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State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court

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Abstract

The article analyses the main features of the Statute of the International Criminal Court in the context of recent developments in international law. The core submission is made that the states' obligations enshrined in the Statute (namely, to investigate and prosecute the most heineous crimes, and to co-operate with the Court in their investigation and prosecution) are to be construed as obligations *erga omnes*. Since ending impunity for such crimes transcends the interests of individual states, the Court should act on behalf of the international community in remedying any shortcomings of states' action in this respect. In this perspective, particular attention is devoted to the principle of complementarity: it is argued that it could and should be construed and implemented in such a way as genuinely to allow the achievement of the universal objective of preventing impunity for those crimes of concern to the international community.

Key words

complementarity; ICTR; ICTY; International Criminal Court; obligations *erga omnes*; primacy; sovereignty; universal jurisdiction

1. The International Criminal Court and the sovereign jurisdiction of states

The adoption of the Statute of the International Criminal Court (Court or ICC) in Rome in 1998 (the Statute) and its coming into force as of 1 July 2002[1] were hailed by some as major advances on the road towards individual accountability for the perpetration of the most heinous crimes.[2] Crimes provided for under the Statute range from genocide[3] to crimes against humanity,[4] from war crimes within

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1. Pursuant to Art. 126(1), the Statute would enter into force 'on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations'.
2. 'The enactment of the ICC Statute . . . represents the pinnacle of the institutionalization and universalization of measures for the enforcement of international humanitarian law. The ICC fulfils the purposes of . . . a symbol of justice' and 'is likely to become the central pillar in the world community for upholding fundamental dictates of humanity': A. Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 3, at 18.
3. Art. 6 of the Statute.
4. Art. 7 of the Statute.

the meaning of the 1949 Geneva Conventions and the whole body of international humanitarian law[5] to (maybe[6]) the crime of aggression. The Preamble to the Statute, echoing the Commission reporting on responsibilities for the First World War,[7] states that such crimes constitute 'unimaginable atrocities that deeply shock the conscience of humanity'. While the *raison d'être* of the ICC is commonly identified in the desire to put an end to impunity for the perpetrators of such crimes, thus contributing to their prevention, its ability effectively to achieve such goals has been questioned. There appears to be some concern that, despite the ambitious objectives set forth in the Preamble of its Statute, the ICC still pays too great a tribute to state sovereignty. To a large extent, such concern appears to be based on the rules governing the relationship between the Court and national jurisdictions, comprehensively referred to as the 'principle of complementarity'.[8]

Indeed, it is common knowledge that every state traditionally conceives the jurisdictional function (the function of *jus dicere*, 'to tell the law'), either civil or criminal, as one of the expressions of its sovereignty,[9] the exercise of which is to be protected from external interference. It is equally beyond controversy that the legitimacy of this self-protective attitude of states is sanctioned by the UN Charter. While Article 2(1) identifies 'the sovereign equality of all its Members' as the first of the principles on which the Organization is based,[10] Article 2(7) reinforces such a principle by prohibiting the United Nations from intervening 'in matters which are essentially within the domestic jurisdiction of any state'.[11]

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5. Art. 8 of the Statute.
6. The jurisdiction of the ICC over the crime of aggression is conditional upon such crime being defined within the context of the review which states parties are mandated to undertake seven years after its entry into force (Art. 5(2), Art. 123 of the Statute).
7. Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (presented to the Preliminary Peace Conference 29 March 1919), Ch. III: impunity for 'the greatest outrages against the laws and customs of war and the laws of humanity . . . would shock the conscience of civilized mankind'.
8. A. Cassese, *International Criminal Law* (2003), 351, identifies 'the intent to respect State sovereignty as much as possible' as the 'principled motivation' underlying the complementarity regime. For J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (1999), 41, at 75, the fact that some of the criteria for determining admissibility (namely, those relating to a state's 'unwillingness') will 'require the Court to be satisfied as to the intent of the State in the circumstances' amounts to a weakness; M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity', (2003) 7 *Max Planck UNYB* 591, at 595, maintains that 'the complementarity regime . . . is designed to protect and serve . . . the sovereignty both of State parties and third States'; F. Lattanzi, 'The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanisms', in F. Lattanzi-W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1 (1999), 51, at 54, argues that the defeat of the German proposal on universal jurisdiction in Rome was 'an excessive tribute' paid to state sovereignty.
9. G. Kor, 'Sovereignty in the Dock', in J. K. Kleffner and G. Kor (eds.), *Complementary Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004* (2006), 53, at 64, refers to a state's 'right and power to adjudicate' as 'judicial sovereignty'. See also Benzing, *supra* note 8, at 595, identifying in the exercise of criminal jurisdiction 'a central aspect of sovereignty itself'.
10. For general remarks on the meaning of 'sovereign equality', and its implications in the current age, see B. Fassbender and A. Bleckmann, 'Commentary on Article 2(1)', in B. Simma (ed.), *The Charter of the United Nations – A Commentary* (2002), I, 68, at 89; M. Kohen, 'Commentaire sub Article 2.1', in J. P. Cot, A. Pellet, and M. Fortaud (eds.), *La Charte des Nations Unies – Commentaire article par article* (2005), 399, in particular at 406.
11. The sole exception to this all-pervading principle, vesting a sort of 'right to non-interference' in states parties of the UN, is provided in respect of the application of enforcement measures adopted by the Security Council under Chapter VII of the Charter, i.e. in the exercise of its primary function of guardian of international

As a newly established institution, purporting to be 'independent' of any other body or authority, including the United Nations (although 'in relationship' with it, under terms defined by a specific agreement[12]), the Court could have chosen to depart from that traditional approach. It could have vested in itself exclusive jurisdiction in respect of the horrendous crimes set forth in the Statute, thus depriving states (i.e., those states who would become party to it) of the power to investigate or adjudicate any conduct falling within its jurisdiction.[13] It chose, however, not to: the Preamble to Statute not only reaffirms 'the Purposes and Principles of the Charter of the United Nations' as a whole, but specifically reasserts the prohibition on states to use or threaten the use of force against the territorial integrity or political independence of another state. Instead, an approach was adopted whereby the ICC jurisdiction would be 'complementary to national criminal jurisdictions'.[14] Such an approach, requiring 'the existence of both national and international criminal justice functioning in a subsidiary manner',[15] has been labelled by some as a compromise.[16]

The purpose of this article is to try to assess these concerns about the compromising nature of the principle of complementarity and to establish whether the relevant provisions of the Statute can be read consistently with a 'modern' model of relations between states, which may not only guarantee 'lasting respect for the enforcement of international justice'[17] but ultimately foster common 'peace, security and well-being'[18] as universal values. In this perspective, the assumption that

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peace and security; the ad hoc tribunals established under those provisions (see *infra*, section 2) provide an example of such exceptions. In general, on Art. 2(7), see G. Nolte, 'Commentary', in Simma, *supra* note 10, I, 148; G. Guillaume, 'Commentaire sub Article 2.1', in Cot, Pellet, and Fortaud, *supra* note 10, 485 ff.. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep. 14, para. 202 ('the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference', 'is part and parcel of customary international law' although not specifically spelt out in the UN Charter, and is 'a corollary of the principle of the sovereign equality of States').

12. Pursuant to Art. 2 of the Statute, the ICC would have been 'brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties'. Such an agreement (available at http://www.icc-cpi.int/library/asp/ICC-ASP-3-25-III_English.pdf, last visited 3 Aug. 2006) was concluded by Philippe Kirsch, president of the ICC, and Kofi Annan, UN Secretary-General, on 4 October 2004; this conclusion was welcomed by the Fourth Assembly of the States Parties in 2005 (available at http://www.icc-cpi.int/library/asp/PartIII_-_Resolutions.pdf, last visited 3 Aug. 2006).
13. This solution was adopted for the panels established by the United Nations within the District Court in Dili in East Timor, endowed with exclusive (as well as universal) jurisdiction over certain serious criminal offences as specified in relevant regulations (see United Nations Transitional Administration in East Timor, Regulation No. 2000/15, ss. 1 and 2).
14. The reasons underlying the adoption of this approach were never specifically spelt out. However, some of the protagonists of the negotiations shed some light: M. Politi ('Le Statut de Rome de la Cour Pénale Internationale: le point de vue d'un négotiateur', (1999) RGDIP 817, at 842) recalls how 'plusieurs Pays se préoccupaient . . . de souligner, à cet égard, l'importance de ne pas déresponsabiliser les juridictions criminelles nationales dans leur activité ordinaire de répression des crimes prévus par le Statut'. Other delegations explicitly declared that their support for complementarity was 'in the interests of respecting the sovereignty of States parties' (Statement by the delegation of Tunisia, Summary records of the meetings of the Committee of the Whole, A/CONF/183/C.1/SR.1, 190, para. 59).
15. M. El Zeidy, The Principle of Complementarity: A New Machinery to Implement International Criminal Law, (2001–2) 23 *Michigan Journal of International Law* 869, at 870.
16. Ibid., at 881. The author (at 879) also notes that the principle that emerged during the early efforts to establish an international penal tribunal (in the context of the works on the UN Genocide Convention) 'is the outcome of two combined factors, namely, the respect of national sovereignty and the need to facilitate international criminal justice to repress genocide'.
17. Statute, 11th preambular paragraph.
18. Statute, 3rd preambular paragraph.

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the states' obligations to investigate and prosecute the crimes provided under the Statute and to co-operate with the Court may qualify as obligations *erga omnes* will be tested. Attention will also be paid to the experience of the immediate predecessors of the International Criminal Court: the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR – collectively 'the ad hoc tribunals').

