

International Criminal Justice:  
An Unattainable Goal or Current Reality?

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## **Abstract**

This thesis examines the area of conflict between the fundamental principles of sovereign equality of states and a people's right to self-determination on the one hand, and the need for efficient protection of human rights and the imperative to end impunity for perpetrators of international crimes on the other. In this context, the argument is focused on the question whether the current system of international criminal justice is suitable to administer justice, i.e. not only appropriate to improve the protection of human rights, but also to promote justice and peace in general.

At the centre of this question lies the problem of selectivity, that is the question whether international criminal law is just another means for powerful states to suppress weaker countries by judging their nationals and even their state officials while at the same time the nationals of powerful nations are basically exempt from the jurisdiction both of foreign national criminal courts and the International Criminal Court (ICC). In order to find an answer to this question and to give a better understanding of international criminal justice, the highly controversial principle of universal jurisdiction and the still vague and blurred principle of complementarity as established by the Rome Statute of the ICC are analysed.

The thesis concludes that the suggestion that any limitation of the principle of state sovereignty is regarded as a success for human rights is false and dangerous since it has even been used to justify the use of force by one state against another and without the authorization of the UN Security Council. However, in view of the unprecedented atrocities committed throughout the 20<sup>th</sup> century by humans against humans, there is clearly an exigence to bring the perpetrators of these crimes to justice to prevent the repetition of at least some of such events in the future. Still, it is indispensable that national criminal courts and the ICC exercise their jurisdiction over foreign perpetrators of the ICC core crimes with caution in order to prevent that international criminal law is abused to further increase the inequality between states.

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*“There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstances”*

*Benjamin B. Ferencz, former Nuremberg prosecutor*

## **A. Introduction**

The creation of the International Criminal Court (ICC) has been described as a historic development in the advancement of human rights and as the most important advance for international law since the establishment of the United Nations.<sup>1</sup> In the same line, Kofie Annan, the United Nations Secretary-General expressed his opinion at the 1998 Rome Conference establishing the ICC that in the prospect of an international criminal court lies the promise of universal justice and asked the delegations to do theirs in the struggle to ensure that no ruler, no state, no junta and no army anywhere can abuse human rights with impunity.<sup>2</sup> These statements are symptomatic of the recent changes in the viewing of international criminal law that are responsible for an extraordinary development in the realm of international criminal justice.

The changes that evolved in the aftermath of the genocide in Rwanda and the ethnic cleansing in the former Yugoslavia cannot be described as anything but exceptional. Not only has the concept of individual criminal responsibility for international crimes like genocide, crimes against humanity and war crimes become widely accepted, but there is also an increasing willingness to bring the perpetrators of these crimes to justice. Therefore, the argument has been made that international criminal law has undergone a maturation process from the declaratory era of some 50 years

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<sup>1</sup> Patten, Chris: “Statement of C. Patten on the International Criminal Court“, July 3, 2002, [http://www.europa.eu.int/comm/external\\_relations/osce/stment/icc120303.htm](http://www.europa.eu.int/comm/external_relations/osce/stment/icc120303.htm) (last visited: September 27, 2004); Schabas, William A.: An Introduction to the International Criminal Court, Cambridge 2001, p. vii.

<sup>2</sup> Cf. Kofie Annan/United Nations, Website of the Rome Statute of the International Criminal Court, last updated on December 19, 2003, <http://www.un.org/law/icc/general/overview.htm> (last visited: January 22, 2005).

ago, through a monitoring and denunciatory phase, into the current modern era of efficient enforcement through personal criminal responsibility.<sup>3</sup>

However, are we really there yet? Is it indeed safe to say that an effective system of international criminal justice is in force or is it still in the process of development or even an unattainable goal? Taking into account only the most recent atrocities in, for instance Iraq and Chechnya, it seems questionable whether the era of impunity for human rights violators is in fact over. Moreover, with respect to the current conflict in northern Uganda there is a vivid discussion as to whether efforts of the ICC to bring to justice perpetrators of war crimes and crimes against humanity would risk jeopardising the ongoing peace process.<sup>4</sup> Even though the changes in international criminal law have undoubtedly been significant, it might be too early to proclaim a new world order. Changes in international law only prevail if they are constantly supported by all or at least the vast majority of states. Yet, in the last years, international criminal law and especially the ICC has been the target of much misunderstanding as well as unrealistic expectations and unfounded and irrational fears. There is hardly any area of international law that in the last two decades has given rise to so many strong and emotional reactions. On the one hand, the changes in international criminal law have been welcomed as a major progress of human rights law; on the other hand they were seen as an uncontrollable and intolerable restriction to state sovereignty.

International criminal law is a discipline that operates in the sensitive area of conflict between the principles of respect for human rights and sovereign equality of states. In this regard special attention must be given to the function of sovereignty as a foundation of friendly relations between states and the problem of 'selectivity', i.e. the creating of double standards for (nationals of) poor and rich countries. Throughout

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<sup>3</sup> Arbour, Louise: "Will the ICC Have An Impact On Universal Jurisdiction?" in: JICJ 1.3 December 2003, pp. 585-588.

<sup>4</sup> Cf. Irinnews.org, UN Office for the Coordination of Humanitarian Affairs, "UGANDA: ICC jeopardising local peace efforts - northern leaders", 25/03/2005, [http://www.irinnews.org/report.asp?ReportID=46323&SelectRegion=East\\_Africa&SelectCountry=UGANDA](http://www.irinnews.org/report.asp?ReportID=46323&SelectRegion=East_Africa&SelectCountry=UGANDA) (last visited: March 30, 2005); Reuters Foundation, Alertnet, "UGANDA: ICC jeopardising local peace efforts - northern leaders", 25/03/2005, <http://www.alertnet.org/thenews/newsdesk/IRIN/fdee10a55e5c2b32acf00205f0fc698b.htm> (last visited: March 30, 2005).

its history, international criminal law has been accused of being just another means for rich and powerful states to suppress poorer and weaker countries by exposing their nationals to foreign criminal courts while at the same time not accepting the same standards for their own nationals. To address these issues and concerns adequately it is important to have a closer look at these two fundamental principles governing international relations, while at the same time keeping in mind that international crimes are still committed by men and not by abstract entities.<sup>5</sup>

To better illuminate the current system of international criminal justice, it is furthermore necessary to view the role of the ICC in context with the jurisdiction of national criminal courts for international crimes. During the negotiations leading up to the adoption of the 1998 Rome Statute of the International Criminal Court (Rome Statute / ICCSt / Statute), this question was a pivotal article in the debate.<sup>6</sup> The solutions developed were both complex and politically sensitive, reflecting the concerns of states over national sovereignty and the potentially intrusive powers of an international institution.<sup>7</sup> The finally adopted so-called 'principle of complementarity' defers in most instances to national efforts and thus establishes a system of 'subsidiarity' of the jurisdiction of the ICC. It therefore must be stressed that although the creation of the ICC is tremendously important for an effective system of international criminal justice, the vast majority of cases will still be tried in state tribunals.

The recent development in international criminal law has, however, also affected the way in which domestic criminal courts exercise their jurisdiction over extraterritorial international crimes. There is a continued growth in the reach of national criminal jurisdiction and thus of cases in national criminal courts that deal with serious violations of human rights committed by foreign nationals abroad. Especially in

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<sup>5</sup> United Nations, Website of the Rome Statute of the International Criminal Court, last updated on December 19, 2003, <http://www.un.org/law/icc/general/overview.htm> (last visited: April 2, 2005).

<sup>6</sup> Cf. Holmes, John T.: "The Principle of Complementarity" in: Lee, Roy S.(editor): *The International Criminal Court – The Making of the Rome Statute – Issues, Negotiations, Results*, The Hague, London, Boston 1999, p. 41; Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 16.

<sup>7</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 668.

the last years national courts have increasingly initiated criminal proceedings to punish the perpetrators of international crimes. Criminal proceedings have been initiated even against (former) high state officials like Augusto Pinochet, Ariel Sharon, Muammer Al-Gaddhafi, Saddam Hussein, Abdoulaye Yerodia Ndombasi, Laurent Gbagbo and Donald Rumsfeld. As a result, the legal basis on which national criminal courts may ground their jurisdiction over extraterritorial international crimes such as torture or genocide has been discussed highly controversial, concentrating specifically on the question of universal jurisdiction.

The aim of this thesis is to give a better understanding of the current system of international criminal justice, by analysing the concept of international criminal law in relation to the fundamental principles of respect for human rights and sovereign equality of states and by giving an insight into the highly controversial principle of universal jurisdiction and the still mostly unclarified and blurred principle of complementarity as established by the Rome Statute.

## **B. The Evolution and Interaction of Human Rights Law and International Criminal Law *versus* the Principle of Sovereign Equality of States**

International human rights law and international criminal law are interlocked in many ways. Obviously, international crimes like genocide, war crimes and crimes against humanity constitute serious violations of human rights. In addition, international human rights law and international criminal law both provide for significant limitations to the principle of sovereignty of states and are in essence reactions to the unprecedented atrocities of the 20<sup>th</sup> century, committed by humans against humans. From the Armenian to the Rwandan genocide, to massacres in East Timor, child abduction in Uganda and ethnic cleansing in the former Yugoslavia, not to mention the atrocities of Nazi Germany, the commission of serious human rights violations was on the agenda throughout the 20<sup>th</sup> century.<sup>8</sup> Still, at the same time, this century has been the century of the genesis of human rights law and international criminal law.

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<sup>8</sup> Cf. Badinter, Robert: "International Criminal Justice: From Darkness to Light" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 1931.

Although at the beginning of the 20<sup>th</sup> century the concept of human rights did hardly exist, it developed, especially after World War II, at an astounding pace. The principle of human dignity as the core of any human right is an achievement of the 20<sup>th</sup> century. Yet it is somewhat shattering that only in the face of the atrocities of World War II and the Holocaust, the international society was able to recognize the concept of human rights and subscribe to its protection. Even more disturbing is the fact that even after World War II the commission of serious violations of human rights did not stop or at least decrease but continued as unresisted as before. Only (very) recently have the conflicts in the former Yugoslavia, Rwanda, Uganda, the Democratic Republic of the Congo (DRC) and the Sudan shocked the international community again. For instance, the conflict in the DRC, was one of the deadliest documented conflicts in African history: in the four year period between 1998 and 2002, about 3.3 million people lost their lives; more than in any conflict since World War II - however, largely ignored by the international community.<sup>9</sup> In addition, the consequences of the war in Iraq are only starting to show themselves.

The United Nations is going through a crisis of redefinition in the post-cold war era, and its credibility in the security and peace-protecting area has been tarnished by the disasters in, for instance, Somalia, Burundi, Rwanda and the former Yugoslavia.<sup>10</sup> Despite this massive criminality in the field of serious violations of human rights, the impunity of the perpetrators has been the rule. One of the striking features of the international community is thus the failure of its collective bodies to discharge their function of preventing or punishing serious, large-scale human rights violations amounting to international crimes.<sup>11</sup>

Yet, in the face of the atrocities committed in the former Yugoslavia and Rwanda, the international community finally made a new effort to prosecute those

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<sup>9</sup> Cf. Amnesty International, 24/06/2004, <http://news.amnesty.org/index/ENGAFR620142004> (last visited: April 1, 2005); Citizens for Global Solutions, last updated: December 9, 2004, [http://www.globalsolutions.org/programs/peace\\_security/peace\\_ops/conflicts/conflicts\\_drc.html](http://www.globalsolutions.org/programs/peace_security/peace_ops/conflicts/conflicts_drc.html) (last visited: April 2, 2005); Human Rights *First* / International Justice, Democratic Republic of Congo (DRC), [http://www.humanrightsfirst.org/international\\_justice/regions/drc/drc.htm](http://www.humanrightsfirst.org/international_justice/regions/drc/drc.htm) (last visited: April 1, 2005).

<sup>10</sup> Nagan, Winston P.: "Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the ad hoc Tribunal for the former Yugoslavia" in: 6 *Duke J. Comp. & Int'l L.* 127.

<sup>11</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003.

responsible for serious violations of human rights and to create a functioning system of international criminal justice. Apparently it is only when the worst has already happened that human beings understand the need to prevent such events in the future. The far-reaching changes in international criminal law that evolved in the aftermath of the genocide in Rwanda and the ethnic cleansing in the former Yugoslavia led not only to the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994,<sup>12</sup> but also to the adoption of the Rome Statute in 1998 and thus to the creation of the ICC. Moreover, they provoked even more significant changes in the way domestic criminal courts deal with human rights violations committed abroad by foreign nationals.

However, at the same time as the willingness to bring the perpetrators of serious human rights violations to justice increased, voices were raised that questioned the legitimacy of exactly these actions. International criminal law is a very sensitive area of law that corresponds tremendously with the concept of sovereign equality of states. Even though modern public international law no longer sees sovereignty as absolute, it is still the foundation of international relations, and with justification. The view that the erosion of sovereignty is always a bellwether for human rights has rightly been criticised as too narrow and one-sided.<sup>13</sup>

While it is unquestionable that, when misused, the concept of sovereignty can shield perpetrators of human rights violations from international reaction or even scrutiny, it must at the same time be noted that the erosion or violation of sovereignty can also occasion grave abuses.<sup>14</sup> Only recently has the so called 'humanitarian intervention', i.e. the unilateral threat or use of force by one state or one group of states,

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<sup>12</sup> In May 1993 and in November 1994, the Security Council of the United Nations determined that the situations in the former Yugoslavia and in Rwanda constituted threats to international peace and security. Accordingly, the Council established the International Criminal Tribunal for the former Yugoslavia (ICTY, Security Council Resolution 827) and the International Criminal Tribunal for Rwanda (ICTR, Security Council Resolution 955) under Chapter VII of the UN Charter. Both the ICTY and the ICTR are subsidiary organs of the Security Council within the meaning of Article 29 of the UN Charter. As such, they are dependent in administrative and financial matters on various United Nations organs; but, as a judicial institution, they are independent of any one State or group of States, including their parent body, the Security Council (Source: ICTY-Bulletin No. 9/10, <http://www.un.org/icty/BL/09art1e.htm> (last visited: March 31, 2005).

<sup>13</sup> Bennoune, Karima: " 'Sovereignty vs. Suffering'? Re-Examining Sovereignty and Human Rights Through the Lens of Iraq" in: EJIL 2002, pp. 243-262.

without the authorisation of the UN Security Council (SC), against another state to protect foreign nationals against serious violations of human rights, been claimed a legitimate exception to the prohibition of the threat or use of force. This is alarming as one could also argue that war - and nothing else is the use of force - is always the worst violation of human rights. Moreover, any discussion of humanitarian intervention must try to reconcile two types of human rights: those of the victims one might hope to protect on the one hand, and the collective human right of self-determination on the other.<sup>15</sup> Besides, humanitarian interventions may even endanger the lives of those that actually shall be saved by it. For example, it is estimated that four times as many people were killed during NATO's eleven-week intervention in the Kosovo than that died in the previous years of fighting between the Serbs and the KLA, and six times as many refugees were created.<sup>16</sup> The evidence thus seems to support the view that at least humanitarian interventions by air, i.e. an intervention constructed solely of dropping bombs, is a contradiction in terms.<sup>17</sup> If states are not prepared to deploy ground troops, because they want to protect their own troops from getting hurt or killed, the willingness to save foreign nationals from serious human rights violations cannot be as strong as purported. In addition, with respect to forced regime changes it is difficult and indeed culturally arrogant to determine what sort of contextually workable regime should replace an existing functioning regime.<sup>18</sup> A forced regime change is thus probably the prime example of a violation of a people's right to self-determination and the principle of sovereign equality of states.

However, even if one accepts that in exceptional circumstances the threat or use of force even by single states, acting on their own initiative, may be justified to stop or prevent serious violations of human rights, one has to admit that there is a high danger of misuse, since there are no clear rules and boundaries as to when viola-

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<sup>14</sup> Ibid., Abstract.

<sup>15</sup> Cf. Brown, Bartram S.: "Humanitarian Intervention at a Crossroads" in: 41 *Wm and Mary L. Rev.* (2000), pp. 1683-., II.

<sup>16</sup> Cf. Vesel, David: "The Lonely Pragmatist: Humanitarain Intervention in an Imperfect World" in: 18 *BYU J. Pub. L.* (2003), pp. 1-58, III. F. 3.

<sup>17</sup> Ibid.

<sup>18</sup> Reisman, Michael W.: "The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea" in: 98 *A.J.I.L.*, July 2004, pp. 516-525, VI.

tions of human rights are so serious that they justify the use of force. There is no neutral body which decides when this borderline has been crossed, instead any state may act according to its own estimation. Furthermore, this instrument is clearly in favour of rich and powerful states as only very few states in the world are militarily and financially strong enough to successfully attack other countries – for what reason so ever. It therefore has been argued that while intervention rhetoric used by strong sovereign nations may create a façade that human rights are the goal, in reality, policy concerns still govern when and how interventions take place.<sup>19</sup> Moreover, one could also make the argument that an international system under which a state could freely interfere with the affairs of another in the name of human rights protection would tend to result in the denial of the fundamental interests and rights of weaker states and their people.<sup>20</sup> Admittedly, no state official in his right mind would dare to use military force to stop human rights violations in, for example, Russia or China. Even wealthy West European states that like to portray themselves as strong protectors of human rights are very cautious when it comes to even mentioning the topic of human rights violations in their diplomatic relations to these countries.

The question is therefore whether also international criminal law is at least endangered to become just another means for powerful states to suppress poorer and weaker countries and to interfere in the internal affairs of such states; or if indeed the development in the last decade has created a functioning system of international criminal justice that applies to all perpetrators of serious human rights violations irrespective of their nationality or the place of commission of the crime.

### **I. The Principle of Sovereign Equality of States**

Of the various fundamental principles regulating international relations, the principle of sovereign equality is clearly one of the most accepted foundations of international law. As the first principle laid down in art. 2 UN Charter, it has the support of all members of the United Nations and thus of all groups of states. Furthermore, the

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<sup>19</sup> Ibid.

<sup>20</sup> Shen, Jiaming: “National Sovereignty and Human Rights in a Postive Law Context” in: 26 Brooklyn J. Int’ L. (2000), pp. 417-446, IV.

General Assembly (GA) has reaffirmed the basic importance of sovereign equality in its 1970 Friendly Relations Declaration,<sup>21</sup> and stressed that the purposes of the United Nations can be implemented only if states enjoy sovereign equality and comply fully with the requirements of this principle in their international relations. Without the mutual respect of sovereignty and equality between states, peaceful international relations would be impossible. The principle of sovereign equality of states is thus one of the most important cornerstones of public international law.

### **1. Sovereign Equality of States and the Right to Self-Determination**

According to art. 2.1 UN Charter, members of the United Nations are to respect the principle of sovereign equality of all UN members. The principle of sovereign equality of states, however, goes way back to the starting time of international law. Sovereignty was the crucial element in the peace treaties of Westphalia; as a concept, it formed the cornerstone of the edifice of international relations that 1648 raised up,<sup>22</sup> and became the foundation for the development of the modern nation state.<sup>23</sup> In its post-Westphalian configuration sovereignty aimed for the exclusive and unsupervised power of the *souverain* within its borders.<sup>24</sup>

#### **a) The People as the Bearer of Sovereignty and Its Right to Self-Determination**

While at the time of the peace in Westphalia, the *souverain* was identical with the monarchic sovereign that is the King or Emperor, who could rule within the borders of his kingdom literally 'like a king' – that is basically like he pleased, the world order has changed fundamentally since then. Starting with the French revolution of 1789, the world has undergone a process of democratization that puts the people into the focus of power. As of today and regardless of the specific system of rule in a state, the people and not a king, a government or any other elite is regarded as the bearer of

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<sup>21</sup> 1970 Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations.

<sup>22</sup> Janis, Mark W.: Introduction to International Law, 4<sup>th</sup> edition, New York 2003, p. 162.

<sup>23</sup> Simonovic, Ivan: "State Sovereignty and Globalization: Are Some States More Equal?" in: 28 Ga. J. Int'l & Comp. L., Summer 2000, pp. 381-404, II.

<sup>24</sup> Bennoune, Karima: " 'Sovereignty vs. Suffering'? Re-Examining Sovereignty and Human Rights Trough the Lens of Iraq" in: EJIL 2002, pp. 243-262, 2. A.

sovereignty. Even if a state is ruled by a dictator like Saddam Hussein, the people remains the bearer of sovereignty and has the right to self-determination. It is therefore the responsibility of each people to regulate its living-together and no other people and no other state is allowed to interfere. Self-determination thus means not only that it is up to the people to determine its domestic and foreign affairs, but also that the people have the right to freely choose its own leaders without any interference from other states and other peoples. Even though it would be cynical to say that the Iraqi people freely chose Saddam Hussein as its leader, it must be stressed that it was – and still is - first of all its own responsibility to deal with him.

Moreover, as has been pointed out by Michael Köhler, it would constitute an unfounded presumptuousness, if one state or one people could dictate to another its legal norms and values and for example subordinate a foreign accused without a valid reason under international law under its jurisdiction.<sup>25</sup> The legitimate individuality of all legal relations within one people, in particular criminal law and criminal jurisdiction, is the expression of a people's sovereignty and its right to self-determination.<sup>26</sup> As has been stressed by Rainer Keller, the realisation of justice is part of the *essentia* of self-determination; therefore as long as a nation is able to conduct an acceptable avengement of human rights violations within its community, no other state or international organisation has a right to intervene - even if they are of the opinion that they could conduct this task better or more effectively.<sup>27</sup> In general it is therefore for the domestic criminal courts to judge upon all crimes committed within the borders of the state in question and by its nationals.

#### **b) The Scope of the Modern Concept of Sovereign Equality**

The modern concept of sovereignty encompasses a number of different rights such as the power to wield authority over all the individuals living in the territory; the power

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<sup>25</sup> Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 439.

<sup>26</sup> Ibid.

<sup>27</sup> Keller, Rainer: "Zu Weltrechtspflege and Schuldprinzip" in: Festschrift für Klaus Lüderssen, Baden Baden 2002, pp. 435, 433.

to freely use and dispose of the territory under the state's jurisdiction and to perform all activities deemed necessary or beneficial to the population living there; as well as the right that no state intrudes in another state's territory.<sup>28</sup> In addition, it includes the right to immunity for state representatives acting in their official capacity; the principle that acts performed by state officials in international relations must be imputed not to the individuals acting on behalf of the state, but to the state itself; and finally the right to immunity from the jurisdiction of foreign courts for acts or actions performed by the state in its sovereign capacity.<sup>29</sup> This principle that no state is allowed to judge upon the judicative, executive and legislative of another state goes back to the 14<sup>th</sup> century dictum of Bartolus: *par in parem non habet imperium*, providing that one sovereign (state) should not adjudicate upon the conduct of another and consequently, that the acts of one state should not be justiciable before the courts of another.<sup>30</sup> The concept of state immunity thus follows of the principle of sovereignty of states and serves the realization of mutual equality.<sup>31</sup> Legal equality implies that formally speaking, no member of the international community can be placed at a disadvantage: all must be treated on the same footing.<sup>32</sup>

### c) Summary

To sum up, the international legal order relies on the principle of human self-determination in communities; a people's right to self-determination and the prohibi-

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<sup>28</sup> Cf. 1970 Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations; Cassese, Antonio: International Law, Oxford 2001, p. 89; Herdegen, Matthias: Völkerrecht, 3<sup>rd</sup> edition, München 2004, pp. 197-200.

<sup>29</sup> Cassese, Antonio: International Law, Oxford 2001, p. 90; Herdegen, Matthias: Völkerrecht, 3<sup>rd</sup> edition, München 2004, pp. 255-258.

<sup>30</sup> Bröhmer, Jürgen: State Immunity and the Violation of Human Rights, The Hague, Boston, London 1997, p. 18; Dörr, Oliver: "Staatliche Immunität auf dem Rückzug?" in: AVR 41 (2003), pp. 201, 202; Folz, Hans-Ernst; Soppe, Martin: "Zur Frage der Völkerrechtmäßigkeit von Haftbefehlen gegen Regierungsmitglieder anderer Staaten" in: NStZ 1996, pp. 576, 577; Rensmann, Thilo: "Internationale Verbrechen und Befreiung von staatlicher Gerichtsbarkeit" in: IPRax 1999, p. 268; Verdross, Alfred; Simma, Bruno: Universelles Völkerrecht, 3<sup>rd</sup> edition, Berlin 1984, § 1168.

<sup>31</sup> Doehring, Karl: Völkerrecht, Heidelberg 1999, § 657.

<sup>32</sup> Cassese, Antonio: International Law, Oxford 2001, p. 90.

tion of intervention in internal affairs are consequences of this principle.<sup>33</sup> Sovereignty is thus the demand of each territorial community, however small and weak and however organized, to be permitted to govern itself,<sup>34</sup> or to put it differently, sovereignty is the right of one people (one state) to independently organize its community without interference from others.

## 2. Limitations of the Principle of State Sovereignty

The principle of sovereignty is not unrestricted. Traditionally limitations are imposed upon state sovereignty by customary rules that are the natural legal consequence of the obligation to respect the sovereignty of other states,<sup>35</sup> i.e. the right to sovereignty of one state ends where the right to sovereignty of another state begins. For example, the principle of immunity that is itself an element of sovereignty restricts the same principle in so far, as it provides for situations in which a state, even though it has jurisdiction, may not exercise this power, since it would otherwise violate the right to sovereignty of another state.<sup>36</sup> In addition to these logical consequences of mutual respect of sovereignty and equality, new restrictions of state sovereignty have evolved in the second half of the 20<sup>th</sup> century. These new limitations have increasingly narrowed the power which the holder of sovereignty may exercise and shrunk the borders in which those powers may be exercised.<sup>37</sup>

The arrival of human rights on the international scene has in this regard fostered tension and conflict among states as this concept is essentially meant to tear aside the veil that in the past covered and protected sovereignty, since it forces states to account of how they treat their own nationals, administer justice, run prisons, and

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<sup>33</sup> Cf. Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 448-449.

<sup>34</sup> Reisman, Michael W.: "The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea" in: 98 *A.J.I.L.*, July 2004, pp. 516-525, I.

<sup>35</sup> Cassese, Antonio: *International Law*, Oxford 2001, p. 91.

<sup>36</sup> Seidl-Hohenveldern, Ignaz: *Lexikon des Rechts – Völkerrecht*, 2<sup>nd</sup> edition, Neuwied, Darmstadt 1992, p. 133.

<sup>37</sup> Bennoune, Karima: "'Sovereignty vs. Suffering'? Re-Examining Sovereignty and Human Rights Through the Lens of Iraq" in: *EJIL* 2002, pp. 243-262, 2. C.

so on.<sup>38</sup> The belief that each state has a right to be autonomous over its domestic policies and decisions is in direct conflict with the belief that every individual has an innate right to fundamental freedom that should not be jeopardized under any set of circumstances.<sup>39</sup> With the recognition of the obligation to respect human rights on the international level, states have thus restricted their power to treat human beings and thus even their own nationals as they please.

Consequently, gross violations of human rights are no longer seen as a solely internal matter but as of concern to the international community as a whole, as they may even be regarded as a threat to international peace and security in the sense of art. 39 UN-Charter, or even as justifying an exception to the universally accepted prohibition of the threat or use of force. In this spirit, for instance the interventions in northern Iraq, Somalia, Haiti, Rwanda and Bosnia all carried some rhetoric of humanitarian concerns.<sup>40</sup> It thus has been argued that at least in the case of gross and large-scale violations of human rights, also individual states are legally entitled to use force against other states with a view of stopping such atrocities. Although this argumentation is highly disputed and probably - at least in the scholarly discussion - the view still prevails that such a use of force may only be resorted to when the UN Security Council considers that in this specific situation the use of force is exceptionally justified and acts accordingly by authorizing it in compliance with art. 39 and art. 42 UN Charter,<sup>41</sup> this argument shows what a powerful instrument the concept of human rights has become when it is regarded as even justifying an exception to the constitutive prohibition of the threat or use of force. In addition, sovereignty had to give way in order to remove static barriers between individual victims on the one hand and international law and mechanisms which might offer them a remedy on the other.<sup>42</sup>

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<sup>38</sup> Cassese, Antonio: *International Law*, Oxford 2001, p. 349.

<sup>39</sup> Petersen, Frederick J.: "The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations" in: *Arizona Journal of International and Comparative Law* Vol. 15 No. 3 (1998), pp. 871—904, I.

<sup>40</sup> *Ibid.*

<sup>41</sup> Cf. for example: Cassese, Antonio: *International Law*, Oxford 2001, p. 321; Vesel, David: "The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World" in: *18 BYU J. Pub. L.* (2003), pp. 1-58, II. A.

<sup>42</sup> Bennoune, Karima: " 'Sovereignty vs. Suffering'? Re-Examining Sovereignty and Human Rights Through the Lens of Iraq" in: *EJIL* 2002, pp. 243-262, 2. E.

International criminal law poses an even more severe limitation to the principle of sovereignty. The power to punish has always been the prerogative of the sovereign and is an important element of state sovereignty, to delegate this power to an international court or to accept its exercise by another state over foreign nationals of the prosecuting state and crimes committed outside its territory, is to surrender more than a simple element of state sovereignty.<sup>43</sup> Moreover, more and more claims have been made to restrict or lift state immunity in cases of serious violations of human rights. Therefore, the contradiction between the principle of national sovereignty and the universal nature of human rights reaches its apogee when faced with serious violations of human rights, since human rights law, international criminal law and international humanitarian law dictate that these crimes must not go unpunished, but state sovereignty subjects this demand for justice to the contingencies of political choice.<sup>44</sup>

## II. Individuals as Subjects of International Law

To be a subject of international law means the ability to hold rights and obligations under international law; as a rule this includes the ability to claim ones rights at an international level.<sup>45</sup> Historically, the subjects of international law have been states, not humans. The classic international law that was in force from the 17<sup>th</sup> century until the end of World War I neither granted any rights to, nor did it contain any obligations for the individual, therefore the individual could not breach international law and thus not be punished for a violation of international law.<sup>46</sup> The individual did not exist independent from its state to which it was bound by its nationality.<sup>47</sup> If individuals required some relevance in international affairs, it was mostly as beneficiaries of treaties of commerce and navigation, or of conventions on the treatment to be ac-

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<sup>43</sup> Badinter, Robert: "International Criminal Justice: From Darkness to Light" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 1931, 1932.

