

## Universal Jurisdiction and Cooperation between ICC Member States in Prosecuting Nationals of non-Member States

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*Abstract:* With the advent of universal jurisdiction, member States of the ICC can bring the perpetrators of non-member States to justice or prosecute crimes that would have otherwise been inadmissible under the Rome Statute. A bystander state with no territoriality or nationality link when prosecuting under universal jurisdiction relies on the cooperation of another state where the suspect is residing or any other state where the crime took place. The cooperation takes place in multiple forms, including, but not limited to, the extradition of the suspect or the sharing of facts and evidence with the bystander state. This article scrutinizes how the existing ICC system facilitates inter-states cooperation, stressing the need for an effective mechanism that can foster a cooperative relation. It starts with examining the scope of the principle of complementarity, with particular attention to how the principle can withstand competing jurisdiction claims and promote a system of cooperation under which the ICC and the domestic jurisdictions positively complement each other through mutual support and assistance. Finally, it analyzes the resonance of the procedures adopted by the Assembly of the State Parties that can possibly be used to promote inter-state interactions and encourage the requested state to comply with the cooperation request of the bystander state.

*Keywords:* Subsidiary universal jurisdiction; horizontal complementarity; positive complementarity; obligation to cooperate; non-Member States.

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## 1. Introduction: Universal Jurisdiction and the Prosecution of Nationals of non-Member States

The International Criminal Court (ICC) is a permanent court established by the Rome Statute to prosecute international crimes committed in the territory of a State Party (*ratione loci*) or by a person who is national of a State Party (*ratione personae*)<sup>1</sup>. The ICC can only prosecute nationals of non-State Party if that state accepts the jurisdiction of the Court with respect to the crime in question under Article 12(3) of the aforementioned Statute, or the situation is referred to the Court by the Security Council<sup>2</sup>, or at least part of the conduct takes place in the territory of a State Party<sup>3</sup>. On the contrary, if there is

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Disclaimer: for the purpose of this article, the expressions "Member State", "State Party" and the word "State" (with the capital letter) are used to refer to States which are parties of a particular institution (being it, for example, the International Criminal Court or the European Union, as *infra* specified), while the word "state" (with the lowercase letter) refers either to a country which is not part of such institution or to countries in general.

1. The International Criminal Court (ICC) is founded through the adoption of a treaty which took effect in 2002, upon ratification by 60 states; see the Rome Statute of the International Criminal Court, 17 July 1998, No.38544 (entered into force on 1 July 2002) [*hereinafter* Rome Statute].

2. *Id.*, art. 13 (b).

3. The Pre Trial Chamber III observed that "...at least part of the conduct (i.e. the *actus reus* of the crime) must take place in the territory of a State Party. Accordingly, provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law." See the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of*

no territorial or nationality link or the state does not accept the jurisdiction and there is no Security Council referral, the perpetrators of a non-State Party remain immune from the prosecution of the ICC<sup>4</sup>.

A number of scholars stressed that, had the ICC been granted universal jurisdiction, it is possible that this would have externalized its jurisdiction far beyond State Parties and enabled the Court to prosecute crimes irrespective of the place of occurrence or the nationality of the perpetrator<sup>5</sup>. Although the universal jurisdiction was not granted to the ICC, the drafters of the Rome Statute did not restrict the right of its member states to utilize such jurisdiction; rather it is provided that every state has the duty to "exercise its criminal jurisdiction over those responsible for international crimes" and take measures at the national level to ensure "effective prosecution" of such crimes<sup>6</sup>. Furthermore, the Preamble of the Statute clearly stated that "the most serious crimes of concern to the international community as a whole must not go unpunished", meaning that such crimes must be punished no matter where they take place.

The territoriality and the nationality principle that limit and shape the jurisdictional apparatus of the ICC, cannot motivate the restriction

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*Bangladesh/Republic of the Union of Myanmar*, Case No. ICC-01/19, 27, para 61 (14 November 2019).

4. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in Antonio Cassese, Paula Gaeta, and John RWD Jones, *The Rome Statute of the International Criminal Court: A Commentary*, 583, 612 (Oxford University Press 2003). Olympia Bekou and Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 *International and Comparative Law Quarterly* 49, 51 (2007), available at <https://corteidh.or.cr/tablas/R06755-2.pdf> (last visited April 19, 2021).

5. Bekou and Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?* at 52 (cited in note 4); Hans-Peter Kaul considered the rejection of universal jurisdiction as a 'painful weakness' of the ICC regime; see Kaul, *Preconditions to the Exercise of Jurisdiction*, at 613 (cited in note 4). Likewise, Leila Nadya Sadat stressed that, due to the jurisdictional provisions of the Statute, 'many of the most egregious cases will not be prosecuted by anyone'. See also Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* at 118 (Martinus Nijhoff 1st ed. 2002).

6. See the Preamble of the Rome Statute (cited in note 1). However, the obligation to prosecute international crimes (e.g. war crimes) can be traced back to customary international law, and therefore existed even before the adoption of the Rome Statute; see Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (Cambridge University Press, 2005). See also Art. 49, Geneva Convention (I) 1949.

of the national criminal jurisdiction when it comes to the prosecution of international crimes; the states can actually investigate and prosecute under the authority of universal jurisdiction which allows any state "to bring criminal proceedings in respect of international crimes irrespective of the location of the perpetration of the crimes and the nationality of the perpetrator or the victims"<sup>7</sup>. The principle of universal jurisdiction, therefore, can be used as a strong basis to prosecute crimes committed even by the nationals of a non-State Party or the crimes which are otherwise inadmissible under the Statute of the Court. It is particularly worth mentioning here that the jurisdiction of the States to prosecute crimes committed by non-nationals (in the territory of another State) "must be governed by clear rules" and the standards recognized under international law<sup>8</sup>. So, when a State wants to prosecute a crime on the base of universal jurisdiction, international law requires that the alleged offender must be present in its territory<sup>9</sup>. In the absence of the alleged offender (non-national), the prosecuting State can only initiate investigation and request for extradition<sup>10</sup>.

However, a number of states not party to the Rome Statute have experienced, or have been experiencing, serious violation of human rights and humanitarian abuses during the armed conflicts which the ICC has manifestly failed to address, due to the lack of its jurisdiction. For instance, the ICC could not start an investigation into the crimes

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7. Zdzislaw Galicki, *Preliminary Report of the Special Rapporteur on the Obligation to Extradite or Prosecute*, International Law Commission U.N. A/CN.4/571, 6 (2006), available at <https://digitallibrary.un.org/record/578129> (last visited April 19, 2021); see also Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* at 278 (Cambridge University Press, 2015).

8. See Institute of International Law - Krakow Session *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes* (Aug 26, 2005). available at [https://www.idi-iil.org/app/uploads/2017/06/2005\\_kra\\_03\\_en.pdf](https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf) (last visited April 19, 2021).

