Neither Complimentary nor Complementary: *National Commissioner of the South African Police Service v Southern African Litigation Centre and Another*[1]

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The Rome Statute of the International Criminal Court (ICC)[2] was the hard-won prize of over a century of gestation,[3] a few fits and starts[4] and a final marathon negotiating session in June 1998.[5] Aside from the powers of its independent Prosecutor, the relationship between the ICC and national justice systems was one of the most complex and fraught aspects of the negotiations. In the final text, States agreed that the ICC should be one of last resort, acting when States themselves are 'unwilling or unable'[6] to exercise their primary responsibility to prevent impunity for the most serious (so-called 'core') international crimes: genocide, crimes against humanity, war crimes and, after more time and further negotiations,[7] aggression. The concept of *complementarity*[8] emerged as the byword

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1 [2014] ZACC 30, 2015 (1) SA 315 (CC), 2015 (1) SACR 255 (CC), 2014 (12) BCLR 1428 (CC).

2 Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002 ('Rome Statute').

3 See, eg, CK Hall 'The First Proposal for A Permanent International Criminal Court' (1998) 322 *International Review of the Red Cross* 57 (Attributing the first proposal for a permanent international criminal court to Gustave Moynier in 1872, in connection with the atrocities of the Franco-Prussian war). For a more extensive treatment, see C Çakmak 'Evolution of the Idea of a Permanent International Criminal Court Prior to World War I' (2008) 4 *Review of International Law and Politics* 135.

4 See, eg, K Ambos *Treatise on International Criminal Law: Volume 1: Foundations and General Part* (2013) 16–19 (Reviewing the efforts of the International Law Commission, International Law Association and Association International de Droit Pénal in the period 1947–1994).

5 For two useful, 'inside' perspectives of the Rome Conference, see P Kirsch & JT Holmes 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93(1) *American Journal of International Law* 2; and J Washburn 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11(2) *Pace International Law Review* 361. See also 'Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (Rome, 15 June–17 July 1998), available at http://legal.un.org/icc/rome/proceedings/contents.htm.

6 See Rome Statute art 17.

7 Assembly of States Parties 'The Crime of Aggression' Resolution RC/Res.6 (adopted 11 June 2010)(This amendment was adopted at the Review Conference mandated by Rome Statute art 123 held at Kampala, Uganda in 2010).

8 See, eg, Rome Statute preamble, 10th recital: 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.'

for structuring the *vertical* relationship between the ICC and its members – currently numbering 124 States Parties, including (at the time of writing) South Africa,[9] and significantly, excluding Zimbabwe.

What the architects of complementarity in Rome did not anticipate – not, at least, on a search of the written record – was the extension of the concept of complementarity to regulate *horizontal* relationships between states, including states parties.[10] Neither does the ICC itself: in 2009, its Pre-Trial Chamber defined complementarity in relation to the admissibility of cases before the ICC, and in strictly *vertical* terms:

> Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed.[11]

Yet a horizontal application of the Rome Statute's complementarity standard is exactly what the Constitutional Court mandates, by unanimous judgment, in *National Commissioner of the South African Police Service v Southern African Litigation Centre and Another* (*SALC*).[12]

This judgment has already been lauded as having 'breathed new life into the principle of universal jurisdiction',[13] by providing 'clarification of [its] scope' and permitting investigation but not prosecution *in absentia*.[14] The praise is not merely external. From the perspective of discourse analysis, the Court's reasoning itself speaks from a position of not only legal authority but a veritable moral

[9] On 19 October 2016, South Africa announced its intention to withdraw from the Rome Statute, depositing is Instrument of Withdrawal under art 127(1) of the Rome Statute. The Instrument was rescinded on 7 March 2017, following the decision of the Full Bench of the High Court on 22 February 2017 that *both* the implementation of the decision to withdraw by the Minister of International Relations and Cooperation, and the depositing of the instrument of withdrawal with the Secretary General of the United Nations without prior parliamentary approval were unconstitutional and invalid. *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123 (GP) at para 84. It is unclear whether South Africa will renew the withdrawal process in the future.

