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The Archipelago and the Wheel

The Universal Jurisdiction and the International Criminal Court Regimes

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The objectives of international criminal law combine traditional goals of criminal justice (retribution, advancing international social norms, and deterrence) with transitional justice goals (establishing a historical record of atrocities, providing a voice to victims, and reestablishing the rule of law).¹ Individual states exercising universal jurisdiction and the International Criminal Court (ICC) are the two permanent criminal law regimes available to advance these goals if no territorial state or other state with a relevant link to core international crimes prosecutes such crimes or pursues a legitimate noncriminal approach to the situation.²

Despite the unique function of these regimes in the enforcement of core international crimes—that is, crimes against humanity, genocide, and certain war crimes—the Office of the Prosecutor (OTP) of the ICC has paid limited attention to the relationship between the ICC and universal jurisdiction. This relationship, moreover, remains undertheorized in the literature surrounding international criminal law. To help fill these lacunae, this chapter proposes a theoretical framework to analyze what the relationship between these two regimes should be. The core argument in support of this framework is that, all else being equal, the ICC enjoys a greater degree of state consent and political, procedural, rational, and functional legitimacy than universal jurisdiction domestic statutes and proceedings. This higher level of legitimacy in these respects results from a variety of factors: more than 120 states have explicitly accepted the jurisdiction of the ICC over their territory and nationals; the Court has allowed for wider participation in the drafting of its constitutive instru-

ments and is more accountable to the international community; a large number of world viewpoints participate in making its decisions; and it better communicates to the defendant and the world that core international crimes affect the community of states and all human beings. This higher level of legitimacy is sustained regardless of the conception of international law and international institutions adopted, including statism, cosmopolitan democracy, natural law, global administrative law, and cosmopolitan constitutionalism.

Once the components of this theoretical framework are established, I analyze three central issues in the relationship between these two legal regimes. First, I maintain that despite the ICC's higher level of legitimacy, universal jurisdiction still has a significant role in prosecuting core international crimes. Universal jurisdiction can advance the goals of international criminal law and finds a legal basis under customary international law, and a substantial portion of states and global civil society actors have embraced universal jurisdiction claims over core international crimes. In addition, prosecutions under universal jurisdiction generally meet international due process standards and are subject to informal accountability checks that prevent abuse.

Second, I examine the relationship between the two legal regimes in practice. Since the ICC Statute was adopted or entered into force, the number of statutes incorporating universal jurisdiction have probably increased, while the number of universal jurisdiction complaints has not (substantially) diminished. The vast majority of these universal jurisdiction complaints have concentrated on situations that have not been or are not being investigated by the ICC. Potential shortcomings in the functional legitimacy of universal jurisdiction may have been revealed through this limited role in supplementing the Court's investigations and prosecutions. This chapter identifies reasons for this lack of cooperation and suggests measures that the ICC and its prosecutor could take to encourage prosecutions under universal jurisdiction that better supplement the Court's work.

The final portion of this chapter analyzes whether the principle of complementarity—establishing that domestic prosecutions take precedence over ICC proceedings—should regulate the relationship between the Court and universal jurisdiction. Contrary to the majority of commentators, I maintain that the complementarity principle should not govern this relationship. None of the rationales underpinning this principle favor its application in this area, and the Court holds greater legitimacy than universal jurisdiction statutes and proceedings. Rather, the ICC and

the OTP should adopt a weak primacy principle that acknowledges the higher degree of legitimacy displayed by the Court while remaining sufficiently flexible to accommodate those factors that in many circumstances favor prosecutions under universal jurisdiction over those by the ICC.

As a preface to this chapter's argument, I briefly review the universal jurisdiction and ICC regimes before turning to an analysis of these topics.

