to utilize universal jurisdiction.\textsuperscript{179}

At the present, the Prosecutor’s interpretation of positive complementarity has focused on measures such as providing information to national judiciaries upon request, calling upon legal professionals from countries with situations under ICC investigations to participate in ICC-OTP investigations, providing information for other parties such as the UN, and promoting support for accountability efforts by other external parties such as donors’

\textsuperscript{175} \textit{Ibid.} p. 349.
\textsuperscript{176} Kleffner (2008) p. 314.
\textsuperscript{177} \textit{Ibid.} p. 318.
Judicial cooperation with State Parties is limited to fostering adoption of domestic legislation in the State Parties.\footnote{ICC-OTP (2009) p. 5.}

The usage of positive complementarity by the Office of the Prosecutor may therefore act as a potential, although limited, incentive for national proceedings.

\subsection*{5.1.2 Article 18 (1) as an incentive for national proceedings}

The Rome Statute emphasises the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.\footnote{Ibid. p. 11.} According to Art. 18 (1) of the Rome Statute, the Prosecutor is required to notify all State Parties and those states that “normally exercise jurisdiction over the crimes concerned” if he is to initiate an investigation. This applies only to referrals by a State Party\footnote{Rome Statute Art. 13 \textit{litra} (a), confer Art. 14.} or when the Prosecutor is acting on his own initiative.\footnote{Rome Statute Art. 13 \textit{litra} (c), confer Art. 15.} This provides the states concerned with an incentive to investigate international crimes at the earliest opportunity possible.\footnote{Broomhall (2003) p. 87.}

Notification on non-State Parties will only be applicable if they “normally” would exercise jurisdiction, based on the wording in Art. 18 (1). An example of this would be a subject of a non-State Party that commits a crime that falls under the jurisdiction of the Court while in the territory of a State Party. Such a notification would therefore act as a direct incentive for the use of universal jurisdiction by non-State Parties in the complementarity regime.
Interpreting the relevant text in the Rome Statute Art. 18 (1) in its ordinary meaning, the use of the word “and those States” instead of “including those States” indicates a distinction between the two groups of states concerned.\(^\text{186}\) This interpretation is also supported by the fact that any State with jurisdiction over a case, including non-State Parties based on universal jurisdiction, can challenge the Courts proceedings.\(^\text{187}\) Support of this argument is also found in the draft proposal to the Rome Statute, limiting the right to challenge the admissibility of a case to interested states only.\(^\text{188}\) An alternative interpretation would be to give the word “and” meaning as “especially”. However, there are no other indications that the Rome Statute is precluded from encompassing non-State Parties in this matter.

If one assumes that Art. 18 (1) includes non-State Parties, the next question is what constitutes a “normal” exercise of jurisdiction. The use of the word “normal” indicates a more narrow interpretation of jurisdiction than the one found in Art. 17 (1).\(^\text{189}\) One interpretation of what constitutes “normal exercise” of jurisdiction is that the non-State Party has a territorial- or active/passive personality-connection to the crime.\(^\text{190}\) This interpretation can give the rule a very narrow area of application, as territorial jurisdiction cannot apply to non-State Parties without a UN Security Council referral or an ad-hoc acceptance of the ICC’s jurisdiction.\(^\text{191}\) On the other hand, if one assumes that this rule would be most applicable for situations where a subject of a non-State Party commits a

\(^{186}\) Stigen (2011) p. 514.

\(^{187}\) Rome Statute Art. 17 and 19 (2) litra (b).

\(^{188}\) Art. 19 (2) litra (b). See Draft Statute for an International Criminal Court. Article 35. ILC Yearbook 1994. Such drafts are supplementary means of interpretation in international law, if an interpretation of the ordinary meaning of the treaty leaves the meaning ambiguous. See VCLT Art. 32 litra (a), confer Art. 31 (1).

\(^{189}\) Stigen (2011) p. 514.

\(^{190}\) Stigen (2011) p. 514.

\(^{191}\) Rome Statute Art. 12 (1) and (2). See also Stigen (2011) p. 514.
crime while on the territory of a State Party, then this interpretation of a “normal” exercise of jurisdiction would be fruitful. Another example may be where an investigated person has taken refuge in a non-State Party, leaving the non-State Party with the option to extradite or prosecute based on universal jurisdiction.

Until this question is brought before the ICC, it will be impossible to conclude on a definite answer. However, some points shown suggest that the Prosecutor is obligated to notify non-State Parties that have a certain nexus to a specific situation or case, for example territorial or based on active or passive personality, or if the investigated person is based in the territory of the non-State Party.

