PART V

Complementarity in perspective

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Horizontal complementarity

CEDRIC RYNGAERT

Abstract

This chapter tackles the question whether a subsidiarity/complementarity principle – as is set out in Article 17 of the Rome Statute of the International Criminal Court – governs domestic prosecutions for international crimes on the basis of universal jurisdiction (a 'horizontal' complementarity principle): are 'bystander' states that have no link with those crimes but nevertheless want to prosecute them required to defer to states that have a stronger link and that are able and willing to investigate and prosecute? The author derives from a discussion of six relevant elements of the international legal system that there is no strong legal requirement of horizontal complementarity. Nevertheless, it amounts to proper criminal policy to defer to 'territorial' states (states on the territory of which the crime has been committed) that intend to embark in good faith on their own investigations and prosecutions.

1 Introduction

The complementarity principle was established by the drafters of the Rome Statute. As such, it was designed for *vertical* application. Indeed, a supranational institution, the International Criminal Court ('ICC'), would supervise the investigative and prosecutorial work of states, and assume its responsibilities if that work proved to be below acceptable standards. So far, however, scant attention has been paid to the *horizontal* dimension of complementarity. Horizontal complementarity, the term used in this contribution, refers to the complementary prosecutorial role played by 'bystander' states, i.e. those states that do not have a strong nexus

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with an international crime situation (and that are, for instance, exercising universal jurisdiction), vis-à-vis states that are directly concerned with such a situation, e.g. because the situation occurred on their territory or because the crimes were perpetrated by their nationals (hereinafter denoted as 'the territorial/national state' or, generically, as 'the home state').

When the ICC and bystander states, acting under the universality principle, investigate and prosecute international crimes, they may be considered as acting as agents of the international community.[1] Because they both vindicate international interests, it appears logical that they apply the same principles, not only at the level of substantive law (many states parties to the Rome Statute have indeed incorporated the Statute's crimes into their national law upon ratification) but also at a procedural level. One of the central procedural principles in the Rome Statute is precisely the principle of complementarity. In the past I have argued that 'there is no compelling reason for international and national courts to use a different standard for subsidiarity/complementarity, certainly not for states that have ratified the Rome Statute and have thus subscribed to the vision of justice underlying the complementarity principle'.[2] At the time, however, I did not theoretically flesh out that claim to the fullest extent, as I was mainly concerned with identifying relevant tendencies in state practice and emerging rules of customary international law. In this contribution, I revisit my doctrinal position by listing the arguments for and against horizontal complementarity (Sections 2–6). I will subsequently link the insights of this theoretical discussion to the most recent state practice, especially in Spain (Sections 7–8). Because most universality cases are currently brought in Spain (which boasts probably the world's most liberal universality statute), Spain provides a fertile breeding ground for the application, or non-application for that matter, of a horizontal complementarity principle. Not surprisingly, it will become clear that I am in favour of the application of a horizontal complementarity principle. Carrying out a horizontal complementarity analysis is normatively desirable

1 Compare the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 ('Rome Statute'), fourth preambular paragraph ('*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation').

2 C. Ryngaert, 'Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle', (2008) 19 *Crim. L.F.* 153, 178.

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for a number of reasons, not least the imperative of respecting and encouraging genuine proceedings in the home state, and forestalling diplomatic tension arising from overly broad jurisdictional assertions.

2 The sovereignty dimension

In the ICC system, complementarity implies that the primary jurisdiction over violations of international criminal law lies with the state. The jurisdiction of the ICC is merely a complementary (or subsidiary) one: the ICC only steps in when the state proves unable or unwilling genuinely to investigate and prosecute a case. As is well known, in this respect the ICC system differs considerably from the ad hoc tribunals, which have primacy of jurisdiction vis-à-vis national courts.[3] If the ICC's vertical complementarity system is now turned into a horizontal one, this would imply that the jurisdiction of the bystander state – which may, as indicated, and just like the ICC, be seen as representing the interests of the international community – is only complementary to the jurisdiction of the territorial or national state. This implication is somewhat problematic from a sovereignty perspective.

It is recalled that the classic international law of jurisdiction is perceived as leaving a wide measure of jurisdictional discretion to states.[4] Even if international law were seen as authorizing jurisdiction only on the basis of permissive principles, there is no evidence that there is a hierarchy among these principles.[5] Accordingly, assuming that the (majority of the) international crimes over which the ICC has jurisdiction are also amenable to jurisdiction under the universality principle, which is one of the permissive jurisdictional principles, the (bystander) state exercising such jurisdiction is not supposed to back down in the face of a purportedly superior claim by a state with a stronger nexus, such as the territorial or

3 Statute of the International Tribunal for the Prosecution of Persons Responsible for serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslovia since 1991, SC Res. 827, UN Doc. S/Res/827 (25 May 1993) ('ICTY Statute'), Art. 9 and Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for genocide and Other serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for genocide and other such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, SC. Res 1315, UN Doc. 5/RES/955 (6 November 1994) ('ICTR Statute'), Art. 8.

4 *SS Lotus (France* v. *Turkey)*, ICJ, Permanent Court of International Justice ('PCIJ') Reports, Series A, No. 10, pp. 18–19 (1927).

5 C. Ryngaert, *Jurisdiction in International Law* (2008), 128–9.

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national state. Put differently, in classic international law, the jurisdiction of the bystander state is concurrent with, and not complementary to, the jurisdiction of the territorial or national state.[6] This idea is rooted in the principle of sovereign equality, pursuant to which the legal claims of one state do not and cannot prevail over the claims of another state. All states are equal, and restrictions on the power of states to prescribe laws and apply them to a given situation should not be presumed.[7] This holds all the more true if those laws govern violations of obligations arising under a peremptory norm of general international law.[8] These are obligations in which every state has an interest,[9] which it could (although not necessarily *should*) vindicate by conferring on its prosecutors and courts the power to investigate and prosecute violations of those obligations.

Admittedly, the jurisdiction of the ICC and the states parties to the Rome Statute is *also* concurrent. After all, the complementarity principle only comes into play at the level of admissibility.[10] Yet the international law of prescriptive state jurisdiction has not made the distinction between jurisdiction and admissibility.[11] If a state has jurisdiction under international law, it is also allowed to *exercise* that jurisdiction. Restrictions have been imposed on the exercise of jurisdiction, but these find their legal basis in domestic law rather than international law. In classic international law, therefore, there are no indications that some sort of 'horizontal' complementarity principle – by virtue of which the bystander state's courts are

6 See also Juzgado Central de Instrucción No Cuatro, Audiencia Nacional Madrid, No. 157/2.008, 4 May 2009, p. 13 ('. . . dichos Convenios [the Geneva Conventions], suscritos por España, establecen de forma expresa un régimen de jurisdicción universal concurrente, claramente alternativa respecto de otras jurisdicciones y en ningún caso estrictamente subsidiaria').

7 *SS Lotus*, *supra* note 4, 18–19.

8 Cf., International Law Commission ('ILC'), Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 40.

9 *Ibid.* Art. 41.

10 The complementarity principle is enshrined in Article 17 of the Rome Statute, which bears the heading 'Issues of admissibility'. Systemically, Article 17 comes after the provisions on jurisdiction (Arts. 5–14).

11 It is noted that there *is* such a distinction at the level of international tribunals other than the ICC, e.g. at the International Court of Justice ('ICJ'). While the Statute of the ICJ only addresses issues of competence/jurisdiction (Arts. 34–8 of the Statute), issues of admissibility may also arise before the Court, e.g. in relation to state claims for diplomatic protection for their nationals. Cf., ILC, *supra* note 8, Art. 44. ('Admissibility of claims'), stating that 'the responsibility of a State may not be invoked if: (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims; (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted'.

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only courts of last resort which ordinarily defer to an 'able and willing' territorial/national state – would be mandatory.

Despite these misgivings, however, complementarity has implicitly been referred to in the separate opinion of Judges Higgins, Kooijmans and Buergenthal in the International Court of Justice's ('ICJ') *Arrest Warrant* judgment (2002). The opinion states that '[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'.[12] This statement, which was not further elaborated upon, might be taken as requiring deference on the part of the bystander state if the state of nationality (often also the territorial state) proves willing, and presumably also able, to prosecute. In the *Arrest Warrant* case itself, the bystander state (Belgium) had allegedly offered to the territorial/national state (the DRC) that it would investigate and prosecute, and only when this offer was turned down (either explicitly or implicitly) did Belgium take its own initiative.[13] As is known, the ICJ eventually went on to address issues of immunity only, and not the criteria for a lawful exercise of universal jurisdiction (such as an alleged principle of horizontal complementarity).

Litigants before the ICJ have not put the issue of horizontal complementarity to rest, however. In an application a year after the ICJ's judgment in the *Arrest Warrant* case, the DRC asserted that the jurisdiction of states exercising universal jurisdiction on the basis of Article 5.2 of the UN Torture Convention[14] 'is subsidiary [or, in the terminology mainly used in this chapter, "complementary"] to that of the States mentioned in paragraph 1 [these are the States exercising jurisdiction on the basis of nationality or territoriality] and, above all, to that of the State which has territorial sovereignty'. The DRC went on to state that:

> [i]t follows that, if one of those States has commenced proceedings in respect of the alleged offences, the State provided for in paragraph 2 [of

12 *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)*, ICJ, Separate Opinion of Judge Higgins *et al.*, Judgment, 14 February 2002, para. 59.