2. Piercing the veil of jurisdictional sovereignty through international criminal courts: the ad hoc tribunals

In 1993, exercising powers conferred on it under Chapter VII of the UN Charter, the Security Council took the unprecedented step of establishing 'an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia' after 1 January 1991[19] (the ICTY). In 1994, under the same legal basis, a second ad hoc tribunal (the ICTR) was set up for the prosecution of persons responsible 'for genocide and other serious violations of international humanitarian law' committed in Rwanda or in neighbouring states by Rwandan citizens during 1994.[20]

These tribunals, based in The Hague and Arusha respectively, and still operating,[21] are usually regarded as radically different in background and nature from the military tribunals sitting in Nuremberg and in Tokyo after the Second World War. Far from appearing as expressions of 'victors' justice', the ICTY and ICTR purported to provide examples of genuine international judicial bodies, acting on behalf of the international community as a whole. The report of the Secretary-General on the establishment of the ICTY[22] makes it clear that, albeit a subsidiary organ of the Security Council within the meaning of Article 29 of the UN Charter, the Tribunal would have a judicial nature; accordingly, not only would it have 'to perform its functions independently of political considerations', but it 'would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions'.

Some years later, deciding on a jurisdictional challenge in what would become known as the landmark *Tadić* decision,[23] the ICTY Appeals Chamber would show that it took its independence very seriously, claiming for the Tribunal the power to 'ascertain its own competence' and therefore to go as far as to examine the legality of its own establishment by the Security Council.[24] This statement was tantamount

19. Security Council Resolution 827, 25 May 1993 (UN Doc. S/Res/827 (1993)).
20. Security Council Resolution 935, 1 July 1994 (UN Doc. S/Res/935 (1994)).
21. Although within the boundaries and under the constraints entailed by their 'closing strategy', i.e. on the assumption of their winding up by the end of 2010: see Security Council Resolution 1503, 28 August 2003 (UN Doc. S/RES/1503 (2003)).
22. 'Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)' (UN Doc. S/25704, 3 May 1993), para. 28.
23. *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 (hereinafter *Tadić*) (http://www.un.org/icty/tadic/appeal/decision-e/51002.htm, last visited 3 Aug. 2006).
24. Ibid., paras. 17–19.

to dismissing the idea that the Tribunal should be seen as a 'subsidiary' organ of the latter.[25]

Even more significantly, on the same occasion the ICTY appeals judges rejected the claim that the assessment of the legality of the action by the Security Council would be a 'political and as such non-justiciable' issue. In their own words, similar doctrines were 'remnants of the reservations of "sovereignty", "national honour", in very old arbitration treaties', all of which had 'receded from the horizon of contemporary international law'.[26] In denying that any violation of sovereignty was at stake in the establishment of the Tribunal, they highlighted the fact that the very idea of 'sovereignty violation' dated 'back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood' and pointed out that this concept had recently 'suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights'.[27] Finally, when examining the distinction between international and internal armed conflict for the purposes of the Geneva Conventions, the ICTY Appeals Chamber argued that the relevance of such a distinction had significantly faded, on grounds *inter alia* of the significant changes brought about in international law by the development and propagation of human rights doctrines, 'notably in the approach to problems besetting the world community';[28] such changes had resulted in 'a State-sovereignty-oriented approach [having] been gradually supplanted by a human-being-oriented approach'.

For the purposes of the present study, the relevance of the *Tadić* decision of the ICTY Appeals Chamber appears twofold: (i) the ICTY judges acknowledged the existence of 'a contemporary international law', as opposed to an 'old' (even 'very old') international law, thus endorsing the idea that the approach to state sovereignty and international relations had evolved in time; and (ii) they clarified that such evolution had resulted in a 'modern' attitude, the main feature of which was the progressive restriction of the scope of national sovereignty. Otherwise stated, the ICTY judges seemed to embrace the idea that 'international law – once conceived as a system of state-to-state abstention and accommodation – has become a system of state-to-state cooperation and harmonisation for the attainment of common goals'.[29]

3. The relationship between national jurisdictions and the ad hoc tribunals: concurrent jurisdiction and the primacy of the latter

The approach taken by the ICTY Appeals Chamber in *Tadić* does not strike one as extravagant, if considered in the light of the constitutive instrument of the Tribunal.

25. Ibid., para. 15: the ICTY could not be considered as 'totally fashioned to the smallest detail by its creator and . . . totally in its power and at its mercy'.
26. Ibid., para. 24.
27. Ibid., para. 55.
28. Ibid., para. 97.
29. R. Steinhardt, 'Book Review: Jürgen Schwarze, *European Administrative Law*', (1994) 28 *George Washington Journal of International Law and Economics* 225, at 240.

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The notion of 'modern' international law and its focus on the pursuance of universal goals seems indeed reflected in the rules governing the relationship between the ICTY and national courts. Article 9 of the ICTY Statute provides that 'the International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations' falling within the jurisdictional scope of the ICTY, provided, however, that 'the International Tribunal shall have primacy over national courts' and may 'formally request national courts to defer to the competence of the International Tribunal . . . at any stage of the procedure'.[30]

The reasons underlying the choice of endowing the ICTY and the ICTR with primacy are not extensively spelt out in the Secretary-General's report. One could prima facie argue that the rule of primacy sounds at odds with the statement according to which, by establishing the ad hoc Tribunals, not only did not intend the Security Council 'to preclude or prevent the exercise of jurisdiction by national courts', but such exercise, in accordance with relevant national laws and procedures, would have to be 'encouraged'.

Interesting remarks as to the ultimate justification for the 'primacy' rule were developed by the *Tadić* decision. The ICTY appeals judges argued that failure to endow an international tribunal with primacy vis-à-vis national jurisdictions would by definition jeopardize the objectives that had been pursued in establishing it. They warned that 'human nature being what it is, there would be a perennial danger of international crimes being characterised as "ordinary crimes", or proceedings being "designed to shield the accused", or cases not being diligently prosecuted. If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute'.[31]

In the view of the ICTY Appeals Chamber, the reason for endowing an international tribunal with primacy would lie in scepticism about the very willingness of national courts genuinely and effectively to exercise their jurisdiction over persons allegedly responsible for serious violations of international humanitarian law, which jurisdiction they were supposed to continue sharing with the international tribunal under Article 9 of the ICTY Statute; accordingly, the universal objective of putting an end to impunity for the most serious crimes could only be effectively pursued by endowing an international criminal jurisdiction with primacy.

4. The ICC and the principle of complementarity

It might therefore have come as a surprise that, a few years later, a court purporting to fulfil the role of an effective international criminal jurisdiction on a permanent basis should come into existence under the auspices of the principle of complementarity, that is, by way of an apparent denial of the very idea of primacy in which the key

30. A parallel rule is set forth in Art. 8 of the ICTR Statute.
31. *Tadić*, *supra* note 23, para. 58.

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to success for such an exercise had been identified by the ICTY Appeals Chamber. The Statute emphasized that the ICC would be 'complementary to national criminal jurisdictions': since the exercise of criminal jurisdiction over those responsible for international crimes was 'the duty of every State', the Court would only step in when a state was unwilling or unable to do so.[32] Far from confirming the advantages of primacy as spelt out by *Tadić*, the principle of complementarity seemed rather to import into the yet-to-be-born Court the 'old' idea of respectful abstention from interfering in the domestic jurisdiction of sovereign states, all the more so since it appeared from the outset as 'central to the whole conception of the ICC'.[33] If complementarity really was the opposite of primacy, and if primacy alone would be able to achieve the objective of international criminal justice (as apparently held by the ICTY Appeals Chamber), the ICC seemed doomed to failure; hence the flourishing of comments to the effect that the Statute reflected 'the concerns of states over national sovereignty and the potentially intrusive powers of an international institution',[34] or that the notion of primacy for national procedures fitted 'the sovereignty concerns of many States'.[35]

Even prior to the entry into force of the Statute, however, some relief was to be provided by some of the fathers of the ICC. Philippe Kirsch, who presided over the Committee of the Whole in Rome and would later become the Court's first president, identified the essence of complementarity in that 'if a national judicial system functions properly, there is no reason for the ICC to assume jurisdiction'.[36]

Other commentators identified this 'proper functioning' in the exercise of *genuine* and *effective* jurisdiction over the crimes set out in the Statute.[37] According to this view, primacy of national jurisdictions would simply acknowledge the fact that national courts are often best placed to deal with international crimes, due to the immediate availability of evidence and witnesses. However, such primacy was and had to be tempered with the persisting obligation of states to investigate and prosecute the most serious crimes;[38] moreover, due to the fact that investigation and prosecution of these crimes transcended the interests of one or more individual states, the ICC not only would share its jurisdiction with national courts but, more significantly, would be endowed with the power to assess the effective implementation of this obligation as sole and ultimate arbiter. Accordingly, failure to act by

32. See Art. 17 of the Statute.
33. Cassese, Gaeta, and Jones, *supra* note 2, at 1906. See also, among many, Holmes, *supra* note 8, at 73 (defining complementarity as 'one of the cornerstones' of the ICC).
34. J. T. Holmes, 'Complementarity: National Courts versus the ICC', in Cassese, Gaeta, and Jones, *supra* note 2, 667, at 668.
35. Holmes, *supra* note 34, at 671.
36. P. Kirsch, 1999 Cornell International Law Journal Symposium, 'The International Criminal Court: Consenses and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression', keynote address, (1999) 32 *Cornell International Law Journal* 437, at 438.
37. Holmes, *supra* note 34, at 667.
38. Ibid., at 673, recalls the effort, throughout the negotiations, 'to develop an approach which ensured respect for the principle of complementarity, founded on national sovereignty and the obligations of States to prosecute, and yet which allowed the ICC scope to assume jurisdiction where doubts existed that States would or could follow through'.

the ICC would only occur when such genuine effectiveness in putting an end to impunity would be reached on a universal basis.

5. The nature of the obligations enshrined in the Statute

The optimistic scenario laid out in the preceding paragraphs needs, however, to be assessed against the provisions of the Statute and, in particular, those governing the functioning of the principle of complementarity. There is a need to establish whether the powers vested in the ICC are adequate to ensure the effective fulfilment of the states' persisting obligations to investigate and prosecute for the gravest crimes, thus achieving the ultimate objective of preventing impunity. For this purpose a preliminary assessment of the nature of these obligations seems appropriate.