5.1.3 An obligation to exercise universal jurisdiction?

Along with adopting the Rome Statute, several states have incorporated the subject matter provisions as expressed in Art. 5 (1), into domestic law. It is however unclear whether the Rome Statute establishes an obligation to exercise mandatory universal jurisdiction for international crimes, provided that the crime falls under the jurisdiction of the ICC. One condition for an obligation to exercise universal jurisdiction is that there exists a principle of mandatory universal jurisdiction for the international crime, for example through customary international law or treaty, such as Art. 5 (2) of the Torture Convention. This question is also relevant for the jurisdiction over nationals of non-State Parties, which is examined in the next section of this study.

The Preamble of the Rome Statute recalls the duty of “every State” to exercise its criminal jurisdiction, including implicit universal jurisdiction. While the Preamble must be considered integral to the main body of the Statute, there exists no additional legal requirements for this duty. It is therefore difficult to conclude on a specific obligation to exercise universal jurisdiction based on the Rome Statute. According to the ICJ, the Rome

194 VCLT Art. 31 (2).
Statute “does not prohibit universal jurisdiction”.\(^{195}\) It can also be noted that the Preamble uses the words “every State” and not “every State Party,” indicating that the duty towards exercising criminal justice is not geographically limited to signatories. However, VCLT Art. 34 prohibit a treaty from imposing obligations on third-party states, as far as.

Kleffner argues that Art. 17 does not in any way affect the pre-existing regime of universal jurisdiction with regard to international crimes. It is therefore reasonable to argue that Art. 17 neither prohibit nor creates an obligation to exercise universal jurisdiction for State Parties.

The Preamble does not restrict “criminal jurisdiction” to any form of jurisdiction. Since universal jurisdiction is one of the five traditional forms of jurisdiction in international law, an obligation to exercise universal jurisdiction implicitly exists in the Preamble. Hall argues that a teleological interpretation of Art. 21 (1) \textit{litra} (b) of the Rome Statute, together with VCLT Art. 31 and the normative nature of the Rome Statute, favours the broadest interpretation for protection of victims. The obligations of states should therefore not be restricted by interpretation. This interpretation would also be consistent with the obligation to interpret the Rome Statute in accordance with human rights.

The Preamble arguably incorporates an obligation for State Parties to exercise universal jurisdiction where it is applicable for international crimes, although it is a vague obligation that proscribes few legal requirements to be invoked.

5.1.4 Nationals of Non-State Parties

The question that follows the potential obligation to exercise jurisdiction is how the ICC and states prosecuting based on universal jurisdiction differ regarding nationals of non-State Parties. If a national of a non-State Party is suspected of international crimes, the ICC might be left without jurisdiction. Exemptions from this general rule are when the UN

\(^{195}\) ICJ \textit{DRC v. Belgium} supra note 25. Separate opinion of Judge Van den Wyngaert, \textit{para} 64.
Security Council refers the situation to the Court,\(^{196}\) when the non-State Party whose national is suspected have given the Court an *ad-hoc* jurisdiction,\(^{197}\) or when the crime was committed on the territory of a State Party.\(^{198}\) One question, therefore, is to what degree universal jurisdiction can be used to compensate for this potential lack of jurisdiction over nationals of non-State Parties. Exercising universal jurisdiction in this given scenario is consistent with the principal aim of the Rome Statute, to end impunity.

China, especially, has raised concern for the ICC jurisdiction over non-State Party nationals.\(^{199}\) This is partly because the Court itself decides what will constitute as “unable” or “unwilling,” leaving the final answer to the question of admissibility to the Court. The United States has argued that exercise of ICC jurisdiction over US nationals (i.e. nationals of all non-State Parties) would be contrary to international law and VCLT Art. 34 specifically provides that a treaty may not impose obligations on third-party states without consent.\(^{200}\)

Akande argues that the State Party which is in custody of a national of a non-State Party may delegate its jurisdiction to the ICC. ICC jurisdiction over nationals of non-State Parties also appears to be inconsistent with the ICJ decision in the *Monetary Gold* case.\(^{201}\) There, the ICJ held that a case was inadmissible if adjudicating the rights and obligations of a third-party state was necessary for the case to be decided. However, the Rome Statute does

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\(^{196}\) Rome Statute Art. 13 *litra* (b). The *Situation in Darfur* is an example of a referral by the UN Security Council of a situation in a non-State Party. Sudan is a signatory to the treaty, but has yet not ratified the Rome Statute. See ICC-ASP (2012).

\(^{197}\) Rome Statute Art. 12 (3), confer Art. 12 (2) *litra* (b).