13 *Ibid.*, para. 16 of the majority opinion.

14 This article provides: 'Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences [acts of torture within the meaning of Article 1] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article [that is to say, the State in which the offence was allegedly committed and that of which the alleged offender or the victim is a national]'.

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> Article 5 of the UN Torture Convention] will lack jurisdiction, even if the alleged offender is present on its territory and it has not received a request for his extradition.[15]

Apparently, the claimant believed that this interpretation flows from the very text of the Convention. However, apart from the fact that the principle of the *aut dedere aut judicare*-based universal jurisdiction as set out in Article 5.2 of the Convention is to be found, in the system of the said article, *after* the other jurisdictional grounds as set out in Article 5.1 of the Convention, there is not much evidence that the drafters intended to establish a jurisdictional hierarchy between the different paragraphs of Article 5 of the Convention. Possibly, the DRC could have relied on a more general ICC-style principle of complementarity, which is applicable, across the board, to all investigations and prosecutions of international crimes. If so, it would have been required to adduce evidence of state practice and *opinio iuris* with a view to establishing the existence of the principle under customary international law. The case was removed from the general list of the court by order of 16 November 2010, following mutual agreement by the parties on the discontinuance of the proceedings.[16] Needless to say, this judgment might well have been ground-breaking for the clarification of the claimed principle of horizontal complementarity. As pointed out in this Section, however, classic international law does not augur well for a limitation of the sovereign right of states to exercise the jurisdiction which the law allots to them.

3 The absence of a transnational *ne bis in idem* principle

It is noted that, in a domestic context, courts are not allowed to prosecute the defendant again when he has already been convicted or acquitted. This is denoted as the principle of *ne bis in idem* or the prohibition of double jeopardy, a principle which is codified in international and regional human rights instruments.[17] It is widely accepted, however, that the

15 *Certain Criminal Proceedings in France* (*Democratic Republic of the Congo* v. *France*), ICJ, Judgment, 11 April 2003, 9 (arguing that the Democratic Republic of the Congo is not a party to the UN Torture Convention, and that, accordingly, its provision on universal jurisdiction cannot be opposed to it).

16 See, ICJ, Certain Criminal Proceedings in France (*Republic of the Cengo* v. *France*, Order, 16 November 2010, 2–3.

17 See International Covenant for Civil and Political Rights ('ICCPR'), Art. 14(7) ('No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of

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principle is not applicable at the transnational level, as has been pointed out amongst others by the Human Rights Committee, and as implied by Protocol no. 7 to the European Convention on Human Rights.[18]

Somewhat related to the argument of sovereignty and jurisdictional entitlement is the argument based on the absence of a transnational *ne bis in idem* principle. This argument, which similarly undermines the claim that there is such a thing as horizontal complementarity, primarily comes into play in relation to the initiation of proceedings by the 'bystander' state acting under the universality principle, in cases where the territorial state or the state of nationality had already started investigations which resulted in the conviction or acquittal of the defendant. If a transnational *ne bis in idem* principle does indeed not exist, it cannot act as a bar to the initiation of prosecutions by a bystander state. It is then immaterial whether or not the defendant has been convicted or acquitted in another state: the bystander state's jurisdiction is not complementary but primary and original.

For our purposes, this implies that, before the courts of bystander states, there is no *res judicata* effect of judgments relating to the prosecution of international crimes delivered in the territorial state or the state of nationality of the offender. Seen from the angle of international human rights law, it would be perfectly legitimate for a bystander state to open an investigation into crimes for which the presumed offender has already been acquitted or convicted (and for which he has possibly served his sentence) in another state.[19] International human rights law does not condition re-prosecution on the quality of the prior proceedings. This implies that even if the conviction or acquittal by a court of the territorial state or the state of nationality was the result of a real ability and willingness bring to a person to justice, a bystander state can still

each country'); Protocol No. 7 (1984) to the European Convention on Human Rights ('ECHR'), Art. 4.

18 *AP* v. *Italy*, Communication No. 204/1986, UN Doc. CCPR/C/OP/2 at 67 (1990), para. 7.3, Report of the Human Rights Committee, 43rd Sess., Supp. No. 40, UN Doc. A/43/40 (1998) (stating that 'article 14, paragraph 7 of the Covenant does not guarantee *ne bis in idem* with regard to the national jurisdiction of two or more states . . . This provision prohibits double jeopardy only with regard to an offence adjudicated in a given state). Article 4 of Protocol No. 7 (1984) to the ECHR (referring to the applicability of the principle within the 'jurisdiction of the same State').

19 Obviously, this angle is not necessarily the same as the angle from which general international law looks at the matter, the latter being primarily concerned with the interests of states and the delimitation of their respective spheres of competence, and the former being concerned with the rights and interests of the individual (human rights).

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consider the case as admissible. The jurisdiction of the bystander state is accordingly not complementary in the sense set out in the Rome Statute, pursuant to which the ICC can only exercise its jurisdiction (declare a case admissible) if the state has not been able and willing genuinely to investigate and prosecute. On the contrary, any state has, in principle, a full right to reprosecute and retry a presumed offender, irrespective of the result of any prior proceedings in another state.[20]

4 The absence of a credible threat posed by the bystander state

Carsten Stahn has observed that '[c]omplementarity enhances observance through threat'.[21] If a situation risks being investigated, and a case being declared admissible by the ICC, states are well advised, and even encouraged, to conduct their own investigations and prosecutions if they do not want to lose face. The threat potential of the ICC crucially depends on its effectiveness in monitoring compliance. If the Court is not backed by an international community that wants to throw its weight behind the enforcement of arrest warrants and other requests for cooperation, the Court will be viewed as a toothless institution. When it is indeed seen as harmless and lacking deterrence, states will feel more at ease not to take their primary responsibility to investigate and prosecute international crimes seriously. Because of the legitimacy with which the ICC is imbued (widespread ratification of the Statute, an independent prosecutor, highly

20 This principle may evidently be derogated from in specific treaties. This has happened in the European Union: cf., Art. 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Berelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJ* L 239 22.9.2000 pp. 19–62 ('A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'). There is no such convention at the global level. Some states have also derogated from it in their legislation. See, e.g. Canada, Crimes Against Humanity and War Crimes Act (c. 24), Art. 12.2, (stating, however, along the lines of Article 20 of the Rome Statute, that a person may not plead *autrefois acquit*, *autrefois convict* or a pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court (*a*) were for the purpose of shielding the person from criminal responsibility; or (*b*) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice').

21 C. Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19 *Crim. L.F.*, 97–8.

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qualified staff), it is quite likely that the international community will bring pressure to bear on states in order for them to live up to their duty to cooperate with the Court (either for State Parties, on the basis of the Statute,[22] or for states which are not parties, on the basis of a Security Council resolution), and genuinely to investigate and prosecute crimes. Put differently, compliance, backed up by the principle of vertical complementarity, is increased on the ground that the ICC can rely on multilateral bargaining power.

In contrast, the *national* threat of prosecution by bystander states is not nearly as much of a deterrent as the *international* threat of prosecution. Irrespective of the strength of their case, bystander states cannot possibly harness the level of international support that the ICC can count on. It is therefore uncertain whether bystander states' efforts to have a person arrested outside the jurisdiction could bear fruit. The bilateral bargaining power which the state of which the indicted person is a national could use against the state that has received the bystander state's request for cooperation may impel it not to honour the request, whereas the outcome could well be very different if the request were made by the ICC backed up by multilateral bargaining power. Compliance will of course be even less likely if the indicted individual is still present in and protected by his home state. Thus, states will ordinarily not be very impressed by bystander states' threats of prosecution, and are unlikely to set about investigating and prosecuting the crimes themselves. As a result, the complementarity principle may be considered not to serve its purpose of inducing compliance with the duty to prosecute international crimes.

Nevertheless, it should not be overlooked that the mere initiation of an investigation, apart from 'immobilizing' the targets of the investigation in their safe haven, could set in motion a flurry of investigative and prosecutorial activity in the territorial state. The bystander state's investigation may indeed bring to light a past that was not particularly bright, and strengthen the hand of progressive domestic powers that want to bring the presumed offenders (often belonging to a former regime) to justice in the territorial state. At the end of the day, that state also wants to maintain its reputation on the international scene. In the literature, this has been called the 'Pinochet effect'.[23] It is a term that is derived from the increased willingness of Chilean investigators to dig up the crimes committed in

22 Rome Statute, Art. 86.

23 Cf., N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2005).

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Chile between 1973 and 1990; more generally, it denotes the investigative efforts that have been undertaken throughout the whole of Latin America in the wake of criminal proceedings in Europe (in particular in Spain) in the 1990s and 2000s. The Pinochet effect shows that bystander states' prosecutions can enhance compliance through a combination of a wake-up call and embarrassment.