9. *Id.* paragraph 3(b).

10. *Id.* It is highly contentious whether the universal jurisdiction *in absentia* is prohibited under international law or not. It is suggested that a state must not exercise universal jurisdiction *in absentia* "where there is a "general" prohibitive rule under international law to that effect"; see Mohamed El Zeidy, *Universal Jurisdiction In Absentia: Is It A Legally Valid Option for Repressing Heinous Crimes?* (Oxford University Comparative Law Forum (2003), available at <https://ouclf.law.ox.ac.uk/universal-jurisdiction-in-absentia-is-it-a-legally-valid-option-for-repressing-heinous-crimes/> (last visited April 19, 2021).

taking place in Syria as it is not a party to the Rome Statute, and a referral to the Court by the UN Security Council was blocked by Russia and China<sup>11</sup>. But the non-membership to the ICC or the non-referral of a situation is not, or should not be the ground for impunity. The states frequently exercise universal jurisdiction and initiate measures at the national level to bring an end to such impunity. With respect to the situation in Syria, the German Federal Public Prosecutor (*Generalbundesanwalt*), on the basis of the principle of universal jurisdiction, opened investigations focusing on Jamil Hassan as one of the Syrian officials responsible for committing international crimes in Syria, and on 8 June 2018, the Federal Court of Justice (*Bundesgerichtshof* – BGH) issued an arrest warrant against him<sup>12</sup>. Also the Higher Regional Court in Koblenz (*Oberlandesgericht Koblenz*) recently charged two former members (Anwar R. and Eyad A.) of the Syrian General Intelligence Service for crimes against humanity<sup>13</sup>. The trial started on 23 April 2020 and it is the first trial initiated under the authority of the principle of universal jurisdiction against the officials of President Assad's regime, who are suspected to be complicit in the torture of many people in Syria<sup>14</sup>. Up until now, the Court has convicted one accused, Eyad A., and sentenced him to four and a half years in prison due to his role in aiding and abetting the torture of detained protesters in Damascus.

Complaints against Syrian officials have also been filled in some other states (i.e. Lebanon, United States, France and Spain). These complaints were filled in either for the assassination of the citizen of

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11. Security Council, Department of Public Information, *Referral of Syria to International Criminal Court fails as negative votes prevent Security Council from Adopting Draft Resolution*, SC/11407, (May 22, 2014), available at <https://www.un.org/press/en/2014/sc11407.doc.htm> (last visited April 19, 2021).

12. *German Authorities Issue Arrest Warrant Against Jamil Hassan, Head of the Syrian Air Force Intelligence* (ECCHR, August 2019) available at <https://www.ecchr.eu/en/case/german-authorities-issue-arrest-warrant-against-jamil-hassan-head-of-the-syrian-air-force-intelligence/> (last visited April 19, 2021).

13. Elisabeth Baier, *A puzzle coming together – The henchmen of Assad's torture regime on trial in Germany*, *Völkerrechtsblog* (April 22, 2020), available at <https://voelkerrechtsblog.org/a-puzzle-coming-together/> (last visited April 19, 2021).

14. *First criminal trial worldwide on torture in Syria before a German Court*, ECCHR (2021) Available at <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/> (last visited April 19, 2021).

those states or on the basis of universal jurisdiction. There are also instances where two states issued separate arrest warrants against the same official of the Syrian Air force Intelligence<sup>15</sup>. In such circumstances, when multiple authorities assert jurisdiction over the same case, a question always remains as to which state will have the priority to prosecute.

Since the State Parties enjoy vast discretion in terms of initiating criminal proceedings based on universal jurisdiction, there is always the possibility that multiple institutions will have conflicting, competing, or concurrent jurisdiction over the same disputes<sup>16</sup>. Hence, in order to minimize this kind of competing claims, it is essential to increase mutual respect and cooperation between the State Parties. In fact, from a practical standpoint, a success of universal jurisdiction mostly depends on the cooperation of the states where the crime has taken place or of any other state where the suspect is residing<sup>17</sup>. The territorial state plays an important role in this activity, since it has direct access to the facts and evidence, and it can substantially contribute to the forum state's investigation by sharing that evidence. Moreover, for the execution of international arrest warrants and extradition of the suspect, a forum state highly relies on the assistance of the custodial state. What this article mainly aims to do is to discuss how these cooperative interactions between the State Parties are being facilitated within the ICC system, analyzing the topic from a normative ground, while also searching for effective mechanisms that can further facilitate inter-state cooperation.

## 2. *Universal Jurisdiction and the Obligation to Cooperate*

The legal principle of universal jurisdiction may either allow or require a state to bring criminal proceedings in respect of international

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15. In October 2018, right after four months of the issuance of arrest warrant by the German Federal Court of Justice, French authorities also issued the same against Jamil Hassan (head of the Air Force Intelligence Directorate) and two other officials of the Syrian security services.

16. Brandeis Institute for International Judges, *The International Rule of Law: Coordination and Collaboration in Global Justice*, Brandeis University (2012).

17. Bekou and Cryer at 61(cited in note 4).

crimes,<sup>18</sup> regardless of the location of the crime and the nationality of the perpetrator or the victim<sup>19</sup>. The rationale behind the principle is profound: certain crimes are so grave and harmful to the international interest that the perpetrators must not go unpunished<sup>20</sup>. In other words, the principle requires every state to exercise its criminal jurisdiction over those responsible for such heinous crimes.

It is generally true to say that the implementation of the principle of universal jurisdiction mostly depends on the cooperation of other States. Since the crimes are generally committed with no nexus to the forum state - to carry out the preliminary investigation - the forum state itself relies on the cooperation of "the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case"<sup>21</sup>. The authorities of those States generally conduct the preliminary inquiry and collect facts and evidence, e.g. documents and witness statements<sup>22</sup>. To frame charges and prosecute the perpetrator, the judicial institutions of the forum State need to have access to those facts and evidence.

Based on these facts and evidence, if the prosecuting authority of the forum State finds a reasonable basis to proceed, and the alleged

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18. To constitute international crime, as has been reflected in the views of Evelyne Schmid, "international law must either directly establish criminal liability at the international level or require states to criminalise conduct in domestic criminal law"; see Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* at 63 (cited in note 7).

19. Kenneth C. Randall, *Universal jurisdiction under International law*, 66 *Texas Law Review* 785–8 (1988); See also International Law Association Committee on International Human Rights Law and Practice, *Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences* (ILA London Conference, 2000). See further, Mary Robinson, 'Foreword,' in *The Princeton Principles on Universal Jurisdiction* 16 (Princeton University Press, 2001), available at [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf) (last visited April 19, 2021).

20. Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?* 88, (862) *International Review of the Red Cross* 375, 378 (2006).