States' duties to investigate and prosecute such crimes, with a view to achieving the universal objectives set forth in the Preamble to the Statute, seem to qualify as obligations '*erga omnes*' or 'community obligations',[39] within the meaning set forth by the ICJ in the *Barcelona Traction* case.[40] The main feature of such obligations lies in their being 'obligations of a state towards the international community as a whole', as opposed to obligations 'rising vis-à-vis another State in the field of diplomatic protection'. According to the resolution recently adopted by the Institut de droit international,[41] obligations *erga omnes* 'bind all subjects of international law for the purposes of maintaining the fundamental values of the international community', so that their breach enables all relevant States 'to take action'.

The Preamble echoes expressions which are indeed traditionally attached to or associated with obligations *erga omnes*; in particular, the reference to the relevant crimes being 'of concern to the international community as a whole'[42] appears significant. Furthermore, the persisting duty of states to proceed against the most serious crimes appears to share the two most commonly identified features of this class of obligations: (i) universality (i.e., the obligation binds all states without exception, irrespective of specific consensus having been given, and is owed to the

39. Cassese, *supra* note 8, at 4.

40. *Case Concerning the Barcelona Traction, Light and Power Company Limited*, Second Phase, Judgment, 5 February 1970, [1970] ICJ Rep. 32, paras. 33 ('an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*') and 34 ('Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character').

41. Institut de droit international, Fifth Commission, Resolution 'Obligations erga omnes in international law', 27 August 2005, Rapporteur G. Gaja (available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_01_en.pdf, last visited 16 Aug. 2006).

42. M. Ragazzi, *The Concept of International Obligations* Erga Omnes (1997), 42. According to G. S. Goodwin-Gill, 'Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute', in G. S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 199, at 213, 'the element of "international concern" . . . is probably more descriptive rather than definitive'.

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international community[43]); and (ii) solidarity (i.e., every state is deemed to have a legal interest in their protection and, 'in cases of breach, may be entitled to resort to countermeasures'[44]).

Indeed, at least for some of the crimes under the Statute, codified by international treaties to which a high number of states have become parties, states are subject to international obligations (namely, the obligation to prevent and punish genocide and war crimes and the obligation to outlaw aggression); it is commonly held that these qualify as obligations *erga omnes*,[45] having their foundation in peremptory norms (or norms of *jus cogens*[46]), and as such not subject to derogation.[47] The fact that ICC membership as of today falls short of universality[48] (and that many significant actors on the international scene are missing) does not detract from the soundness of the assumption. It has in fact been clarified that the 'international community as a whole' within the meaning of Article 53 of the 1969 Vienna Convention on the Law of Treaties does not require unanimity and that the dissent of one isolated state or of 'a very small number of States' does not result in the norm being denied its peremptory nature,[49] as long as the basic components of the international community can be said to abide by it.[50]

Finally, these obligations also appear 'instrumental to the main political objectives of the present time, namely the preservation of peace and the promotion of fundamental human rights . . . first and foremost life and human dignity'.[51]

At first sight it may seem more difficult to construe the obligation to co-operate with the Court in the investigation and prosecution of crimes within its jurisdiction[52] as an obligation *erga omnes*. On the one hand the overall architecture of the Statute makes it clear that the obligation to co-operate with the Court only binds states parties to the treaty. On the other hand, however, the clear instrumental nature of this obligation vis-à-vis that to investigate effectively and prosecute

43. See the draft articles on 'Responsibility of States for Internationally Wrongful Acts', adopted by the ILC in 2001 at its fifty-third session, Art. 33 (Annex to GA Resolution 56/83 of 12 December 2001).
44. Cassese, *supra* note 8, at 4. See also Ragazzi, *supra* note 42, at 17.
45. See the Preamble to Institut de droit international 2005 Resolution (*supra* note 41), maintaining that 'a wide consensus exists to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights . . . are examples of obligations reflecting' the fundamental values of the international community.
46. Goodwin-Gill, *supra* note 42, at 213.
47. 1966 Vienna Convention on the Law of Treaties, Art. 53: 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.
48. As of 3 August 2006, the Statute counted 100 ratifications (Mexico's being the most recent).
49. Ragazzi, *supra* note 42, at 55–6.
50. 'Il faut que la conviction du caractère impératif de la règle soit partagée par toutes les composantes essentielles de la communauté internationale et non seulement, par exemple, par les Etats de l'Ouest ou de l'Est, par les pays développés ou en voie de développement, par ceux d'un continent ou d'un autre': R. Ago, 'Droit des traités à la lumière de la Convention de Vienne – Introduction', in *Collected Courses of the Hague Academy of International Law* (1971), III, 297, at 323.
51. Ragazzi, *supra* note 42, at 133–4, lists this as one of the elements characterizing obligations *erga omnes*.
52. Part 9 of the Statute, 'International cooperation and judicial assistance', Arts. 86–102.

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international crimes[53] would seem to require this as a reasonable and consequent assumption. The adequate fulfilment of the co-operative obligations indeed appears crucial to the achievement of the Court's mandate; this is also acknowledged in the Preamble, which states that international co-operation should necessarily supplement measures taken 'at the national level'.

Furthermore, recent developments in the theory of obligations *erga omnes* in international law seem to lend support to this view. In 2005, a resolution by the Institut de droit international established that *erga omnes* obligations are not only those 'that a State owes in any given case to the international community, in view of its common values and its concern for compliance',[54] but also those 'under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance';[55] in respect of either group, a breach of that obligation enables all relevant states to take action. Otherwise stated, in the view of the Institut de droit international the treaty nature of a given obligation is not an obstacle to that obligation qualifying as *erga omnes*, provided only that it is of relevance to fundamental values of the international community.

It could further be argued that a state's duty to co-operate, on the one hand, and the Court's right to obtain such co-operation, on the other hand, are not to be seen as mere technicalities mandated by practical reasons, that is, by the fact that the ICC does not have police or military forces of its own for the purpose of apprehending suspects or gathering evidence. Beside and beyond this practical aspect, they have an 'ideal' significance, in that they signal and foster an ongoing evolution in the conception of the relationships among jurisdictions and hence among states, well beyond the idea of reciprocal non-interference.[56]

The association between the prosecution of international crimes and interests pertaining to the international community as a whole, rather than to individual states, appears to be a recurring feature of international criminal law. The provision criminalizing 'crimes against humanity' in the London Charter of the Nuremberg Tribunal is considered to have marked 'a great advance' in highlighting that these crimes would be cause of 'meta-national' concern, given that they ran counter 'to those basic values that are, or should be, considered inherent in any human being'.[57] The relationship between some of the crimes provided in the Statute (in particular, aggression, slavery, genocide, and apartheid) and the notion of obligations 'essential

53. Failure to co-operate triggers the power of the Court to 'make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council', on the assumption that either forum would stigmatize (and possibly take action in respect of) the violation of a state's fundamental duty.
54. Institut de droit international 2005 Resolution, *supra* note 41, Art. 1(a).
55. Ibid., Art. 1(b).
56. The rules governing the procedural functioning of the principle of complementarity seem of further significance in this respect. Even when a case has been deferred to a national jurisdiction, the ICC Prosecutor is entitled to request that state to submit periodic reports on 'the progress of its investigations and any subsequent prosecutions' (Art. 18(5) of the Statute). Accordingly, the assessment on complementarity is not a one-step issue and the ICC is meant to act continuously as a 'controller' as to whether a state is genuinely and effectively fulfilling its duties under the Statute.
57. A. Cassese, *International Law* (2005), 440.

for the protection of fundamental interests of the international community' was at one point also highlighted by the International Law Commission in the context of its work on state responsibility.[58]

Indicia in the same direction can be inferred from the statutory instruments and case law of the ad hoc tribunals. Article 29 of the ICTY Statute provides for the states' duty to 'co-operate with the international tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law' and to 'comply without undue delay with any request for assistance or an order issued by a Trial Chamber'. The ICTY Appeals Chamber highlighted that the power to issue orders to sovereign states was 'novel and indeed unique' for an international tribunal and clarified that the states' obligations vis-à-vis the ICTY were entailed by 'a community interest in [their] observance'.[59] While the ICTY Statute and its origin in a Chapter VII resolution of the Security Council made this co-operation enforceable in the event of non-compliance, the ICTY Appeals Chamber highlighted that co-operative compliance was to be preferred to mandatory compliance whenever possible, 'as a matter of policy and in order to foster good relations with States'. Echoing the ICJ in the *Nuclear Tests* case,[60] the Appeals Chamber also stressed the importance of trust and confidence in matters of international co-operation, 'in particular in an age when this co-operation in many fields is becoming increasingly essential'.[61] The fact that a significant number of states have ratified the Statute, thereby voluntarily becoming subject to the obligations enshrined in it, seems to signal an increasing willingness of the international community to advance along the road of mutual co-operation.

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58. See 'Report of the International Law Commission on its twenty-eighth session', para. 78 ff. (in *Yearbook of the International Law Commission* (1976), II, part 2), Draft articles on state responsibility, in particular Article 19, International Crimes and International Delicts:

    1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.
    2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
    3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
        (a) a serious breach of an international obligation of essential importance for maintenance of international peace and security, such as that prohibiting aggression; . . .
        (c) a serious breach on widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and *apartheid.*

    Subsequent lengthy debates (see, in particular, 'Report of the International Law Commission on its Fiftieth Session', paras. 241–330, in *Yearbook of the International Law Commission* (1998), II, part 2) showed the unfeasibility of an agreement on the very notion of 'international crimes'; accordingly, it was eventually dropped. No reference to the topic appears in the text on 'Responsibility of States for Internationally Wrongful Acts', adopted by the ILC at its fifty-third session, in 2001 (Annex to GA Resolution 56/83 of 12 December 2001).