What has been said about the lack of a credible threat that could be posed by bystander states' prosecutions may appear to apply mainly to a situation of an individual being indicted, and possibly a warrant for his arrest issued, *in his absence* (jurisdiction *in absentia*). After all, if the individual is present in the bystander state's territory, a warrant for his arrest could easily be enforced. It is noted that most states only allow the exercise of universal jurisdiction in cases where the suspect is present in the territory. Nonetheless, this is not what is exactly meant by the compliance-enhancing power of complementarity through deterrence. At most, the threat of arrest will prevent sought individuals from voluntarily stepping onto the territory of the bystander state seeking his arrest. The deterrent effect of prosecutions initiated in the bystander state is, from that perspective, limited to deterring individuals from leaving safe havens. This is obviously not the deterrence that complementarity is hoped and supposed to deliver.

Genuine complementarity is geared towards effecting *systemic change* in the way states address international crimes through threatening international or extraterritorial prosecution. The indictment, arrest and eventual trial of a single individual who has taken the risk of entering the territory of a bystander state willing to bring a prosecution is unlikely to effect lasting change in the territorial state as far as the implementation of the rule of law is concerned. It should also be realized in this respect that the typical individual that enters the territory of a bystander state of his or her own volition is an individual who no longer feels safe in his home state. Individuals against whom prosecution has successfully been brought are often refugees or asylum seekers who are later unmasked as international criminals. These individuals have already been sidelined in their home state (e.g. because a new regime has seized power), which would possibly even bring criminal prosecutions if it had the chance or capacity to do so. The home state will normally welcome the prosecution by the bystander state (it can also do so by acquiescence, i.e. by not protesting against the exercise of jurisdiction), so that the antagonism which accompanies the threat-based compliance enhancement of the complementarity principle will often not be present.

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5 Positive complementarity

The absence of antagonism between the bystander state and the territorial state now brings us to the *positive* side of the complementarity principle. This side has been emphasized by both the ICC Office of the Prosecutor and the recent doctrine on complementarity.[24] Basically, positive complementarity means that the Court and the state *cooperate* with a view to bringing international criminals to justice. To that effect, the Court encourages domestic prosecution in a positive manner. Also, the Court and the state may decide to divide tasks.

Positive complementarity will only work effectively if the state shows some willingness to work together with the Court in acting against suspects of international crimes, and, importantly, does not view the Court as an opponent. As far as bystander states are now concerned, it is common, as shown above, that the territorial state does not view the bystander state as an opponent, given the typical outcast status in the territorial state of the suspects that are voluntarily present in the territory of the bystander state. This augurs well for the implementation of a system of positive complementarity.

However, is this translated into an effective system of positive complementarity? There are some instances of territorial states cooperating rather well with the bystander states that have brought the prosecution (under the universality principle). In prosecuting Rwandan *génocidaires*, for instance, bystander states, such as Belgium, have greatly benefited from the assistance of Rwanda. There is, however, no evidence that positive complementarity is approached *in a systematic fashion* by states. Bystander states' public prosecutors have so far not directly incited territorial states to investigate and prosecute. Making demands for information about investigations and prosecutions – which bystander states have done – is one thing,[25] but it is quite another to actively encourage the territorial state to initiate prosecutions. To be honest, a 'Pinochet effect'

24 Cf. ICC-OTP, 'Paper on Some Policy Issues before the Office of the Prosecutor', September 2003, 4, www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf; W. W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *Crim. L.F.* 59, 61; Stahn, *supra* note 21.

25 For instance, in 2009, Spain, asked Israel to inform it about any investigations carried out by Israel in relation to a number of senior Israeli military officers against whom a Spanish human rights group had filed a case (the '*Shehadeh* case'). Investigating Judge Andreu later determined that the documents forwarded by the Israeli embassy in Madrid made it clear that Israel was not willing to prosecute the officers, See *infra* Section 9.

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may sometimes be discernable. Yet this is merely a side-effect of bystander states' prosecutorial efforts; it is not the result of an active, systemic and overarching vision of international criminal justice.

Bystander states should not be chided for not developing such a vision, however. After all, national prosecutors have many more things on their minds than international prosecutors. International prosecutors can focus exclusively on a limited number of international crimes, they can develop specific expertise in the field, and they have access to resources and a sizable international network. It is not surprising, then, that they are able to lay out a thorough positive complementarity vision (although they do not always implement this vision).[26] For national prosecutors, it will always be an uphill struggle to mobilize resources for prosecutions that do not directly reduce *domestic* criminality. Often, only to the extent that the territorial presence of international criminals disturbs the peace of the country, will prosecutors intervene. The intervention will typically limit itself to either the prosecution or the extradition of the presumed offender (*aut dedere aut judicare*). When opting for extradition, the prosecutor will normally not undertake efforts to facilitate the trial of the individual in his home state. It should nonetheless be conceded that human rights exceptions in extradition laws (which lay down a ground for refusing to extradite when there is a lack of due process or other human rights guarantees in the requesting state) may bring some pressure to bear on the requesting home/territorial state to ensure that the individual receives a fair trial, and thus effect some local change.

6 The direct effect of Article 17 of the Rome Statute in the domestic legal order

In some jurisdictions, notably in those with a strong monist tradition of giving effect to international law, the courts appear to believe that they can directly apply the provisions of the Rome Statute if the domestic legislation implementing the Rome Statute is not satisfactory and leaves impunity gaps. This opens up some possibilities of applying the elaborate complementarity regime as laid down in the Rome Statute in domestic legal orders. If the Rome Statute could be directly applied at the national level, the ICC's vertical complementarity regime would be automatically

26 Cf. C. Ryngaert, 'The Principle of Complementarity: A Means of Ensuring Effective International Criminal Justice', in C. Ryngaert (ed.), *The Effectiveness of International Criminal Justice* (2009), 145–72.

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transformed into a horizontal complementarity regime that is based on the same procedural and substantive criteria.

It should be realized that there are no systems that are fully monist in that they automatically give effect to treaties in domestic law. Typically, only to the extent that treaty provisions are self-executing will they be given effect. It is submitted here that the Rome Statute is non-self-executing and does not lend itself to direct application in domestic courts. There is no evidence that the drafters ever wanted the Statute to be self-executing at the domestic level.[27] Moreover, many provisions of the Statute simply do not lend themselves to direct application in domestic courts because they are procedural in nature, and set out the division of competences within the International Criminal Court proper. As far as the complementarity principle is concerned, admittedly, its substantive core could be applied in domestic courts (such courts deferring to another state's jurisdiction if the latter state is genuinely able and willing to investigate and prosecute the case).[28] Yet the direct application of the procedural aspects of the principle is problematic. The principle needs to be implemented, transposed and adapted for it to be useful at the domestic level. The operationalization of the principle at the ICC indeed involves Court-specific organs such as the Prosecutor, the Pre-trial Chamber and the Appeals Chamber,[29] which may not readily have an equivalent at the national level. In addition, it reserves a prominent procedural position for the state challenging the jurisdiction of the Court;[30] such a position does not ordinarily exist at the domestic level. Moreover, the jurisdiction of bystander states over international crimes is typically based on the (anticipated) presence of the presumed offender on their territory. This is very unlike the jurisdiction of the ICC, which is not dependent on the territorial presence of the offender.[31]

27 Cf. Restatement (Third) of Foreign Relations Law of the United States, Section 111(4)(a) (1987) (stating that a treaty is non-self-executing 'if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation').

28 Along the same lines, the substantive criminalization in Arts. 6–8 of the Rome Statute could be given direct application.

29 Rome Statute, Arts. 17–19. 30 *Ibid.*, Art. 19.

31 See also T. Singelnstein and P. Stolle, 'Völkerstrafrecht und Legalitätsprinzip – Klageerzwingungsverfahren bei Opportunitätseinstellungen und Auslegung des §153f StPO', (2006) *Zeitschrift für Internationale Strafrechtsdogmatik*, 118, 121 (arguing that the effect given to the Rome Statute's complementarity principle in the German legal order is 'unabhängig von der Frage, in welchem Masse das gegenüber einer Bezugnahme auf das deutsche Recht nachrangige Statut für eine Auslegung des §153f StPO tatsächlich

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The argument that the complementarity principle could be applied in domestic courts on the ground that it is enshrined in a treaty which the state has ratified is therefore misguided. This is, of course, not to say that the complementarity principle is not good law for domestic courts. It could certainly be so, yet not on the basis of a treaty but, *de lege lata*, on the basis of another source of international law, or *de lege ferenda* on the basis of policy arguments. The most useful other international law sources from which the principle could spring are customary international law and general principles of law. Evidence should therefore be adduced that the principle of complementarity indeed borrows its normative validity from the fulfilment of those two sources' constitutive criteria, state practice and, as far as custom is concerned, *opinio iuris* (see Section 7).

