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Horizontal Complementarity

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A. Disclaimer

1 This contribution is partially based on CMJ Ryngaert 'Horizontal Complementarity' in C Stahn and MM El-Zeidy (eds), *The International Criminal Court and Complementarity — From Theory to Practice* (CUP Cambridge 2011) 855–87.

B. Introduction

2 The principle of → *universal jurisdiction* confers on bystander states, ie states that do not have a strong territorial, personal, or security connection with a crime situation, the authority to prosecute a limited number of international crimes, such as → *war crimes*, → *crimes against humanity*, and → *genocide*, on the basis of treaty (→ *Treaties*) and → *customary international law* (Reydams, 2003).

3 The introduction of the → *universality* principle with respect to these crimes is aimed at reducing impunity, as it broadens the circle of states with authority to prosecute. At the same time, however, the principle may give rise to international tension when multiple states claim jurisdiction over the same case or situation. This tension is particularly likely to arise in relations between a bystander state and a more closely connected state, in particular 'the territorial state' where the crime occurred, or 'the national state' whose national allegedly committed the crime. To mitigate such inter-state conflict, while not sacrificing the anti-impunity rationale of universal jurisdiction, the procedural mechanism of 'horizontal complementarity' has been introduced.

4 Pursuant to horizontal complementarity, a bystander state's jurisdiction would be complementary to the jurisdiction of a more closely connected state. This means that the latter enjoys first jurisdictional right of way, unless it proves unable or unwilling to genuinely investigate or prosecute a case. In this sense, its operation mirrors that of the vertical complementarity principle codified in Article 17 Rome Statute of the International Criminal Court ('Rome Statute' or 'Statute'), which applies in the relation between a supranational institution—the → *International Criminal Court (ICC)* ('Court')—and sovereign states.

5 This entry lists elements suggesting and questioning the existence of a concept of horizontal complementarity in → *international criminal law*. It explains that horizontal complementarity is not currently mandated by customary international law. However, it is argued that it is justifiable on criminal policy grounds, and that, accordingly, prosecutors investigating international crimes are advised to defer to good faith investigative and prosecutorial efforts by more closely connected states.

C. The Vertical Complementarity Principle of the ICC

6 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: a case is only admissible before the ICC if the state proves unable or unwilling genuinely to investigate and prosecute a case (Art 17 Rome Statute).

7 In this respect the ICC system differs considerably from the *ad hoc* tribunals, which have primacy of jurisdiction *vis-à-vis* national courts (Art 9 (2) Statute of the International Criminal Tribunal for the former Yugoslavia ['ICTY Statute']); Art 8 (2) Statute of the International Criminal Tribunal for Rwanda ['ICTR Statute']).

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8 Under the complementarity principle, the ICC defers to good faith efforts by closely connected states. At the same time, if states act in bad faith, the ICC will assume its responsibility so as to prevent impunity. Carsten Stahn has observed in this respect that '[c]omplementarity enhances compliance through threat' (Stahn, 2008, 97–98). If a situation runs the risk of 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.

9 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 qualified staff—it is assumed 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 Article 86 Rome Statute, or for states which are not parties, on the basis of a United Nations 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 (on bargaining power and ICC arrests, see Ryngaert, 2012, 673). In the real world, of course, political support for the ICC may not always materialize.

10 Rather early in the life of the ICC, the ICC Office of the Prosecutor and the literature emphasized the *positive* rather than the negative dimension of complementarity (→ *Positive complementarity*; ICC-OTP, 2003, 4; Burke-White, 2008, 61). Pursuant to positive complementarity, the ICC and the state *cooperate* in bringing international criminals to justice, and the ICC encourages domestic prosecution in a proactive and positive manner. Also, the Court and the state may decide to divide tasks. Positive complementarity will obviously 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.

11 In a number of cases, the ICC has clarified the operation of the complementarity principle (see in particular *Prosecutor v Kony*, 2009; *Prosecutor v Katanga and Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 2009; *Prosecutor v Katanga and Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 2009). There is a large body of scholarly literature on the ICC complementarity principle, a discussion of which falls outside the scope of this entry (see eg Stahn and El Zeidy, 2011).