\(^{198}\) Rome Statute Art. 12 (2) *litra* (a).


not impose obligations on third-party States as such, only individuals. Scharf also argues that individual criminal responsibility must be interpreted not to impose obligations on the State, but on the individual, and that VCLT Art. 34 therefore cannot be applied.

If the suspected perpetrator of an international crime is in the custody of a State Party, but he is a national of a non-State Party, he might also be prosecuted under universal jurisdiction for international crimes. This situation can, for example, be relevant where the suspected perpetrator is seeking refuge in another country than where the crime was committed, as in the *Belgium v. Senegal* case. It can be incoherent if the State Party in such a situation is unable to delegate its jurisdiction to the ICC.

If the suspect is in the custody of the ICC, the question is whether he can be extradited to a non-State Party based on universal jurisdiction. This situation does not fall under the core definition of extradition in Art. 102 *litra* (b) of the Rome Statute, as this only encompass extradition by a State. Art. 103 1 *litra* (a) provides that a sentenced person can be transferred to another State for the completion of a sentence. But in view of Art. 17 and 19 (4), whereas a non-State Party can challenge the admissibility of a case, a successful challenge must result in the transfer of a suspect to a non-State Party.

### 5.2 Universal jurisdiction as a complement to the ICC?

There have been approximately fifty relevant proceedings based on universal jurisdiction in Europe since 1998, with convictions in more than one fifth of the cases. Some have been watershed cases, such as the 2001 *Butare Four* case in Belgium, convicting four Rwandan nationals of grave breaches of the 1949 Geneva Conventions during the 1994 Rwandan

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202 Rome Statute Art. 25 (1) together with (4) limits the Courts jurisdiction to individuals, and preclude state responsibility.


204 ICJ *Belgium v. Senegal* supra note 160.


In its first ten years of operation, the ICC has investigated seven situations, and reached conviction in one case. The sheer amount of international crimes combined with the institutional capacity of the ICC is therefore an argument for universal jurisdiction to complement the ICC regime.

Universal jurisdiction can potentially fill the gap of impunity where international crimes are not investigated by the national court and are inadmissible at the ICC. This would in many cases be because of a lack of gravity in the specific case. The ICC is not constructed to handle lower-level perpetrators, so if the State in which the crime took place is disinterested in prosecuting, then there will be an impunity gap, which universal jurisdiction has the potential to fill. This is especially true if the alleged perpetrator seeks refuge in another State.

Investigations and prosecutions based on universal jurisdiction can also put a public spotlight on international crimes, as it did in the Pinochet proceedings. The hearings here had a definite impact on the attention universal jurisdiction and the issues of impunity received internationally. Although universal jurisdiction has gained attention for international crimes, the views on universal jurisdiction outside of Europe have often been quite negative. The African Union has been very critical towards the use of universal jurisdiction to prosecute suspects of acts of genocide in Rwanda. Wide differences between different domestic legal systems can reinforce this effect. In addition to this, prosecution based on universal jurisdiction have proven a tendency to run been between former colonial powers and their subjects. Another tendency has been to prosecute

210 For example the Spanish Guatemala Genocide case, and the prosecution of Rwandans in the Belgian Butare Four case.
subjects of African and South American nations. However, it must be admitted that most international crimes have been perpetrated in African conflicts. But it must also be noted the exercise of universal jurisdiction in the aftermath of the war in the Balkans.

In addition, the preparatory work during the phase of investigation by State Parties asserting universal jurisdiction in absentia, can be an important contribution to the ICC. Ryngaert argues that this could be considered as a duty under the Rome Statute, under which states are obliged to “cooperate fully” with the Court in its investigations and prosecutions. This obligation could be interpreted as including preparatory work in the earliest phases of an investigation.

In the 2002 Arrest Warrant case, the ICJ narrowed the principle of universality significantly. By establishing that foreign ministers enjoy personal immunity ex officio, and that they may only be prosecuted for crimes committed while in office in a “private capacity,” the ICJ in effect narrowed the application of universal jurisdiction for prosecuting international crimes. While the interpretation on the law of immunity in the Arrest Warrant case led to a significant narrowing of the reach of universal jurisdiction, the ICJ did not define what constitutes “private capacity”. In addition to this, the dissenting opinion of Judge Van den Wyngaert argued that international crimes such as genocide and aggression are possible to commit only in a State capacity, and that immunity never should apply to war crimes and crimes against humanity. Although the ICJ reserved the right to address the question of universal jurisdiction in the Arrest Warrant case, the Court did not address it in the merits of the case. This was due to Congo dropping the claim of

211 Guatemala Genocide (Spain), Belgium v. Senegal, Butare Four (Belgium), Pinochet (UK).
215 Ibid. para 43.
unlawful application of universal jurisdiction in its final submission. In the separate opinion of Judge Oda, it was highlighted that universal jurisdiction is an undeveloped field, and therefore the ICJ should not take “a definite stance” on the subject.216

By differentiating between jurisdiction and admissibility, the ICC respects the sovereignty of its State Parties. Universal jurisdiction can, on the other hand, be considered a threat to sovereignty217, partly because of the lack of a principle of horizontal complementarity.