<sup>44</sup> Ibid.

<sup>45</sup> Herdegen, Matthias: *Völkerrecht*, 3<sup>rd</sup> edition, München 2004, p. 62.

<sup>46</sup> Goring, Gilbert: "Die Verantwortlichkeit politischer Funktionsträger nach völkerrechtlichem Strafrecht" in: NJ 1992, pp. 4, 13.

<sup>47</sup> Dupuy, Pierre-Marie in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 1085, 1086; Triffterer, Otto: "Der lange Weg zu einer internationalen Strafgerichtsbarkeit" in: ZStW 114 (2002), pp. 321, 332.

corded to foreigners, or else as beneficiaries of diplomatic or judicial protection – if their national state decided to exercise such protection *vis-à-vis* another state.<sup>48</sup> The question whether international rules reached individuals directly or through the intermediary of national legal systems was, however, first raised with respect to piracy in the 17<sup>th</sup> and 18<sup>th</sup> centuries; still, it seemed rather odd to speak of individuals as subjects of international law, when allegedly they had obligations deriving from international rules, but were not granted any rights and powers.<sup>49</sup> Even after the emerging of human rights treaties, it was still disputed whether the individual could be regarded as a subject of international law. It was argued that, even when treaties provided for rights and duties of individuals, this did not mean that these treaties provided for direct individual rights but only that they created rights and obligations between the contracting state parties with respect to the treatment of individuals.<sup>50</sup>

### **1. The Individual as Bearer of Rights Under International Law**

As of today, the view has been established that rules of international law may create direct rights and obligations for the individual. Customary international law creates individual rights especially with regards to elementary human rights such as the right to life.<sup>51</sup> With respect to human rights treaties, it depends on the interpretation of the treaty; at least when the individual is given the possibility to claim its rights under the treaty before an international tribunal etc. one can safely argue that in this context the individual is regarded as a subject of international law.<sup>52</sup> For example, under the human rights system established by the 1950 European Convention on Human Rights (ECHR), the European Court of Human Rights may be addressed by any individual claiming to be the victim of a violation of the Convention or the additional Protocols by one of the contracting states.<sup>53</sup> The petitioner participates fully and on an equal footing with the accused state in the proceedings before the Court and thus acts as an

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<sup>48</sup> Cassese, Antonio: *International Law*, Oxford 2001, pp 78-79.

<sup>49</sup> *Ibid.*, p. 79.

<sup>50</sup> Cf. Herdegen, Matthias: *Völkerrecht*, 3<sup>rd</sup> edition, München 2004, pp. 100-101.

<sup>51</sup> *Ibid.*, p. 101.

<sup>52</sup> *Ibid.*

<sup>53</sup> Art. 34 ECHR.

equal opponent. Taking into account this development it is legitimate to argue that the principle of human rights, with its claim to universality, must be regarded as the transition to the subjectivity of individuals under international law.<sup>54</sup>

## **2. The Individual as Addressee of Obligations Under International Law**

In modern international law states have lost their exclusive monopoly over individuals, while individuals have gradually come to be regarded not only as holders of internationally material interest but also as capable of violating universally accepted values.<sup>55</sup> The individual is thus no longer solely mediated by its state but can be held accountable personally for infringing international law. The general concept of personal criminal responsibility for international crimes has first been recognized in the judgement of the International Military Tribunal of Nuremberg (Nuremberg Tribunal / IMT): by stressing that crimes against international law are committed by men, not by abstract entities, and that only by punishing individuals who commit such crimes the provisions of international law can be enforced, the judgement establishes the principle of individual criminal responsibility as a cornerstone of international criminal law.<sup>56</sup> According to the 1996 Draft Code of Crimes against the Peace and Security of Mankind, drafted by the International Law Commission, this principle applies equally to any individual throughout the government hierarchy or military chain of command and thus even irrespective of an official position.<sup>57</sup> With respect to international criminal law, individuals are thus deemed criminally responsible under international law for certain crimes, irrespective of what state law provides.<sup>58</sup>

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<sup>54</sup> Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 451.

<sup>55</sup> Cassese, Antonio: International Law, Oxford 2001, p. 79.

<sup>56</sup> United Nations, Website of the Rome Statute of the International Criminal Court, last updated on December 19, 2003, <http://www.un.org/law/icc/general/overview.htm> (last visited: January 22, 2005).

<sup>57</sup> Cf. Art. 2, art. 5-7 1996 Draft Code of Crimes against the Peace and Security of Mankind.

<sup>58</sup> Bassiouni, Cherif M.: Introduction to International Criminal Law, New York 2003, p. 58.

### 3. Summary and the Concept of Limited Legal Capacity

To sum up, in contemporary international law individuals are no longer only objects but also have own legal obligations and rights under international law. While human rights law provides the individual with direct individual rights, international criminal law imposes on it the obligation not to violate human rights. However, it has to be pointed out that while states have international legal personality proper, individuals possess only a limited *locus standi* in international law and a limited array of rights and obligations,<sup>59</sup> as rights and obligations for the individual arise only in the areas of international human rights law and international criminal law but not in other areas of international law. On this score, one speaks of a limited legal capacity of the individual under international law.<sup>60</sup> In favour of this opinion that recognises individuals as (limited) subjects of international is also the consideration that a human being that as of today is recognized as a subject of law in any civilized legal system cannot become a mere object of international law, when and insofar its own protection is the subject of international law.<sup>61</sup>

### III. The Concept and History of International Human Rights Law

Even though the term human rights has recently been on everyone's lips, the concept is less clear than one would assume. First, the idea of human rights is susceptible to ideological determinations – concreteness is only an illusion.<sup>62</sup> In addition, the problem of cultural relativism, that is that human rights cannot be abstracted from the respective social and cultural settings and its respective history, has a huge influence on the definition and interpretation of human rights.<sup>63</sup> Finally, the concept of human rights has changed significantly over the last 60 years and is still in motion. The idea of human rights is not a static concept but – as the European Court of Human Rights

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<sup>59</sup> Cassese, Antonio: International Law, Oxford 2001, p. 85.

<sup>60</sup> C.f. for example, *ibid*; Broomhall, Bruce: International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Oxford, New York 2003, p. 20.

<sup>61</sup> Ipsen, Knut: Völkerrecht, 4<sup>th</sup> edition, München 1999, Vor § 48, paragraph 3.

<sup>62</sup> Keller, Rainer: "Zu Weltrechtspflege and Schuldprinzip" in: Festschrift für Klaus Lüderssen, Baden Baden 2002, pp. 435, 433.

<sup>63</sup> *Ibid*.

likes to put it with respect to the ECHR – a living instruments that must be read in conjunction with the current changes and developments of society, taking into account its current values and objectives.

## **1. Defining the Concept of Human Rights**

According to a generally accepted definition, human rights are rights given to the individual by virtue of his humanity and with his birth but do not require a further legally relevant conduct.<sup>64</sup> The idea behind this definition is that human rights are not attributed to the individual by a state or any other authority but are a natural consequence of his being human. Human rights thus virtually stand above the state and its legal system. This idea of human rights as ‘natural’ rights is a very persuasive concept, as it creates the image of universally binding human rights that protect all human beings everywhere in the world and at all times. However, this image of human rights is deceitful in many ways.

### **a) The European Christian Perspective on Human Rights**

The idea of universal human rights is, as Klaus Günther has pointed out, in itself a particular European idea and has a long history of misreading, selective interpretation and wrong application.<sup>65</sup> The idea that all human beings are equal was interpreted by the Christians on the bias of a belief in a Christian God who created all human beings according to his own image - it therefore already included particularity, because it referred primarily to those human beings who believed in the Christian God and excluded all those who did not.<sup>66</sup> After secularization, the idea of human rights was often interpreted in a specific way which led to an exclusion of certain human beings who lacked certain features from the realm of human rights and were thus not considered as being completely human and who therefore had no rights at all.<sup>67</sup> Throughout

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<sup>64</sup> Piechowiak in: Hanski, Raija; Suksi, Markku (editors): *An Introduction to the International Protection of Human Rights*, 2<sup>nd</sup> edition Turko / Abo (Finland) 2000, p. 3.

<sup>65</sup> Günther, Klaus: “The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture” in: *The EU and Human Rights*, edited by Philip Alston, Oxford 1999, p. 117.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid., pp. 117, 118.

the history of mankind there have been what could be called 'first and second class human beings'. Basically every human being that was not a wealthy, heterosexual, white male, belonging to the Christian religion was looked down upon at some point of human history and was not regarded as an equal human being: women, aboriginals, sick people, working class people, disabled people, Jews, children born out of wedlock, homosexuals: - the list is endless. Human rights interpreted or better misinterpreted in this way give a licence to draw a distinction between human beings who are under the protection of human rights and those 'other beings' that are not.<sup>68</sup> Furthermore, based on this distinction between 'first and second class human beings', men felt they had a licence, a right to discriminate, expropriate, chase, imprison, torture, rape and kill those dehumanised men, women and children.<sup>69</sup> As has already been pointed out, the modern system of human rights protection is the result of a long line of atrocities committed by humans against humans. However, one could also argue that the current idea of human rights is also the rejection of the practice of dehumanisation that for a long time perverted the idea of human rights.

#### **b) From a 'Right' to Speech to a General Principle of International Relations**

It has been expounded that by referring to a human right, a person articulates his suffering from an offence or harm, and claims that everybody is obliged to listen to the individual report of this experience.<sup>70</sup> Cornelia Vismann has therefore brought forward the argument that human rights are not rights at all – or at least not in the strict sense of enforceable rights that may be the basis of judicial action – but only give a right to speech where the law fails; i.e. human rights symbolize a partial *ad hoc* reunification of sovereignty by the state in favour of the human being who shall speak if he experiences injustice by the state.<sup>71</sup> According to this view, human rights are a concept that stands above the law and thus should not be enforced by it. In the case of human rights, the voicing of the experience shall directly define right and wrong but

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<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid., 117, 127.

<sup>71</sup> Vismann, Cornelia: "Das Recht erklären - Zur gegenwärtigen Verfassung der Menschenrechte" in: KJ 1996, pp. 321, 325.

does not give a claim or a right to action, nor does it result in a judgement or an execution, as all this is included in the act of speaking.<sup>72</sup> As an example of this understanding of human rights reference is always made to the South African *Truth and Reconciliation Commission*, which objective is neither to judge the perpetrators nor to achieve revenge but to give the victims the opportunity to voice their truth about the experienced injustice in public.

Presumably, because the experience of violations by the state came before the state was also considered as the pre-eminent protector of human rights, all approaches to human rights try to demonstrate how and why human rights are above the state and a legally constituted society.<sup>73</sup> However, even those who argue in favour of a state-free environment for human rights admit that the inefficiency of human rights virtually calls for institutions that have the power to enforce them.<sup>74</sup> In favour of this recognition of a need for enforcement mechanisms is also the consideration that even if human rights are a concept that stands above the state and its law, it is still only a concept, developed by men and therefore in need of their protection. Moreover, even though the idea of human rights might be regarded as sacrosanct one must not forget that human rights violations are an everyday event, thus, to deny human rights any form of national and international protection and enforcement mechanisms would mean to destroy any chance of this concept ever becoming an effective and efficient means against human suffering. Consequently, the current concept of human rights goes much further than to give the victim a mere right to express its suffering.

As of today, the victim's claim to human rights also aims at its potential consequences: the attribution of responsibility to the perpetrators.<sup>75</sup> Human rights are no longer only defined by the victim's perspective, but the claim to human rights is

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<sup>72</sup> *Ibid.*, pp. 321, 326.

<sup>73</sup> Günther, Klaus: "The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture" in: *The EU and Human Rights*, edited by Philip Alston, Oxford 1999, p. 117, 141.

<sup>74</sup> Vismann, Cornelia: "Das Recht erklären - Zur gegenwärtigen Verfassung der Menschenrechte" in: *KJ 1996*, pp. 321, 330-331.

<sup>75</sup> Günther, Klaus: "The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture" in: *The EU and Human Rights*, edited by Philip Alston, Oxford 1999, pp. 117, 140.

linked with a relationship between the victim and the perpetrator.<sup>76</sup> As Klaus Günther argues, the focus on negative experiences and the memory of injustice and fear shall not keep human beings in the passive role of victims, instead, the performative meaning of the claim to human rights must be extended to the role of the victim so that the claim to human rights refers to the status of an equal participation in the discourse of human rights.<sup>77</sup> Therefore, the analysis of human rights violations by way of court proceedings or other enforcement mechanisms gives the victim the opportunity to stop defining itself only as victim and to restore the balance of power.

Moreover, at the same time as human rights developed in the direction of enforceable, claimable rights, they also gained importance as objective standards. For example, one of the entry requirements for states to join the European Union is that candidates must comply with certain human rights standards and become members to the ECHR. Since World War II states have gradually become to accept the idea that massive infringements of basic human rights are reprehensible and make the delinquent state accountable to the whole community; thus, the respect for human rights has simultaneously gained the status of a general principle of international relations.<sup>78</sup>

## **2. The History of Modern International Human Rights Law**

International human rights law is founded on the understanding of human rights as rights that the individual bears by virtue of his humanity and aims, by formulation of legal norms, at creating a suitable protection of these rights and values.<sup>79</sup> Modern human rights law is based on the recognition of the individual human being as an independent legal subject and thus as a holder of rights and duties under international law.<sup>80</sup> Yet, as has been shown above, this idea of individuals as subjects of international law is a relatively recent phenomenon.

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<sup>76</sup> Ibid., pp. 117, 141.

<sup>77</sup> Ibid.

<sup>78</sup> Cf. Cassese, Antonio: *International Law*, Oxford 2001, p.104.

<sup>79</sup> Piechowiak in: Hanski, Raija; Suksi, Markku (editors): *An Introduction to the International Protection of Human Rights*, 2<sup>nd</sup> edition Turko / Abo (Finland) 2000, pp. 3, 10-12.

<sup>80</sup> Herdegen, Matthias: *Völkerrecht*, 3<sup>rd</sup> edition, München 2004, p. 322.

### **a) Humble Beginnings or the Roots of Modern Human Rights Law**

The history of international human rights law began – even if very hesitantly – before the evolution from classic to modern international law. Treaties prohibiting the slave trade were agreed upon in the 19<sup>th</sup> century, others banning the slave trade and slavery as such were made in the early 20<sup>th</sup> century. After World War I, conventions to protect the rights of workers were initiated by the International Labour Organisation. At the same time, various treaties safeguarding religious, ethnic and linguistic minorities were concluded. Although all these conventions and treaties were also motivated by the self-interest of the contracting states, it remains true that one of the motivations behind these treaties was the concept that certain groups or categories of individuals ought to be protected by international law for their own sake.<sup>81</sup> The same holds true for international humanitarian law and the agreements on the protection of foreigners. Early humanitarian rights treaties such as the comprehensive 1907 Hague Conventions are supplemented by special rules protecting the human person, both by exempting them from being targets of attacks and by the assured provision of relief and assistance when in need.<sup>82</sup> In 1870 the International Committee of the Red Cross (ICRC) was created to alleviate suffering in war; as of today, the ICRC is a highly important organisation in areas of conflicts, assisting and alleviating human suffering and contributing, by strict observance of confidentiality, to the development of humanitarian law and human rights protection.<sup>83</sup>

To sum up, the roots of international human rights law lie in the principles of the protection of individuals under international humanitarian law, the rules on the legal position of foreigners, the conventions to protect the rights of workers and the agreements on the protection of minorities.<sup>84</sup> Yet, until the end of World War II, human beings were not protected as such but only as members of specific groups that were regarded as especially vulnerable.

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<sup>81</sup> Cassese, Antonio: *International Law*, Oxford 2001, p. 350.

<sup>82</sup> Detter, Ingrid: *The Law of War*, 2<sup>nd</sup> edition, Cambridge 2000, p. 153.

<sup>83</sup> *Ibid.*

<sup>84</sup> Herdegen, Matthias: *Völkerrecht*, 3<sup>rd</sup> edition, München 2004, p. 322.

## b) The Development of Human Rights Law Within the Framework of the UN

The turning point in the development of international human rights law came with the end of World War II and the establishment of the United Nations. The atrocities of Nazi Germany and World War II called for a change in the protection of individuals and for a strengthening of the principle of human dignity. An example for this new viewing of individuals and the recognition of the concept of human dignity is art. 1 of the 1949 *Grundgesetz*,<sup>85</sup> which provides that the dignity of the human being is sacrosanct. Consequently, from the late 1940s on, the view was established that individuals were no longer to be taken care of on the international level, *qua* members of a group, a minority or another category, but as single human beings as such.<sup>86</sup>

The victors of World War II adopted a two-pronged strategy: on the hand, they pursued the development of international criminal law to bring to justice the German and Japanese war criminals, on the other hand, they set out to elaborate a set of general principles of human rights designed to serve as guidelines for the UN and its member states.<sup>87</sup> In this spirit, the Preamble of the UN Charter lists as a goal to *reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small*. This dedication to human rights is reaffirmed in the UN Charter itself,<sup>88</sup> and especially in art. 1 which defines as one of the purposes of the UN: *to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*.<sup>89</sup> However, it has been criticized that the text of the UN Charter does not provide for a specific obligation to take separate action for the promotion, let alone the protection,

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<sup>85</sup> The *Grundgesetz* is the current German constitution, it entered into force on May 23, 1949 and is hugely influenced by the atrocities of the Third Reich and the experiences with the prior German constitution of 1919 (*Weimarer Reichsverfassung*).

<sup>86</sup> Cf. Cassese, Antonio: *International Law*, Oxford 2001, p. 351.

<sup>87</sup> *Ibid.*

<sup>88</sup> Cf. Art. 1, paragraph 3; art. 55, paragraph c and art. 76, paragraph c UN Charter.

<sup>89</sup> Art. 1, paragraph 3 UN Charter.

of human rights,<sup>90</sup> and that the Charter provisions on human rights were inspired by the conviction that human rights should only be furthered as a means of safeguarding peace.<sup>91</sup> Still, even though the commitment to human rights in the UN Charter is not as clear and strong as it could have been, the mere fact that the UN Charter and thus a document that was agreed upon while the war in Europe was hardly over and the fights in the Far East still continued, recognizes and supports the existence of the idea of human rights is remarkable and can be viewed as the first great success for the concept of human dignity. Of course there could always have been more, but in view of the time in question and the historical background in which the UN Charter was adopted, even this hesitant commitment to human rights is a major step in the process of recognizing human rights as universally accepted and protected values.

The codification endeavours of human rights protection were continued and promoted within the framework of the United Nations. At the beginning of these endeavours stands the Universal Declaration of Human Rights (UDHR), which was adopted by the GA on December 10, 1948. The rights of the UDHR are essentially derived from the concept of human dignity.<sup>92</sup> Two categories of human rights are contained: a group of civil and political rights and a group of economic, social and cultural rights. The catalogue of civil and political rights is in essence similar to the catalogues of fundamental rights contained in many modern Western democratic constitutions, and in particular the French *Déclaration des droits de l'Homme et du citoyen* of 1789 and the American *Declaration of Independence* of 1776.<sup>93</sup> The second complex of economic, social and cultural rights was included on request of the African, Asian and communist states – while Western countries had a more sceptic view regarding these rights and would have preferred a human rights declaration consisting only of

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<sup>90</sup> See art. 56 UN Charter.

<sup>91</sup> Cassese, Antonio: *International Law*, Oxford 2001, p. 353.

<sup>92</sup> Schmidt-Jortzig, Edzard: "Menschenrechtliche Entwicklung in Deutschland im Lichte des internationalen Vertragsrechts" in: *Studien zu Grund- und Menschenrechte/2: Menschenrechte für alle - 50 Jahre Allgemeine Erklärung der Menschenrechte*, Potsdam 1999, pp. 7, 8.

<sup>93</sup> Buergenthal, Thomas: "Die Bedeutung der Allgemeinen Erklärung der Menschenrechte für den internationalen Menschenrechtsschutz" in: *Studien zu Grund- und Menschenrechten/2: Menschenrechte für alle - 50 Jahre Allgemeine Erklärung der Menschenrechte*, Potsdam 1999, pp. 19, 23; Schaber, Thomas: *Internationale Verrechtlichung der Menschenrechte: Eine reflexive institutionstheoretische Analyse des Menschenrechtsregimes der Vereinten Nationen*, Baden-Baden 1996, p. 146.

civil and political rights. The compromise between the liberal Western and the African/Eastern socialist conception of human rights was only agreeable to all states, because the UDHR was not adopted in form of a binding legal treaty but as a kind of political manifest that did not require the accepting parties to sacrifice part of their sovereignty or take immediate action.<sup>94</sup> Although the UDHR is not legally binding, it is the first international document that contains a substantial catalogue of human rights. The UDHR therefore constitutes the first comprehensive statement of commitment to human rights by the international community.

The quality and enforceability of human rights protection took a further step with the adoption of legally binding international treaties securing human rights. With regards to international instruments of general purport, the two 1966 UN Covenants – the UN Covenant on Civil and Political Rights (ICCPR) and UN Covenant on Economic, Social and Cultural Rights (ICESCR) – are of tremendous importance for general human rights law. Originally it was intended to pass only one treaty, containing a catalogue of the most important human rights, however, the Western and Eastern views differed so substantially that finally two covenants were passed.<sup>95</sup> To stress nevertheless the unity of these two treaties, a common preamble and a common art. 1 were adopted in both Covenants. At the regional level, the ECHR, the 1969 American Convention on Human Rights (ACMR) and the 1981 African Convention on Human and Peoples' Rights (Banjul Charter) must be emphasized; in 1994 the Council of the Arab League passed the Arab Charter of Human Rights – however, this treaty is not yet in force. Besides, there are numerous treaties dealing with special topics of human rights law such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) or the 1984 Convention against Torture and Other Cruel and Degrading Treatment or Punishment (Torture Convention).

In addition to the development of international treaty law, important customary norms protecting human rights evolved in the second half of the 20<sup>th</sup> century. For

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<sup>94</sup> Schaber, Thomas: *Internationale Verrechtlichung der Menschenrechte: Eine reflexive institutionstheoretische Analyse des Menschenrechtsregimes der Vereinten Nationen*, Baden-Baden 1996, pp. 146, 147.

<sup>95</sup> Stern, Klaus; Sachs, Michael: *Das Staatsrecht der Bundesrepublik Deutschland*, Band III/1, *Allgemeine Lehren der Grundrechte*, München 1988, p. 263.

example, as of today the international crimes of aggression, genocide, crimes against humanity, war crimes, torture, piracy, slavery and slave-related practices as well as the fundamental guarantees of a fair and impartial trial are regarded as *jus cogens*, i.e. as peremptory rules of international law that are applicable to all states irrespective of specific treaties and that cannot be reserved or derogated from.<sup>96</sup> There even exists a legal entitlement for any state or international organization competent in the field of human rights to request states where gross and large-scale violations of human rights are allegedly occurring to discontinue such violations; and, if these violations do not cease, to take, in addition to diplomatic or economic steps amounting to retorsion proper, peaceful counter-measures, i.e. reprisals.<sup>97</sup>

Finally, over the years the United Nations has tended to reject the objection of state sovereignty put forward by a number of states, and to discuss various questions concerning human rights, justifying its 'intervention' on the grounds that these violations constituted a threat to peace and to friendly relations between states.<sup>98</sup> However, even though this UN engagement is surely in compliance with international law and necessary for the protection of human rights, it should not be forgotten that this does not mean that also states are allowed to act on their own initiative to protect human rights via abusive humanitarian interventions. Still, at least when dealing with serious violations of human rights, states can no longer rely on the principle of non-intervention in internal affairs, since at least severe and repeated violations of human rights are now regarded as of concern to the international community as a whole. The concept of human rights has thus developed from a mere political, moral engagement to a foundation of international law that imposes legally binding obligations on all states and sets objective standards for the treatment of individuals.

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<sup>96</sup> Bassiouni, Cherif M.: "Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes" in: 59 *Law & Contemp. Prob.* 63 (1996); Geiger, Rudolf: *Grundgesetz und Völkerrecht*, 2<sup>nd</sup> edition, München 1994, p. 400.

<sup>97</sup> Cassese, Antonio: *International Law*, Oxford 2001, p. 370.

<sup>98</sup> *Ibid.*, p. 360.

#### **IV. The Coming into Being of International Criminal Law**

International criminal law is a relatively recent phenomenon of international law that has mostly developed after World War II, but especially in the last 15 years has made extraordinary progress. As of today, international criminal law seems to be in motion like hardly any other area of international law, at least no other area of international law has in the last years caused so many strong and emotional reactions – both positive and negative – from states, non-governmental organizations (NGOs) and international organisations around the world.

##### **1. Defining International Criminal Law: The Area of Conflict Between International Law and Domestic Criminal Law**

International criminal law has been described as a body of international rules designed to proscribe international crimes and to impose upon states the obligation or at least the right to prosecute and punish these crimes.<sup>99</sup> In addition, especially since 1993/1994, the law of international criminal courts has become a further important aspect of international criminal law. Finally, it has been argued that at the core of international criminal law are the doctrines by which international law imposes criminal responsibility directly upon individuals, regardless of national law.<sup>100</sup>

Although these definitions give an understanding of the problems that are dealt with in the framework of international criminal law, it does not truly explain the specific nature of international criminal law as a field of law that operates in the area of conflict between international law and domestic criminal law. Like national criminal law, international criminal law deals with the individual criminal responsibility of a single person; in contrast, a state or any other legal entity cannot be culpable and punishable under (international) criminal law. This is remarkable insofar as international law – except for international human rights law – as a rule only regulates the relationship between states, or between states and international organisations. In addition, most cases that are relevant to international criminal law are dealt with in domestic

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<sup>99</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 15.

<sup>100</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 9.

criminal courts and thus follow the national criminal procedure of the respective state in question. The transition between international criminal law and domestic criminal law is thus floating and a differentiation sometimes difficult. This raises the question what distinguishes international criminal law from national criminal law or to put it differently what qualifies a crime as an international crime?

As an answer to this question Michael Köhler argues that international crimes are only universal crimes affecting the basic relationship defined by public international law and universal crimes against humanity.<sup>101</sup> For example, the crime of genocide is according to this delimitation an international crime *par excellence*, since it concerns all peoples as it negates in a fundamental way their position as subjects under international law and thus the concept of humanity or mankind as such.<sup>102</sup> This view is in so far approvable as it points out that there must be a special connection between the international society and the crime in question to justify its qualification as an international crime. For example, an act of shoplifting or even an ordinary murder does not concern the international community as a whole but only the society of the state in which the crime has been committed and - if not identical - the society of the home state of the perpetrator and (maybe) the home state of the victim.

However, this way of distinguishing between international crimes and ordinary crimes is still too narrow, since it excludes for example the qualification of war crimes that do not amount to acts of a war of extermination as international crimes, since these crimes are not directed against the international society as a whole but occur only in the context of internal or inter-state conflicts.<sup>103</sup> While it is true that armed conflicts are in essence internal or inter-state conflicts, it must be pointed out that especially the commission of large-scale violations of humanitarian law may have a significant effect on the international community as a whole. For example, war crimes committed against the civil population of one state by the military of another state may lead to floods of refugees to third countries and thus to the necessity to deal

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<sup>101</sup> Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 467.

<sup>102</sup> *Ibid.* p. 435.

<sup>103</sup> Cf. *ibid.*, pp. 435, 458.

with this conflict in countries that are not participating in the conflict. Therefore, the international society as a whole may be affected by inter-state and even by internal armed conflicts, even if these conflicts do not qualify as wars of extermination. In favour of this argumentation is furthermore the fact that as of today the settlement of armed conflicts is usually not an exclusive matter of the fighting parties but often of a multitude of members of the international community. For instance, not only are there numerous mediation endeavours within the framework of the United Nations but also by single countries or other international organisations like the EU. It is therefore preferable to define international crimes as crimes that are directed against or at least affect the international society as a whole. As a rule, crimes that affect the international community as a whole also constitute serious violations of human rights.

In conclusion, international criminal law can be defined as the law that deals with the most serious violations of human rights by individuals and that thus serves as an important means of enforcing human rights.

## **2. Important Steps in the Evolution of International Criminal Law**

The power to punish has always been the prerogative of the sovereign and is an important element of state sovereignty.<sup>104</sup> Traditionally crimes were therefore only prosecuted in the state on which territory they were committed or which national had perpetrated the crime in question.

However, a first exception to this rule existed with regards to piracy already in the 17<sup>th</sup> century. As far as this crime was concerned, all states were empowered to search for and prosecute the perpetrators, regardless of the nationality of the victim or the perpetrator and of whether the proceeding state had been directly damaged or not.<sup>105</sup> Piracy is a criminal act that takes place in a space where there is no overall territorial sovereignty.<sup>106</sup> The rationale behind this exceptional authorization for states to

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<sup>104</sup> Cf. Badinter, Robert: "International Criminal Justice: From Darkness to Light" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 1931, 1932.

<sup>105</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 38.

