# 8

# Concurring Criminal Jurisdictions under International Law

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## 8.1. Introduction

### 8.1.1. The Problems Discussed in this Chapter

The exercise of universal jurisdiction in Europe over the past fifteen years reveals a number of legal and practical problems[1], among the most crucial ones is the problem of concurring criminal jurisdictions, often discussed under the heading of complementarity or subsidiarity. In general, the merits of these principles may not be doubted; however, the danger of their extensive application becomes apparent when a forum state declines to exercise universal jurisdiction over one suspect based on the fact that the home state has shown or has pretended to be willing and able to prosecute lower-ranked human rights violators. Recent cases in Germany and Spain illustrate the results of this false interpretation. In Germany the Federal Prosecutor invoked an analogy to Article 14 of the Rome Statute and declined to open a case against Donald Rumsfeld and other high ranking officials allegedly responsible for the U.S. torture program, based on the fact that the United States had put a number of low-ranking soldiers and agents on trial who were involved in the Abu Ghraib torture incidents.[2]

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[1] See, *e.g.*, Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", Michigan Journal of International Law, 2009, vol. 30, no. 3, 927-980, at 958.

[2] See Florian Jessberger, "Universality, Complementarity, and the Duty to Prosecute Crimes under International Law in Germany", in: W. Kaleck, M. Ratner, T. Singelnstein and P. Weiss (eds.), *International Prosecution of Human Rights Crimes*, Springer, 2007, 213 (221).

Recently, Spanish courts decided in a case on sexual violence and torture against women in Mexico and in another case on the targeted killing of a suspected Hamas-leader with many civilian casualties in Gaza in 2002, that they were not competent to open investigations into the alleged commission of international crimes because investigations were already going on in the territorial state of the crime.[3] The courts argued that by investigating these crimes in the territorial state under its criminal jurisdiction third states were prevented from exercising their criminal jurisdiction under the principle of universality. According to the courts, the hierarchy of jurisdictions gives priority to territoriality over universality. Consequently, as long as a state investigates and is thus exercising its jurisdiction based on the territoriality principle, third states are prevented to exercise their jurisdiction based on the principle of universality. The courts further argued that the investigation does not have to meet certain standards as long as they are conducted by a state based, as a matter of principle, on the rule of law.[4]

On a second line of argument, the courts found that the principle of *ne bis in idem* also does not allow investigations in other states once a state has opened an investigation.[5] Otherwise a perpetrator would have to face being prosecuted twice for the same conduct.

The decisions by the Spanish courts raise fundamental questions of international law and relations. They address one of the key issues of contemporary international criminal justice: how to organize legally an international criminal justice system which involves several actors with, to a large extent, overlapping jurisdictional competences. The Spanish courts seem to push for a quick and uncomplicated closure of highly complex and politically sensitive cases. Focusing on the principles of territoriality and universality, this chapter provides for an in-depth analysis of concurring criminal jurisdictions under international law. Additionally, it analyzes which universal standards of investigation have to be met for there

[3] *Atenco* case, Auto of the Sala de lo Penal of the Audiencia Nacional of 14 January 2009 on the Rollo de Apelación nº 172/2008 of Section 2ª, from Diligencias Previas nº 27/08 del Juzgado Central de Instrucción nº 3, pp. 10 and 12; *Gaza* case, Auto 1/2009 of the Sala de lo Penal of the Audiencia Nacional of 9 July 2009 on the Recurso de Apelación nº 31/09 Rollo de Sala de la Sección 2ª Nº 118/09, Diligencias Previas nº 157/08 of the Juzgado Central de Instrucción nº4, pp. 16, 19 and 23.

[4] *Atenco* case, *supra* note 3, pp. 10-13; *Gaza* case, *supra* note 3, p. 16.

[5] *Atenco* case, *supra* note 3, p. 5; *Gaza* case, *supra* note 3, p. 23.

to be an adequate investigation. Finally, the chapter takes a position on the relevance of the *ne bis in idem* principle in inter-state relations.