Horizontal complementarity can be a factor for exercising universal jurisdiction without creating tension between universalism and sovereignty, as argued supra in Section 4.4. However, this principle can be given too much weight when domestic prosecutors apply universal jurisdiction. As the indictment of Rumsfeld and others for responsibility for torture shows, the German Federal Prosecutor deferred to a US investigation, based on the existence of other US proceedings of lower ranking individuals, and not directly related to the subject of the original indictment.218 Such an interpretation of horizontal complementarity leaves manoeuvring room for the home State to block foreign proceedings by initiating proceedings against lower-level officials.219

One argument against universal jurisdiction to complement the ICC regime is that it can be criticized for being politically motivated and lacking the political impartialness that international tribunal can provide. The arrest warrant for the Israeli politician Tzipi Livni for responsibility for war crimes in Gaza was met with domestic political pressure.220 However, one solution is to restrain the politization of universal jurisdiction, and to leave the power of prosecution to an politically independent prosecutor, such as the office of

219 Ibid.
220 BBC (2009)
Riksadvokaten in Norway and the newly established Director of Public Prosecution in the UK.\textsuperscript{221} Although this raises the bar for exercising universal jurisdiction, it restrains the potential political motivation, especially of private petitions.

Universal jurisdiction has also been accused of following old colonial lines. But it is equally valid that most international crimes happen in failed states and poor countries, and that international prosecution is a predominantly Western phenomenon.\textsuperscript{222} Likewise, the prosecution at the ICC have also been criticized for taking political considerations into account regarding prosecution.\textsuperscript{223} The ICC has been proven to seek state cooperation, as the self-referrals of the situations in the DRC, Uganda and the Central African Republic have shown. The gravity criteria in Art. 17 (1) \textit{litra} (d), in conjunction with the prosecutorial discretion based on the gravity of a crime in Art. 53 (1) \textit{litra} (c) has also proven to be politically powerful. The extension of judicial priorities to enable the current use of the gravity threshold was unforeseen by the Rome Negotiations.\textsuperscript{224} The gravity threshold was used to justify the refusal to investigate the 2003 invasion in Iraq, despite receiving over 200 communications regarding possible international crimes. Another development has been in the “contextual interpretation” of the gravity threshold in the \textit{Lubanga} case, indicating that the conduct must be “especially grave” to be admissible.\textsuperscript{225} The development of the prosecutorial discretion in the ICC regime can affect the exercise of universal jurisdiction, as it leaves a lesser amount of international crimes admissible for the ICC. Both the Court and the exercise of universal jurisdiction therefore exist in a political context where justice is dependant on power, self-interests and cooperation to be efficient.

\begin{footnotes}
\item[221] 2011 \textit{Police Reform Bill}. See also Stigen (2009) p. 43.
\item[223] Newton (2011) p. 309.
\item[225] ICC \textit{Prosecutor v. Lubanga and Ntaganda} supra note 146, para 41.
\end{footnotes}
5.2.1 Lack of positive domestic legislation

The legislative basis of universal jurisdiction varies between states. Some states apply ordinary criminal law for the prosecution of international crimes, while other refer directly to international law through domestic criminal code.\textsuperscript{226}

In the first eight years after the Rome Statute’s entry into force, only 38 State Parties enacted legislation providing the core international crimes as crimes under national law, permitting national courts to exercise universal jurisdiction.\textsuperscript{227} It is beyond the scope of this thesis to do a comparative analysis of these State’s legislation. Instead some examples are provided.