<sup>106</sup> Abi-Saab, Georges: "The Proper Role of Universal Jurisdiction" in: JICJ 1.3 December 2003, pp. 596-602.

depart from the classic principles of jurisdiction was thus the inadequacy of national enforcement legislation with respect to an offence committed in locations not subject to the authority of any state, such as the high seas.<sup>107</sup> Consequently it could be argued that in fact the acceptance of universal jurisdiction for piracy is not even surprising or especially progressive as it was the only way of effectively protecting international shipping routes and thus international trade. Moreover did this exception to the classic principles of jurisdiction not force states to relinquish part of their sovereignty by allowing another state to prosecute crimes committed in a foreign territory, as it only authorized states to extend their jurisdiction to cases that would otherwise have gone unpunished as they were committed in locations not subject to the authority of any state. The prosecuting state thus did not interfere in the internal affairs of another state but prosecuted in its own interest and in the interest of every other state, crimes that although they were committed in a no man's land were considered as harmful to every member of the international community.

Still, it is remarkable that even though international criminal law is in essence a phenomenon of the 20<sup>th</sup> century, the initial stages date back several hundreds of years. From the 13<sup>th</sup> century on, when in 1268 in Naples, Conradin von Hohenstafen, Duke of Suabia, was tried, convicted and executed for initiating an unjust war, there have been sporadic instances in history where efforts had been made to bring individuals to account for what would be regarded today as international crimes.<sup>108</sup> Yet, these instances remained sporadic until a constant evolution of international criminal law developed in the 20<sup>th</sup> century.

#### **a) First Attempts: The Post-World War I Age**

The 1919 Peace Treaty of Versailles first implied the individual responsibility of a head of state, namely the German Emperor Wilhelm II, and other high military personnel, and thus contained a first limitation of the act of state doctrine.<sup>109</sup> Still, a trial

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<sup>107</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 156.

<sup>108</sup> *Ibid.*, p. 325.

<sup>109</sup> Triffterer, Otto: "Der lange Weg zu einer internationalen Strafgerichtsbarkeit" in: *ZStW* 114 (2002), pp. 321, 333.

against Wilhelm II never took place as the Netherlands, not-being a party to the treaty of Versailles, refused to extradite the abdicated German emperor and granted him the status of a political refugee. As for the trials of German military personnel alleged to have committed war crimes, no international court was set up, nor were they tried by courts of the Allies – finally only 12 minor indictees out of the 896 Germans accused by the Allies of war crimes and violations of the laws of humanity were brought to trial before a German court, of which a further 6 were acquitted.<sup>110</sup>

Between World War I and World War II, the inter-war period was plagued with the fiascos of the League of Nations; for example, no one ratified the Convention Against Torture, which included a provision to establish an international criminal tribunal.<sup>111</sup> Therefore, even though in the aftermath of World War I first serious attempts were made to promote the development of international criminal law and to prosecute at least German war criminals, these attempts remained for the moment fruitless and sovereignty prevailed over international criminal justice.

#### **b) Opening the Door to the Practical Time of International Criminal Law: Nuremberg, Tokyo and the Post World War II Age**

After World War II, the establishment of the Nuremberg Tribunal and the Tokyo Tribunal finally opened the door to the practical time of international criminal law. By setting up these tribunals, states for the first time broke the monopoly of national jurisdiction over international crimes.<sup>112</sup> Furthermore, the Nuremberg process established the principle that the veil of sovereignty could be judicially pierced, and that individuals responsible for substantive criminal acts of a grave nature could be personally responsible.<sup>113</sup> On December 11, 1946 the GA unanimously adopted a resolution, affirming the principles of the IMT Charter and its judgments. Since then, the

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<sup>110</sup> Cf. Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 326; Cassese, Antonio: *International Law*, Oxford, 2001, p. 266.

<sup>111</sup> Moralez, Cheryl K.: "Establishing an International Criminal Court: Will It Work?" in: 4 *DePaul Int'l L.J.* 135 (2000), II.

<sup>112</sup> Cassese, Antonio: *International Law*, Oxford, 2001, p. 267.

<sup>113</sup> Nagan, Winston P.: "Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the ad hoc Tribunal for the former Yugoslavia" in: 6 *Duke J. Comp. & Int'l L.* 127, VIII.

so-called 'Nuremberg Principles' have been of major importance in the development of international criminal law and especially in the drafting process of the Charters of the ICTY and the ICTR and later the Rome Statute.

International criminal law in its current form is in essence a reaction to the grave violations of human rights of the Third Reich. During World War II the Allies became aware that some of the most heinous acts of barbarity perpetrated by the Germans were not prohibited by traditional international law, as the law of warfare only proscribed violations involving the adversary of the enemy population, whereas the Nazis had also performed inhuman acts for political or racial reasons against their own citizens.<sup>114</sup> Thus, due to the unprecedented atrocities of World War II and Nazi Germany, in 1945 the concepts of crimes against humanity and crimes against peace were developed, followed in 1948 by the first official definition and outlawing of genocide in the 1948 Genocide Convention.

Especially the creation of the concept of crimes against peace is remarkable and questionable at the same time, since until the end of World War I war was commonly accepted as a legitimate means of dispute settlement. The sovereign had the right to war (*ius ad bellum*), thus an individual responsibility for breaches of peace was unheard of.<sup>115</sup> This cornerstone of classical international law was first questioned by the Statute of the League of Nations and its partial proscription of war. A comprehensive outlawing of the right to wage aggressive war was subsequently proclaimed by the 1928 Briand Kellogg Pact and more substantially by the United Nations Charter in 1945. In any case, it must be emphasized that the possibility of individual culpability of state officials for aggression was unknown both in international and in national law until the end of World War II.<sup>116</sup>

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<sup>114</sup> Cassese, Antonio: International Law, Oxford, 2001, p. 248.

<sup>115</sup> Goring, Gilbert: "Die Verantwortlichkeit politischer Funktionsträger nach völkerrechtlichem Strafrecht" in: NJ 1992, pp. 4, 7.

<sup>116</sup> Cf. Verdross, Alfred; Simma, Bruno: Universelles Völkerrecht, 3<sup>rd</sup> edition, Berlin 1984, § 442.

### c) Current Developments: the Post Cold War Age

Despite the substantial changes in international law after the end of World War II, during the subsequent cold war age, although widespread violations of humanitarian law and international human rights law continued, the perpetrators of these crimes were rarely forced to take responsibility. In the atmosphere of suspicion and obstructionism brought on by the cold war, attempts within the framework of the United Nations to establish an international criminal court failed; enforcement of international criminal law was left to national judicial systems - and proved totally ineffective.<sup>117</sup>

Only very recently has the public opinion and with it the legal position started to change again. With the end of the cold war, the UN Security Council that had been more or less blocked for nearly half a century became operable for the first time in its history. However, not only the animosity that had dominated international relations for almost half a century dissipated, but also created a power vacuum, as each of the superpowers had acted as a sort of policeman and guarantor in its respective sphere of influence.<sup>118</sup> This power vacuum, as Antonio Cassese calls it, led to an unprecedented flourishing of international criminal law. Remarkable in this regard are especially two developments: First, claims against (former) high state officials piled up in foreign national courts – for example, proceedings have been instituted against Augusto Pinochet, Ariel Sharon, Muammer Al-Gaddhafi, Saddam Hussein, Abdoulaye Yerodia Ndombasi, Laurent Gbagbo and Donald Rumsfeld. Secondly, the idea of establishing an international criminal court that had been subject of codification endeavours since 1948 within the framework of the UN, gained new support and led not only to the creation of the two *ad hoc* Tribunals but finally to the establishment of the ICC. The possibility of criminal prosecutions of international crimes anywhere in the world has thus increased significantly in the last decade and is likely to increase further.

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<sup>117</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 64.

<sup>118</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 26.

The Rome Statute has been adopted on July 17, 1998 with 120 to 7 votes and 21 abstentions.<sup>119</sup> It came into force less than 4 years later on July 1, 2002 when the necessary 60 ratifications to trigger its entry into force were deposited at UN headquarters in New York. As of today, there are 139 signatories and 98 state parties to the Rome Statute.<sup>120</sup> Both the large number of supporters of the Rome Statute as well as the rapidity of its entering into force are strong indicators for the high acceptance and strong support the ICC enjoys within the international community of states.

Presently, ICC Chief Prosecutor Luis Moreno Ocampo is undertaking formal investigations into war crimes and crimes against humanity committed in northern Uganda and the DRC; both situations have been referred to the ICC by the respective states in question in early 2004. According to the chief prosecutor the crimes reported in the DRC include ethnic massacres, summary executions, disappearances, torture, ritual cannibalization and forced recruitment of child soldiers.<sup>121</sup> The commission of identical and comparable crimes such as child abduction, summary executions, torture, rape and sexual assault, forced labour, mutilation, extrajudicial killing and forcible displacement, mainly by rebels but also by Ugandan governmental troops, has been reported by human rights organisations with respect to northern Uganda.<sup>122</sup> Both the Central African Republic and Ivory Coast have also asked the Court to investigate crimes committed in their countries during civil wars and uprisings.<sup>123</sup> The first pre-trial hearing of the ICC ever - in the Congo Case - took place on March 15, 2005.<sup>124</sup> The ICC has thus successfully resumed its work.

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<sup>119</sup> As the final vote was unrecorded, it is not known with certainty which states voted against the Rome Statute, as likely candidates are however regarded China, Iraq, Israel, India, Yemen, Libya, Qatar and the United States.

<sup>120</sup> Cf.: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited: April 1, 2005).

<sup>121</sup> BBC News, "Court examines DR Congo 'Crimes'", 16/7/2003, <http://news.bbc.co.uk/2/hi/africa/3071331.stm> (last visited: April 1, 2005).

<sup>122</sup> Cf. HRW, "ICC: Investigate All Sides in Uganda", February 4, 2004, <http://www.iccnw.org/pressroom/membermediastatements/2004/02.04.2003-HRW-Uganda.pdf> (last visited: April 3, 2005).

<sup>123</sup> Cf. Reuters Foundation, Alertnet, "ICC launches first judicial proceedings on Congo", 15/03/2005, <http://www.alertnet.org/thenews/newsdesk/L15116014.htm> (last visited: April 1, 2005).

<sup>124</sup> Ibid.

On March 31, 2005 the UN Security Council, acting under Chapter VII of the UN Charter, referred the situation in Darfur, Sudan since July 1, 2002 to the ICC. SC Resolution 1593 (2005) was adopted by a vote of 11 in favour, none against and with 4 abstentions (United States, Algeria, Brazil and China).<sup>125</sup> This vote marks the first time that the Security Council has referred a situation to the ICC. In the case of Darfur a referral to the ICC by the Security Council was necessary since Sudan is not a party to the Rome Statute. On that score, Sudan's ruling party has called on the government to reject the UN resolution to refer suspects in the Darfur region to the ICC.<sup>126</sup> The National Congress said it "strongly denounces and totally rejects the Security Council's stances and its successive resolutions against Sudan".<sup>127</sup> However, even though the Sudanese government has criticised the SC resolution, it has been welcomed by Darfur's two main rebels groups, calling it a "victory for human rights".<sup>128</sup> Still, the Sudanese government is not likely to cooperate with the ICC willingly; international political pressure will thus be necessary to compel Sudan to cooperate with the Court.

The adoption of SC Resolution 1593 (2005) is not only important because it clearly shows the increasing willingness of the international community to prosecute the perpetrators of serious violations of human rights, but also because it is the first sign that the United States might drop its open hostility towards the ICC. Even though Anne Woods Patterson declared on behalf of the United States in the SC that her country continued to maintain its long-standing and firm objections and concerns regarding the ICC and that "the Rome Statute was flawed",<sup>129</sup> the fact alone that the United States did not (mis)use its veto-power to stop this resolution but abstained is more than remarkable. After nearly 5 years of increasing hostility and numerous US attempts to prevent the ICC from functioning, the United States has made the first step to at least tolerate the Court. Of course, Resolution 1593 (2005) only displays a

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<sup>125</sup> Cf. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (last visited: April 2, 2005).

<sup>126</sup> Cf. BBC News, "Darfur war crimes vote 'unjust'", 01/04/2005, <http://newsvote.bbc.co.uk/1/hi/world/africa/4402073.stm> (last visited: April 1, 2005).

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Cf. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (last visited: April 2, 2005).

compromise in that the U.S. abstained on the vote in return for language guaranteeing that no US personnel could be prosecuted by the ICC for anything that occurs in Darfur.<sup>130</sup> This inclusion of a provision that exempts persons of non-party states from the ICC prosecution shows that the US are still very far from becoming a party to the ICCSt. However, even though it is difficult enough for the ICC to work without the (financial) support of the US,<sup>131</sup> it would have been nearly impossible for it to flourish in the long run despite active US hostility. Consequently, the possibility of a developing US tolerance gives, if nothing else, ground for hopes.

### 3. The Problems of Selectivity and the Danger of the Misuse of Power

Despite the recent developments in international criminal law, the exercise of criminal jurisdiction by national and international courts over foreign nationals and especially foreign state officials is still a highly sensitive topic since it corresponds significantly with the principle of sovereign equality of states. In addition, international criminal tribunals – whenever they came in existence – were always criticized for having no legitimate legal basis in international law for their jurisdiction.

There were always doubts as to the legality of the judgements of the World War II tribunals at Nuremberg and Tokyo as those courts were established after the crimes had been committed, with Charters indicating applicable law *ex post facto*, since crimes against humanity and crimes against peace were only developed in reaction to the atrocities of Nazi Germany.<sup>132</sup> One of the fundamental principles of criminal law that applies in any constitutional state and that is guaranteed not only by art. 7 ECHR but also by art. 11 II UDHR and art. 16 ICCPR and thus is clearly of universal validity is the principle of *nullum crimen sine lege*; it requires the statutory certainty of the punishability of an offence. Since clarity and non-retroactivity are key compo-

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<sup>130</sup> Citizens for Global, last updated: April 1, 2005, [http://www.globalsolutions.org/programs/law\\_justice/news/darfur\\_icc.html](http://www.globalsolutions.org/programs/law_justice/news/darfur_icc.html) (last visited: April 2, 2005).

<sup>131</sup> On that score it is interesting to note that it is even recognized by Resolution 1593 (2005) that none of the expenses incurred in connection with the referral of the situation in Dafur to the ICC will be borne by the UN, but by the parties to the Rome Statute and those that contribute voluntarily.

<sup>132</sup> Cf. for example: Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 333; Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 248; Detter, Ingrid: *The Law of War*, 2<sup>nd</sup> edition, Cambridge 2000, p. 424.

nents of the principle of legality, *nullum crimen sine lege* is a basic maxim of any criminal justice system claiming to be guided by the rule of law.<sup>133</sup> Consequently, as has been stressed by Antonio Cassese, this maxim is not a limitation of state sovereignty, but a general principle of justice, and thus no doubt valid even for grave atrocities and inhuman acts.<sup>134</sup> Nuremberg will therefore never be free of the criticism of violating this fundamental principle of criminal law.

Moreover it has been suggested that the nature of the IMT was more akin to that of a municipal court established by the allied governments exercising sovereign power in Germany after the war than an international court, since although no state objected to its establishment, the allied powers received only 22 statements of support.<sup>135</sup> The Tokyo Tribunal was not even established by an international treaty. General McArthur, who created this Tribunal on behalf of the Allies, decided its substantive and jurisdictional law, chose its chief prosecutor and even had the power to select its president and judges.<sup>136</sup> Without doubt, Nuremberg and Tokyo were a form of victor's justice over the vanquished. Even though it was surely in favour of justice to hold the German and Japanese perpetrators responsible for the atrocities committed by them during the Third Reich and World War II, it leaves a stale taste that not also actions of the Allies such as the bombing of Dresden and especially the dropping of the atomic bombs on Hiroshima and Nagasaki were questioned in the same way.

Unlike the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR cannot be accused of being victor's justice, since the nations that established these tribunals were not involved in the underlying conflicts.<sup>137</sup> However, it has been said that the ICTY was set up to make up for the impotence of diplomacy and politics, and there-

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<sup>133</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 26.

<sup>134</sup> Antonio: *International Criminal Law*, Oxford, 2003, p. 249.

<sup>135</sup> Cf. Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 333.

<sup>136</sup> Cf. Jeu, Cassandra: "A Successful, Permanent International Criminal Court... 'Isn't it Pretty to Think so?'" in: *Houston Journal of International Law*, Volume 26 - 2004, No. 2, pp. 411, 414-416.

<sup>137</sup> *Ibid.*, pp. 411, 424.

fore conceived of a kind of 'fig leaf'.<sup>138</sup> Moreover, Security Council members have been accused of having political and strategic interests in the ICTR and ICTY outcome. The Security Council has been reproached for overstepping its competences under Chapter VII of the UN Charter and for selectivity when establishing the ICTY and the ICTR.<sup>139</sup> In any case, the question why the former Yugoslavia and why Rwanda and not for example Chechnya, Liberia or Somalia is difficult to answer. Of course, the atrocities committed in Rwanda and the former Yugoslavia constitute serious large-scale human rights violations, however the situations in other states have been hardly better. It is reasonable that at least the members of the European Union had a special interest in the conflict in Bosnia and Herzegovina since the atrocities were literally happening on their doorsteps and called to mind the bad memories of the Third Reich and Nazi Germany in Europe. In contrast, Rwanda might have been only a form of showing that the international community was also concerned with the conflicts in African countries. In any case, the perpetrators of Rwanda and the former Yugoslavia were obviously not the only ones who deserved to be held responsible for serious violations of human rights since the trials in Nuremberg and Tokyo.

The ICC is the first international criminal tribunal that has been established by a treaty by which the contracting parties expose their own nationals to the jurisdiction of the created court and which jurisdiction is not limited to a specific conflict or territory. This commitment to international criminal justice and trust in the international institution of the ICC is remarkable and would not have been possible only a few more years ago. Nonetheless, the ICC has been described as an 'in and out club', that favours major and powerful countries by in fact exempting the most 'civilised' states in the world, namely the members of the European Union, the US and other prestigious countries from the jurisdiction of the ICC and thus establishes double standards as only nationals of poorer and weaker countries might be sent to the Court.<sup>140</sup> Indeed,

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<sup>138</sup> Cassese, Antonio: „From Nuremberg to Rome: From Ad Hoc International Criminal Tribunals to the International Criminal Court“ in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 3, 13

<sup>139</sup> Cf. *Ibid*; Seidel, Gerd; Stahn, Carsten: "Das Statut des Weltstrafgerichtshofs – Ein Überblick über Entstehung, Inhalt und Bedeutung" in: *Jura* 1999, pp. 14.

<sup>140</sup> Vicuna, Francisco Orrego: "The International Criminal Court and The In and Out Club" in: *IJCJ* 2.1 (2004), pp. 35-37.

rich states with a well functioning judicial system run basically no risk of being forced to accept the jurisdiction of the ICC over their own nationals.

Similarly, the Sudanese delegate, Elfatih Mohamed Ahmed Erwan, argued on the occasion of the adoption of Resolution 1593 (2005) in the UN Security Council that as long as the Security Council believed that the scales of justice were based on exceptions and exploitation of crisis in developing countries and bargaining among major powers, it did not settle the question of accountability in Dafur, but exposed the fact that the ICC was intended for developing and weak countries and was a tool to exercise cultural superiority.<sup>141</sup> Moreover according to the official Sudanese point of view, the Council was continuing to use a policy of double standards, and sending the message that exemptions were only for major powers.<sup>142</sup>

The major reoccurring criticism directed at international criminal courts is therefore that of 'double standards' or 'selectivity'. Why charge Milosevic with ethnic cleansing in Bosnia and Kosovo, and not Putin, who is doing more or less the same in Chechnya?<sup>143</sup> The same criticism applies with respect to the exercise of universal jurisdiction by national criminal courts. The presumption is that only nationals of poor and weak countries run the risk of being tried in foreign criminal courts, while at the same time only powerful states possess the necessary judicial system and financial resources not to speak of the required drive and power to host such trials. One could thus argue that international criminal law is only another device for powerful states to suppress poorer and weaker countries, by being able to try their nationals while at the same not accepting or having to accept the exercise of foreign or international jurisdiction over their own nationals. This argument is especially powerful when one considers, that even (former) high state officials may be tried in the ICC or foreign criminal courts for acts committed while in office or even in official capacity.

Against this could be argued that every person who commits serious human rights violations should be held responsible for such crimes. Someone who for exam-

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<sup>141</sup> Cf. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (last visited: April 2, 2005).

<sup>142</sup> Ibid.

<sup>143</sup> Garapon, Antoine: "Three Challenges for International Criminal Justice" in: JICJ 2.3 2004, pp. 716-726.

ple commits genocide deserves to be punished. Therefore, only because one perpetrator of serious human rights violations goes unpunished that cannot be an argument to let a second one go as well. However, such an argument might be an inadmissible simplification. When dealing with international criminal justice, one has to consider that it operates in a different realm from its domestic counterpart and that it is often difficult to distinguish between the legal and the political.<sup>144</sup> Moreover, even in domestic criminal law applies the principle of the unlawfulness of arbitrary rule. Therefore if an act fulfills all legally required elements of an offence, it must be punished. If only arbitrarily some of the perpetrators would be taken responsible for their actions, the prohibition of this offence would lose its general validity and thus its legitimacy. Likewise a system of international criminal justice cannot be regarded as universally applicable if certain groups of people are deliberately exempt from its jurisdiction or if it is purely arbitrary who is held responsible in court for violating international rules and who is not.

## V. Concluding Remarks

The development of international criminal law is inextricably linked with the evolution of international human rights law. Both areas of law share the same roots and basically the same history since they both evolved as reactions to gross and large-scale human rights violations. In addition, the dual movement of international criminal responsibility of individuals and international protection of individual and collective human rights has eroded the barrier of state sovereignty.<sup>145</sup> For centuries, any event taking place within the territorial jurisdiction of a particular state was seen and treated as a purely internal affair and the state in question was answerable to no one.<sup>146</sup> In the post World War II era, this standpoint has been abolished. In the doctrine of modern international law, the view has been established that respect for fundamental

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<sup>144</sup> Cf. Mundis, Daryl: "The United States of America and International Justice – Has Lady Liberty Lost Her Way?" in: JICJ 2.1 2004, pp. 2-10.

<sup>145</sup> Bassiouni, Cherif M.: Introduction to International Criminal Law, New York 2003, p. 58.

<sup>146</sup> Gibney, Mark; Tomasevski, Katarina; Vedsted-Hansen, Jens: "Transnational State Responsibility for Violations of Human Rights" in: Harvard Human Rights Journal Vol.12 (1999), pp. 269-95, I.

human rights is no longer part of the *domaine réservé* of a nation-state,<sup>147</sup> but of concern to the international community as a whole. Moreover, the international obligations to promote and protect human rights are real and substantial.<sup>148</sup>

The evolution and development of international criminal law and international human rights law has been greatly influenced and promoted through the network of the United Nations. With the adoption of the UN Charter in 1945 the organisation and cooperation of the international community changed fundamentally. The United Nations has succeeded in moving from a static concept of human rights, conceived as a means of realizing international peace, to a dynamic doctrine of human rights which goes so far as to promote conflict and disruption of the *status quo* for the sake of introducing social justice and respect for human dignity.<sup>149</sup>

Yet, the international community has not been as progressive and successful in every respect. Even though the prohibition of the threat or use of force as an absolute and all-inclusive prohibition was first laid down in art. 2.4 UN Charter and as of today is regarded as a cornerstone of modern public international law, the time following up 1945 has not been as peaceful as one might assume. Quite the contrary, large-scale human rights violations as well as internal and international armed conflicts have been on the agenda on an everyday basis throughout the second half of the 20<sup>th</sup> century and still are today. Even Europe that after the end of World War II seemed to have learned its lesson and had been peaceful for about half a century became with the war in the Kosovo again a theatre of war. In addition, despite this massive criminality in the field of serious human rights violations, the impunity of perpetrators has been the rule. The international community has thus not been able to develop a functioning system of international peace and security that is able to prevent large-scale human rights violation or at least to bring the perpetrators of these crimes to justice.

This raises the question whether the perpetrators of such crimes would think twice about committing such an act if they would face a significant risk of subse-

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<sup>147</sup> Ambos, Kai: "Anmerkung zu BGH, Urteil vom 14.04.1999 – 3 StR 45/99" in: NStZ 1999, pp. 404, 405.

<sup>148</sup> Rehmann, Javid: "The Influence of International Human Rights Law Upon Criminal Justice Systems" in: JCL 66.6 2002, pp. 510-527 (Conclusion).

<sup>149</sup> Cassese, Antonio: International Law, Oxford, 2001, p. 373.

quently being held responsible for their actions by the international community. In this regard it has been argued that individual criminal liability is in many respects more effective in dissuading law than state responsibility.<sup>150</sup> Besides, not states but humans torture, kill or otherwise maltreat other human beings and inflict grave pain. International crimes are not like natural disasters that happen irrespective of human behaviour but constitute intentional human actions. When the risk of being caught and punished is low, it lies in the human nature to be more daring than when the chances are high that one will be held responsible. International criminal law is thus an important means of protecting international peace and international human rights since it discourages the individual to breach international law.

Still, the tendency to embrace any restriction of the principle of sovereignty as a welcome success for human rights and international justice is questionable and as shown above even dangerous. Only mutual respect for the integrity, autonomy and independence of other states and peoples can be the basis of friendly and peaceful international relations. The right to internal self-determination of one people / one state is therefore with justification the first and fundamental principle of international peace law.<sup>151</sup> However, it is an undeniable fact that within the international community of states, power, wealth and influence are very unequally distributed. Moreover, one cannot but notice that international standards that are regarded as universally binding seem hardly to apply equally to big, powerful nations and weaker, poorer states alike. For example, human rights violations in China and Russia seem to be more or less acceptable or at least appear to be widely ignored, while the same crimes seem to call for immediate action when committed in Yugoslavia, Rwanda or Iraq.

Furthermore, an argument could be made that the activities of the United States in Iraq qualify as war crimes and even aggression. However, even though for example the German *Bundesstaatsanwaltschaft* (federal prosecutor's office) is at the moment dealing with charges against US Secretary of Defence Donald Rumsfeld for committing war crimes in Iraq, it is very unlikely that they will indeed open criminal proceed-

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<sup>150</sup> Ibid., p. 272.

<sup>151</sup> Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 453.

ings against Rumsfeld; and even if they would, the Belgian example has shown that even wealthy European states are not in the position to stand up to US pressure.

This however does not mean that national and international criminal courts should fully refrain from exercising their jurisdiction in cases of genocide, war crimes and crimes against humanity. The purpose of international criminal law is to restore the peace in international relations and to achieve justice for the victims of serious violations of human rights by holding the perpetrators of these crimes responsible for their actions. It is right and important to pursue these goals. However, it is indispensable that national courts and the ICC are aware of the danger of creating double standards and thus of suppressing especially developing countries. The dangers embodied in the erosion or violation of sovereignty must be taken as serious as the dangers of using the principle of sovereignty as a shield against international justice.

### **C. The Question of Universal Jurisdiction**

Notwithstanding the growing interest of the international society in the establishment of international criminal tribunals, the importance of national criminal courts in the fight against the perpetrators of international crimes has not been diminished by the establishment of the ICC. On the contrary, the reverse argument could be made that the coming into being of the ICC has strengthened national criminal jurisdiction and encouraged domestic courts to exercise their jurisdiction over international crimes committed abroad by foreign nationals.

The principle of complementarity as found in the ICCSt defers in most instances to national efforts and thus establishes a system of 'subsidiarity' of the jurisdiction of the ICC. Only when no state is willing and able to genuinely carry out an investigation or prosecution is a case admissible to the ICC.<sup>152</sup> Besides, the jurisdiction of the ICC is limited to offences committed within the territory or by a national of a state party or of a state that has specifically accepted the Court's jurisdiction with respect to the crime in question.<sup>153</sup> If neither of these conditions is fulfilled, the Court

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<sup>152</sup> Art. 17 ICCSt.

<sup>153</sup> Art. 12 ICCSt.

may deal with a case only if it is referred to it by the Security Council acting pursuant to its power under Chapter VII UN Charter.<sup>154</sup> Furthermore, the ICCSt does not apply to offences committed before its entry into force on July 1, 2002.<sup>155</sup> Thus, the jurisdiction of the ICC still shows significant gaps so that state prosecution of international crimes will be necessary if the goal of eliminating impunity is to be accomplished.<sup>156</sup>

The importance of national criminal jurisdiction is further highlighted by its reach, as international tribunals generally focus only on the senior level decision-makers, planners and senior executors while national prosecution includes all persons who have committed criminal acts.<sup>157</sup> For example, during the famous first phase of the Nuremberg trials, only 19 defendants were convicted; the ICTY's first nine years saw final judgements for 35 defendants in 17 trials, with 17 people having pleaded guilty and a further 8 accused were being tried in 6 separate cases;<sup>158</sup> the ICTR has so far completed 23 cases.<sup>159</sup> Paragraph 9 of the Preamble of the ICCSt states that the ICC has been established and has jurisdiction only *over the most serious crimes of concern to the international community as a whole*. International tribunals were therefore always established to prosecute only the most important offenders, leaving the vast majority of cases to be tried in state tribunals.<sup>160</sup> Even with regards to the ICC core crimes national criminal courts will thus remain or better become the main forum of prosecution for serious human rights violations.

Taking into account the most recent development of the last two decades, one can view a continued growth in the reach of national criminal courts for international crimes, committed outside their territory and by foreign nationals. Especially in the

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<sup>154</sup> Cf. Art. 12 II, III; 13 b) ICCSt.

<sup>155</sup> Cf. Art. 11 I ICCSt.

<sup>156</sup> Summers, Mark A.: "The International Court of Justice's Decision in Congo v. Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States To Prosecute War Criminals?" in: B.U.Int'l.L.J. Spring 2003 pp. 63-99, VIII.

<sup>157</sup> Bassiouni, Cherif M.: Introduction to International Criminal Law, New York 2003, p. 712.

<sup>158</sup> Cf. the Washington Times, <http://washingtontimes.com/upi-breaking/20040629-070404-3203r.htm> (last visited January 30, 2005).

<sup>159</sup> Cf. <http://www.ictor.org/default.htm> (last visited Janurar 30, 2005).