### 8.1.2. Relevant Principles of Jurisdiction

To begin with, it is to be noted that international law recognizes different forms of criminal jurisdiction. In addition to the territoriality principle that connects jurisdiction to the place where a crime was committed, there are several other grounds of extraterritorial jurisdiction. The main forms of extraterritorial jurisdiction are the protective principle, the active personality (or nationality) principle, the passive personality principle and the universality principle.[6]

Whether the passive personality principle can be invoked, that is to say the exercise of jurisdiction based on the nationality of the victim, is a matter of controversy under international law. The principle is established as basis of jurisdiction in numerous domestic laws and in a number of international treaties.[7] Yet some states do not provide for this form of jurisdiction in their domestic legislation. Still, according to the majority view, which is shared by the authors of this article, there is sufficient support for the position that, under international law, the fact that the victim holds a state's nationality forms a firm basis for the exercise of extraterritorial jurisdiction by this state.[8] It should be noted, however, that some cases which from the viewpoint of international law can be regarded as exercise of the passive personality principle may, from the perspective of specific national legislation, be dealt with as exercise of another jurisdictional principle, for example the universality principle.

Unlike the other principles of extraterritorial jurisdiction, the universality principle requires no specific nexus between the crime and the forum state. Jurisdiction is solely based on the nature of the crime, with-

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[6] See Cedric Ryngaert, *Jurisdiction in International Law*, Oxford: Oxford University Press, 2008, pp. 85-133.

[7] *E.g.*, Spanish law established the passive personality principle in Article 23.4 and 5 of the Spanish Law of the Judiciary by the Organic Law 1/2009 on 3 November 2009; according to Article 5(1)(c) of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states are authorized but not obliged to establish criminal jurisdiction on the basis of the passive personality principle.

[8] See, *e.g.*, Tom Vander Beken *et al*., *Finding the Best Place for Prosecution*, Antwerp: Maklu, 2002, p. 13: Bundesverfassungsgericht, Juristenzeitung 2001, pp. 975, 979; see also Restatement (Third) of Foreign Relations Law, 1987, § 402.

out regard to where the crime was committed, the nationality of the (alleged) perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[9] This principle recognizes the authority of each state to prosecute especially "heinous" crimes, which due to their specific characteristics, affect the international community as a whole. By allowing all states to prosecute those international crimes such as genocide, war crimes, crimes against humanity, and, arguably, torture, the principle of universal jurisdiction protects and upholds fundamental values of the international community. The universality principle for those crimes is rooted in customary international law.[10]

Drawing on this background information, this chapter will address the following questions: Does international law provide for the priority of territorial jurisdiction over extraterritorial, in particular universal jurisdiction? And does the *ne bis in idem* /double jeopardy principle, under international law, bar prosecution in a foreign jurisdiction?

## 8.2. Does International Law Provide for the Priority of Territorial Jurisdiction over Extraterritorial, in Particular Universal Jurisdiction?

### 8.2.1. The *Lotus* Case

International law envisions a system of concurrent jurisdictions. There is no rule prohibiting states from establishing domestic criminal jurisdiction on the basis of active or passive nationality, or universality over an extraterritorial situation that is already covered by the jurisdiction of other

[9] See, *e.g.*, Princeton University Program in Law and Public Affairs, 2001 Princeton Principles on Universal Jurisdiction. The steering committee was composed of Professors Macedo, Bass, Falk, Flinterman, Butler, Oxman and Lockwood. See also the definition of the *Institut de Droit international* of 26 August 2005, seventeenth commission, universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, resolution, para. 1; members of the 17th Commission of the *Institute de Droit international* in Krakow 2005 were Professors Ando, Barberis, Bennouna, Caflisch, Cassese, Conforti, Crawford, Dinstein, Lee, Momtaz, Orrego Vicuna, Rozakis, Salmon, Tomuschat, Torres Bernárdez, Vinuesa and Yusuf.