59. *Prosecutor v. Blaškić*, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, IT-95-14 'Lasva Valley', Appeals Chamber, 29 October 1997, para. 26 (http://www.un.org/icty/blaskic/appeal/decision-e/71029JT3.html, last visited 3 Aug. 2006).
60. ICJ Decision 20 December 1974 (Nuclear Tests case, Australia v. France), ICJ Reports, 1974, 268.
61. *Prosecutor v. Blaškić, supra* note 59, at para. 68.

6. The specific provisions governing the complementarity regime

The foregoing remarks prompt us to consider whether the specific rules governing the functioning of the complementarity regime can be construed in such a way as to allow the proper implementation of these obligations, arguing that the ICC jurisdiction is triggered whenever required for the purpose of achieving the ultimate goal of preventing impunity for the gravest crimes.

6.1. The inability of national courts to investigate and prosecute, in particular, the 'unavailability' of a national judicial system

Pursuant to Article 17(1) of the Statute, a state's 'unwillingness' or 'inability' are the factors triggering the admissibility of a case,[62] once a situation has been referred to the ICC pursuant to Article 13. Reversing the order of the Statute, we shall analyse inability first.

According to Article 17(3), inability has to be determined by considering 'whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. In the view of several commentators, inability is an objective, 'fact-driven' criterium[63] and will therefore prove to be a scenario of little contention. Indeed, the danger of preposterous sovereignty-based jurisdictional claims, evoked in *Tadić* as inevitably entailed by the failure to endow an international jurisdiction with primacy, seems hardly at stake in the scenario of total or substantial collapse. The notion of a 'failed state', whereby a national institutional system is collapsed or compromised to a large extent, is often mentioned. It is hard to see how a failed state, whether totally or substantially,[64] could claim to be fulfilling its duty to investigate and prosecute the most heinous crimes.

More controversial situations seem likely to arise in connection with the third scenario of inability provided by the Statute, consisting of the 'unavailability' of a

62. 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State having jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.'
Art. 20(3) clarifies that this latter ground of inadmissibility shall not apply when national proceedings 'were for the purpose of shielding' the person from criminal responsibility or 'otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'. The provision supplies the Court with a tool to monitor the genuineness of national proceedings jurisdictions even after their completion. It has been noted, accordingly, that 'Article 20 aims, in a way, at retroactive application of the articles on jurisdiction and admissibility' (see I. Tallgren, 'Article 20. *Ne bis in idem*', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (1999), 419, at 420).

63. Holmes, *supra* note 34, at 677.

64. The *travaux préparatoires* show that mere 'partial' collapse was deliberately excluded from the scope of inability (see Holmes, *supra* note 8, at 54–5). See also, on this issue, the Informal Expert Paper for the Office of the Prosecutor, The Principle of Complementarity in Practice, 15 (available at http://www.icc-cpi.int/library/organs/otp/complementarity.pdf, last visited 3 Aug. 2006).

national judicial system, entailing the state's inability 'to obtain the accused or the necessary evidence and testimony or otherwise to carry out its proceedings'. In this connection, the leading consideration should be that complementarity is a device aimed at ensuring the effective and proper achievement of the objectives of the Statute. In particular, as regards a state being 'otherwise' (i.e., for a reason other than the inability to obtain the accused or the relevant evidence) unable to carry out its proceedings, it seems that the Court should take into account both normative and factual elements.

As to normative elements, the adequacy of the legal framework available in the relevant state should be assessed. Accordingly, a national judicial system should be considered 'unavailable' when its substantive provisions do not allow the conducts corresponding to the crimes provided for in the Statute to be punished in terms which adequately reflect their gravity,[65] thus triggering the stepping in of the Court.

As to factual elements, the objective features of the crime at stake should be of relevance. When conduct extends over or has connections with several jurisdictions (for instance, in a situation of joint criminal responsibility, with suspect or indicted persons of different nationalities), practical difficulties as to the obtaining of the accused or the securing of evidence are likely to arise.[66] In similar scenarios, on the one hand each of the states involved could be regarded as 'unable' to prosecute the crime(s) as a whole on its own, while on the other hand the stepping in of the ICC would most likely prevent conflicts among different national jurisdictions (each supposedly vying for proceeding) and therefore it would qualify as the most 'convenient' forum.

This 'convenience' might be appreciated in many respects. First, from a perspective of efficiency, ICC investigations and prosecutions may be more likely to succeed

65. On implementation of the Statute, some legislators have taken the view that the specific qualification of conduct or the specific features of a crime under domestic law have no impact on the rules on complementarity, as long as they do not amount to a lacuna entailing failure to punish conduct within the jurisdiction of the Court. A similar view has been taken as regards sanctions, arguing that only 'a grave and unjustified discrepancy' between the Statute and domestic law as regards the criminal treatment of a given conduct might lead to the Court asserting jurisdiction in a specific case under the rule of complementarity. See 'Message relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale internationale ainsi qu'à une révision du droit pénal', dated 15 Nov. 2000 (available at http://www.admin.ch/ch/f/ff/2001/359.pdf, last visited 3 Aug. 2006) para. 3(1), at 418–19: 'Si le Statut définit certains crimes d'une façon déterminée, il n'impose pas aux Etats l'obligation de prévoir de manière identique les mêmes crimes dans leur ordre juridique national . . . Les Etats doivent néanmoins faire diligence en la matière, et cela découle essentiellement du principe de la complémentarité inscrit dans l'art. 17. En effet, s'ils ne veulent pas risquer de perdre dans un cas particulier leur compétence primaire en faveur de la Cour pénale internationale, ils doivent veiller à ce que les crimes relevant de la compétence de ladite Cour soient sanctionnés d'une façon ou d'une autre dans leur ordre juridique interne . . . Est déterminant pour l'appréciation le critère suivant: la clause de la complémentarité de l'art. 17 est – tout comme la conception globale du Statut de Rome – fondée sur le résultat. Le but est de mettre fin à l'impunité . . . La qualification de droit pénal d'un acte selon le droit interne est donc sans importance, du point de vue de la clause de la complémentarité, aussi longtemps qu'il n'en résulte pas de véritable lacune du point de vue de la punissabilité de l'acte concerné ou tant qu'un crime majeur en droit international public n'est pas traité, aux yeux du droit national, comme une simple peccadille.'

66. As otherwise stated, 'States should not underestimate the many difficulties involved in carrying out investigations and concluding a trial in situations in which (most of) the evidence is to be found in other States or when the suspect or accused is not on their territory. They should, therefore, carefully examine whether or not the Court might be in a better position to adjudicate, and refrain from acting themselves if this seems to be the case': Cassese, Gaeta, and Jones, *supra* note 2, at 1906.

in securing the accused or any relevant evidence, given the wide spectrum of international co-operation on which the Court should be able to rely. Second, from the standpoint of the principle of equality of arms, three elements seem worth being highlighted: first, the Court would provide all participants (including the victims) with a 'neutral' forum, as opposed to one or more parties having the advantage of his or her own court; second, it would offer the advantage of a truly international (or 'supranational') law, upholding the highest substantive and procedural standards of fair trial; third, it would prevent the risk of 'forum shopping' by some of the victims (whose choice is likely to benefit jurisdictions notoriously willing to proceed with this sort of crime). The recent examples of cases against high-ranking politicians, brought before jurisdictions presenting a most tenuous, if any, link to the alleged crime or perpetrator, make such an advantage hard to overestimate, especially when considering that such high-profile cases rarely, if ever, come to effective completion[67] and usually fade out against the lessening attention of the media and/or some procedural obstacle.

Besides, having these 'multi-jurisdictional' cases adjudicated by the ICC seems to be in full compliance with the principle of complementarity: on the one hand the admissibility criteria are to exist and to be assessed in respect of the whole criminal conduct at stake, while on the other the fact that scenarios within the jurisdictional reach of the ICC must be broad enough to qualify as 'situations' rather than 'cases'[68] seems to point at conducts which might and most likely will extend beyond the jurisdiction of one single state.

In sum, the notion of unavailability may lead to the ICC being considered to be the most 'proper' forum to investigate and prosecute international crimes which involve several jurisdictions. This reasoning seems to echo some of the arguments traditionally brought under the doctrine of *forum non conveniens*, the Latin expression for 'inconvenient court'. According to this doctrine, 'a court which has jurisdiction of a case may decline to exercise it where there is no substantive reason for the case to be brought there, or where presentation of the case in that court will create a hardship on the defendants or relevant witnesses because of its distance from them';[69] in the words of the Institut de droit international, this doctrine encompasses 'the practice of declining to assume or exercise jurisdiction on the ground that a court in another country is more appropriate to deal with the issues'.[70] As such, it has often been used for avoiding interference in the jurisdictional power of a sovereign state.

67. Among many, see the cases brought in 2003 in Belgium against former US President George Bush Sr and US Secretary of State Colin Powell (available at http://news.bbc.co.uk/1/hi/world/europe/3135934.stm, last visited 3 Aug. 2006); and in 2005 in Germany against the former US Defence Secretary Donald Rumsfeld (available at http://news.bbc.co.uk/1/hi/world/americas/4254191.stm, last visited 3 Aug. 2006).
68. See Art. 13 of the Statute.
69. S. H. Gifis, *Law Dictionary* (1996), 208.
70. Institut de droit international Resolution 'The principles for determining when the Use of the Doctrine of Forum Non Conveniens and Anti-suit Injunctions is appropriate', Second Commission, Rapporteur L. Collins, Co-rapporteur G. Droz, 2 September 2003, second preambular paragraph (available at http://www.idi-iil.org/idiE/resolutionsE/2003_bru_01_en.PDF, last visited 16 Aug. 2006). Although the Resolution is aimed at covering proceedings in civil and commercial matters (excluding family law), they can be regarded as a specific expression of a broader principle, namely that a case, irrespective of its nature, should be brought before an 'appropriate' forum, this probably being most conducive to effective proceedings.

Common-law jurisdictions are familiar with defendants claiming that the action should be dismissed due to insufficient links with the seized forum, on grounds ranging from difficulty of the court in securing evidence to 'oppressiveness and vexation to a defendant out of all proportion to plaintiffs' convenience',[71] subject to the existence and availability of an adequate alternative forum. The international character of the ICC, the broad network of co-operation on which it is able to rely, and its obligation to abide by the highest human rights standards all seem to concur in making it not only an 'available' alternative forum to national jurisdictions, but also a most *conveniens* one for proceeding against the most serious cross-border crimes.

