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Universal Jurisdiction as Janus-Faced

The Dual Nature of the German International Criminal Code

Máximo Langer*

Abstract

The legitimacy of universal jurisdiction over crimes against humanity, genocide and war crimes has generated great attention among policy makers and scholars. This article argues that allowing for the participation of, and being accountable to, the international community, are two requirements of legitimacy that universal jurisdiction domestic statutes and proceedings should strive to meet. These are requirements for the legitimacy of universal jurisdiction regardless which conception of international law and international institutions one adopts — statist, cosmopolitan democracy, natural law, global administrative law or global constitutionalism. This article then analyses the important implications of these principles of international participation and accountability for a number of central debates on universal jurisdiction, namely, the crimes universal jurisdiction statutes and proceedings may include, the definition of these crimes, and which doctrines from the general part of international criminal law should be incorporated. These principles also affect how universal jurisdiction cases should be selected, what the relationship between universal jurisdiction prosecutions and the International Criminal Court should be, and which transparency and participatory requirements proceedings under universal jurisdiction should meet. In so doing, the author takes the German Code of Crimes against International Law as a case study to illustrate the analysis.

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1. Introduction

Under universal jurisdiction, any state in the world may prosecute and try core international crimes (crimes against humanity, genocide and war crimes) without any territorial, nationality or national interest link to the crime in question at the time it was committed.¹ Instead, the jurisdictional claim is typically based on the nature of the crime. The legitimacy of universal jurisdiction over these crimes has been the subject of heated controversy in recent years. The tenth anniversary of the German Code of Crimes against International Law, *Völkerstrafgesetzbuch* (VStGB, following its abbreviation in German) provides an opportunity to revisit this discussion.²

The debates on the legitimacy of universal jurisdiction have addressed, first, the legitimacy of the very idea of claiming universal jurisdiction over core international crimes,³ including whether this exercise of universal jurisdiction is legal under international law.⁴ Even if legitimate, there has been further debate on which requirements universal jurisdiction domestic statutes and proceedings should meet. This debate includes whether the presence of the defendant in the prosecuting state is a requirement for launching an investigation and prosecution under universal jurisdiction;⁵ and whether the double

- 1 See e.g. The American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 402, comments c-g, § 404, comments a-b, § 423.
- 2 The *Völkerstrafgesetzbuch* (hereinafter 'VStGB') came into effect on 30 June 2012. On the process of its adoption, see e.g. H. Gropengießer and H. Kreicker, 'Deutschland', in A. Eser and H. Kreicker (eds), 1 *Nationale Strafverfolgung völkerrechtlicher Verbrechen* (Max Plank Institute, 2003) 21, at 58–60.
- 3 See e.g. A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press, 2010); L. May, *Crimes against Humanity: A Normative Account* (Cambridge University Press, 2005); W. Lee, 'International Crimes and Universal Jurisdiction', in L. May (ed.), *International Criminal Law and Philosophy* (Cambridge University Press, 2009) 15; D. Luban, 'A Theory of Crimes Against Humanity', 29 *Yale Journal of International Law* (2004) 85.
- 4 Legality and legitimacy are, of course, two distinct and separate concepts and one can meaningfully refer to institutions as being illegal and legitimate or legal and illegitimate. However, the debate whether universal jurisdiction over core international crimes is legal may be informed or shaped by the position taken on whether universal jurisdiction is legitimate. On the debate on the legality of universal jurisdiction, see e.g. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3, §§ 49–52 (hereinafter 'Arrest Warrant Judgment'); Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant Judgment*; Dissenting Opinion of Judge Van den Wyngaert, *Arrest Warrant Judgment*, §§ 49–58; Separate Opinion of President Guillaume, *Arrest Warrant Judgment*, §§ 13–16; Declaration of Judge Ranjeva, *Arrest Warrant Judgment*, § 8.
- 5 See e.g. L. Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2004); J. Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction', 7 *Journal of International Criminal Justice (JICJ)* (2009) 945, at 955–957; E. Lafontaine, 'Universal Jurisdiction — the Realistic Utopia', 10 *JICJ* (2012) 1277.

criminality principle,⁶ the prohibition of double jeopardy,⁷ and the subsidiarity principle should apply to such proceedings.⁸ Finally, there has also been discussion on whether universal jurisdiction statutes and proceedings bring more harm than good or vice versa.⁹ While analysing and taking a position on each of these debates is beyond the scope of this article, it will be assumed that, at a minimum, claiming universal jurisdiction over core international crimes is legitimate and that universal jurisdiction proceedings must meet due process standards.¹⁰

The central argument of this article is that allowing for the participation of, and being accountable to, the international community are additional requirements of legitimacy that universal jurisdiction statutes and proceedings should strive to meet.¹¹ So far these requirements have not been articulated in

6 Compare, for instance, Art. 689-11, French Code of Criminal Procedure, with 'The Princeton Principles on Universal Jurisdiction', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2003) 18 (hereinafter 'The Princeton Principles'). While the former includes a double criminality requirement the latter does not.

7 See e.g. The Princeton Principles, including a prohibition against double jeopardy in Principle 9; G.P. Fletcher, 'Against Universal Jurisdiction', 1 *JICJ* (2003) 580.

8 On whether the universal jurisdiction forum state should give priority to the territorial and active nationality states, See e.g. Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant Judgment*, § 59; Council of the European Union Secretariat, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, at 14; Art. 3(c), (d), Institute of International Law, Seventeenth Commission, *Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes*; M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010).

9 See e.g. J. Goldsmith and S.D. Krasner, 'The Pitfalls of International Idealism', 132 *Daedalus* (2003) 47, at 51–52, 55; H. Kissinger, 'The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny', 80 *Foreign Affairs* (July/August 2001), at 86; E. Kontorovich, 'The Inefficiency of Universal Jurisdiction', 2008 *University of Illinois Law Review* (2008) 389; N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press, 2006); J.L. Snyder and L. Vinjamuri, 'Trial and Errors', 28 *International Security* (2004) 5.

10 On why the exercise of universal jurisdiction over core international crimes is legitimate, see M. Langer, 'The Archipelago and the Wheel: Universal Jurisdiction Domestic Prosecutions and the International Criminal Court', in M. Minow et al. (eds), *The First Global Prosecutor: Constraints and Promise* (University of Michigan Press, forthcoming 2014).

11 The arguments set out by this article refer to normative, not sociological, legitimacy. In other words, whether or not the use of coercion in these cases is justified or whether those to whom universal jurisdiction statutes are directed should obey them. At a minimum, the arguments refer to the moral legitimacy of universal jurisdiction. However, there are also policy and legal consequences to the extent that moral considerations inform or are part of policy decisions and legal interpretation. In addition, my claim will be that the participation of, and accountability to, the international community are requirements under an ideal theory on universal jurisdiction's legitimacy, as opposed to a minimalist one. On the distinction between ideal and minimal theories of moral legitimacy. See e.g. R.H. Fallon, 'Legitimacy and the Constitution', 118 *Harvard Law Review* (2005) 1787, at 1797–1799, distinguishing between 'ideal theories, which attempt to specify the necessary conditions for assertions of state authority to be maximally justified or to deserve unanimous respect' and 'minimal theories of moral legitimacy [that] define a threshold above which legal regimes are sufficiently just to deserve the support of those who are subject to them in the absence of better, realistically attainable

the literature on universal jurisdiction. This analysis will maintain that allowing for the participation of, and being accountable to, the international community, should form part of the legitimacy of universal jurisdiction regardless which conception of the international legal order and international organizations one adopts — statist, cosmopolitan democracy, natural law, global administrative law or global constitutionalism. However, I will show that these requirements have differing content depending on which of these conceptions is embraced. Under statist conceptions, states hold the right to participate in the enactment and regulation of international criminal law and universal jurisdiction and to hold other states exercising universal jurisdiction accountable. Under cosmopolitan democratic conceptions, not (only) states, but (also) individuals and even other groups hold these rights. Under natural law, and certain strands of global administrative law or cosmopolitan constitutionalism, all states and all human beings have the right to be heard by domestic authorities that enact and enforce universal jurisdiction statutes. They also have the right that institutions and proceedings under universal jurisdiction are transparent and responsive to their concerns.