Two International Criminal Law Regimes

Under universal jurisdiction, any state may prosecute and try core international crimes without any territorial, personal, or national interest link to the crime in question when it was committed.³ Instead, the jurisdictional claim is typically based on the nature of the crime. The classic crime prosecuted with universal jurisdiction is piracy. Piracy is committed on the high seas beyond states' territorial reach, and each state has an interest in unhindered maritime travel and commerce, so any state that arrests pirates may try them.⁴

The rationale for exercising universal jurisdiction over crimes against humanity, genocide, and war crimes is different from the rationale for piracy and relies on two sets of arguments that can be presented alternatively or in combination. First, these crimes are generally committed by or with the consent of state officials. A state thus waives its sovereignty over these crimes when its officials commit them or acquiesce in their commission.⁵ Second, these crimes affect humanity as a whole,⁶ for a variety of reasons that may be presented individually or in combination because they are committed against groups of people, are widespread, attack human diversity, show a serious failure of the state system to protect basic human rights, or dehumanize victims in particular ways. Since these crimes affect the entirety of humanity, any state may assert jurisdiction over them.⁷ While states have claimed universal jurisdiction over the crime of piracy for more than two centuries, the exercise of universal jurisdiction over core international crimes is essentially a twentieth-century phenomenon that reflects a growing commitment to the protection of human rights and the humanization of armed conflict.⁸

The universal jurisdiction regime for core international crimes does not have its own institutional infrastructure. Rather, it relies on individual states' domestic institutional apparatus—police, prosecutors, defense counsel, courts, and prisons. Moreover, this regime lacks an institutional center because no state may formally claim a distinctive role. In this sense,

universal jurisdiction can be conceptualized as an international archipelago of national legal institutions.

The tectonic structure of this archipelago is constituted by a set of distinct substantive, jurisdictional, and procedural rules—accompanied by theoretical justifications, including those outlined previously. These substantive rules include the international definitions of crimes against humanity, genocide, and war crimes laid down by treaties and customary international law,⁹ together with general doctrines such as personal immunity.¹⁰ The jurisdictional rules are derived from treaties, customary rules, and general principles of law that support universal jurisdiction claims. The procedural rules include the right to a fair trial.¹¹ States, policymakers, and scholars continue to debate whether other rules such as those concerning subsidiarity,¹² double criminality,¹³ double jeopardy,¹⁴ functional immunity,¹⁵ and the defendants' presence on the prosecuting state's territory¹⁶ should also regulate states' exercise of universal jurisdiction.

The Rome Statute, adopted in July 1998 and ratified by over 120 states, created the ICC and conferred it with jurisdiction over crimes against humanity, genocide, and certain war crimes.¹⁷ The ICC has jurisdiction over ratifying states' territory (territorial principle) and nationals (active nationality principle) and states that have accepted the ICC's jurisdiction with respect to specific crimes.¹⁸ The ICC's jurisdiction is thus based on the voluntary participation by states in the ICC regime. Under chapter VII of the United Nations Charter, the U.N. Security Council may also refer situations anywhere in the world to the ICC—including situations involving crimes committed by the nationals, or within the territory, of nonparty states.¹⁹ In these cases, the ICC's jurisdiction derives from the U.N. Security Council's powers under chapter VII to adopt measures to maintain and restore international peace and security.²⁰

Unlike the universal jurisdiction regime, the ICC has its own designated institutional apparatus, including an OTP with investigators; Pre-Trial, Trial, and Appeal Chambers; counsel to represent defendants or victims; and other administrative units.²¹ The legal regime of the ICC, however, also includes the domestic legal institutions of state parties, which have their own functions to perform. The principle of complementarity integrates the ICC and ratifying states' legal institutions into a single regime by enabling the institutions of these states to take the lead in investigating and prosecuting international crimes.²² The ICC Statute and other basic documents of the Court provide a common framework of substantive, jurisdictional, and procedural rules for state parties to follow.²³

While universal jurisdiction represents an archipelago, the ICC regime

is akin to a wheel—the hub composed of the ICC’s institutions, with a unique role within the regime, and the spokes consisting of the various states’ legal systems that retain primary responsibility for preventing and prosecuting core international crimes, at least when committed within their territories or by their nationals.