Two instances of courts directly applying the Rome Statute in a criminal case have so far been reported. The first one is a case reported from the DRC, *Military Prosecutor* v. *Bongi Massaba* (2006).[32] The DRC is a party to the Rome Statute (and has on that basis also referred a situation to the ICC) and has, like its former colonial power Belgium, a monist system of giving effect to international law in domestic courts. In the *Massaba* case, the DRC Military Tribunal of Ituri – an area where many atrocities have occurred – convicted the accused for war crimes as provided for in Article 8 of the Rome Statute. Finding that the Congolese military penal code did not provide for a penalty for the said crimes, it directly applied Article 77 of the Rome Statute, i.e. the article listing the penalties that the ICC can impose.[33] A commentator has observed that the Military Tribunal, in doing what it did, actually failed to appreciate the true meaning of complementarity, which is of course also part of the Rome Statute. As Article 26 of the Congolese military penal code listed in general terms the penalties that military courts can impose, without specifically referring to the penalties that are applicable to war crimes, there was in fact no

herangezogen werden kann – nicht zutreffend, da die Subsidiaritätsregeln für den IStGH [ICC] anders strukturiert sind als die des deutschen Völkerstrafrechts', and citing the 'Inlandsbezug' as a central criterion for national prosecution in footnote 32).

32 Criminal trial judgment and accompanying civil action for damages, RP No 018/2006; RMP No 242/PEN/06, ILDC 387 (CD 2006).

33 It is noted that in an earlier case, the Military Tribunal of Mbandaka (DRC) had given effect to the Rome Statute's regime governing crimes against humanity (RP No. 086/05, RMP No. 279/GMZ/WAB/2005, 12 January 2006). The decision in the *Massaba* case is based on the *Mbandaka* case. The text of the *Mbandaka* decision is not available. Reference to the case was made, however, in the comment by Dunia P Zongwe, ILDC 387 (CD 2006), A8.

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gap that ought to be filled by Article 77 of the Rome Statute.[34] Under the complementarity principle, if the domestic level can adequately deal with a case, there is no need for the ICC, or ICC law for that matter, to step in. If anything, the *Massaba* case illustrates how far we have come since the inclusion of the complementarity principle in the Rome Statute. Whereas the complementarity principle as embodied in Article 17 of the Statute was primarily designed to protect the sovereign interests of states against undue encroachment by the Court, we now see that states are more than ready to resort to the ICC or the Rome Statute, not only by referring situations on their own territory to the Court, but also by giving effect to ICC law over domestic law in their own legal orders.

For our purposes – a study of the horizontal complementarity principle along the lines of Article 17 of the Rome Statute – the more important case is the second one, which was reported from Germany. Germany is a state that boasts one of the world's most liberal universality laws. The Code of Crimes against International Law (Völkerstrafgesetzbuch) in conjunction with the relevant provisions of the Code of Criminal Procedure (Strafprozessordnung, 'StPO') even provides for universal jurisdiction *in absentia*, provided that the presence of the suspect can be anticipated.[35] Given the broad sweep of the law, it was not surprising that the legislature also provided for *subsidiary* universal jurisdiction, in accordance with Article 17 of the Rome Statute: the StPO provides that the federal prosecutor (Generalbundesanwalt) can renounce the prosecution of an act under the Völkerstrafgesetzbuch if that act is prosecuted by a state on whose territory the offence was committed (the territoriality principle), whose national is suspected of having committed it (the nationality principle), or whose national was harmed by it (the passive personality principle).[36] In so doing, Germany appeared to implement the Rome Statute's complementarity principle in the German legal order, and thus to give it horizontal effect. It is noted that, precisely because of the implementation, the German complementarity principle is only *indirectly* based on Article 17 of the Rome Statute; there is no evidence that Germany, upon ratification, wanted to give Article 17, including any ICC case law in respect of the application of the article, direct effect in

34 *Ibid.*, A7.

35 Cf. in particular StPO, section 153(f). See generally on universal jurisdiction in Germany: C. Ryngaert, 'Universal Jurisdiction over Violations of International Humanitarian Law in Germany', (2008) 47 *The Military Law and the Law of War Review* 377.

36 StPO, section 153(f)(2)(4).

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Germany.[37] Giving direct effect to the Rome Statute was, however, exactly what the German federal prosecutor did in the *Abu Ghraib* case (2005), a case against a number of US officials and members of the armed forces relating to the incidents in the infamous Iraqi prison.[38] Applying Article 14 of the Rome Statute in the mistaken belief that it clarified the complementarity principle, he observed that the Abu Ghraib 'situation' (i.e. the term that figures in Article 14) had been dealt with by the United States, and decided, accordingly, that there was no reason for Germany to bring its own laws to bear.

While the German prosecutor incorrectly applied the complementarity principle, if anything the *Abu Ghraib* case bears witness to a willingness on the part of states to apply Article 17 of the Rome Statute in the domestic legal order. Normatively, there are powerful arguments against this method, but what is at this juncture relevant for our purposes is that some states believe that the complementarity principle has a role to play at a horizontal level. If a critical number of states share the same belief and practice, it may crystallize as a norm of customary international law, irrespective of the normative desirability of such as a norm.

7 Customary international law: ascertaining state practice with respect to horizontal complementarity

The effect given to the Rome Statute by the German federal prosecutor in the *Abu Ghraib* case has seamlessly brought us to the role that states, in their legislative, prosecutorial and judicial practice, reserve for the horizontal complementarity principle. The leading question here is whether states generally apply the principle and consider themselves to be bound by it as a matter of law (*opinio iuris*), or, put differently, whether customary international law mandates the application of a horizontal complementarity principle. There is little practice of states conducting a complementarity analysis. Yet it would not be the first time that limited positive practice translates into a norm of customary international law.[39]

37 Governmental statements upon ratification may play a role in determining the self-executive character of treaties. Compare Restatement (Third) of Foreign Relations Law of the United States, *supra* note 27, Section 111(4)(b) (1987) ('if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation').

38 Juristenzeitung (2005), 311. The federal prosecutor actually held that the Rome Statute was 'Richtschnur für die Auslegung und Anwendung des Section 153f *StPO*'.

39 See, e.g. the limited practice cited by the ICJ with respect to the absolute immunity of incumbent Ministers of Foreign Affairs in *Case concerning the Arrest Warrant of 11 April*

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But then, it should be established that the limited practice which is put forward is indeed unambiguous for it to form the basis for a claimed customary norm. It is argued that on the basis of the state practice available – German and Spanish practice in particular – it cannot reasonably be stated that the states concerned consider a complementarity analysis to be mandated by law.

Let us first further discuss the federal prosecutor's reasoning in the *Abu Ghraib* case. This reasoning has been heavily criticized in the doctrine, including by me.[40] Article 14 of the Rome Statute, which was cited by the German prosecutor, can indeed hardly be considered as applicable to the case, as the article addresses the referral of a situation by a state party (the article cannot even applied by analogy, as the United States, of course, did not refer the *Abu Ghraib* situation to the German federal prosecutor). More importantly, even if, *arguendo*, the Rome Statute could have direct effect in the domestic legal order, the reference to 'situation' in the Rome Statute does not mean that the ICC or a bystander state can satisfy itself with the fact that 'something' is done to investigate and prosecute crimes committed in respect of a situation under review, even if the individuals who are targeted in the complaint in fact remain unpunished. This is precisely what the German federal prosecutor decided: since, at the time of deciding, a number of persons presumed to be responsible for the transgressions had been prosecuted in the United States, the United States should have been regarded as adequately and genuinely dealing with the situation. Accordingly, in the prosecutor's view, there was no need for German complementary jurisdiction over any individuals allegedly involved in the situation.[41]

Regardless of the merits of the prosecutor's application of the complementarity principle in the German legal order, it is unclear from the decision whether the prosecutor believed that he was *bound* to apply the principle under international law. Seen from one perspective horizontal

2000 (*Democratic Republic of the Congo* v. *Belgium*), ICJ, Judgment 14 February 2002, para. 52.

40 K. Ambos, 'Völkerrechtliche Verbrechen, Weltrechtsprinzip und §153f StPO', *Neue Zeitschrift für Strafrecht* (2006), 434, 436; M. E. Kurth, 'Zum Verfolgungsermessen des Generalbundesanwaltes nach §153f StPO', (2006) *Zeitschrift für Internationale Strafrechtsdogmatik*, 81, 85; Ryngaert, *supra* note 2, 171–2; C. Ryngaert 'Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union', (2006) *Eur. J. Crime, Crim. L. & Crim. Justice* 43, 63.

41 It is noted that the Oberlandesgericht of Stuttgart refused to judicially review the federal prosecutor's decision on the ground that such a decision is a discretionary one that is not subject to review. *Neue Zeitschrift für Strafrecht*, Decision, 13 September 2005, 2006, 117.