[10] See, *e.g.*, Princeton Principles, *supra* note 9; see also Claus Kress, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", *Journal of International Criminal Justice*, 2006, vol. 4, 561-585 (566).

states, especially the territorial state.[11] As the Permanent Court of International Justice stated in its famous *Lotus* case:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law (allowing exercising jurisdiction outside its own territory). (…) The territoriality of criminal law (…) is not an absolute principle of international law and by no means coincides with territorial sovereignty.[12]

Moreover, the Fourth Geneva Convention in its Article 146 even obliges all states to establish their domestic criminal jurisdiction over one and the same act of a grave breach of the Fourth Geneva Convention as defined in its Article 147.

### 8.2.2. No Hierarchy Between Jurisdictional Principles

International customary law recognizes no hierarchy among the different types of criminal jurisdictions outlined above. In particular, there is no conclusive evidence regarding the existence of a rule of customary international law which may provide for the priority of the territoriality principle. It follows that, under international law, a state which practices universal jurisdiction – the so-called third state – is under no legal obligation to accord priority in respect of investigation and prosecution to the state where the criminal acts were committed.[13]

Equally, the Fourth Geneva Convention in its Article 146 does not establish any hierarchy between jurisdictional principles. This provision simply obliges state parties to provide effective personal sanctions for persons committing any of the grave breaches of the Convention in order to avoid safe havens for perpetrators; it does not establish an order of priority whatsoever among different grounds of jurisdiction.

To conclude, a state exercising extraterritorial jurisdiction by investigating and prosecuting a crime on the basis of one of the acknowledged

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[11] Ryngaert, *supra* note 6, at 129.

[12] Permanent Court of International Justice, Series A, No. 10, 7 September 1927, *The case of S.S. "Lotus"*, pp. 18-20.

[13] See *AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction*, Report (2009), 8672/1/09 Rev 1 Annex, para. 14, at 11.

jurisdictional principles is not violating international law even if the crime is already investigated or prosecuted by the authorities of the state where it was committed.

### 8.2.3. Territorial Jurisdiction has a Special Role

Notwithstanding the absence of a positive rule of customary international law providing for the priority of territorial jurisdiction, jurisdiction exercised on the basis of the territoriality principle is accorded a special place. This follows not from a firm rule of international law but as a matter of policy. In fact, there is reason to believe that states prosecuting international crimes on the basis of the universality principle should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction.[14] State practice accompanied by what appears to be an emerging sense of *opinio juris* indicates that states consider a prosecutorial effort by the territorial state to foreclose the possibility of a prosecution by states with universal jurisdiction.[15]

There are several reasons for the preference of territorial jurisdiction which are based, *inter alia*, on procedural as well as political considerations and the recognition of a legitimate primary interest of those states that are most directly connected with the crime. While third states act in the interest of and, thus, as agents of the international community as a whole, the territorial state primarily pursues its own interests by prosecuting alleged offenders.

As regards the said priority of territorial jurisdiction, however, three points must be stressed: First, it is to be emphasized that territorial jurisdiction enjoys such priority relative to universal jurisdiction as a *matter of policy* only and not as a matter of international law. Second, the priority of territorial jurisdiction is *not* under discussion *relative to other principles of extraterritorial jurisdiction, such as the passive personality principle*, but only relative to the universality principle where no link whatsoever exists between the crime and the third state. And third, priority is subject to *certain conditions relating to the exercise of jurisdiction* by the

[14] See *ibid.*, recommendation R9, at 42.

[15] Spanish Constitutional Court Judgment 237/2005, of 26 September, II. conclusions of law, para. 4.; Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, 86 Wash. U. L. Rev. (2009), 769 (835).

territorial state and its authorities. These conditions are spelled out in the following paragraphs.

### 8.2.4. Unsettled, Conditional Subsidiarity

Hence, the position territorial jurisdiction enjoys under international law does not lead to an absolute and unlimited subsidiarity of universal jurisdiction; rather, it is a form of conditional subsidiarity whose nature and content are not yet settled conclusively.