This article will then show that the principles of the participation of, and accountability to, the international community, not only deepen our theoretical understanding of universal jurisdiction, but also have practical implications. Rather than taking sides between the differing versions of these principles, I will combine these different conceptions for the purpose of discussing these practical implications. It will be assumed that the principles of international participation and accountability require that, at a minimum, states have the right to participate in the enactment and regulation of international crimes and universal jurisdiction statutes and also to hold universal jurisdiction statutes and proceedings accountable. These requirements are appropriate given that states remain the main generators of international norms and international institutions and universal jurisdiction statutes and proceedings affect state sovereignty. This combined account of these principles also requires that all human beings, as well as specific individuals and groups, such as victims and human rights non-governmental organizations (NGOs), have (at a minimum, procedural) rights over universal jurisdiction statutes and proceedings given that certain core international crimes affect all human beings, state officials are often involved in their commission, and states have incentives not to go against powerful officials of other states.

Once I articulate my conception of these principles, I will then analyse concrete implications of these principles by taking the VStGB as a case study.

alternatives. ... Ideal theories establish the standards of justification to which political regimes ought to aspire, even if all existing governments fall short. ... minimal theories specify the threshold conditions that a regime must satisfy in order to deserve any support or justify any official coercion' (emphasis in original).

2. The Participation of, and Accountability to, the Political Community in Domestic Criminal Law

Within individual states, the participation of, and accountability to, the domestic political community, are requirements for the legitimacy of domestic criminal law statutes and proceedings — at least in democracies.¹² In this context, participation means ‘that each individual claims the right to play his part, along with the equal part played by all other individuals, in the government of the society’.¹³ Once institutions and officials represent and act for the domestic political community composed of individuals, these individuals have a right to hold the institutions and officials accountable to ensure that they are responsive to their wishes and concerns. In this context, accountability can be defined as implying ‘that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibility in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met’.¹⁴

For instance, members of the domestic political community have the right to enact domestic criminal legislation and criminal procedure codes, typically through a representative legislature. If citizens disagree with the legislation that their representatives enact (e.g. with the criminalization of certain behaviour), they have mechanisms to sanction these representatives, such as voting them out of office. In addition, when criminal law and procedure bills are considered, citizens have a right both to say what they think about them and to have their opinions heard.

One could argue that although these requirements apply to criminal law legislation, they do not apply to criminal proceedings and judges because the legitimacy of proceedings and judges derives from respecting due process and judicial independence standards.¹⁵ This position does not hold, however,

12 On participation as the ‘right of rights’ in democracies, see e.g. J. Waldron, *Law and Disagreement* (Oxford University Press, 1999), at 233–254. On accountability, see e.g. B. Manin, *The Principles of Representative Government* (Cambridge University Press, 1997), at 234, stating that: ‘Representative institutions aimed to subject those who govern to the verdict of those who are governed. It is the rendering of accounts that has constituted from the beginning the democratic component of representation’; A. Przeworski et al. (eds), *Democracy, Accountability and Representation* (Cambridge University Press, 1999). Among contemporary accounts about the legitimacy of authority, Joseph Raz’s service conception does not include participation and accountability as (central) legitimacy requirements of political authorities. See J. Raz, *The Morality of Freedom* (Oxford University Press, 1986); J. Raz, ‘Authority and Justification’, 14 *Philosophy & Public Affairs* (1985) 3. But it is precisely for this reason that Raz’s conception has been criticized on democratic grounds. See e.g. S. Herskovitz, ‘Legitimacy, Democracy, and Razian Authority’, 9 *Legal Theory* (2003) 201; S. Shapiro, ‘Authority’, in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 382.

13 Waldron, *ibid.*, at 236 (emphasis omitted).

14 R.W. Grant and R.O. Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *American Political Science Review* (2005) 29.

15 For arguments in this direction, see A. Fichtelberg, ‘Democratic Legitimacy and the International Criminal Court: A Liberal Defence’, 4 *JICJ* (2006) 765; M. Glasius, ‘Do

because due process and judicial independence are not the only requirements of legitimacy that must be met. For instance, judges must apply criminal law that is enacted, in contemporary democracies, by representatives of the political community and follow proceedings established by those representatives in the constitution or codes of criminal procedure. Furthermore, domestic judges are appointed and removed from office through constitutionally established procedures that are also enacted by representatives of the political society. Moreover, domestic judges, and the judiciary, more generally, have a duty of transparency towards their own political community. This is one of the rationales for having public trials or for publicly announcing verdicts and sentences.

3. The Dual Nature of Universal Jurisdiction Statutes and Proceedings

Even if the principles of participation and accountability are requirements for the legitimacy of domestic criminal statutes and proceedings, one may nonetheless question whether the participation of, and accountability to, the *international* community, are requirements for the legitimacy of universal jurisdiction statutes — like the VStGB — and proceedings. One objection may be that, despite appearances, universal jurisdiction statutes and proceedings are still domestic and, as such, should only allow for the participation of, and be accountable to, the domestic political community.

However, this objection does not stand. There is no question that universal jurisdiction statutes like the VStGB are domestic in many ways. The German people, through their representatives, decided to pass this type of universal jurisdiction statute.¹⁶ In addition, universal jurisdiction statutes, like the VStGB, are passed and come into effect according to the constitutional and legislative rules and procedures of the domestic legal system. Moreover, specific proceedings typically follow domestic rules of procedure, and these domestic constitutional and legislative rules and procedures also regulate the appointment, removal, and work of prosecutors and judges in universal jurisdiction proceedings. This is why the VStGB is appropriately referred to as *German* international criminal law.

This first objection is not valid because the German universal jurisdiction statute and proceedings pursuant to it are also international. First of all, one could argue that the core crimes included in the VStGB — crimes against humanity, genocide, and war crimes — affect the international community (understood as the community of states and/or human beings) because the

International Criminal Courts Require Democratic Legitimacy? 23 *European Journal of International Law (EJIL)* (2012) 43; Luban, *supra* note 3.

16 This type of decision has to be made regardless whether it is required or merely permissible under international law.

commission of these crimes shows a serious failure of the state system to protect basic human rights. Furthermore, these crimes are typically committed by state officials, are widespread, are committed against groups of persons, and attack human diversity or dehumanize victims in particular ways.¹⁷ In addition, these crimes are considered international crimes because they are enacted not only in the Statute of the International Criminal Court (ICC) but also reflect customary international law.¹⁸ Consequently, such crimes can be understood as affecting the international community as a whole.¹⁹ In fact, these were the grounds for the introduction of universal jurisdiction in the VStGB bill.²⁰ Furthermore, by exercising universal jurisdiction over these crimes, a state can be understood as acting as a trustee or agent of the international community.²¹ States exercising universal jurisdiction have indicated that they are acting as trustees or agents of this community.²²

For these reasons, universal jurisdiction statutes and proceedings can be conceived of as dual — simultaneously possessing a domestic and an international nature. In addition, the institutions that enact and apply these statutes can be envisaged as dual institutions that act, at the same time, as domestic and international organizations.²³ If these statutes and proceedings hold a