21. Final Report of the International Law Commission, International Law Commission, *The obligation to extradite or prosecute (aut dedere aut judicare) - Final Report of the International Law Commission*, in 2 *Yearbook of the International Law Commission* vol. II Final Report of the International Law Commission, *Yearbook of the International Law Commission* 9 (2014), available at [https://legal.un.org/ilc/texts/instruments/english/reports/7\\_6\\_2014.pdf](https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf) (last visited April 19, 2021).

22. *Id.* at 9.

perpetrator is not present in their territory, the prosecuting authority normally issues an international arrest warrant; or, if the perpetrator happens to be in the custody of any other State, the forum state requests to the custodial state to extradite him<sup>23</sup>. Extradition of the perpetrator is thus one of the fundamental aspects that influence much of the success of universal jurisdiction.

The obligation to extradite or prosecute (*aut dedere aut judicare*) is one of the recognized principles of international law that entails the responsibility of the state to either prosecute or extradite the perpetrator<sup>24</sup>. This principle is intrinsically connected to and supportive of the principle of universal jurisdiction and shares with it a common goal, which is to fight against impunity. Practically speaking, a considerable amount of cooperation between the states is a necessity for the effective implementation of both of the principles<sup>25</sup>.

### 2.1 *The ICC and the Application of the Principle of Universal Jurisdiction*

The statute of the ICC adheres to the principle of complementarity, which states the priority to exercise jurisdiction, meaning a "functional principle" aimed at granting jurisdiction first to the

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23. To read about universal jurisdiction and its relationship to the obligation to extradite or prosecute, see Matthew Garrod, *Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and Universal Jurisdiction in the Light of the Habre Case*, 59 *Harvard International Law Journal* 1, 125 (2018), available at <http://sro.sussex.ac.uk/id/eprint/70382/1/UNRAVELLING%20THE%20CONFUSED%20RELATIONSHIP%20BETWEEN%20TREATY%20OBLIGATIONS%20TO%20EXTRADITE%20OR%20PROSECUTE%20AND%20UNIVERSAL%20JURISDICTION.pdf> (last visited April 19, 2021).

24. *The obligation to extradite or prosecute* at 9 (cited in note 21). Also see International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, available at <https://www.icj-cij.org/en/case/144> (last visited April 19, 2021).

25. The relation between *aut dedere aut judicare* principle, and the obligation to cooperate can be identified in the Preamble to the ICC Statute: 'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'; see the Preamble of the Rome Statute (cited in note 1).

member States<sup>26</sup>; only when the member States are "unwilling or unable genuinely to carry out the investigation or prosecution", the ICC will intervene to carry out the proceedings<sup>27</sup>. In other words, the ICC empowers its State Parties to investigate and prosecute first, whereas, it only works as a Court of last resort. Taking this aspect into consideration, Xavier Philippe implies that the principle of complementarity the ICC follows is based on "a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction"<sup>28</sup>. To put it another way, the principle of complementarity confers the State Party the right to exercise universal jurisdiction and to take effective measures at the national level. Under both principles, the "national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws"<sup>29</sup>.

Nonetheless, unlike the principle of complementarity, universal jurisdiction offers unprecedented discretion to the states, enabling them "to prosecute international crimes independently from any link to their territory or nationals"<sup>30</sup>. As a result, there is a likelihood that multiple states would simultaneously assert jurisdiction over the same case. Thus, universal jurisdiction is a much debated concept as "it has the capacity to infringe state sovereignty and cause positive jurisdiction conflicts"<sup>31</sup>.

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26. Bartram S. Brown, *Primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals*, 23 *Yale Journal of International Law* 386 (1998) available at <https://digitalcommons.law.yale.edu/yjil/vol23/iss2/3/> (last visited April 19, 2021); See Philippe, *The Principles of Universal Jurisdiction and Complementarity* at 380 (cited in note 20).

27. Rome Statute art.17 (cited in note 1).

28. Philippe, *The Principles of Universal Jurisdiction and Complementarity* at 380 (cited in note 20).

29. See *ibid.*

30. Christopher K. Hall, *The Role of Universal Jurisdiction in the International Criminal Court Complementarity System*, in Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes* at 205 (FICHL Publication, 2010) available at <https://www.toaep.org/ps-pdf/7-bergsmo> (last visited April 19, 2021).

31. Jo Stigen, *The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core Crimes*, in Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes* at 13 (FICHL Publication 2010) available at <https://www.toaep.org/ps-pdf/7-bergsmo> (last visited April 19, 2021); George Fletcher, *Against Universal Jurisdiction*, 1 *Journal of International*

To avoid possible conflicts, and ensure an effective implementation of universal jurisdiction, a small number of states have enacted a subsidiarity system, pursuant to which the prosecuting authorities can only initiate criminal proceedings if the territorial state does not genuinely prosecute itself<sup>32</sup>. According to this principle of subsidiary universal jurisdiction, "the priority of prosecution should be given to the states having a direct link to the crimes due to the territoriality or nationality of the perpetrator"<sup>33</sup>. A third state can only proceed if the

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Criminal Justice 580 (2003) available at [https://www.toaep.org/ps-pdf/7-bergsmo](https://watermark.silverchair.com/mqg039.pdf?token=AQECAHi208BE49Ooan9kKhW_Ercy7Dm3ZL_9Cf3qfKAc485y-sgAAApSWGgKXBgkqhkiG9w0BBwagggKIMIIChAIBADCCAn0GCSqGSIB3D-QEHATAeBgIghkgBZQMEAS4wEQQMH3ZL9PqavRF6f2mWAgEQgIICT-s7TK1mtNjgUmiKrXTrdTKxkWuyaLrau4pjgOTFYIY-am8FJgB9Jz7lMteTX-QiF-kaoj6oTNqPgXBeKzoaSJoFLZ00FjtZ8wyVD-CHAYmTuGFT15D8BRZIW-dC5YyOlXXmyQvwVQ69oqyYiGE0G4-CO6Ozcdp8RIIpTgwvTqK6dqgj6ki6r-lKG5VSWnOAmRXSJKN6Muk5gbvvBzPwYD5B0mrluRN6krkbjG51kIR5Cle-C6O7rbfAdCkjOLbshfqsAKNWVLPgVgVNPp0gVelbmFgcp_uM7KIDlje-p5MX-5g00YI0IKEXlsTAEaajtZKgv566uU9m4dVz-qrHEaXYSnGw3Q0LtdlpueY_FQ0uaRb839-EN3MGcspjNRnr5S_nCVygrC0PPa5VcUw04Fieq2oPtYboGxL-8vGMYOfZdgZnbqfe27uyN2g6f96OJw1B0jvweecYSPHxsLocnK-MFzvr129n-DTHbFmzArRwoq_Hqg5zdc9I7szweLbz2bwckLbWeFF6olx8chURA_AH2qoJnt-smOaiblfWbW9PFKPkI8QX8SI575RY5b3j7xlPZhk7UzL3QUzCwkbGpPllf-cPxIO-sEZ8mhdshJYReHtx18kvC5fc5b8uDPfp9XIILA-vvsfEJmgYipvc0pE1lZVa-Osw22Uct0OuC8-c7CvyEQ7pzhLwZ7yN_n-q9leyUG3w8QEMssdFSN-4Cs2LwJAsy6ik8DKfLIR-raA5spyJ-s5kaGx3_9pGcKlDIxqh_mFA4ItbYG-4Va2-Da8ZsUXzf3h (last visited April 19, 2021); See further Cedric Ryngaert, <i>Complementarity in Universality Cases: Legal-System and Legal-Policy Considerations</i>, in Bergsmo, <i>Complementarity and the Exercise of Universal Jurisdiction for Core Crimes</i>, at 197 (FICHL Publication 2010) available at <a href=) (last visited April 19, 2021); Laura Burens, *Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court*, *Criminal Law Forum* 76 (2016), available at <https://link.springer.com/content/pdf/10.1007/s10609-016-9272-9.pdf> (last visited April 19, 2021).

