

The Relevance of *Erga Omnes* Obligations in Prosecuting International Crimes

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Abstract

The need to regulate the potential for concurrent jurisdiction among States interested in prosecuting international crimes – such as genocide, crime against humanity, war crimes, and torture – might be satisfied by relying on the concept of *erga omnes* obligations. This concept is intended to protect fundamental community values by way of individual State action. The same values are undermined by international crimes. One of the means of *erga omnes* obligations enforcement is substitution between States less and less linked to a certain breach of community interests. It seems that contemporary international law is gradually coming to terms with this solution even in the field of international criminal justice. In fact, both in the relationship among States *inter se* and between States and international criminal tribunals, international law seems to distinguish primary from sec-

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ondary claims to jurisdiction over international crimes and set the legal requirements for substitution among them. Within each class of relationship these requirements seem identical. However, they require further clarification in practice.

I. Introduction

This article seeks to ascertain whether *erga omnes* obligations (*i.e.*, obligations under general international law that every State owes to the international community as a whole) can play a role – as a matter of contemporary international law – in prosecuting core international crimes: namely, genocide, crimes against humanity, war crimes, and torture. The central question is whether the doctrine of *erga omnes* obligations may help provide a normative setting to govern the potential concurrent exercise of jurisdiction by States interested in prosecuting such crimes, thereby enforcing the values embodied in the rules on international crimes.

I will attempt to demonstrate that, in recent times, a trend is growing to enhance one of the means of enforcement of *erga omnes* obligations: that based on substitution between States less and less linked to a certain breach of fundamental community interests.

Contemporary international law seems to distinguish between States primarily entitled to engage in judicial action against alleged perpetrators and States (or entities) secondarily entitled to do so. The latter may only act to substitute for the former whenever these are unwilling or unable to genuinely carry out prosecutions. This pattern holds true both in the relationship among States *inter se* (*i.e.*, horizontally) and in the relationship between States and international criminal tribunals (*i.e.*, vertically). Nowadays, more than in the past, at both levels there is a tendency to embrace the logic of substitution that is typical to the enforcement of customary rules designed to protect general interests. It is the logic underpinning the enforcement of *erga omnes* obligations.

In addition, contemporary international law seems to subject such substitution to a set of legal requirements (*i.e.*, criteria that trigger and govern the substitution mechanism), both horizontally and vertically. By the same token, at both levels the contents of such requirements seem to correspond. In my view, this circumstance shows the progressive incorporation of the *modus operandi* of *erga omnes* obligations in the prosecution of international crimes, in order to solve controversial problems arising from the need to coordinate criminal judicial bodies.

II. Substitution between States in Enforcing General Norms Aimed at Protecting Community Values

Probably one of the most complex and controversial issues in the field of *erga omnes* obligations enforceability concerns the regulation of possible reactions of all States against breaches of such obligations. Since the well-known *obiter dictum* of the International Court of Justice (ICJ) in the 1970 *Barcelona Traction* Judgment,¹ all States have a legal interest in the implementation of *erga omnes* obligations. Their breach is deemed to be an offence not only against the injured State, but also against the international community as a whole. Hence, such breach enables all States to take action, even if they are not specially affected.²

However – it has been advocated by some legal scholars – on the one hand, the legal sources of *erga omnes* obligations grant all States collective rights³ to maintain general interests; on the other hand, it does not follow that all States are equally entitled to exercise their rights in the event of a breach. The entitlement to a collective right as a counterpart of an *erga omnes* obligation and the empowerment to exercise such a right (for instance, by unilaterally taking non-forcible counter-measures) are two different and separate concepts. The former does not necessarily or automatically imply the latter.⁴

¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5.2.1970, ICJ Reports 1970, 32, para. 33.

² On this topic see, notably, *A. de Hoogh*, *Obligations Erga Omnes and International Crimes*, 1996; *M. Ragazzi*, *The Concept of International Obligations Erga Omnes*, 1997; *C. Tams*, *Enforcing Obligations Erga Omnes in International Law*, 2005; *S. Villalpando*, *L'émergence de la communauté internationale dans la responsabilité des États*, 2005; *P. Picone*, *Comunità internazionale e obblighi «erga omnes»*, 2013; *G. Gaja*, *The Protection of General Interests in the International Community*, *Recueil des cours de l'Académie de droit international de La Haye* 364 (2014), 9 et seq. See also the Resolution on Obligations and Rights *Erga Omnes* in International Law, adopted by the *Institut de Droit International* at its 2005 Krakow Session <www.justitiaetpace.org>, and the two Reports of the Special Rapporteur *G. Gaja* [AIDI 71-I (2005), 119 et seq., 189 et seq.].

³ As it is widely known, the legal qualification of the individual legal positions corresponding to *erga omnes* obligations is highly controversial. For reasons I cannot develop here, the approach relying on the notion of collective rights is the most convincing.

⁴ See, also for the analysis which follows this note, *P. Picone*, *Obblighi reciproci e obblighi erga omnes degli Stati nel campo della protezione internazionale dell'ambiente marino dall'inquinamento*, in: *V. Starace* (ed.), *Diritto internazionale e protezione dell'ambiente marino*, 1983, 15 et seq., 82 et seq. [reprinted in *P. Picone* (note 2), 1 (72 et seq.)], who further elaborated his thesis in various occasions. Among the most recent ones, see: *P. Picone*, *Il ruolo dello Stato leso nelle reazioni collettive alle violazioni di obblighi erga omnes*, *Riv. Dir. Int.* 95 (2012), 957 et seq.

The right to take action varies depending on whether breaches of *erga omnes* obligations simultaneously affect the collective rights of all States and the individual rights of one or more specific States. It is therefore possible to single out different normative frameworks intended to regulate the potential concurrence of State reactions against a certain infringement of an *erga omnes* obligation.⁵ If an *erga omnes* breach simultaneously affects the collective rights of all States and the individual rights of a specific State, one such normative framework is marked by the logic of substitution. As a result, the aggrieved State may react first, in order to satisfy its and the other States' claims. However, if it fails to act, the other States may do so in its stead in order to satisfy all claims arising from the internationally wrongful act, including those waived by the aggrieved State and regarding its individual rights (e.g., compensation).

These considerations hold particularly true where *erga omnes* obligations might be qualified as "functional powers", that States with a stronger nexus to a certain wrongful act may exercise on behalf of the international community for the protection of general interests. Whenever and for whatever reasons these States fail to act, such "functional powers" may be exercised by other States in pursuit of the same objectives.⁶

In support of this theoretical approach, for instance, in the field of marine environment protection from acts of pollution from vessels (when take place within the territorial sea or the exclusive economic zone) are the special enforcement powers granted to coastal States by Art. 220 of the United Nations Convention on the Law of the Sea of 10.12.1982 (UNCLOS).⁷ It provides authority to "undertake physical inspection" of foreign vessels (accused of breaches of UNCLOS or of applicable international rules and standards for the prevention, reduction and control of pollution from vessels, committed while exercising their right of innocent passage) and, "where the evidence so warrants, institute proceedings, including detention of the vessel". Such powers must be exercised to protect the public interest in the marine environment. Whenever the coastal State fails to act, the port State may, upon request of the coastal State, step in to achieve the same ends regardless of whether it has been harmed by the pollution at hand (Art. 218

⁵ *Erga omnes* obligations are collective obligations protecting interests of the international community as such, but they may at the same time protect individual interests. Consider, for instance, the prohibition of acts of aggression. It protects the survival of each State and its population. This is one of the reasons why the exercise of collective self-defense under Art. 51 of the UN Charter requires the consent of the State under attack.

⁶ See again *P. Picone*, *Obblighi reciproci e obblighi erga omnes degli Stati* (note 4), 82 et seq.