In Belgium, Art. 5 (3) of the Act of 1993 Concerning Grave Breaches of International Humanitarian Law provided that it was to be applied equally to all persons, disregarding any immunity. Thus Belgium could prosecute an acting minister of the DRC, in the 2000 Arrest Warrant case. This act was amended in 2003, limiting the unconditional universal jurisdiction, by requiring a nexus of active or passive personality.\textsuperscript{228}

In Norway, the 2008 entry into force of Chapter 16 of the 2005 Penal Code gave Norwegian courts competence in cases regarding war crimes, genocide, and crimes against humanity.\textsuperscript{229} These crimes may be prosecuted on the basis of universal jurisdiction.\textsuperscript{230} The rationale was to give Norwegian courts the same competence as the ICC.\textsuperscript{231} But, there are in fact some limitations on the exercise of universal jurisdiction. The maximum punishment in the Norwegian Criminal Code must exceed one year, and the conduct must be punishable

\textsuperscript{226} Kaleck (2008) p. 959.
\textsuperscript{227} Hall (2010) p. 218.
\textsuperscript{228} Reydams (2003) p. 680.
\textsuperscript{229} Eskeland (2006) p. 175.
\textsuperscript{230} 2005 Penal Code §§ 101-110, confer § 5.
\textsuperscript{231} Ot.prp. nr. 8 (2007-2008) section 12.2.1.1, p. 277.
in the territorial State. The accused must also reside in Norway.\textsuperscript{232} In 2006, before the entry into force of the new legislation, the ICTR requested the transfer of the case against Michel Bagaragaza from the tribunal to Norway to try him in Norway for genocide. This was later rejected by the ICTR as Norway’s legislation did not encompass jurisdiction over genocide based on universal jurisdiction.

In Spain, universal jurisdiction legislation was amended in 2009 after the investigation regarding the 2002 bombings by Israel was closed (see Section 4.4).\textsuperscript{233} It is now required that the perpetrator is apprehended in Spain, or that the prosecution is based on the passive personality principle. The legislation also imposes that Spanish prosecution be suspended if proceedings are commenced in a State or international court or tribunal, thereby imposing a provision of horizontal complementarity.\textsuperscript{234}

In 2001, the UK enacted legislation extending universal jurisdiction over core international crimes, but limits this to persons living in the UK at the time of the crime or proceedings and excludes the crime of aggression.\textsuperscript{235}

Non-State Parties have also amended their legislation after the entry into force of the Rome Statute. In the United States, until 2007, the crime of torture was the only crime subject to universal jurisdiction. In 2008 and 2009, legislation was enacted providing for universal jurisdiction for genocide and the recruitment of child soldiers.\textsuperscript{236}

\begin{thebibliography}{99}
\item \textsuperscript{232} 2005 Penal Code § 5.
\item \textsuperscript{233} Ryngaert (2010b) p. 28.
\item \textsuperscript{234} \textit{Ibid}.
\item \textsuperscript{235} International Criminal Court Act 2001 (UK) § 50.
\item \textsuperscript{236} Hall (2010) p. 223.
\end{thebibliography}
States v. Yousef, a US Court of Appeals excluded terrorism as a subject of universal jurisdiction because it was unable to distinct the subject matter of the crime of terrorism.237

For those countries that do allow investigation or prosecution based on universal jurisdiction, temporal and spatial restriction of universal jurisdiction often apply.238 For example, some countries require the presence of the suspect before investigations can commence or extradition can be requested.239 Although trials in absentia may be in conflict with human rights, a strict presence requirement like the one adopted in Belgium in 2009, may lead to limited applicability of universal jurisdiction. In addition, only a few states have special units that investigate crimes under international law. Denmark, the Netherlands and Norway are three examples of countries where units of the national prosecutors are specialized in international crimes.240 In other countries, especially France and Spain, the private petition continues to serve as the sole means for invoking universal jurisdiction.241

5.2.2 The potential lack of due process in universal jurisdiction

One of the non-jurisdictional issues regarding universal jurisdiction is the potential difficulty in safeguarding the human rights of the perpetrator. The ICC employs admissibility as an method of protecting the human rights of the accused. Because of the complementarity principle, the accused is free of multiple proceedings and double jeopardy. The missing safeguards, and therefore potential lack of a due process in universal jurisdiction, could come into conflict with international and regional human rights instruments such as the ECHR242 and the ICCPR.243 The right to a fair trial, issues

241 Ibid.
242 ECHR Protocol 7 Art. 4.
regarding trials in absentia, and the lack of a transnational ne bis in idem-principle are just a few examples (see Section 4.4).

Repeated prosecution can happen, with the lack of a ne bis in idem-principle. As there exists no principle regulating repeated prosecutions between states, the exercise of universal jurisdiction would have to rely on the successive national courts to prevent repeated prosecution. The EU has implemented such a principle. A related issue is that the lack of an international ne bis in idem-principle can lead to forum shopping. The three European states most favourable towards exercising universal jurisdiction have traditionally been Belgium, Germany and Spain.