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complementarity, as interpreted idiosyncratically by the prosecutor, may appear to be a welcome tool for the prosecutor to dispose of a politically sensitive case. Taking the purportedly objective character and application of the principle seriously, however, it is useful to take a closer look at the structure of the procedural provisions of the German StPO in order to ascertain the normative character of the horizontal complementarity principle in Germany. When doing so, doubts emerge as to whether German law actually *allows* the complementarity principle to play a strong normative role in the first place.[42] The relevant article in the StPO provides that the federal prosecutor may renounce the prosecution, in relation to an act committed abroad, of a foreigner present in Germany, if surrender to an international tribunal or extradition to a prosecuting state is admissible (*zulässig*) and intended (*beabsichtigt*).[43] Accordingly, to the extent that a complaint targets an individual present in Germany the federal prosecutor will normally only be able, under German law, to defer to a foreign state if that state is bringing a prosecution *and* the individual could be extradited to that state. If he cannot be extradited – for instance because there has been no extradition request, because there is no extradition treaty between Germany and the other state, or because there is a risk that his substantive or procedural human rights will be violated in the other state – the German federal prosecutor is under an obligation to prosecute; there will be no room for deferring on the basis of the complementarity principle. There is more room for deference in the event that the complaint targets individuals who are not yet present on German soil, but even then, renouncing prosecution is not mandatory on the basis of the text of the law.[44] Therefore, Germany arguably does not consider the principle of horizontal complementarity to be a norm that binds prosecutors and courts.

In Germany, the complementarity principle appears to provide only a non-binding guideline for prosecutors and courts. The same holds true in Belgium, whose Preliminary Title of the Code of Criminal Procedure provides that the federal prosecutor may refuse to initiate proceedings if 'the specific circumstances of the case show that, in the interest of the proper administration of justice and in order to honour Belgium's international obligations, said case should be brought either before the

42 Singelnstein and Stolle, *supra* note 31, 121. 43 StPO, section 153 (f)(2) *in fine*.

44 StPO, section 153 (f)(2) ('Die Staatsanwaltschaft *kann insbesondere* von der Verfolgung einer Tat, die nach den §§6 bis 14 des Völkerstrafgesetzbuches strafbar ist, in den Fällen des §*153c* Abs. 1 Nr. 1 und 2 absehen . . .') (emphasis added).

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international courts, or before the court of the place in which the acts were committed, or before the court of the state of which the perpetrator is a national, or the court of the place in which he can be found, and to the extent that said court is independent, impartial, and fair, as may be determined from the international commitments binding on Belgium and that state'.[45] No application of this provision has so far been reported.

Other states have not laid down the principle of horizontal complementarity in their criminal codes. The absence of statutory codification of a horizontal complementarity principle does not mean, however, that the principle cannot impose limits on the exercise of universal jurisdiction. It surely can, if prosecutors and courts derive it directly from international law, comity or general principles underlying the legal system. A good example of this category of states is offered by Spain, whose prosecutors have initiated many investigations on the basis of the universality principle. As will be demonstrated, however, Spain does not seem to believe that international law *requires* the application of a binding horizontal complementarity principle to prosecute international crimes.

The principle of subsidiarity/horizontal complementarity in relation to international crimes has quite a history in Spain. Its application went largely unchallenged until 2003, when a conservative Spanish Supreme Court rejected it in its *Guatemala Genocide* judgment.[46] This was not because the principle *limited* Spain's exercise of jurisdiction to an unacceptable degree, but, on the contrary, because the principle unjustifiably *expanded* Spain's jurisdiction in that it allowed Spain – on the basis of an 'able and willing' test – to pass judgment on another state's judicial acts, thereby possibly impeding the political branches' conduct of foreign relations.[47] On closer inspection, these combined act of state and political question doctrines in fact militated not so much against horizontal complementarity, but rather against the very application of the universality principle, given the political sensitivity of many cases arising under that

45 See Art. 10, 1*bis*, and Art. 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure. English translation available in (2003) 42 *ILM*. 1258, 1267.

46 Spanish Supreme Court, Decision of the Supreme Court concerning the *Guatamala Genocide* care, Decision No. 327/2003, 25 February 2003, (2003) 42 *ILM*, 686.

47 The Court noted that basing this test 'on the real or apparent inactivity of local courts implies a judgment of one state's courts about the ability to administer justice of the similarly situated organs of another sovereign state (Section II[6]), while such an "unable or unwilling" inquiry might be appropriate for the International Criminal Court, national courts should not be making these kinds of judgments, which could have an important effect on foreign relations and should be left to the political branches'. Cf., N. Roht-Arriaza, 'Guatamela Genocide Case', (2006) 100 *AJIL* 208–9.

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principle. It should be realized in this context that complementarity only comes into play at the admissibility stage, *after* a court has upheld jurisdiction. This is indeed the regime in the Rome Statute, where the jurisdictional articles (5–16) logically precede those on admissibility (17–19). If a court does not have jurisdiction over a case, there is no need to conduct an admissibility analysis. Accordingly, in Spain, complementarity could only have an autonomous meaning provided that the universality of jurisdiction over international crimes was no longer contested.

The lawfulness of universal jurisdiction was eventually reaffirmed, however, in relation to the same *Guatemala Genocide* case, by a progressive Spanish Constitutional Court in 2005,[48] which consequently quashed the Supreme Court's judgment. Logically, the Court subsequently addressed the admissibility question, i.e. the question of whether a horizontal complementarity/subsidiarity principle, which was in fact also applied by the courts *after* the Supreme Court's 2003 judgment,[49] would impose hard and fast *legal* limits, under international law, on Spain's exercise of universal jurisdiction. This was in fact the first, and so far the only, time that a domestic court has inquired into the *international legal basis* of horizontal complementarity.[50]

It was not wholly surprising that the Constitutional Court ruled that international law did *not* oblige states to conduct a complementarity analysis along the lines of Article 17 of the Rome Statute. As noted above, international law does not seem to prioritize the grounds of jurisdiction;[51] there is no evidence that the universality principle is a subsidiary principle which can only be relied on if the exercise of jurisdiction based on 'stronger' principles, such as territoriality or nationality, proves to be ineffective. Horizontal complementarity/subsidiarity may exist as a principle, of course, but not one endowed with legal normativity. Instead, it may

48 Constitutional Tribunal (Second Chamber), *Guatamala Genocide* case, Judgment No. STC 237/2005, 26 September 2005, (2006) 100 *AJIL* 2010.

49 E.g. in the *Scilingo* case, decided by the Spanish High Court a few months before the Constitutional Court handed down its judgment in *Guatemala Genocide. Public Prosecutor's Office* v. *Scilingo Manzorro*, Final appeal, Judgment No. 16/2005, 19 April 2005, available in Oxford Reports on International Law in Domestic Courts, ILDC 136 (ES 2005), para. B.5 of the judgment.

50 Horizontal complementarity has been codified in a number of national codes of criminal procedure (e.g. section 153(f) of the German StPO and Article 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure). If domestic courts apply the complementarity principle, they do so in the first place as a matter of *national* law, rather than of *international* law.

51 Cf. *supra* Section 2.

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merely constitute a principle of politico-criminal policy. Prosecutors may thus invoke it to justify their unwillingness to commence proceedings in the face of evidence of proceedings occurring, or having occurred, in the territorial state or the state of nationality, *in the exercise of their prosecutorial discretion* (possibly guided by national prosecutorial guidelines), and not because international law contains a binding obligation to that effect.

It is reiterated here that the relevant German 'complementarity' provision (Section 153f of the StPO), discussed in the previous section, has no binding character either, as a matter of international law or as a matter of domestic law. While, admittedly, that provision has carved out an exception to the German principle of mandatory prosecution in cases of crimes against international law, it clearly does not *require* that German prosecutors forgo their exercise of jurisdiction. The article may urge them to dismiss a case if the criteria for the exercise of complementary jurisdiction by German authorities are not met. Yet in essence, German prosecutors remain entitled to exercise jurisdiction, even in spite of rather strong evidence that a state with a stronger nexus is able and willing genuinely to investigate and prosecute a case.

Hostility towards, or uneasiness with the principle of complementarity – at least as applied by the ICC – may also be gleaned from Spain's 2006 progress report on the implications for Council of Europe member states of the Ratification of the Rome Statute. In this report, Spain stated that:

> Article 7.3 of the Organic Act on Cooperation with the ICC expressly states that if the ICC Prosecutor does not initiate an investigation related to the facts that have been reported, *or the ICC determines the inadmissibility of the matter*, the report, complaint or request may be resubmitted to the competent Spanish authorities, which thus recover their full jurisdiction and competence.[52]

Accordingly, Spain does not consider itself to be bound by an inadmissibility finding of the ICC made on the basis of the vertical complementarity principle. In all likelihood, Spain is indeed not bound by the Rome Statute or ICC decisions on the basis of the Statute, as the ICC does not directly apply in the domestic legal order (see above). Yet it is telling that the Spanish authorities are not even willing to defer to ICC admissibility findings as a matter of *prosecutorial policy*: these authorities may thus

52 CE Doc. 4th Consult/ICC (2006), Strasbourg, 14 September 2006 (emphasis added), quoted in Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity* (2008), 192–3.