⁷ 1833 UNTS 3.

para. 2 UNCLOS). Therefore the port State acts in the general interest and not in its own individual interest. Furthermore, pursuant to Art. 218 para. 4 UNCLOS, any proceedings instituted by the port State may be suspended at the request of the coastal State. This legal setting, and the powers it confers, would demonstrate the existing subsidiary relationship between the competences pertaining to such classes of States in enforcing international rules aimed at the protection of collective values.⁸

The question arises whether this line of reasoning may also be followed, *mutatis mutandis*, in the field of international crime prosecution.

In fact, the rules of enforcement regarding violations of *erga omnes* obligations contained in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission (ILC) in 2001, do not solve, but raise the problem related to State coordination. As it is widely known, the ARSIWA distinguish between injured States (Art. 42) and States other than the injured State (Art. 48), without elaborating upon the relationship between these groups of States in such enforcement (whether it is governed by priority, concurrence or substitution, etc.).⁹ However, they give an impression of the secondary role of Art. 48 States and of the prior entitlement to reaction of the injured State (which seems to enjoy a stronger position).¹⁰ Although both classes of States can invoke the responsibility for a breach of an *erga omnes* obligation, request cessation, assurances of non-repetition and reparation, and arguably take countermeasures,¹¹ Art. 48 States cannot seek reparation in their own name, but in the interest of the injured State¹² or of the beneficiaries of the obligation breached (pursuant to Art. 48 para. 2 lit. (b)), can take forcible measures only to ensure these ends (pursuant to Art. 54) and obtain guarantees of non-repetition only if they are accepted by the injured

⁸ P. Picone, *Obblighi reciproci e obblighi erga omnes* degli Stati (note 4), 94 et seq.

⁹ Yearbook of the International Law Commission, 2001, Vol. 56-II, 117, 126.

¹⁰ P. Picone, *Il ruolo dello Stato leso* (note 4), 974 et seq. See also J. Crawford, *State Responsibility. The General Part*, 2014, 549 et seq., who notes that the entitlement to invoke responsibility under Art. 48 is “ancillary or secondary” to the entitlement of injured States under Art. 42.

¹¹ If collective countermeasures are admitted, in light of the saving clause contained in Art. 54 ARSIWA. Today this seems to be the prevailing view: L. A. Sicilianos, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, in: J. Crawford/A. Pellet/S. Olleson (eds.), *The Law of International Responsibility*, 2010, 1137 et seq., 1144 et seq.; M. Dawidowicz, *Third-Party Countermeasures in International Law*, 2013. Recent practice seems consistent with such a theoretical approach. For instance, consider the reactions against the incorporation of Crimea by the Russian Federation [see *ZaöRV* 75 (2015), 1 et seq.].

¹² In case it “cannot or does not want to do so”: B. Stern, *The Obligation of Reparation*, in: J. Crawford/A. Pellet/S. Olleson (note 11), 563 et seq., 568.

State.¹³ Anyway, it seems that Arts. 42 and 48 have left the door open to various possible solutions. This was acknowledged by the ILC itself. In its Commentary to Art. 48 para. 2 lit. (b), the ILC stated that it “involved a measure of progressive development”,¹⁴ meaning it needed further clarification and development in practice.

III. The Collective Nature of the Values Protected by the Rules on International Crimes

International crimes are widely deemed to be serious breaches of norms of customary international law protecting fundamental values of the international community as a whole (*i.e.*, peace, security, life). Their commission may lead to collective responses and collective enforcement.¹⁵ There is substantial normative and judicial evidence for this contention. For instance, in the Statute of the International Criminal Court (ICC),¹⁶ and in the judgment rendered in 1962 by the Supreme Court of Israel with respect to the *Adolf Eichman Case*.¹⁷

Moreover, by their very nature, international crimes originate from conducts undertaken by States. Basically, such crimes are committed by State officials. Even where they are committed by non-State officials, normally they are perpetrated pursuant to or in furtherance of an organizational policy or plan to commit them. Therefore, usually international crimes are connected – directly or indirectly, explicitly or implicitly – to a governmental action or inaction. They form part of a collective criminal conduct conceived and performed at the highest level of the State machinery, as they are perpetrated on a widespread or systematic scale. It follows that States with the strongest nexus to the crimes are seldom, if ever, willing or able to genuinely prosecute the wrongdoers.

Similarly, it should be noted that the commission of an international crime often entails the responsibility of the perpetrator’s home State for serious breaches of obligations under peremptory norms of general interna-

¹³ *S. Barbier*, Assurances and Guarantees of Non-Repetition, in: J. Crawford/A. Pellet/S. Olleson (note 11), 551 et seq., 558 et seq., who, taking relevant practice into account, further notes that “the responsible State [...] takes the initiative to offer guarantees of non-repetition [...] only at the request of the injured State”.

¹⁴ Yearbook of the International Law Commission (note 9), 127.

¹⁵ See, *ex multis*, *M. C. Bassiouni*, Introduction to International Criminal Law, 2003, 114.

¹⁶ See the third preambular consideration and Art. 5 ICC Statute.

¹⁷ ILR 36 (1968), 302.

tional law, within the meaning of Art. 40 ARSIWA.¹⁸ This happens when the common features of both the individual crime and the State crime are inherent in the same material conduct, as with aggression, genocide, and crimes against humanity. However, it may also occur when other types of conduct – such as war crimes and acts of torture – are not isolated or random, but perpetrated on a widespread or systematic scale, or pursuant to or in furtherance of a State policy.¹⁹

IV. The Interplay between the Various Grounds of State Jurisdiction over International Crimes

In the field of prosecuting international crimes, the protection of collective values rests on the involvement of one or more criminal judicial bodies (domestic or international) acting under one or more grounds for jurisdiction.

In the event that several fora coexist, all of which claim entitlement to try alleged perpetrators, the question necessarily arises what laws govern the relationship among the various grounds of jurisdiction. Does contemporary international law sketch out any hierarchy? How is the entitlement for judicial action in defense of collective values allocated? Who can first engage in criminal law enforcement? In which circumstances? Does international law allow for primary and secondary claims to criminal jurisdiction?

The answers to these queries are difficult to find (and, in principle, might differ depending on the crime at stake). There are no general international rules providing for a specific and strict order of priorities with respect to each and every core crime. Moreover, as for treaty law, not all international crimes are the subject of treaties devoted to their suppression (e.g., crimes against humanity). Even where such a treaty exists, normally it does not afford adequate regulation to the problems surrounding concurrent jurisdiction.

With respect to international criminal trials, the legal bases for jurisdiction most frequently invoked by States are those typical to trials for ordinary crimes. Essentially, such bases reflect the close connection between the forum State and the criminal conduct it seeks to regulate or address: *territoriality* (jurisdiction over crimes committed in the State's territory, even by foreign nationals), *active nationality* (jurisdiction over crimes committed by

¹⁸ Yearbook of the International Law Commission (note 9), 112 et seq.

¹⁹ For a further analysis, see A. Nollkaemper, Concurrence between Individual Responsibility and State Responsibility in International Law, ICLQ 52 (2003), 615 et seq.

the State's nationals anywhere in the world), *passive nationality* (jurisdiction over crimes committed against the State's nationals, even by an alien abroad). In addition, as it is commonly understood, international law allows States to exercise *universal* jurisdiction over international crimes (jurisdiction over crimes irrespective of the place of commission and any nationality link or other grounds of jurisdiction recognized by international law).