For states who have codified universal jurisdiction in their national legislation, it can be implemented narrowly (conditionally) or extensively (unconditionally). An extensive implementation of universal jurisdiction would allow courts to rule in absentia, without the presence of the accused. According to the Princeton Principles on Universal Jurisdiction, ruling in absentia can only apply to pre-trial proceedings, without possibly violating the accused’s due process and human rights, for example the right to a fair trial, as expressed in ECHR Art. 6. The narrow or conditional form of universal jurisdiction is the most common, although some European states have opted for legislation, which allows for proceedings in absentia. For example, in Belgium, between 1993 and 2003, civil petitioners could initiate cases where no territorial link to Belgium existed. This led to cases against several sitting heads of State, such as Fidel Castro of Cuba and Ariel Sharon

243 ICCPR Art. 14 (7).
244 Cryer et. al (2010) p. 60.
245 Article 54 of the Convention on the Implementation of the Schengen Agreement.
of Israel.\textsuperscript{249} In Spain, a 2005 Constitutional Tribunal ruling interpreted Spanish jurisdiction such that proceedings \textit{in absentia} could be carried out. This wide interpretation has later been amended to require proceedings based on the territorial principle and the active and passive personality principle, although only for future proceedings.\textsuperscript{250}

5.2.3 Amnesties and statutes of limitations

One further question is how exercising universal jurisdiction differs from complementarity in relation to amnesties and statutes of limitations. This is relevant because of the tension exercising jurisdiction over crimes a State have given amnesty for, might create with that States’ sovereignty. Amnesties in some form are often part of the transitional justice process in a post-conflict society. Examples include the amnesties given by the Government to the LRA in Uganda,\textsuperscript{251} El Salvador, South Africa and Guatemala.\textsuperscript{252}

The Rome Statute Art. 29 provides that the jurisdiction of the ICC may be exercised regardless of statutes of limitations given in or after a conflict. On the other hand, the Rome Statute does not mention amnesties explicitly. If the national courts decide not to prosecute crimes, or to grant an amnesty, for example in combination with an official truth commission, then the test will be whether or not the national proceedings can be identified as “genuine unwillingness” and if the crimes are grave enough to warrant admissibility before the Court.\textsuperscript{253} The South African TRC and the \textit{Gacaca} courts in Rwanda are two examples of hybrid transitional justice that have been found to constitute genuine prosecution. However, if an amnesty has been given, the Prosecutor may find that prosecution by the ICC is not in the “interests of justice”.\textsuperscript{254} The UN Security Council may

\textsuperscript{249} Ibid. pp. 70-71.
\textsuperscript{250} Ibid. p. 71.
\textsuperscript{251} Amnesty Act, Act no. 2, 2000 (Uganda), Chapter 294 § 3.
\textsuperscript{252} Broomhall (2003) p. 94.
\textsuperscript{253} Triffterer (ed.) (2008) p. 618.
\textsuperscript{254} Rome Statute Art. 53 (1) \textit{litra} (c).
also request that the Court defer any proceedings, which can take into account the need for amnesty.  

The use of amnesty was one of the principal questions regarding the admissibility of the Situation in Uganda. The question there was whether amnesty given to the LRA leaders by the Ugandan government could be considered a genuine willingness and ability to prosecute. The conditions of the amnesty included a public admitting of guilt and a public apology. In 2004, Uganda referred the case to the ICC and in 2005, the Court issued arrest warrants for the leaders of the LRA, including Joseph Kony. Uganda later wished to withdraw the arrest warrants and instead reverts to negotiations and amnesty. For the ICC to withdraw, the question is whether the investigations and prosecutions are “genuine”. Given that there is no definition of “prosecution” in Art. 17 of the Rome Statute, it is therefore unknown whether the traditional tribal justice combined with the amnesty will be defined as a genuine investigation and prosecution. Interpreting “prosecution” narrowly would obviously leave out Uganda’s traditional form of justice.

States prosecuting international crimes are not bound by domestic amnesties, as foreign law is not binding on another sovereign State. How states prosecuting based on universal jurisdiction relate to amnesties, is therefore up to the prosecutorial discretion in that State. States such as Spain and France hold that their prosecutions disregard foreign amnesties.

255 Rome Statute Art. 16.
In Uganda, the government set up a special war crimes court, the International Crimes Division,\textsuperscript{261} to prevent the LRA leaders from being tried before the ICC as agreed in the amnesty. This was done when the government learned that the ICC would disregard the Ugandan amnesty. In such a way, the threat of international prosecution, from the ICC or other states, can act as a disincentive for giving amnesty.

For statutes of limitations, the 1968 UN Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, forbid the use of statutory limitations for war crimes and crimes against humanity. The European Convention has, at the present, been ratified by seven European states.\textsuperscript{262} The UN Convention has been ratified by 54 states.\textsuperscript{263} This indicates a very reserved international support of these treaties and does not indicate a definite rule.