However, there is a widespread view that where the authorities and courts of a third state have serious reason to believe that the territorial state is manifestly unwilling or unable to prosecute the alleged offender, they may initiate criminal proceedings and take the necessary steps to prosecute the crime.[16] In other words: the argument that prosecutorial efforts by the territorial state foreclose the possibility of exercise of universal jurisdiction by third states is dependent on the condition that the territorial jurisdiction is exercised genuinely or in "good faith".[17] Further, it is difficult to assert that the principle of subsidiarity already applies at the initial investigation stage compared to the situation after the conclusion of an investigation.[18] Investigations can be initiated simultaneously in different countries and the results and evidentiary material collected be shared in legal assistance to the forum state of prosecution.[19]

The necessity of imposing the condition of subsidiarity regarding prosecution is rooted in the rationale of universal jurisdiction. Universal jurisdiction is supposed to be exercised only in cases that affect the international community as a whole and in order to prevent gaps of enforcement leading to impunity. In cases where jurisdiction is effectively exercised on other grounds, there is no need for universal jurisdiction. However, the lack of "good faith" investigations and prosecutions in other *fora*

[16] Compare AU-EU Technical Ad hoc Expert Group, *op. cit.*, recommendation R10, at 43; see also Section 3(c) of the Resolution of the *Institute de Droit international* (2005), *supra* note 9.

[17] See Anthony J. Colangelo, *supra* note 15, 769 (835); for a similar approach, see Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, International Court of Justice, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, pp. 64 – 91.

[18] See Claus Kreß, *supra* note 10, at 580.

[19] See AU-EU Technical Ad hoc Expert Group, *op. cit.*, recommendation R10, at 43.

means that the exercise of universal jurisdiction by third states is the only chance to avoid impunity.

### 8.2.5. Assessing Territorial State Prosecutions

To determine the "good faith" of prosecutorial efforts in the territorial state, criteria established in international human rights law regarding universal standards for investigations should be taken into account. As such, not only international human rights courts can determine whether an investigation meets universal standards, but national courts too can apply these universal principles to determine whether the territorial state is investigating genuinely or whether a third state has to step in.

Various decisions of international human rights courts support the universal principles of independence, effectiveness, promptness and impartiality in carrying out investigations.[20] The Inter-American Court of Human Rights found in its *Moiwana Community* case that the State has the obligation to initiate *ex officio* and immediately, a genuine, impartial and effective investigation, which is not undertaken as a mere formality predestined to be ineffective.[21] The European Court of Human Rights found in its *Finucane* decision of 1 July 2003 that certain rights imply some form of effective official investigation to secure these rights of individuals.[22] The Court reaffirmed its jurisprudence that "(f)or an investiga-

[20] Chamber Judgment of the European Court of Human Rights in the case of *Finucane v. United Kingdom*, 1 July 2003; European Court of Human Rights cases *Hugh Jordan; Kelly and others; Shanaghan v. United Kingdom; Mckerr v. United Kingdom*, 4 May 2001; *Fatma Kaçar v. Turkey*, 15 July 2005; *Isayeva (I) and (II) v. Russia*, 24 February 2005; the Inter-American Court of Human Rights has established similar jurisprudence in the case of *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, Series C No. 148, at 296 and the case of *Mapiripan Massacre v. Colombia*, Judgment of 15 September 2005, Series C No. 134, para. 223. See also Harmen van der Wilt and Sandra Lyngdorf, "Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle", International Criminal Law Review 9, 2009, at 50 *et seq.*

[21] Inter-American Court of Human Rights case of the *Moiwana Community*, Judgment of 15 June 2005, Series C No. 124, paras. 145-146; *Ituango Massacres v. Colombia, supra* note 20; *Pueblo Bello Massacre*, Judgment of 31 January 2006, Series C No. 140, para. 143; and *Mapiripan Massacre*, *supra* note 20.