Regarding specific crimes, as for *genocide* the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly (UNGA) on 9.12.1948, highlights territorial jurisdiction (Art. 6).²⁰ As for *war crimes*, the Geneva Conventions on the protection of victims of armed conflicts of 12.8.1949 (Arts. 49, 50, 129 and 146, respectively)²¹ and their First Additional Protocol, relating to the Protection of Victims of International Armed Conflicts, of 8.6.1977 (Art. 85),²² put the custodial State (the State where the alleged offender is located) under the obligation of trying individuals alleged to have committed grave breaches of the Conventions or of the Protocol, regardless of their nationality. However, if it prefers, the custodial State may hand such persons over for trial to another State party, provided it has submitted an extradition request. As for *torture*, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UNGA on 10.12.1984 (CAT), reverses this sequence and grants primacy to territoriality and active nationality (Arts. 5 and 7 para. 1).²³ Similar provisions also apply to the crime of *enforced disappearance*. Arts. 9 and 11 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UNGA on 20.12.2006, duplicate almost verbatim Arts. 5 and 7 CAT.²⁴

²⁰ 78 UNTS 277.

²¹ 75 UNTS 31, 85, 135, 287.

²² 1125 UNTS 3.

²³ 1465 UNTS 85.

²⁴ 2716 UNTS 3.

V. The Two Levels of International Crimes Prosecution Where the Logic of Substitution Typical to the Enforcement of *Erga Omnes* Obligations Is Currently Taking Place

At both the horizontal level (inter-State) and the vertical level (States *vis-à-vis* international criminal tribunals), contemporary international law distinguishes between States primarily entitled to prosecute alleged perpetrators of international crimes and States (or entities) only secondarily entitled to do so.

The former States are those directly affected by the crimes. They have two legal interests. First, the common interest of every State, as a member of the international community, in repressing serious crimes that threaten fundamental community values. Second, the individual primary interest in safeguarding their own sovereignty. Which States are these? On this point relevant practice is neither uniform nor consistent. Anyway, it seems it tends to favor the territorial State and the home State of the suspect.²⁵

The latter States (or entities) may only act if States more connected to the offence fail to effectively prosecute the alleged perpetrator in accordance with internationally recognized standards of due process, thus giving up the need to defend their primary interest. Third States are thereby enabled to fill the prosecutorial vacuum for the purposes of protecting collective values.²⁶ These are the custodial States²⁷ (and the ICC).²⁸

The custodial State acts as holder of the common interest to adjudication (*i.e.*, for the sole purpose of preventing impunity for crimes infringing the fundamental community values). It does not act in its own name, nor as the representative of any other State (for example, the territorial and the home States of the offenders, as would be the case under some multilateral treaties for the suppression of transnational crimes – such as counterfeit currency, narcotics trade, some forms of terrorism – which protect reciprocal inter-

²⁵ See the national legislations that will be mentioned at notes 41-51 and the ILC Final Report on the Obligation to Extradite or Prosecute of 2014 (Yearbook of the International Law Commission, 2014, Vol. 69-II, 139; hereinafter, ILC Final Report).

²⁶ See *J. Geneuss*, *Fostering a Better Understanding of Universal Jurisdiction*. A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction, *Journal of International Criminal Justice* 7 (2009), 945 (957 et seq.).

²⁷ See Section V. 1.

²⁸ See Sections V. 2. and V. 3.

ests, rather than general interests), but rather as an agent of the fundamental community values.²⁹

1. Relationship among States (Horizontal Level)

This trend is displayed by the ongoing evolution of the concept of universal jurisdiction over international crimes, in terms of the preconditions of its functioning.

International and States' practice have progressively set the basic concept of "absolute" or "unconditional" universality aside.³⁰ This concept was not inspired by any sort of substitutive logic, given that it was conceived as a *primary* ground of jurisdiction. In fact, it could be asserted without any limitations or any link to the criminal conduct (not even the custody of the suspect) by any State which incorporated it into its own domestic legal system, regardless of other States' activities.³¹ As a result, such a model of universal jurisdiction entailed an inherent potential for concurrent claims.

During the last ten years things have changed. According to the prevailing international legal scholarship, under contemporary international law, States may exercise adjudicative universal jurisdiction subject to a set of legal limitations, including the prohibition of trials *in absentia* and the principle of subsidiarity *vis-à-vis* one or more States directly affected by the relevant crime.³² Universal jurisdiction may only be invoked if States having

²⁹ See C. Kress, Universal Jurisdiction over International Crimes and the *Institut de Droit International*, *Journal of International Criminal Justice* 4 (2006), 561 (567). For a similar view, but more specifically focused on universality as a jurisdictional rule designed to enforce community interests, see C. Tams, Individual States as Guardians of Community Interests, in: U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus (eds.), *From Bilateralism to Community Interests. Essays in Honour of Judge Bruno Simma*, 2011, 379 (395 et seq.), who perceives custodial State jurisdiction as structurally similar to port State jurisdiction (see Section II), as "in both cases [...] international legal rules accept that a particular State could/should act as trustee of the international community", 398.

³⁰ Due to a number of events: namely, the skepticism of legal scholarship based on political and legal reasons [*M. Henzelin*, *Le principe de l'universalité en droit pénal international*, 2000; *G. P. Fletcher*, *Against Universal Jurisdiction*, *Journal of International Criminal Justice* 1 (2003), 580 et seq.; *L. Reydams*, *Universal Jurisdiction. International and Municipal Legal Perspectives*, 2003], the ICJ's failure to define the concept [see *Arrest Warrant of 11.4.2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14.2.2002, ICJ Reports 2002], the consequential retrogressive legislative trend on the issue.

³¹ *K. Randall*, *Universal Jurisdiction Under International Law*, *Tex. L. Rev.* 66 (1988), 785 et seq.

³² See, notably, *A. Cassese*, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, *Journal of International Criminal Justice* 1 (2003), 589 (593); *M. Inazumi*, *Universal Jurisdiction in Modern International Law*, 2005, 217; C. Kress (note 29),

primary jurisdiction are unwilling or unable to effectively investigate and, where appropriate, prosecute the offender in accordance with minimum standards of due process. As a consequence, universality may only be employed to substitute for those States. Moreover, it requires the presence of the suspect in the territory of the forum State. In my view, such a narrower concept – also known as “subsidiary” or “conditional” universality – endorses the logic of substitution as discussed in the previous sections.³³ This concept conceives universality as an *additional* and *residual* ground of jurisdiction (to be invoked for the sole purpose of avoiding impunity for core crimes in the interest of the international community). It implies the existence of States bearing primary responsibility for prosecuting international crimes: the State where the crime occurred and the home State of the offender. Consequently, it creates a sort of default jurisdiction. Universality is thus a “last resort” means of prosecution *vis-à-vis* States that enjoy primary claims to jurisdiction because they are more strongly connected to the offences.

Hence, under contemporary international law the universality principle is supplemented by the subsidiarity principle, which operates as a legal limitation to the exercise of state jurisdiction over core crimes and crystallized as a legal rule.

The *Institut de Droit International* took the lead in shaping such developments.³⁴ The Resolution on Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes, approved at its 2005 Krakow Session (hereinafter, IDI Resolution), perceived universality as an “additional ground” *vis-à-vis* the jurisdiction of States having

579 et seq.; C. Ryngaert, Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle, *Criminal Law Forum* 19 (2008), 153 (154, 157, 173); F. Jessberger, Universal Jurisdiction, in: A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, 2009, 555 (556 et seq.); K. Coombes, Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?, *The George Washington International Law Review* 43 (2011), 419 (459); S. Yee, Universal Jurisdiction: Concept, Logic, and Reality, *Chinese Journal of International Law* 10 (2011), 503 (527); H. van der Wilt, Universal Jurisdiction under Attack. An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States, *Journal of International Criminal Justice* 9 (2011), 1043 (1046); R. van Steenberghe, The Obligation to Extradite or Prosecute. Clarifying its Nature, *Journal of International Criminal Justice* 9 (2011), 1089 et seq.

³³ See Section II.