- 17 For philosophical justification for the proposition that core international crimes affect humanity, see e.g. H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics, 1994), at 253–279; May, *supra* note 3; L. May, *War Crimes and Just War* (Cambridge University Press, 2007); L. May, *Genocide: A Normative Account* (Cambridge University Press, 2010); A. Duff, 'Authority and Responsibility in International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 589; Lee, *supra* note 3; Luban, *supra* note 3.
- 18 See e.g. A. Cassese, *International Criminal Law* (2nd edn., Oxford University Press, 2008), at 11–13. The drafters of the VStGB had this understanding. See S. Wirth, 'Germany's New International Crimes Code: Bringing a Case to Court', 1 *JICJ* (2003) 151, at 153.
- 19 See e.g. Art. 5 ICCSt.; K. Ambos, *Internationales Strafrecht* (3rd edn., C.H. Beck, 2011), at 63; M. Böse, 'Das Völkerstrafgesetzbuch und der Gedanke "antizipierter Rechtshilfe"', in F. Jessberger and J. Geneuss (eds), *Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines deutschen Völkerstrafrechts* (Nomos, 2013) 167; G. Werle, 'Völkerstrafrecht und deutsches Völkerstrafgesetzbuch', 67 *JuristenZeitung* (2012) 373, at 377; G. Werle and F. Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes against International Law', 13 *Criminal Law Forum* (2002) 191, at 212.
- 20 See e.g. Deutscher Bundestag, Drucksache 14/8524, 13 March 2002, at 14.
- 21 See e.g. C. Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs* (Nomos, 2000), at 26; C. Kreß, 'Universal Jurisdiction over International Crimes and the Institut de droit international', 4 *JICJ* (2006) 561, at 582.
- 22 See e.g. Israel Supreme Court, *Attorney-General of the Government of Israel v. Eichmann* (1962), 36 ILR (1968) 277, at 304; *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), Brief for the United States, at 32–34.
- 23 The idea that domestic institutions have an international or global character when they play a role in transnational regulation has been central in global administrative law. See e.g. B. Kingsbury et al., 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15. The origins of the idea can be traced back to the work of, among others, G. Scelle, *Précis de droit des gens* (Librairie du Recueil Sirey, 1932–34).

dual nature, this first objection to requiring the participation of, and accountability to, the international community for the legitimacy of universal jurisdiction does not hold. As partly international, universal jurisdiction statutes and proceedings may have to allow for participation by, and be accountable to, not only the domestic political community of the state, but also the international community.

4. The Principles of International Participation and Accountability

A second objection may be raised. Even if these statutes and proceedings have a dual domestic and international nature, they still should not allow for the participation of, and be held accountable to, the international community, because the international community is substantially different from domestic political communities. For instance, it may be argued that since there is no world government, much less a democratic world government, the participation of, and accountability to, the international community, do not apply as requirements of legitimacy for international criminal law and organizations.²⁴

In this section, I will argue that while the differences between the international and domestic communities are undeniable, this second objection does not hold because these principles follow as requirements for the legitimacy of universal jurisdiction from cosmopolitan conceptions of the international order that imagine possible world governmental structures, as well as from any of the other major conceptions of the international community, international law, and international organizations.

In order to sketch how these principles follow from each of these conceptions, I will classify these conceptions into three groups: first, statist; second, cosmopolitan democracy; and thirdly, non-positivist accounts of international law and non-principal agent accounts of international organizations.

A. Statist Conceptions

From the perspective of traditional international law and other statist accounts of the international order, only sovereign states compose the international community and have the power to create international norms and international organizations.²⁵ Thus, as equal sovereigns, each state has an equal

24 The literature on the democratic deficit of international law and international organizations is extensive. See e.g. A. Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', 40 *JCMS* (2002) 603. On the democratic legitimacy challenges for international courts in particular, see e.g. A. von Bogdandy and I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *EJIL* (2012) 7.

25 These statist accounts may include traditional international law and a number of international relations theories such as institutionalism and interstate solidarism. See e.g. V. Heiskanen,

right to participate in the creation of international norms and to hold those who enforce those norms accountable. If one understands the community of states as a political community, these principles of international participation and accountability should be understood as requirements of political legitimacy.²⁶ Moreover, even if the community of states is not conceived as a political community, as long as the community of states is considered the principal on whose behalf international organizations are acting, these same principles would follow as moral principles based on a principal agent argument.²⁷

In the case of international criminal law, traditional statist accounts of the international legal order could thus claim that a number of international criminal prosecutions have sufficient legitimacy because states have participated through customary law and treaties — such as the Rome Statute, the Geneva Conventions of 1949, Additional Protocol I, and the Genocide Convention — in the establishment and definition of crimes against humanity, genocide and war crimes.²⁸ States have also directly or indirectly participated in the creation of international criminal jurisdictions — such as the Nuremberg Tribunal, the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and the ICC — in order to enforce these crimes. Statist accounts could thus claim that a number of these international criminal jurisdictions have sufficient legitimacy for the following reasons: they apply the substantive and procedural law that states have directly or indirectly established; states have participated either directly or indirectly in the appointment and removal of

'Introduction', in J.-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001) 1, at 1, 5. They may also include accounts of the international order and international institutions by political philosophers like T. Nagel, 'The Problem of Global Justice', 33 *Philosophy & Public Affairs* (2005) 113, at 138, stating that: 'International institutions act not in the name of individuals, but in the name of the states or state instruments and agencies that have created them'; and J. Rawls, *The Law of Peoples* (Harvard University Press, 1999), who limits the international community to well ordered peoples.

26 On how the community of states can be considered a political community, see e.g. N. Feldman, 'Cosmopolitan Law?' 116 *Yale Law Journal* (2007) 1023.

27 For instance, Nagel, *supra* note 25, argues that the international community is not a political community because it does not have monopoly on violence over a territory. But even if states did not constitute a political community in such a sense, they could still be considered a community to the extent that, under international law, they have the power to create customary norms that apply even to those states that have not expressly given their consent. In addition, states may create organizations or delegate to preexisting organizations the power to enforce and even create international norms and thus be the principal of these organizations.

28 In traditional international law, treaties and custom are the two main ways in which states participate in the creation of international legal norms. But one can imagine other statist conceptions of the international legal order in which international legal norms would be created through other mechanisms or using different decision-making rules. Though I cannot elaborate on this issue further because it is beyond the scope of this article, my point is that traditional international law is only one version among the possible array of statist conceptions of the international legal order. I use traditional international law to illustrate the position of statist conceptions because it is the most familiar and widespread among them.

the prosecutors and judges; and these international criminal jurisdictions have fulfilled their duty of transparency towards the community of states.

Statist accounts of the international legal order can similarly claim that universal jurisdiction is sufficiently legitimate by arguing that states have also exercised their right to participate through customary law and treaties — such as the Torture Convention, the Geneva Conventions of 1949, and Additional Protocol I — by establishing that the exercise of universal jurisdiction by individual states is permissible or at least not prohibited under international law. Based on a principal agent argument, statist accounts could therefore maintain that states may claim universal jurisdiction as agents of the community of states only over international crimes that this community has established and following other rules and directives that the community of states has set for their enforcement.²⁹ Otherwise, states may hold that particular state accountable — for example, through protests, sanctions and other measures — for not applying the norms set by the community of states.³⁰ In addition, to the extent that a state exercising universal jurisdiction claims that it is acting as an agent of the community of states, the state in question would have a duty of transparency towards the community on whose behalf it is acting.

B. *Cosmopolitan Democracy Conceptions*

Cosmopolitanism is a rich term with a long history that goes back at least to ancient Greece and the term cosmopolitan democracy has been given different meanings.³¹ In order to illustrate how the principles of international participation and accountability are requirements for the legitimacy of universal jurisdiction under cosmopolitan democracy, this concept as articulated by Jürgen Habermas will be considered. According to Habermas, individuals are simultaneously national and cosmopolitan citizens. As national citizens, they are represented by their states, and in turn the states have a foundational role in the global legal system. As cosmopolitan citizens, individuals would also be founding subjects of a world constitution. This politically constituted world

29 For a similar conclusion reached through a jurisdictional theory of double jeopardy within a statist conception of the international legal order, see A. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory', 86 *Washington University Law Review* (2009) 769, at 796–797.

30 If a state exercises universal jurisdiction over a crime that the community of states has not established as such, or is not following this community's definition of the crime, universal jurisdiction might still be legal under statist conceptions of international law (for instance, using the *Lotus* principle) and minimally legitimate (if, for instance, it is the only way to do justice and still respects due process standards). But such an exercise would not be legitimate under ideal statist theories of universal jurisdiction. On the distinction between minimal and ideal theories of moral legitimacy, see, in general, *supra* note 11. In such a case, a universal jurisdiction state may even be proposing that a new international crime or a new definition of an existing crime be adopted by the community of states. But until other states join the state in question, the state may claim universal jurisdiction solely on its own behalf.