[10] See C Ryngaert 'Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations' in M Bergsmo (ed) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) 165 ('[T]he complementarity principle, as designed by the drafters of the Rome Statute, was meant to apply vertically. Vertical complementarity means that a supranational institution, the International Criminal Court (ICC), would supervise the investigative and prosecutorial work of States (Parties to the Rome Statute), and, applying Article 17 of the Statute, assume its responsibilities (that is, declare a case admissible) if that work proved to be below acceptable standards.')

[11] *Prosecutor v Joseph Kony et al., Decision on the Admissibility of the case under article 19(1) of the Statute* ICC-02/04-01/05-377, Pre-Trial Chamber II (10 March 2009) at para 34.

[12] Note 1 above.

[13] A Mudukuti 'The Zimbabwe Torture Case: Reflections on Domestic Litigation for International Crimes in Africa' in S Williams & H Woolaver (eds) *Civil Society and International Criminal Justice in Africa: Challenges and Opportunities* (2016) 287, 288, also published in (2016) *Acta Juridica* 287.

[14] H Woolaver 'Partners in Complementarity: The Role of Civil Society in the Investigation and Prosecution of International Crimes in South Africa' in Williams & Woolaver (note 13 above) 129 at 140–141.

righteousness, not uncommon in international crimes prosecutions[15] and, indeed, from a critical perspective, a characteristic of mainstream international criminal law:[16]

> Our country's international and domestic law commitments must be honoured. We cannot be seen to be tolerant of impunity for alleged torturers. We must take up our rightful place in the community of nations with its concomitant obligations. We dare not be a safe haven for those who commit crimes against humanity.[17]

Passages such as these leave the reader with the impression of a 'hurrah' judgment, reflecting the recent concerns of critical scholarship in the field:

> International criminal law has (both formally and rhetorically) been instrumental in the designation of 'outlaw states'. … Increasingly the enforcement of international criminal law has become the yardstick against which states are measured and sovereign privilege is granted or revoked (see, for one, complementarity). One might suggest that increasingly international crimes are doing the rhetorical work that the notions of human rights and development can no longer undertake as effectively after years of sustained critique.[18]

One need not agree with these and similar views to acknowledge that they offer valuable and challenging insights for the exploration of social reality. Gevers, for instance, goes on to suggest – presciently, in light of South Africa's potential withdrawal from the Rome Statute – that the stigmatising 'anti-pluralist' and hegemonic undertow of international criminal law has proved to be the principal locus of struggle for African states parties to the Rome Statute.

The legal standard for assessing complementarity, captured in art 17 of the Rome Statute,[19] is in reality the warp and woof of the entire legal regime – the

[15] F Mégret 'Accountability and Ethics' in L Reydams, J Wouters & C Ryngaert *International Prosecutors* (2012) 417.

[16] C Schwöbel 'The Market and Marketing Culture of International Criminal Law' in C Schwöbel (ed) *Critical Perspectives on International Criminal Law* (2014) 270.

[17] *SALC* (note 1 above) at para 80.

[18] C Gevers 'International Criminal Law and Individualism' in Schwöbel (note 16 above) 228–229.

[19] Rome Statute art 17 reads in full:

'1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(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;

'cornerstone', to adopt the language of the ICC Pre-Trial Chamber.[20] Through a complex internal logic of provisions of the Rome Statute and its Rules of Procedure and Evidence, this *complementarity test* serves as a central reference point in guiding: the exercise of the Prosecutor's power to initiate investigations;[21] the admissibility of situations;[22] the admissibility of cases;[23] review of determinations of inadmissibility of cases;[24] the confirmation of charges before the Pre-Trial Chamber;[25] and the myriad other circumstances in which admissibility is either challenged or falls to be determined *mero motu*.

The core of the judicial reasoning in *SALC* is open to critique because it transposes the normative content of the complementarity test (from the Rome Statute via the ICC Act),[26] where it is intended to regulate *vertical relationships* between the ICC and states parties, and applies it outside the ICC framework to *horizontal relationships* between states, without the procedural safeguards the Rome Statute provides. These safeguards include, most notably, a prominent role in proceedings for the 'home states' (that is, the states of nationality of the person under investigation, and on whose territory the alleged crimes occurred); the uncontested availability of the defence *ne bis in idem*; and the availability of a 'complementarity arbiter' acceptable to both the forum and home States, namely the ICC itself, by means of their ratification of the Rome Statute regime.