D. Sovereignty and Cooperation

12 Pursuant to horizontal complementarity, the jurisdiction of a bystander state is only complementary to the jurisdiction of the territorial or national state. This may be problematic on grounds of state sovereignty. The classic international law of jurisdiction is perceived as leaving a wide measure of jurisdictional discretion to states (*SS 'Lotus'*, 1927, 18–19 ['*Lotus*']; → *Lotus, The*). 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. Accordingly, a bystander state exercising universal 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 national state. In classic international

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law, the jurisdiction of a bystander state is concurrent with, and not complementary to, the jurisdiction of a territorial or national state. 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 should not be presumed (*Lotus*, 18–19; → *Jurisdiction of States*).

13 This liberal view of jurisdiction has its downsides, however. Allowing multiple states to exercise jurisdiction on the basis of the same or different principles of jurisdiction may be a recipe for international conflict. This explains why some treaty regimes have provided for a jurisdictional coordination mechanism (see, Ambos, 2016, vol 3, 233). For instance, Article 42 (5) United Nations Convention against Corruption provides that

> [i]f a State Party exercising its jurisdiction … has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

This provision admits of factoring in horizontal complementarity: the Legislative Guide to Implementation of the United Nations Convention against Corruption provides that cooperation may result in one State Party deferring to the investigation or prosecution of another, or in an agreement to pursue certain actors or offences, leaving the other actors or related conduct to the other interested States Parties (2006, para 512). Within the European Union (‘EU’), Council of the European Union Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings applies, which is based on the principle of cooperation between states and requires the establishment of contact between the different states making a jurisdictional claim and an ultimate decision on who can continue proceedings, depending on criteria such as the nationality of the offender, the place of commission of the crime, and the interests of the victim. If the different Member States fail to reach consensus, the case will be referred to Eurojust, which will provide a written, nonbinding opinion in order to resolve the issue. It is apparent that this Framework Decision acknowledges the principled concurrent jurisdiction of multiple Member States, while at the same time creating a mechanism to solve jurisdictional conflicts and to designate the state with primary jurisdiction.

14 Also in the absence of specific treaty regimes on coordination, when a conflict of jurisdiction nevertheless arises, the states concerned may want to jointly consider which state is most suitable to pursue the prosecution for the proper administration of justice. In light of the principle of sovereignty, states are not *required* to enter into cooperation, however. Sometimes, states themselves explicitly express a preference for investigation and prosecution by the state where the crime took place (see eg Amendment to the Penal Code in connection with the revision of the rules on the operation of the criminal law outside the Netherlands (revision of rules concerning extraterritorial jurisdiction in criminal cases), 2013).

E. The Absence of a Transnational *ne bis in idem* Principle

15 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. Pursuant to the principle of *ne bis in idem*—also known as the prohibition of double jeopardy—as applied in a domestic context, courts are not allowed to prosecute a defendant once more when he or she has already been convicted or acquitted. This principle is codified in international and regional human rights instruments, including Article 14 (7) → *International Covenant on Civil and Political Rights (1966)* and Article 4, Protocol No 7 to the → *European Convention for the Protection of Human Rights and Fundamental Freedoms*

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(1950). However, the principle is not applicable at the transnational level, such as in the initiation of proceedings by a 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.

16 The non-applicability of a transnational version of *ne bis in idem* undermines the claim that horizontal complementarity is a legal principle. 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 primary and original.

17 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 national state. In 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 or she has possibly served his or her sentence—in another state. 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 national state was the result of a real ability and willingness to bring a person to justice, a bystander state can still 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 and 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 retry a presumed offender, irrespective of the result of any prior proceedings in another state.

F. Different Ways in which Complementary Domestic Jurisdiction Influences the Policies and Practices of Other States

18 From an international-systemic perspective, the concurrent, complementary jurisdiction of bystander states may be conceived of as an instrument to not just provide accountability in an individual case, but also more fundamentally to entrench the rule of law, and further anti-impunity policies and practices in more closely connected states. In this regard, when bystander states exercise complementary universal jurisdiction, they may engage in a form of 'contingent unilateralism' (on this term in a climate change context, see Scott and Rajamani, 2012): they exercise jurisdiction in individual atrocity cases so as to exert pressure on a more closely connected state to take up those particular cases, but may also be intent on bringing about larger changes in the way in which such a state generally deals with atrocity cases. Discrete assertions of complementarity jurisdiction could thus have ramifications for a larger class of cases.