[22] *Finucane v. United Kingdom*, *supra* note 20, p. 67; see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A No.

tion to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence".[23] As for the content of an investigation, the Court further noted that "(t)he authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings …".[24] Turning to the requirement of promptness and reasonable expedition, the Court found this "implicit in this context. … a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts".[25]

### 8.2.6. The Standard of ICC Article 17 as a Guiding Principle

On the inter-state level, in determining the "good faith" of prosecutorial efforts in the territorial state the complementarity principle of Article 17 of the Rome Statute of the International Criminal Court (ICC) is a useful reference as it establishes the preconditions that a state has to meet in

324, p. 49, para. 161; *Kaya v. Turkey*, Judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, para. 86. The Inter-American Court of Human Rights has established similar jurisprudence in the case of *Ituango Massacres v. Colombia*, *supra* note 20, p. 297.

[23] *Finucane v. United Kingdom*, *supra* note 20, p. 68; see, *e.g.*, *Güleç v. Turkey*, Judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, paras. 81-82; *Oğur v. Turkey* [GC], No. 21594/93, paras. 91-92, ECHR 1999-III; see, *e.g.*, *Ergi v. Turkey*, Judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-1779, paras. 83-84, and the recent Northern Irish cases cited above, *supra* note 20, for example, *McKerr*, para. 128, *Hugh Jordan*, para. 120, and *Kelly and Others*, para. 114.

[24] *Finucane v. United Kingdom*, *supra* note 20, p. 69; see, *e.g.*, *Salman v. Turkey* [GC], No. 21986/93, para. 106, ECHR 2000-VII; *Tanrıkulu v. Turkey* [GC], No. 23763/94, para. 109, ECHR 1999-IV; *Gül v. Turkey*, 22676/93, para. 89, 14 December 2000.

[25] *Finucane v. United Kingdom*, *supra* note 20, at 70; see *Yaşa v. Turkey,* Judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-2440, paras. 102-104; *Çakıcı v. Turkey* [GC], No. 23657/94, paras. 80, 87 and 106, ECHR 1999-IV; *Tanrıkulu*, *supra* note 24, para. 109; *Mahmut Kaya v. Turkey*, No. 22535/93, paras. 106-107, ECHR 2000-III; see, *e.g.*, *Hugh Jordan*, *supra* note 21, paras. 108, 136-140.

order to avoid that the ICC exercises its jurisdiction. Notwithstanding that the horizontal relation between two states is different from the vertical relation between a state and the ICC,[26] the standard established by the complementarity principle can be taken into consideration and may be, as a guiding principle, transferred to inter-state relations. However, it has to be emphasized that the complementarity principle itself, applicable to the state-ICC relation, does not exist on a state-to-state level where concurrent jurisdiction with conditional subsidiarity prevails.

Article 17(1)(a) states that a case is inadmissible before the ICC where "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". According to this wording, and particularly in regard to the element of unwillingness, the lack of efforts to genuinely prosecute the crime needs to be determined positively; it is not sufficient that investigations or prosecutions might merely be conducted more effectively by the ICC or – in the case of third party prosecutions – by other states.[27] References for this interpretation are contained in Article 17(2) of the Rome Statute:

> 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;
>
> 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.

[26] Florian Jessberger, "Universality, Complementarity, and the Duty to Prosecute Crimes under International Law in Germany", *supra* note 2.

[27] Compare R. Cryer *et al*., An Introduction to International Criminal Law and Procedure, Cambridge, 2007, pp. 127-128.

Thus, also on an inter-state level a positive determination whether another state is genuinely conducting an investigation or prosecution should be made. A state cannot refuse investigations simply pointing to another state claiming it is carrying out an investigation. A state has to consider whether universal standards of investigations are met by the other state. Only with an affirmative answer to that question can a state invoke the priority of the territorial state's jurisdiction as a matter of policy.

To conclude, international law does not provide for a priority of territorial jurisdiction over extraterritorial, in particular universal, jurisdiction. It is only as a matter of policy that the territoriality principle is favoured over the universality principle once there is an investigation concluded – this conditional subsidiarity requires that international human rights standards for investigations are respected.