31 On the history of the term cosmopolitanism, see e.g. Feldman, *supra* note 26.

society composed by cosmopolitan citizens and states would directly or indirectly participate in the elaboration of a global charter and would be represented by a world parliament that would interpret this charter.³² There would also be a world organization with the authority to intervene and regulate in order to secure peace and protect human rights.³³

If Habermas' vision is applied to international criminal law and universal jurisdiction, one could argue that individuals and states, as founding subjects of the world order and members of this global political community, have a political right to participate either directly or indirectly in the creation and regulation of international crimes and their enforcement.³⁴ Furthermore, to the extent that international criminal organizations and states applying universal jurisdiction act as agents of this global community, the members of this community would have the right to hold these international organizations and states to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if it is determined that these responsibilities have not been met. These international organizations and states would thus also have a duty of transparency towards this global community of states and individuals on whose behalf they would be acting.

C. *Non-Positivist Accounts of International Law and Non-Principal Agent Accounts of International Organizations*

There is another set of diverse conceptions of the international order that, unlike statist and cosmopolitan democracy accounts, assume that the legitimacy of international law and international organizations — and thus also the participation of, and accountability to, the international community as requirements for legitimacy of universal jurisdiction — cannot be derived from the rights of the foundational members of a global (political) community to enact positive law or from a principal agent framework. These conceptions include natural law which does not rely on the concept of positive law enacted by an international community because it conceives international law as

32 For another proposal to create a global peoples assembly, see R. Falk and A.L. Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', 36 *Stanford Journal of International Law* (2000) 191.

33 J. Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society', 15 *Constellations* (2008) 444. Other conceptions of cosmopolitan democracy would include as the global demos not only states and cosmopolitan citizens, but also other groups and entities such as transnational human rights movements and regional organizations. See, D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press, 1995). However, for our purpose, similar ideas about participation and accountability would follow from such a conception — except that the holders of these rights would include more types of members than in Jürgen Habermas' conception of the international order.

34 Habermas does not talk about international crimes in his article. This paragraph is thus an elaboration that takes his conception as the starting point.

universal morality,³⁵ as well as certain trends of global administrative law and cosmopolitan constitutionalism which do not rely on a principal agent framework to establish the legitimacy requirements of international law and international institutions. Such global administrative law and cosmopolitan constitutionalist conceptions argue either that there is too great a distance between a possible global demos/principal and these institutions, or that it is not possible to conceive the international community as an existing political community for the reasons mentioned earlier.³⁶

Nevertheless, one could argue that even under these accounts, the principles of international participation and accountability would still be requirements for the legitimacy of universal jurisdiction. The first step in this argument relies on what I would like to call the procedural principle of affected interests.³⁷ According to this principle, whenever a decision of an institution affects the interests of an individual or group, fairness requires that this individual or group has *procedural* rights to participate and to hold accountable the institution's decision-making process.³⁸ These rights include, for instance, the right to be heard, the right for transparency of the institution's proceedings, and the right that the institution be responsive to one's concerns. However, unlike statist and cosmopolitan democracy conceptions, these rights do not include a (political) right to either participate in the decision-making body that creates legal norms or to sanction the agents of this decision-making body if they do not follow these norms.

35 For natural law conceptions of international crimes and universal jurisdiction, see e.g. Luban, *supra* note 3; D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 569; Feldman, *supra* note 26, at 1056–1069.

36 See e.g. Kingsbury, *supra* note 23, at 26; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *EJIL* (2004) 907, at 915, holding that international law lacks democratic pedigree; M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World: International Law, Global Governance, Constitutionalism* (Cambridge University Press, 2009) 258.

37 The principle of affected interests can be traced back at least to John Stuart Mill as a way to define the demos (that is, the decision-making body) in a democracy. According to such a principle, 'everyone who is affected by the decisions of a government should have the right to participate in that government'. See R.A. Dahl, *After the Revolution? Authority in a Good Society* (Yale University Press, 1990), at 64. On possible global implications of such a principle, see A. Fung, 'The Principle of Affected Interests: An Interpretation and Defense', 30 March 2010, available online at <http://archonfung.net/docs/articles/2010/FungAffectedInterests4a.pdf> (visited 1 July 2013); R.E. Goodin, 'Enfranchising All Affected Interests, and Its Alternatives', 35 *Philosophical & Public Affairs* (2007) 40. Unlike this political principle of affected interests, the procedural principle of affected interests that I am articulating would not give a right to participate in the decision-making body, but to be heard by the decision-making body and that this body be responsive to one's concerns.

38 One can find this idea, for instance, in certain strands of cosmopolitan constitutionalism and global administrative law. See e.g. Kumm, *supra* note 36, at 926; Kingsbury, *supra* note 23, outlining that global administrative law requires that global institutions meet standards of accountability, transparency, and participation, not only for states, but also for others affected by the institutions' regimes, such as groups and individuals.

In the case of institutions that enforce international crimes, there are a number of individuals and groups that can be affected, including victims, defendants and the society in which the international crimes take place. However, as already explained, one can argue that so too are the interests of the international community — understood as either the community of states and/or human beings — affected by international crimes and their enforcement.³⁹ Whether and how these crimes are prosecuted would thus also affect the community of states and human beings. In addition, the enforcement of these crimes through universal jurisdiction in particular would affect the community of states since it would redefine the scope of state sovereignty.⁴⁰

To the extent that universal jurisdiction statutes and proceedings affect their interests, all states and all human beings would thus have a procedural right to participate in them and hold them accountable. In other words, all states and all human beings would have a right to be heard by the legislatures that enact these statutes and the courts that hold these proceedings, a right that these institutions and proceedings be transparent, and a right that these legislatures and courts be responsive to their concerns.

D. The International Participation and Accountability Principles and their Combination

As shown above, universal jurisdiction statutes and proceedings should strive to meet the principles of the participation of, and accountability to, the international community, regardless which conception of the international community, international law, and international institutions is embraced. To be sure, these principles are not the same under each of these conceptions. Under statist conceptions, only states, as the sole foundational subjects of the international order, hold the right to both participate in the regulation of international criminal law and universal jurisdiction and to hold accountable other states exercising universal jurisdiction, if they violate international norms. Under cosmopolitan democratic conceptions, not (only) states, but (also) individuals and even other groups hold these rights. Under natural law, and certain strands of global administrative law and cosmopolitan constitutionalism, all states and all human beings have a procedural right both to be heard by the domestic legislatures that enact universal jurisdiction statutes and by the authorities that enforce them, and for universal jurisdiction institutions and proceedings to be transparent and responsive to their concerns. Despite these different formulations, the principles indicate an objective that must be strived for: international participation and accountability as crucial components to the legitimacy of universal jurisdiction.

Moreover, though I have presented these conceptions separately for reasons of conceptual clarity, these conceptions can be combined. For instance, one

39 See, in general, *supra* note 17, and accompanying text.

40 May, *supra* note 3; Lee, *supra* note 3.

can support the procedural principle that affected interests must be heard, while still embracing a statist or cosmopolitan democracy conception of the international community. In such a case, states or the members of a cosmopolitan demos would have the right to regulate universal jurisdiction and hold these states accountable, while all states and all human beings would also have a procedural right to be heard by the authorities of those states exercising universal jurisdiction. Furthermore, even if democratic cosmopolitan conceptions in their pure form may be considered utopian or even dangerous, they still provide an account for the intuition held by many people: at least in some areas, states should not be the only actors with the political legitimacy to generate international law and hold international institutions accountable.⁴¹ In this sense, cosmopolitan democratic conceptions may be considered as a correction to extreme statist conceptions, instead of free standing conceptions.