32. To read about Spanish, Belgium and German subsidiarity principle, see Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 *Michigan Journal of International Law* 932, 949 and 954 (2008-9) available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil> (last visited April 19, 2021); See Rosa Ana Alija. Fernández, *The 2014 Reform of Universal Jurisdiction in Spain*, 13 at 717 (*Zeitschrift für Internationale Strafrechtsdogmatik* 2014); See also Burens at 77 (cited in note 31).

33. To read more about the idea of subsidiarity, see K. Hall (cited in note 30); Claus Krefß, *Universal Jurisdiction over International Crimes and the Institut de droit*

territorial state or the state of nationality is "manifestly unwilling or unable" to prosecute the perpetrator<sup>34</sup>.

It seems that the principle of subsidiary universal jurisdiction and the principle of complementarity have conceptual similarities since both of the principles deal with the priority among several authorities in terms of exercising jurisdiction. But they cannot be equated so easily since, on the one end, the subsidiary universal jurisdiction deals with a horizontal relationship between the states and, on the other hand, the complementarity principle of the ICC system regulates a vertical relation between the State Parties and the ICC. Essentially, the vertical complementarity as prescribed by the Rome Statute cannot fix the horizontal jurisdiction conflicts between the State Parties. But if the ICC's vertical complementarity system could be turned into a horizontal one, this would minimize much of the clashes and help ensure a coherent application of the principle of subsidiary universal jurisdiction.

## 2.2 *Subsidiary Universal Jurisdiction and Horizontal Complementarity*

Since universal jurisdiction entails a non-binding duty of states to prosecute international crimes, naturally, a question would arise about which of the member States will perform the duty and which of the other states will have the duty to cooperate in that process. Here comes the relevance of the concept of subsidiary universal jurisdiction according to which the priority of prosecution should be given

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*international*, 4 JICJ 561, 580 (2006), available at <https://academic.oup.com/jicj/article-abstract/4/3/561/814320?redirectedFrom=PDF> (last visited April 19, 2021); Antonio Cassese, *Is the Bell Tolling for Universality? A plea for a Sensible Notion of Universal Jurisdiction*, 1 JICJ 589, 593 (2003), available at <https://academic.oup.com/jicj/article-abstract/1/3/589/2188870?redirectedFrom=fulltext> (last visited April 19, 2021); Fannie Lafontaine, *Universal Jurisdiction—the Realistic Utopia*, 10 JICJ 1277, 1280 (2012) available at <https://academic.oup.com/jicj/article-abstract/10/5/1277/817161> (last visited April 19, 2021); See also *Burens* at 77 (cited in note 31).

34. Florian Jeßberger, Wolfgang Kaleck and Andreas Schueller, *Concurring Criminal Jurisdictions under International Law*, in Bergsmo, ), *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes*, at 239 (FICHL Publication 2010) available at <https://www.toaep.org/ps-pdf/7-bergsmo> (last visited April 19, 2021); See also *Burens* at 78 (cited in note 31).

to the states with a direct connection to the crime<sup>35</sup>. Intriguingly, the notion of subsidiary universal jurisdiction is nothing but corollary to the principle of horizontal complementarity, which also entails the priority of nexus states to prosecute international crimes. The principle of horizontal complementarity implies that the jurisdiction of the bystander state that has no link to the alleged crime is complementary to the jurisdiction of the territorial or national state<sup>36</sup>. Accordingly, the bystander states shall exercise jurisdiction only if the territorial or national state (nexus state) is unwilling or unable to carry out its duty to prosecute<sup>37</sup>.

However, the fundamental concern that is likely to be encountered is the normative basis of this concept since international law is still evolving in terms of recognizing the principle of horizontal complementarity. Although there is hardly any codified law, the Resolution of the Institute of International Law adopted in 2005 seems to be the core legal basis that endorses the applicability of the complementarity principle on the inter-state level<sup>38</sup>. According to Paragraph 3 (c) of the Resolution, any State having custody of the alleged perpetrator, before commencing the trial based on universal jurisdiction, asks the territorial or nationality State "whether it is prepared to prosecute that person". Only if "these States are manifestly unwilling or unable to do so", the custodial State commences the trial<sup>39</sup>.

This clause of the resolution is unique and peculiar to the general understanding of international law because, under classic international law, the inter-state jurisdictions are mainly concurrent and not

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35. The presence of the suspect on the territory of a state may also help to prove certain amount of connection to the alleged crime which may provide a basis to exercise universal jurisdiction, see Julia Geneuss, *Fostering a Better Understanding of Universal Jurisdiction*, 7 JICJ 945, 956 (2009).

36. Carsten Stahn and Mohamed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, at 857 (Cambridge University Press, 2011).

37. Stigen at 133 (cited in note 31); see also Burens, *Universal Jurisdiction Meets Complementarity* at 85 (cited in note 31).

38. See Institute of International Law - Krakow Session, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes* (cited in note 8).

39. *Id* at para 3(c).

complementary to each other<sup>40</sup>. It is due to the sovereign power and equal rights of every state to exercise its national jurisdiction independently of the interference or claims of another state. Practically speaking, any state can assert jurisdiction over a specific case and is not bound to defer that case to the nexus state unless there exists any other treaty obligation between them.

At this juncture, it seems important to rethink whether the classic understanding of inter-states relationships might have changed based on the fact that the states have become members of the ICC<sup>41</sup>. Simply put, one may wonder whether the member States by ratifying the Statute have also indirectly accepted the complementarity regime on the inter-state level. It is worth mentioning here that the Rome Statute is non-self-executing and "does not lead to an automatic transformation of the vertical complementarity system into a horizontal one"<sup>42</sup>. But, of course, the Statute can provide a solid basis for the states to incorporate the principle into their national laws and apply in shaping horizontal (inter-state) relations.