### 8.3. Does, Under International Law, the *Ne Bis in Idem* Principle Bar Prosecution in a Foreign Jurisdiction?

The *ne bis in idem* principle signifies that no one shall be tried twice for the same offence. The principle is incorporated in most national criminal justice systems and contained in many international conventions, both in the area of cooperation in criminal matters as well as human rights.[28] While most states seem to recognize the principle, there are so many qualifications and restrictions to it that it is difficult to describe its status in international law or in comparative criminal law.[29]

The first qualification that needs to be made is in regard to the extent of the *ne bis in idem* principle. With the possible exception of the formulations in the statutes of international criminal courts, it becomes apparent that this principle is usually a safeguard only against double prosecution by entities of the same organized political power, usually the nation state. The formulation of Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) is a clear example of this:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or ac-

[28] See, *e.g.*, Article 14(7) ICCPR.

[29] Christine Van den Wyngaert and Tom Ongena, "*Ne bis in idem* Principles, Including the Issue of Amnesty", in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, 705-729 (706).

> quitted in accordance with the law and penal procedure *of each country*. [emphasis added]

This restriction of the *ne bis in idem* principle to decisions by the same sovereign was partly abandoned in the process of European integration, as Article 54 of the Schengen Convention[30] (1990) extends this principle to the decisions of other contracting parties. This development is, however, not indicative of a wider interpretation of the *ne bis in idem* principle in international law beyond the context of the European Union.

The second qualification is that the *ne bis in idem* principle merely protects from double prosecution, once there has been a final decision. Most legal systems will only invoke the *res judicata* principle for judgments on the merits of the case, while interlocutory judgments usually do not have that effect. That means that the *res judicata* effect is generally bound to the condition that the offender has been acquitted or sentenced and that the sentence is currently being served or has already been served. Obviously, the mere opening of investigations or prosecutions carried out by another state does not fulfil these criteria as it does not put an end to a proceeding. Thus it cannot exert a *res judicata* effect since the existence of a judgment, whether convicting or acquitting, is the key rule to consider a double jeopardy situation. As we have already pointed out, a mere investigation or ongoing prosecution will simply create a conflict of jurisdiction or a *lis pendens* which, unlike the *ne bis in idem* principle, does not prohibit another jurisdiction from investigating or prosecuting the same case.

## 8.4. Summary and Conclusions

International law envisions a model of concurrent jurisdictions. It enables states to exercise their jurisdiction on different grounds without prescribing a hierarchy between those types of jurisdiction.

However, one can recognize a policy rule to accord priority to the principle of territoriality in combination with a model of conditional subsidiarity of universal jurisdiction once an investigation is concluded. The conditionality of the exercise of universal jurisdiction, while not settled

[30] Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic, on the Gradual Abolition of Checks at their Common Borders, *ILM*, 1991, p. 84.

conclusively, may be based on the "good faith" exercise of the primary jurisdiction and may be construed following the case law of human rights courts and the basic concept established by Article 17 of the Rome Statute for the vertical state-ICC relation. It follows that, if the territorial state is unwilling or unable to genuinely conduct investigations or if the investigations or prosecutions are no more than sham proceedings to shield the perpetrator, then the third state must initiate its own criminal proceedings. For an investigation to be considered genuine, it must meet the universal standards of effectiveness, promptness, independence and impartiality.

Finally, it is to be noted that the mentioned policy rule does not extend to the exercise of extraterritorial jurisdiction other than universal jurisdiction. Thus, under international law, states exercising jurisdiction on the basis of the nationality principle or the passive personality principle need not – not even as a matter of policy – accord priority to the jurisdiction of the territorial state.

Domestic courts should not blindly trust that investigations in the territorial state of the crime will be proper. States have a duty to exercise their criminal jurisdiction over those responsible for international crimes, as already mentioned in the preamble of the Rome Statute. They cannot refrain from this duty by merely pointing to investigations in another state, regardless whether these investigations are serious or not. Further, they cannot invoke a hierarchy of criminal jurisdiction under international law or the *ne bis in idem* principle to prevent a third state from opening its own investigations. The investigation of international crimes needs international efforts and cooperation. It is a task for the international community as a whole composed of many single states.