5. Implications of the International Participation and Accountability Principles for the VStGB

Let us now explore possible consequences of the principles of the participation of, and accountability to, the international community, for a universal jurisdiction statute like the VStGB. In this discussion, rather than taking sides among the different conceptions of the principles articulated above, I will assume that states have political/principal agent and procedural rights to participate in, and hold universal jurisdiction statutes and proceedings accountable. The reasons for this assumption are that states are still the main generators of international norms and international institutions and that universal jurisdiction statutes and proceedings affect state sovereignty. Moreover, I will also assume that all human beings, as well as specific individuals and groups such as victims and human rights NGOs, have (at a minimum, procedural) rights over universal jurisdiction statutes and proceedings. This assumption is based on the fact that certain core international crimes affect all human beings, state officials are often involved in their commission, and states have incentives not to go against powerful officials of other states.⁴²

Before proceeding with this analysis, a few comments are in order. First, while this article has concentrated so far on the *rights* of participation and

41 On the role that non-state actors play in transnational legal processes that may create normativity for states, see e.g. H.H. Koh, 'Transnational Legal Process', 75 *Nebraska Law Review* (1996) 204; H.H. Koh, 'Why Do Nations Obey International Law?' 106 *Yale Law Journal* (1997) 2599.

42 On these incentives, see M. Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *American Journal of International Law (AJIL)* (2011) 1. On the political selectivity problems that international criminal law has historically presented, see e.g. W. Kaleck, *Mit zweierlei Maß. Der Westen und das Völkerstrafrecht* (Klaus Wagenbach, 2012); M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, 1999), at 25–51.

accountability that members of the international community have regarding universal jurisdiction and its enforcement, the *duties* that a state exercising universal jurisdiction like Germany may have in light of these principles will now be focused on. In this sense, the principles of international participation and accountability not only express rights that members of the international community have, but are also tools for universal jurisdiction states like Germany to make policy and legal decisions on universal jurisdiction regulations and cases.

Second, it is worth emphasizing that the following analysis is illustrative. There may be many ways to meet the legitimacy requirements of the participation of, and accountability to, the international community, and this section does not intend to suggest that the ways discussed are the only or even the best possible ones. The analysis is also illustrative in that the goal is not to make an exhaustive analysis of each of the cases and topics under the VStGB, but rather to show how the principles in question may shed new light on the examination of these cases and topics. As a justificatory tool, these principles should provide new or better grounds for explaining universal jurisdiction regulations and decisions in individual cases. As a critical tool, these principles should enable problems to be identified in such regulations and decisions.

Finally, the principles should not be interpreted in such a demanding way that they would impose prohibitive costs or requirements over universal jurisdiction states like Germany. Otherwise, these principles would radically undermine the very ability of universal jurisdiction to carry out the enforcement functions that legitimize its existence in the first place.⁴³

A. The Domestic Definition of International Crimes

As shown above, one of the implications of the principles under analysis is that the members of the international community have a right to participate in the establishment and definition of international crimes. Generally, a state may criminalize whatever conduct it wants and may thus go beyond the international crimes that the international community has established. However, the principles of international participation and accountability suggest that a state should not claim to be enforcing international crimes or acting on behalf of the international community, unless it takes as a starting point only those crimes established by the international community and follows the definition of these crimes that the international community has adopted.⁴⁴

43 On the functions that legitimize universal jurisdiction domestic statutes and prosecutions over core international crimes see, Langer, *supra* note 10.

44 Even pluralist accounts of international criminal law that have argued for the application of domestic rules, principles, and interpretations in the prosecution of international crimes have considered that the international community should have the exclusive or central role in the establishment and definition of these crimes. See e.g. A. Greenwalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal* (2011) 1063; H. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *International Criminal Law Review* (2008) 229.

In this respect, Germany included in the VStGB not only crimes contained in the ICC Statute but also crimes clearly established and defined by international humanitarian treaties and customary rules.⁴⁵ In addition, the VStGB moved away from the ICC definitions of crimes when deemed necessary to fully respect the domestic criminal law principle of specificity or certainty that is one of corollaries of the principle of legality.⁴⁶ The approach Germany took is consistent with the principles of international participation and accountability described above, since customary international law is one of the ways in which the international community participates in the establishment and definition of international crimes. In addition, since due process includes the principle of legality and is a requirement for the legitimacy of universal jurisdiction, Germany was entitled to deviate from international law definitions when these definitions were not specific enough, provided that Germany did not criminalize more behaviour than international law.

The Kampala compromise on the crime of aggression at the ICC Review Conference in 2010 and Germany's ratification of these Kampala amendments on 3 June 2013, has reopened this issue, and debates are ongoing in Germany whether and how the crime of aggression should be added to the VStGB.⁴⁷ If Germany adds this crime to the VStGB,⁴⁸ should the crime of aggression as currently defined in German law, by paragraph 80 and 80a of the German Criminal Code (hereinafter 'StGB'), be included or instead the definition set out by customary international law? Or should Germany adopt the definition of the crime of aggression reached in Kampala?

The principles of international participation and accountability described above suggest that, in this context, the VStGB should adopt the definition of the crime of aggression as reached in Kampala. One reason is that even if

45 See e.g. Deutscher Bundestag, Drucksache 14/8524, 13 March 2002, at 12, 13, 33; Werle, *supra* note 19, at 375; A. Zimmermann, 'Bestrafung völkerrechtlicher Verbrechen durch deutsche Gerichte nach In-Kraft-Treten des Völkerstrafgesetzbuchs', 55 *Neue juristische Wochenschrift* (2002) 3068.

46 On the approach followed during the drafting of the VStGB, see e.g. Werle and Jessberger, *supra* note 19, at 200, 207–209; C. Kreß, 'The German Model', in M. Bergsmo et al. (eds), *Importing Core International Crimes into National Law* (2nd edn., Torkel Opsahl Academic EPublisher, 2010) 23.

47 See e.g. H. Kaul, 'Zehn Jahre Völkerstrafgesetzbuch. Bilanz und Perspektiven eines „deutschen Völkerstrafrechts“', in Jessberger and Geneuss (eds), *supra* note 19, 223; S. Oeter, 'Das Verbrechen der Aggression, die Konferenz von Kampala und das deutsche Strafrecht', in Jessberger and Geneuss (eds), *supra* note 19, 101; Werle, *supra* note 19, at 378–379. For debate whether the ICC should exercise jurisdiction over the crime of aggression, see e.g. A. Paulus, 'Second Thoughts on the Crime of Aggression', 20 *EJIL* (2009) 1117; C. Kreß, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus', 20 *EJIL* (2009) 1129.

48 Given that the Kampala definition has not come into effect, it could be debated whether Germany needs to include a crime of aggression in the VStGB at present. If Germany does so it would not be able to claim that it is acting on behalf of a substantial part of the international community until ICC state parties put the Kampala definition into effect.

there is relatively broad consensus that the crime of aggression is established by customary international law, there is no consensus on what would be the customary law definition of this crime.⁴⁹ This lack of consensus covers every dimension of the crime: the type of conduct the crime would include, the other objective elements (if any) and the *mens rea* it would require, and which justifications and excuses should apply to it.⁵⁰ Consequently, customary international law does not provide a definition enacted with the participation of the international community that Germany could follow and to which it could be held accountable. The current definition of the crime of aggression under German law does not provide an alternative because Germany adopted it without giving an opportunity for other states and global civil society to participate in its discussion. Thus, from the perspective of the participation of the international community, the Kampala definition seems to be the appropriate option.⁵¹ The principles of international participation and accountability would thus suggest that Germany should adopt the Kampala definition.⁵² Otherwise, other states and actors could challenge any claim that Germany is applying an international crime or acting on behalf of the international community by enforcing this crime.

B. General Principles of Criminal Law

Another implication of these principles is that the members of the international community could determine that enforcers of international criminal law may have to apply certain general principles of criminal law to adjudicate international crimes.⁵³ The drafters of the VStGB decided that the general part of domestic German criminal law would be applicable to the international crimes included in the VStGB, under paragraph 2, because a second set of

49 See e.g. K. Ambos, 'The crime of aggression after Kampala', 53 *German Yearbook of International Law* (2010) 463; C. Kreß, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2 *JICJ* (2004) 245, at 246.