19 The question obviously arises whether the exercise of complementary jurisdiction is likely to influence the—criminal—policies and practices of states. If complementarity enhances observance through threat (see sec C above regarding the ICC), one wonders whether this also applies to *horizontal* complementarity. If the national threat of prosecution by bystander states does not act as a deterrent, or as a mechanism to spur closely connected states into action, doubts may be cast over the systemic *raison d'être* of horizontal complementarity. There are indeed reasons to doubt the effect of horizontal complementarity on the policies and practices of closely connected states. Irrespective of the strength of their case, bystander states may not be able to harness the level of power and international support that the ICC can count on (on the role of power of international law, see Steinberg and Zasloff, 2006; Schachter, 1999; on international law compliance, in

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particular the role of power-based retaliation, see Guzman, 2008, 25–69). The territorial state itself may dispose of sufficient bilateral bargaining power to resist pressure from bystander states to arrest and prosecute fugitives from justice. As a result, the complementarity principle may be considered not to serve its purpose of inducing compliance with states' duty to prosecute international crimes.

20 That said, it should not be overlooked that the mere initiation of an investigation, apart from 'immobilising' 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' (Roht-Arriaza, 2005). It is a term that is derived from the increased willingness of Chilean investigators to dig up the crimes committed in 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 (Jouet, 2007, 535). The Pinochet effect shows that bystander states' prosecutions can enhance compliance through a combination of a wake-up call and embarrassment.

21 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 or her arrest issued, in his or her absence (→ *In absentia proceedings*; Rabinovitch, 2004). After all, if the individual is present in the bystander state's territory, a warrant for his or her 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 their territory (eg Art 2 (1) (a) Dutch International Crimes Act, 2003). 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 a bystander state seeking their 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 not the deterrence that complementarity is hoped and supposed to deliver.

22 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 produce lasting change in the territorial state as far as the implementation of the rule of law is concerned. On the contrary, universal jurisdiction may even undermine local justice, reconciliation, and political transition processes (see Moodrick-Even Khen, 2015, 268–69). It should also be realized in this respect that the typical individual who enters the territory of a bystander state of his or her own volition is an individual who no longer feels safe in his or her home state. Individuals against whom prosecution has successfully been brought are often refugees or asylum seekers who are later unmasked as international criminals (Langer, 2011, 17). These individuals have already been sidelined in their home state, eg 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 a bystander state—it can also do so by acquiescence, ie by not protesting

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against the exercise of jurisdiction—which means this situation lacks the threat-based compliance enhancement mechanism that may accompany the complementarity principle.

23 So far, there has been no evidence that bystander states systemically implement ‘positive’ complementarity, ie, cooperate with closely connected states to encourage the latter to start proceedings. Admittedly, there are some instances of territorial states cooperating rather well with bystander states that, under the universality principle, have brought the prosecution. In prosecuting Rwandan *génocidaires*, for instance, bystander states, such as Belgium, have greatly benefited from the assistance of Rwanda (Vandermeersch, 2005, 412–13). However, states do not normally approach positive complementarity *in a systematic fashion*. 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, but it is quite another to actively encourage the territorial state to initiate prosecutions. While a Pinochet effect may sometimes be discernible, 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. This should give us pause when reflecting on the long-terms goals and effects of horizontal complementarity.

24 Ultimately, however, bystander states should not be chided for not developing such a vision. 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 sizeable 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 it (Ryngaert, 2009, 153–64). 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 domestic prosecutors intervene.

25 The intervention will typically limit itself to either the prosecution or the extradition of the presumed offender— → *aut dedere aut iudicare*. When opting for extradition, the prosecutor will normally not undertake efforts to facilitate the trial of an 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. It is observed in this respect that recent literature on horizontal complementarity, building on the ICC’s admissibility decision in the case against Saif Gaddafi (*Prosecutor v Gaddafi*, 2013, paras 209–15), has incorporated considerations regarding due process and the independence of the judiciary into the ‘inability’ prong of the horizontal complementarity analysis (Moodrick-Even Khen, 2015, 284–85; Burens, 2016, 90–91). Thus, a bystander state could arguably exercise complementary universal jurisdiction not only when the home state proves unwilling to prosecute, or when its judicial apparatus has collapsed, but also when the latter insufficiently protects the due process rights of an individual over whom the former has custody. In this incarnation, horizontal complementarity serves the purpose of protecting the rights of presumed offenders rather than that of vindicating the victims’ interests to see justice done. Repeated refusals to extradite presumed offenders to their home state, coupled with the subsequent exercise of bystander state jurisdiction, could eventually have a salutary effect on the rule of law quality of the proceedings of the home state, as the impact of initially court-blocked

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attempts at extradition, as well as of ICTR transfer, to Rwanda have demonstrated (*Uwinkindi v Prosecutor*, 2011; *Ahorugeze v Sweden*, 2011).