The Geneva Conventions and the Torture Convention impose mandatory universal jurisdiction (a duty to extradite or prosecute). This is hard to reconcile with blanket amnesties. Admittedly, Art. 6 (5) of the Second Additional Protocol to the Geneva Conventions calls for the use of broad amnesty, but it is believed that this doesn’t apply for core international crimes. \textit{De lege ferenda} one could argue that this threshold should be similar to the interpretation of the Rome Statute, in effect balancing the need for political manoeuvrability through amnesty and the need to prevent impunity for international crimes. Therefore the test of “genuine willingness to prosecute” could be also used against amnesties.

\textsuperscript{261} Human Rights Watch (2008).
\textsuperscript{262} CoE (2012).
\textsuperscript{263} United Nations Treaty Collection (2012).
In summary, there exist no definite rules limiting the exercise of universal jurisdiction in situations where an amnesty has been given, or for statutes of limitations. The ICC would in any case have to assess the “interests of justice”, in effect the political gains of the amnesty or statute of limitations, compared with the severity of the crime. Other sovereign states are not obligated to assess this issue, leaving the exercise of universal jurisdiction in a situation where it can disturb a fragile peace process.\textsuperscript{264}

\textsuperscript{264} Cassese (2007) pp. 5-10.
6 Concluding remarks

The rationale behind establishing a permanent international criminal court was to end impunity and to ensure that the statement “never again” would not once more become the reality of “again and again”.\textsuperscript{265} The principle of complementarity has arguably contributed to a increase in prosecution of international crimes;\textsuperscript{266} however, the Court has only begun to utilize the all the provisions in the Rome Statute, meaning it is too early to measure all the effects of the complementarity principle in its fullest extent. How the complementarity principle is to actually work, was left to be fleshed out by practice. In addition, exercising universal jurisdiction can be relevant because of the limits of the jurisdiction of the ICC. However, as universal jurisdiction is partly lacking in basis in positive international law, these two regimes need further development to fulfil the objective of ending impunity.

Prosecuting based on universal jurisdiction, and at the supra-national level, should not be a process of relative gains, but rather absolute gains. This thesis has argued that universal jurisdiction can fill some of the impunity gaps in the ICC regime, thereby acting as a complement. At some points, complementarity and universal jurisdiction can even act as catalysts, especially through positive complementarity and the investigations in early universal jurisdiction proceedings.

As this thesis argues in the case of amnesty, universal jurisdiction and the ICC together can fill an impunity gap where criminal proceedings are hindered because of domestic political deals. Although, the possible conflict with states sovereignty can here be an issue.

\textsuperscript{265} Former Chief Prosecutor at the ICTY, Judge Richard Goldstone, in Chesterman (1997) p. 316.

\textsuperscript{266} Philippe (2006) p. 398.
Although this thesis argues that there are shortcomings in the concept of universal jurisdiction, it may help indirectly by contributing to international criminal law by raising awareness of international crimes and interpreting and creating case law and treaties outside the ICC. But most importantly, it may serve a direct relevance by filling the impunity gap in the complementarity regime, provided that it is exercised with some restraint and political independence. As the Court is reserved for the most serious cases, it will be up to national proceedings to handle the bulk of cases. The exercise of universal jurisdiction may, as this thesis argues, serve to investigate and prosecute in those situations where the State with the territorial nexus is unwilling or unable or in the cases where the perpetrator has sought refuge in another State. However, the shortcomings of universal jurisdiction limit the role it can have, as argued in Section 5.2.

Success for the ICC will not lie in the expansion of the number of cases by expanding institutional capacity, but instead may be found in enabling national prosecution, including the use of universal jurisdiction, to be the spear point for ending impunity for international crimes. This has been the goal from the start of the ICC for its first Prosecutor, that the success of the Court should be measured in the overall effect on impunity.\footnote{Moreno-Ocampo (2003) p. 2.}
7 Table of references

7.1 Primary sources

7.1.1 International treaties and other instruments

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<tr>
<td>(Fourth Geneva Convention), 12 August 1949.</td>
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<td>UN Charter</td>
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<tr>
<td>ICJ Statute</td>
<td>Statute of the International Court of Justice. 33 UNTS 993.</td>
</tr>
<tr>
<td>Genocide</td>
<td>Prevention and punishment of the crime of genocide.</td>
</tr>
<tr>
<td>Convention 9 December 1948.</td>
<td>A/RES/260</td>
</tr>
<tr>
<td>Torture Convention</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1465 UNTS 85.</td>
</tr>
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7.1.2 National legislation and draft legislation

Footnote: Full title:


Ot.prp. nr. 8 Ot.prp. nr. 8 (2007-2008) Om lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (Norway).