<sup>160</sup> Summers, Mark A.: "The International Court of Justice's Decision in Congo v. Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States To Prosecute War Criminals?" in: B.U.Int'l.L.J. Spring 2003 pp. 63-99, I, A.

last years, national criminal courts have increasingly initiated criminal proceedings to punish the perpetrators of serious human rights violations. As has already been mentioned, criminal proceedings have been initiated even against (former) high state officials. Yet, at the same time, more and more concerns are voiced that national criminal courts might abuse their power to prosecute and try foreign state officials for political reasons. As a result, the basis on which national courts may ground their criminal jurisdiction for international crimes committed outside their territories has been discussed highly controversially. In the centre of this discussion lies the question of universal jurisdiction – its interpretation, its scope and its admissibility.

## **I. Principles Under International Law Justifying a State's Assertion of Jurisdiction**

International law provides for several principles justifying a state's assertion of criminal jurisdiction. Traditionally states ground their jurisdiction on the principle of territoriality or the principle of active or passive nationality. In addition, the principle of protection of national interests is universally recognized under international law.

### **1. The principle of Territoriality**

The basic principle that a crime committed in a state's territory is justiciable in that state is universally accepted and stems from the essential element of state sovereignty of a distinct and delineated territory.<sup>161</sup> As has already been pointed out above, the realisation of justice is part of the *essentialia* of self-determination,<sup>162</sup> therefore it is in general the task of the 'territorial community', that is the community of the state on which territory the crime has been committed, to restore peace and bring the perpetrators to justice since, as a rule, it is most affected by the commission of the crime in question. In addition, the principle to give states a primary right to exercise criminal jurisdiction over offences committed in their territories has the advantage of immedi-

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<sup>161</sup> Janis, Mark W.: Introduction to International Law, 4<sup>th</sup> edition, New York 2003, p. 318; Cassese, Antonio: International Criminal Law, Oxford, 2003, p. 279; Verdross, Alfred; Simma, Bruno: Universelles Völkerrecht, 3<sup>rd</sup> edition, Berlin 1984, § 1184.

<sup>162</sup> Keller, Rainer: "Zu Weltrechtspflege and Schuldprinzip" in: Festschrift für Klaus Lüderssen, Baden Baden 2002, pp. 435, 433.

ate accessibility of sources of evidence, relevant witnesses and subsequent minimisation of expenses and judicial time.<sup>163</sup> It is therefore not only in the interest of state sovereignty and a people's right to self-determination to give the territorial state primary jurisdiction, but also a logical conclusion based on pragmatic considerations.

## 2. The Principles of Active and Passive Nationality

With regard to extraterritorial jurisdiction the most fundamental principle is that of nationality or personality. Here, the relevant link between the crime committed abroad and the prosecuting state is that of nationality – the nationality of the perpetrator (active personality) or the nationality of the victim (passive personality). When exercising its criminal jurisdiction on the ground of personality over serious human rights violations, the state in question is thus taking responsibility for its nationals by either prosecuting them when they have violated international law and thus taking responsibility towards the international society for its nationals, or by protecting them when they have become the victim of a crime abroad and thus taking responsibility of the well-being of its own nationals even outside its territory.

The principle of active nationality provides that national courts of a state have jurisdiction over certain criminal offences committed by a national of this state abroad.<sup>164</sup> In addition, there is a tendency of states to broaden this ground of jurisdiction by including residents or stateless persons residing on the territory of the prosecuting state.<sup>165</sup> Although the active personality principle is mostly prevalent in civil law jurisdictions, it is in the meanwhile widely accepted also in common law countries and can thus be regarded as enjoying universal acceptance.<sup>166</sup> As for international

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<sup>163</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 144; Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 84.

<sup>164</sup> Cf. Verdross, Alfred; Simma, Bruno: *Universelles Völkerrecht*, 3<sup>rd</sup> edition, Berlin 1984, § 1184; Bröhmer, Jürgen: *State Immunity and the Violation of Human Rights*, The Hague, Boston, London 1997, p. 36.

<sup>165</sup> Cf. Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 150; Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 282.

<sup>166</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, pp. 151-152; Van den Wyngaert, Christine in: Dugard, John; van den Wyngaert, Christine (editors): *International Criminal Law and Procedure*, Aldershot, Brookfield USA, Singapore, Sidney 1996, pp. 131, 134.

crimes like genocide, war crimes and crimes against humanity, states mainly uphold this ground of jurisdiction in order to comply with international obligations to prosecute and to punish the perpetrators of such crimes.<sup>167</sup> A state that is exercising its criminal jurisdiction over serious violations of human rights committed by its nationals abroad is thus taking responsibility for the actions of its nationals (and residents) and ensures that its country is not a sanctuary for human rights violators.

The jurisdiction of national criminal courts is much more disputed when the crime is committed by a foreign national abroad. By virtue of the principle of passive nationality states may exercise jurisdiction over crimes committed abroad against their own nationals.<sup>168</sup> The principle is grounded on the need to protect own nationals abroad, it has therefore been argued that this principle shows a substantial mistrust in the exercise of jurisdiction by a foreign territorial state.<sup>169</sup> Even though this principle has been implemented in some states – such as Germany – decades ago and more recently has been relied upon by courts in Belgium, France and Italy with respect to crimes against humanity and torture, it is not (yet) universally accepted.<sup>170</sup> However, even common law states that have long opposed the principle of passive personality have in the course of growing transnational terrorist activities increasingly accepted this principle as an appropriate ground of jurisdiction.<sup>171</sup> With respect to crimes like torture and genocide it is claimed however that the passive personality principle should at the most be relied upon as a fall-back, whenever no other state is willing and able to administer international criminal justice.<sup>172</sup>

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<sup>167</sup> Cf. Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 281.

<sup>168</sup> Van den Wyngaert, Christine in: Dugard, John; van den Wyngaert, Christine (editors): *International Criminal Law and Procedure*, Aldershot, Brookfield USA, Singapore, Sidney 1996, pp. 131, 135.

<sup>169</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 282.

<sup>170</sup> Cf. Verdross, Alfred; Simma, Bruno: *Universelles Völkerrecht*, 3<sup>rd</sup> edition, Berlin 1984, § 1184; Van den Wyngaert, Christine in: Dugard, John; van den Wyngaert, Christine (editors): *International Criminal Law and Procedure*, Aldershot, Brookfield USA, Singapore, Sidney 1996, pp. 131, 135.

<sup>171</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 152.

<sup>172</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 284.

### **3. The Principle of Protection of National Interests**

The principle of protection of national interests - or the protective principle - whereby domestic courts possess jurisdiction over crimes committed abroad by nationals or foreigners when the crimes jeopardize or imperil the state's national interests is unequivocally accepted as an implication of state sovereignty.<sup>173</sup> The theoretical independence of a state or a people would lose its meaning, if it were not allowed to protect its fundamental interests that constitute the basis of its living together against intruders from the outside. The problem with this theory is that national parliaments enacting the protective principle may take a very expansive, or at least subjective, view of what is actually injurious to their national interests.<sup>174</sup> It is therefore generally agreed that, in order to restrict possible abuse, the use of this principle should be limited to cases where both significant interests are at stake, and, moreover, where its application in each particular case is permissible under international law.<sup>175</sup> Therefore, with respect to international crimes, this principle is rarely used since states tend to consider these crimes as not directly relevant to, or affecting their national interests whenever a national or territorial link is lacking.<sup>176</sup> The principle of protection of national interests is therefore extremely rarely the ground for national criminal jurisdiction over serious human rights violations. Consequently, it has not been in the focus of international attention with regards to the questions discussed here.

### **4. The principle of Universality**

The principle of universal jurisdiction is of huge practical importance for the prosecution of serious human rights violations committed abroad and therefore highly disputed. Under this principle, any state is empowered to try persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of

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<sup>173</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 154.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Cf. Ibid.*, p. 155.

<sup>176</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 277.

the perpetrator or the nationality of the victim.<sup>177</sup> As has already been stated above, this principle was first proclaimed in customary international law in the 17<sup>th</sup> century with regards to piracy - a crime that would otherwise have been impossible to effectively prosecute since it was as a rule committed on the high seas and thus in a kind of no man's land, not subject to the jurisdiction of any state.

After World War II, the principle of universality was included in the 1949 Geneva Conventions on War Victims, the 1984 Torture Convention and a number of international treaties on terrorism. The rationale for universal jurisdiction in these cases however differed from that invoked in piracy, as states were not empowered to exercise universal jurisdiction for the purpose of protecting a joint interest but to prosecute and punish, on behalf of the international community as a whole, persons responsible for violating universal values.<sup>178</sup> While in the first case piracy is regarded as at least potentially harmful to any single member of the international community but is usually committed out of the reach of any territorial jurisdiction; in the latter case the relevant crimes are usually perpetrated within the territory of one state but conflict so tremendously with fundamental universal values that they are regarded as harmful to the international community as a whole. Universal jurisdiction in these cases is thus founded on the heinous and repugnant nature and scale of the offences and the belief that these offences constitute such a grave violation of universal values that they concern the international community of states as a whole.<sup>179</sup>

This reason for universal jurisdiction is remarkable and would have been impossible without the simultaneous development of international human rights law. Only with the atrocities of the Third Reich and World War II in mind can it be ex-

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<sup>177</sup> Bungenberg, Marc: "Extraterritoriale Strafrechtsanwendung bei Verbrechen gegen die Menschlichkeit und Völkermord" in: AVR 39 (2001), pp. 170, 172; Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 284; Dolzer, Rudolf: "Nationale Konzepte oder internationales Verfahren?" in: NJW 2000, p. 1700; Van den Wyngaert, Christine in: Dugard, John; van den Wyngaert, Christine (editors): *International Criminal Law and Procedure*, Aldershot, Brookfield USA, Singapore, Sidney 1996, pp. 131, 135-136; Weiß, Wolfgang: "Völkerstratrecht zwischen Weltrechtsprinzip und Immunität" in: JZ 2002, pp. 696, 697-698.

<sup>178</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 284.

<sup>179</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, p. 156; Dolzer, Rudolf: "Nationale Konzepte oder internationales Verfahren?" in: NJW 2000, pp. 1700, 170; Roggemann, Herwig: *Die Internationalen Strafgerichtshöfe - mit Ergänzungsbänd*, 2<sup>nd</sup> edition, Berlin 1998, p. 52.

plained that the international community saw a necessity for creating a legitimate possibility for states to prosecute war criminals and perpetrators of serious human rights violations anywhere in the world. Since then, the protection of human rights has gained the status of a binding obligation under international law that applies also to situations of peace. The international community of states is thus in the process of shifting from a mere partnership of convenience to a real community based on a common system of values such as the protection of human rights. Consequently, the idea that serious human rights violations such as genocide and torture must be punishable anywhere in the world, no matter where, by whom and against whom they have been committed has gained significant support. Only recently have especially European countries such as Germany, Belgium and Spain started to exercise universal jurisdiction with respect to the ICC core crimes.<sup>180</sup>

## **II. The Scope of Application of Universal Jurisdiction**

Due to the broad extra-territorial competences encompassed by the exercise of universal jurisdiction, it is obvious that only a very limited number of especially grave and harmful offences can trigger this form of jurisdiction.<sup>181</sup> The right of one people to regulate its internal affairs and thus its right to sovereignty and self-determination would be perverted and negated if any state, even if not harmed or otherwise concerned by the crime in question, could subordinate any situation occurring on a foreign territory under its criminal jurisdiction. Moreover, as has been pointed out, it is not only in the interest of state sovereignty and a people's right to self-determination to give the territorial state a primary right to exercise its jurisdiction over crimes committed on its territory, but also a logical conclusion based on pragmatic considerations. Therefore one has to agree that, as far as ordinary offences are concerned, national courts must rely on traditional criteria of jurisdiction, chiefly territoriality and

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<sup>180</sup> See for an comprehensive overview of universal jurisdiction in domestic law: Reydam, Luc: *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford 2003, pp. 81-219

<sup>181</sup> Bantekas, Ilias; Nash, Susan: *International Criminal Law*, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, 156.

(active) nationality.<sup>182</sup> The condemnation of ordinary offences is the task of the harmed or at least affected communities, since their peace and their values have been violated and are in need of restoration. Ordinary offences are thus strictly internal affairs of the affected states. Consequently, the crimes over which universal jurisdiction may be exercised must not only constitute criminal offences in basically every state in the world, but also qualify as international crimes. Or, to put it differently, the crimes triggering universal jurisdiction must be of such a gravity and magnitude that they can be regarded as harmful to the international community as a whole and thus warrant their universal prosecution and suppression.<sup>183</sup>

### 1. Customary International Law

As has been pointed out above, both grave violations of universal values such as human rights, as well as the *locus commissi* of an offence can establish the application of the principle of universality.<sup>184</sup> In this respect, it is at least widely accepted that grave breaches of international humanitarian law, including crimes against humanity and piracy are without doubt international crimes subject to universal jurisdiction.<sup>185</sup>

In addition, it has been argued in the 2<sup>nd</sup> *Pinochet decision* of the House of Lords by Lord Browne-Wilkinson and Lord Millett that the character of any international crime as *jus cogens* would justify the application of universal jurisdiction, as long as the violation of *jus cogens* were of such a gravity and extent that it must be seen as an attack on international legal security.<sup>186</sup> In compliance with this argument it has been demanded that universal jurisdiction may also be exercised over a wider

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<sup>182</sup> Cassese, Antonio: "Is The Bell Tolling for Universality? A Plea For a Sensible Notion Of Universal Jurisdiction" in: JICJ 1.3 December 2003, pp. 589-595, 2.

<sup>183</sup> Cf. Ibid.

<sup>184</sup> Cf. Bantekas, Ilias; Nash, Susan: International Criminal Law, 2<sup>nd</sup> edition, London, Sydney, Portland 2003, pp. 156-157.

<sup>185</sup> Ibid., p. 157.

<sup>186</sup> Cf. Ahlbrecht, Heiko; Ambos Kai (ed.): Der Fall Pinochet(s) / Auslieferung wegen staatsverstärkter Kriminalität?, Baden-Baden 1999, Lord Browne-Wilkinson/Lord Millett, 2. Pinochet-decision of the House of Lords 1999/03/24, pp. 148, 157, 195.

range of international crimes such as crimes against humanity, genocide and torture.<sup>187</sup> The acceptance of states of the exercise of universal jurisdiction by Israel in the *Eichmann Case*, as well as the most recent practice of some states, and the authoritative opinion of some judges of the ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000 / Democratic Republic of the Congo v. Belgium (Congo v. Belgium)* are clearly in favour of this interpretation.<sup>188</sup>

However, as has been shown by Rainer Keller, also the reverse argument could be made, as it could even be questioned that genocide is universally accepted as an international crime since for example the United States and China strongly reject the ICC and its jurisdiction over genocide.<sup>189</sup> Moreover, it took the US Congress over 40 years to ratify the Genocide Convention, and the final ratification included five understandings, a declaration, and two reservations, which combined to reduce the US signature to a hortatory expression of disapproval of the crime.<sup>190</sup> Still, as of today the US is a party to the Genocide Convention. As permanent members of the SC both China and the US have furthermore significantly participated in the establishment of the ICTY and the ICTR and their jurisdiction over the crime of genocide. Moreover, genocide is often described as the *crime of crimes*, that is as the worst possible crime under international criminal law that clearly enjoys *jus cogens* status.<sup>191</sup> Therefore it would be quite abstruse to refuse genocide the qualification as one of the most serious violation of human rights and thus the possibility to trigger universal jurisdiction.

At least with the establishment of the ICC, there seems to be an increasing support to allow at least a conditional version of universal jurisdiction over the crimes

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<sup>187</sup> Arbour, Louise: "Will the ICC Have An Impact On Universal Jurisdiction?" in: JICJ 1.3 December 2003, pp. 585-588; Cassese, Antonio: "Is The Bell Tolling for Universality? A Plea For a Sensible Notion Of Universal Jurisdiction" in: JICJ 1.3 December 2003, pp. 589-595, 2.

<sup>188</sup> Cf. Cassese, Antonio: *International Criminal Law*, Oxford, 2003, pp. 293-294; Higgins/Kooijmans/ Buergenthal, ICJ, 2002/02/14 (*Congo v. Belgium*); <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited: February 3, 2005).

<sup>189</sup> Keller, Rainer: "Zu Weltrechtspflege and Schuldprinzip" in: *Festschrift für Klaus Lüderssen*, Baden Baden 2002, p. 435.

<sup>190</sup> Cf. Power, Samantha: "The United States and Genocide Law: A History of Ambivalence" in: Sewall, Sarah B./Kaysen, Carl: *The United States and the International Criminal Court*, Lanham, Boulder, New York, Oxford 2000, p. 165, 166.

<sup>191</sup> Safferling, Christoph J.M.: "Wider die Feinde der Humanität – Der Tatbestand des Völkermordes nach der Römischen Konferenz" in: *JuS* 2001, pp. 735, 736.

within the jurisdiction of the ICC, that is genocide, crimes against humanity and war crimes – the problem of the crime of aggression shall be left out here.<sup>192</sup> It thus can be concluded that as of today, customary international law does not prohibit the exercise of universal jurisdiction by domestic criminal courts over serious violations of international human rights law and grave violations of international humanitarian law.<sup>193</sup> At the same time it must be stressed that there is no obligation under customary international law to exercise universal jurisdiction. It is thus a matter of state discretion whether or not to exercise this form of jurisdiction over international crimes committed abroad by foreign nationals.

## 2. International Treaty Law and the Principle *Aut Dedere Aut Judicare*

It is widely undisputed that international law treaties can provide for the prosecution of certain international crimes by national criminal courts on the basis of universal jurisdiction.<sup>194</sup> The principle of universality has at the level of treaty law been upheld with regard to grave breaches of the 1949 Geneva Conventions and the First Additional Protocol of 1977, torture,<sup>195</sup> acts of terrorism such as hijacking of aircraft,<sup>196</sup> as well as apartheid.<sup>197</sup> These treaties, however, do not confine themselves to granting the power to prosecute and try the alleged perpetrator, but also oblige the contracting states to do so or alternatively to extradite the defendant to a state concerned that is willing to prosecute the suspected perpetrator.<sup>198</sup>

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<sup>192</sup> According to Art. 5 I ICCSt the ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes and aggression. However, with respect to aggression, delegations were unable to agree on a definition. Therefore as a compromise, the crime of aggression is listed as a crime within the jurisdiction of the ICC but at the same time, art. 5 II provides that the jurisdiction of the ICC over the crime of aggression is suspended until a suitable definition is adopted.

<sup>193</sup> Cf. Kreß, Claus: "Völkerstrafrecht und Weltrechtspflegeprinzip im Blickfeld des Internationalen Gerichtshofs" in: ZStW 114 (2002), pp. 818, 834.

<sup>194</sup> Cf. Higgins/Kooijmans/Buergenthal, ICJ, 2002/02/14 (Congo v. Belgium), Tz. 41; <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited: February 3, 2005).

<sup>195</sup> Art. 7 of the 1984 Torture Convention.

<sup>196</sup> For instance: Art. 7 of the Hague Convention for the suppression of unlawful seizure of aircraft of aviation (sabotage), of 1971; Art. 8 of the 1979 Convention against the taking of hostages; Art. 7 of the 1988 Convention for the suppression of unlawful acts against the safety of maritime navigation.

<sup>197</sup> Art. IV b) and V of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid.

<sup>198</sup> Cassese, Antonio: International Criminal Law, Oxford, 2003, p. 286.

Rejected for the Genocide Convention and contested not so long ago during the drafting of the UN Torture Convention, *aut dedere aut judicare* now seems to be the obvious formula for international criminal law treaties.<sup>199</sup> It therefore has even been considered to be a norm of customary international law or a general principle of international law, the argument being that otherwise the result would be the unlikelihood of punishment of a perpetrator of a universally condemnable crime where the host state is not a party to the treaty, which contains a respective obligation.<sup>200</sup>

This argument however, must be rejected as being only 'wishful thinking'. The admittedly noble wish that all perpetrators of international crimes should not go unpunished is no justification for ignoring the distinction between customary law and treaty law. Only because certain treaties provide for an *aut dedere aut judicare* provision does in itself not mean that this principle is already part of customary international law and may be applied to all international crimes alike. There are strict rules as to when a certain principle gains the status of customary international law. To qualify as customary international law a rule or principle has to fulfil two conditions: First, there must be a certain state practice with respect to the rule in question that is of a certain constancy, uniformity and prevalence and that is shared by the predominant majority of states; secondly, there must be a corresponding *opinio juris*, that is a universally shared conviction that states are legally obliged to act according to this rule.

Taking into consideration even the most recent state practice, there is no support for the assumption that all states feel indeed obliged to either try or extradite all perpetrators of international crimes even when there is no treaty obligation to do so. On the contrary, for example, in the *Pinochet Case* before the British House of Lords the majority of Lords of the 2<sup>nd</sup> decision only saw an obligation for Britain to extradite or prosecute General Pinochet with regards to acts of torture committed after the Torture Convention - that was incorporated into UK law through the *Criminal Justice Act* of September 29, 1988 - went into force for Britain on December 08, 1988. In addition there is no principle accepted in most domestic legal systems to either prose-

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<sup>199</sup> Reydam, Luc: *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford 2003, p. 286.

<sup>200</sup> Enache-Brown, Colleen; Fried, Ari: "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law" in: (1998) 43 *McGill L.J.* 613, III.

cute or extradite foreign nationals for international crimes committed outside the territory of the state in question. Thus, the principle *aut dedere aut judicare* is still neither a norm of customary international law nor a general principle of international law.

Finally, it has to be pointed out that these treaties do not provide for universal jurisdiction proper, as only the contracting states are obliged to exercise extraterritorial jurisdiction; in addition it may be contended that such jurisdiction does not extend to offences committed by nationals of non-contracting state parties, unless the crime is indisputably prohibited by customary international law or the national of a non-contracting party engages in prohibited conduct in the territory of a state party, or against a national of that state.<sup>201</sup> Nevertheless, the fact remains that these treaties are tremendously important both on account of the high numbers of contracting parties and because they encapsulate the concept that states are entitled to sit in judgement over certain offences committed by foreign nationals abroad.<sup>202</sup>

### III. The Argument About Absolute or Conditional Universal Jurisdiction

The principle of universal jurisdiction has been upheld in two different versions, a broad notion of – as Antonio Cassese calls it – absolute universal jurisdiction and a narrow notion of conditional universal jurisdiction.<sup>203</sup> The absolute universality principle does not require any link with the forum state; the only criterion is the international legal character of the offence.<sup>204</sup> In contrast, the conditional universality principle provides that a state may prosecute the accused only if there is an additional sensible link between the accused and the prosecuting state – such as the residence or at least the presence of the accused in the state in question. According to the narrow notion of conditional universal jurisdiction, a state may therefore in general only begin proceedings when the accused is present on its territory.<sup>205</sup>

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<sup>201</sup> Cassese, Antonio: "Is The Bell Tolling for Universality? A Plea For a Sensible Notion Of Universal Jurisdiction" in: JICJ 1,3 December 2003, pp. 589-595, 2.

<sup>202</sup> Ibid.

<sup>203</sup> Cf. Cassese, Antonio: International Criminal Law, Oxford, 2003, p. 285-291.

<sup>204</sup> Reydamas, Luc: Universal Jurisdiction – International and Municipal Legal Perspectives, Oxford 2003, p. 38.

<sup>205</sup> Cf. Cassese, Antonio: International Criminal Law, Oxford, 2003, p. 285-286.

## 1. Absolute and Conditional Universal Jurisdiction in Domestic Law

Only very recently has the exercise of absolute universal jurisdiction started to hit the headlines. In this regard especially the proceedings against Augusto Pinochet in Spain and Abdoulaye Yerodia Ndombasi in Belgium come to mind. While the first one has been met with general approval and is regarded as an important stage on the way to a system of effective protection of human rights and international criminal justice, the latter can be viewed – because of the subsequent decision of the ICJ in favour of the Congo – as a delicate step backwards. At least if one looks at the scholarly discussion of this ICJ decision, there is hardly any approval with respect to the way of argumentation chosen by the ICJ but many criticisms.<sup>206</sup> Still, one could also value this decision as an important confirmation of the principle of sovereign equality of states, depending on the point of view one has on the conflict between the principle of sovereign equality of states and the principle of respect for human rights.

However, as the majority of judges in the *Congo v. Belgium Case* did not use the chance to comment on the principle of (absolute) universal jurisdiction,<sup>207</sup> this judgement has not contributed to the clarification of the principle of (absolute) universality. In addition, in the majority of states there are presumably few hard facts on universal jurisdiction,<sup>208</sup> since only a small number of states have so far actively participated in the prosecution of international crimes on the basis of universal jurisdiction - and even fewer on the basis of absolute universal jurisdiction. The following

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<sup>206</sup> See for commentaries on the *Congo v. Belgium Case* for example: Cassese, Antonio: "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case" in: EJIL 2002, pp. 853-875; Dörr, Oliver: "Staatliche Immunität auf dem Rückzug?" in: AVR 41 (2003), pp. 201-219; Kreß, Claus: "Der Internationale Gerichtshof im Spannungsfeld von Völkerstrafrecht und Immunitätenschutz – Besprechung von IGH, Urteil vom 14.2.2002 (Demokratische Republik Kongo gegen Belgien)" in: GA 2003, pp. 25-43; Maierhöfer, Christian: "Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern" in: EuGRZ 2003, pp. 545-554; Schultz, Nikolaus: "Ist Lotus verblüht? – Anmerkung zum Urteil des IGH vom 14. Februar 2002 im Fall betreffend den Haftbefehl vom 11. April 2000 (Demokratische Republik Kongo gegen Belgien)" in: ZaöRV 2002, pp. 703-758; Weiß, Wolfgang: "Völkerstrafrecht zwischen Weltrechtsprinzip und Immunität" in: JZ 2002, pp. 696-704; Wirth, Steffen: "Immunity for Core Crimes - The ICJ's Judgement in the Congo v. Belgium Case" in: EJIL 2002, pp. 877-893; Zeichen, Sigrid; Hebenstreit, Johannes: "Kongo v. Belgien / Sind Außenminister vor Strafverfolgung wegen völkerrechtlicher Verbrechen immun?" in: AVR 41 (2003), pp. 182-200.

<sup>207</sup> Cf. ICJ, 2002/02/14 (*Congo v. Belgium*), <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited: February 3, 2005).

<sup>208</sup> Reydams, Luc: *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford 2003, p. 83.

examples of universal jurisdiction in domestic law are therefore not representative for the international community of states and only aim at giving an overview of the legal possibilities and recent developments in discussion.

The notion of conditional universal jurisdiction is for example applied in § 6 I of the German *Strafgesetzbuch* (German Criminal Code) and the equivalent Swiss, Austrian and British regulations. However, in Spain and – until 2003 – in Belgium, the broad notion of universal jurisdiction is/was applied. Officially because the Belgian 1993 *Loi relative à la repression des violations graves du droit international humanitaire* (Act Concerning Grave Breaches of International Humanitarian Law) was systematically abused by persons and organisation with their own political agenda, but at the same time following massive protest by US authorities,<sup>209</sup> the Belgian law of 1993/1999 was amended in April 2003 and then, more radically in August 2003. In the end it was probably the US threat to do anything in order to move the NATO headquarters away from Brussels, if Belgium did not change its law providing for absolute universal jurisdiction that brought the country to its knees. As of today, the principle of universal jurisdiction over international crimes is completely expunged in Belgian law. With regard to extraterritorial jurisdiction, only the active and passive nationality principle, plus the principle of legal residence in Belgium for a minimum of three years are upheld.<sup>210</sup>

Yet, even though the United States strongly opposed the exercise of universal jurisdiction by Belgium, this did not stop it from exercising universal jurisdiction itself over aircraft hijackers or even from lobbying other governments to exercise universal jurisdiction over the likes of Pol Pot and Saddam Hussein.<sup>211</sup>

Moreover, in the course of the drafting of the Rome Statute, Germany lobbied in favour of absolute universal jurisdiction for international crimes and has in June

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<sup>209</sup> Cf. Reydams, Luc: “Belgium Reneges On Universality: The 5 August 2003 Act on Grave Breaches Of International Humanitarian Law” in: JICJ 1.3 December 2003, pp. 679-689, 1.

<sup>210</sup> Cf. Homepage - Federal Public Service Foreign Affairs Belgium: “The Law on Universal Jurisdiction review”, <http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=5943> (last visited: February 1, 2005).

<sup>211</sup> Cf. Reydams, Luc: *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford 2003, p. 219.

2002 adopted an additional criminal code for international crimes (*Völkerstrafgesetzbuch*) that provides that German law applies to all listed international crimes, i.e. the ICC core crimes, even when the criminal conduct occurs abroad and does not show any link with Germany. Still, so far the *Bundesgerichtshof* (German Federal Supreme Court) has not (yet) abandoned the requirement of a legitimising link with Germany while at the same time the German *Bundesstaatsanwaltschaft* (federal prosecutor's office) is presently looking into whether or not to open proceedings against US Secretary of Defence Donald Rumsfeld for committing war crimes in Iraq. Consequently, the question which path Germany will take with respect to the exercise of (absolute) universal jurisdiction is not yet completely settled.

Even common law states like Australia and Canada have in the context of implementing the Rome Statute overcome the common law doctrine that all crime is local and with the *Australian International Criminal Court Act 2002* and the comprehensive Canadian *Crimes Against Humanity and War Crimes Act 2000*,<sup>212</sup> established universal jurisdiction over the ICC core crimes; even though, except for grave breaches of the Geneva Conventions, no treaty obligations exist and in the case of genocide even despite a contrary jurisdiction clause in a relevant convention.<sup>213</sup> However, with respect to Canada, universal jurisdiction requires the voluntary presence of the foreign offender in Canada and also the Australian law contains no indication of an intent to enforce the law *in absentia*.<sup>214</sup> Other countries like France and the Netherlands are still very reluctant to exercise universal jurisdiction and only establish this principle if an international treaty obliges them to do so.<sup>215</sup> In addition, even though UK law provides for universal jurisdiction over specific crimes, no prosecution on this basis has been reported.<sup>216</sup> However, since many nations still have to adopt ICC implementation legislation it is not impossible that some will follow the German ex-

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<sup>212</sup> The full title of this act is: An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts, 2000; shortform taken from Luc Reydam's.