By contrast, the record in *SALC* shows that the Zimbabwean authorities were not approached by the victims, although with apparently good reason;[27] there is no indication that South Africa provided notice of the proceedings to Zimbabwe or afforded that State an opportunity to act,[28] even in a manner that would safeguard the confidentiality and security of the complainants; there was no role for Zimbabwe in proceedings in which the Constitutional Court finds the authorities of that country either 'unwilling' or 'unable' to investigate or

(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.

3. In order to determine inability in a particular case, 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.'

[20] *Joseph Kony* (note 11 above) at para 34.

[21] See Rome Statute art 15, read with rule 48, which refers to art 53(1)(b), which refers back to art 17.

[22] See Rome Statute art 18(3), which refers to a 'change of circumstances based on a State's unwillingness or inability to genuinely carry out the investigation' – the wording of the complementarity test in art 17.

[23] See Rome Statute art 19(1) which refers back to art 17.

[24] See Rome Statute art 19(10) which refers back to art 17.

[25] See Rules of Procedure and Evidence rule 122, which refers to rule 58.

[26] Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ('ICC Act').

[27] *SALC* (note 1 above) at para 62 ('Zimbabwe was not asked by the alleged victims of torture to investigate the crime').

[28] See J Stigen 'The Relationship between the Principle of Complimentarity and the Exercise of Universal Jurisdication for Core International Crimes' in Bergsmo (note 10 above) 133 at 158 ff (Assessment of proposals that international law allows the forum State to offer the case to the home State or States as a means of 'proactive subsidiarity').

prosecute its nationals for acts of torture;[29] there is no binding principle *ne bis in idem* in a transnational context, without which the rights of any person eventually prosecuted in South Africa would be in (double) jeopardy;[30] and finally, Zimbabwe does not share the Rome Statute framework, or indeed have recourse to any other impartial 'complementarity arbiter' in relation to any eventual investigations or prosecutions in South Africa.[31]

The logic of Majiedt AJ, writing for a unanimous bench, is generally straightforward and can be sketched out in brief: from the proposition that torture is an international crime,[32] he draws the entirely correct conclusion that South Africa has international customary and treaty obligations to prosecute the crime of torture.[33] He goes on to find that while physical presence of the alleged torturer may be required for a prosecution to proceed, presence on South African territory is not a legal requirement at the investigation stage, being an exercise of *adjudicative* and not *enforcement* jurisdiction.[34] He then finds that three cumulative legal requirements must be satisfied to justify the exercise of universal jurisdiction at the investigation stage – in other words, that the exercise of universal jurisdiction by South Africa under customary international law (and its own ICC Act) is limited in three ways:

a. firstly, a requirement of *subsidiarity*,[35] namely that there exists a 'substantial and true connection between the subject-matter and the source of the jurisdiction'; [36]
b. second, a requirement of *complementarity*,[37] namely that the territorial (and presumably the national State) are unwilling or unable genuinely to investigate or prosecute; and
c. third, a case-by-case assessment of the *practicality*[38] of the investigation sought.

Admittedly, a degree of confusion is introduced into the reasoning in one problematic paragraph, where considerations of subsidiary and complementarity appear to be conflated. The reasoning here seems to construe complementarity either as a subset of subsidiarity, or as a means of limiting jurisdiction previously founded on the basis of subsidiarity.[39] On this basis, Majiedt AJ refers to 'at least two limitations': subsidiarity and practicality.[40] A close reading of the later paragraphs, however, suggests that the Court considered complementarity as a third,