³⁴ For an isolated precedent, see the statement of Judges R. Higgins, P. Kooijmans and T. Buergenthal in their Joint Separate Opinion in the *Arrest Warrant Case* (note 30): “[a] State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned” (80, para. 59).

primary responsibility for prosecuting international crimes (the territorial State and the home State of the offender) for the purposes of safeguarding fundamental community values.³⁵ In this vein, it establishes various requirements which apply as from the end of the investigation stage.³⁶ First, it demands the “presence of the alleged offender in the territory of the prosecuting State”.³⁷ Second, it calls the custodial State “before commencing a trial, [to] ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so”.³⁸ Finally, it demands the custodial State

“[to] carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender”.³⁹

The *Institut* recently endorsed a similar approach also with respect to the different, but connected field of universal civil jurisdiction over international crimes.⁴⁰

In the wake of the IDI Resolution – and in order to implement the substantive and procedural rules of the ICC Statute – many States enacted and/or amended their national legislation providing for universal jurisdiction over international crimes. They encompassed the “conditional” notion of universality by subjecting it to a series of legal constraints, procedural and judicial in character. Essentially, such constraints correspond to those contained in the IDI Resolution (*i.e.*, the presence of the suspect in the prosecuting State’s territory; the consultation, before commencing a trial, with the territorial State and/or the home State of the prospective accused, unless these States are manifestly unwilling or unable to genuinely prosecute; the postponement of criminal proceedings in case of concomitant pro-

³⁵ See <www.justitiaetpace.org>.

³⁶ See the preamble and para. 1.

³⁷ Para. 3 lit. (b).

³⁸ Para. 3 lit. (c).

³⁹ Para. 3 lit. (d).

⁴⁰ See the Resolution on Universal Civil Jurisdiction with regard to Reparation for International Crimes, adopted at the 2015 Tallinn Session <www.justitiaetpace.org>. Art. 2 prevents a national court to exercise jurisdiction over claims for reparation by victims in case another State has “stronger connections” with the claim and “is capable of dealing with the claim in compliance with the requirements of due process” (paras. 1 and 2). Furthermore, such a court should decline to entertain the claims, or suspend the proceedings, when the victims’ claims have also been brought before an international jurisdiction or the court of another State having stronger connections and available remedies (para. 3).

ceedings over the same case before States more significantly linked to the offences, again unless these States are manifestly unwilling or unable to genuinely prosecute). German⁴¹ and Spanish laws⁴² are the most representative of such legal development. Similar laws are in force – to name a few – in Austria,⁴³ Australia,⁴⁴ Belgium,⁴⁵ Canada,⁴⁶ France,⁴⁷ the Netherlands,⁴⁸ and New Zealand.⁴⁹ Of course, these are all western countries, so the question arises whether they provide sufficient evidence of a general practice. However, western countries are also the most active States in prosecuting international crimes based on universal jurisdiction. Anyway, apart from these countries, consider Argentina⁵⁰ and Senegal.⁵¹ Furthermore, national regimes have rarely been challenged by other States with regard to universal jurisdiction.

In addition, some national judicial authorities relied on subsidiarity even before its incorporation within their own domestic legal system.⁵² They subjected the commencement of criminal proceedings to the presence of the wrongdoer in the territory of their States and to the inaction of the territorial State and the home State of the presumed offender. A few recent examples follow. On 10.2.2014, the Spanish *Audiencia Nacional* issued an arrest warrant against five Chinese political leaders, including the former Head of State *Jiang Zemin*, charging them with serious crimes perpetrated in Tibet. This judicial measure followed the abstention of Chinese authorities from investigation and prosecution since 1998, when the crimes were allegedly committed. The subsequent amendment of the Spanish national law on universal jurisdiction⁵³ *de facto* led to the discontinuance of the proceedings. However, this legal amendment was recently submitted to the Constitu-

⁴¹ Art. 153 lit. (f) para. 2, inserted in the Code of Criminal Procedure by the Act to Introduce the Code of Crimes against International Law of 2002.

⁴² Art. 23 paras. 4 and 5 of the Ley orgánica del poder judicial of 2014.

⁴³ Arts. 64 and 65 of the Criminal Code of 2013.

⁴⁴ Criminal Code Act of 2011.

⁴⁵ Arts. 10 and 12bis of the Code of Criminal Procedure of 2006.

⁴⁶ Arts. 6, 7 and 8 of the Crimes against Humanity and War Crimes Act of 2000.

⁴⁷ Art. 689 para. 11 of the Code of Criminal Procedure of 2011.

⁴⁸ Art. 2 of the International Crimes Act of 2003.

⁴⁹ Art. 8 of the International Crimes and International Criminal Court Act of 2000. For further details see *Amnesty International*, Universal Jurisdiction. A Preliminary Survey of Legislation around the World – 2012 Update, October 2012.

⁵⁰ Ley de implementación del Estatuto de Roma of 2007.

⁵¹ Law No. 02 of 12.2.2007 amending the Penal Code; Law No. 23 of 25.7.2008 on the insertion of Art. 664bis of the Code of Criminal Procedure.

⁵² See C. *Ryngaert* (note 32), 160 et seq.

⁵³ See note 42.

tional Court for judicial review.⁵⁴ Apart from western States' judicial practice, a significant case concerns the former Chadian dictator *Hissène Habré*. He is allegedly responsible for mass atrocities committed against the Chadian population during the 1980s. Senegal, acting as a custodial State, is currently prosecuting him on the basis of universal jurisdiction. It is doing so following the establishment of the Extraordinary African Chambers within its courts (pursuant to the agreement of 22.8.2012 between the Senegalese Government and the African Union),⁵⁵ as well as the *stasis* of the primarily responsible State (Chad).⁵⁶ Moreover, on 31.10.2014 an Argentinian investigative judge ordered the arrest of 17 Spanish nationals, including former Ministers, and sought extradition from Spain, charging them with crimes against humanity perpetrated during *Franco's* regime in the 1970s.⁵⁷ In March 2015, the Spanish Government rejected the extradition request, arguing that Spain had primary jurisdiction over the case. Subsequently, in a joint public statement, four UN experts on human rights, having acknowledged the Spanish courts primacy over the charges, stressed that 40 years of judicial inaction entailed substitution by States which purport to rely on universal jurisdiction.⁵⁸ Finally, on 30.10.2014 the Constitutional Court of South Africa held that South Africa has the duty to investigate allegations of crimes against humanity, including torture, committed in 2007 by the Zimbabwean state forces against their political opponents in Zimbabwe. It ordered South African authorities to commence an investigation pursuant to domestic legislation endowing them with universal jurisdiction over international crimes, in view of Zimbabwean unwillingness to genuinely investigate and prosecute the alleged offences.⁵⁹

As for treaty law, it should be considered that, under Arts. 5 para. 2 and 7 para. 1 CAT, universality is an autonomous ground of jurisdiction and is secondary to the judicial bases reflecting stronger links likely to be estab-

⁵⁴ For further info, see <www.penalecontemporaneo.it>.

⁵⁵ See <www.hrw.org>.

⁵⁶ For an insight, see *E. Cimiotta*, The First Steps of the Extraordinary African Chambers. A New Mixed Criminal Tribunal?, *Journal of International Criminal Justice* 13 (2015), 177 et seq.; *S. Williams*, The Extraordinary African Chambers in the Senegalese Courts. An African Solution to an African Problem?, *Journal of International Criminal Justice* 11 (2013), 1139 et seq.

⁵⁷ See <www.pagina12.com>.

⁵⁸ See <www.dipublico.org>.