6.2. Inability and the role of universal jurisdiction

Reference to the doctrine of *forum non conveniens* prompts us to consider how the relationship between the national and the international jurisdiction should be construed in the absence of a significant link between the crimes and the state exercising jurisdiction, typically when the crime was neither committed in the territory of this state, nor by or against one of its nationals, and the state proceeds on the basis of 'universal jurisdiction'.[72]

As recently reiterated by the Institut de droit international, universal jurisdiction is commonly regarded as designed 'to protect and uphold' fundamental values of the international community (particularly human life, human dignity, and physical integrity) by allowing prosecution of international crimes.[73] One could therefore assume that its exercise is thoroughly consistent with the objectives of the Statute and should therefore be encouraged. It also appears consequential to the assumption that those enshrined in the Statute are obligations *erga omnes*: it has been argued that, in pursuing international crimes on the basis of universal jurisdiction, a state would not act '"in representation of" any other state, but . . . as . . . a trustee if the fundamental values of the international community'.[74]

A note of caution seems nevertheless appropriate in this respect. It has been argued that, in the absence of a significant link between the state and the crime, one should not automatically assume that a state will have better access to facts

71. US District Court for the Southern District of New York, *Abdullahi v. Pfizer, Inc.*, 01 Civ. 8118 (WHP), 9 August 2005, 2005 U.S. Dist. LEXIS 16126, 5.

72. The core feature of universal jurisdiction is that criminal jurisdiction is triggered solely by the nature of the crime; legal systems vary as to whether the presence of the accused in the territory of a state is required (the term 'pure' or 'absolute' universal jurisdiction being used to refer to these latter scenarios). See, for a comprehensive overview, 'The Princeton Principles on Universal Jurisdiction', Princeton, 2001 (available at http://www.princeton.edu/~lapa/unive_jur.pdf#search='princeton%20principles%20on%20universal%20jurisdiction', last visited 3 Aug. 2006).

73. Institut de droit international, Seventeenth Commission, Resolution 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes', 26 Aug. 2005, Rapporteur C. Tomuschat (available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf, last visited 16 Aug. 2006). See C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de Droit International', (2006) *Journal of International Criminal Justice* 561.

74. Kress, *supra* note 73, at 7. The author argues that the theory of the 'significant link' results in a principle of 'subsidiarity' aimed at identifying the 'forum conveniens' (ibid., at 19) and concludes that the states having a direct connection to the crime should have priority not only over the ICC but also over states acting on the basis of universal jurisdiction (ibid. at 22); this 'not only on considerations of judicial economy' but also because states directly connected with the crime have 'an interest beyond that of mere trustees of the international community when they exercise their jurisdiction' (ibid. at 20).

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and evidence than the ICC and that investigations and prosecutions conducted at the national level will be more effective than those which might be carried out by the Court; accordingly, the assessment of the genuineness of national initiatives for the purposes of complementarity should be evaluated in an especially rigorous manner,[75] and a state proceeding on the sole basis of universal jurisdiction may be considered as 'unable' due to the unavailability of its judicial system.

This view seems entirely in line with the assumption that the Statute should be interpreted in such a way so as to allow the effective achievement of its objectives. More specifically, if we accept that the ICC is likely to qualify as the most 'convenient' forum for tackling crimes which extend beyond the boundaries of one jurisdiction, it should follow that the Court may equally qualify as a more apt forum than a national one purporting to proceed on the basis of universal jurisdiction.

The view also appears consistent with the recent approach of the Institut de droit international, establishing that any state relying solely on universal jurisdiction for genocide, crimes against humanity, and war crimes 'should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender'.[76]

6.3. 'Unwillingness' genuinely to investigate or prosecute – in particular, violations of due process to the detriment of the accused

Most commentators point out that an issue of unwillingness[77] is due to arise in connection with 'fake trials', whereby a case is investigated and/or prosecuted 'with a view to shielding the persons concerned from any meaningful judicial determination',[78] possibly because of political implications or the complicity of the judiciary. While listing the scenarios of which unwillingness may consist, the Statute also provides that 'the principles of due process recognized by international law' are the paramount standard against which the ICC has to carry out its discretionary judgement concerning the 'unwillingness' of a state.

In the perspective of those underlying the Statute being obligations *erga omnes*, a most interesting and delicate question under the heading of unwillingness may arise in connection with the specific *way* in which the state purports to fulfil its duty to investigate and prosecute the most serious crimes. It is beyond controversy

75. M. Politi, The complementarity regime of the ICC, International Criminal Law Network Annual Conference, 18 December 2003.
76. Institut de droit international Resolution 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes', 26 August 2005, *supra* note 73, Art. 3(d).
77. Art. 17 provides that a case is admissible under the heading of 'unwillingness' whenever (i) 'the proceedings were or are being undertaken or the national decision was made 'for the purpose of shielding the person concerned from criminal responsibility'; (ii) there has been an 'unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice'; or (iii) 'the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.
78. Holmes, *supra* note 34, at 668.

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that the Court is to remedy violations of human rights standards entailing shielding the accused from criminal responsibility. Far from uncontroversial, instead, is whether the ICC should equally be entitled to step in when such violations occur to the detriment, rather than to the benefit, of the person subjected to the proceedings.[79] More specifically, there seems to be a need to establish whether the mere fact of a state investigating and prosecuting the most serious crimes can per se be regarded as due performance of the obligations under the Statute and therefore prevent the Court from stepping in or whether, rather, this can only be the effect of investigations and prosecutions carried out in due compliance with international human rights standards. The recent well-known establishment of various special tribunals at the national level, to a greater or lesser extent departing from due process safeguards, makes this question, far from hypothetical, all the more urgent.

Some authors explicitly label this scenario as 'questionable'. They recall that the ICC was never meant to operate as a human rights court and point out that more suitable remedies for this kind of breach are available under international law.[80]

A critical review of this conclusion may be warranted in the light of the letter of the relevant provisions, as well as of the nature of the obligations enshrined in the Statute and the ultimate rationale of the complementarity regime.

First, taking a broad perspective, if we assume that the Court is meant to serve as an international body complementing national jurisdictions in meting out fair punishment for the most serious crimes by abiding by the highest international human rights standards, allowing the ICC to remedy the failures of national courts in complying with due process standards seems entirely consistent with this role.

Second, under Article 17 both an 'unjustified delay' and a lack of independence or impartiality in the national proceedings would trigger a finding of unwillingness by the Court when they are held as 'inconsistent with an intent to bring the person concerned to justice'. A plain assessment of this parameter seems to favour an interpretation referring not solely to the ascertainment of guilt and subsequent punishment, but rather to an impartial assessment of the position and role of the accused consistent with the general principles governing the interpretation of a treaty.[81]

Third, it might be argued that limiting the intervention by the Court to violations occurring to the benefit of the accused would be tantamount to frustrating the very objective underlying the reference to 'principles of due process recognized by international law', namely to circumscribing the Court's discretion. If the Court were, given a departure from due process standards, to determine whether such departure

79. For example, this would be the case in the event of a conviction issued following summary proceedings preventing the accused from submitting exculpatory evidence, or in the event of a court obviously biased against the accused.
80. Benzing, *supra* note 8, at 598.
81. See Art. 31(1) of the 1969 Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

benefited rather than prejudiced the accused (with a view to limiting its intervention to the former cases), such an assessment would likely imply a significant amount of discretion, possibly also jeopardizing the fundamental principle of impartiality vis-à-vis the person on trial which is to guide the Court throughout the exercise of its functions.

Fourth, the Statute as a whole seems to foster the objective and fair assessment of the truth, as opposed to a one-sided approach necessarily leading to the conviction of the accused: Article 54(1) mandates the Prosecutor to 'extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate incriminating and exonerating circumstances equally' with a view to 'establish[ing] the truth'.

Fifth, this reading would seem to be entirely in line with Article 21(3) of the Statute, which specifically mandates that the application and interpretation of law by the Court shall 'be consistent with internationally recognized human rights'.

Finally, an additional element in favour of this view seems to flow from the broader architecture of 'modern' international criminal justice, as first implemented by the ad hoc tribunals. Rule 11 *bis* of the ICTY Rules of Procedure and Evidence[82] makes the Chamber's satisfaction as to the fact that the accused 'will receive a fair trial' a condition for the case being referred to the judicial authorities of a state, in furtherance of the ICTY's 'closing strategy'.[83] It seems beyond controversy that the 'fair trial' referred to in this rule is meant to encompass full compliance with the relevant rules and that failure to comply with any of such rules results in an obstacle to the case being referred to the national jurisdiction, irrespective of whether such failure is to the benefit or the disadvantage of the accused.[84] Similarly, it is the view of the Institut de droit international that any state prosecuting an individual for international crimes on the basis of universal jurisdiction 'is bound to comply with the generally recognized standards of human rights'.[85]

According to the specific perspective of the present study, this reading seems also to be mandated by the assumption that the obligations to investigate and prosecute the most heinous crimes (and to co-operate with the Court, at least among states parties) are obligations *erga omnes* and that complementarity is a procedural jurisdictional tool aimed at allowing their proper performance. The general theory on obligations *erga omnes* has clarified that the performance of such obligations is

82. As amended on 11 Feb. 2005.
83. See Security Council Resolution 1503 (2003) 28 August 2003 – UN Doc. S/RES/1503 (2003); Security Council Resolution 1534 (2004) 26 March 2004 – UN Doc. S/RES/1534 (2004).
84. For a recent review of the issue, including an exhaustive account of the preparatory works, the work of the ILC and the treatment of the issue in the context of the closing strategy of the ad hoc tribunals, see E. Carnero Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: from "No peace without justice" to "No peace with victors' justice"?', (2005) 18 LJIL 829, leaning towards excluding that the ICC may take action where the violation of fair trial guarantees is prejudicial to the accused.
85. Institut de droit international Resolution 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes', 26 August 2005, *supra* note 73, Art. 4.