[29] *SALC* (note 1 above) at para 62.
[30] Ryngaert (note 10 above) at 170–172. See also C van Den Wyngaert & G Stessens 'The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions' (1999) 48 *International and Comparative Law Quarterly* 779–804.
[31] The precaurious neutrality of the forum State in assessing complementarity standards in the home State is explored in some depth by Stigen (note 28 above) at 157.
[32] *SALC* (note 1 above) at para 38.
[33] Ibid at para 40.
[34] Ibid at para 29.
[35] Ibid at paras 61–62, 78.
[36] Ibid at para 61. Compare ibid at para 28, which refers to a 'substantial and bona fide connection'.
[37] Ibid at paras 61–62 and 78.
[38] Ibid at para 63.
[39] Ibid at para 61.
[40] Ibid.

self-standing limitation on the exercise of universal jurisdiction: while it frames the subsidiarity threshold ('substantial and true connection') as establishing a jurisdictional nexus between South Africa and alleged crimes committed abroad, it characterises the complementarity test ('unwilling or unable to prosecute') as an expression of the principle of non-intervention.[41] These two are expressions of related but distinct principles of international law. Subsidiarity works to found jurisdiction and prevent jurisdictional overreach; complementarity respects the UN Charter-based principle of non-intervention in the internal affairs of other States.

The idea that subsidiarity 'founds' jurisdiction is an intriguing and valuable one that receives inadequate attention in the judgment, and would have strengthened its reasoning. This is because it dispels a longstanding misunderstanding in the literature and in practice about the nature of universal jurisdiction, which does not itself *establish* or *found* jurisdiction but merely *describes* a set of circumstances, framed as a negative or residual category,[42] under which States, as a matter of international law, are *permitted but not required* to exercise criminal jurisdiction over core international crimes. In other words, permissive universal jurisdiction is 'jurisdiction exercised over crimes committed abroad where there are no links of nationality to the suspect or victim or of harm to the state's own special interests'.[43]

But states choosing to exercise permissive universal jurisdiction remain bound by other norms of international law in taking action: the principle of non-intervention, for instance. Universal jurisdiction does not somehow suspend the operation of the international legal system; it is part of that complex, adapative system, in which it plays a part that occasionally defies linear prediction.

To regulate the inevitable tensions that arise between those rules of international law that tend to entrench State sovereignty and those that promote international justice, a number of legal balancing tests have evolved in the practice of states. Majiedt AJ rightly identifies three: complementarity, subsidiarity and practicality. Without stretching the metaphor, these tests play the role of potentiometers in the international circuitry: they regulate the flow of (state) power by varying (judicial) resistance.

However, the judgment itself works at cross-purposes on this point. While founding jurisdiction on the principle of subsidiarity in one place,[44] an earlier passage misconstrues universal jurisdiction – whether intentionally or through lax usage – by appearing to make its exercise dependent – in practice if not in law – on membership of the Rome Statute regime:

[41] Ibid.

[42] R O'Keefe 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735, 745 and fn 12.

[43] CK Hall 'The Role of Universal Jurisdiction in the International Criminal Court Complementarity System' in Bergsmo (note 10 above) 201 at 205. See also ibid at 202: ('[U]niversal jurisdiction means the *ability* of the court of any state to try persons for crimes committed outside its territory which are not linked to the forum state by the nationality of the suspect or of the victims at the time of the crimes or by harm to that state's own special national interests.')

[44] *SALC* (note 1 above) at para 61.

> If an investigation is not instituted by non-signatory countries in which the crimes have been committed, the perpetrators can only be brought to justice through the application of universal jurisdiction, namely the investigation and prosecution of these alleged crimes *by states parties under the Rome Statute*.[45]

This is a category mistake. The exercise of universal jurisdiction is conceptually distinct from South Africa's Rome Statute obligations. Indeed, many states prescribe the exercise of universal jurisdiction over a range of so-called 'ordinary' (non-Rome Statute) crimes.[46] The Court's reliance on the ICC Act also works at cross-purposes. While the Court grounds the investigative powers of SAPS over the alleged instances of torture in this instance on the ICC Act,[47] the only valid basis on which South Africa and Zimbabwe share reciprocal obligations under international law to investigate and prosecute torture is as a crime under peremptory norms of customary international law, as well as under the Torture Convention. The ICC Act enacts Rome Statute crimes into South African law, including torture *only when committed as a crime against humanity* – that is, in the context of a widespread or systematic attack directed against a civilian population. It does not, by any means, domesticate the Torture Convention or the customary international law prohibition on torture (a measure effected instead by the Torture Act).[48] The judgment's own analysis of the purposes of the ICC Act makes no such sweeping finding.[49] The character of subsidiarity as founding jurisdiction does not receive sufficient attention in the judgment itself.