⁵⁹ For a thorough analysis of this ruling, see *M. Ventura*, The Duty to Investigate Zimbabwe Crimes Against Humanity (Torture) Allegations. The Constitutional Court of South Africa Speaks on Universal Jurisdiction and the ICC Act, *Journal of International Criminal Justice* 13 (2015), 861 et seq.

lished between a State party and an act of torture.⁶⁰ Universality is invoked to protect the collective interests of the group of contracting parties, given their nature as interests underlying obligations *erga omnes partes*, such as the obligation to prosecute established by Art. 7 para. 1 CAT.⁶¹

Statistically, and contrary to what it is generally believed, the concept of universal jurisdiction has not fallen out of favor, notwithstanding the legislative amendments that have been adopted by a substantial number of States and the establishment of the ICC. In quantitative terms, there is a significant increase in legislative acts, judicial proceedings and criminal complaints in this field, as it is demonstrated by recent academic appraisals.⁶²

2. Relationship between States and International Criminal Tribunals (Vertical Level)

It is commonly understood that international criminal tribunals act on behalf of the international community, given the modes of their establishment and the nature of the crimes under their jurisdiction. Such tribunals operate as a sort of *lato sensu* organ of the international community to protect its fundamental values.⁶³ In particular, they allow the international community to enforce general norms on core crimes on its own, in the place of individual States. They contribute to the restoration of the international legal order by ensuring the application of international criminal law rules, so as to prevent them from being set aside as a result of States' failure to act. It thus cannot be excluded that international criminal tribunals exercise

⁶⁰ See, extensively, *E. Cimiotta, Aut dedere aut judicare, universalità "condizionata" e Convenzione contro la tortura: a margine del caso Belgio c. Senegal*, *Diritti umani e diritto internazionale* 7 (2013), 105 et seq. For a similar perspective, see *A. Nollkaemper, Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in Belgium v Senegal*, *Journal of International Dispute Settlement* 4 (2013), 501 et seq.

⁶¹ See ICJ, Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment of 20.7.2012, ICJ Reports 2012, 450, para. 69.

⁶² See *R. Ben-Ari, Universal Jurisdiction: Chronicle of a Death Foretold?*, *Den. J. Int'l L. & Pol'y* 43 (2015), 165 et seq.; *M. Langer, Universal Jurisdiction is Not Disappearing. The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction*, *Journal of International Criminal Justice* 13 (2015), 245 et seq.

⁶³ See, for instance, *C. Kress/M. Prost, Art. 98*, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2008, 1601 (1612); *F. Jessberger/J. Geneuss, The Many Faces of the International Criminal Court*, *Journal of International Criminal Justice* 10 (2012), 1081 (1086, 1090); *L. Corrias/G. Gordon, Judging in the Name of Humanity. International Criminal Tribunals and the Representation of a Global Public*, *Journal of International Criminal Justice* 13 (2015), 97 et seq.

“functional powers” to substitute for States having the same powers and being in a better position to exercise them.⁶⁴

The legal trend outlined in Section V is shown by the ongoing evolution of the relationships between international criminal tribunals and States most significantly linked to the crimes.⁶⁵ Now we need to focus on this evolution.

The first generation of international criminal tribunals was set up by the Allied Powers in the aftermath of the Second World War: the Nuremberg and Tokyo Tribunals. Their statutes did not deal with their relationships with national criminal jurisdictions on a case-by-case basis.⁶⁶ In fact, the Tribunals were charged with trying German and Japanese leaders who bore the greatest responsibilities for the most serious crimes, whereas domestic courts were called upon to adjudicate the offences of minor culprits. As a result, the Nuremberg and Tokyo Tribunals held *de facto* exclusive authority over the group of individuals they effectively prosecuted. There was no emphasis on the logic of substitution.

The second generation of international criminal tribunals was established nearly 50 years later by the UN Security Council (UNSC) acting under Chapter VII of the UN Charter: the former Yugoslavia and Rwanda Tribunals (ICTY and ICTR). Their statutes provide for concurrent jurisdiction with national courts prosecuting persons for crimes under their jurisdiction. However, the Tribunals’ jurisdiction had been given primacy over UN Member States jurisdiction. Both Tribunals were granted authority to inter-

⁶⁴ See Section II.

⁶⁵ Another different – but very significant – form of substitution is that of international criminal tribunals for custodial States. In contemporary international law a trend is emerging to require these States, before commencing a trial on the basis of universal jurisdiction, to take into account the jurisdiction of those international criminal tribunals whose competence they have recognized (in particular, the fact that such tribunals have initiated proceedings over the same case, or the opportunity to surrender the person concerned to them), besides the jurisdiction of primary States. The IDI Resolution was the first step of this trend [see para. 3 lit. (c)]. It was followed by State practice [see, for instance, Art. 23 para. 5 lit. (a) of the Spanish law on criminal jurisdiction (note 42) and Art. 153 lit. (f) paras. 2 and 4 of the German Code of Criminal Procedure (note 41)], and by treaty law (see Art. 11 para. 1 of the International Convention for the Protection of All Persons from Enforced Disappearance of 2006). Finally, the ILC Final Report provides for what it calls “third alternative”: namely, the possibility for a State faced with an obligation to extradite or prosecute an alleged perpetrator to opt for surrendering him or her to a competent international criminal tribunal, so as to discharge that obligation. Moreover, the Report suggests that, in light of the increasing significance of international criminal tribunals, new treaty provisions on the obligation to extradite or prosecute should include this third alternative, as should national legislations (note 25, paras. 27 et seq.).

⁶⁶ See Art. 6 of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8.8.1945, 82 UNTS 279; Charter of the International Military Tribunal for the Far East of 19.1.1946, TIAS 1589.

vene at any stage of the criminal procedure and request that national judicial authorities defer to them.⁶⁷ Their establishment followed the UN's evaluation of the inability and/or unwillingness of Rwanda and the successor States to the former Yugoslavia to conduct fair trials on the whole criminal situation in their respective areas. In light of the very reasons behind their establishment, there was no substitution over specific criminal acts as a result of a case-by-case assessment of the concrete prospect that those States could effectively assert their jurisdiction over them.⁶⁸

The third and last generation of international criminal tribunals consists of the ICC, established by a multilateral agreement signed in 1998, and in force as of 2002.⁶⁹ As is well-known, the ICC's functioning is premised upon the principle of complementarity, whereby the Court is subsidiary to domestic courts, whose jurisdiction over crimes under the Court jurisdiction enjoys priority.⁷⁰ Pursuant to Arts. 1 and 17 of its Statute, the ICC is barred from ruling on an international crime whenever: a national court asserts its jurisdiction over the same crime and the case is being genuinely investigated or prosecuted, that court genuinely has decided not to prosecute the person concerned, or a trial has already been conducted for the same crime. The ICC may intervene only when, even if a case concerning an international crime is pending before a national court, that court proves unable or unwilling to genuinely carry out the investigation or prosecution, or its decision not to prosecute has resulted from its unwillingness or inability to genuinely prosecute the person concerned, provided that the case is sufficiently serious to justify action by the ICC. The notions of unwillingness and inability are spelled out in Art. 17 paras. 2 and 3 ICC Statute.

Hence, the establishment of the ICC was not premised on an assessment of past inability and/or unwillingness of certain States to cope with situations occurred on their soil, but on the eventuality that this circumstance could happen in the future with regard to specific criminal conducts.

⁶⁷ See Art. 9 ICTY Statute [annexed to UNSC Res. 827 (1993)] and Art. 8 ICTR Statute [annexed to UNSC Res. 955 (1994)].

⁶⁸ The reverse practice of the two *ad hoc* Tribunals – consisting in referring cases before them to national judicial authorities, pursuant to Rule 11bis of their Rules of Procedure and Evidence (RPE) – has no bearing on this line of reasoning. In fact, this practice originated from the need to downsize the Tribunals' workload (due to, *inter alia*, financial and staff restraints) and to start gradually take over the job from them in view of their shutdown. Such a practice seems not based on the logic of substitution discussed in this paper.

⁶⁹ 2187 UNTS 90.