A small number of states have already enacted a subsidiarity system that equally serves the goal of horizontal complementarity<sup>43</sup>. Germany is one of the few countries that introduced a subsidiarity system in terms of applicability of universal jurisdiction. The Code of Crimes against International Law (Volkerstrafgesetzbuch) in conjunction with the relevant provisions of the Code of Criminal Procedure (Strafprozessordnung, 'StPO') offers a comprehensive framework and empowers the German courts to investigate and prosecute based

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40. Ryngaert, *Horizontal Complementarity* at 858 (cited in note 36); see also Rod Rastan, *Complementarity: Contest or Collabortion?* in Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes*, at 98 (FICHL Publication 2010) available at <https://www.toaep.org/ps-pdf/7-bergsmo> (last visited April 19, 2021); see further Burens, *Universal Jurisdiction Meets Complementarity* at 81 (cited in note 31).

41. See *ibid.*

42. See *ibid.*; Ryngaert, *Legal-System and Legal-Policy Considerations* at 177 (cited in note 31).

43. Belgium, Spain and Germany are at the forefront of introducing a subsidiary system; see Preliminary Title of the Belgian Code of Criminal Procedure, Art. 10, 1bis, and Art. 12bis.

on universal jurisdiction<sup>44</sup>. But the StPO provides that "the federal prosecutor (Generalbundesanwalt) can renounce the prosecution of an act under the *Volkerstrafgesetzbuch* if that act is prosecuted by a state on whose territory the offence was committed (the territoriality principle), whose national is suspected of having committed it (the nationality principle), or whose national was harmed by it (the passive personality principle)"<sup>45</sup>. The federal prosecutors are therefore vested with the discretion to renounce the prosecution of an act if it does not have any connection with the interest of Germany, meaning that the priority of the prosecution has been given to the state with a direct link to the crime. In doing so, Germany appears to implement the complementarity principle of the Rome Statute at the state level and to give it a horizontal effect<sup>46</sup>. Likewise, in 2014, Spain adopted a new law that limits the extent of universal jurisdiction under which Spanish courts can prosecute international crimes committed abroad. A prosecution can only take place if the suspect is a Spanish citizen, a foreigner residing in Spain (habitual residence) or a foreigner whose extradition has been denied by Spain<sup>47</sup>. It means that the Spanish authority will not initiate any proceeding, or defer the case if the foreign suspect has no connection with its territory, or resides in the territory of other states. However, one thing that is common to these legislations is that the priority of prosecution has been given to states having a direct connection to the crime; in doing so, the states uphold the principle of subsidiarity, demonstrating commitment to complement other states with a closest link to the crimes. The concern here is whether the states adopting the subsidiarity system are actually obliged to perform the complementarity role, since the very decision as to whether the forum state should be required or only advised

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44. Code of Crimes against International Law (*Volkerstrafgesetzbuch*) (2002). Ryngaert, *Horizontal Complementarity* at 869 (cited in note 36).

45. German Code of Criminal Procedure section 153(f)(2)(4); Ryngaert, *Horizontal Complementarity* at 869 (cited in note 36). For a general overview of the universal jurisdiction in Germany, see Cedric Ryngaert, *Universal Jurisdiction over Violations of International Humanitarian Law in Germany*, 47 (The Military Law and the Law of War Review 2008) available at <http://www.ismllw.org/REVIEW/2008%20ART%20Ryngaert.php> (last visited April 19, 2021).

46. Ryngaert, *Horizontal Complementarity* at 869 (cited in note 36).

47. Art. 23 § 4 (LO 1/2014). For more, see Fernández at 717 (cited in note 32).

to proceed is highly discretionary<sup>48</sup>. As discussed above, the federal prosecutor holds enormous discretion to renounce the prosecution. Therefore, in the absence of any territorial or nationality link, a mere unwillingness or inability of the nexus state does not create any binding obligation on the part of the prosecutor and courts of forum state to prosecute the alleged crime. So the complementarity principle appears to provide only a non-binding guideline for the judicial institutions of third state<sup>49</sup> and the benefit it brings in terms of inter-state relations is more nuanced.

### 2.3 Positive Complementarity and a System of Cooperation

At this point, what is relevant for our purposes is to find out whether the complementarity principle can provide a basis to ensure cooperation between the national authorities of the member States. First of all, it is important to mention that the system of cooperation under part 9 of the Rome Statute is not construed in a one-sided fashion, rather based on the premise that the ICC and the domestic authorities will mutually support each other in the process of ending impunity<sup>50</sup>. This idea of mutual support is grounded on the principle of positive complementarity, meaning that the Court and the States will complement each other in a positive manner through mutual assistance and cooperation<sup>51</sup>. "Positive' complementarity requires the Court and the domestic jurisdictions to work together, share burden and cooperate with a view to facilitate effective investigations and prosecutions<sup>52</sup>. In Carsten Stahn's words, it provides "a means to institutionalize a multidimensional system of cooperation under which the ICC and domestic jurisdictions operate as part of a joint network"<sup>53</sup>. Intriguingly, this multidimensional system of cooperation does not only include

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48. Stigen at 148 (cited in note 31).

49. Ryngaert, *Horizontal Complementarity* at 872 (cited in note 36).

50. Id at art. 93(10). Carsten Stahn, *Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity* in Carsten Stahn and Mohamed M El Zeidy, 2 *The International Criminal Court and Complementarity: From Theory to Practice* 249 (Cambridge University Press, 2011).

51. Stahn, *Taking complementarity seriously* at 260 (cited in 50).

52. Ryngaert, *Legal-System and Legal-Policy Considerations* at 175 (cited in note 31).

53. Stahn, *Taking complementarity seriously* at 263 (cited in note 50).

cooperation between the ICC and the State, but also involves inter-state interactions and assistance<sup>54</sup>. It is also suggested that the actual assistance should "as far as possible be delivered through cooperative programmes between states themselves, as well as through international and regional organisations and civil society"<sup>55</sup>. Such mutual cooperation and assistance are crucial for enabling domestic courts to ensure effective prosecution based on universal jurisdiction<sup>56</sup>.

The modalities of inter-state assistance of which may include, but are not limited to the sharing of information and evidence, the transfer of criminal proceedings, or other forms of assistance. There are some instances of bystander states requesting information about investigation and prosecution which the nexus states have conducted. For instance, in 2009, Spain, asked Israel to inform it about any investigations carried out by Israel in relation to a number of senior Israeli military officers against whom a Spanish human rights group had filed a case<sup>57</sup>. After investigating, Judge Andreu later determined that the documents forwarded by the Israeli embassy in Madrid made it clear

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54. The concept of 'positive complementarity' was significantly developed after the Review Conference took place in Kampala, Uganda. During the 8th Session of the Assembly of States Parties to the Rome Statute (ASP), the Bureau presented a report, providing that the State Parties may "even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions"; See Resolution ICC-ASP/8/Res.9, Review Conference, at 21 (adopted on March 25, 2010). Also see Resolution RC/Res.1 (adopted on 8 June 8, 2010).