G. Giving Effect to International Law in Domestic Courts

26 In some jurisdictions, notably in those with a strong monist tradition of giving effect to international law, courts may possibly want to directly apply the provisions of the ICC Rome Statute if domestic legislation implementing the Rome Statute is not satisfactory and leaves impunity gaps (see for instance *Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib/Irak ('Abu Ghraib decision')*, 2005). 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 national level, the ICC's vertical complementarity regime would be automatically transformed into a horizontal complementarity regime that is based on the same procedural and substantive criteria.

27 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 (→ *Treaties, Direct Applicability*; Vazquez, 1995). The Rome Statute is largely non-self-executing and does not lend itself to direct application by domestic courts, with the exception of a number of provisions directly naming duties of state authorities, eg regarding arrest (Art 59 Rome Statute, imposing a number of duties on the competent judicial authorities of the custodial state). There is no evidence that the drafters ever intended the Statute to be self-executing at the domestic level. 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 ICC 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. 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, which may not readily have an equivalent at the national level. In addition, it reserves a prominent procedural position for a state challenging the jurisdiction of the Court (Art 19 (2) (b) Rome Statute); 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.

28 More generally, this reveals how 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 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 customary international law, or *de lege ferenda* on the basis of policy arguments.

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H. Customary International Law: Ascertaining State Practice with respect to Horizontal Complementarity

29 In their separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans, and Buergenthal stated 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' (*Arrest Warrant of 11 April 2000*, Judgment (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), 2002, para 59). Also, the → *Institut de Droit International* ('IDI') stated in a resolution adopted at the 2005 Krakow session, in somewhat less legal-obligatory terms:

> [a]ny State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so' (Art 3 (c) IDI Resolution, 2005).

These statements invite an analysis of whether application of horizontal complementarity is mandated by international law, in particular customary international law. To establish a relevant customary norm, evidence must be adduced that the concept of horizontal complementarity borrows its normative validity from the fulfilment of the requirements of general state practice and *opinio iuris* for purposes of customary international law.

30 Looking at the scarce practice, only three states—Germany, Belgium, and Spain—have codified the horizontal complementarity principle in their universal jurisdiction legislation (Moodrick-Even Khen, 2015, 287–94), but the principle is not necessarily legally mandated (Section 153 (f) (2) German Code of Criminal Procedure; Arts 10 and 12*bis* Preliminary Title, Belgian Code of Criminal Procedure). If it is legally mandated (see Art 23 (5) (b) Spanish Organic Law on the Judiciary), it is uncertain that the legislature considered it to be mandated by customary international law. Complementarity has sometimes been applied without legislative fiat, in particular in Spain (*Order No 1/*2009 (*'Shehadeh')*, 2009; *Order No 1916/2012 ('Guantánamo')*, 2012), but only a judgment of the South African Constitutional Court explicitly derives the principle from international law (*National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre*, 2014, para 61). In light of the available practice, it would therefore be a stretch to posit the existence of a requirement of horizontal complementarity under customary international law. At most, horizontal complementarity can be considered as an emerging norm of customary international law. Where the norm is applied, it appears to be more a matter of international reasonableness than binding international law. Only when legislatures and courts emulate the South African Constitutional Court's approach to horizontal complementarity could the principle be characterized as mandated by international law with more certainty. Ultimately, current practice continues to reflect the theoretical framework developed above, pursuant to which a number of factors militate against the internationally binding character of horizontal complementarity.

I. In Support of Domestic Courts Applying a Horizontal Complementarity Principle

31 So far, a number of 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 yield a convincingly positive answer to the question. 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.