<sup>213</sup> Reydam's, Luc: Universal Jurisdiction – International and Municipal Legal Perspectives, Oxford 2003, pp. 88-92; 122-125.

<sup>214</sup> Ibid.

<sup>215</sup> Cf. Ibid. pp. 140, 178-179.

<sup>216</sup> Ibid.; p. 210.

ample and establish a possibility for exercising absolute universal jurisdiction over the ICC core crimes as a last resort in their national law.<sup>217</sup>

In conclusion, it can only be said that the practice of states remains highly ambivalent, and is still in a process of evolution. In this respect it seems that the implementation process of the Rome Statute will be a turning point in the acceptance of at least conditional universal jurisdiction. However, even though there is a clear tendency of increasing support of conditional universal jurisdiction, there is hardly any conclusion possible as to the general recognition of absolute universal jurisdiction. On the one hand one could argue that because states did not oppose the German *Völkerstrafgesetzbuch* or the Spanish jurisdiction in the *Pinochet Case*, the exercise of absolute universal jurisdiction is regarded as admissible, on the other hand, hardly any domestic law provides for absolute universality and in the case of Belgium, this provision was strongly opposed at least by the US and the Congo.

## **2. Absolute and Conditional Universal Jurisdiction in International (Treaty) Law**

With regard to piracy, the notion of conditional universal jurisdiction is accepted by customary international law since any state that arrests a pirate has the right to exercise jurisdiction over him.<sup>218</sup> International law treaties that provide for an *aut dedere aut judicare* provision not only give a right to exercise conditional universal jurisdiction but also an obligation to do so or to extradite the alleged perpetrator to another state concerned that is willing to prosecute him. The principle of conditional universality as a basis for criminal jurisdiction over certain international crimes is therefore generally accepted under international law.

However, neither customary international law nor international law treaties that allow for universal jurisdiction are clear as to whether or not trials *in absentia* are permitted. One cannot conclude from the obligation to prosecute in a case when the accused is present on a state's territory (the principle *aut dedere aut judicare*) that in

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<sup>217</sup> Ibid., p. 157.

<sup>218</sup> Cassese, Antonio: "When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case" in: EJIL 2002, pp. 853, 857-858.

the case of the absence of the accused there is no right to do so.<sup>219</sup> This view has been supported by three dissenting judges of the ICJ in the *Congo v. Belgium Case*, arguing that the fact that international law does not explicitly prohibit absolute universal jurisdiction leads to the conclusion that states are free to apply the broad notion of absolute universality.<sup>220</sup> In favour of this argument is cited the famous *Lotus* decision of the Permanent Court of International Justice (PCIJ) which – with respect to limitations of national jurisdiction – only pointed out that a state may not exercise its power in any form in the territory of another state.<sup>221</sup> However, a different argument must be made, if the exercise of absolute universal jurisdiction would violate fundamental principles of international law.

### 3. Merits and Flaws of Absolute Universal Jurisdiction

The merits of absolute universal jurisdiction are obvious at first sight: If any state in the world is allowed to prosecute all perpetrators of certain international crimes, no perpetrator of such crimes is safe from prosecution. The principle of absolute universality is therefore a highly effective means in the fight against the impunity of perpetrators of serious human rights violations.

However, the principle of absolute universality also provides the prosecuting state with an immense amount of power when it authorizes it to judge with respect to certain international crimes any person and any situation anywhere in the world without even requiring any link to the prosecuting state. Even though it may be argued that this is exactly the main advantage of absolute universality, it may also be regarded as its major flaw. Only very few states in the world have the necessary strong judicial system not to speak of the required financial, human and institutional resources to host such trials. The principle of absolute universality therefore creates a further possibility for already powerful states to gain even more power. In addition, this principle has not only been accused of increasing the inequality between states and of being

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<sup>219</sup> Kreß, Claus: “Völkerstrafrecht und Weltrechtspflegeprinzip im Blickfeld des Internationalen Gerichtshofs” in: ZStW 114 (2002), pp. 818, 831, 840.

<sup>220</sup> Higgins/Kooijmans/Buergenthal, ICJ, 2002/02/14 (*Congo v. Belgium*), at 46; <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited: February 3, 2005).

<sup>221</sup> *Ibid.*, at 49.

open for abuse for political reasons, but also of infringing the universally accepted human right of a fair trial for a person accused of criminal offences.

**a) Trials *in absentia* and the Right of the Accused to a Fair Trial**

It has been argued that trials *in absentia* constitute a severe violation of the accused's fundamental right to a fair trial. Yet, it must be noted that many civil law countries such as France permit trials *in absentia*. The reason being that one should not allow justice to be thwarted by the accused, when he chooses to escape instead of standing trial - furthermore, in states upholding a system whereby the evidence on behalf of the accused is gathered by the investigating judge or the prosecutor, at least in principle, the defendant is not put at a disadvantage.<sup>222</sup> It therefore must be stressed that the prohibition of trials *in absentia* is not a universally accepted element of a fair trial.

Still, even if one accepts that the presence of the accused in court is a sensible and necessary element of a fair trial, one must take into account that a trial *in absentia* must be distinguished from jurisdiction *in absentia* based on the absolute universality principle, as the latter does not imply a right to convict the accused *in absentia* but only to initiate proceedings although the accused is not present in the territory of the state in question.<sup>223</sup> In this regard, it has been pointed out that the initiation of criminal proceedings in the absence of the person accused, the gathering of evidence and the issuance of an arrest warrant could have the advantage of making the subsequent arrest and trial of the suspected perpetrator possible;<sup>224</sup> while at the same time not infringing the right of the accused to be present at his trial since this right never includes a right to participate in all initial stages of criminal proceedings.

However, it has been stressed that if one accepts that trials *in absentia* are prohibited and the accused never enters the state where the proceeding court is located, a

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<sup>222</sup> Cf. Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 401.

<sup>223</sup> Higgins/Kooijmans/Buergenthal, ICJ, 2002/02/14 (*Congo v. Belgium*), at 56; <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited: February 3, 2005); Schultz, Nikolaus: "Ist Lotus verblüht? – Anmerkung zum Urteil des IGH vom 14. Februar 2002 im Fall betreffend den Haftbefehl vom 11. April 2000 (Demokratische Republik Kongo gegen Belgien)" in: *ZaöRV* 2002, pp. 703, 728.

<sup>224</sup> Cassese, Antonio: "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case" in: *EJIL* 2002, pp. 853, 858.

situation is most likely to appear where judges will end up investigating hundreds or even thousands of complaints about which they can do nothing,<sup>225</sup> and even know so from the start. The idea of courts everywhere in the world dealing with criminal charges that will never reach the trial stage seems – at least from a pragmatic point of view - a waste of financial and human resources. Moreover, it includes the danger that other criminal proceedings may be delayed because judges are at the same time dealing with cases that will never result in a conviction since it is highly unlikely that the accused will ever enter the territory of the prosecuting state. The trust in a national judicial system can be damaged if the criminal courts in question are increasingly dealing with more or less hypothetical cases while at the same time being forced to neglect their main duties out of a shortage of time and resources.

In conclusion, one can say that even though absolute universal jurisdiction does not *per se* violate the right of the accused to a fair trial, this principle seems – at least from a pragmatic point of view - not the best and most effective way to end the impunity of perpetrators of international crimes since ending impunity does not only mean that proceedings against suspected perpetrators of international crimes are initiated but also that they - if found guilty - are convicted and actually punished.

#### **b) The Danger of *Forum Shopping* and of Increasing Inequality Between States**

A second argument against absolute universal jurisdiction has gained a lot of attention in the recent debate under the notion of *forum shopping*. According to this argument, the establishment of national law granting absolute universal jurisdiction in some states might attract victims and induce them to lodge their complaints only in these states.<sup>226</sup> The danger of this situation is an increased inequality between states that impose rules on others while excluding them for themselves, and states that are subject to these rules without having the political or judicial means to require their respect by others.<sup>227</sup> The fear is that absolute universal jurisdiction may be perceived as

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<sup>225</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 290.

<sup>226</sup> Cf. *Ibid.*, pp. 289-290.

<sup>227</sup> Delmas-Marty, Mireille: "The ICC and the Interaction of International and National Legal Systems" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 1915, 1922.

a kind of hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations;<sup>228</sup> while at the same time nationals from Western states do not face a comparable risk of being tried in foreign courts exercising absolute universal jurisdiction. The argument, summarized under the notion of *forum shopping* is thus in essence nothing else but the old objection against international criminal law of creating double standards for (the nationals of) rich and poor states.

As the recent flood of complaints by civil parties asking to initiate criminal proceedings in Belgium has indeed shown, absolute universal jurisdiction can attract victims and thus lead to a high increase of criminal proceedings against foreign nationals and especially foreign (former) state officials in domestic criminal courts. Moreover, it is obvious that developing countries that are often hardly in the position to prosecute serious human rights violations committed in their own territory are not in the position to host trials against foreign nationals, suspected of having committed international crimes abroad that are not even present in their territory. It therefore holds true that poor states will always be the ones that are judged and never the ones that judge. This is more than questionable since it implies that the acceptance of absolute universality indeed creates two kinds of states: those that pass judgements about events occurring on foreign territory, not linked to them and those that don't.

However one could also argue that the Belgian example has at least contradicted the second presumption that the nationals of Western countries will never be subjected to foreign criminal courts exercising universal jurisdiction, since proceedings were also initiated against former state officials and even state officials in office of the last existing superpower to date, the United States.<sup>229</sup> But again, also the reverse argument is valid since the US not only forced Belgium to drop the initiated proceedings but even to abolish the law that might have led to penal proceedings against the highest US state officials. However, also the arrest warrant against the former foreign minister of the Congo, Abdoulaye Yerodia Ndombasi had to be revoked by Belgium

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<sup>228</sup> Summers, Mark A.: "The International Court of Justice's Decision in Congo v. Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States To Prosecute War Criminals?" in: B.U.Int'l.J. Spring 2003 pp. 63-99, VI. B.

<sup>229</sup> In Belgium proceedings were instituted for example against George Bush senior, George W. Bush, US-Vice President Dick Cheney, Foreign Minister Collin Powell and the US Generals Schwarzkopf und Tommy Franks.

after the ICJ decision. Belgium even argued that, inter alia, a reason for changing its law with respect to absolute universality had been the ruling of the ICJ in the *Yerodia Case*, since it was regarded as necessary to reaffirm Belgium's adherence to the international rule of law establishing the international immunity attached to the official capacity of certain individuals.<sup>230</sup> The Belgian example is thus not the best one to support the presumption of creating double standards for rich and poor countries. Still, the danger that other Western state might concentrate even more on international crimes committed by nationals of developing countries cannot be denied.

The Belgian example is also unique insofar as there was no comparable flood of charges in other states with absolute universal jurisdiction such as Spain and Germany. Although the reason for this may simply be that the establishment of absolute universality in the law of these countries is not as well known abroad as it was with respect to Belgium, one could also argue that the way in which absolute universal jurisdiction was exercised in Belgium was simply excessive. No country in the world has a judicial system that is strong enough to prosecute every human rights violation committed anywhere in the world. It therefore comes as no surprise that, as Luc Reydams points out, one cannot but notice the gap between the aim of the Belgian legislature and the apparent lack of institutional capacity of the domestic justice system, which finally even led to unjustifiable delays in criminal proceedings against known and in Belgium present perpetrators of genocide.<sup>231</sup> This example shows painfully that the establishment of absolute universality can even bring the impunity to perpetrators of serious human rights violations like genocide that it was meant to prevent.

Of course, one could argue that Belgium was simply trying to take on too much and that other states exercising absolute universal jurisdiction may be more cautious about how their national criminal courts apply the principle of universality. Yet this raises the question as to how states that do not accept all complaints brought to them by victims of international crimes asking to initiate criminal proceedings should

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<sup>230</sup> Cf. Homepage - Federal Public Service Foreign Affairs Belgium: "The Law on Universal Jurisdiction review", <http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=5943> (last visited: February 1, 2005).

<sup>231</sup> Reydams, Luc: *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford 2003, p 118.

choose the cases they want to deal with. Neither an arbitrary selection of cases nor a choosing for political reasons would be in the interest of justice. It is thus questionable if the principle of absolute universality can work at all. In contrast, the requirement of a legitimising link between the prosecuting state and the accused as required by the principle of conditional universality provides for a sensible, objective criterion of accepting cases committed abroad by foreign nationals against foreign nationals.

### **c) The Danger of Political Abuse**

Thirdly it is argued that the power of national judges to issue arrest warrants against foreign state officials may lead itself to abuse for political reasons if the power is not exercised with caution.<sup>232</sup> The reason behind this argument is again the fear that rich, powerful countries might abuse their power to prosecute even (former) foreign state officials for crimes committed abroad and not showing any link to the state in question, and thus under violation of the principle of sovereign equality of states interfere in the internal affairs of poorer and weaker countries.

However, this argument is only valid when the person accused holds a high position in government, but does not apply with respect to low-ranking military officers or other junior state agents, or even civilians, culpable of alleged crimes such as torture and crimes against humanity.<sup>233</sup> Furthermore, it must be noted that, as long as judges respect the international law of immunities, a national judge cannot begin proceedings in court against foreign state officials in office. It therefore is important to distinguish between jurisdiction and immunities. Immunity is an exception from the general principle of jurisdiction,<sup>234</sup> with the only purpose of shielding foreign state officials and thus the state itself from foreign jurisdiction. The possibility of a misuse of absolute universal jurisdiction for political reasons can be minimised by appropriate precautionary mechanisms such as the unconditional guarantee of judicial inde-

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<sup>232</sup> Cf. Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 290

<sup>233</sup> *Ibid.*, p. 291.

<sup>234</sup> Higgins/Kooijmans/Buergenthal, ICJ, 2002/02/14 (*Congo v. Belgium*), at 71; <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited: February 3, 2005).

pendence, the absolute observance of personal immunity and the guarantee of primacy of jurisdiction founded on the principle of territoriality or (active) nationality.<sup>235</sup>

However, this raises the question who should enforce these precautionary mechanisms. As the *Congo v. Belgium Case* has shown a certain extent of protection can be provided for by the ICJ. Yet, so far less than a third of all states have accepted the general compulsory jurisdiction of the ICJ according to art. 36 II ICJ Statute. In addition, many acceptances of the ICJ's general compulsory jurisdiction are only given with numerous reservations. It is therefore highly likely that the ICJ will not have jurisdiction in all cases involving absolute universality. The only authority in the position to implement such precautionary mechanisms and enforce their compliance with in domestic courts is thus the prosecuting state itself, which however cannot be regarded as a sufficient safeguard against political abuse.

#### **d) Résumé**

To sum up, the exercise of absolute universal jurisdiction is likely to create double standards for rich and poor states, since the most likely scenario is that of domestic criminal courts of rich Western states judging about nationals and even (former) state officials of developing countries, while at the same time the reverse scenario is - to say the least - highly unlikely. This result is hardly justifiable especially since the prosecuting state has no link whatsoever with the crime in question. It cannot even claim that it would be unbearable for it to host a perpetrator of serious human rights violations as the accused is not present in its territory. Moreover, since no state can judge over all human rights violations committed anywhere in the world, the danger of an arbitrary choosing or a choosing of cases for political reasons cannot be excluded if the prosecuting state wants to keep its judicial system functioning and not to be overloaded with cases that will never result in a conviction.

In addition, it must be stressed that the trying of even a former high state official for acts committed in official capacity may raise highly political questions.<sup>236</sup> A state

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<sup>235</sup> Ibid., at 59; Schultz, Nikolaus: "Ist Lotus verblüht? – Anmerkung zum Urteil des IGH vom 14. Februar 2002 im Fall betreffend den Haftbefehl vom 11. April 2000 (Demokratische Republik Kongo gegen Belgien)" in: ZaöRV 2002, pp. 703, 734.

that is exercising absolute universal jurisdiction in such a case may thus not only be concerned with serious human rights violation, committed in the past, but also with events that still have an impact on the current politics of the territorial state. It therefore cannot be excluded that, even if one considers serious and large-scale human rights violation as no longer part of the internal affairs of one state, at least the prosecution of former high state officials might constitute an interference in the internal affairs of another state. As has been stated above, international criminal law operates in a sensitive realm between the legal and the political. It therefore cannot be ruled out that at least the excessive use of absolute universal jurisdiction may overstep the border between prosecuting a perpetrator of international crimes and thus an individual and judging over the political conduct of another state and thus interfering in its internal affairs and violating its right to sovereign equality and self-determination.

The principle of absolute universality thus shows many flaws not only with respect to a high danger of misuse for political reasons and the problem of creating double standards for poor and rich countries, but furthermore with respect to its ability to function and with regard to pragmatic considerations. However, despite these prominent flaws in absolute universality it would be going too far as to regard it *per se* as infringing international law, since if exercised with caution and in compliance with the law of immunities, it might work – which however still has to be shown. In any case, the system of conditional universal jurisdiction seems to be preferable as it guarantees a higher protection of sovereign equality of states and is not as open to political abuse and the danger of creating double standards as the absolute notion.

#### **IV. Objections To (Conditional) Universal Jurisdiction**

Even the principle of conditional universality is still highly disputed. Yet, it must be noted that the critics of universal jurisdiction hardly make the effort to distinguish between the two different notions of universality, which makes it sometimes difficult to adequately address their arguments. In the following the argumentation concentrates on the objections against universality that may at least also be raised against

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<sup>236</sup> Maierhöfer, Christian: “Weltrechtsprinzip und Immunität: das Völkerstrafrecht vor den Haager Richtern” in: EuGRZ 2003, pp. 545, 553.

conditional universality. In this respect two objections against universal jurisdiction shall be discussed. The first objection concerns the already mentioned assumption that courts exercising universal jurisdiction interfere unlawfully with the internal affairs of another state.<sup>237</sup> The second objection is based on the concern that the application of universal jurisdiction might violate the procedural guarantee of double jeopardy (*ne bis in idem*) and the primacy of closely linked jurisdictions.<sup>238</sup>

### 1. The Objection of Interference in Internal Affairs

As has already been stated above, one of the fundamental principles of international law and an essential element of sovereign equality of states that goes back to the 14<sup>th</sup> century dictum of Bartolus: *par in parem no habet imperium*, provides that one sovereign state should not adjudicate upon the conduct of another and consequently that the acts of one state should not be justiciable before the courts of another.<sup>239</sup> Universal jurisdiction has therefore been highly criticised especially in situations in which a state issued proceedings against a foreign state official, since in such cases it may be difficult to distinguish between the individual offence and the (illegal) act of the respective state. Moreover, it is part of a people's right to self-determination to organize its living together and consequently also to punish the crimes accruing within its community. One of the major reoccurring criticisms against the principle of universality is therefore that states exercising such jurisdiction would interfere in the internal affairs of another state - this argument was for example put forward by Chile in a memorandum to the UK on the possible extradition of General Pinochet to Spain.<sup>240</sup>

In order to be able to respond adequately to this accusation, one has to consider the development of the international community within the last 60 years. While

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<sup>237</sup> Cf. Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 292.

<sup>238</sup> Fletcher, George P.: "Against Universal Jurisdiction" in: *JICJ* 1.3 December 2003, pp. 580-584.

<sup>239</sup> Bröhmer, Jürgen: *State Immunity and the Violation of Human Rights*, The Hague, Boston, London 1997, p. 18; Dörr, Oliver: "Staatliche Immunität auf dem Rückzug?" in: *AVR* 41 (2003), pp. 201, 202; Folz, Hans-Ernst; Soppe, Martin: "Zur Frage der Völkerrechtmäßigkeit von Haftbefehlen gegen Regierungsmitglieder anderer Staaten" in: *NStZ* 1996, pp. 576, 577; Rensmann, Thilo: "Internationale Verbrechen und Befreiung von staatlicher Gerichtsbarkeit" in: *IPRax* 1999, p. 268; Verdross, Alfred; Simma, Bruno: *Universelles Völkerrecht*, 3<sup>rd</sup> edition, Berlin 1984, § 1168.

<sup>240</sup> Cf. Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 292.

in classic international law, international relations and international cooperation was reduced to a minimum, states have moved closer together after World War II in order to prevent the repetition of events. As of today there is hardly any important issue of life that has not been the subject of international codification endeavours. From more traditional areas of international law like international trade law and especially the law of the World Trade Organisation to highly progressive areas of international law like international environmental law and especially the 1997 Kyoto Protocol, any area of international law has made incredible progress in the last years. In addition, international organisations like the United Nations and supranational organisations like the European Union show that, as of today, states are taking serious the necessity to cooperate and coordinate their mutual existence. Even the most powerful states can no longer afford a policy of isolationism. States are dependent on one another to an unprecedented scale and thus are forced to cooperate and coordinate their mutual existence. In this respect, the necessity to cooperate is even regarded as so important that states even transfer parts of their sovereignty to international organisations in order to optimise international cooperation. Thus, even though the principle of sovereign equality of states is still a foundation of international law, states are no longer as independent and detached as they were in the times of classic international law.

In this process of internationalisation, the international community has started to develop from a mere partnership of convenience to a real community based on a common system of values such as the protection of human rights. The evolution of international human rights law has been sufficiently discussed above and therefore shall not be repeated here, however it is important to stress that respect for human rights is one of the fundamental principles governing international relations. Only if one understands this fundamental importance of the concept of human rights and human dignity as a basis of international relations, does it make sense that serious and large-scale violations of human rights can no longer be regarded as part of the *domaine réservé* of a state but of concern to the international community as a whole.

Of course, this does not mean that the primary right of a state or a people to prosecute crimes occurring in its territory is no longer valid. As sovereign equality of states and a people's right to self-determination remain important foundations of in-

ternational law, the exercise of criminal jurisdiction should ideally always be based on traditional grounds of jurisdiction such as territoriality or nationality. Yet, if neither of these states exercises its right to prosecute the perpetrators of international crimes and thus to defend universal values and to restore justice, other members of the international community must have a right to step in. A national court that stands in for a defaulting foreign state and hands down decisions relating to crimes committed by foreigners against foreigners abroad protects fundamental values recognized by the international community as a whole.<sup>241</sup> Thus, the universal interest in the prosecution of the offence transcends the national interest of the state with primary jurisdiction that fails to conduct own criminal proceedings.<sup>242</sup> Or to put it differently, the international community as a whole has an interest in the prosecution of perpetrators of international crimes since they infringe fundamental universal values and thus constitute a threat to the international community as a whole. Consequently, every member of the international community must have at least the right to protect these values and to punish the perpetrators of international crimes. The universality of the values infringed by certain crimes transfers them from an internal to an international level.

That the exercise of universal jurisdiction may at the same time be open to abuse and even increase the inequality between states has been sufficiently discussed above. However, with regards to conditional universal jurisdiction, these risks do not weigh as heavy as the otherwise inevitable consequence of continued impunity for perpetrators of serious human rights violations such as genocide and torture. The perpetrators of international crimes must face a real risk of being prosecuted for their actions in order to allow for an efficient protection of human rights and thus of universal values. It therefore must be stressed that states exercising this form of jurisdiction do not interfere in the internal affairs of another state but act as representatives for and in the interest of the international community as a whole.

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<sup>241</sup> Ibid.

<sup>242</sup> Kreß, Claus: "Völkerstrafrecht und Weltrechtspflegeprinzip im Blickfeld des Internationalen Gerichtshofs" in: ZStW 114 (2002), pp. 818, 837.

## 2. The Principle of Double Jeopardy (*ne bis in idem*)

Universal jurisdiction has furthermore been accused by George P. Fletcher of being both unwise and unjust, as under a system of universal jurisdiction, the universally accepted procedural guarantee of double jeopardy (*ne bis in idem*) that protects the accused against repeat trials based on the same charges and the same facts can no longer be guaranteed.<sup>243</sup> Even subjecting the exercise of universal jurisdiction to the principle of *ne bis in idem* would in this view not be an appropriate remedy, as the exercise of universal jurisdiction would make it impossible for other courts, more closely linked to the occurrence of the crime, to accept the judgement of the adjudicating court.<sup>244</sup> Furthermore, according to this standpoint, universal jurisdiction violates the principle of 'keeping trials close to home', which in the US receives constitutional status and gives the local community the opportunity to confront the crime that has occurred among its people and seek a solution that satisfies its need to restore justice and peace within the community.<sup>245</sup>

This argument is unconvincing in many ways. Only because a right is guaranteed by the US constitution does not mean that it is a universally accepted element of a fair trial. For example, the right to be tried by a jury is also guaranteed by the US constitution but unknown to the civil law system – and one can hardly make the argument that all criminal proceedings in most European countries are unfair only because they regard a jury trial more as an obstacle to a fair trial than as an essential element of it. However, with respect to the present example, one must agree that the courts of the state on which territory the crime was committed are in general best placed to exercise criminal jurisdiction, as they are closest to the scene, the evidence and the witnesses. Moreover, it is also an important element of state sovereignty and a people's right to self-determination that crimes committed on the territory of one state are primarily justiciable in this state and by its community. Yet, the problem here is not that of priority or of who would be best, but of the availability of such a court, or

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<sup>243</sup> Fletcher, George P.: "Against Universal Jurisdiction" in: JICJ 1.3 December 2003, pp. 580-584.

<sup>244</sup> Cf. Ibid.

<sup>245</sup> Ibid.

as a second best, a court of (active) nationality, i.e. a court in the home state of the perpetrator or as a fall-back even a court in the home state of the victim.<sup>246</sup>

Critics of the principle of universal jurisdiction tend to focus on the problem that there might be cases in which more than one community is interested in exercising its criminal jurisdiction. However, universal jurisdiction is only meant as a solution for cases in which there is no state with primary jurisdiction that is willing and able to resolve the conflict and conduct criminal proceedings. Universal jurisdiction is in essence a jurisdiction of last resort, a fail-safe solution called for by urgency and necessity as otherwise fundamental values of the international community would be unprotected.<sup>247</sup> Therefore, since universal jurisdiction may only be exercised as a substitute for traditional forms of jurisdiction, it is clear that it does not ignore the primacy of local concerns, but only steps in as a subsidiary safeguard for universal values. Consequently, if the exercise of universal jurisdiction is subjected to the principle of *ne bis in idem* - and indeed there is no reason why it should not be - there are no grounds for arguing that it would violate the principle of double jeopardy.

The theoretical problem that one state might not accept the judgement of a foreign criminal court is therefore not specific to universal jurisdiction but could occur in any case with a transnational element. Besides, since according to the view advanced here universal jurisdiction should only be exercised when the accused is at least present at the trial, there is also no danger that more than one domestic criminal court might at the same time conduct trials based on the same charges and the same facts. The principle of universality does therefore neither infringe the principle of *ne bis in idem* nor the principle that 'trials should be kept close to home'.

## V. The Impact of the ICCSt on the Application of Universal Jurisdiction

As has been shown above, the establishment of the ICC has apparently encouraged states to change their domestic criminal law and to adopt the principle of universal jurisdiction with respect to the ICC core crimes. At first glance this seem surprising:

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<sup>246</sup> Abi-Saab, Georges: "The Proper Role of Universal Jurisdiction" in: JICJ 1.3 December 2003, pp. 596-602.

<sup>247</sup> Ibid.

why should the creation of an international institution that itself was created to judge the perpetrators of genocide, crimes against humanity and war crimes get national states to extend their domestic criminal jurisdiction? Would it not be more logical if states would limit their national criminal jurisdiction with respect to genocide, crimes against humanity and war crimes committed abroad by foreign nationals if they finally succeeded in creating an international institution to fulfil exactly this task? To answer this question it is necessary to understand how the newly created ICC and national courts will interact in the prosecution of ICC core crimes in the years to come.

The jurisdiction of the ICC has been accurately described as a default jurisdiction that is only activated if and when national criminal courts fail to prosecute the crimes falling within their overlapping jurisdiction with the ICC.<sup>248</sup> This view is supported first by the Preamble of the ICCSt which emphasises that the ICC shall be *complementary* to national jurisdiction,<sup>249</sup> and is subsequently made explicit and enforceable in the admissibility provision,<sup>250</sup> which provide that cases are only admissible to the ICC if no domestic criminal court is willing and able to genuinely carry out proceedings. The right to punish the perpetrators of genocide, crimes against humanity and war crimes thus remains, in compliance with the principles of sovereignty and a people's right to self-determination, primarily the task of domestic criminal courts.

On this score, Louise Arbour has raised an interesting point by asking whether states, by becoming a party to the Rome Statute, have undertaken an additional obligation to establish and exercise universal jurisdiction for all ICC core crimes for which they have not already undertaken such an obligation under an existing convention.<sup>251</sup> The only provision in the ICCSt that supports such a view is paragraph 6 of the Preamble.<sup>252</sup> According to this provision, the *state parties to the ICCSt recall, that it is the duty of every state to exercise its criminal jurisdiction over those responsible*

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<sup>248</sup> Arbour, Louise: "Will the ICC Have An Impact On Universal Jurisdiction?" in: JICJ 1.3 December 2003, pp. 585-588.

<sup>249</sup> Paragraph 10 of the Preamble of the ICCSt.

<sup>250</sup> Art. 17-19 ICCSt.

<sup>251</sup> Arbour, Louise: "Will the ICC Have An Impact On Universal Jurisdiction?" in: JICJ 1.3 December 2003, pp. 585-588.

<sup>252</sup> Cf. Ibid.