50 Compare, for instance, Cassese, *supra* note 18, at 152–61; G. Werle, *Principles of International Criminal Law* (2nd edn., T.M.C. Asser Press, 2009), at 481–489; Ambos, *supra* note 49; Kreß, *supra* note 49.

51 This would be the case even if Germany decided to include the crime of aggression in the VStGB without giving German courts universal jurisdiction over it, at least if Germany includes the crime of aggression in the VStGB under the argument that it is an international crime — i.e., a crime established by the international community.

52 For an argument in this direction, see Kaul, *supra* note 46.

53 This implication does not exclude the application of domestic general principles of criminal law in the prosecution of international crimes. My argument is that if the international community adopts general principles of criminal law and suggests that domestic prosecutions should apply these international principles, universal jurisdiction states have a strong reason to apply them or to at least apply principles that lead to results consistent with the results that one would obtain applying the international principles. However, domestic prosecutions may still apply the remaining domestic general principles of criminal law in the prosecution of international crimes. For arguments on the application of these domestic principles, see e.g. Greenwalt, *supra* note 44; van der Wilt, *supra* note 44.

general criminal law principles could lead to unforeseeable difficulties and because the drafters thought that, for the most part, the application of the general part of domestic criminal law to international crimes would lead to results consistent with the Rome Statute.⁵⁴ The drafters of the VStGB deviated from this approach only in a few instances by establishing special regulations regarding command responsibility, under paragraph 4 of the VStGB, the absence of statutes of limitation for the core international crimes, pursuant to paragraph 5, and the superior orders doctrine, as set out by paragraph 3.⁵⁵

Different reasons have been articulated why the general part of international criminal law statutes like the VStGB should lead to consistent results with the ICC Statute. First, if the ICC regulations are more favourable to the defendant than domestic regulations, due process may require consistency since the scope of an international crime is determined not only by its definition, but also by the general principles that are used to apply it to individual cases.⁵⁶ Second, consistency may be important because, under the principle of complementarity of the ICC, the Court may claim jurisdiction over a case entertained but not prosecuted by a domestic jurisdiction due to the application of domestic general principles of criminal law divergent with the ICC's principles.⁵⁷ Finally, there are functional reasons — inconsistencies with the ICC regulations may create enforcement gaps in domestic jurisdictions that are still devised to have

54 See Werle, *supra* note 50, at 129.

55 Zimmermann, *supra* note 45, at 3069. In the case of the different provisions for superior orders, the expert commission that drafted the VStGB did not propose it, instead it was required by the ministry of justice. For critical analysis of the adoption of the command responsibility doctrine by the VStGB and by international criminal law more generally, see e.g. K. Ambos, 'Command responsibility and Organisationsherrschaft: Ways of attributing international crimes to the "most responsible"', in A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (Cambridge University Press, 2009) 127; B. Burghardt, 'Die Vorgesetztenverantwortlichkeit nach Völkerstrafrecht und deutschem Recht (§ 4 VStGB)', 11 *Zeitschrift für Internationale Strafrechtsdogmatik* (2010) 695; M.R. Damaška, 'The Shadow Side of Command Responsibility', 49 *American Journal of Comparative Law* (2001) 455; J. Vogel, 'Thesen zur Vorgesetztenverantwortlichkeit', in Jessberger and Geneuss (eds), *supra* note 19, 75; T. Weigend, 'Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht', 116 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2004) 1000.

56 One can interpret as an application of this idea the regulation of the superior orders doctrine by § 3, VStGB, following § 5, Defense Criminal Statute ('WStGB') in a way more favourable to the perpetrator than the regulation of mistake of law by § 17, StGB. See e.g. A. Zimmermann, 'Auf dem Weg zu einem deutschen Völkerstrafgesetzbuch', 35 *Zeitschrift für Rechtspolitik* (2002) 97, at 100. It is important to mention that due process may also require ICC state parties like Germany to deviate from ICC regulations when those regulations would not be compatible with German constitutional principles. This would explain, for instance, why Germany did not adopt the mistake of law regulation in Art. 32(2) ICCSt., that would hold a perpetrator criminally liable even when the perpetrator could not avoid the mistake of law. See T. Weigend, 'Das Völkerstrafgesetzbuch — nationale Kodifikation internationalen Rechts', in O. Triffterer (ed.), *Gedächtnisschrift für Theo Vogler* (C.F. Müller, 2004) 197, at 205. On this tension more generally, see e.g. H. Satzger, *Internationales und Europäisches Strafrecht* (5th edn., Nomos, 2011), at 342–345.

57 See e.g. Deutscher Bundestag, Drucksache 14/8524, 13 March 2002, at 19, arguing that the ground for § 5, VStGB, on the exclusion of statutes of limitation is avoiding a lack of complementarity of the German rules.

the leading role in the enforcement of international crimes even after the creation of the ICC.⁵⁸

The principles of the participation of, and accountability to, the international community, provide a rationale that supplements these reasons. According to these principles, if the international community has participated in the adoption of specific regulations of the general part of international criminal law and suggested that domestic jurisdictions should apply these specific regulations, a national jurisdiction that acts as an agent of this community should respect and be responsive to the international community's decisions, at least when the application of divergent international and domestic regulations would lead to different results.⁵⁹

C. Selection of Cases

Given that no criminal justice regime is able to prosecute every single crime that is committed, criminal justice systems have to make decisions about which crimes are prosecuted. International crimes in particular present challenges, as they often involve political and military leaders and situations, transitional justice considerations, the challenges of regime change, and so on. Prosecutions based on universal jurisdiction present additional challenges because they may strongly disrupt international relations.

States have room to arrange their selection of universal jurisdiction cases in different ways.⁶⁰ However, if their selection of cases wrongly interferes with

58 On the regulation of the command responsibility doctrine under §§ 4, 13, 14, VStGB, in a way that is compatible with German criminal law principles while still avoiding impunity in cases covered by Art. 28 ICCSt., see Weigend, *supra* note 56, at 210–211.

59 Claus Krefß seemingly argued in this direction when he claimed that given that the community of states had decided to not apply statute of limitations to crimes within the jurisdiction of the ICC, it was hard to conceive of Germany not reproducing this decision at the national level. See Krefß, *supra* note 21, at 29. It is worth mentioning that this argument may apply not only when international and domestic principles would lead to different results in specific cases. For instance, if a universal jurisdiction state adopts a 70-year statute of limitation, the practical punishment effects are likely to be the same as the absence of a statute of limitation. But the absence of a statute of limitation may express that these crimes are unforgettable or unforgivable by the mere passing of time in a way that a 70-year statute of limitation would not express. The universal jurisdiction state may thus still have reasons to embrace the general part adopted by the international community given that significant considerations other than punishment are also at stake in the choice between different domestic and international regulations.

60 For discussion in Germany on the role that political actors and courts should play in the selection of universal jurisdiction cases, see e.g. A. Fischer-Lescano, 'Welrecht als Prinzip. Die Strafanzeige gegen Donald Rumsfeld in der Bundesrepublik', 38 *Kritische Justiz* (2005) 72; K. Gärditz, 'Die Zuständigkeit des Generalbundesanwalts zur Verfolgung von Straftaten nach Völkerstrafgesetzbuch im Lichte des Grundgesetzes', 1.BJR *Sonderausgabe* (2010) 11. For a global perspective on this question, see Langer, *supra* note 42. For the different views of German courts and commentators on how much discretion, if any, § 153f, German Criminal Procedure Code (hereinafter 'StPO') gives to the German Federal Prosecutor, and to what extent the Prosecutor's decision is reviewable by the courts, see e.g. K. Ambos, 'Prosecuting

legitimate transitional justice processes or with international peace and security, the international community should be in a position to hold the state accountable by resorting to a range of accountability measures such as diplomatic protests and sanctions. States exercising universal jurisdiction thus have reason to take into consideration the opinion and decisions of the international community about which international criminal situations and cases should be investigated and eventually prosecuted.⁶¹

In terms of case selection, German universal jurisdiction formal proceedings and prosecutions so far have only been against individuals from the former Yugoslavia, a Rwandan individual for the genocide in 1994, and two Rwandans for alleged crimes committed in the Democratic Republic of the Congo (one of the situations under investigation by the ICC).⁶² Using the international participation and accountability principles, this pattern of universal jurisdiction investigations and prosecutions could be defended or criticized depending both on the interpretation adopted of the opinion and will of the international community in the selection of international criminal situations and cases and on how one defines the international community.