The Greater Structural Legitimacy of the ICC

Any sound analysis of the proper relationship between universal jurisdiction and the ICC must have its foundation in an explicit or implicit understanding of their relative legitimacy.²⁴ Yet, despite these legal regimes’ distinct roles in prosecuting international crimes, their relative legitimacy has received scant attention from international criminal law policy makers and scholars.²⁵ The few commentators who have analyzed the two regimes’ comparative legitimacy have mostly fallen into one of two camps.

According to one position, ICC and universal jurisdiction are equally legitimate to try core international crimes where due process standards are met.²⁶ However, provided that due process standards are equally satisfied, I argue that the ICC has a higher degree of legitimacy to try international crimes than does universal jurisdiction.

According to the other position, the ICC enjoys greater legitimacy, albeit for different reasons than those I advance. In general, members of this camp consider that the ICC’s superior legitimacy derives from its characteristics: the Court would be less political or slanted against leaders of developing countries than prosecutions under universal jurisdiction while being more respectful of due process and more effective in bringing defendants to justice.²⁷ However, these criteria do not provide a solid basis for a theoretical framework determining what the relationship between the two regimes should be.

These criteria are mostly contingent as opposed to structural. In other words, how politically motivated, slanted against leaders of developing countries, respectful of due process, and effective in bringing defendants to justice these legal regimes are primarily depends on contingencies—including the identity of individual prosecutors and judges, which states bring prosecutions by exercising universal jurisdiction, and the variable extent of support obtained by the ICC or universal jurisdiction prosecutions from states. Where differences exist in the regimes’ designs, such differences do not clearly indicate which regime will perform better based on these four criteria.

In addition, although it is too early in the ICC's life to reach a definitive conclusion, the existing record does not show substantial differences between the regimes with respect to these four criteria. First, even if political incentives differ under the two regimes, such considerations may equally affect prosecutorial decisions.²⁸ Second, universal jurisdiction trials have generally been true adjudicatory processes, while the ICC has not been free of criticism on its due process standards.²⁹ Third, both types of prosecutions have tended to focus on politically weak defendants, and the ICC has investigated situations only in Africa.³⁰ Finally, the ICC has formally charged several defendants who remain at large, including Joseph Kony, leader of the Lord's Resistance Army, and the president of Sudan, Omar al-Bashir.

However, assuming that these legal regimes cannot be clearly distinguished on these criteria, I maintain that the ICC does indeed enjoy more legitimacy than universal jurisdiction, but for reasons other than those proposed by other scholars. I contend that the ICC has greater *state consent*, *political*, *procedural*, *rational*, and *functional* legitimacy than universal jurisdiction statutes and proceedings. This makes the ICC more legitimate relative to universal jurisdiction under any of the principal theories of international law and institutions, including statist conceptions of the international order, different strands of cosmopolitan democracy, natural law, global administrative law, and cosmopolitan constitutionalism.

The ICC has greater legitimacy based on state consent—what I term state consent legitimacy—because it was created by a treaty that state parties voluntarily ratified, thereby explicitly accepting the Court's jurisdiction over their territory and nationals.³¹ Statist conceptions of international law value consent by states as it respects state sovereignty, or people's self-determination.³² Consent to an international organization given by the territorial or active nationality state thus legitimizes this organization's prosecution and adjudication of international crimes allegedly committed in the state's territory or by its nationals.³³ The consent of this state may also provide legitimacy to an international organization or legal regime, even according to nonstatist conceptions of the international order. For example, different strands of cosmopolitanism reject the state as the sole source of legitimacy in the international order but affirm that certain decisions are still best made at the national level.³⁴ Through state consent, the national level may legitimate the participation of an international organization in the decision-making process by conveying that participation is welcome.³⁵

In contrast, universal jurisdiction is subject to weaker state-based consent. Treaty law contains a limited legal basis for universal jurisdiction—there is no international convention on crimes against humanity,³⁶ and the