only satisfactory when the relevant state complies with basic norms and principles strictly associated with them.[86] In the area of the investigation and prosecution of international crimes, the most relevant basic principle appears to be the right to a fair trial, sanctioned as fundamental by human rights treaties on a worldwide basis.[87] By requiring that a state be able and willing to proceed in compliance with internationally recognized human rights standards, the Statute precisely aims at clarifying that not just *any* kind of investigation or prosecution may be regarded as proper implementation of the obligations at stake, but exclusively those which abide by the highest standards of fair trial; accordingly, failure to comply with such standards should be construed as tantamount to failing to perform the obligation and result in the Court legitimately stepping in.[88]

The assumption that human rights shortcomings in investigating and prosecuting the worst crimes prevent the relevant state from adequately performing its obligations under the Statute and, therefore, entail the stepping in of the Court may also have an impact on the interpretation of the requirement of inability as consisting of unavailability, that is, the state being 'otherwise' unable to carry out the proceedings. One may argue that a national system should only be considered 'available' when it incorporates the entire spectrum of substantive and procedural safeguards enshrined in the Statute and by which the ICC is to abide.[89] From the substantive standpoint, the general principles of criminal law would be of relevance.[90] From the procedural standpoint, provisions reflecting the highest standards of fair trial should be crucial.[91]

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86. As upheld by Judge Weeramantry in the dissenting opinion to the ICJ Case concerning East Timor – Portugal v. Australia, Judgment, 30 June 1995, 211 (available at http://www.icj-cij.org/icjwww/icases/ipa/ipa_ijudgments/ipa_ijudgment_19950630.pdf, last visited 20 April 2006).
87. First and foremost, Art. 14 of the 1966 International Covenant on Civil and Political Rights.
88. Although not with specific reference to the Statute and the complementarity principle, this seems also the view of Goodwin-Gill, *supra* note 42, at 220, according to whom the obligation to prosecute an international crime 'would seem to entail the obligation also to conduct a preliminary enquiry into the facts, to co-operate, and to exchange information with other states or international organizations having a recognized interest in the matter or the offender, as well as obligations generally relating to process, impartiality and so forth'.
89. For the complementarity regime as 'a benchmark for judicial effectiveness' see W. W. Burke-White, 'Complementarity in Practice: the International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo', (2005) 18 LJIL 557, at 574. Along the same lines see also Kress, *supra* note 73, at 22, arguing that a state proceeding on the basis of universal jurisdiction (and therefore acting as a trustee of a fundamental value of the international community) 'must adhere to the same human rights limitations in conducting its proceedings as an international criminal court, which has been created as an organ of the international community to preserve the fundamental value in question'.
90. Part 3 of the Statute, 'General principles of criminal law': *nullum crimen sine lege* (Art. 22), *nulla poena sine lege* (Art. 23), non-retroactivity *ratione personae* (Art. 24), individual criminal responsibility (Art. 25), exclusion of jurisdiction over persons under eighteen (Art. 26), irrelevance of official capacity (Art. 27), responsibility of commanders and other superiors (Art. 28), non-applicability of statute of limitations (Art. 29), mental element (Art. 30), grounds for excluding criminal responsibility (Art. 31), mistake of fact or mistake of law (Art. 32), superior orders and prescription of law (Art. 33).
91. In particular, the rights of persons during an investigation (Art. 55), the rights of the accused (Art. 67), and the rules governing the protection of the victims and witnesses and their participation in the proceedings (Art. 68). This seems the view underlying the remark by M. Delmas-Marty, 'The ICC and the Interaction of International and National Legal Systems', in Cassese, Gaeta, and Jones, *supra* note 2, 1915, at 1927, arguing that a process of 'harmonization . . . will clearly be necessary when cases are tried by national courts in application of the principle of complementarity'.

6.4. Complementarity and self-referrals

Beyond the statutory elements, the view of the ICC as a tool enhancing the odds of achieving the paramount goal of ending impunity for the most serious crimes seems also strengthened by the developments witnessed by the Court in the initial phases of its activity. Some states declared that they would have crimes committed on their territory tackled by the Court, rather than themselves, notwithstanding their ability to do so, and referred their own situations to the latter. These scenarios, which apply to all but one[92] of the situations currently pending before the Court, have come to be known in legal parlance as 'self-referrals'.[93]

Several views have been expressed in this respect. One the one hand, some scholars have cautioned against admitting voluntary referrals as a basis for admissibility, highlighting that this would run counter to the intentions of the drafters.[94] According to this perspective a self-referral would still have to satisfy the requirements set forth in Article 17. The political risks potentially associated with a self-referral have equally been signalled as warranting particular caution on the part of the Court.[95]

On the other hand, it has been pointed out that the Statute does not prevent an interpretation whereby states deeming it appropriate to have the Court handle their own situation constitute fora that are as 'inappropriate' as outright unwilling or unable states.[96] In the perspective of the present study, if we assume that the Court and national jurisdictions are meant to complement each other in the furtherance of a common, 'superior' goal, this latter approach seems fully consistent with the objectives of the complementarity regime. Indeed, willingness by states to defer jurisdiction to the ICC in the overarching interest of international justice might prove a most efficient way to achieve the ultimate goal of preventing impunity for the most heinous crimes. The first decisions of the Court seem to have taken this path: Pre-Trial Chamber I held that the self-referral by the Democratic Republic of the Congo was 'consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them'.[97]

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92. The situations in the Democratic Republic of the Congo (available at http://www.icc-cpi.int/pressrelease_details&id=19&l=fr.html, last visited 3 Aug. 2006), in Uganda (available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html, last visited 16 Aug. 2006), and in the Central African Republic (available at http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html, last visited 3 Aug. 2006) all originated from a self-referral of the respective state; the situation in Darfur was referred by the Security Council by Resolution 1593 (2005) (available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm, last visited 3 Aug, 2006).
93. C. Kress, '"Self-Referrals" and "Waivers of Complementarity" – Some Considerations in Law and Policy', (2004) *Journal of International Criminal Justice* 944.
94. M. H. Arsanjani and W. M. Reisman, 'The Law–in-Action of the International Criminal Court', (2005) 99 AJIL 385, at 388.
95. P. Gaeta, 'Is the Practice of "Self-referrals" a Sound Start for the ICC?', (2004) *Journal of International Criminal Justice* 949, at 950–1; Arsanjani and Reisman, *supra* note 94, at 392.
96. Kress, *supra* note 93, at 945: while holding that the practice of a state referring its own situation does not 'give rise to legality concerns', the author cautions against the risks entailed by such practice.
97. Pre-Trial Chamber I 'Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58', para. 40 (ICC-01/04-01/06-8-Corr 17-03-2006, unsealed pursuant to Decision ICC-01/04-01/06-37).

6.5. Concluding remarks on complementarity

The analysis of the specific rules governing the complementarity regime seems to support the view that, far from just being a principle merely allowing the Court not to trample 'on national sovereignty and jurisdiction unless necessary',[98] complementarity should first and foremost be regarded as a device aimed at allowing the joint pursuance of universal objectives and the proper performance of obligations *erga omnes* (i.e., to investigate and prosecute the most serious crimes and to co-operate with the Court). If it is true that, as a matter of principle, national courts are better placed to proceed effectively against these crimes, due to their usual proximity to the scene, it is equally true that the universal nature of the objective of preventing impunity makes it necessary to test the soundness of this assumption on a case-by-case basis. Whenever this assumption proves not to be accurate, be it because of legal obstacles, specific features of the conduct at stake, or political constraints, it is appropriate and of essence that the ICC step in and exercise its complementary jurisdiction with a view to making it possible that this universal objective be actually achieved. Accordingly, it can be argued that the Statute is compatible with a 'modern' paradigm of international relations, whereby all states are under a duty to co-operate in the furthering of universal values, on the one hand; and international institutions and organizations, including the ICC, are meant to assist (to 'complement') them whenever they fail, on the other.

7. Primacy vis-à-vis complementarity: a real alternative?

This overview of the complementarity regime and its rationale prompts us to reconsider the relationship between the two models of international criminal justice outlined above: the model of primacy, that both ad hoc tribunals are commonly considered to represent, and complementarity, as applying to the ICC.

There seems to be little, if any, doubt among commentators as to these two models being radically opposed and alternative to each other.[99] A closer look, however, seems to warrant some doubts. It appears hardly worthy of debate to suggest that the situations envisaged under Article 17 (unwillingness and inability) remind one of those which led the Security Council to establish the ad hoc tribunals. More specifically, it seems that the provision on unwillingness was drafted bearing in mind the situation prevailing in the former Yugoslavia in the early 1990s, when courts were deemed to be technically able (since in place and functioning) but

98. El Zeidy, *supra* note 15, at 912.

99. See, among many, B. S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', (1998) 23 *Yale Journal of International Law* 383, at 384–6; B. Swart and G. Sluiter, 'The ICC and International Criminal Cooperation', in H. A. M. von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 91, at 125 (the situation of the ICC 'is very different from that of the ad hoc Tribunals, which have primary jurisdiction'); Lattanzi, *supra* note 8, at 53; Cassese, *supra* note 8, 348; Kleffner and Kor, *supra* note 9, at v; F. Mégret, 'Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity', ibid., 1, at 23.

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politically unwilling to prosecute, on the one hand;[100] and that the definition of inability was first and foremost meant to cover 'failed' states, the situation arising in Rwanda in the aftermath of the 1994 genocide being commonly mentioned as an example thereof,[101] on the other.