For instance, under one form of interpretation, it could be argued that the international community has decided that, among others, international crimes committed by the Nazis, in the former Yugoslavia, in Rwanda, and in the situations in which investigation has been opened by the ICC, should be investigated and prosecuted. In the case of the Nazis, this decision is indicated by, inter alia, the holding of the trial at Nuremberg and the other trials after the Second World War and by the United Nations (UN) General Assembly adopting the Principles of Nuremberg. In the case of the former Yugoslavia and Rwanda, the international community decided that these crimes would be prosecuted by creating and supporting the work of the ICTY and ICTR, not only through the UN Security Council and the General Assembly (which annually approves the budgets), but also through other organizations, such as the European Union, and actions by individual states. In the situations before the ICC, the international community indirectly participated in this process by

Guantánamo in Europe: Can and Shall the Masterminds of the “Torture Memos” Be Held Criminally Responsible on the Basis of Universal Jurisdiction? 42 *Case Western Reserve Journal of International Law* (2009) 405, at 430–432; S. Zappalà, ‘The German Federal Prosecutor’s Decision Not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?’ 4 *JICJ* (2006) 602.

61 It is important to mention that the international community is not entitled to protect situations and cases from criminal prosecution for the wrong reasons — such as not prosecuting in order to advance the geopolitical interests of a powerful state. In such cases, the state that is exercising universal jurisdiction may then be entitled to reject measures by other states and go ahead with universal jurisdiction proceedings.

62 See e.g. R. Hannich, ‘Justice in the Name of All. Die praktische Anwendung des Völkerstrafgesetzbuchs aus der Sicht des Generalbundesanwalts beim Bundesgerichtshof’, 13 *Zeitschrift für Internationale Strafrechtsdogmatik* (2007) 507, at 510–511; BGH 17 June 2010, No. AK 3/10; Generalbundesanwalt, Anklage gegen einen ruandischen Staatsangehörigen wegen Völkermordes, 18 August 2010, available online at <http://www.generalbundesanwalt.de/txt/showpress.php?newsid=369> (visited 1 July 2013).

creating the ICC, holding the different organs of the Court accountable through formal and informal mechanisms, and the referral by the Security Council of situations to the Court (Darfur and Libya).⁶³ If the international community's will is interpreted in this way, it could be contended that Germany has legitimately concentrated its universal jurisdiction proceedings only in situations that the international community has selected as deserving criminal investigation and eventually prosecution.

Nonetheless, under a second set of interpretations, the German pattern could be criticized as timid because it has opened universal jurisdiction formal proceedings exclusively in situations that the Security Council or the ICC has identified. Arguably, the Security Council and the ICC are imperfect ways for the international community to participate in these decisions. The Security Council's five permanent members have geopolitical interests resulting in the use of the veto power in ways that may prevent accountability processes for international crimes. The ICC is imperfect as a mechanism because its default jurisdiction is solely on the territories and over the nationals of state parties. As a consequence, according to this criticism, Germany should consider the investigation and prosecution of situations even when the Security Council or the ICC have not advocated for or opened a criminal investigation and prosecution so long as there are indications of consensus, in most of the international community, that certain crimes should be investigated. From non-statist conceptions of the international order, the selection of cases by Germany could also be criticized as being state centric — that is, as paying attention mostly or only to how other states and international organizations have conceived case selection rather than to (also) the conception by the global civil society.

D. Overlapping ICC and Universal Jurisdiction Investigations and Prosecutions

Investigations and prosecutions based on universal jurisdiction are likely to enter into jurisdictional conflicts with other legal systems. The principles of international participation and accountability may also provide insights in this respect. The domestic society in which international crimes take place should have some room to decide whether or not to prosecute these crimes and which ones to prosecute since it is the society most affected. However, whenever a territorial state or other state with a relevant link to an

63 It could be argued that if almost half of the worldwide population is not part of a state that is a party to the Rome Statute, the idea of the ICC being created by the international community does not have sufficient merit. However, notice, first, that almost two thirds of states have ratified the ICCSt. Second, the number of states that have participated in the drafting of the ICCSt., and in other ICC events, is even larger and includes states that have been particularly reluctant to join the ICC, such as the United States. Third, all states have the opportunity to join and participate in the ICC regime. Finally, to a certain extent the ICC is accountable to the UN Security Council that may refer and defer investigations and prosecutions by the Court.

international crime does not prosecute the crime in question or does not pursue a legitimate, alternative, and non-criminal approach to the situation, the international community and other states may have a role to play.⁶⁴

The German Criminal Procedure Code (StPO) includes, in paragraph 152, as a general rule, the principle of mandatory prosecution, however, in paragraph 153f, it also establishes exceptions that apply to crimes under the VStGB in particular. These provisions authorize the German Federal Prosecutor to dismiss a case in order to give priority to ongoing prosecutions by other jurisdictions with a relevant link with the alleged crimes or to prosecutions by an international court, especially in cases that have no territorial or nationality link with Germany. This final aspect of the German regulation is at odds with the predominant interpretation of the complementarity principle that, according to most commentators, also applies to the relationship between ICC and universal jurisdiction prosecutions.⁶⁵ According to the principle of complementarity, a case is inadmissible before the ICC if it is being or has been investigated, prosecuted or tried 'by a State which has jurisdiction over it'.⁶⁶ If this principle were applied to German universal jurisdiction prosecutions, German law should establish the trumping of these German universal jurisdiction prosecutions over prosecutions by the ICC.

Instead, German regulations imply that the principle of complementarity does not apply to German universal jurisdiction prosecutions.⁶⁷ The rationales for these regulations, as articulated by German courts and commentators, have included that international proceedings should have priority because they are in the best position to bring validity to the idea of international solidarity and in general they have greater ability to acquire evidence through criminal cooperation than universal jurisdiction prosecutions.⁶⁸ The ICC in

64 On non-criminal responses to mass atrocities, see e.g. R.I. Rotberg and D. Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, 2000).

65 See e.g. ICC-OTP, *Informal expert paper: The principle of complementarity in practice* (2003), § 75; Cassese, *supra* note 18, at 344; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008), at 113; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), at 190–194; C.K. Hall, 'The Role of Universal Jurisdiction in the International Criminal Court Complementarity System', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 201, at 209–212; F. Pocar and M. Maystre, 'The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?' in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 247; C. Rynjaert, 'The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?' 12 *New Criminal Law Review* (2009) 498, at 504–505.

66 Art. 17 ICCSt.

67 See BGH, NStZ 2012, 223, x§ 17–18; BVerfG, NStZ 2011, 353, citing in support the positions by Kai Ambos and Claus Kreß. See also K. Ambos, '§ 1 Anwendungsbereich', in 6/2 *Münchener Kommentar zum Strafgesetzbuch* (2009) 461, at 477.