Genocide Convention does not explicitly require or authorize the exercise of universal jurisdiction over this crime.³⁷ Only the Geneva Conventions of 1949 and Additional Protocol I provide a textual basis for exercising universal jurisdiction over a subset of war crimes—that is, over grave breaches of these conventions³⁸—and some authorities seem to question even this interpretation.³⁹

The most authoritative supporters of universal jurisdiction over core international crimes have therefore placed its principal legal basis in customary international law. The thrust of this argument is that customary international law does not contain a prohibition against exercising universal jurisdiction over these crimes. According to the *Lotus* principle, everything that is not forbidden is allowed by international law. It follows that universal jurisdiction is legal under customary international law.⁴⁰ However, even if this argument for universal jurisdiction's legality is accepted,⁴¹ customary rules do not require the consent of every state to become legally valid. Thus, a state that never consented to a rule allowing universal jurisdiction may nevertheless find crimes committed in its territory or by its nationals subjected to such a prosecution.⁴²

The ICC also displays greater political, procedural, rational, and functional legitimacy in comparison to universal jurisdiction statutes and proceedings. My starting point for this claim is the exchanges between Hannah Arendt and Karl Jaspers on the Eichmann case and the Holocaust. Arendt and Jaspers argued that “the crime against Jews was also a crime against mankind” and that “consequently the verdict can be handed down only by a court of justice *representing* all mankind.”⁴³ It was for an international criminal court, not an Israeli court, to pass judgment on Adolf Eichmann.⁴⁴ I assume that the term *representation* is relevant in this context. This term must be unpacked to illuminate the ways in which the ICC affords greater representation to the community of states and all human beings and why this confers more legitimacy on the Court—issues that Arendt and Jaspers barely addressed. In addition, I assume that it is also necessary to move beyond this term, as *representation* does not fully exhaust the array of possible considerations concerning the legitimacy of international criminal institutions.

A first sense in which the ICC is more representative is that it has offered greater opportunities for the participation of and is more accountable to the community of states and global civil society than universal jurisdiction statutes and prosecutions. Under statist conceptions of the international order, the more participatory and accountable international regimes and organizations are with respect to the community of states that

created them, the greater *political legitimacy* they carry.⁴⁵ In a political community constituted by equal states, each state would hold an equal political right to participate in deciding which crimes are international and the requirements that should apply to the prosecution of these crimes. In addition, states have the right to hold enforcers of these crimes accountable to ensure that they are responsive to concerns of the members of this community.⁴⁶ Under cosmopolitan democracy, the same idea would apply, with the exception that not (only) states but (also) all human beings and other entities or groups comprise the international community.⁴⁷ Finally, certain conceptions of international institutions—such as strands of global administrative law and cosmopolitan constitutionalism—emphasize that these institutions, regardless of their political origins, must meet certain procedural requirements. They must afford persons affected by the institutions' decisions the opportunity to participate in their proceedings and grant such persons the power to hold the institutions accountable.⁴⁸ By this reasoning, given that international criminal law institutions arguably affect all states and all human beings, the greater participation and accountability these institutions provide to states and human beings, the more *procedural legitimacy* they carry.⁴⁹

The ICC regime has offered a higher level of participation for and accountability to the community of states and global civil society. First, a large section of the community of states and global civil society drafted and brought into effect the ICC Statute and other relevant ICC documents. Second, the community of states and global civil society retain both formal and informal mechanisms to hold the Court accountable. More than 160 states and numerous nongovernmental organizations (NGOs) and other members of global civil society participated in the drafting of the ICC Statute.⁵⁰ In addition, more than 120 states have ratified the ICC Statute.⁵¹ These state parties may amend the ICC Statute, Rules of Procedure and Evidence, and Elements of Crimes. Among other powers, states parties appoint the key ICC officials, including the prosecutor and judges, remove these officials under certain circumstances, and contribute to and control the Court's budget.⁵² To a certain extent, the ICC is also accountable to all U.N. member states in that the U.N. Security Council may refer situations and cases to the Court or defer them.⁵³

Furthermore, the ICC is more transparent to states, media, NGOs, activist and expert networks, and other domestic and global groups and is thus accountable to a broader swath of the community of states and global civil society than are universal jurisdiction prosecutions. The Court works in both English and French and has four other official languages—Arabic,

Chinese, Russian, and Spanish.⁵⁴ This alone makes its documents and proceedings more globally accessible to a wider array of people. In addition, the ICC's work is closely followed by a large group of media, NGOs, governments, and scholars from around the world. Experts from many countries are also available to explain to domestic constituencies how the ICC regime works.