*for international crimes*. Surely this could be interpreted as meaning that, with respect to the ICC core crimes, all states should exercise their own criminal jurisdiction to the fullest,<sup>253</sup> and thus also oblige them to establish and exercise universal jurisdiction within their national legal systems. Moreover, this assumption is supported by the fact that states such as Germany, Canada and Australia have in the framework of implementing the ICCSt adopted additional national legislation providing for universal jurisdiction with regards to genocide, crimes against humanity and war crimes.

However, it must be stressed that only a few state parties to the Rome Statute have amended their national legislation in favour of universal jurisdiction. It is therefore more than doubtful whether paragraph 6 of the ICCSt Preamble can indeed be understood as a mandatory obligation to establish universal jurisdiction. Besides, according to the wording of paragraph 6 of the Preamble every state should *exercise its* criminal jurisdiction. This phrasing can hardly be interpreted as an obligation to change the domestic law with respect to new grounds of jurisdiction but only to use all possibilities already available under national law to prosecute those responsible for ICC core crimes. Therefore, as long as the domestic criminal law provides for a possibility to punish ICC core crimes, states cannot be forced to change their national legislation. Moreover, international treaties hardly ever establish specific obligations in the Preamble. As even the ornate language used shows, the purpose of a Preamble is to establish the overall goals and purposes of an international treaty as well as its standpoint and context in international law but not to create specific obligations. Thus, in conclusion, paragraph 6 of the Preamble can only be regarded as an invitation to all state parties to use all possibilities of their existing legal systems to try the perpetrators of international crimes but not as an obligation to establish universal jurisdiction in their national law. However, one could nevertheless legitimately make the argument that this provision at least makes an emphatic request to all state parties to apply the principle of universality – but only if possible under domestic law.

It has furthermore been suggested that national courts shall have priority over the jurisdiction of the ICC only when courts have a traditional link with the crime, but not when national courts can only exercise their jurisdiction on the basis of the prin-

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<sup>253</sup> Ibid.

ciple of universality, in which case international jurisdiction shall take precedence over universal jurisdiction.<sup>254</sup> The reason for this distinction is based on the consideration that in exercising universal jurisdiction the state does not act in its own name *uti singulus*, but in the name of the international community – however, once this community develops its own specialised institution to fulfil precisely this task, they take precedence over actions by single states.<sup>255</sup>

This argument has its merit; however, it is neither in compliance with the present role of international criminal courts nor the principle of complementarity. As has been pointed out above, international criminal courts are established to try only the most important and most serious international crimes and generally only the senior level decision makers, planners and senior executors. The ICC could therefore only have primacy over national courts exercising universal jurisdiction with respect to the most serious crimes of concern to the international community as a whole. Yet not even this interpretation is supported by the Rome Statute. Art. 17 ICCSt emphasizes that the ICC is a complement to national criminal systems and has no primacy whatsoever over national criminal courts.<sup>256</sup> Moreover it was agreed upon at the Rome Conference leading up to the adoption of the ICCSt that the ICC was not seeking to undermine or detract from national jurisdiction, but would only assume jurisdiction where no state was willing and able to do so in good faith.<sup>257</sup>

To sum up, the ICCSt encourages states to establish and exercise universal jurisdiction over the ICC core crimes since it is primarily the responsibility of domestic criminal courts to judge the perpetrators of international crimes. However, the ICCSt does not provide for an obligation for the state parties to establish universal jurisdiction in their national law, but only to punish the perpetrators of the ICC core crimes on the grounds of existing forms of jurisdiction.

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<sup>254</sup> Abi-Saab, Georges: "The Proper Role of Universal Jurisdiction" in: JICJ 1.3 December 2003, pp. 596-602.

<sup>255</sup> Ibid.

<sup>256</sup> Cf. Williams, Sharon A. in: Triffterer, Otto (editor): Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 1st edition, Baden Baden 1999, article 17, at 31.

<sup>257</sup> Ibid. At 16.

## VI. Concluding Remarks

Universal jurisdiction is an important weapon against the impunity of perpetrators of international crimes. It is exercised by a state on behalf of the international community to protect international human rights that are accepted as universal values. Consequently, from a human rights perspective it would be a considerable sacrifice not to allow the exercise of universal jurisdiction with respect to international crimes like genocide, war crimes and crimes against humanity. As of today, the exercise of universal jurisdiction is in principle universally accepted at least with respect to genocide, torture and grave breaches of humanitarian law.

However, even though the principle of universality as such has become an inalienable part of international law, there is still more disagreement than agreement with respect to its definition and scope. As a consequence, when states prosecute a crime that has not been committed in their territory or by one of their nationals, they are reluctant to rely on universal jurisdiction alone and - out of abundance of caution - usually base their jurisdiction on as many linkage principles as possible.<sup>258</sup> Still, international law is not a static concept, but constantly in motion. Thus the acceptance and exercise of universal jurisdiction might change in the future, possibly the next years. In this respect, the question as to whether the principle of universality will gain more support and practical importance will for the most part depend on the performance of states already exercising universal jurisdiction, and on the practice of the ICC.

The prosecution of perpetrators of international crimes – and especially state officials – by foreign domestic courts is still a highly sensitive area. The principle of sovereign equality and a people's right to self-determination require that the states and the communities most affected by a crime have the primary right to deal with it and to restore peace and justice. Justice will not be served if in the end only rich Western countries pass judgements on situations and nationals of developing countries while at the same time human rights violations committed by nationals of rich and powerful countries will still only be subjected to the jurisdiction of their home-states and thus to political choice. It is an undisputable fact that only few states in the

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<sup>258</sup> Strapatsas, Nicolaos: "Universal Jurisdiction and the International Criminal Court" in: 29 *Man.L.J.* 1, pp. 1-31, VII.

world have the financial and institutional resources as well as the political power to host criminal proceedings against foreign nationals that have committed international crimes abroad. National criminal courts exercising universal jurisdiction must therefore be aware of the immense power and responsibility that is attributed to them by the principle of universality and exercise extreme caution when prosecuting foreign nationals and especially foreign state officials on the basis of universal jurisdiction.

Objections against universal jurisdiction are to a large extent based on the fear that this ground of jurisdiction is not exercised in good faith and in compliance with international due process norms.<sup>259</sup> It is very understandable that states do not want to have their head of state or foreign minister prosecuted by another state for political reasons, therefore it is very important that national courts, in addition to exercising caution, strictly follow the rules of international immunity law.

The necessity to exercise caution when dealing with universal jurisdiction is especially evident with respect to the principle of absolute universality. While the principle of conditional universality is due to the requirement of a legitimising link between the crime and the prosecuting state less open to abuse, the principle of absolute universality holds many dangers. Not only is there an undeniable chance of misuse for political reasons or arbitrary choosing of cases, but also a more pragmatic danger of overburdening a national judicial system with cases that will never result in a convictions. The idea that a domestic criminal court has jurisdiction over any serious violation of human rights committed anywhere in the world, no matter by whom or against whom and where the perpetrator resides, has something megalomaniacal.

Finally, one cannot stress enough that the current exercise of universal jurisdiction must be read in conjunction with the establishment of the ICC and its future work. Both the ICC and the principle of universality contribute to a common system of international criminal justice. Even though it is still difficult to foresee how exactly the ICC and the principle of universality will influence each other, there are, as shown, grounds for the supposition that the exercise of universal jurisdiction will increase under a system of criminal justice supervised by the ICC.

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<sup>259</sup> Cf. Marks, Jonathan H.: "Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council" in: 42 *Colum.J.Transnat'l L.*, pp. 445-490, II.

#### **D. The Principle of Complementarity Under the Rome Statute**

The rules summarized under the term 'principle of complementarity' regulate the relationship between the ICC and domestic criminal courts.<sup>260</sup> It has been shown above that the creation of international criminal courts corresponds significantly with the principles of sovereignty and a people's right to self-determination. Consequently, the question which powers the ICC will have in relation to domestic criminal courts is of pivotal importance. The solution adopted in the Rome Statute with the principle of complementarity has been described, as a cornerstone of the Statute, without which there would have been no agreement.<sup>261</sup> However, even though it has been forcefully pointed out that complementarity is central to the whole idea of the ICC, this does not mean that there is agreement on the exact meaning of this term. Moreover, the solution adopted in the Statute is still the object of forceful criticisms – both founded and unfounded. In this respect, most objections focus on the role of the ICC as arbiter of its own jurisdiction and thus on its functioning as a supervisor over the exercise of domestic criminal jurisdiction with respect to the ICC core crimes.

The aim of this section is therefore to shed some light on this still poorly illuminated and highly disputed principle and to show how the ICC and national criminal courts are supposed to work together in a common system of international criminal justice. In addition, while looking into the solution adopted in the ICCSt under the term of complementarity, the question as to whether this solution is in compliance with the fundamental principles of sovereignty and a people's right to self-determination shall be kept in view.

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<sup>260</sup> The author of this thesis is aware that – as the current negotiations between the government of Uganda and the ICC suggest - in practice the principle of complementarity might in the first instance affect the relationship between national governments and the ICC. However, since this thesis deliberately concentrates on the legal aspects of complementarity, this highly political dimension of complementarity is beyond the reach of this thesis.

<sup>261</sup> Cf. Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 20; The Board of Editors: "The Rome Statute: A Tentative Assessment" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 1901, 1906.

## I. Complementarity *versus* Primacy: The Statutes of the *ad hoc* Tribunals *versus* the Rome Statute

According to the Statutes of both *ad hoc* tribunals, the ICTY and the ICTR respectively shall have concurrent jurisdiction with national criminal courts over serious violations of international humanitarian law.<sup>262</sup> Still, they also provide that the *ad hoc* tribunals shall have primacy over the national criminal courts of all states.<sup>263</sup> At any stage of the procedure, the respective *ad hoc* tribunal may formally request national courts to defer their criminal proceedings to its competence and suspend proceedings underway,<sup>264</sup> and states are bound to comply with this request since the Statutes of the ICTY and the ICTR are decisions of the UN Security Council and thus binding for all UN members.<sup>265</sup> In cases of conflict between the jurisdiction of the ICTY or the ICTR and national criminal courts, that is in cases that fall within the jurisdiction of the ICTY or the ICTR but in which also a national criminal court is exercising its jurisdiction, it is thus for the *ad hoc* tribunal to decide in which forum the suspected perpetrator shall be tried. At first sight, this rule is surprising and maybe even shocking, since it denies even the communities most affected by a crime the primary right to deal with it and thus with the perpetrators of crimes committed within their midst.

This immense power of the *ad hoc* tribunals is however better understandable when one recalls that the *ad hoc* tribunals were creations of the Security Council acting under Chapter VII of the UN Charter and that all UN member states are bound to comply with such an action pursuant to article 25 UN Charter.<sup>266</sup> Moreover, when establishing the ICTY and the ICTR, the Security Council was faced with situations where in the former Yugoslavia there was an open unwillingness to investigate and

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<sup>262</sup> Art. 9 I ICTYSt, art. 8 I ICTRSt.

<sup>263</sup> Art. 9 II ICTYSt, art. 8 II ICTRSt.

<sup>264</sup> Ibid.

<sup>265</sup> Cf. Art. 25 UN Charter.

<sup>266</sup> Williams, Sharon A. in: Triffterer, Otto (editor): Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 31.

prosecute effectively those responsible for international crimes and in Rwanda there was a clear inability to do so.<sup>267</sup> The solution adopted in art. 9 ICTY Statute and art. 8 ICTR Statute that in cases of conflict gives primacy to the *ad hoc* tribunals, was thus necessary to ensure that at least the persons chiefly responsible for the most serious international crimes committed in the course of these two conflicts would not go unpunished. With regard to the respective conflicts, it is therefore understandable that the SC attributed primacy to the *ad hoc* tribunals, since otherwise the creation of these tribunals might have been ineffective or even entirely in vain.

In addition, since the Statutes of the *ad hoc* tribunals do not specify on what conditions and how primacy is to be exercised, the judges of the ICTY wisely drew up a set of rules on primacy which were subsequently adopted by the judges of the ICTR that do not lay down the absolute primacy of the respective *ad hoc* tribunal, but worked out a mechanism whereby a case could be referred back to national courts when deemed appropriate.<sup>268</sup> In this respect, the rules adopted in the ICTY *Rules of Procedure and Evidence* provide that in the case of concurrent jurisdiction of the *ad hoc* tribunal and national courts, the tribunal may divest itself of a case when it considers that the case may more appropriately be tried by a national court.<sup>269</sup> So far the two *ad hoc* tribunals have seldom relied on their primacy. In fact, the most popular case that comes to mind is the case of Dusko Tadic who was arrested on February 13, 1994 in Munich, and following his indictment on February 13, 1995 by the ICTY, was transferred from Germany to The Hague on April 24, 1995.<sup>270</sup> In this case however, the prosecuting state, i.e. Germany, was not directly affected by the crimes committed by Tadic since neither Tadic nor his victims were German nationals and the acts of war crimes and crimes against humanity in question were not committed on Germany territory. The request of the ICTY to defer the *Tadic Case* to its competence thus did not affect German sovereignty concerns. In conclusion it therefore can

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<sup>267</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 669.

<sup>268</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 349.

<sup>269</sup> Rule 11 bis of the ICTY Rule of Procedure and Evidence.

<sup>270</sup> Cf. *Tadic Case* (IT-94-1), <http://www.un.org/icty/glance/tadic.htm> (last visited: April 2, 2005).

be said that even though the *ad hoc* tribunals have been attributed with immense power, they have used this power wisely and cautiously: instead of constantly insisting on their primacy they have encouraged and strengthened national jurisdiction.

Unlike the ICTY and the ICTR, the ICC does not enjoy primacy over national criminal courts but only complements national criminal jurisdiction. There are a number of reasons for approaching the ICC differently from the ICTY and the ICTR. First of all, unlike the statutes of the ICTY and the ICTR, the ICCSt is not the product of a SC decision, but an international treaty and thus the outcome of intense multilateral negotiations and consequently subject to diverse international politics.<sup>271</sup> Any solution adopted in the Rome Statute is the result of a political tug-of-war, a compromise between states that wanted a powerful and effective ICC and states that were mainly driven by sovereignty concerns. In addition, the jurisdiction of the ICC is not limited to a specific conflict but applies - at least in principle - worldwide and to any act of genocide, crimes against humanity and war crimes, committed after the entry into force of the Rome Statute on July 1, 2002. States therefore feared that the ICC would be flooded with cases from all over the world and would be unable to cope with a broad range of cases.<sup>272</sup> The same argument that is valid against absolute universal jurisdiction, i.e. that no court is able to deal with all human rights violations committed anywhere in the world, was therefore also considered with respect to the jurisdiction of the ICC. In this light, the claim raised by states exercising absolute universal jurisdiction seems even more abstruse since any national criminal court exercising absolute universal jurisdiction is claiming an even broader scope of jurisdiction than the ICC. In addition, the solution of giving primacy to national criminal jurisdiction is also in compliance with the principle of sovereignty and a people's right to self-determination, since even though international crimes like the ICC core crimes violate universal values and thus concern the international community as a whole, they first of all cause harm to the communities in which they are committed; therefore it is also their primary right to deal with the perpetrators of such crimes.

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<sup>271</sup> Cf. Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 31.

<sup>272</sup> Cassese, Antonio: *International Criminal Law*, Oxford, 2003, p. 351.

Still, sovereignty concerns were central in the process of establishing the ICC since the parties to the Rome Statute would be subjecting their own nationals to the jurisdiction of the Court. Consequently, at least some states forcefully tried to protect their own sovereignty against the intrusive power of an international organisation. It is still disputed whether these concerns have been adequately addressed by the ICCSt, since the ICC has a supervising function over the exercise of domestic criminal jurisdiction with respect to the ICC core crimes. It has been argued that by equipping the ICC with such a supervisory function, also the decision has been made that perpetrators of international crimes must be subjected to criminal court proceedings and, if convicted, punished.<sup>273</sup> Consequently, according to this view, states are no longer free to choose other ways of dealing with human rights violations such as amnesties or truth and reconciliation commissions, since the Rome Statute establishes a duty to prosecute which abidance is supervised by the ICC.

## II. The Principle of Complementarity: What Does it Mean?

The term *complementarity* is unknown both in domestic legal systems and in international law. Yet, it has been suggested that it has something in common with the term *subsidiarity*, used to describe the relationship between the European Community (EC/Community) and its member states.<sup>274</sup> According to the principle of subsidiarity, in areas which do not fall within the exclusive competence of the EC, the Community only takes action if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.<sup>275</sup> It is true that the ICC system of complementarity and EC system of subsidiarity have a common structure, since both establish the primacy of national actions and thus show respect for the principles of state sovereignty and a people's right to self-determination. How-

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<sup>273</sup> Cf. Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 445.

<sup>274</sup> Crawford, James: "The Work of the International Law Commission" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: The Rome Statute of the International Criminal Court: A Commentary, Oxford 2002, pp. 23, 44.

<sup>275</sup> Cf. Art. 5 II of the Treaty Establishing the European Community.

ever, there are also significant differences between complementarity and subsidiarity. While the EC can take action when objectives can be better achieved by it than by the member states, the ICC only has jurisdiction when no national criminal court is willing and able to genuinely carry out investigations or prosecutions.<sup>276</sup> Consequently, only because the ICC could deal better or more efficiently with a case that does not give him the right to resume jurisdiction since it is still the right of national states, and especially of states directly affected by the crime, to deal with the perpetrators. Therefore, as long as domestic courts are able to deal adequately with a situation, the ICC must respect their jurisdiction. Only in cases where the availability of domestic criminal courts is not given may the ICC step in and prosecute the perpetrator. It is thus important not to confuse the systems of subsidiarity and complementarity.

### 1. Achieving Agreement on Complementarity

The ICCSt was adopted by treaty in an international conference and by delegations from about 160 nations from all over the world and thus from the most diverse legal systems and of the most diverse political backgrounds. To be viable as a treaty, the Statute therefore needed to derive its strength from a combination of reasonably strong provisions and reasonably strong support from as many states as possible.<sup>277</sup> The principle of complementarity is thus the result of a multitude of concessions and compromises. Yet, considering the explosiveness and touchiness of the topics involved, it is astonishing that states were at all able to agree on a common solution.

The Draft Statute for the ICC that was prepared by the International Law Commission (ILC) during its 1993 and 1994 sessions included a presumption of primacy for national criminal courts, but reserved some residual primacy in limited situations for the ICC.<sup>278</sup> The criteria under which the ICC could usurp national primacy according to the Draft Statute were however vague – ‘*apparently well founded*’

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<sup>276</sup> Cf. Art. 17 I ICCSt.

<sup>277</sup> Cf. The Board of Editors: “The Rome Statute: A Tentative Assessment” in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: The Rome Statute of the International Criminal Court: A Commentary, Oxford 2002, pp. 1901, 1902.

<sup>278</sup> Cf. Draft Statute for an International Criminal Court (Report of the ILC on the work of its forty-sixth session, 2 May-22 July 1994, GA, official records, forty-ninth session, supplement No. 10 (A/49/10), par. 42-91, pp 29-161).

and 'no reason for the Court to take any further action' – and therefore, potentially the ICC could have decided to exercise jurisdiction in many instances.<sup>279</sup> The theoretical primacy of national jurisdiction was thus partially invalidated by the wide decision-making leeway attributed to the ICC by the Draft Statute. Therefore, even though the general principle of primacy for national jurisdictions proposed was in compliance with the sovereignty concerns of many states, the wide margin of appreciation given to the ICC by the indefinite legal terms used in the Draft Statute was not, and consequently highly criticised during the negotiations.

The concerns of states with respect to their sovereign interests in criminal justice were at the forefront of the negotiations in Rome from the earliest stage, therefore a proper balance had to be struck between the ICC and national authorities in order to make the Statute acceptable to a large number of states.<sup>280</sup> Some states including France, the United Kingdom and the United States expressed the view that the ICC should not act as an appeal tribunal or engage in judicial review of national decisions, whereas others were committed to giving the ICC a role to take jurisdiction where national proceedings were ineffective - a consensus finally emerged that the Court should not take jurisdiction unless the state(s) with criminal jurisdiction over the offence in question is/are unable or unwilling to carry out the investigation or prosecution.<sup>281</sup> This solution ties together neatly the reasons for giving primacy to the ICTY and the ICTR as in Rwanda and the former Yugoslavia it was already obvious when the *ad hoc* tribunals were established that the domestic criminal courts were either not able or not willing to deal with some of the worst perpetrators responsible for such acts as ethnic cleansing and genocide committed in those two conflicts.

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<sup>279</sup> Cf. Holmes, John T.: "Complementarity: National Courts versus the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 671.

<sup>280</sup> Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 1, 9.

<sup>281</sup> *Ibid.*, art. 17 at 12.

## 2. The Principle of Complementarity as Laid Down in the Rome Statute

The principle of complementarity is laid down in paragraph 10 of the Preamble and art. 1 sentence 2 of the Rome Statute.<sup>282</sup> It is further spelled out especially in art. 17, 18 and 19 ICCSt. Art. 18 and 19 govern procedure, while art. 17 sets out substantive criteria; these provisions provide that, as a rule, it is the task of national criminal courts to try those accused of ICC core crimes. The ICC is to function only as a kind of jurisdictional compromise solution; only when there is no alternative forum to prosecute those linked to ICC core crimes can the ICC exercise its jurisdiction.

There are numerous arguments in favour of the primacy of domestic criminal jurisdiction. With respect to traditional forms of jurisdiction it has already been pointed out that national criminal courts are usually in the best position to judge the crimes committed in their territories or by their nationals since they usually enjoy the forum convenience and thus have best access to evidence, witnesses and/or alleged offenders. In addition, national criminal jurisdiction over international crimes like genocide, war crimes and crimes against humanity is generally much broader than the jurisdiction of the ICC as it embraces even lesser offences, such as sporadic and isolated crimes.<sup>283</sup> However, the most important argument for a presumption in favour of national criminal jurisdiction is that it complies with the principles of sovereignty and a people's right to self-determination since it preserves the primary right of the affected communities to deal with situations arising in their own midst and leaves their judicial integrity unharmed. It must be stressed that although it makes sense to accept the ICC as a necessary contribution to a functioning system of international criminal justice, the sovereignty rights of states must not be needlessly limited. Sovereignty is one of the fundamental principles of international peace law that protects especially weaker and poorer states against interference from more powerful countries. Consequently this principle should only be constrained in order to protect other fundamental

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<sup>282</sup> Paragraph 10 of the Preamble:

*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.*

Art. 1 sentence 2 (in the end):

*(...) and shall be complementary to national criminal jurisdiction.*

<sup>283</sup> Cf. Cassese, Antonio: "The Statute of the International Criminal Court: Some Preliminary Reflections" in: EJIL 1999, pp. 144, 158.

principles of equal value and importance and only to the degree absolutely necessary, since otherwise groundless disadvantages for poorer and weaker states would be created and therewith the inequality between states increased.

The four grounds that mandate the ICC to declare a case inadmissible are laid down in art.17 I ICCSt. According to this list, a case is as a rule inadmissible when:

- (a) *it is being investigated or prosecuted by a state which has jurisdiction over it;*
- (b) *it has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned;*
- (c) *the person concerned has already been tried for conduct which is the subject of the complaint, or*
- (d) *the case is not of sufficient gravity to justify further action by the ICC.*

In the first two cases, inadmissibility is however not given if the state in question is *unwilling or unable genuinely to carry out the investigation or prosecution* or if the decision not to prosecute resulted from such an *unwillingness or inability*. Here again resurface the situations that the SC faced in the cases of Rwanda and the former Yugoslavia: the circumstances in which national courts are no longer in the position to guarantee that the perpetrators of international crimes are called to account.

The third ground of inadmissibility that blocks the jurisdiction of the ICC is the already discussed principle of *ne bis in idem* or *double jeopardy*. With respect to the Rome Statute, the principle of *ne bis in idem* is written out in full in art. 20 ICCSt. Yet, it must be noted that the ICC may nonetheless exercise its jurisdiction even though the person in question has already been tried for a specific conduct, if the proceedings in the domestic criminal court *were for the purpose of shielding the person concerned from criminal responsibility* or were otherwise *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.*<sup>284</sup> The *raison d'être* of this provision is to circumvent sham proceedings that are only conducted by national courts in order to exempt a perpetrator of international crimes from the jurisdic-

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<sup>284</sup> Art. 17 I (c) in conjunction with art. 20 III ICCSt.

tion of the Court. This concept is very close to the idea of *unwillingness*, since the ICC may find an unwillingness to prosecute an alleged culprit of international crimes if the proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility.<sup>285</sup>

Finally, the fourth ground of inadmissibility that declares a case inadmissible if it is not of sufficient gravity is in line with the role of international criminal tribunals as institutions that generally focus only on the senior level decision-makers, planners and senior executors. Moreover, it protects the sovereignty of states by ensuring that crimes that are not of pressing concern to the international community as a whole remain the task of national criminal jurisdiction.

In conclusion, the basic idea of complementarity is that as long as states effectively exercise their jurisdiction over the crimes set out in the ICCSt, the ICC recognizes the primacy of national jurisdictions and declares these cases inadmissible to it. Only if states are unwilling or unable to do so and only if these cases are of sufficient gravity to trigger the ICC's jurisdiction may the Court exercise its jurisdiction.

### **III. Limitations of Inadmissibility**

Certain crimes such as genocide or crimes against humanity are often committed with the help, assistance, complicity or acquiescence of national authorities.<sup>286</sup> Especially widespread or systematic acts, amounting to crimes against humanity in the sense of the Rome Statute as well as crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes in internal or international armed conflicts, qualifying as war crimes as defined by the Rome Statute,<sup>287</sup> usually show a state-related element. As has been highlighted, in these cases there is a danger that complementarity might lend itself to abuse and might amount to a shield used by states to thwart international justice by pretending to investigate and try crimes, and even conducting proceedings, but only for the purpose of actually protecting the allegedly re-

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<sup>285</sup> Cf. art. 17 II (a) ICCSt.

<sup>286</sup> Cassese, Antonio: "The Statute of the International Criminal Court: Some Preliminary Reflections" in: EJIL 1999, pp. 144, 159.

<sup>287</sup> Cf. Art. 7, 8 ICCSt.

sponsible persons.<sup>288</sup> In addition, states that have been the scene of armed conflicts are more likely to find that their judicial system is unable to effectively initiate proceedings against the perpetrators of serious violations of international humanitarian law. The ICCSt thus provides for a range of safeguards designed to quash any attempt made by national authorities to *de facto* shield the alleged offenders or respectively to address situations in which no national judicial system is available.

The applicability criteria for determining whether the state in question has met the required standard for conducting criminal proceedings or is not genuinely dealing with a case is spelled out in paragraph 2 and 3 of art. 17 ICCSt. By applying these admissibility criteria, the ICC exercises a supervisory function over the adequacy of national criminal jurisdiction, determining the outer boundaries for states to implement and enforce criminal law with regard to the ICC core crimes and how much discretion is available to them in that respect.<sup>289</sup> The important question as to whether this extensive power of the ICC is in compliance with the principles of sovereignty and a people's right to self-determination will be discussed in full below, while this section concentrates on giving an idea of the notions of *unwillingness* and *inability* as well as the term *genuine* as used by the ICCSt. However, these terms cannot be addressed adequately without referring at some points to the mentioned function of the ICC as arbiter of its own jurisdiction and thus its power to supervise to a certain extent the exercise of national criminal jurisdiction with respect to the ICC core crimes.

### **1. The Notion of *Unwillingness***

The ICC may find unwillingness only where,

- (a) *the national proceedings or the decision not to prosecute was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;*
- (b) *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;*

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<sup>288</sup> Cassese, Antonio: "The Statute of the International Criminal Court: Some Preliminary Reflections" in: EJIL 1999, pp. 144, 159.

(c) *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.*<sup>290</sup>

This list is regarded as exhaustive.<sup>291</sup> The ICC must therefore rely on one of the listed grounds to declare that a state has been unwilling to genuinely deal with a case and restore justice even though it investigated or even prosecuted an alleged perpetrator.

It has been pointed out that *unwillingness* refers to the purpose for which proceedings are undertaken and thus to the subjective intention of a state.<sup>292</sup> Consequently, determining *unwillingness* always involves the assessment of a subjective motive.<sup>293</sup> As a rule, subjective motives are much more difficult to prove than objective elements. Therefore, it depends decisively on the opinion of the person deciding whether or not the existence of a subjective element is answered in the affirmative or not. Consequently, with respect to subjective elements, the deciding judge has a larger scope for judgement evaluation than with respect to objective ones. To nonetheless make proceedings as objective as possible and thus to minimize this margin of appreciation, subjective elements are often described or defined by objective ones that indicate if the subjective one is given. That is, whenever certain objective elements are provable, there is a presumption in favour of the existence of the respective subjective element. The more objective a test to determine a subjective element is, the more amenable is it to verification and thus the more objective.

With respect to defining the term *unwillingness*, the negotiations at the Rome Conference therefore focused on the subjective *versus* the objective nature of the test

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<sup>289</sup> Kleffner, Jann K.: "The Impact of Complementarity on National Implementation of Substantive International Criminal Law" in: JICJ 1.1 (2003), pp. 86, 87.

<sup>290</sup> Art. 17 II ICCSt.

<sup>291</sup> Williams, Sharon A. in: Triffterer, Otto (editor): Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 26.

<sup>292</sup> Kleffner, Jann K.: "The Impact of Complementarity on National Implementation of Substantive International Criminal Law" in: JICJ 1.1 (2003), pp. 86, 87.

<sup>293</sup> Ibid.

to be used by the ICC.<sup>294</sup> The finally adopted criteria to define the subjective intent of a state with respect to unwillingness provide for objective links by describing situations in which unwillingness is most likely to occur. They thus provide for a framework within which the judges of the ICC will have to argue when deciding on the unwillingness of a state to genuinely initiate and carry out proceedings. Yet, the exact interpretation and building up of the terms used as well as the evaluation of the specific proceedings in question will still be the task of the ICC.