68 See BGH, NStZ 2012, 223, § 17.

particular would have priority over German universal jurisdiction prosecutions because, under the contrary rule, a prosecution at the domestic level under universal jurisdiction, such as in Germany, 'would increase the tensions [with] states which consider the exercise of extraterritorial jurisdiction in such cases as an intervention in internal affairs' and because 'it would leave the ICC virtually without cases since all the crimes within the subject matter jurisdiction of the ICC fall, *per definitionem*, under universal jurisdiction and could therefore be prosecuted by states instead of the ICC'.⁶⁹

The principles of international participation and accountability provide a different rationale for these German regulations.⁷⁰ The argument is that, if the ICC determines, ICC prosecutions should have priority over universal jurisdiction prosecutions because, everything else being equal, the former have more legitimacy than the latter, given that the ICC regime has allowed for more participation and has been more accountable to the international community than universal jurisdiction statutes and proceedings, such as those under the VStGB.⁷¹

This is the case because more than 160 states, numerous NGOs, and other members of global civil society participated in the drafting of the ICC regime,⁷² and the Court is now accountable to its more than 120 state members and, to a certain extent, to all UN member states since the Security Council may refer situations and defer situations and cases at the ICC.⁷³ The ICC is also accountable to a larger part of the community of states and global civil society because it is more transparent to states, media, NGOs, activist and expert networks, and other domestic and global groups than universal jurisdiction proceedings for the following reasons: the Court works in two languages

69 See K. Ambos, 'Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik', in W. Kaleck et al. (eds), *International Prosecution of Human Rights Crimes* (Springer, 2007) 55, at 66.

70 For reasons that fall outside the scope of this article, arguments on participation and accountability could also provide a new rationale for the German regulation of state to state jurisdictional conflicts.

71 For a more comprehensive articulation of these arguments regarding the ICC's higher legitimacy to prosecute international crimes and that the principle of complementarity should not apply to the relationship between the ICC and universal jurisdiction prosecutions, see Langer, *supra* note 10. The conclusion that the complementarity principle should not apply in this area does not mean that the ICC should always prosecute these cases. In fact, given the limited resources of the ICC, it should rarely take these cases and instead encourage universal jurisdiction states to do so. The point is that the ICC should have priority to take these cases if it decides to do so.

72 See e.g. M.C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court', 32 *Cornell International Law Journal* (1999) 443; J. Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', 11 *Pace International Law Review* (2000) 361.

73 Arts 13(b) and 16 ICCSt. It is in comparison to universal jurisdiction prosecutions by individual states that the Security Council is more formally accountable to all United Nations member states even in light of the accountability deficit that the Security Council presents with its five permanent members holding veto power. On the legitimacy problems of the Security Council, see e.g. D.D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* (1993) 552.

— English and French — and has four other official languages — Arabic, Chinese, Russian and Spanish; its work is closely followed by the global media, a large group of governments and NGOs as well as scholars from around the world; experts from many different countries can explain to domestic constituencies how the ICC regime works.⁷⁴

In contrast, universal jurisdiction proceedings like those under the VStGB are carried out by domestic authorities that may act on behalf, or as trustees, of the international community but apply domestic regulations and proceedings which typically give participation only to local actors and are only formally accountable to their own domestic community. In addition, universal jurisdiction prosecutions tend to be carried out in the language of the domestic legal system, by prosecutors and courts that are, in most cases, less transparent than the ICC, and following proceedings and rules that are often obscure or unknown to an international audience.

E. The Participation of, and Accountability to, the International Community in Universal Jurisdiction Proceedings

Another implication of the principles under analysis is that the international community should be able to participate in, and hold accountable, individual universal jurisdiction criminal proceedings. At the very minimum, this requires that the proceedings are transparent and accessible to the international community because these features are necessary conditions for accountability.

In this respect, there may be room for improvement for universal jurisdiction proceedings in Germany. For instance, even if these proceedings have been understandably held in German given their partially domestic nature, it could be argued that there have been relatively little effort to simultaneously or subsequently translate them or, at least, some of their decisions, into other languages such as one of the working languages of the ICC or the official languages of the UN and thus make them available to international audiences.⁷⁵ The German Federal Prosecutor could also publish periodical (e.g. annual) reports about news, activities, and proceedings related to the VStGB in particular and international criminal law more generally.

74 It can reasonably be argued that despite the accountability checks described, the ICC is not accountable enough to the international community — e.g. that it has more independence from states, the Security Council or global civil society than is advisable. But even if this argument was right, it is important to emphasize two issues. First, my argument in this section is comparative. In other words, my claim is that there are more accountability mechanisms in place for the ICC than in universal jurisdiction prosecutions, not that the ICC's accountability mechanisms are ideal. Second, the level of accountability accorded to the ICC was chosen at the Rome Conference in 1998 through the broad participation of states and global society.

75 For instance, as of 5 July 2012, the website of the German Federal Prosecutor does not seem to have any information about international criminal cases in any language different from German, see online at <http://www.generalbundesanwalt.de/de/index.php> (visited 1 July 2013). In the past, this website did have some information in English, but it was only minimal.

Universal jurisdiction and international criminal proceedings in Germany could also be opened to the international community by giving interested actors, ranging from other states to members of the global civil society, an opportunity to participate in the proceedings. In (political) principal agent conceptions of the principles under analysis, participation in actual proceedings could be a mechanism to gather the views and opinions of the international community — especially in the international order in which many basic governmental structures are missing. In procedural conceptions of these principles, this participation would be a way to implement the right to be heard.

For instance, though little known in Germany, the institution of *amicus curiae* or a similar institution could be a way to implement such participation. *Amicus curiae* is a person or entity, not a party to the case, which files a brief that informs the judges on one or more aspects of the case because the person or entity has a strong interest in the subject matter.⁷⁶ Through this or a similar institution, other states, international organizations, human rights NGOs, and other actors could express their position about issues under discussion in universal jurisdiction proceedings and bring elements that could be helpful for German courts to decide these cases.

It may be contended that the proposals articulated sound attractive in theory but would be too burdensome or impractical.⁷⁷ For instance, German universal jurisdiction trials have already presented substantial logistical challenges that have generated due process problems for defendants.⁷⁸ There are, however, good reasons to argue for the implementation of these proposals since they would increase the legitimacy of proceedings under universal jurisdiction. In addition, none of the proposals included in this subsection seem overly demanding for Germany, which is one of the largest economies in the world and has substantial human capital. The institution of *amicus curiae* in particular is used regularly without any serious disruption or delay to legal proceedings in the United States and other less developed countries such as Argentina. In fact, the institution was recently used in the United States Supreme Court's Alien Tort Statute case *Kiobel v. Royal Dutch Petroleum*, in which *amicus briefs* were presented by various actors, including Germany.⁷⁹

76 B.A. Garner (ed.), *Black's Law Dictionary* (9th edn., West, 2009), at 98, defining *amicus curiae*.

77 Due process could be another problem if the *amicus* briefs are overwhelmingly one sided against the defendant. Such a risk in individual cases would be a reason for the court not to accept *amicus* briefs in those cases since due process is also a requirement for the legitimacy of universal jurisdiction. However, this risk is not a reason to reject altogether the idea of using *amicus curiae* or related mechanisms in all universal jurisdiction cases.

78 See e.g. P. Kroker, 'Universal Jurisdiction in Germany: The Trial of Onesphore R. Before the Higher Regional Court of Frankfurt', 54 *German Yearbook of International Law* (2011) 671; C. Safferling, 'VStGB und Strafverfahren: Beweisaufnahme und Angeklagtenrechte', in Jessberger and Geneuss (eds), *supra* note 19, 185.

79 Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, United States Supreme Court, 2 February 2012.

6. Conclusion

The principles of the participation of, and accountability to, the international community are among the requirements for the legitimacy of universal jurisdiction. These principles apply regardless which conception of the international legal order and international institutions is adopted — statist, cosmopolitan democratic, non-positivist or non-principal agent. The content of these principles differs under each of these conceptions and their various combinations. Nonetheless, this article has shown that, in any case, universal jurisdiction must meet some requirements of international participation and accountability.

The arguments articulated above not only affect the theoretical grounds of universal jurisdiction over core international crimes, but also have important practical implications for universal jurisdiction statutes and proceedings. This article has analysed some of these practical implications by discussing one of the most influential universal jurisdiction statutes — the German VStGB. The principles of international participation and accountability require that while discussing these issues, German scholars, policy makers, prosecutors and judges give an opportunity to participate and be responsive to the decisions and concerns of the international community. The same requirements would apply to other states that exercise universal jurisdiction. Only by doing so can universal jurisdiction states claim to be applying international criminal law and acting as agents of the international community, and would take seriously the idea that the international community is affected by the core international crimes.