In contrast, prosecutors and judges in universal jurisdiction proceedings try international crimes by applying domestic statutes enacted by domestic authorities, are appointed and removed according to the domestic regulations, and receive salaries and budgets determined by their state. In addition, universal jurisdiction prosecutions are usually conducted in the language of the domestic legal system by prosecutors and courts that in most cases are less transparent than the ICC and follow procedures and rules that are often obscure or unknown to an international audience.⁵⁵

A second sense in which the ICC is more representative of the international community is that a larger number of world viewpoints participate in formulating the ICC's decisions than in universal jurisdiction decisions, thereby providing more *rational legitimacy* to the Court.⁵⁶ This type of representativeness is important because the more relevant viewpoints participate or are considered in the process of adjudicating, the greater likelihood that the decision will be perceived as impartial or valid by the relevant community—here, the community of states and/or all human beings.⁵⁷ This argument works independently of the various conceptions of international law and international institutions—that is, despite variations of the relevant community under each of these conceptions.⁵⁸

The practice of the ICC incorporates more world viewpoints on various grounds. First, ICC judges are nationals of states parties from different geographical regions. Second, no two judges may be nationals of the same state.⁵⁹ Third, in selecting judges, state parties must consider the need for members of the Court to fairly and equitably represent gender and the world's principal legal systems and geographical regions.⁶⁰ Finally, the OTP, Chambers, and other units within the ICC also employ staff from around the world. In contrast, universal jurisdiction prosecutions are pursued and adjudicated by officials residing within a single state.⁶¹

Finally, the Court both literally and metaphorically embodies and performs the community of states and all human beings better in comparison to universal jurisdiction prosecutions. This affords the ICC greater *functional legitimacy* through communicating to the defendant and the world that core international crimes are not ordinary domestic crimes and that their commission affects the community of states and all human be-

ings—by itself advancing an international social norm against the commission of these crimes.⁶² Once again, this argument is sustainable regardless of which conception of the international order and international crimes is applied, assuming it is accepted that a goal of international criminal law is to advance a global social norm against the commission of these crimes.

The ICC better performs and embodies the global community because state officials, individuals, and organizations from across the world have jointly participated in the drafting and ratification of the ICC Statute and other relevant instruments as well as prosecuting, defending, and adjudicating ICC cases. The nature of this performance and embodiment is readily apparent to observers: ICC policymakers, prosecutors, defense attorneys, judges, and other staff members come from all corners of the globe and present widely diverse ethnicities, appearances, languages, and accents. In contrast, while universal jurisdiction prosecutions and trials may be carried out on behalf of the international community, they tend to look and sound domestic.

My claims in this section are comparative, not absolute. I have not maintained that the ICC optimally meets state consent, political, procedural, rational, and functional requirements of legitimacy under any ideal theory of legitimacy. I contend only that the ICC displays greater legitimacy than universal jurisdiction based on these criteria and that therefore, all else being equal, the Court is more legitimate.

In addition, these four legitimacy arguments are supported by or compatible with all major theories of international law, international regimes, and international institutions. Rather than taking sides among these competing theories, I have articulated arguments that contribute to an overlapping consensus on the higher structural legitimacy of the ICC. In this sense, this chapter's framework aids analysis of the relationship between the ICC and universal jurisdiction regardless which theory is adopted.