Subparagraph (a) meets the concern of a state fulfilling only the letter of the Statute by carrying out an investigation or prosecution, but not the spirit, by in fact having a sham proceeding to shield the person concerned from criminal responsibility.<sup>295</sup> The concept of shielding is quite broad, therefore an argument has been made that the other criteria – unjustified delay and independence and impartiality, are simply corollaries of this concept.<sup>296</sup> This argument is convincing, since the first criterion is the most subjective and thus only explains the notion of unwillingness in more words, while the other two provide for specific situations in which unwillingness is most likely to occur and are thus more objective than the first one.

The second criterion of an *unjustified delay*, even though in principle accepted by most delegations at the Rome Conference, gave rise to a lengthy discussion with respect to its phrasing. It was feared that a state which pursues an investigation or prosecution, might be unable to prevent the ICC from unwarrantedly assuming jurisdiction if the Court determines that the delays are unjustified and inconsistent with an intent to bring the person to justice.<sup>297</sup> Therefore, the term *unjustified delay* was finally used instead of the earlier suggested term *undue delay*, since it was viewed as providing for a higher standard than *undue* and since it was regarded as implicit that a

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<sup>294</sup> Cf. Holmes, John T.: “The Principle of Complementarity” in: Lee, Roy S.(editor): The International Criminal Court – The Making of the Rome Statute – Issues, Negotiations, Results, The Hague, London, Boston 1999, pp. 41, 49.

<sup>295</sup> Williams, Sharon A. in: Triffterer, Otto (editor): Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 27.

<sup>296</sup> Holmes, John T.: “Complementarity: National Courts *versus* the ICC” in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: The Rome Statute of the International Criminal Court: A Commentary, Oxford 2002, pp. 667, 675.

<sup>297</sup> Cf. *Ibid.*, pp. 667, 676.

state would have the right to in fact justify its actions in delaying proceedings domestically before the ICC could determine a case admissible to it.<sup>298</sup>

In this respect it is interesting to note that the term of an *undue delay* was regarded as too narrow for the purpose of determining a state's unwillingness to prosecute, even though most international human rights treaties and even art. 67 I c) ICCSt use this term with respect to the fundamental element of a fair trial of expeditiousness of proceedings.<sup>299</sup> The reason to deviate from the (previously) universally acceptable wording can only be explained with respect to the immense power attributed to the ICC by allowing it to determine the intent of a state behind national criminal proceedings. Many states were only willing to accept this power of the ICC if they were guaranteed a right to explain why proceedings were taking so long, before the ICC could usurp national primacy and declare the case admissible to it. In this respect it must be emphasized that although most human rights treaties are legally binding, the enforcement mechanisms are usually weak and - probably with the exception of the European Court of Human Rights, the enforcement mechanism of the ECHR - have predominantly a political effect insofar as states do not like to be portrayed as human rights violators and thus may change certain practices.

The last criterion emphasizes the need for independence and impartiality in criminal proceedings. However, unwillingness may only be presumed when in addition to lacking independence and impartiality the respective proceedings are or were conducted in a manner which is inconsistent with an intent to bring the person concerned to justice. Obviously there is a potential for overlap between this criterion and the first one since proceedings that are conducted with an intent of shielding a person from criminal prosecution cannot be regarded as impartial.<sup>300</sup> Still, the fact that the criterion of independence and impartiality of criminal proceedings was listed as an

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<sup>298</sup> Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 17.

<sup>299</sup> See for provisions on the expeditiousness of proceeding: Art. 14 III c) ICCPR, art. 7 I d) Banjul Charter, art. 8 I ACHR, art. 6 I ECHR, art. 20 IV c) ICTR-Statute, art. 21 IV c) ICTY-Statute and art. 67 I c) ICCSt.

<sup>300</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 676.

extra ground for unwillingness shows the immense importance that is attributed to it with respect to fair criminal proceedings. Impartiality is one of the major conditions for justice through criminal proceedings. Only when the outcome of a trial is still open when proceedings start can justice be done; neither a conviction nor an acquittal that is predetermined can be justified. In addition, it can be argued that the third criterion was listed as an extra point, since it is a prime example for a situation in which a state is unwilling to bring the perpetrators of international crimes to justice.

When considering whether one of the situations described in paragraph 2 is given, the ICC will have to take into account previous investigations and prosecutions in comparable circumstances.<sup>301</sup> Moreover departures from the normal legal procedure of a state would be another factor that could give rise to serious doubts about the legitimacy of an exercise such as the transfer of a case to a secret tribunal.<sup>302</sup> In this respect it is important to stress that the ICC will have to respect local peculiarities as well as the differences between the different legal systems around the world. It is an important part of state sovereignty and a people's right to self-determination to establish an own judicial system, therefore, it cannot be expected that all states adopt a system of criminal justice that meets Western standards or that is identical with the ICCSt. Even Western systems of criminal justice differ significantly because of the major differences between the civil law system and the common law system. The ICC therefore has to concentrate on the question as to whether the criminal proceedings in question show, in comparison to other criminal proceedings in that state, an intention to shield the person concerned from criminal responsibility, or an inconsistency with the intent to bring the person concerned to justice, since it is not the task of the ICC to 'colonise' national judicial systems. Furthermore, it must be assumed that the Court will require clear proof before it admits a case against the wishes of a state party.<sup>303</sup>

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<sup>301</sup> Ibid., pp. 667, 675.

<sup>302</sup> Ibid.

<sup>303</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 90.

## 2. The Notion of *Inability*

In determining whether a state is unable to carry out a genuine investigation or prosecution,

*the Court shall consider 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.*<sup>304</sup>

It has been said that the negotiations of paragraph 3 of art. 17 ICCSt were less contentious than defining the concept of unwillingness, largely because inability is a more objective, fact-driven notion than unwillingness as the absence of for instance a functioning court system is a fact that either exists or not and therefore lends itself to less subjective interpretation.<sup>305</sup> Art. 17 III ICCSt addresses both the situation of a total and the situation of a substantial collapse of a national judicial system. Until the Rome Conference, the term *partial* as opposed to *substantial* collapse was used. However, some delegations argued that there could be a partial collapse of the national judicial system in a country, yet it would not necessarily mean that an investigation and/or prosecution could not take place in good faith.<sup>306</sup> For this reason, in the final package the text was changed to read '*substantial collapse*'.

In considering what constitutes a total or substantial collapse, the ICC must consider whether *the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings*. These criteria are essentially determinations of fact, diminishing the potential for subjective interpretations by the ICC - although the third criterion does give the Court some liberty to determine admissibility were unforeseen circumstances block national criminal proceed-

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<sup>304</sup> Art. 17 III ICCSt.

<sup>305</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 678.

<sup>306</sup> C.f. Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 17.

ings.<sup>307</sup> Situations of so called 'failed states' such as Somalia or Rwanda, lacking a central government, or a state of chaos due to a civil war or natural disaster, or any other event which leads to public disorder, were contemplated.<sup>308</sup> In conclusion, the situations targeted were thus states of chaos where either the complete or the main part of the national judicial system has broken down.

According to the wording of art 17 III ICCSt, the ICC shall not only consider the *collapse* of a national judicial system but also the *unavailability* of such a system. It therefore has been argued that inability may also result from the absence or inadequacies of substantive legislation, i.e. defects of domestic law which render a judicial system totally or substantially unavailable – although at least economic considerations, such as the administrative burden connected to a larger number of cases, are understood not to be included.<sup>309</sup> According to this view, to safeguard their primary right to investigate and prosecute ICC core crimes, states are obliged to respond to complementarity by adopting and implementing legislation, enabling their authorities to enforce criminal law rendering it applicable to such offences.<sup>310</sup> If this interpretation is correct, states are required to ensure that their legislative framework criminalizes acts of genocide, crimes against humanity and war crimes and even to adopt general principles of law such as the principle of individual criminal responsibility entirely consistent with the definitions of these crimes and principles provided for by the ICCSt.<sup>311</sup> Consequently, even though a state has a functioning judicial system, it may not be able to proceed if, for example, the national courts cannot prosecute because the specific act in question is not punishable under domestic law.

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<sup>307</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 678.

<sup>308</sup> Seidel, Gerd; Stahn, Carsten: "Das Statut des Weltstrafgerichtshofs – Ein Überblick über Entstehung, Inhalt und Bedeutung" in: *Jura* 1999, pp. 14, 16; Stahn, Carsten: "Zwischen Weltfrieden und materieller Gerechtigkeit: Die Gerichtsbarkeit des Ständigen Internationalen Strafgerichtshofs (IntStGH)" in: *EuGRZ* 1998, pp. 577, 589; Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 30.

<sup>309</sup> Kleffner, Jann K.: "The Impact of Complementarity on National Implementation of Substantive International Criminal Law" in: *JICJ* 1.1 (2003), pp. 86, 88-89.

<sup>310</sup> *Ibid.*, pp. 86, 88.

<sup>311</sup> *Ibid.*, pp. 86, 95, 101.

This argument is open to question. First of all, it must be noted that the commentators on the ICCSt that participated in the negotiations in Rome hardly mention the difference between the two alternatives of inability. However, if unavailability were to be interpreted in the way suggested above it would most likely have hit the headlines. From a historic point of view it is thus more convincing to argue that unavailability applies to situations where – for example because of a natural disaster – the national judicial system is temporarily unavailable, while the first variant applies to situations in which – for example because of a massive genocide like in Rwanda – the whole state and with it the national judicial system has, for an indefinite period of time, ceased to function. In addition, if one reads the notion of unavailability in context with the clearer concept of a total or substantial collapse, it makes sense to require with respect to unavailability a comparably severe situation in the state in question. Therefore, if with respect to the collapse of a national judicial system the situation of a failed state was contemplated, with regard to unavailability a comparably grave situation of destruction and chaos that substantially hinders a national judicial system from functioning must be required.

In any event, the demand that states should be forced to completely synchronise their national judicial system with the rules and principles established by the ICCSt is both unrealistic and undesirable. Even though it is true that the ICCSt encourages states to exercise national criminal jurisdiction over the ICC core crimes,<sup>312</sup> and even though one could legitimately argue that the state parties to the Rome Statute are obliged to establish at least a possibility to prosecute those accused of genocide, crimes against humanity and war crimes in their national legal system, this does not mean that national law must be identical with the provisions of the Rome Statute. Even Germany that has undertaken large-scale changes with respect to its national judicial system when implementing the ICCSt and even established absolute universal jurisdiction for the ICC core crimes, has not used exactly the same definitions of elements of a crime as established by the ICCSt. Moreover, as stated above in context with the notion of unwillingness, the ICC is bound to take into account the distinc-

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<sup>312</sup> Cf. Paragraph 6 of the Preamble of the ICCSt.

tions between different states and different legal systems. Consequently, the same holds true with respect to inability. It cannot be stressed enough that the purpose of the ICC is not to level out differences between national judicial systems, but only to ensure that the perpetrators of ICC core crimes do not go unpunished.

Moreover, the above interpretation of the ICCSt is incompatible with the principle of sovereignty and a people's right to self-determination. It is the task of each state and each community to implement signed international treaties in their national law, however, states are free to implement these treaties in a way that agrees with their own national (judicial) system as long as they fulfil their treaty obligations. Yet, it would go beyond any treaty obligation if states were obliged to completely synchronise their national law with the law of an international treaty even if the relevant provisions do not impose any direct obligations on the state parties.

Of course, states are under a general obligation to bring their national system in compliance with international law and international standards - for example, both customary international law and numerous human rights treaty oblige states to bring their national judicial system in compliance with international fair trial standards. However, the Rome Statute provides for a level of fair trial standards that exceeds the minimum requirements of international (customary) law by far; states are therefore not obliged to uniform with these standards. Admittedly, this does not mean that, at some point, one of the side effects of the Rome Statute could be to raise the bar for international fair trial standards. However, this is still dreams of the future and furthermore not the main target of the ICCSt but only a possible side effect.

Finally, in practice, states might – like the DRC - voluntarily declare that their national judicial system is not in a position to carry out its international obligation to punish ICC core crimes committed within its borders, and voluntarily refer a situation to the ICC. For instance, even though in the DRC the court infrastructure has not completely broken down like in Rwanda, where infrastructure still exists, it is inadequate and in a state of advanced decay: staff, who are in short supply, live and work in miserable conditions, with inadequate training to address contemporary justice issues;

corruption, tribalism and nepotism are omnipresent.<sup>313</sup> In addition, numerous Congolese laws in force, inherited from colonial authoritarian regimes, actually contradict the international instruments signed by the DRC: for instance, the 1886 criminal code was last revised in 1940, and the 1959 criminal procedure code was likewise passed before the adoption of the international human rights instruments.<sup>314</sup> The ICC prosecutor thus agreed that the DRC is unable to genuinely carry out proceedings. Consequently, in practice there might be less disagreement on inability than in theory.

### 3. The Term '*Genuine Trial*' in Art. 17 ICCSt

Even if the ICC finds indications that point to a certain unwillingness or inability of a state to deal with a case, it can claim jurisdiction only if this unwillingness or inability actually renders the state in question incapable of granting a *genuine trial*. At the Rome Conference, the major concern behind the discussion of this term was that the ICC should not take the approach that it could do the job of investigating and prosecuting better than domestic courts, which the use of terms such as *effectively* might have implied.<sup>315</sup> In contrast, it was agreed that the critical factor should be whether there was a defect in the approach taken by the state in question, which inevitably would result in a travesty of justice.<sup>316</sup> However, since some subjectivity on the part of the ICC was inevitable and also necessary, the term *genuine* was finally adopted because it was – at least in comparison to terms like *effectively*, *diligently* or *in good faith* – regarded as ‘the least objectionable wording’.<sup>317</sup>

It must be stressed that in contrast to the terms *inability* and *unwillingness*, a definition of the term *genuine* is not given by the ICCSt. Moreover, like the term

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<sup>313</sup> Cf. Open Society, [www.justiceinitiative.org/db/resource2/fsl?file\\_id=15284](http://www.justiceinitiative.org/db/resource2/fsl?file_id=15284) (last visited: April 1, 2005).

<sup>314</sup> Ibid.

<sup>315</sup> Holmes, John T.: “Complementarity: National Courts *versus* the ICC” in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 674

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.; Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 22.

*complementarity*, the term *genuine* has no precedent, neither in international nor in domestic law. In fact, even though the term was for many delegations at the Rome Conference less clear than other terms considered, it was finally agreed upon in order to achieve a broad consensus.<sup>318</sup> The partly undefined meaning of the word *genuine* was thus more or less consciously used in order to achieve general agreement on one term. Moreover, it could be argued that, by using such an ambiguous term, the state parties deliberately delegated the task of shaping it, and thus ultimately of forming the principle of complementarity as such, to the ICC judges.

Admittedly, the term *genuine* is not unlimitedly open to any interpretation or definition. According to the commentaries on the negotiations in Rome, it is closely linked to the principle of good faith.<sup>319</sup> Yet, the term *good faith* was rejected at the Rome Conference since it was argued that a state may undertake an investigation in good faith, but at the same time it is apparent to the outsider that an objective result cannot be achieved - not due to lack of good faith but rather due to other, more objective factors such as a partial disability of the domestic system.<sup>320</sup> Moreover, even though the term *genuine trial* has been mostly discussed in correlation with the determination of *unwillingness*, it must be kept in mind that it is as important to the definition of *inability*,<sup>321</sup> a concept that is much more objective and fact-driven. Hence, the term *genuine* is indeed preferable to that of *good faith* since it - like the notion of *inability* - is more objective and not only geared at the subjective intention or motive of the prosecuting state in question.

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<sup>318</sup> Holmes, John T.: "The Principle of Complementarity" in: Lee, Roy S. (editor): *The International Criminal Court – The Making of the Rome Statute – Issues, Negotiations, Results*, The Hague, London, Boston 1999, pp. 41, 50.

<sup>319</sup> Cf. Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 674; Williams, Sharon A. in: Triffterer, Otto (editor): *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1<sup>st</sup> edition, Baden Baden 1999, art. 17 at 22.

<sup>320</sup> Cf. Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 674.

<sup>321</sup> Art. 17 I (a) ICCSt reads: ..., *unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*; and respectively art. 17 I (b) ICCSt: ..., *unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute*.

With respect to a first attempt to illuminate this important notion, one can assume that an investigation or prosecution cannot be called genuine if it is not suitable to administer justice. As a rule, criminal proceedings can only serve justice when they are conducted in accordance with the rule of law. Moreover, at least with respect to *unwillingness*, the term *genuine* must be read in conjunction with the obligation of the ICC to have regard to *the principles of due process recognized by international law*.<sup>322</sup> It therefore can be argued that the question as to whether an investigation or prosecution is carried out genuinely boils down to the problem whether the proceedings are in compliance with the basic principles of a fair and impartial trial as recognized by international law and thus suitable to serve the administration of justice.

However, it cannot be stressed enough that each national judicial system has its own particularities, and consequently also different standards and requirements of a fair and impartial trial. As has been mentioned, even with respect to Western states, the basic differences that exist between the common law and the civil law systems, and thus between the adversarial and the inquisitorial system of criminal proceedings, are fundamental. In addition, it is obvious that the way in which criminal proceedings are conducted in European countries is very different from the practices in, for example, African states. This diversity of national procedural law and criminal law in practice must be recognized. It is part of the principle of sovereignty and a people's right to self-determination that each state is allowed to establish and apply whatever procedural rules it chooses – at least as long as the end result can be seen to be a fair trial.

Yet, unless the most fundamental principles of a fair and impartial trial such as the presumption of innocence or the right to an impartial and independent tribunal are abided by, justice cannot be done. With respect to the latter example, this is explicitly recognized by the provisions of the Rome Statute establishing the principle of complementarity, since in the case of proceedings that are not conducted independently or impartially, the ICC may find that the state in question is unwilling to genuinely deal with the case in question. Consequently, it could be argued that in any case in which a state violates the most fundamental principles of a fair and impartial trial it is either not willing or not able to conduct a *genuine* trial.

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<sup>322</sup> Cf. Art. 17 II ICCSt.

The underlying premise of the complementarity regime is however to ensure that the ICC does not interfere with national investigations or prosecutions except in the most obvious cases.<sup>323</sup> The notion of a *genuine trial* is part of this complementarity rule, therefore it is most convincing to argue that only if violations of the principle of a fair and impartial trial show in fact that a state is obviously unable to carry out criminal proceedings or are deliberately undertaken to shield the person concerned from criminal proceedings or otherwise inconsistent with an intent to bring the person concerned to justice, may the ICC consider that the respective investigations or proceedings are not conducted genuinely and declare the case admissible to it.

It is important to stress that the ICC must be careful when judging the fairness and thus the quality of national criminal proceedings. Even though the guarantees of a fair and impartial trial and especially the rights of the accused as provided for by the ICCSt and its *Rules of Procedure and Evidence*<sup>324</sup> show a very high standard of protection, it is not the task of the ICC to enforce such standards in national judicial systems. The ICC has been created *to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of these crimes*.<sup>325</sup> However, it is not its task to bring national criminal proceedings in accordance with international fair trial standards. The ICC must therefore exercise its power to quash domestic proceedings restrictively since it would otherwise wrongfully interfere in the internal affairs of the state in question and thus violate its right to sovereignty. Moreover, if the ICC could find unwillingness or inability in any case in which the principles of a fair and impartial trial are violated, this would most likely increase the inequality between states, since the standards of a fair and impartial trial in developing countries are as a rule significantly lower than in rich Western countries. Even though in this respect it could be argued that the standards of a fair and impartial trial should be equally high in any country of the world, this does not mean that the fact that these are still dreams of the future can

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<sup>323</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 675.

<sup>324</sup> Cf. ICC Rules of Procedure and Evidence, adopted by the Assembly of States Parties at the first session in New York, 3-10 September 2002, Official Records ICC-ASP/1/3.

<sup>325</sup> Paragraph 5 of the Preamble of the ICCSt.

be ignored. Of course, the human rights situation in developing countries must improve, but this should not be done by ignoring their sovereignty and their right to self-determination. Again it must be stressed that it is not the task of the ICC to enforce the compliance with international fair trial standards but to bring the perpetrators of genocide, crimes against humanity and war crimes to justice.

#### **IV. The ICC as Arbiter of its Own Jurisdiction**

Art. 19 I ICCSt provides that *the Court shall satisfy itself that it has jurisdiction in any case brought before it*. Furthermore, art. 17 I ICCSt states that *the Court shall determine that a case is inadmissible to it*. These and other provisions, plus the fact that the Statute does not assign this authority to any other entity, confirm that the ICCSt attributes the responsibility and statutory authority to determine jurisdiction and admissibility issues to the ICC.<sup>326</sup> The ICC is thus arbiter of its own jurisdiction.

Obviously the Court is bound by the provisions of the Rome Statute and therefore cannot exceed the limits of the exercise of jurisdiction set out in it, but with respect to aspects of jurisdiction and admissibility that potentially are subject to interpretation it is the Court itself that must decide if it has jurisdiction.<sup>327</sup> The Rome Statute thus defines both the powers of the ICC and the boundaries within which they may be exercised. For example, the ICC may not decide to judge over crimes such as acts of terrorism that are not listed in art. 5 ICCSt but is free to determine whether a specific instance of genocide, war crimes or crimes against humanity is of sufficient gravity to fall within its scope of jurisdiction. In this regard the ICC will contribute significantly to the development of international criminal law in the future, since its interpretation of the Rome Statute will not only clarify its own scope of jurisdiction but also have an important impact on the exercise of national criminal jurisdiction over the ICC core crimes. For instance, the exact interpretation of the ICC core crimes that will be developed by the ICC will also have a clarifying effect on the scope of

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<sup>326</sup> Holmes, John T.: "Complementarity: National Courts *versus* the ICC" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 667, 672

<sup>327</sup> *Ibid.*

these crimes in general under international law and thus will most likely also be con-  
noting for the interpretation of these crimes by national criminal courts.

### 1. The Supervisory Function of the ICC

As has been shown above in connection with the discussion of the terms *unwillingness*, *inability* and *genuine*, especially the principle of complementarity is still widely undefined and therefore open to interpretation by the ICC. It is thus up to the Court to determine whether a state is unwilling or unable to genuinely deal with a case and therewith, whether the ICC can quash national proceedings and decisions. Hence, the ICC has a kind of supervisory function over the exercise of domestic criminal jurisdiction over the ICC core crimes. As reported by commentators on the negotiations in Rome, this corollary of making the ICC arbiter of its own jurisdiction was one of the major issues with respect to complementarity.<sup>328</sup>

Still, it has been shown above that even though the approach taken by the Rome Statute with respect to complementarity is clearly in favour of a decision-making power of the ICC, it also aims at limiting the scope for judgement evaluation of the Court in as much as possible. This wariness shows that even though it was agreed at the Rome Conference that the ICC should be arbiter of its own jurisdiction, the resulting supervisory function of the ICC over the exercise of national criminal jurisdiction was regarded with suspicion. The future decisions of the ICC in this respect will therefore be watched very closely.

With respect to the scholarly discussion of how this power of the ICC is to be evaluated, a great diversity of opinions can be demonstrated. While in the 'pro-ICC literature' the decision to make the ICC arbiter of its own jurisdiction is generally seen as an indispensable precondition for an effective and independent Court, other authors raised heavy concerns on this score. In favour of the regulation adopted in the ICCSt can be argued that due to the supervisory function of the ICC and the rule of primacy for national criminal jurisdiction, complementarity neither means autonomy

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<sup>328</sup> Cf. Kirsch, Philippe; Robinson, QC and Darryl: "Reaching Agreement at the Rome Conference" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 67, 81-82.

of national and international systems of criminal justice, nor the strict subordination of one to the other.<sup>329</sup> Yet, while according to this opinion a fair balance has been achieved between state sovereignty and international criminal justice and thus the protection of human rights, other commentators regard this supervisory function of the ICC with much more scepticism and actually hostility. Even if one leaves aside the more unfounded objections based on specific national interests, one cannot as easily brush aside the general objection that this power of the ICC might violate the right to self-determination of one people and the principle of sovereign equality of states. The following discussion will thus concentrate on this important objection while at the same time trying not to repeat the points already made in this respect in the discussion of the terms *unwillingness*, *inability* and *genuine*.

## 2. Objections Against the Supervisory Function of the ICC

Those objecting the supervisory function of the ICC have argued that a state party to the Rome Statute that has been the scene of a civil war or an oppressive dictatorship in the course of which war crimes or crimes against humanity in the sense of the ICCSt were committed<sup>330</sup> must have the right to restore peace not only through the use of criminal proceedings but also through other means such as national amnesties if deemed necessary or preferable.<sup>331</sup> In this respect the possibility of solving domestic conflicts with whatever means considered appropriate is seen as a constitutive element of internal self-determination of one people (one state). Similarly, the Sudanese government has argued before the UN Security Council that Resolution 1593 (2005) that refers the situation in Darfur to the ICC, would only serve to weaken prospects for settlement and further complicate the already complex situation in Darfur.<sup>332</sup>

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<sup>329</sup> Delmas-Marty, Mireille: "The ICC and the Interaction of International and National Legal Systems" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, p. 1915.

<sup>330</sup> Cf. Art. 7 ICCSt (Crimes against humanity); art. 8 ICCSt (war crimes).

<sup>331</sup> Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics*, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 445.

<sup>332</sup> Cf. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (last visited: April 2, 2005).

Moreover, even with respect to inter-state conflicts, it is regarded as necessary for the cessation of hostilities and thus for the rebuilding of peace that the parties to the conflict are free to decide how war criminals shall be dealt with.<sup>333</sup> Consequently, crisis management at least with respect to war crimes not amounting to acts of a war of destruction as well as human rights violations like torture – but not genocide – are considered to be the exclusive task of national authorities.<sup>334</sup> In addition, the power of the ICC to even quash proceedings in national criminal courts of non-state parties has been viewed as highly questionable.<sup>335</sup>

**a) The Right to and the Necessity of Truth and Reconciliation Commissions**

When addressing this argument, one has to acknowledge that it is indeed a corollary of a people's right to self-determination and the principle of state sovereignty that domestic authorities must have a primary right to deal with international crimes committed within their community. Moreover, it cannot be dismissed *per se* that at least in some cases there may be better and more efficient ways to deal with international crimes in order to restore peace and stability than criminal proceedings. For example, in the Rwandan genocide of 1994 between 800,000 and one million humans were killed by their neighbours, friends and even family members, i.e. this human disaster stands out not only because of the enormous number of victims but also because of the monstrous number of perpetrators. In such a case, especially when the national court system has collapsed, it is impossible to issue proceedings against all perpetrators of ordinary and international crimes. As a solution, the Rwandan *Unity and Reconciliation Commission*, modelled on its better-known South African predecessor, was established to give the victims a forum to speak about their suffering and therewith to heal open wounds and ultimately to restore peace in Rwanda.

However, it must be stressed that a reconciliation commission is usually not the appropriate forum to deal with senior level decision-makers, planners and senior executors of the most serious international crimes and thus the group of perpetrators

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<sup>333</sup> Ibid., pp. 435, 446.

<sup>334</sup> Ibid., pp. 435, 445-446.

<sup>335</sup> Ibid., pp. 435, 446.

aimed at by the Rome Statute. Also in Rwanda, the principal offenders of the 1994 genocide are not dealt with in the *Unity and Reconciliation Commission* but in the ICTR or national criminal courts. Therefore, as a rule, persons primarily responsible for serious international crimes should be held responsible for their actions by way of criminal proceedings and ultimately punishment.

The Rwandan example shows furthermore that the existence of an international criminal tribunal, and even one with primacy over national criminal courts like the ICTR, must not violate a people's prerogative to deal with at least minor perpetrators of international crimes in other ways than through criminal proceedings in court. Moreover, the UN Security Council has emphasized in its Resolution 1593 (2005) in which it referred the situation in Darfur, Sudan to the ICC, the need to promote healing and reconciliation, as well as the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace.<sup>336</sup> Consequently, the assumption that by establishing an international criminal court, states will, as a rule, be deprived of their right to solve internal conflicts and especially to deal with the perpetrators of international crimes in other ways than by way of criminal court proceedings is only very limitedly valid.

#### **b) The Problem and the Legitimacy of National Amnesty Law**

With respect to national amnesties for international crimes, the conflict between state sovereignty and an effective protection of human rights becomes especially pressing. Amnesties aim to prevent prosecutions for acts otherwise criminal, typically in the name of promoting peaceful relations between those crafting the agreement.<sup>337</sup> Many states have at some point in their history passed legislations granting amnesties for war crimes or crimes against humanity committed in a specific episode of their his-

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<sup>336</sup> Cf. <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (last visited: April 2, 2005).

<sup>337</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 93.

tory.<sup>338</sup> The rationale behind amnesty laws is that in the aftermath of periods of chaos and violence such as following armed conflict, civil strife, or revolution, it is considered best to heal social wounds by forgetting past misdeeds and hence by obliterating all the criminal offences that have been perpetrated by any side.<sup>339</sup> In this context it has been argued that especially where two groups must continue to cohabit in society together, and where resources to devote to punishment and reconciliation are scarce, amnesties may be the only reasonable solution – at least, as long as the need for reparation and the dignity of victims is also recognized.<sup>340</sup>

This argument is currently brought forward by local northern Ugandan leaders against efforts by the ICC to bring to justice perpetrators of war crimes and crimes against humanity in Uganda's protracted northern conflict, arguing that the ICC efforts would risk jeopardising the ongoing peace process - the priority should thus be "peace first and justice later".<sup>341</sup> On this score, in March 2005 a delegation from northern Uganda went to The Hague at the invitation of Chief Prosecutor Luis Moreno-Ocampo in an attempt to at least slow the wheels of justice, since they feared that warrants would deter Lords Resistance Army (LRA) commanders from accepting an amnesty and thus hamper efforts to end the conflict in northern Uganda through peaceful means.<sup>342</sup> After this meeting, the ICC chief prosecutor declared to be mindful

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<sup>338</sup> For example: France and Italy granted amnesties to those nationals who had fought against the Germans in World War II. Italy furthermore passed amnesty law for fascists and collaborators. On June 1966 the French Parliament passed a law granting amnesty for all crimes committed in the Algerian war as well as in Indochina. Chile and Argentina passed laws providing for amnesty for all crimes committed during the post-Allende period. Other countries such as Peru und Uruguay also enacted similar laws covering gross violations of human rights compromising torture or crimes against humanity (Source: Cassese, Antonio: International Criminal Law, Oxford, 2003, p. 312).