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Along similar lines, 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, 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 a territorial or national state into compliance will ordinarily prove much more difficult to garner. Moreover, states may lack the resources and willingness effectively to develop and implement a complementarity strategy aimed at enhancing compliance with territorial or national states' duties to prosecute ('positive complementarity'). As to techniques for giving effect to international law in domestic courts, the argument does not particularly weigh in favour of horizontal complementarity. Indeed, there is no evidence that Article 17 Rome Statute was meant to have direct effect in domestic courts hearing international criminal cases.

32 However, as mentioned in the previous section (sec H above), some recent practice has been moving towards mandatory application. This practice invites us to re-examine our theoretical position. It is recalled that a certain construction of the elements discussed militates against binding horizontal complementarity. However, none of the elements automatically led to an outright rejection of horizontal complementarity. Indeed, when having another look at the elements, there are indications that horizontal complementarity may have its rightful place in the structure of international law and international relations. For one thing, states have developed coordination mechanisms featuring forms of horizontal complementarity so as to address the sometimes unhelpful concurrence of jurisdiction flowing from the traditional liberal view of jurisdictional sovereignty. Furthermore, while there may be no hard and fast principle of transnational *ne bis in idem*, some states do respect the *res iudicata* effect of foreign judgments (for the EU, see Art 54 Convention Implementing the Schengen Agreement, 1985; in respect of international crimes, see Art 12 (2) Canadian Crimes Against Humanity and War Crimes Act, 2000). From a policy perspective, there is some evidence that the threat of prosecution by bystander states has contributed to the initiation of local prosecutions. Also, 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; for instance the Dutch International Crimes Unit possesses the authority to transfer information, files, and the prosecution to the state where the suspect is present. Thus, a bystander forum may become the ultimate complementary forum. For a bystander state, it is after all also cheaper and more efficient to have international crimes prosecuted in the home state. As far as the direct effect on complementarity of Article 17 Rome Statute is concerned, while that provision should probably not be given direct effect in a domestic legal order, sometimes states may nevertheless be willing to do just that. A normative argument can even be made in favour of a measure of substantive convergence between vertical and horizontal complementarity, although with due respect for the different institutional environments in which the two modes of complementarity operate.

33 Thus, there are strong normative arguments in favour of a principle of horizontal complementarity, even though it may not yet have crystallised as a norm of customary international law. Horizontal complementarity is desirable, whether from the point of view of criminal policy, national law, or international law. It guarantees that bystander state courts do not become overburdened, and that only cases that deserve to be prosecuted extraterritorially are prosecuted: these are cases which the territorial or national state is

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genuinely unable or unwilling 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 a 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 a territorial or national state (see Ryngaert, 2016, 279).

34 However, stating that there is such a concept 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. Also, where prosecutors are not under a *legal* duty to carry out a complementarity analysis, 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. Such an analysis may be both under- and over-inclusive. It may result in an all too ready dismissal of legitimate cases on the ground that 'some' proceedings are conducted abroad, or, alternatively, an all too ready acceptance of doubtful cases on the ground that it is unlikely that foreign courts will properly investigate the case (for the latter concern, see *Order No 1/2009 ('Shehadeh')*, 2009, para 3; discussed by Weill, 2009).

J. Concluding Observations

35 Universal jurisdiction is sometimes presented as a European imperialist construct in other corners of the world. For the legitimacy and viability of universal jurisdiction, it may appear as crucial that the more closely connected state (the territorial or national state) is accorded first right of way to prosecute, and that bystander states show deference to that state's good faith efforts.

36 However, some systemic features of international law militate against such a horizontal complementarity concept, in particular the principle of state sovereignty, the lack of hierarchy in jurisdictional grounds, the non-existence of a transnational principle of *ne bis in idem*, and the lack of direct effect in domestic legal orders of the ICC's vertical complementarity principle. A more fine-grained analysis of the limited available state practice has demonstrated that the concept of horizontal complementarity has not yet risen to the level of a requirement under customary international law, although some states allow, and even mandate, the application of the concept.

37 From a criminal policy perspective, horizontal complementarity deserves support. This is not necessarily just out of respect for the principles of non-intervention and state sovereignty, but in particular because evidence-gathering, effective history-telling, societal reconciliation, and rule of law entrenchment are best addressed in the place where the crimes have been committed. However, if sufficient evidence is adduced as to the lack of good faith prosecutorial efforts by the closely connected state, bystander states could, and even should, step in and commence a prosecution under the universality principle, thereby exercising their responsibility to protect victims on behalf of the international community.