55. ICC Assembly of States Parties, *Report of the Bureau on Stocktaking: Complementarity, Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap*, at 4, (ICC-ASP/8/51, 2010) available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-51-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf) (last visited April 19, 2021); see also Stahn, *Taking complementarity seriously* at 264 (cited in note 50).

56. Rastan, *Complementarity: Contest or Collaboration?* at 125 (cited in note 40), where he stressed that, "interaction between and within competent national authorities augments the scope for complementary support for the ICC's own investigative efforts. International cooperation between different jurisdictions may also increase the efficiency and viability of launching criminal proceedings on the basis of universal jurisdiction".

57. Ryngaert, *Horizontal Complementarity* at 865 (cited in note 36). For a discussion about the *Shehadeh* case, see S. Weill, *The Targeted Killing of Salah Shehadeh. From Gaza to Madrid*, 7 JICJ 617 (2009) available at <https://academic.oup.com/jicj/article-abstract/7/3/617/864382> (last visited April 19, 2021).

that Israel was not willing to prosecute the officers<sup>58</sup>. There are also instances of nexus states cooperating with the request of bystander states that have launched criminal proceedings based on universal jurisdiction. For example, in prosecuting Rwandan *Génocidaires*, bystander states, such as Belgium, have greatly benefited from the assistance of Rwanda. But it is not always the case that the nexus state responds positively, as sometimes it shows unwillingness or refuses to assist. Such lack of cooperation and collaboration has been evident in the attempts to prosecute former Chadian dictator Hissène Habré<sup>59</sup>. The Belgium Court asserted universal jurisdiction over the case, and requested Senegal to extradite him to Belgium. Senegal, which has been Habré's place of residence since 1990, refused<sup>60</sup>. Later, he was prosecuted by the Extraordinary African Chambers (EAC) and sentenced to life in prison. However, had there been the applicability of complementarity principle at the inter-state level, this kind of conflicting claim could have been resolved in an amicable manner.

*Legal Basis:* Although the 'positive complementarity' is not expressly regulated, it is "embedded in the structure of complementarity" rooted in the provisions of the Rome Statute<sup>61</sup>. It was mainly formulated as one of the fundamental principles of Prosecutorial Strategy<sup>62</sup>. The Office of the Prosecutor (OTP), as a part of the prosecutorial strategy, adopted "a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation"<sup>63</sup>. The main goal of OTP's participation

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58. Ryngaert, *Horizontal Complementarity* at 865 (cited in mote 36). To read the original Order, see *Preliminary Report 157/2.008-G.A.*, Audencia Nacional, (29 January 2009).

59. Brandeis Institute for International Judges (cited in note 16).

60. See *ibid.*

61. See Rome Statute, Art 17 and Art. 53, they may offer a normative space for positive complementarity; see Stahn, *Taking complementarity seriously* at 265 (cited in note 50).

62. *Report on Prosecutorial Strategy*, at 4-5 (Office of the Prosecutor, (September 2006) available at [https://www.icc-cpi.int/nr/rdonlyres/d673dd8c-d427-4547-bc69-2d363e07274b/143708/prosecutorialstrategy20060914\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/d673dd8c-d427-4547-bc69-2d363e07274b/143708/prosecutorialstrategy20060914_english.pdf) (last visited April 19, 2021).

63. *Id* at 5; see The Office of the Prosecutor, *Prosecutorial Strategy (2009-12)*, at 5 (Office of the Prosecutor, February 2010) available at <https://www.icc-cpi.int/nr/>

in a system of cooperation is to promote national proceedings as it is the national authority that bears the primary responsibility to conduct investigation and prosecution.

However, the *positive approach* to complementarity, that formed part of the prosecutorial strategy, received a new dimension during the Review Conference held in Kampala, Uganda<sup>64</sup>. Throughout the conference, the term was used "to refer to the involvement of States, international organisations and civil society in strengthening justice at the national level"<sup>65</sup>. The outcome was reflected in the Resolution adopted by the Review Conference, which recognizes "the desirability for States to assist each other in strengthening domestic capacity to ensure" effective investigations and prosecutions of international crimes<sup>66</sup>.

This Resolution was a formal recognition of how the principle of positive complementarity encourages inter-state cooperation, aiming to support the national jurisdictions to conduct genuine investigations and trials of the core international crimes. Interestingly enough, the Rome Statute also facilitates a positive form of cooperation. Preambular paragraph 4 of the Statute provides : "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". The Statute, by introducing the term "international cooperation", seems to have widened the scope, encouraging both vertical and horizontal forms of cooperation between the Court and State Parties, and other stakeholders, including international organizations and civil society.

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rdonlyres/66a8dcdc-3650-4514-aa62-d229d1128f65/281506/otp-prosecutorial-strategy-20092013.pdf (last visited April 19, 2021).

64. The foundations for the Review Conference discussion on complementarity can be found in the 8th Session of the Assembly of States Parties to the Rome Statute (ASP); see Resolution ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, (adopted on November 26, 2009).

65. Bergsmo, Bekou and Jones, *Complementarity after Kampala: Capacity Building and the ICC's Legal Tools*, 2 Goettingen Journal of International Law 791, 793 (2010) available at <https://www.legal-tools.org/doc/067928/pdf/> (last visited April 19, 2021).

66. See Resolution RC/Res.1, para 5 (cited in note 54).

### 3. Cooperation between the ICC Member States

In the absence of ICC jurisdiction over the nationals of non-Member States, the Member States often invoke universal jurisdiction and, thus, use their domestic judicial systems to prosecute these perpetrators. However, a domestic court naturally faces challenges in conducting a fair trial in an extraterritorial case if the alleged perpetrator is in the custody of another state which is unwilling to extradite him. A lack of cooperation in collecting and sharing the evidence on the part of the territorial state would also make prosecutions difficult. Therefore, a strong cooperation regime within the member states is essential for the prosecution of nationals of non-member states<sup>67</sup>.

The Rome Statute introduces a sophisticated regime of cooperation, underpinned by Article 86, which entails an obligation on the part of the state authority to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court"<sup>68</sup>. The Statute encompasses general provisions on how requests for cooperation should be made<sup>69</sup>; provisions on arrest and surrender as a form of cooperation<sup>70</sup>; and provisions on cooperation with respect to waiver of immunity and consent to surrender<sup>71</sup>, as well as other forms of cooperation<sup>72</sup>.