It is equally noteworthy that the language of the subsidiarity threshold – 'substantial and true connection' – adopted by the Court here echoes the earlier pronouncement of Sachs J in *S v Basson*, also in the context of core international crimes:

> 'to make an offence subject to the jurisdiction of our courts … it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law.'[50]

Nonetheless, the judgment's only tangential reference to *Basson*[51] does not include any consideration of this central pronouncement on the principle of subsidiarity in its application to core international crimes. With this omission, the Court loses an opportunity not only to further develop its own jurisprudence from *Basson* but to harmonise the muddled state of public international law on subsidiarity in the context of universal jurisdiction with its analogue from private international law, which is underpinned by a depth of relatively stable and consistent comparative jurisprudence.

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[45] Ibid at para 32 (emphasis added).

[46] See Hall (note 43 above) at 205–206 (Providing examples of the exercise of universal jurisdiction over ordinary crimes such as murder, rape, assault or abduction).

[47] See *SALC* (note 1 above) at paras 54–60.

[48] Prevention of Combating and Torture of Persons Act 13 of 2013, read with s 231(4) of the Constitution.

[49] *SALC* (note 1 above) at paras 33–34.

[50] *S v Basson* [2005] ZACC 10, 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC) at para 226, quoting *Libman v The Queen* [1985] 2 SCR 178 at 212–213 (LaForest J).

[51] *SALC* (note 1 above) at para 30, fn 24 (Citing with approval the reasoning of Sachs J concerning the ongoing responsibility of states to try cases of breaches of international humanitarian law).

With all due deference, the judgment is strikingly under-researched and thus insufficiently reasoned in at least four additional ways, even allowing for the complexity of the case, the reality of judicial time-pressures in our apex court,[52] and the resources of four senior and 11 junior counsel for the parties.

Firstly, although the judgment quotes the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case[53] before the International Court of Justice in support of the proposition that physical presence on the territory of the forum state is not a precondition for an investigation,[54] it neither cites nor judicially considers the *most directly relevant legal finding* of that same Opinion: 'A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.'[55]

Second, the judgment makes no reference, either to approve or disapprove the line of ICC decisions from 2009 and 2010 that apply the complementarity test in diverse contexts and, in particular, begin to elucidate the legal approach and factors to be considered in assessing unwillingness or inability under the Rome Statute framework.[56]

Third, to the extent consideration of state practice as an element of customary international law is mandated by s 233 of the Constitution, the judgment makes no mention of the limited but instructive foreign decisions relating to subsidiarity in the context of the exercise of universal jurisdiction. These decisions include: the Spanish Supreme Court's applicaton of stringent subsidiarity rule in the 2003 *Guatemalan Genocide* case;[57] the Spanish Constitutional Court's 2005 ruling that the exercise of universal jurisdiction is limited only by a *ne bis in idem* safeguard, not any rule of subsidiarity;[58] the Spanish Appeal Court's 2009 reversal of a decision to prosecute in the *Al-Daraj* case, finding it 'inadmissible to question the competence of the judicial authorities of the State of Israel to investigate, and if fitting, to try the events';[59] and the published decisions of German prosecution authorities from 2005 and 2007 not to proceed with investigations in the *Abu Ghraib* prison abuse matter, first on subsidiarity alone and subsequently on an amalgam of subsidiarity and practicality of the investigation, finding that: 'The view of the complainant that the Federal Republic of Germany must act as a

[52] A period of slightly over five months elapsed between hearing (19 May 2014) and judgment (30 October 2014).

[53] Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) [2002] ICJ 3 (*'Arrest Warrant'*) (14 February 2002).

[54] *SALC* (note 1 above) at fn 50.

[55] *Arrest Warrant* (note 53 above) at para 59.