7.1.3 Decisions of international courts and tribunals

Footnote: Full title:


ICC Prosecutor v. Kony et. al.
**Kony et. al.**  

**ICC Prosecutor v. Kony et. al.**  
Decision on the Admissibility of the Case under Article 19 (1) of the Statute, 10 March 2009.

**ICC Prosecutor v. Kony et. al.**  
Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009.

**Lubanga and Ntaganda**  
Decision on the Prosecutor's Application for a warrant of arrest, Article 58. 10 February 2006. ICC-01/04-01/07.

**ICC Prosecutor v. Lubanga**  
Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence". 13 October 2006. ICC-01/04-01/06-568

**ICJ Belgium v. Senegal**  
ICJ Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Application instituting proceedings. 19 February 2009. ICJ Reports 2009 58.

**ICJ Belgium v. Senegal**  
ICJ Belgium v. Senegal  
ICJ Questions relating to the Obligation to Prosecute or Extradite  

ICJ Belgium v. Spain  
ICJ Barcelona Traction, Light and Power Company, Limited  

ICJ DRC v. Belgium  
ICJ Case Concerning the Arrest Warrant of 11 April 2000  
(Democratic Republic of the Congo v. Belgium), 14 February 2002.  
ICJ Reports 2002 3.

ICJ DRC v. France  

ICJ DRC v. France  

ICJ DRC v. Rwanda  
ICJ Case Concerning Armed Activities on the Territory of the Congo  

ICJ Monetary Gold  
ICJ Monetary Gold (Italy v. France, United Kingdom and United States). ICJ Reports 1954 19.

ICTR Prosecutor v. Bagaragaza  
Bagaragaza 2009. ICTR-2005-86-S


PCIJ France v. Turkey PCIJ Case Concerning S.S. Lotus (France v. Turkey), 7 September 1927 P.C.I.J. Series A No. 10.

7.1.4 Decisions of national courts

**Footnote:**

**Full title:**


*Butare Four* Cour d’Assises de Bruxelles (Belgium). *Public Prosecutor v. ‘Butare Four’*. Arrêt. 8 June 2001.

**Pinochet II**  
House of Lords (United Kingdom). *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No.2)*. 2 W.L.R. 272 (H.L. 1999)

**Pinochet III**  
House of Lords (United Kingdom). *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No.3)*. 2 W.L.R. 827 (H.L. 1999)

**U.S. v. Yousef**  

### 7.2 Secondary sources

#### 7.2.1 Books and journal articles

**Footnote:**  
**Full title:**

Abi-Saab (2003)  

Akande (2003)  
[http://jicj.oxfordjournals.org/content/1/3/618.abstract](http://jicj.oxfordjournals.org/content/1/3/618.abstract)

Akhavan (2005)  


<table>
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<th>Author (Year)</th>
<th>Reference</th>
</tr>
</thead>
</table>


7.2.2 Reports of governments and IGOs, draft instruments, etc.


7.2.3 Press releases and news articles, etc.

**BBC (2007)**


**BBC (2009)**

BBC (2011) 
BBC. *Ugandan LRA rebel Thomas Kwoyelo granted amnesty*. In: 
BBC News. Published 22 September 2011. Available at 
16/04/12.

Ferencz (2012) 
Ferencz, Benjamin B. *Crimes against humanity*. In: New York 
Times. Published 15 March 2012. Available at 
http://www.nytimes.com/2012/03/16/opinion/crimes-against- 
humanity.html?_r=1 Last accessed 26/03/12.

HRW (2008) 
Human Rights Watch. *Uganda: New Accord Provides for War 
Crimes Trials*. 19 February 2008. Available at 
http://www.unhcr.org/refworld/docid/47bea7eb1e.html Last accessed 
16/04/12.

HRW (2012) 
16 January 2012. Available at 
http://www.hrw.org/news/2012/01/15/uganda-war-crimes-trials- 
face-challenges Last accessed 16/04/12.

ICC (2004) 
ICC Press Release. *President of Uganda refers situation concerning 
the Lord's Resistance Army (LRA) to the ICC*. ICC-20040129-44. 
29 January 2004. Available at http://www.icc- 
cpi.int/menus/icc/press%20and%20media/press%20releases/2004/pr 
esident%20of%20uganda%20refers%20situation%20concerning%20 
the%20lord%20resistance%20army%20_lra_%20to%20the%20ic 
c?lan=en-GB Last accessed 10/03/12.

Last accessed 26/03/12.