⁷⁰ On this principle see, *ex multis*, M. Benzling, The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity, Max Planck Yearbook of United Nations Law 7 (2003), 591 et seq.; J. K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 2008.

3. ICC, Complementarity and Substitution

The principle of complementarity under Arts. 1 and 17 ICC Statute embodies the logic of substitution. It regulates the concrete exercise of the Court jurisdiction, on a case-by-case basis, in its relations with States jurisdiction over single international crimes.

The system of complementarity dictates that the ICC must generally defer to national judicial bodies, except when they are not in a position to effectively conduct a proper and fair investigation, prosecution or trial in relation to the relevant offence. Hence, it is inherent in the ICC's powers to substitute for domestic judges, whenever they are not in a better position to dispense justice or deliberately fail to do so. In ICC practice to date, complementarity has been exclusively applied in relation to the territorial State and the State of the nationality of the prospective accused: namely, the States which bear primary responsibility for prosecuting international crimes. Although, as it will be clearer below, pursuant to Arts. 18 and 19 ICC Statute complementarity formally operates between the Court and all States parties (including certain States not parties to the Statute), the ICC has progressively developed into an instance of last resort *vis-à-vis* primary States. Of course, technically speaking, what emerges in practice does not mean that this is what the law provides. However, practice displays a clear trend involving only particular classes of States. This trend cannot be considered as legally meaningless.

Such considerations hold true regardless of the trigger mechanism of the ICC proceedings pursuant to Art. 13 of the Statute, when: (a) a "situation" is referred to the Prosecutor by a State party;⁷¹ (b) the Prosecutor has initi-

⁷¹ Consider the situation in Uganda. In March 2009, the Pre-Trial Chamber II determined that the *Kony et al. Case* was admissible before the ICC within the meaning of Arts. 17 and 19 para. 1 ICC Statute (*The Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10.3.2009). Later on, this decision was confirmed by the Appeals Chamber (*The Prosecutor v. Joseph 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", ICC-02/04-01/05-408, 16.9.2009). The Trial Chamber II issued an analogous ruling in the *Katanga Case*, concerning the situation in the Democratic Republic of the Congo, pursuant to Arts. 17 and 19 para. 2 lit. (a) [*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the oral decision on the motion challenging the admissibility of the case (Art. 19 of the Statute), ICC-01/04-01/07-1213, 16.6.2009]. Subsequently, also this ruling was upheld by the Appeals Chamber (*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of Mr. Germain Katanga against the oral decision of Trial Chamber II of 12.6.2009 on the admissibility of the case, ICC-01/04-01/07-1497, 25.9.2009, hereinafter: *Katanga Judgment*). Finally, concerning the situation in the Central African Republic, another similar decision was taken by Trial Chamber III in the *Bemba Case*, pursuant to Arts. 17 and 19 para. 2 lit. (a) (*The Prosecu-*

ated an investigation *proprio motu* following an authorization by the Pre-Trial Chamber;⁷² or (c) a “situation” is referred to the Prosecutor by the UNSC acting under Chapter VII of the UN Charter,⁷³ even against a State not party to the Statute.⁷⁴

tor v. Jean-Pierre Bemba Gombo, Decision on the admissibility and abuse of process challenges, ICC-01/05-01/08-802, 24.6.2010). Even this decision was confirmed by the Appeals Chamber (*The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24.6.2010 entitled “Decision on the admissibility and abuse of process challenges”, ICC-01/05-01/08-962, 19.10.2010).

⁷² For example, consider the situation in Kenya. In May 2011, the Pre-Trial Chamber II determined that the *Ruto et al. Case* and the *Muthaura et al. Case* were admissible before the ICC, pursuant to Arts. 17 and 19 para. 2 lit. (b) ICC Statute (*The Prosecutor v. William Samoei Ruto et al.*, Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, ICC-01/09-01/11-101, 30.5.2011; *The Prosecutor v. Francis Kirimi Muthaura et al.*, Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30.5.2011). Both decisions were confirmed by the Appeals Chamber (*The Prosecutor v. William Samoei Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30.5.2011 entitled “Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute”, ICC-01/09-01/11-307, 30.8.2011, hereinafter: *Ruto et al. Judgment*; *The Prosecutor v. Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30.5.2011 entitled “Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute”, ICC-01/09-02/11-274, 30.8.2011). In each case discussed in this and in the preceding note, the ICC found that parallel or previous activities undertaken by the competent domestic courts of the territorial States did not prevent, for various and compelling reasons, the Court to step in.

⁷³ Pursuant to Art. 53 ICC Statute, complementarity also applies in the context of UNSC referrals.

⁷⁴ Consider the situation in Libya. On 1.5.2012 and 2.4.2013, the Libyan Government challenged the admissibility of the cases against *Saif Al-Islam Gheddafi* and *Al-Senussi*, respectively. The Pre-Trial Chamber I determined that the first case was admissible, while not the second case, pursuant to Arts. 17 and 19 para. 2 lit. (b) ICC Statute (*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Public redacted-decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-344-Red, 31.5.2013, hereinafter: *Gheddafi Decision*; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11.10.2013, hereinafter: *Al-Senussi Decision*). Later on, the Appeals Chamber confirmed both decisions (*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31.5.2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, ICC-01/11-01/11-547-Red, 21.5.2014; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11.10.2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, ICC-01/11-01/11-565, 24.7.2014, hereinafter: *Al-Senussi Judgment*). In the *Gheddafi Case*, the ICC found that Libya was unable genuinely to carry out the prosecution against Saif Al-Islam Gheddafi (because, due to the unavailability of its judicial system, it was unable to obtain the custody of the accused and the necessary evidence, and was unable to conduct criminal proceedings, giv-

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The logic of substitution is also embodied in Arts. 18 and 19 ICC Statute. Art. 18 requires the Prosecutor to communicate its decision to commence an investigation to all States parties and to those States, even if not parties, who would normally exercise jurisdiction over the crimes at hand (para. 1). These States may inform the Court that they are investigating or have investigated offences falling under the Court's jurisdiction and relating to the information provided in the notification. They may also request that the Prosecutor defer to their investigation of the persons concerned (para. 2). The Prosecutor's deferral to a State's investigation is open to review by the Prosecutor in the event of a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation (para. 3). When the Prosecutor has deferred an investigation, it may request that the State concerned periodically inform it of the investigation's progress and any subsequent prosecutions. States Parties are obliged to respond to such requests without undue delay (para. 5). Therefore the Statute establishes a monitoring mechanism enabling the ICC to be apprised of any developments in national investigations and prosecutions, whenever the ICC defers to national courts. This mechanism underscores the subsidiary nature of the Court's jurisdiction, which keeps on at primary States in order to react to their possible inactions.

Something similar also follows from Art. 19. It allows the ICC to determine the admissibility of a case brought before it, in accordance with Art. 17. Challenges may be made by States having jurisdiction over a case before the Court, even if not parties to the Statute, on the ground they are investigating or prosecuting the case or have investigated or prosecuted it (para. 2 lit. (b)), or by the territorial State or the State of the nationality of the person concerned (para. 2 lit. (c)). In these circumstances, Art. 19 para. 7 requires the Prosecutor to suspend the investigation until such time as the Court will make a determination in accordance with Art. 17. This point is very significant for the purposes of the present paper, since similar provisions do not operate where challenges are filed by the Prosecutor or the Defense. Moreover, the Prosecutor may submit a request for review of the de-

en it could not secure a lawyer for the suspect) and that the evidence submitted by Libya was not sufficient to ascertain whether the domestic and the ICC investigations covered substantially the same conduct. The Court declared the case against *Gheddafi* admissible before it pursuant to Art. 17 para. 1 lit. (a) ICC Statute. Unlike in the *Gheddafi Case*, in the *Al-Senussi Case* the ICC ruled that Libya was able and willing to genuinely carry out proceedings against the suspect and that the evidence placed before it was sufficient to consider that the domestic and the ICC investigations covered substantially the same conduct. As a consequence, the Court determined that the case against Al-Senussi was inadmissible before it pursuant to Art. 17 para. 1 lit. (a) ICC Statute.

cision of inadmissibility whenever it is fully satisfied that new facts have arisen which negate the previous basis for inadmissibility (para. 10). Finally, when the Prosecutor defers an investigation, it may request that the relevant State make information on domestic proceedings available to it. In fact, the Prosecutor may thereafter decide to proceed with an investigation (para. 11). These provisions, taken together, also emphasize the subsidiary nature of ICC jurisdiction, which again keeps on at primary States in order to react to their potential inactions.