<sup>339</sup> Cassese, Antonio: International Criminal Law, Oxford, 2003, pp. 312-313.

<sup>340</sup> Broomhall, Bruce: International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Oxford, New York 2003, p. 99.

<sup>341</sup> Cf. Irinnews.org, UN Office for the Coordination of Humanitarian Affairs, "UGANDA: ICC jeopardising local peace efforts - northern leaders", 25/03/2005, [http://www.irinnews.org/report.asp?ReportID=46323&SelectRegion=East\\_Africa&SelectCountry=UGANDA](http://www.irinnews.org/report.asp?ReportID=46323&SelectRegion=East_Africa&SelectCountry=UGANDA) (last visited: March 30, 2005); Reuters Foundation, Alertnet, "UGANDA: ICC jeopardising local peace efforts - northern leaders", 25/03/2005, <http://www.alertnet.org/thenews/newsdesk/IRIN/fdee10a55e5c2b32acf00205f0fc698b.htm> (last visited: March 30, 2005).

<sup>342</sup> Ross, Will (BBC News): "Ugandans ask ICC to spare rebels", 16/03/2005, <http://news.bbc.co.uk/2/hi/africa/4352901.stm> (last visited: April 1, 2005).

of traditional justice and reconciliation processes and sensitive to the leaders' efforts to promote dialogue between different actors in order to achieve peace.<sup>343</sup> He furthermore stressed that the ICC prosecutor has a clear policy to focus on those who bear the greatest responsibility for the atrocities committed, taking into account the interests of victims and justice and recognized the vital role to be played by national and local leaders to achieve peace, justice and reconciliation.<sup>344</sup> However, the chief prosecutor did not promise that – as was demanded by the Ugandan leaders - whoever has already benefited from amnesty will not be investigated or prosecuted by the ICC.

According to Human Rights Watch research regarding the situation in Uganda, the Lord's Resistance Army (LRA) has engaged in the abduction, execution, torture, mutilation, rape, and sexual assault of thousands of Ugandan civilians, including children; in the past two years, the rebel group has kidnapped approximately 12,000 children for use as soldiers, labourers, and sexual slaves,<sup>345</sup> other human rights groups speak of even 20,000 abducted children.<sup>346</sup> Despite the magnitude and gravity of these crimes, ongoing peace efforts in Uganda include a blanket amnesty, extended by the government to surrendering rebel fighters, which has given reprieves to even the most hardcore rebel commanders, as well as the negotiations spearheaded by former minister Betty Bigombe.<sup>347</sup> However, even ICC chief prosecutor Luis Moreno-Ocampo said he might delay the prosecution of the rebels after he met the delegation

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<sup>343</sup> Statements by ICC Chief Prosecutor and the visiting Delegation of Acholi leaders from northern Uganda, 18/03/2005, <http://www.icc-cpi.int/press/pressreleases/96.html>, (last visited: March 30, 2005).

<sup>344</sup> Ibid.

<sup>345</sup> amnesty international, "Uganda: Government cannot prevent the International Criminal Court from investigation crimes", 16/11/2004, <http://news.amnesty.org/index/ENGAFR590082004> (last visited: April 1, 2005); HRW, "ICC's Uganda Probe Must Protect Witnesses - Court Needs to Investigate Crimes by All Sides in Northern Uganda's Conflict", 29/7/2005, <http://hrw.org/english/docs/2004/07/28/uganda9162.htm> (last visited: March 30, 2005).

<sup>346</sup> Cf. Ross, Will (BBC News): "Ugandans ask ICC to spare rebels", 16/03/2005, <http://news.bbc.co.uk/2/hi/africa/4352901.stm> (last visited: April 1, 2005).

<sup>347</sup> Cf. Irinnews.org, UN Office for the Coordination of Humanitarian Affairs, "UGANDA: ICC jeopardising local peace efforts - northern leaders", 25/03/2005, [http://www.irinnews.org/report.asp?ReportID=46323&SelectRegion=East\\_Africa&SelectCountry=UGANDA](http://www.irinnews.org/report.asp?ReportID=46323&SelectRegion=East_Africa&SelectCountry=UGANDA) (last visited: March 30, 2005); Reuters Foundation, Alertnet, "UGANDA: ICC jeopardising local peace efforts - northern leaders", 25/03/2005, <http://www.alertnet.org/thenews/newsdesk/IRIN/fdee10a55e5c2b32acf00205f0fc698b.htm> (last visited: March 30, 2005).

of religious, cultural and district leaders from northern Uganda and attacks escalated again after peace talks had stalled.<sup>348</sup>

This current discussion shows very clearly how difficult it can be to decide between international criminal justice on the one hand and at least a possibility of peace on the other hand. It is beyond the reach of this thesis to give an answer as to what would be best for solving the situation in Uganda; however, it must be pointed out that in this case the argument to protect human rights would work both for and against the recognition of national amnesty law. Even human rights organisations that welcomed the opening of an investigation on the situation in Northern Uganda urged the prosecutor to take special care in assessing the risks of reprisal on the victims, which may follow the ICC intervention into the country, especially since the Ugandan authorities have demonstrated no capacity to protect the victims.<sup>349</sup>

However, at least with respect to situations in which there is no threat of immediate escalation, it is questionable if national amnesties can serve reconciliation if - as for example in the case of Pinochet in Chile - incumbent military and political leaders pass amnesties in order to protect themselves from future criminal proceedings. The choice between justice and forgetting should not be the task of the principal offenders of the most serious violations of international human rights law.<sup>350</sup>

In many instances international bodies such as the UN Human Rights Committee or national courts have already considered amnesty laws incompatible with treaty provisions on human rights.<sup>351</sup> For example with respect to the *Pinochet Case* it was argued that a comprehensive self-amnesty like that in Chile would run contrary to the worldwide prosecution of international crimes and thus should be regarded as

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<sup>348</sup> BBC News, "Ugandans Rebels Take More Children", 18/03/2005, <http://news.bbc.co.uk/1/hi/world/africa/4361115.stm> (last visited: March 30, 2005).

<sup>349</sup> fidh (Fédération internationale des ligues des dotes de l'Homme), "ICC / Uganda - Security and protection of victims must guide the Prosecutor's intervention", Paris, 29/07/2004, <http://www.icc-cpi.int/newspoint/pressrelease/33.html&1=en> (last visited: April 1, 2005).

<sup>350</sup> It must be stressed that this thesis does not presume to give an answer to the highly complicated and strongly disputed question of admissibility of amnesty laws under international law, but only aims at pointing out some of the difficulties of this instruments with respect to the administration of international criminal justice by national criminal courts and especially the ICC.

<sup>351</sup> Cassese, Antonio: International Criminal Law, Oxford, 2003, p. 313.

violating international law.<sup>352</sup> The Chilean amnesty law was therefore neither recognized by the British House of Lords nor by the Spanish court requesting the extradition of Pinochet to Spain. In addition, a prosecution of Pinochet in Spain was not regarded as violating the principle of *ne bis in idem* since the application of the Chilean amnesty was regarded as a kind of *ex post* decriminalisation and thus not as real criminal proceedings that must be respected by other criminal courts.<sup>353</sup>

Therefore, at least in cases where military or political leaders pass amnesty laws in order to protect themselves against future criminal proceedings, this abuse of power should, as a rule, not be seen as an acceptable means of stopping hatred and animosities in the aftermath of serious violations of human rights and thus not as an appropriate means of restoring peace. At least in these cases, the principle of state sovereignty can not be regarded as violated if national courts or for that matter the ICC do not accept the amnesty law in question as an obstacle to issue criminal proceedings. However, taking into account the current situation in Uganda, at least in situations of an ongoing conflict, national criminal courts and the ICC must proceed with extreme caution when deciding as to whether or not to recognize national amnesty laws since the cessation of continuing atrocities should be the first goal.

### **c) Criminal Proceedings in Non-State Parties**

With respect to state parties to the ICCSt it can legitimately be argued that by signing and ratifying the Rome Statute, states accepted the competence of the ICC to act as an arbiter of its own jurisdiction and thus - to a certain extent - to supervise their exercise of criminal jurisdiction over the ICC core crimes. With regard to non-state parties it must be stressed that entirely internal conflicts in these states are not subject to the jurisdiction of the ICC since the Court has only jurisdiction over crimes committed on the territory or by a national of a state party or of a state that has specifically accepted its jurisdiction with respect to the crime in question.<sup>354</sup> The ICC may thus only quash

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<sup>352</sup> Cf. Ambos, Kai: "Der Fall Pinochet und das anwendbare Recht" in: JZ 1999, pp. 16, 19.

<sup>353</sup> International Commission of Jurists: Crimes Against Humanity / Pinochet Faces Justice, Chenôve, France, 1999, p. 34.

<sup>354</sup> Cf. Art. 12 II, III ICCSt.

national criminal proceedings by a non-state party if the case in question has at least a transnational element, i.e. particularly if the crime in question has been committed by the national or on the territory of a state party to the ICCSt. Such cases, however, cannot be regarded as belonging exclusively to the internal affairs of the non-state party in question, since more than one state has jurisdiction over the crime in question anyway. On that score it must be stressed that the mere possibility that a national of one state might be tried in a foreign national court or for that matter in an international criminal court to which his home state is not a party, does not *per se* violate the sovereignty of the state in question but is a mere corollary of different grounds of jurisdiction. In addition, even by quashing national criminal jurisdiction in such a case, the ICC does not violate a people's right to self-determination or the right to sovereignty of the state in question since it is dealing with the case with the consent of a state that has at least an equivalent claim to jurisdiction.

**d) Final Remarks: The Credibility of the ICC Judges**

Finally, and even though this is not a legal but merely a fact-based argument, it must be stressed that the chances that the judges of the ICC might make careless and extensive use of their supervisory power over national criminal courts are virtually non-existent. The practice of the ICJ has shown that judges appointed to international courts take their responsibility for justice very seriously and, as a rule, have neither shown a sign of partiality for their home states nor of voting for political reasons. Furthermore, the ICC judges must be nominated and elected by the Assembly of States Parties with at least a two-third majority of the states parties present and voting,<sup>355</sup> i.e. a candidate that is presumably not free from partiality and political bias will probably not gain the required majority of votes for his election.

The election of the first 18 judges of the ICC that took place on February 5-7, 2003 was one of the most important decisions that the Assembly of States Parties had to make in setting up the ICC, since the judges along with the prosecutor are decisive for its long term success. It was essential for the credibility and effective operation of

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<sup>355</sup> Art. 36 VI. (a) ICCSt.

the Court that judges of the highest qualification and reputation from all over the world were elected.<sup>356</sup> It is generally agreed that the judges elected in the 2003 election undoubtedly fulfil these criteria. Even the United States, which still questions whether ICC judges can be relied on to act impartially, has not questioned the impartiality and qualification of even one of these 18 judges.

As has been pointed out before, the whole world is watching closely how the ICC will exercise its power to quash national criminal proceedings. It is therefore to be expected that the ICC judges will be very contained in the use of this power in order to increase the support and credibility of the Court. It is remarkable that not even the most vigorous critics of the ICC seem to expect that the Court in its current personification constitutes a significant threat to a people's right to self-determination and the principle of state sovereignty.

#### **V. Do States Have the Possibility of Waving Their Right to Exercise Criminal Jurisdiction in Favour of the ICC?**

It has been argued that since the principle of complementarity has been developed as a means of protecting national sovereignty, states are free to waive their right to exercise their jurisdiction in favour of the ICC.<sup>357</sup> At least with respect to traditional grounds of jurisdiction, this suggestion is questionable. First of all, one could argue that the right to exercise criminal jurisdiction over international crimes committed within one community is not disposable.<sup>358</sup> Secondly, this idea is not in compliance with the understanding of the ICC as a judicial safety net, i.e. the ICC shall not restrain national criminal jurisdiction but quite the reverse, encourage states to exercise their criminal jurisdiction with respect to the ICC core crimes. The ideal case aimed at by the system of international criminal justice established by the Rome Statute would be that there is no need for the ICC to exercise its jurisdiction since in any case of

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<sup>356</sup> The criteria that judges to the ICC must fulfil are spelled out in art. 36 III ICCSt.

<sup>357</sup> Seidel, Gerd; Stahn, Carsten: "Das Statut des Weltstrafgerichtshofs – Ein Überblick über Entstehung, Inhalt und Bedeutung" in: Jura 1999, pp. 14, 16.

<sup>358</sup> Cf. Köhler, Michael: "Zum Begriff des Völkerstrafrechts" in: Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics, Band 11 (2003), herausgegeben von B. Sharon Byrd, Joachim Hruschka, Jan C. Joerden, Berlin 2003, pp. 435, 449.

serious violations of human rights there are national criminal courts that are willing and able to bring the perpetrators of these crimes to justice.

In addition, the idea of a voluntary waiver comprises the danger of abuse since powerful states might try to 'persuade' weaker states to 'voluntarily' waive their right to conduct national criminal proceedings. Finally, this raises the question which states would have to waive their rights to exercise criminal jurisdiction: only the territorial state or also the home state of the author of the crime and the home state of the victim, or even any state that would be able to exercise universal jurisdiction? The idea of a waiver thus raises more problems and questions than it answers.

## **VI. Concluding Remarks**

The sheer never-ending chain of atrocities committed during the 20<sup>th</sup> century has shown that national criminal courts alone are not in the position to (even) judge the chief culprits of the most serious international crimes. For a very long time, the impunity of perpetrators of genocide, crimes against humanity and war crimes has been the rule. The system of international criminal justice thus needed to change to finally become effective. In this respect the solution currently pursued is that of creating a system of international criminal justice that employs in addition to national criminal courts a permanent international institution able and responsible for the prosecution of the most serious crimes - the ICC.

However, international criminal justice still cannot be singularly identified with a specific institution, but rather is associated with a principle of communication between the domestic and international levels.<sup>359</sup> International criminal courts can only deal with the tip of the iceberg, leaving the vast majority of cases to be dealt with in national criminal courts. In addition, the principles of sovereign equality of states and a people's right to self-determination require that the communities most effected by a crime have the prerogative to deal with these crimes. At the same conclusion arrive pragmatic considerations since the authorities on the spot are as rule in the best position to exercise jurisdiction over crimes committed within their communities.

The solution that had to be designed by the drafters of the Rome Statute therefore had to take into account all these considerations and thus retain the primacy of national criminal jurisdiction, while at the same time incorporating the ICC in the new effective system of international criminal justice to be created. In this respect it was necessary to give the ICC some power to evaluate national criminal jurisdiction since otherwise states would have been able - for example by way of sham proceedings - to shield their nationals from criminal prosecution and nothing would have changed. To give the concept of primacy of national jurisdiction meaning and to safeguard the principle of state sovereignty and the right to self-determination, the scope of judgment evaluation attributed to the ICC had to be limited by providing a test as objective as possible to be applied by the ICC with respect to admissibility issues. The final solution for regulating the relationship between the ICC and national criminal courts as adopted in the ICCSt seems to have achieved this goal. Admittedly, the creation of an international institution and especially an international criminal court always entails a restriction of state sovereignty since international institutions are created to fulfil tasks for the international community and thus inevitably diminish the latitude of single states to do as they please. Moreover, the principle of complementarity, although highly disputed already at the Rome Conference, is still less clear than one would expect and thus open to the interpretation and moulding of the ICC. However, as long as the ICC judges exercise their supervisory function over domestic criminal proceedings with care and especially respect the diversity of national criminal proceedings in different states, this power of the ICC does not violate national sovereignty. Still, respect for the diversity of the law and practice of criminal proceedings in different states and different legal systems all around the world is indispensable in order to prevent the ICC from being abused to increase the inequality between states, by quashing only national proceedings in developing countries that do not provide for the standards of a fair and impartial trial applied in Western states.

In this respect, however, it cannot be emphasised enough that there are no indications whatsoever that the judges of the ICC will jeopardize the success of the

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<sup>359</sup> Garapon, Antoine: "Three Challenges for International Criminal Justice" in: JICJ 2.3 2004, pp. 716-726.

Court by extensively exercising their supervisory function over national criminal proceedings and thus by disrespecting state sovereignty and a people's right to self-determination. The election of the first judges to the ICC has been universally welcomed as an important step to a fair and independent Court. Indeed, it is very likely that for the time being the ICC will concentrate only on cases that undoubtedly fall within its jurisdiction and hardly quash national proceedings since none of the judges elected will be willing to put the creditability of the Court on the line.

Consequently the ICCSt does not 'assert a jurisdiction above that of all nations' as has been argued by ICC critics,<sup>360</sup> but only aims at closing the gaps in the prosecution of the most serious international crimes. Moreover, it is true that the principle of complementarity is an important mechanism to further ensure that all states take the responsibility to prosecute the perpetrators of the ICC core crimes seriously and implement the necessary legislation to play a more active role in the prosecution of international crimes<sup>361</sup> - and be it only to ensure that their nationals will not be prosecuted by the ICC but in their own domestic criminal courts.

Finally, a last word on the many criticisms voiced against the principle of complementarity: as has been pointed out above, the ICC is established by an international treaty, negotiated by about 160 nations and thus perforce a compromise between the two legitimate claims of protection of state sovereignty and human rights. Of course, it is easy to find fault in any compromise as it lies in the nature of this concept that no point of view can be fully realized. However, to reopen this package as has been advocated especially by US scholars,<sup>362</sup> is neither wise nor desirable and might destroy the only hope that there is of today to ameliorate the current system of international criminal justice. Moreover, even further amendments are not likely to create a broader agreement on the Rome Statute or change for example the minds of

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<sup>360</sup> Walker, Andrew J.: "When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated From International Politics and to Protect Basic Due Process Guarantees" in: *West Virginia Law Review*, Volume 106, Winter 2004 No. 2, pp. 245-304.

<sup>361</sup> The Board of Editors: "The Rome Statute: A Tentative Assessment" in: Cassese, Antonio; Gaeta, Paola; Jones, John R.W.D.: *The Rome Statute of the International Criminal Court: A Commentary*, Oxford 2002, pp. 1901, 1906.

<sup>362</sup> Cf. for example: Walker, Andrew J.: "When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated From International Politics and to Protect Basic Due Process Guarantees" in: *West Virginia Law Review*, Volume 106, Winter 2004 No. 2, pp. 245-304.

those currently in charge of US politics with respect to the ICC.<sup>363</sup> Besides, the ICCSt itself provides for a review of the Statute to consider possible amendments seven years after its entry into force.<sup>364</sup> Until then, the question of what the ICC shall look like has been answered: the ICCSt has been in force since July 1, 2002. Convincing 139 states to sign such a treaty is extraordinary – even though since then two states have formally withdrawn their signatures.<sup>365</sup> The task is thus now to work with what we have and not to ponder over what we would have liked to have.

## E. Conclusion

To draw a conclusion: where do we stand? Is it correct to say that all perpetrators of genocide, crimes against humanity and war crimes, no matter of the nationality of the offender or the nationality of the victim or the place of commission of the crime, run an equal risk of being prosecuted either before national criminal courts or the ICC? Or rather, is it more accurate to say that there is no such thing as international criminal justice and that it is only a matter of selectivity, of choosing for political reasons and of power who is held responsible for committing international crimes and who is not? As usual, the truth lies somewhere in the middle.

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<sup>363</sup> Cf. Wald, Patricia M.: "Is the United States' Opposition to the ICC Intractable?" in: JICJ 2.1 2004, pp. 19-25.

<sup>364</sup> Art. 123 I ICCSt.

<sup>365</sup> In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: "*This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.*"

On 28 August 2002, the Secretary-General received from the Government of Israel, the following communication: "*.....in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.*"

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (last visited February 23, 2005).

On the one hand, one has to admit that the exercise of national and international jurisdiction over foreign perpetrators of international crimes has, as a rule, always been influenced by the interests and politics of powerful states. Moreover, the question of who goes unpunished is predominantly one of force, i.e. especially state-related international crimes committed by nationals of powerful countries are very unlikely to be the subject matter of criminal proceedings abroad. On the other hand, one can hardly find any examples where perpetrators of international crimes were obviously prosecuted solely for political reasons and thus where state policies and not the individual malfeasance were the real target of criminal proceedings.

The fact that power is unequally distributed between the different countries of the world is no secret and not specific to international criminal law. It therefore must be asked, if we really want to sacrifice the first substantial chance of bringing the perpetrators of the most appalling atrocities committed anywhere in the world to justice only because we might not – or at least not yet – be able to guarantee total equality. Of course we do not want a system of international criminal justice in which only the nationals of developing countries are judged by the Western world; however, if national criminal courts and the ICC exercise their jurisdiction over the ICC core crimes with caution, this horror scenario can be ruled out.

It must be stressed though that such a cautiousness in the prosecuting of international crimes is essential if the nascent system of international criminal justice is to work. First, it has to be acknowledged that international events are usually very complex and interwoven. Secondly, the prosecution of one principal culprit should inevitably entail the question of the criminal responsibility of accessories and instigators. For instance, with respect to the Pinochet example, the question of the criminal responsibility of CIA members as accessories or instigators of Pinochet, at least with respect to the crimes committed in connection with the overthrow of the democratically elected government of Salvatore Allende, comes to mind. However, since such a consequential application of the principle of individual responsibility is not realistic, a general cautiousness in the dealing with such cases is indispensable in order to prevent the exercise of criminal jurisdiction over international crimes from increasing the inequality between states.

However, the ICC in its current manifestation is to be expected to act as objectively as an (international) court possibly can. It must be taken into account that an effective system of international criminal justice cannot be perfect from the start but must develop over the course of time. In this respect, one cannot fail to notice that the establishment of the ICC is clearly a step forward to more objectivity and equality in prosecuting international crimes. For the first time in history a permanent, independent international institution is in charge of judging the most serious crimes of concern to the international society as a whole, and thus an institution that has itself no interests whatsoever in the outcome of a specific trial and that cannot as easily as a single state be threatened by the hectoring of especially powerful states. An optimistic but not totally unrealistic point of view is therefore that although in the next years or even decades there will probably be more cases against the nationals of developing countries and hardly any cases against the nationals of states like China, Russia or the United States, the ICC might contribute to a new system of international criminal justice where at some point it really does not matter anymore where or by whom an international crime is committed. Considering the current reality of international criminal justice, this may still sound utopian, however, if one takes into account that also the creation of an international criminal court sounded utopian only 10 to 15 years ago and, in addition, considers the astonishing development of international human rights law within the last 60 years, this optimistic foresight might not look as unfounded and utopian as at first glance.

On this score, it must be stressed that even if countries like China, Russia and the United States do not stand behind the ICC or even openly oppose it, they cannot stop the ongoing process of advancement of international criminal law through the work of the ICC if the strong support of the Court is held up by the majority of states. In this respect the case law of the ICC will contribute significantly to the development of substantive international criminal law, since for example the Court's interpretations of the ICC core crimes will have a great influence on the general understanding of these crimes in international criminal law and thus will constitute an invaluable contribution to the clarification of the scope of these crimes.

At any rate, the above analysis has argued that international criminal law could become an important factor in the protection of human rights. The continuing atrocities committed throughout the last century despite the parallel evolution of human rights law have shown that something had to change in order to make the world a better, safer and more peaceful place. The claim that the perpetrators of such atrocities should run the risk of being prosecuted anywhere in the world might be that something that was missing, since it certainly has a daunting and deterring effect on potential perpetrators if they face a real risk of being punished for their actions instead of being greeted with impunity. Consequently, the concept of state sovereignty had to give way in order to allow for a worldwide prosecution of international crimes and thus a better protection of human rights through international criminal law.

However, one must not forget that the erosion of state sovereignty is not always a victory for human rights but that state sovereignty also is an important protector of human rights and a people's right to self-determination. As deserved and warrantable as for instance the proceedings against the former Chilean dictator Augusto Pinochet by Britain and especially Spain were, the current use of human rights as a *carte blanche* justifying basically anything is more than questionable. For example, on the same day as the judgement in the 2<sup>nd</sup> *Pinochet decision* of the British House of Lords was pronounced, the NATO started its air raids against the Federal Republic of Yugoslavia. In this respect, the idea to stop the commission of one human rights violation by committing an arguably even worse one seemed neither in the view of the persons responsible nor in the predominant opinion of the world public to constitute a questionable contradiction. It therefore cannot be stressed enough that even serious violations of human rights and thus international crimes do not negate state sovereignty and a people's right to self-determination as such.

Finally, to draw a conclusion when everything is still in motion is evidently difficult. Even though it lies in the nature of (international) law that its development is never concluded but constantly in motion, it has to be admitted that this dynamic has been especially strong with respect to the current development of international criminal law. The ICC is only starting to begin its work and the states having implemented the principle of (absolute) universal jurisdiction in their national law are still

struggling with how to exercise it. Needless to say, there is still a long way to go until a universally applicable, functioning system of international criminal justice is in place. The question to ask is therefore what do we expect of the future and how do we evaluate the existing first attempts to bring the perpetrators of international crimes to justice. In this respect, much depends on the future work of the ICC and the question whether or not it will succeed in becoming a credible, effective international institution that is universally accepted like the ICJ.

On that score, the success of the ICC will primarily depend on two factors: (1) the way in which the ICC judges exercise their jurisdiction and (2) the willingness of states to cooperate with the Court. As has already been pointed out, because of the high credibility and qualification of the judges currently in charge of the ICC, there is ground for optimism as to the future work of the Court. However, since the ICC will have no police powers on its own and will have limited resources for investigations and prosecutions,<sup>366</sup> the Court will significantly depend on the cooperation of states.<sup>367</sup>

Essential in this regard is firstly the obligation to surrender persons to the ICC,<sup>368</sup> and secondly the obligation to provide other forms of assistance as for example the taking and protecting of evidence, the submission of evidence and the protection of victims and witnesses.<sup>369</sup> In many civil law countries the first obligation raised a constitutional problem as extradition of state's own nationals is often forbidden. Thus for example in Germany, a constitutional amendment had to be adopted to allow the country to fulfil its obligations under the Rome Statute. This however did not pose any political problem, as cooperation with the Court is a principle accepted by all po-

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<sup>366</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 154.

<sup>367</sup> The obligation for state parties to the Rome Statute to cooperate with the ICC in its investigation and prosecution of crimes within the jurisdiction of the Court are set out primarily in Part 9, art. 86-102 ICCSt. In this respect, a general obligation to co-operate with the ICC is laid down in art. 86 ICCSt, which is further specified and spelled out in a number of specific obligations.

<sup>368</sup> Art. 89 ICCSt.

<sup>369</sup> Art. 93 ICCSt.

litical parties.<sup>370</sup> Since constitutional amendments are usually very difficult to achieve and thus seldom successful, this example shows how extraordinary the willingness to cooperate with and to support the ICC in some countries is. However, other states parties may be less willing to cooperate with the ICC. In addition, even though the ICCSt grants the authority to make findings of non-cooperation to the Court, the ultimate power to enforce cooperation lies with the states acting through the Assembly of States Parties or with the SC.<sup>371</sup> Therefore, even though the ICCSt provides a sufficient framework of obligations of considerable detail, both the goodwill and adequate legislative framework of states will be necessary to realize the ICC's potential.<sup>372</sup>

In this context it might be interesting to note that while General Pinochet was under house arrest near London in 1999 awaiting a court decision as to his possible extradition to Spain, the former UK prime minister, Margaret Thatcher, campaigned for his release and met repeatedly with him, thanking her old friend for being an ally during the 1982 Falklands War and for "bringing democracy to Chile".<sup>373</sup> Even though the UK support of international criminal justice in general and the ICC in particular has developed considerably after the change of government from the conservatives to New Labour, the fact that the former head of state of an indisputably democratic and pro-human rights country like the UK has as recently as 1999 openly supported a notorious human rights violator like Augusto Pinochet and campaigned for his exemption from punishment is shocking. Sadly, this example suggests that there may be many more states that - at least under certain governments - will be unwilling to fully cooperate with the ICC. Consequently, the question as to how well the cooperation between the ICC and the state parties to the Rome Statute will work cannot be answered in general or with certainty. Much will depend on the specific state in question and its current government as well as the willingness of the Assembly of States Par-

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<sup>370</sup> Bothe, Michael: "The International Criminal Court - Perspectives from Europe", [http://wwwsoc.nij.ac.jp/sjil/annual\\_documents/2003/autumn/houkoku-abstr/Panel%20B1%20Bothe%20paper.pdf](http://wwwsoc.nij.ac.jp/sjil/annual_documents/2003/autumn/houkoku-abstr/Panel%20B1%20Bothe%20paper.pdf) (last visited: September 27, 2004), p. 2.

<sup>371</sup> Cf. Art. 87 (7) ICCSt.

<sup>372</sup> Broomhall, Bruce: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford, New York 2003, p. 159.

<sup>373</sup> Cf. BBC News, Friday, March 26, 1999: "UK Thatcher stands by Pinocet" <http://news.bbc.co.uk/1/hi/uk/304516.stm> (last visited: March 11, 2005).

ties and hopefully at some point the UN Security Council to enforce this obligation to cooperate.

To conclude, even though there are considerable indications that an effective system of international criminal justice is in the process of development, there are still many factors that have to wait until a dependable prediction as to the future of human rights protection through international criminal law can be given. According to the view presented here, the recent developments give grounds for hope that a cautious exercise of international criminal jurisdiction by national courts and the ICC may lead to more justice and less suffering in the world. However, one need not hold one's breath on this score since it has also been shown that international criminal law may be open to abuse if exercised excessively or for political purposes.

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