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Cited Bibliography

CM Vazquez, ‘The Four Doctrines of Self-Executing Treaties’ (1995) 89 AJIL 695–723.

O Schachter, ‘The Role of Power in International Law’ (1999) 93 ASILPROC 200–5.

ICC-OTP, ‘Paper on Some Policy Issues before the Office of the Prosecutor’ (September 2003).

L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP Oxford 2003).

R Rabinovitch, ‘Universal Jurisdiction in Absentia’ (2004) 28 FordhamIntlLJ 500–30.

N Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press Philadelphia 2005).

D Vandermeersch, ‘Prosecuting International Crimes in Belgium’ (2005) 3 JICJ 400–21.

RH Steinberg and JM Zasloff, ‘Power and International Law’ (2006) 100 AJIL 64–87.

M Jouet, ‘Spain’s Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond’ (2007) 35 Georgia Journal of International and Comparative Law 495–537.

WW Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’ (2008) 19 CrimLF 59–85.

A Guzman, *How International Law Works: A Rational Choice Theory* (OUP Oxford 2008).

C Stahn, ‘Complementarity: A Tale of Two Notions’ (2008) 19 CrimLF 87–113.

C Ryngaert, ‘The Principle of Complementarity: A Means of Ensuring Effective International Criminal Justice’ in C Ryngaert (ed), *The Effectiveness of International Criminal Justice* (Intersentia Antwerp 2009) 145–72.

S Weill, ‘The Targeted Killing of Salah Shehadeh. From Gaza to Madrid’ (2009) 7 JICJ 617–31.

M Langer ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’ (2011) 105 AJIL 1–49.

C Stahn and MM El-Zeidy (eds), *The International Criminal Court and Complementarity — From Theory to Practice* (CUP Cambridge 2011).

C Ryngaert, ‘Arrest and Detention’ in L Reydams, J Wouters, C Ryngaert (eds), *International Prosecutors* (OUP Oxford 2012) 647–99.

J Scott and L Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 EJIL 469–94.

H Moodrick-Even Khen, ‘Revisiting Universal Jurisdiction: The Application of the Complementary Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War’ (2015) 30 EmoryIntlLRev 261–311.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2021. All Rights Reserved.
Subscriber: Utrecht University Library; date: 15 November 2021

K Ambos, *Treatise on International Criminal Law*, vol 3: *International Criminal Procedure* (OUP Oxford 2016).

L Burens, 'Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court' (2016) 27 CrimLF 75–97.

C Ryngaert, 'Universal Jurisdiction over International Crimes and Gross Human Rights Violations: The Role of the Principle of Subsidiarity' in GZ Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2015* (OUP Oxford 2016) 275–90.

Cited Documents

Code d'instruction criminelle (Code of Criminal Procedure), 25 April 1878 (Belgium).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; UN Doc A/RES/39/46; UN Reg No I-24841.

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (adopted 19 June 1990, entered into force 26 March 1995) OJ L 239/19.

Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222; ETS No 5; UN Reg No I-2889.

Council of the European Union Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (30 November 2009) 2009/948/JHA.

Crimes Against Humanity and War Crimes Act, 29 June 2000, SC 2000 c24 (Canada).

Institute of International Law, Resolution on Universal Criminal Jurisdiction With Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes (26 August 2005) 71 Ann IDI 296, IDI Resolution III/2005.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; UN Doc A/6316; UN Doc A/RES/2200(XXI), Annex; UN Doc A/RES/2200(XXI), Annex.

Legislative Guide for the Implementation of the United Nations Convention against Corruption by United Nations Office on Drugs and Crime (UN New York 2006).

Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Organic Law 6/1985, of 1 July, on the Power of the Judiciary), promulgated 1 July 1985, entered into force 3 July 1985, Organic Law No 6/1985; BOE No 157, 2 Jul 1985, BOE-A-1985-12666 (Spain).

Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; UN Reg No I-38544; UN Doc A/CONF.183/9.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2021. All Rights Reserved.
Subscriber: Utrecht University Library; date: 15 November 2021

Statute of the International Criminal Tribunal for Rwanda (8 November 1994) UN Doc S/RES/955(1994), Annex; (1994) 33 ILM 1598.