There seems to be room to take this historical record a step further, so as to suggest that the Statutes of those tribunals, rather than choosing to rule out complementarity in favour of primacy, provided an application *ante litteram* of the complementarity principle to the situations experienced in the former Yugoslavia and Rwanda. The ICTY and ICTR Statutes could be regarded as respectively applying the rules on unwillingness and inability to a given historical context.[102] According to this perspective, they confirm that, as a matter of principle, national jurisdictions are indeed better placed to proceed in respect of the most serious crimes, unless and as long as a situation of either unwillingness or inability is given; then, and only then, does international jurisdiction legitimately and necessarily step in. Only with the ICC, a permanent international criminal jurisdiction meant to exclusively operate *de futuro*, was it possible to state this principle under general and abstract terms.

The history and constitutive instruments of other international jurisdictions also seem to support this view. The agreement between the United Nations and the Sierra Leone government establishing the Special Court for Sierra Leone, negotiated and entered into following the adoption of the Statute,[103] endowed the latter with primacy over the national courts of the country. However, the Report of the Secretary-General clarified that the lifespan of the Special Court would be determined by a subsequent agreement between the parties and that the duration of such a lifespan would depend *inter alia* on 'an indication of the capacity acquired by the local courts'.[104]

These elements further support the view that complementarity is the 'right' way in which the relationship between national and international jurisdictions is to be construed.[105] It appears significant that even those who expose the complementary

100. Holmes, *supra* note 34, at 668: 'In the former Yugoslavia, the national courts in parts of the country and in the emerging successor States continued to function but effective prosecutions were not initiated . . . there were serious concerns that any proceedings initiated by these courts would be attempts to shield individuals from ICTY's jurisdiction and from serious punishment for the crimes committed.'

101. Ibid., at 668–9: 'In Rwanda, the judicial system was decimated by the genocide and substantial international assistance was required before the country could begin to prosecute those responsible.'

102. A hint in this direction is to be found in ibid.: 'Put generally, the Security Council was faced with situations where in the former Yugoslavia, there was an unwillingness to investigate and prosecute effectively those responsible for international crimes and in Rwanda there was an inability to do so.' However, the author seems not to go so far as to convey the idea of the 'primacy' vested in the ad hoc tribunals as an *ante litteram* implementation of the complementarity regime enshrined in the Statute.

103. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000 (UN Doc. S/2000/915), signed on 16 January 2002 (http://www.sc-sl.org/scsl-agreement.html, last visited 3 Aug. 2006).

104. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000 (S/2000/915), para. 28.

105. B. Fassbender, 'Comments on Chapters 1 and 2', in Kleffner and Kor, *supra* note 9, 73, at 73–4, identifies a similarity between the notion of complementarity and that of subsidiarity, in that both 'give priority to the lower level of a hierarchy in a system of public function'; he further argues that 'in the process of a further

nature of the ICC as a 'retreat from the primacy of the two International Criminal Tribunals'[106] cannot help acknowledging that the Statute sets up a pluralist system in which national and international factors and elements are meant constantly to enrich and influence each other.

8. Further elements supporting the assumption of the universal nature of the objectives underlying the Statute

The foregoing remarks place complementarity right at the forefront of a perspective where national and international actors are meant to act jointly in furtherance of a universal goal: the prevention of impunity for the most serious crimes.[107] Besides the provisions specifically governing the complementarity regime, there are at least three other sections of the Statute which seem to lend significant support in the same direction: the mechanism of 'reverse co-operation', the regime of withdrawal, and the role of the Security Council.

8.1. The role and main features of 'reverse co-operation'

It is widely acknowledged that co-operation between the ICC and states is crucial in the architecture of the Statute and therefore key to the effective functioning of the Court. What appears to be far less widely acknowledged is the fact there are two perspectives from which the broad issue of co-operation can be considered: co-operation from states to the benefit of the ICC, mostly on request of the latter, and co-operation from the ICC to the benefit of states, whether or not they are parties to the Statute. Unlike the constitutive instruments of most other international jurisdictions,[108] Part 9 of the Statute, under the heading 'International cooperation and judicial assistance', addresses both such perspectives. Albeit virtually neglected both in legal writing and in the national laws implementing the Statute,[109] there seem to be reasons to hold that the Court's co-operation to the benefit of states

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expansion of powers of international organizations and institutions', it [i.e., subsidiarity/complementarity] might 'evolve into a rule of the constitutional law of the international community, governing the general distribution of competences between the organs of that community, on the one hand, and the individual Member States of the international community on the other, and complementing the principle of sovereign equality'.

106. Delmas-Marty, *supra* note 91, at 1916.

107. G. Sluiter, 'Legal Assistance to Internationalized Criminal Courts and Tribunals', in C. P. R. Romano, A. Nollkaemper, and J. K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals – Sierra Leone, East Timor, Kosovo, and Cambodia* (2004), 379, at 383: 'international crimes can be said to affect the interest of every member of the international community'; hence states' preparedness 'to engage in a vertical cooperation relationship'. The author also argues that 'legal assistance express[es] international solidarity' (ibid., at 384).

108. See, however, the 'Memorandum of Understanding' between the Republic of Indonesia and the United Nations Transitional Administration in East Timor regarding 'Cooperation in Legal Judicial and Human Rights Related Matters', dated 6 April 2000 (available at http://www.etan.org/et2000c/december/10-16/14mou.htm, last visited 31 July 2006), whereby the two parties agreed to 'afford *to each other* the widest possible measure of mutual assistance in investigation or court proceedings' (emphasis added) relating to crimes within their jurisdictions, with a view *inter alia* to providing 'due process during the investigation, prosecution and trial of individuals'.

109. For the few exceptions see, in particular, the implementing laws enacted in Belgium, Germany, New Zealand, Sweden, and the Netherlands.

(to which we shall refer as 'reverse co-operation') is equally crucial to the proper functioning of the Statute and to the achieving of its universal goals.

Article 93(10) of the Statute, as supplemented by Rule 194 of the Rules of Procedure and Evidence of the Court,[110] provides that 'the Court may, upon request, cooperate with and provide assistance to a state party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State'. Paragraph 2 of the provision clarifies some of the forms which such co-operation may take (crucially, although not exclusively, in the area of evidence gathering and sharing); paragraph 3 establishes that reverse co-operation may be provided by the Court even to states which are not parties to the Statute, under the same conditions as provided for co-operation lent to the benefit of states parties.

It appears regrettable that the statutory instruments of the Court fail to address the role of reverse co-operation vis-à-vis the principle of complementarity. More specifically, neither the Statute nor the Rules clarify whether a request for co-operation from the Court may or should play a role within the context of the assessment of the conditions under which the Court may step in. In particular, one may wonder whether reverse co-operation may become a tool allowing the state to overcome the 'unavailability' of its judicial system and thereby prevent the stepping in of the ICC. This perspective seems particularly interesting with respect to a state being unable 'to obtain . . . the necessary evidence and testimony' due to the 'unavailability' of its judicial system, since assistance from the Court in evidentiary matters is expressly envisaged as a form of reverse co-operation.

Article 93 and the Statute as a whole allow for contrasting views to be taken.

On the one hand, arguing not only that a request for and offer of reverse co-operation should become a relevant factor of an assessment of the availability of a national judicial system, but also that the Court should proceed to offer co-operation whenever feasible, even in the absence of a request from the relevant state, would result in enhancing the 'friendly' face of complementarity. This view would be entirely consistent with the assumption of this study, namely that the ICC is not meant as a supervisor or censor of national systems of criminal justice, but rather as

110. Rule 194, 'Co-operation requested from the Court':

1. In accordance with article 93, paragraph 10, and consistent with article 96, mutatis mutandis, a State may transmit to the Court a request for co-operation or assistance to the Court, either in or accompanied by a translation into one of the working languages of the Court.
2. Requests described in sub-rule 1 are to be sent to the Registrar, which shall transmit them, as appropriate, either to the Prosecutor or to the Chamber concerned.
3. If protective measures within the meaning of article 68 have been adopted, the Prosecutor or Chamber, as appropriate, shall consider the views of the Chamber which ordered the measures as well as those of the relevant victim or witness, before deciding on the request.
4. If the request relates to documents or evidence as described in article 93, paragraph 10 (b) (ii), the Prosecutor or Chamber, as appropriate, shall obtain the written consent of the relevant State before proceeding with the request.
5. When the Court decides to grant the request for co-operation or assistance from a State, the request shall be executed, insofar as possible, following any procedure outlined therein by the requesting State and permitting persons specified in the request to be present.

a new actor complementing them when they fail, in the pursuit and furtherance of universal goals.

On the other hand, Article 93(10) also makes it clear that reverse co-operation is meant to take place at the request of a state. Accordingly, failure to take advantage of this option could be considered as tantamount to the state being satisfied that the case should be taken up by the Court. Such a state would find itself in a scenario similar to that of self-referrals, whereby a state agrees that the situation of crimes being committed in its own territory be tackled by the Court and asks it to do so.[111]

Following this line of reasoning, the state affected by one or more shortcomings suitable to be remedied by the Court's assistance might avoid being labelled as unable by requesting co-operation from the Court. Conversely, failure to do so might accordingly be construed as the state's agreement that the Court step in, or even as a signal of the state being not only unable but also unwilling to pursue the matter on its own.

Whichever view is taken,[112] the very existence in the Statute of a provision for the Court to assist states in the carrying out of their international duties seems to lend further support to the idea that both the Court and national criminal jurisdictions are meant to serve one goal: putting an end to impunity for the gravest crimes.[113]

8.2. The regime of withdrawal

The regime of withdrawal from the Statute provides additional arguments in support of the view according to which the states' obligations underlying the establishment of the Court, and the goals pursued by the latter, transcend the interest of individual states and are of a universal character.

Article 127[114] provides that, while a state may withdraw from the Statute, it will not be discharged from its obligations relating to the period prior to the withdrawal, including the obligations to co-operate in Court's investigations and proceedings; most significantly, it is provided that the withdrawal will not 'prejudice in any way

111. See above, section 6.4.

112. For a broader discussion on issues relating to reverse co-operation, including an assessment of the risk of a malicious recourse to reverse co-operation by states, see F. Gioia, '"Reverse Cooperation" and the Architecture of the Rome Statute: A Vital Part of the Relationship Between States and the ICC?', Proceedings of the Colloquium 'Corte Penale Internazionale e cooperazione internazionale alla luce dello Statuto di Roma', Lecce, Italy, 21–2 October 2005 (forthcoming).