[56] Among these, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case* ICC-01/04-01/07-1497 (25 September 2009) at paras 78 and 85; Joseph Kony (note 11 above) at paras 45 and 51; *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* Case No. ICC-01/09-19 (31 March 2010) at paras 50 and 183; *The Prosecutor v Jean-Pierre Bemba Gombo, Decision on the Admissibility and Abuse of Process Challenges ('Bemba Admissibility Decision')* Case no. ICC-01/05-01/08-802 (24 June 2010) at paras 239–247

[57] Tribunal Supremo Case No. 327-2003(25 February 2003).

[58] Tribunal Constitucional Case No. STC 237/2005 (26 September 2005).

[59] Audiencia Nacional Appeal No. 31/09 (9 July 2009).

representative of the "international community" and therefore at least take up investigations is thus mistaken.'[60]

Fourth, the judgment would have been strengthened by explicit reference or at least some incorporation of argument from the work of Rastan, Stigen or Ryngaert – each characterised in 2010 as 'leading international experts'[61] on complementarity, and each having analysed the specific issue of the application of the subsidiarity principle in the exercise of universal jurisdiction in domestic legal systems.

Both individually and cumulatively, these are deafening silences.

How, then, should the Court have approached subsidiarity and complementarity in *SALC*? Scholars and practitioners alike recommend both caution and depth of reasoning. More prosaically: 'If you do it, do it right.' Cedric Ryngaert makes the following targeted observation:

> [T]here are strong normative arguments in favour of a principle of horizontal complementarity, although admittedly it may not yet have crystallized as a norm of customary international law given the dearth of pertinent state practice. However, stating that there is such a thing as horizontal complementarity is one thing, implementing it correctly is quite another. A warning may have to be provided here as to an overly policy-based horizontal complementarity analysis. Lacking principled guidance, such an analysis may easily be contorted for political purposes. And because prosecutors are not under a legal duty to carry out a complementarity analysis, assuming that there are no administrative guidelines on horizontal complementarity which are binding on them either, they may even believe that they can do wholly without a complementarity analysis, or at least carry out a very superficial self-serving analysis without genuinely inquiring into whether the territorial or national state has conducted any relevant proceedings.[62]

It is worth recalling, in this vein, that the Court's 'unwillingness or inability' analysis of the Zimbabwean judicial system is limited to a brief paragraph, and that the home state was neither notified of the proceedings nor invited to have its views heard.

As Jo Stigen has observed, compellingly:

> There is, however, an inherent paradox with the application of such a subsidiarity criterion. Absent an international scrutiny mechanism, it presupposes a horizontal scrutiny between states of the adequacy of their respective proceedings. This is quite different from the vertical scrutiny exercised by the ICC. Thus, while initially aiming at reducing the risk of interstate friction, subsidiarity can also make the application of universal jurisdiction more intrusive. This makes it all the more important that the most essential aspects of the complementarity principle aimed at safeguarding the integrity of states vis-à-vis the ICC are applied *mutatis mutandis* to the exercise of universal jurisdiction.[63]

Chief among these safeguards is the notification of the home state by the forum state and the offer of the case for genuine investigation, with support if necessary,

[60] Decision 3 ARP 156/06-2 (5 April 2007). See also Decision 3 ARP 207/04-2 (10 February 2005).

[61] M Bergsmo 'Between Territoriality and Universality: Room for Further Reflection' in Bergsmo (note 10 above) 1.

[62] Ryngaert (note 10 above) at 190.

[63] Stigen (note 31 above) at 158.

in a manner that guarantees the confidentiality and safety of complainants.[64] The guarantee of *ne bis in idem* protection as between the forum and home states would also be a requirement of international human rights law, at least once the investigation crystallises to the point that suspects are 'substantially affected' by the suspicion against them, or formally notified that they are suspects in the investigation.[65]

It may be helpful, in conclusion, to make explicit that the efflorescence of the principle of horizontal complementarity is indicative of a broader shift in the discourse of international criminal law. The language of a 'web' of universal jurisdiction as a foil to the insularity of a corrupted national sovereignty, ensnaring perpetrators of international crimes, was prevalent around the adoption and entry into force of the Rome Statute – and is still apparent today in the language of 'no safe haven'.[66] But the discourse has matured and reflects a deeper understanding of the challenges of *managing overlapping responsibilities*: the *primary responsibility* of the home states (typically on the basis of territoriality or nationality of the offender) and the *secondary responsibility* of other states as well as international courts and tribunals. Quite beautifully, this shift both reinforces and recasts the value of sovereignty in regulating world order.