Statute of the International Criminal Tribunal for the former Yugoslavia (as amended) (25 May 1993) UN Doc S/RES/827(1993), Annex; UN Doc S/25704, Annex; (1993) 32 ILM 1203.

Strafprozeßordnung (Code of Criminal Procedure (as amended)), 1 February 1877, RGBl 1877 Nr 8 S 253 (Germany).

UN General Assembly Res 58/4, 'United Nations Convention Against Corruption' (adopted 31 October 2003, entered into force 14 December 2005) GAOR 58th Session Supp 49 vol 1, 4.

Wet internationale misdrijven (International Crimes Act), 19 June 2003, Stb 2003, 270 (The Netherlands).

Wijziging van het Wetboek van Strafrecht in verband met de herziening van de regels over werking van de strafwet buiten Nederland (herziening regels betreffende extraterritoriale rechtsmacht in strafzaken) (Amendment to the Penal Code in connection with the revision of the rules on the operation of the criminal law outside the Netherlands (revision of rules concerning extraterritorial jurisdiction in criminal cases)), 27 November 2013, Stb 2013, 484 (The Netherlands).

Further Documents

Netherlands Public Prosecution Service; The International Crimes Team.

Cited Cases

Ahorugeze v Sweden, Merits and just satisfaction, ECtHR, 27 October 2011, App 37075/09.

Arrest Warrant of 11 April 2000, The Democratic Republic of the Congo v Belgium, Judgment, 14 February 2002, ICJ Rep 3.

Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib/Irak ('Abu Ghraib Decision'), Generalbundesanwalt (German federal prosecutor), 10 February 2005, 60 Juristenzeitung (2005) 311.

National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another, Judgment, South Africa Constitutional Court, 30 October 2014, [2014] ZACC 30.

Order No 1/2009 ('Shehadeh'), Audiencia Nacional, Sala de lo Penal (National High Court of Spain, Criminal Chamber), 9 July 2009, ECLI:ES:AN:2009:129A.

Order No 1916/2012 ('Guantánamo'), Tribunal Supremo of Spain, Sala do Penal (Supreme Tribunal, Criminal Chamber), 20 December 2012, ECLI:ES:TS: 2012:12597A.

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2021. All Rights Reserved.
Subscriber: Utrecht University Library; date: 15 November 2021

Preliminary Report No 157/2.008-G.A ('Shehadeh'), Audiencia Nacional, Juzgados Central de Instrucción No 4 (National High Court, Central Magistrates' Court No 4), 29 January 2009.

Questions relating to the Obligation to Prosecute or Extradite, Belgium v Senegal, Judgment, 20 July 2012, ICJ Rep 422.

Situation in Libya, Prosecutor and Libya (intervening) (on the application of Victims) v Gaddafi and Al-Senussi, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC Pre Trial Chamber I, 31 May 2013, ICC-01/11-01/11-344-Red.

Situation in the Democratic Republic of the Congo, Prosecutor (on the application of Victims) v Katanga and Ngudjolo Chui, Reasons for the oral decision on the motion challenging the admissibility of the case (Article 19 of the Statute), ICC Trial Chamber II, 16 June 2009, Case No ICC-01/04-01/07; ICL 791 (ICC 2009).

Situation in the Democratic Republic of the Congo, Prosecutor v Katanga and Ngudjolo Chui, Judgment on the appeal of Mr Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case, ICC Appeals Chamber, 25 September 2009, ICC-01/04-01/07-1497.

Situation in Uganda, Prosecutor (on the application of Victims) v Kony and ors, Decision on the admissibility of the case under Article 19(1) of the Statute, ICC Pre Trial Chamber II, 10 March 2009, Case No ICC-02/04-01/05; ICL 1535 (ICC 2009).

SS 'Lotus', France v Turkey, Judgment, 7 September 1927, PCIJ Series A No 10, 26.

Uwinkindi v Prosecutor, Decision on Uwinkindi's appeal against the referral of his case to Rwanda and related motions, Judgment, 16 December 2011, Case No ICTR-01-75-AR11bis; ICL 911 (ICTR 2011).

From: Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2021. All Rights Reserved.
Subscriber: Utrecht University Library; date: 15 November 2021