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67. For an in-depth analysis of the importance of cooperation between the ICC and the states, see Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 *European Journal of International Law*, 2, 13, (1998), available at <http://ejil.org/pdfs/9/1/1477.pdf> (last visited April 19, 2021); James Crawford, *An International Criminal Court?*, *Connecticut Journal of International Law*, 12, 1997, pp. 255-256.

68. Seventeen provisions of the Rome Statute deal with cooperation and they are included in Part 9 of the Statute. See Bekou and Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?* at 63 (cited in note 4); Dire Tladi, *When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic*, 7 *African Journal of Legal studies* 381, 386-390 (2014) available at [https://brill.com/downloadpdf/journals/ajls/7/3/article-p381\\_5.pdf](https://brill.com/downloadpdf/journals/ajls/7/3/article-p381_5.pdf) (last visited April 19, 2021).

69. *Rome Statute*, Art. 87 (cited in note 1).

70. See *ibid.*, Art. 89, 90, 91 and 92.

71. See *ibid.*, Art. 98.

72. See *ibid.*, Art. 93(1). Article 93(1) provides: "States Parties shall...provide the following assistance in relation to investigations or prosecutions: (a) The identification and whereabouts of persons or the location of items; (b) The taking of

It is worth mentioning that the ICC's cooperation mechanism is limited to State Parties to the Statute. There are two exceptions: the first, when a non-party state accepts the jurisdiction of the Court pursuant to Article 12(3) and, this way, it also agrees to cooperate under Part 9 of the Statute; the second, based on an 'ad hoc agreement', any non-party State may provide assistance to the Court<sup>73</sup>. Another possibility would be for the Security Council - acting under Chapter VII of the UN Charter - to require any state to cooperate with the Court<sup>74</sup>.

Practically speaking, the above-mentioned cooperation regime regulates a vertical relationship between the states and the ICC, and not an horizontal one among the member States. It is thus a matter of concern whether or not a State Party is under an obligation to comply with the cooperation requests of other State Parties.

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evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; (c) The questioning of any person being investigated or prosecuted; (d) The service of documents, including judicial documents; (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court; (f) The temporary transfer of persons as provided in paragraph 7; (g) The examination of places or sites, including the exhumation and examination of grave sites; (h) The execution of searches and seizures; (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".

73. See *ibid.*, Art. 87(5). Under Article 87(6) of the Rome Statute, the ICC may also ask any International Organization to cooperate. See *ibid.*, Art 87(6). For instance, the ICC has entered into an agreement on cooperation with the EU. See *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance*, ICC Press Release (ICC-PRES, April 2006) available at [https://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf) (last visited April 19, 2021); Bekou and Cryer, *The International Criminal Court and Universal Jurisdiction*, at 61 (cited in note 4).

74. United Nations Security Council Resolution 1593, which referred the situation of Darfur, Sudan, to the ICC, provided for an obligation to cooperate. This obligation, however, was limited only to the 'Government of Sudan and all other parties to the conflict in Darfur'. United Nations Security Council Resolution 1373, S/RES/1373 (2001) (adopted on March 31, 2005), available at <https://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf> (last visited April 19, 2021).

Anyway, the Rome Statute provides certain guidelines on how a State Party should deal with the competing requests and claims from any other state concerning the extradition of any suspect or any other form of cooperation<sup>75</sup>. If a State Party receives competing extradition requests from another State Party and from the Court, and if the case in respect of which the surrender is sought is admissible, "the requested State shall give priority to the request from the Court"<sup>76</sup>. On the contrary, if the Court determines that the case is inadmissible, the requested State may proceed to extradite the person to the requesting state<sup>77</sup>.

Further, if a State Party receives a request from any state for the extradition of a person "for conduct other than that which constitutes the crime for which the Court seeks the person's surrender" and it is under "an existing international obligation to extradite the person to the requesting State", the requested state shall determine "whether to surrender the person to the Court or to extradite the person to the requesting State"<sup>78</sup>. In making its decision, the requested State shall consider all the relevant factors, *inter alia*, "the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought"<sup>79</sup>. However, if a State Party receives competing requests for other forms of cooperation (as prescribed by Article 93), it "shall endeavour ... to meet both requests"<sup>80</sup>.

What if a state is unwilling to fulfill the requests of other states or refuses to extradite the alleged perpetrator? The Statute does not explicitly impose on the State Parties any obligation in terms of extradition to, or cooperation with, the other member States<sup>81</sup>. In the absence of any existing international obligation (e.g., extradition treaties), it is more of the state's discretion whether or not to comply with the request for extradition from other states. The following section deals with issues that may arise out of non-cooperation.

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75. Rome Statute, Art. 90 and 93 (cited in note 1).

76. See *ibid.*, Art. 90(2).

77. See *ibid.*, Art. 90(3).

78. See *ibid.*, Art. 90(7).

79. See *ibid.*, Art. 90(6).

80. See *ibid.*, Art. 93(9).

81. See *ibid.*, Art. 90(3), 90(5), 90(6) and 90(7).

#### 4. *Non-Cooperation and a Need for an Effective Mechanism*

One of the most striking issues the ICC is now facing is the need for an effective enforcement mechanism against recalcitrant states that refuse to comply with the cooperation requests<sup>82</sup>. In the event of non-compliance, what the Court can do is only to make a finding to that effect and to refer the matter to the Assembly of State Parties (hereinafter the 'Assembly') or to the Security Council<sup>83</sup>. The Court itself does not have any sanctioning capacity except the power of reporting non-compliance<sup>84</sup>. Owing to the growing trend of non-cooperation, the Assembly attempted to address the matter. In 2011, the Assembly adopted the *Assembly Procedures Relating to Non-Cooperation* (hereinafter the 'Procedures')<sup>85</sup>. The Procedures identify two possible scenarios of non-cooperation. The first one relates to those cases, where the Court has made a judicial determination of non-cooperation and referred the matter to the Assembly<sup>86</sup>. The second scenario relates to those exceptional cases where the Court has not made a judicial determination of non-cooperation but "there are reasons to believe that a specific and serious incident of non-cooperation in respect of an arrest and surrender... is about to occur or is currently ongoing and urgent action by the Assembly may help to bring about cooperation"<sup>87</sup>.

The Assembly follows *formal procedure* to address the first scenario. The President of the Assembly, on behalf of the Bureau, sends an open letter to the state concerned, reminding the state of the

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82. See William A. Schabas, *An Introduction to the International Criminal Court*, at 130, (Cambridge University Press 2nd ed. 2004).

83. Rome Statute, Art 87(7) (cited in note 1).

84. Rod Rastan, *Testing Co-operation: The International Criminal Court and National Authorities*, 21 *Leiden Journal of International Law* 431, 439 (2008) available at <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/testing-co-operation-the-international-criminal-court-and-national-authorities/D11922DB41676CE8A0E390282259BCAF> (last visited April 19, 2021).