By the same token, some scholars noted that the ICC performs different “functions”. It has been suggested that the Court would be more than a “criminal court” proper adjudicating individual criminal responsibility. It could also be regarded as a “watchdog court” monitoring its States parties’ duty to investigate and prosecute perpetrators of international crimes, by means of the principle of complementarity. This function would markedly distinguish the ICC from other international criminal tribunals.⁷⁵ Therefore the ICC would interact with States. Complementarity allows the Court to monitor States’ prosecutorial actions, to control and assess their effectiveness and propriety, and to determine whether a State has failed to adequately comply with its obligations and responsibilities under international law. ICC intervention, formally directed against an individual offender, might be perceived as an action against a State.

It follows a substitution mechanism whose power to verify the effectiveness and propriety of domestic investigations and prosecutions is centralized within the Court. Such a mechanism is different from that hinged on the custodial State,⁷⁶ whose evaluation of the ability and willingness of primary States to take judicial action may lend itself to politically or judicially motivated abuses. Such centralization is exemplified by what happened in the aftermath of the arrest of *Saif Al-Islam Gheddafi*. In November 2011, Libyan authorities communicated to the Court their refusal to surrender *Gheddafi* and their intention to bring him to trial in Libya, notwithstanding the Libyan obligation to fully cooperate with the ICC under UNSC Res. 1970 (2011), and despite the request for surrender issued by the ICC itself. They stressed that Libya enjoyed primary jurisdiction over the charges and was able and willing to genuinely prosecute *Gheddafi* according to its own domestic law. They did not file any immediate admissibility challenge.⁷⁷ A

⁷⁵ See *F. Jessberger/J. Geneuss* (note 63), 1087 et seq.

⁷⁶ See Section V. 1.

⁷⁷ For a thorough analysis see *C. Stahn*, *Libya, the International Criminal Court and Complementarity. A Test for “Shared Responsibility”*, *Journal of International Criminal Justice* 10 (2012), 325 et seq.

few days later, the ICC replied that in so far the arrest warrant remained outstanding, it had exclusive jurisdiction to decide on the continuation of its proceedings against *Gheddafi*.⁷⁸ It added that should Libyan authorities wished to conduct national prosecutions against the suspect, they had to formally challenge the admissibility of the case before the ICC, pursuant to Arts. 17 and 19 ICC Statute, and that any decision on such admissibility was under its sole authority. Hence, any decision on who, as between the Court and Libya, was entitled to prosecute the international crimes allegedly perpetrated by *Gheddafi* rested on the ICC's exclusive competence.

VI. At Both Levels, International Law Spells Out Identical Requirements for Substitution

A further contention of this paper is that at both the horizontal and the vertical levels contemporary international law identifies the requirements for substitution: namely, the criteria which prompt the custodial States or the ICC to lawfully substitute for primary States. Moreover, at each level, the contents of such requirements seem to coincide. Their role is to allocate the competing entitlement to engage in international criminal law enforcement among different classes of States, either *inter se* or with respect to the ICC.

There are two requirements. First, the *effectiveness* of primary States' action (*i.e.*, the willingness and ability to prosecute the same case), given the positive consequences that are likely to result in terms of efficiency (thanks to such States' proximity to the evidence, familiarity with the accused and the victims, and power to implement judicial orders for the purposes of criminal police investigations and evidence collection), national reconciliation and strengthening of domestic judicial systems.⁷⁹ Second, the *genuineness* of primary States' action (*i.e.*, the compliance with minimum standards of fair trial, such as independence and impartiality).

However, a number of controversial aspects remain largely unaddressed. First, the details of the subsidiarity principle are open to doubt. There is a growing need to define, with relative certainty and consistency, the exact content and scope of application of those requirements. For instance:

⁷⁸ Press Release of 23.11.2011, ICC-CPI-20111123-PR746.

⁷⁹ Consider, for instance, Art. 23 para. 5 of the Spanish law on universal jurisdiction (note 42). It prescribes, by duplicating Art. 17 paras. 2 and 3 ICC Statute, what situations may qualify as situations in which the primary State is genuinely unable or unwilling to investigate or prosecute.

whether subsidiarity already applies at the pre-trial stage or from the end of the investigation stage (as advocated by the IDI Resolution⁸⁰); whether subsidiarity requires the custodial State to suspend its proceedings at the request of the primary State, and eventually, to defer the case; what are the scope and timing of the primary States' responsibility to investigate and prosecute. Second, it is unclear what specific standard of proof is required, as a matter of customary international law, to determine whether States entitled to primary adjudication are unwilling or unable to genuinely prosecute a certain criminal conduct.⁸¹

Regarding the principle of subsidiarity, States practice is not sufficiently uniform or consistent to shed light on these questions. States tend to incorporate universal jurisdiction in their own domestic legal orders and then embrace different criteria about the limits to the exercise of such jurisdiction and the level of deference to countries enjoying primary jurisdiction. As a result, the outline and the scope of subsidiarity are still vague. Furthermore, despite having heard several cases involving universal jurisdiction, the ICJ has never addressed the content or the scope of subsidiarity. It did not take the opportunity to pronounce on them in the *Belgium v. Senegal Case*.⁸² Nor the Court could do it in a previous case, which raised similar problems. In fact, in *Certain Criminal Proceedings in France* it had to order the removal of the case from the list, following withdrawal of the application instituting proceedings and the submission by the claimant State of a request for discontinuance of proceedings.⁸³ In this case, the Republic of

⁸⁰ See para. 3 lit. (c) and (d).

⁸¹ According to some commentators, useful indications to address these problems may proceed from ICC practice operationalizing complementarity. Such practice could shed more light on issues surrounding the contents and standard of proof of complementarity. For example, first, whether the ICC is allowed to exercise jurisdiction after a *prima facie* finding of inactivity or unwillingness by primary States or whether a higher threshold is required. Second, how to strike a balance between the need to fight against impunity and the need to defend legitimate sovereign interests: thus, what level of deference to territorial States or to home States is appropriate under the subsidiarity principle. In this regard – it is argued – custodial States should apply subsidiarity with respect to a certain case as strictly as the ICC would have applied complementarity with respect to the same case, and should not defer more readily to the territorial or national State that the ICC would have done [see *C. Kress* (note 29), 580; *C. Ryngaert* (note 32), 154, 177 et seq.]. It is also suggested that, to avoid abuses by custodial States in applying such standard of proof, a multilateral agreement on universal jurisdiction providing for institutional safeguards should be stipulated. More specifically, such agreement should empower an international judicial organ to take decisions, in the place of custodial States, as to whether primary States are unwilling or unable to aptly conduct criminal proceedings in a given case [*C. Kress* (note 29), 584 et seq.].

⁸² See note 61.

⁸³ *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16.11.2010, ICJ Reports 2010, 635.