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second-guess authoritative ICC determinations (even though Spain is a party to the Rome Statute), and conduct either a horizontal complementarity analysis of a different order (possibly using a lower threshold of admissibility), or no complementarity analysis at all. As discussed above, the Spanish courts may of course apply some sort of horizontal complementarity analysis as a matter of non-binding *criminal policy*. But this analysis is very different from the one conducted by the ICC, which separates the legal requirements relating to admissibility/complementarity from the exercise of prosecutorial discretion.[53]

8 In support of domestic courts applying a horizontal complementarity principle

So far, six elements that have a bearing on the answer to the question whether there is, or should be, a principle of horizontal complementarity have been discussed. None of these elements yields a convincingly positive answer to the question. As set out in Section 3, the principle of sovereignty may fail to circumscribe the jurisdiction which states are entitled to: as soon as states can invoke a jurisdictional ground, no further limiting principles, such as a principle of horizontal complementarity, may apply under the classic international law of jurisdiction. Along similar lines, in Section 3, it was noted that there is no principle of transnational *ne bis in idem*. The absence of this principle allows bystander states to cast aside judgments pronounced by courts in other states, resulting in the conviction or acquittal of the accused, even if the latter states have genuinely investigated and prosecuted the crime. Then in Section 4 it was shown that one of the main systemic rationales of the complementarity principle is enhancing compliance through threat. Because the ICC can make good its threat to exercise jurisdiction and declare cases admissible by enlisting the support of the international community, the complementary nature of its jurisdiction may, at least in theory, guarantee the success of its mission. In contrast, states *ut singuli*, when exercising universal jurisdiction, cannot carry that big a stick, as enlisting international support to coax the territorial or national state into compliance will ordinarily prove much more difficult to garner. Moreover, as argued in Section 5, states may lack the wherewithal effectively to develop and implement a complementarity

53 Admissibility/complementarity is discussed in Articles 17–19 of the Rome Statute, whereas the 'interests of justice' criterion, which forms the basis for the Prosecutor's policy, is discussed in Article 53.

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strategy aimed at enhancing compliance with territorial or national states' duties to prosecute ('positive complementarity'). Section 6 turned its gaze to techniques for giving effect to international law in domestic courts, but also on that front, the argument does not particularly weigh in favour of horizontal complementarity. Indeed, there is no evidence that Article 17 of the Rome Statute was meant to have direct effect in domestic courts hearing international criminal cases. In its Section 7, eventually, it was shown that states exercising universal jurisdiction do not consider a horizontal complementarity principle to be binding on their prosecutors and courts.

All this presents a rather gloomy picture of horizontal complementarity under international law. However, none of the elements discussed allows us to reject horizontal complementarity outright. Indeed, there are indications that horizontal complementarity has its rightful place in the structure of international law and relations. After all, sovereignty, as discussed in Section 2, also has a *negative* connotation. When bystander states bring their laws to bear, they are not allowed to violate the principle of non-intervention. Precisely by casting aside investigations and prosecutions brought in other states, bystander states may encroach on the latter's legitimate interests, thus causing international friction and protest. Furthermore, while there may be no hard and fast principle of transnational *ne bis in idem* (Section 3), it remains no less true that some states respect the *res judicata* effect of foreign judgments in relation to international crimes.[54] And from a policy perspective, there is some evidence that the threat of prosecution by bystander states has contributed to the initiation of local prosecutions (see Section 4). As a related matter, it is not excluded that bystander states with some experience in prosecuting international crimes cases might beef up their investigative units so as to enable them to enter into dialogue with the territorial and national state, and to make a bystander forum only the ultimate complementary forum (see Section 5). After all, for a bystander state, it is cheaper and more efficient to have these crimes prosecuted in the home state. As far as the direct effect of the Rome Statute's provision on complementarity (Article 17) is concerned, while that provision should probably not be given direct effect in the domestic legal order, it has been observed that states are nevertheless willing to do just that (Section 6). This testifies to their willingness to carry out a horizontal complementarity analysis.

54 E.g. Canada, Crimes Against Humanity and War Crimes Act (c. 24), Art. 12.2; Spanish Organic Law on the Judicial Power Art. 23.2 (c) in conjunction with Art. 23.5.

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While states such as Spain and Germany may not consider a horizontal complementarity analysis to be binding (Section 7), they clearly do believe that such an analysis is desirable from the point of view of criminal policy. Horizontal complementarity guarantees that their courts do not become overburdened, and that only the cases that deserve to be prosecuted extraterritorially *are* prosecuted: these are the cases which the territorial or national state is unable or unwilling genuinely to investigate and prosecute, and in relation to which positive complementarity efforts (aimed at convincing initially reluctant territorial or national states to assume their responsibility) do not bear fruit. Horizontal complementarity also guarantees that the diplomatic fallout of the exercise of extraterritorial jurisdiction remains limited: territorial or national states that apparently shield the perpetrator from responsibility by carrying out sham or no proceedings at all against him or her are unlikely to engender much sympathy and support within the international community. Like complementarity at the ICC, horizontal complementarity may ensure that sovereignty is not used as a shield, while at the same time it ensures respect for and, even better, encourages good faith investigations and prosecutions by the territorial or national state.

Thus, there are strong normative arguments in favour of a principle of horizontal complementarity, although admittedly it may not yet have crystallized as a norm of customary international law given the dearth of pertinent state practice. However, stating that there is such a thing as horizontal complementarity is one thing, implementing it correctly is quite another. A warning may have to be provided here as to an overly policy-based horizontal complementarity analysis. Lacking principled guidance, such an analysis may easily be contorted for political purposes. And because prosecutors are not under a *legal* duty to carry out a complementarity analysis, assuming that there are no administrative guidelines on horizontal complementarity which are binding on them either, they may even believe that they can do wholly *without* a complementarity analysis, or at least carry out a very superficial self-serving analysis without genuinely inquiring into whether the territorial or national state has conducted any relevant proceedings.

9 Lessons from recent Spanish practice

An example of the glaring lack of attention for prosecutorial efforts in the accused's home state was recently offered by the Spanish indictment of a

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number of high-ranking Rwandan officials in 2008.[55] In this indictment, investigative Judge Merelles of the Spanish Audiencia Nacional remained conspicuously silent on Rwanda's efforts to bring the named suspects to justice.[56] Possibly, he was of the opinion that, because the indictment targeted persons linked to the sitting Rwandan Government, it was not to be expected that the Rwandan authorities would seriously investigate the crimes allegedly committed by the suspects. This may be true, but it would have been more honest if the judge had explicitly shed some light on this issue. If he had taken complementarity seriously and had looked at Rwandan practice, he could have come across the case of Wilson Gumisiriza – who was named in the Spanish indictment – in Rwanda itself. He could have noticed that proceedings were to be initiated against Gumisiriza in Rwanda at the time of the indictment.[57] If he had waited somewhat, he could have noticed that, while Gumisiriza was acquitted by the Military Court of Kigali on 24 October 2008,[58] the prosecution appealed .[59] What is clear is that the Rwandan justice system seemed to be working. Regrettably, the Spanish judge passed this over, and drew up the indictment, at least against Gumisiriza, without awaiting the outcome of the Rwandan proceedings (which did not seem to shield the perpetrator from responsibility, at least not at the time of writing this contribution).

A similar lack of attention for local investigations is demonstrated by the Audiencia Nacional's court order of 29 January 2009, which granted leave to proceed in the action brought by the representatives of a number of Palestinian civilians killed as a consequence of the targeted bombing of the house of Salah Shehadeh, an alleged Hamas commander, by the Israeli Defence Forces ('IDF') in Gaza in 2002.[60] As far as complementarity is concerned, Judge Andreu limited himself to noting, almost in passing,

55 Juzgado Central de instruccion No. 4, Audiencia Nacional, Sumario 3/2.008 – D. Auto.

56 See also X., 'The Spanish Indictment of High-ranking Rwandan Officials', (2008) 6 *JICJ* 1003, 1008–9.

57 Arrests were made on 11 June 2008 following joint investigations between Rwanda's prosecution authorities and the Office of the Prosecutor General of the ICTR. See 'Rwanda: Four RDF Officers Arrested', 11 June 2008, http://allafrica.com/stories/200806120012.html.

58 Hirondelle News Agency Arusha, 'Rwanda/Church – Rwandan Military Court Acquits Two Officers and Sentences Two Others', 24 October 2008, www.hirondellenews.com/content/view/2540/26/.

59 Hirondelle News Agency Arusha, 'Rwanda/Bishops – Rwandan Military Court to Rule over Appeals on February 25th', 29 January 2009, www.hirondellenews.com/content/view/2878/26/.

60 Central Magistrates' Court No. 4, Audiencia Nacional, Madrid, Preliminary Report no. 157/2.008-G.A., 29 January 2009, unofficial translation by FIDH, www.fidh.org/IMG/pdf/admission_order_propery_translated-1.pdf ('*Audiencia Nacional's* Order'). See also, for a

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that 'there is no evidence that any proceedings have been brought to investigate the facts'.[61] This assessment is inaccurate. In fact, the IDF and the Israeli Security Agency had launched an inquiry immediately after the death of Shehadeh. This inquiry showed 'that the procedures followed in the IDF operation were correct and professional', and that, while it 'found shortcomings in the information available, and the evaluation of that information, concerning the presence of innocent civilians near Shehadeh's vicinity, the timing or the method of the action would have been changed, as was done a number of times in the past'.[62] Although it is true that no criminal prosecutions were subsequently brought,[63] it is no less true that a number of rulings by Israeli courts, including the Israeli Supreme Court – courts that are known for their independence – were made in relation to the *Shehadeh* case.[64] It is almost superfluous to note that a dismissal of the case does not in itself evidence unwillingness on the part of Israel genuinely to investigate and prosecute. More generally,

discussion of the *Shehadeh* case, S. Weill, 'The Targeted Killing of Salah Shehadeh. From Gaza to Madrid', (2009) 7 *JICJ* 617.