85. Assembly Procedures Relating to Non-Cooperation (ICC-ASP, Resolution RC/Res.6, The Crime of Aggression (2010)).

86. See *ibid.*, para. 7(a); see also Tladi, *When Elephants Collide it is the Grass that Suffers: cooperation and the Security Council in the context of the AU/ICC dynamic*, at 387 (cited in note 68).

87. See *ibid.*, para. 7(b); Tladi, *When Elephants Collide it is the Grass that Suffers: cooperation and the Security Council in the context of the AU/ICC dynamic*, at 388 (cited in note 68).

obligation to cooperate and requesting its views on how it would cooperate with the Court<sup>88</sup>. The Bureau then facilitates open dialogue with the requested state based on which it provides recommendation as to whether the matter requires action by the Assembly. The Bureau could also appoint "a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter"<sup>89</sup>. On the other hand, the second scenario involves the use of regional focal points in order to "raise the issue [of non-cooperation] with officials from the requested State and other relevant stakeholders, with a view to promoting full cooperation"<sup>90</sup>.

However, the Assembly adopted these Procedures mainly with an aim to facilitate the state's compliance with cooperation requests from the ICC. There is no record of using these procedures on the inter-state level. Practically speaking, there is no effective measure available to member states to impose a cooperation obligation upon another state's authorities in case of non-compliance. In the views of Laura Burens, the inter-state scenario will usually be followed by diplomatic conflicts<sup>91</sup>.

It is a matter of high appreciation that some mechanisms to facilitate interactions between the domestic authorities have been developed at the regional and intergovernmental levels. For instance, the EU Members States have established an *European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes*<sup>92</sup>. Under this framework, the contact points may exchange information concerning investigations and facilitate cooperation among national authorities. Likewise, at the intergovernmental level, the INTERPOL has established a system of national focal points. Each of the Member States hosts an INTERPOL National

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88. Assembly Procedures Relating to Non-Cooperation, at 425 (cited in note 85).

89. See *ibid.*, para 14(f).

90. See *ibid.*, para 19; Tladi, *When Elephants Collide it is the Grass that Suffers: cooperation and the Security Council in the context of the AU/ICC dynamic*, at 388 (cited in note 68).

91. Burens, *Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court*, at 84 (cited in note 31).

92. EU Council Decision 2002/494/JHA (13 June 2002) available at <https://eur-lex.europa.eu/eli/dec/2002/494/oj> (last visited April 19, 2021).

Central Bureau (NCB), which connects their national law enforcement agencies with other the ones of countries and facilitates support and communications in the process of global investigations<sup>93</sup>. The ICC Member States, when investigating under universal jurisdiction, can certainly seek the help of the INTERPOL.

What is important for our purpose is to find out how an effective mechanism can be developed within the ICC framework to foster inter-state cooperation. From a practical viewpoint, when it comes to the matter of non-cooperation and the need to adopt normative guidelines or procedures, it is the Assembly of State Parties who can perform a critical role<sup>94</sup>. The Assembly already adopted Procedures relating to non-cooperation<sup>95</sup>. However, the concern here is whether these Procedures can be used to facilitate a cooperation request from another state since they mainly aim to promote the execution of the requests coming from the Court. More specifically, paragraph 5 provides that a situation where there is no specific Court request would remain beyond the scope of the Procedures. Consequently, the Procedures cannot be invoked to ensure compliance with the request of a bystander state. Nonetheless, in the event that measures related to inter-state cooperation are adopted, these Procedures can be used as a valid point of reference.

What is more relevant here is to take into consideration the *informal response procedure* prescribed by the Assembly. Paragraph 15 of the Procedures suggests institutionalizing the good offices of the President of the Assembly. Thus, it is necessary to consider whether the President's good offices can be triggered to advance the issue of non-cooperation with officials from the requested state in order to encourage full cooperation. The Procedures provide for the appointment of regional focal points to assist the President in his or her good offices<sup>96</sup>. These focal points can also play a vital role in promoting inter-state interactions. They can share "relevant information ... with members

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93. Available at <<https://www.interpol.int/en/Who-we-are/What-is-INTERPOL>> accessed 22 May 2020.

94. Rome Statute, Art. 112(2)(f). It provides that "the Assembly shall consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation".

95. Assembly Procedures Relating to Non-Cooperation (cited in note 85).

96. See *ibid.*, para. 16

of their respective regional group" and enable the States Parties to take appropriate actions against the perpetrators of non-member States<sup>97</sup>.

## 5. Concluding Remarks

The principle of universal jurisdiction provides the member states with the necessary authority to prosecute even the nationals of non-member states. Two main aspects need to be considered to ensure a smooth application of universal jurisdiction.

At first, the priority in prosecuting should be given to the state (or states) having a direct connection to the crime or the victim (*subsidiary universal jurisdiction*). A bystander state shall only exercise jurisdiction if the nexus state is manifestly unwilling or unable to carry out its duty to investigate or prosecute. Accordingly, the jurisdiction of a bystander state would be complementary to the jurisdiction of the nexus state (*horizontal complementarity*). In any case, it is worth mentioning that state jurisdictions are mainly concurrent, and not complementary to each other. In other words, a mere unwillingness or inability of the nexus state does not create any binding obligation on the part of prosecutors and courts of a bystander state to initiate criminal proceedings. However, if a state wants it, it can bring proper legislation to incorporate a subsidiarity system and/or to give effect to the principle of complementarity at the domestic level.

The second crucial aspect is to ensure an effective mechanism to facilitate inter-state cooperation. Although the ICC Statute does not expressly regulate this issue, it provides a sufficient basis to institutionalise a system of cooperation under which the ICC and domestic jurisdictions can complement each other and cooperate as part of a joint network. Paragraphs 4 of both Article 90 and Article 93, and the positive complementarity as a principle, encourage and provide

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97. ICC Assembly of States Parties, *The Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation in Report of the Bureau on non-cooperation*, at 17 (November 28, 2018) provides that: "each non-cooperation focal point will share relevant information (without disclosing the source of information unless authorized to do so) with members of their respective regional group to enable States Parties to take any action that they may deem appropriate." available at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASPI7/ICC-ASP-17-31-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASPI7/ICC-ASP-17-31-ENG.pdf)

authority to the ICC and its state parties to facilitate cooperation on the inter-state level.

Were there ICC-based mechanisms to ensure cooperation among member states, they would increase the flow of inter-state interactions, improve reciprocal assistance and turn the latter into constructive tools. Given this context, there is a legitimate ground to take seriously the Procedures adopted by the Assembly of State Parties and to explore how the Assembly President's good offices and the focal points can assist in encouraging full cooperation.