Congo had accused France of having asserted criminal jurisdiction over acts of torture committed in Congo by and against Congolese nationals, regardless of the subsidiary nature of universal jurisdiction within the meaning of Art. 5 para. 2 CAT. It argued that if one of the States provided for in Art. 5 para. 1 CAT has commenced proceedings, the State provided for in Art. 5 para. 2 “will lack jurisdiction”, even if the alleged offender is present on its territory and it has not received any request for his extradition.⁸⁴

Matters become clearer when one focuses on the complementarity principle. In its case-law the ICC clarified a substantial number of concepts and notions envisaged by Art. 17 ICC Statute.

It shaped the so called “two-steps test”: in considering whether a case is inadmissible before the ICC in accordance with Art. 17 para. 1 lit. (a) and (b), the initial questions to ask are whether there are ongoing investigations or prosecutions, or whether there have been investigations in the past and the State having jurisdiction has declined to prosecute the person concerned. It is only when the answers to these questions are in the affirmative, and concern the “same case” under ICC jurisdiction (*i.e.*, a case involving the “same person” under ICC investigations and “substantially the same conduct” giving rise to individual criminal responsibility under the ICC Statute), that one has to examine the question of unwillingness and inability. It follows that in case of State inaction, the question of unwillingness or inability does not arise.⁸⁵ In the Court’s view, this analysis should be conducted in light of the factual circumstances existing at the time the admissibility challenge is addressed and taking into account the law and procedure of the State concerned. Furthermore, the same factual circumstances may be considered for the purposes of both the unwillingness and the inability test.

Moreover, in the *Gheddafi Case* and the *Al-Senussi Case*, the Court laid out for the first time the criteria of the “substantially same conduct test”. It found it should assess domestic proceedings only taking into account the alleged individual conduct, not even its legal characterization. In fact, the question whether domestic investigations are carried out with a view to formally prosecuting “international crimes” is not determinative of an admissibility challenge.⁸⁶ Therefore a domestic investigation or prosecution for “ordinary crimes” shall be deemed sufficient, to the extent that the national case covers substantially the same conduct as alleged in the proceed-

⁸⁴ Application Instituting Proceedings and Request for the Indication of a Provisional Measure of 11.4.2003, General List No. 129.

⁸⁵ *Katanga* Judgment (note 71), para. 78.

⁸⁶ *Gheddafi* Decision (note 74), para. 85.

ings before the ICC.⁸⁷ Moreover, the Court found irrelevant whether domestic proceedings deal with each and every “event” and “incident” as referred to in its arrest warrant.⁸⁸ It is sufficient for national proceedings to cover the relevant factual circumstances of the alleged criminal conduct, which must be described with reference to precise temporal, geographic, and material parameters identified in the ICC arrest warrant.⁸⁹

Regarding the standard of proof required to determine the admissibility of a case before it, the Court found that the claimant State must provide evidence of a sufficient degree of specificity and probative value demonstrating that concrete and progressive investigative steps had been taken over the same case under ICC investigation.⁹⁰

Finally, the Court clarified whether violations of internationally recognized fair trial standards may play a role in determining the inadmissibility of a case, pursuant to Arts. 17 para. 2 and 21 para. 3 ICC Statute. In light of the text, context, object, and purpose of Art. 17, the Court declared that only those irregularities which may constitute relevant indicators of one or more of the scenarios described in Art. 17 paras. 2 and 3, and that are sufficiently substantiated by the evidence and information placed before the judges, could form a ground for a finding of unwillingness or inability,⁹¹ since purported breaches of the accused’s procedural rights are not *per se* grounds for such a finding under Art. 17.⁹² In fact, the Court argued that it was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights, either in a general context or in relation to the specific case at hand.⁹³

⁸⁷ *Gheddafi* Decision (note 74), para. 88. In their case-law, the ICTY and the ICTR adopted a completely different approach, in accordance with Rule 11bis RPE, given the prevalence of their jurisdiction over State jurisdiction and the exception to the *ne bis in idem* principle whenever the act for which the alleged offender is tried by a national court is characterized as an ordinary crime (see Art. 10 ICTY Statute and Art. 9 ICTR Statute).

⁸⁸ *Al-Senussi* Decision (note 74), para. 75.

⁸⁹ *Al-Senussi* Decision (note 74), para. 79.

⁹⁰ *Ruto et al.* Judgment (note 72), para. 61.

⁹¹ *Al-Senussi* Decision (note 74), para. 221.

⁹² *Al-Senussi* Decision (note 74), para. 235.

⁹³ *Al-Senussi* Judgment (note 74), para. 219.

VII. Some Final Remarks

It cannot be excluded that the underlying reasons behind the progressive assimilation of the substitution model in the field of international criminal justice might depend upon the *erga omnes* nature of the obligation to investigate and prosecute incumbent, under general international law, on States holding primary jurisdiction over international crimes. Any failure to comply with such an obligation would thus enable other States to substitute for the former, including on the sole basis of “conditional” universal jurisdiction. Since primary States are not only entitled but also compelled to engage in prosecutorial activities against international crimes for the purposes of protecting community values in the general interest, it seems they are called to exercise “functional powers”.⁹⁴ These powers have to be exercised on behalf of the international community.⁹⁵ The existence of such an *erga omnes* obligation is acknowledged by the ICJ,⁹⁶ the ILC,⁹⁷ and legal scholarship.⁹⁸ Moreover, with specific reference to the crime of genocide, the European Court of Human Rights affirmed the “*erga omnes* obligation undertaken by the Contracting States in Art. I of the Genocide Convention to prevent and punish genocide”.⁹⁹ According to the Court, Art. 6 of the Convention does not prohibit persons charged with genocide from being tried

⁹⁴ See Section II.

⁹⁵ Some commentators argue that the exercise of primary States jurisdiction over international crimes does not take place in their own name, but on behalf of the international community: *P. Gaeta*, La repressione penale dei crimini internazionali. Problemi e prospettive, in: M. Calloni (ed.), *Violenza senza legge. Genocidi e crimini di guerra nell'età globale*, 2006, 143 (144).

⁹⁶ In the *Belgium v. Senegal* Judgment, the Court held that the duty to prosecute a person accused of torture incumbent on the custodial State, under Art. 7 para. 1 CAT, qualifies as an obligation *erga omnes partes*: see note 61 and accompanying text.

⁹⁷ According to the ILC Final Report, the duty to prosecute or extradite under Art. 7 para. 1 CAT is owed to all States parties to the Convention. As a result, each State party has a common interest in compliance with such duty and may have standing to invoke the international responsibility of another State party for being in breach of its obligation to extradite or prosecute: see note 25, paras. 45 et seq.

⁹⁸ See *H. van der Wilt* (note 32), 1050 et seq.; *F. Jessberger/J. Geneuss* (note 63), 1087. The duty, under contemporary customary law, to bring to justice those responsible for international crimes, at least with respect to crimes committed on the State's territory or by its nationals, is maintained by the majority of international lawyers. See, for instance, *C. Tomuschat*, The Duty to Prosecute International Crimes Committed by Individuals, in: H.-J. Cremer/T. Giegerich/D. Richter/A. Zimmermann (eds.), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger*, 2002, 315 et seq., 342; *D. Robinson*, Serving the Interests of Justice: Amnesties, Truth Commission and the International Criminal Court, *EJIL* 14 (2003), 481 (490 et seq.).

⁹⁹ *Jorgic v. Germany*, Judgment of 12.7.2007, Application No. 74613/01, para. 20.

by national courts other than those of the State in the territory of which the crime took place, including courts relying on universality.

This paper has attempted to establish an interaction between some of the means of community values enforcement and the different legal concepts employed to justify it, such as universal jurisdiction and *erga omnes* obligations. Hopefully, it will help clarify some of the uncertainties surrounding them. To this end, one might rely on the fact that – although they perform different functions and operate within different areas of international law – these concepts share a similar logic, which seems influenced by what might be called a “public law” approach to the protection of general interests in the international community.