61 Audiencia Nacional's Order, *supra* note 60, at para. 3.

62 Israeli Ministry of Foreign Affairs, 'Findings of the inquiry into the death of Salah Shehadeh', 2 August 2002, www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry %20into%20the%20death%20of%20Salah%20Sh.

63 In 2006, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions called on Israel to explain whether the findings of the inquiry were followed by any disciplinary or criminal proceedings, and, if not, the reasons given as to why not (UN Doc. E/CN.4/2006/53/Add.1, (2006)), but apparently the request went unanswered.

64 According to the Israeli daily *Haaretz*, immediately upon the judge's order being made public, the Israeli Ministry of Justice sent the Israeli Embassy in Madrid a large amount of documents which included legal rulings and Supreme Court decisions dealing with the targeted killing of Shehadeh. The Embassy would submit those documents to Judge Andreu. *Haaretz*, 'Spanish FM: We'll act to prevent war crimes probes against Israel', 3 February 2009, www.haaretz.com/hasen/spages/1059964.html. The Israeli case is known as *Hess and ors* v. *Military Advocate General and ors*, HCJ 8794/03. The petitioners before the Israeli Supreme Court demanded that the Attorney General initiate criminal proceedings against the commanders involved in the bombing of Shehadeh, and that the government establish a more independent and more competent investigation committee than the one in fact appointed. On 23 December 2008, the Israeli Supreme Court denied the petition on administrative law and not on international law grounds. It held that the decisions taken by the respondents were not so unreasonable as to justify judicial intervention, and that such intervention would only possibly be appropriate after an independent examination committee concluded its investigation. Thanks to Elad Peled for pointing this out to me. See also I. Rosenzweig and Y. Shany, 'Universal Jurisdiction: Spanish Court Initiates an Inquiry of the Target Killing of Salah Shehadeh', www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/3d%20Newsletter/1/SpanishCourtInquirySalahShehadeh.aspx.

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reference should also be made to the Israeli Supreme Court's momentous 'targeted killings' decision of 14 December 2006. In this decision, the Court, drawing widely on recognized sources of international humanitarian law, held that the death of civilian bystanders as a consequence of a targeted killing is not necessarily in violation of international law: only to the extent that the collateral damage is disproportionate to the military advantage sought would this be the case.[65] This decision, taken by a presiding judge who is well-known for his liberal, human rights-friendly views,[66] was generally praised in the international law literature for its moderate nature.[67] When after a thorough analysis based on the facts of the case, Israeli legal experts conclude that there has been no violation of the law, prosecutions should arguably not be brought. Rather than an unwillingness to bring a case, there is simply no case to answer in this situation. As a result thereof, complementarity jurisdiction does not come into play at all.[68]

The perception of the judge's insensitivity towards Israel's situation in the *Shehadeh* case is augmented by his holding that the facts 'must be considered as a Crime against Humanity, and concerning which the international commitments subscribed by Spain impose prosecution', and that they constitute 'an attack against civilian population, already illegitimate from the start'[69] – as if there is no act involved of carefully weighing the protection of the lives of innocent civilians against the military advantage anticipated. The judge's failure to heed, or even discuss, Israel's arguments as to the unlawful character of the targeted

65 *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment* v. *Israel and others*, Original petition to the High Court of Justice, HCJ 769/02, Oxford Reports on International Law in Domestic Courts, ILDC 597 (IL 2006), paras. 40–6.

66 See E. Peled, annotation ILDC 597 (IL 2006), *supra* note 64, A8 ('The fact that President Barak, whose deep commitment to preserving human rights has been evident, decided to uphold the targeted killings policy, albeit on strict conditions, could be read to signify the uniqueness of the phenomenon of terror, at least from an Israeli perspective, and the acute necessity of confronting it seriously').

67 E.g. A. Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings', (2007) 7 *JICJ* 339; A. Cohen and Y. Shany, 'A Development of Modest Proportions. The Application of the Principle of Proportionality in the *Targeted Killings* Case', (2007) 7 *JICJ* 310.

68 Compare Rosenzweig and Shany, *supra* note 64 (submitting that 'it is unclear whether Spain is particularly well-suited to address [the criminality of the targeted killing of Shehadeh] especially given the fact that proceedings in Israel are still pending (although, admittedly, at a very slow pace)').

69 Audiencia Nacional's Order, *supra* note 60, para. 3 (translation by the International Federation for Human Rights ('FIDH')).

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killings – arguments that are not extreme, but are crafted on the basis of recognized principles of international law – is highly regrettable; if the judge had taken complementarity seriously, he would have adduced evidence of genuine unwillingness to investigate on the part of Israel. Since, moreover, a bystander state's judge has less expertise and legitimacy than the ICC, a high level of deference under the complementarity principle is required.[70] A high level of deference is all the more warranted in relation to a conflict party's proportionality determinations made in the heat of battle. For such a judge, it is a tall order indeed to second-guess matters that essentially pertain to national military tactics. Only when disproportionality between means and ends is blatant should a domestic judge initiate investigations on the basis of the complementarity principle.[71] It is open to serious doubt whether such blatant disproportionality was present in the *Shehadeh* case.

After a challenge by the public prosecutor, Judge Andreu upheld his decision to open an investigation on 4 May 2009.[72] This time round he did pay attention to proceedings brought in Israel, but considered them to be insufficient so as to warrant deference on the part of Spanish judicial authorities. Amongst others, he pointed out that the targeted killing of Shehadeh took place in the Occupied Palestinian Territories, and not in Israeli territory. Therefore, in the Judge's view, the complementarity principle would not come into play at all, and Spain would have *primary* jurisdiction over the killing.[73] In any event, although the judge believed that a complementarity analysis was not required,[74] he did perform one, but noted, rather predictably, that the Israeli authorities who had

70 Cf. Ryngaert, *supra* note 2, at 177.

71 See also Rosenzweig and Shany, *supra* note 64 (stating, in relation to the *Shehadeh* case that 'an unprincipled employment of universal jurisdiction by foreign judges with a limited appreciation of the unique dilemmas posed by terrorism and counter-terrorism could produce a 'chilling effect' that could further complicate the fight against terrorism', and that 'it is questionable that the exercise of universal jurisdiction can be appropriately exercised in the case of the Shehadeh targeted killing operation, which involves difficult issues of law, fact and procedure').

72 Juzgado Central de Instrucción No Cuatro, Audiencia Nacional Madrid, No. 157/2.008, 4 May 2009.

73 *Ibid.*, second legal argument, 2. It is noted, however, that at least under ICC law the complementarity principle also requires deference to the primary jurisdiction of the state of which the perpetrator is a national. Apart from that, it is arguable that Israel still exercises effective territorial control over the Occupied Palestinian Territories, so that primacy of Israeli jurisdiction on the basis of territoriality is appropriate.

74 See also *ibid.*, fifth legal argument, 13 (stating that the Geneva Conventions do not establish a regime of subsidiary universal jurisdiction).

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conducted investigations were not independent, that its decisions did not motivate or justify the inaction on the Israeli side and that, in fact, since 2002 Israeli authorities had not initiated proceedings inquiring into the criminal responsibility for the targeted killing.[75] This, in turn, arguably allowed Spanish authorities to establish jurisdiction. Another oddity of the decision is the judge's observation that the (purported) absence of an Israeli investigation necessarily led to a finding of there being no concurrent jurisdiction (by Spain and Israel) and thus no jurisdictional conflict,[76] as if Israel would not take issue with Spain's jurisdictional assertions.[77] Eventually, after another challenge by the public prosecutor, a Spanish appeals court closed Judge Andreu's investigation.

Complementarity was also given short shrift in a later decision of 29 April 2009 by the renowned Investigating Judge Baltasar Garzon (who had also initiated the investigation into Augusto Pinochet's alleged crimes) with respect to the acts of torture allegedly committed at the US detainee camp at Guantanamo Bay.[78] In this decision, the Judge completely dispensed with a complementarity analysis, and merely limited himself to stating: '. . . we find ourselves confronted with a situation of Universal Criminal Jurisdiction'.[79] At the time, it was well-known however that the Obama administration was undertaking efforts to come clean about the previous administration's torture memos and practices, and to reconsider the detainees' limited rights.

It is hardly surprising then that, in the immediate aftermath of Judge Andreu's *Shehadeh* order, Israel reacted furiously, and even called on Spain to amend its universality legislation in order to forestall abuse. The United States for its part appeared to be working actively behind

75 *Ibid.*, sixth legal argument, 13–14. 76 *Ibid.*, sixth legal argument, 14.