113. In the perspective of a jurisdictional power shared in furtherance of a common objective, it seems reasonable to imagine that the preferred field of application of reverse co-operation may be the situation whereby a national jurisdiction would be investigating and prosecuting conducts related to those being investigated and prosecuted by the Court at the moment of the request.

114. 1. A State Party may, be written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was Party to the Statute, including any finanicial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with crimical investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

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the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective'.[115]

For the purposes of the present essay, the most significant part of Article 127 lies not so much in its assertion of the right of a state to withdraw, as rather in the peculiar legal effect attached to it. The Statute could not be clearer in stating that, while a state does not need to provide any reason supporting its withdrawal,[116] the withdrawal has *no impact* whatsoever on the '*continued consideration*' of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective. It seems significant that this was already the approach taken in the 1994 ILC Draft Statute. Although based on an opting-in system, requiring the consent of the relevant state (either to general application or limited to a particular conduct or to a particular period of time) for a case to be submitted to the jurisdiction of the Court-to-be, it provided that withdrawal of such consent would under no circumstances 'affect proceedings already commenced under th[e] Statute'.[117]

The rule enshrined in Article 127 results in making withdrawal from the Statute operational *de futuro* only; otherwise stated, termination operates *ex nunc*.[118] One could argue that the limited effects of the withdrawal, under both the ILC Draft and the Statute, not only mirror the fundamental general principle of the law on treaties set forth under Article 70 of the 1969 Vienna Convention on the Law of Treaties[119] but are justified by the universal character both of the obligations at stake and of the interest that they be implemented, in spite of and beyond the changes in attitude to which a state is and remains entitled because of its sovereignty.[120]

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115. It has been stated that the provision is aimed at giving 'the States Parties possibilities of withdrawal, necessarily restricted given the Statute's goal and object, but sufficiently flexible not to seem like a definitive block on their will' (A. Pellet, 'Entry into Force and Amendment of the Statute', in Cassese, Gaeta, and Jones, *supra* note 2, 145, at 167).
116. Ibid., at 171–2.
117. See Art. 22 ILC Draft:

> 1. A State party to this Statute may:
>
> (a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or
> (b) at a later time, by declaration lodged with the Registrar;
> accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.
>
> 2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.
>
> 3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only by giving six months' notice of withdrawal to the registrar. Withdrawal does not affect proceedings already commenced under this Statute. (Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994, 49th session, Supplement no. 10, G.A. Off. Doc. A/49/10, at 82)

118. A. Nollkaemper, 'Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties', in I. F. Dekker and H. H. G. Post (eds.), *On the Foundations and Sources of International Law* (2003), 187.
119. 'The termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.'
120. In November and December 2004, both Ugandan and international media extensively reported that a withdrawal of the referral to the ICC of the situation in northern Uganda was under serious consideration by the Ugandan government, purportedly with a view to facilitating ongoing negotiations with the rebels of the Lord's Resistance Army. Although such withdrawal was never put into effect, this prompts consideration

8.3. The involvement of the Security Council

Similar arguments could also be inferred from the regime applying to the Security Council's involvement in the activities of the Court. It is well known that the Security Council can refer a situation to the Court while 'acting under Chapter VII of the Charter of the United Nations'.[121] Equally well known is that Article 16 of the Statute vests in the Security Council the additional right to request the Court not to commence or proceed with an investigation or prosecution for a period of 12 months. The request has to be the subject matter of a resolution adopted under Chapter VII of the UN Charter and may be renewed 'under the same conditions'.

Although not spelt out in the Statute, it seems reasonable to hold that the power to request a deferral also applies to referrals filed by the Council. No provision is instead made for a withdrawal of the referral; accordingly, it seems reasonable to infer that such withdrawal would not be admissible. Should the Security Council wish, due to changed circumstances, that the Court refrain from acting on a situation previously submitted to it, the only course of action open to the Council would be to request a deferral for a specified, though renewable, amount of time. Even the Security Council acting under Chapter VII of the UN Charter is barred from divesting the Court of its right and duty to proceed with judicial consideration of a situation once this has been made the subject matter of a referral.

Similar thoughts are to be found in legal writing, albeit not explicitly from the perspective of arguing the universal nature of the obligation to investigate and prosecute international crimes. It has been stated that 'once a situation has been referred under Article 13, the system of the ICC appears to be absolutely independent and nothing or no one (except the Court) is entitled to put an end to the proceedings'.[122] With specific respect to the Security Council, it has been pointed out that the latter is 'not entitled to stop definitely a proceeding before the Court, even if the case was engaged following its own initiative', and that, accordingly, 'the only instrument available for the Security Council is the deferral of the investigations

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of whether a withdrawal of a referral would be admissible under the Statute and, in the affirmative, whether such withdrawal would affect the right and duty of the Court to continue considering the referred situation with a view to assessing any individual criminal liability arising in connection with it. The impact of the withdrawal of a referral of a specific situation on the functioning of the Statute is undoubtedly less far-reaching than the act of withdrawal from the treaty as a whole. One may be therefore hold that, since a state may terminate outright its participation in the Statute, it should *a fortiori* be allowed to withdraw a specific referral. However, with a view that such withdrawal should not be turned into a tool for jeopardizing the Statute, its consequences should be drawn along the same lines as those set forth vis-à-vis a withdrawal from the treaty itself. If even a state terminating its participation in the treaty is not allowed to prejudice its obligation of co-operation or the 'continued consideration' by the Court of any matter which was already under its consideration at the time when the withdrawal becomes effective, it seems reasonable to argue that the withdrawal of a referral is without prejudice to (i) the co-operation of the state with the Court in connection with ongoing criminal investigations and proceedings in relation to which the withdrawing state had a duty to co-operate, and (ii) the 'continued consideration' of any matter under consideration by the Court, only provided, in respect of both aspects, that investigation or prosecution or simple 'consideration' by the Court were already under way at the date on which the withdrawal became effective.

121. As mentioned above, it actually did so on 31 March 2005, by referring the situation in the Sudanese region of Darfur (Resolution 1593 (2005), available at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm, last visited 3 Aug. 2006).

122. L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in Cassese, Gaeta, and Jones, *supra* note 2, 627, at 644.

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and prosecutions provided for under Article 16 of the Statute', a power which is submitted to restrictive conditions and only entails the temporary suspension of the proceedings.[123]

9. Concluding remarks

The foregoing remarks lead us to a threefold conclusion: first, the Statute is based on the need to ensure the fulfilment of the obligation to investigate and prosecute the most serious crimes and to co-operate with the Court; second, these obligations are to be construed as *erga omnes* within the meaning of international law; and third, the rules governing the complementarity regime and, more broadly, the Statute as a whole can and should be read in such a way as to allow the effective achievement of the overarching objectives set forth in Preamble. Accordingly, the Statute should be regarded as fully compliant with the 'modern' model of international law and international relations advocated by *Tadić*, whereby all actors on the international scene are expected to act jointly in the preservation of common fundamental values and in the furtherance of universal objectives.[124]

A similar view seems to be shared by those arguing that complementarity is a new, 'revolutionary' concept, meaning 'neither the absolute autonomy of national and international systems of criminal justice, nor the strict subordination of one to the other', and as such difficult to understand 'by reference to traditional concepts of legal systems based on hierarchical systems'.[125] While the 'revolutionary' nature of complementarity may be questioned on the basis of the proposed construing of the 'primacy' of the ad hoc tribunals as its *ante litteram* application, it seems apparent that the ICC will not fail its mission only to the extent that it will be faithful to its role of 'representing the community of nations'[126] and acting as 'a trustee of the fundamental values of the international community'[127] in punishing the worst crimes. The 'formidable achievement'[128] of having states accept some kind of incursion into their sovereign criminal jurisdictions, justified by the need to ensure fulfilment of obligations *erga omnes*, cannot be wasted by interpreting the relevant provisions of the Statute in such a way as to deprive the ICC of its purpose.

There seems to be sufficient authority in the statutory texts for the ICC to construe the principle of complementarity so as not to jeopardize the goals enshrined in the Statute. Although 'the line between domestic and international concern is a function of history rather than principle',[129] this line should be drawn not only in accordance with what states themselves consider as pertaining to the domain of their exclusive concern, but also with what states are *allowed* to consider as such within the context of existing international law. As the ICTY Appeals Chambers put it in the *Tadić*

123. Ibid.
124. For a recent view framing this interaction in the context of the concept of 'multi-level global governance', see Burke-White, *supra* note 89.
125. Delmas-Marty, *supra* note 91, at 1915.
126. *Tadić*, *supra* note 23, para. 58.
127. Kress, *supra* note 73, at 7.
128. Cassese, Gaeta, and Jones, *supra* note 2, 1901.
129. Steinhardt, *supra* note 29, at 240.

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decision, 'it would be a travesty of law and a betrayal of the universal need for justice, should the concept of state sovereignty be allowed to be raised successfully against human rights'.[130] In this respect, it has been highlighted that 'a powerful and successful ICC would herald the rise of an international society which bears almost no relation to the one that we have known since Westphalia'.[131] The fact that the ICC, as any other judicial body, will be sovereign in assessing its own jurisdiction will make any failure in this respect nobody's but its own.[132]

130. *Tadić*, *supra* note 23, para. 58. The same concept echoes in one of the decisions of the UK House of Lords in the *Pinochet* case, according to which conducts amounting to international crimes (in particular, torture and hostage-taking) are not acceptable on the part of anyone including heads of state and any contrary conclusion 'would make a mockery of international law' (Lord Nicholls of Birkenhead, [1998] 3 WLR. 1456 at 1500C–F.).

131. Mégret, *supra* note 99, at 4.

132. See Holmes, *supra* note 8, at 74: the 'fundamental strength of the complementarity regime . . . is that, ultimately, the interpretation and application of the provisions are left to the Court itself'.