In light of these comments, it may also be helpful to conclude with an examination of the means by which the judgment seeks to legitimate the exercise of universal jurisdiction. What is the Constitutional Court saying about South Africa's (and indeed, Zimbabwe's) responsibilities? Whether one understands complementarity only in its narrow, vertical sense, or admits a broader notion of complementarity as 'burden-sharing' in the fight against impunity for atrocity crimes, not only between international courts and domestic legal systems but also between states,[67] the Court's legal characterisation of the facts under the subsidiarity test is reduced to one sentence of reasoning: 'Given the international and heinous nature of the crime, South Africa has a substantial connection to it.'[68]

But to displace the jurisdictional claim of the home states – the states of territoriality and nationality, which have traditionally been accorded some priority out of pragmatism if not in binding international law[69] – requires legitimation. In the context of horizontal complementarity for core international crimes, legitimation must arise from a threshold – subsidiarity or otherwise – that *actually means something*. To say that every core international crime automatically bears a 'substantial and true' connection to South Africa, as the judgment does, is to render the subsidiarity threshold nugatory and thus irrelevant.

I am indebted to the anonymous reviewer who took the point that universal jurisdiction is unashamedly normative in character. A thorough exploration of the

[64] See the detailed analysis of (note 31 above) at 151–153.

[65] *Deweer v Belgium* [1980] ECHR 1 at paras 42, 44 and 46.

[66] See, eg, *SALC* (note 1 above) at para 81.

[67] R Rastan 'Complementarity: Contest or Collaboration?' in Bergsmo (note 10 above) 83, 83–84 and 106 ff.

[68] *SALC* (note 1 above) at para 78.

[69] Rastan (note 67 above) at 99.

theory of representation that legitimates claims to universal jurisdiction lies beyond the scope of this comment.

By way of a concluding *excursus*, however, the recent pronouncement of the full bench of the High Court, declaring South Africa's attempted withdrawal from the Rome Statute unconstitutional and invalid, does contain a curious, thought-provoking and challenging *obiter dictum* that warrants our collective attention:

> Therefore, the approval of an international agreement in terms of s 231(2) creates a social contract between the people of South Africa, through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement.[70]

If we accept that 'social contract' in this context need not refer solely to a state-bound or nationally constructed society, but to all the conceptual and lived richness that characterises Allot's theory of human self-constituting,[71] this seemingly offhand remark from the High Court takes on significant meaning. It may be that international law lifts the 'state veil' to some extent. It may be that the legislative, representative function, rather than the executive one, legitimates the exercise of jurisdiction under international law. In a prescient article, Hume argued that the fully fledged 'real and substantial link' test, transposed from private to public international law, is 'a *constitutive* element of *Parliament's legislative competence under public international law*…[it] legitimates the exercise of *Parliament's authority on the international level*'.[72] This argument is especially compelling because it identifies with precision the nature of the juridical link being created between the forum state exercising universal jurisdiction, and the alleged criminal conduct: it is the *legislature* extending its will to the international plane – not as a mere agent of the international community, but in its own right.

The matter of South Africa's attempted withdrawal from the Rome Statute will not be appealed by the state. Further judicial engagement on the vital question of horizontal complementarity will have to await a future test case.

[70] *Democratic Alliance* (note 9 above) at para 52.

[71] P Allott 'Globalization from Above: Actualizing the Ideal through Law' in K Booth, T Dunne & M Cox (eds) *How Might we Live? Global Ethics for a New Century* (2001) 61ff. See also P Allott *Eunomia: New Order for a New World* (1990).

[72] N Hume 'Four Flaws: Reflections on the Canadian Approach to Private International Law' (2006) 44 *Canadian Yearbook of International Law* 161, 217.