77 This 'vacuum' theory has also been used in order to justify assertions of extraterritorial jurisdiction in the field of antitrust law, notably in the United States. This theory fails to understand, however, that inaction on the part of a state may also amount to a conscious exercise of jurisdiction. It may lead to normative competency conflicts when another state actively exercises jurisdiction.

78 Central Court for Preliminary Criminal Proceedings, Number Five, National Court Madrid, Preliminary Investigations 150/09-N, 29 April 2009, unofficial English translation by the Center for Constitutional Rights.

79 *Ibid.*, 10. The Judge cited an opinion of a judge at the Spanish Supreme Court who found in 2006 with respect to Guantanamo that 'the detention of hundreds of people, among them the appealing party, without charges, without guarantees and therefore without control and without limits, at the Guantanamo base maintained by the United States military constitutes a situation that is impossible to explain, much less justify, from the legal and political reality in which it is found embedded'. *Ibid.*, 9.

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the scenes to persuade Spain to limit universal jurisdiction.[80] Spain's political authorities quickly caved in to foreign concerns: the day after Judge Andreu issued his order, Spain's Foreign Minister informed his Israeli counterpart that Spain would indeed amend its liberal universality legislation.[81]

Eventually, Spain did not shed the universality principle altogether, but conditioned its application to situations of the presumed offender being found in Spain (i.e. presence-based or secondary universality, as required by many other states providing for universal jurisdiction), or of the victims having Spanish nationality (i.e. the passive personality principle), or situations having a relevant connection with Spain.[82] Important for our purposes, the amendment in addition calls for the application of a complementarity analysis, along the lines of German statutory law. Under the new law, jurisdiction does not lie if another state, or an international tribunal, has initiated an investigation or an effective prosecution.[83] The law also clarifies that Spanish proceedings are suspended if another state or tribunal has commenced proceedings.[84]

80 Political commentators were more open, however. See, e.g. A. C. McCarthy, 'Spain's "Universal Jurisdiction" Power Play', *The National Review*, 31 March 2009 ('Were [Spain's manoeuvering] not camouflaged as legal process, it would properly be regarded as a hostile act: an explicit threat of capturing . . . American officials for performing their official duties in defense of the United States').

81 *Haaretz*, *supra* note 64. See also El Pais, 'Moratinos promete cambiar la ley para frenar al juez, según la ministra israelí', 31 January 2009, www.elpais.com/articulo/espana/Moratinos/promete/cambiar/ley/frenar/juez/ministra/israeli/elpepunac/20090131elpepinac_13/Tes.

82 Boletín Oficial del Estado, Núm. 266, 4 November 2009, Sec. I, p. 92089, 92091, Art. 1. See also Enmienda núm. 676, 121/000017 Proyecto de Ley de reforma de la legislación procesal para la implantación de la Nueva Oficina Judicial, new Art. 23(4) and (5) of the Ley Orgánica 6/1985, de 1 de julio 2009, del Poder Judicial, www.derechos.org/nizkor/espana/doc/oficinajud.html ('Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentran en España o que existen víctimas de nacionalidad española o constatarse algún vínculo de conexión relevante con España . . .').

83 *Ibid.*, amendment of Art. 23.4, para. 2, *in fine* ('. . . para que puedan conocer los tribunales españoles de los anteriores delitos deberá quedar acreditado . . . en todo caso, que en otro país competente o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles').

84 *Ibid.*, amendment of Art. 23.4, para. 3 ('El proceso penal iniciado ante la jurisdicción española se sobreseerá provisionalmente cuando quede constancia del comienzo de otro proceso sobre los hechos denunciados en el país o por el Tribunal a los que se refiere el párrafo anterior').

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The Spanish *Shehadeh* case presents a cautionary tale for our purposes of horizontal complementarity. The boomerang constituted by the absence of a serious complementarity analysis and the resultant jurisdictional over-reaching inevitably returned to the thrower, i.e. the Spanish authorities which condoned the practice of going after any alleged international criminal without paying heed to investigations in the presumed offender's home state. It can now only be hoped that Spain will not become the new Belgium, and that only the bathwater is thrown out, not the baby: it is the failure to conduct a horizontal complementarity analysis that ought to be remedied, not the universality principle itself.[85]

10 Concluding observations

Reflecting on the Spanish universality decisions, one can understand that universal jurisdiction is presented as a European imperialist construct in other corners of the world.[86] For the legitimacy and viability of universal jurisdiction, it is crucial that the territorial or national state are accorded the first right of way to prosecute, and that due respect is shown for ongoing local prosecutorial efforts. So-called 'liberal' states such as Spain, or France, where a principle of complementarity or subsidiarity has never been applied in relation to criminal proceedings under the universality principle (amongst others against Rwandan officials), are therefore well advised to examine prosecutorial activity in the suspects' home state more

85 It is recalled that Belgium repealed its universality legislation in August 2003 after intense pressure by the United States. See L. Reydams, 'Belgium Reneges on Universality: the 5 August 2003 Act on Grave Breaches of International Humanitarian Law', (2003) 1 *JICJ* 679. Under the new legislation, the prosecution of violations of international humanitarian law is subject to a nationality requirement (Preliminary Title of the Code of Criminal Procedure Art. 6, 1*bis*, and 10, 1*bis*), and the prosecution of international crimes under the universality principle is only possible if international law *obliges* Belgium to prosecute (Art. 12*bis* of the same title). Mere international authorization to prosecute does not suffice. The new regime is set out at length (in Dutch) in: J. Wouters and C. Ryngaert, 'De toepassing van de (Belgische) wet van 5 augustus 2003 betreffende ernstige schendingen van het internationaal humanitair recht', special issue *Nullum Crimen*, April 2007, 21 pp. See also (again in Dutch): C. Ryngaert, 'De toepassing van het beginsel aut dedere aut judicare in de Belgische rechtsorde', (2008) *Tijdschrift voor Strafrecht* 346.

86 See, e.g. Assembly of the African Union, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Ex. CL/411 (XIII), 1 July 2008, stating: '1) The abuse of the Principle of Universal Jurisdiction is a development that could endanger International Law, order and security; 2) The political nature and abuse of the principle of Universal Jurisdiction by judges from some non-African States against African leaders, particularly Rwanda is a clear violation of their sovereignty and territorial integrity . . .'

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seriously. As far as Rwanda is concerned, the Rwandan authorities ought to be given at least an opportunity to conduct their own proceedings. This is not so much out of respect for the principles of non-intervention and state sovereignty, but because evidence-gathering, effective history-telling, societal reconciliation and rule of law entrenchment best take place where the crimes have been committed.[87] Or as Gloria Anyango has noted in respect of French prosecutions of a number of Rwandan officials:

> Rwanda is yearning to close the dark chapter in her history. This can only be possible if the world sincerely holds on to its vow, 'Never Again', by providing us a dignified opportunity to deal with the justice and accountability matters, to do with those responsible for the genocide – in this regard France's pompous role must be tamed.[88]

Accordingly, the home state's first right of way to prosecute cases of mass atrocities does not as a matter of course mean that the home state has the final say as to an eventual prosecution. Complementarity means that another jurisdiction may step in when the primary jurisdiction fails to assume its responsibility. If, for instance, sufficient evidence is adduced as to the lack of good faith prosecutorial efforts by Rwanda, other states (or the ICC for that matter) could step in and commence a prosecution, thereby exercising their responsibility to protect victims on behalf of the international community. They should not wait for home state authorities to have tried or pardoned the accused in suspect circumstances;[89] bad faith

87 See also Ryngaert, *supra* note 26.

88 G. I. Anyango, 'Rwanda: France, Country's Genocide and the Principle of Universal Jurisdiction', 14 July 2008, http://allafrica.com/stories/200807150261.html. See also Rwandan President Kagame's speech at the UN General Assembly, lambasting the abuse of universal jurisdiction by Western countries, cited above in X, *supra* note 56, 1009.

89 As noted, *supra* note 20, some states (e.g. Canada) have codified this dimension of the complementarity principle (the exception to the *res judicata* principle), which is codified in Article 20 of the Rome Statute. In a similar vein, drawing on Rome Statute, Art. 20, the Inter-American Court of Human Rights creatively applied the complementarity principle horizontally in an intra-state context (as opposed to the vertical context in which the ICC operates, and the interstate context in which bystander states exercising universal jurisdiction operate) in order to clarify the scope of the *ne bis in idem* principle in the *Almonacid-Arellano* case. In relation to the closing of an investigation into a murder, the Court believed 'that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the

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can transpire rather early on if the authorities seem to have dismissed the case (although not on the basis of a court order), or are unjustifiably dragging their heels and seemingly shielding the suspect. But as long as a lack of commitment is not apparent, deference on the part of bystander states, in accordance with the principle of horizontal complementarity, appears to be a wise policy.

protection of the *ne bis in idem* principle' (Inter-American Court of Human Rights, *Almonacid-Arellano et al.* v. *Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 26 September 2006, Series C No. 154, para. 154, citing the Rome Statute in footnote 162).