The Value of Universal Jurisdiction after the Creation of the ICC

Having explained the ICC's higher level of legitimacy relative to universal jurisdiction, I now analyze three issues in the relationship between these two legal regimes: first, whether the ICC and universal jurisdiction are mutually exclusive; second, what role universal jurisdiction has assumed in practice vis-à-vis the ICC; and finally, which legal regime—ICC or uni-

versal jurisdiction—deserves priority if a jurisdictional conflict arises. This section addresses the first of these issues.

As previously noted, long before the creation of the ICC, Arendt and Jaspers claimed that the nature of Eichmann's crimes meant that he should have been prosecuted and punished not by Israel but by an international criminal court or some other institution representing the entirety of humanity.⁶³ Since the establishment of the Court, some commentators and policymakers have argued that universal jurisdiction over core international crimes should simply cease to exist now that the ICC is functioning. This argument is grounded in the relative greater legitimacy of the ICC—though for reasons different from those advanced here.⁶⁴ I maintain that universal jurisdiction continues to have a role after the creation of the ICC because although it has less legitimacy, universal jurisdiction statutes and proceedings meet a minimum threshold of functional, political, and due process requirements of legitimacy.⁶⁵

Jurisdictional Gaps as Well as Institutional and Political Constraints of the ICC Regime

A first argument against abolishing universal jurisdiction over core international crimes is that it retains sufficient functional legitimacy because, in many cases, it remains the only available mechanism to advance the objectives of international criminal law. Substantial jurisdictional gaps in addition to institutional and political constraints within the ICC regime may, either de jure or de facto, prevent the Court from prosecuting international crimes that otherwise should be prosecuted. In such situations, if the territorial state or another state with a relevant link does not prosecute the international crimes in question—or implement a legitimate alternative noncriminal response to these crimes or mass atrocities—universal jurisdiction remains the sole permanent enforcement mechanism available to advance the goals of international criminal law.

As for the jurisdictional gaps within the ICC regime, the Court's personal jurisdiction is generally limited to alleged perpetrators who commit core international crimes in the territory of state parties or who are nationals of state parties.⁶⁶ This limitation means that there are, at present, about seventy states whose territories are beyond the ICC's jurisdiction. Although this figure may decrease, it is unlikely to reach zero or to include powerful states such as China, India, Russia, and the United States in the foreseeable future.

The sole exceptions to these jurisdictional limitations are cases referred

by the U.N. Security Council to the ICC, which may include crimes committed anywhere and by anyone.⁶⁷ However, the U.N. Security Council frequently deadlocks over how to address specific situations, given that its five permanent members have varying global geopolitical interests and have veto power to block resolutions.

When the ICC does have jurisdiction over a case, institutional constraints and political incentives may prevent the court and its prosecutor from investigating and prosecuting certain crimes. The interaction between the International Criminal Tribunal for Rwanda (ICTR) and universal jurisdiction provides an example of this phenomenon in a different context. The U.N. Security Council created the ICTR and gave it jurisdiction over crimes against humanity, genocide, and war crimes committed in 1994 in the territory of Rwanda or by Rwandans in neighboring states.⁶⁸ In addition to jurisdiction over the genocide and other mass atrocities committed by extremist Hutus against Tutsis and moderate Hutus, the ICTR has had jurisdiction over any international crimes committed by the Rwandan Patriotic Front (RPF), which defeated the extremist Hutu government and remains in power today.

However, despite allegations that RPF members committed a number of international crimes, the ICTR has never brought formal charges against any of them.⁶⁹ In fact, when the Office of the Prosecutor of the ICTR commenced investigations into some of these allegations, the Rwandan government threatened to withdraw any support for ICTR investigations. Because of the prosecution's reliance on the cooperation of the Rwandan government to investigate and try cases against extremist Hutus who participated in the genocide, this threatened withdrawal created strong institutional constraints and political incentives for ICTR prosecutors not to bring charges against RPF members.⁷⁰

Nonetheless, two prosecutions under universal jurisdiction provided alternative forums for the investigation of these allegations and endeavored to overcome institutional and political hurdles. The first was the Belgian investigation of Rwandan president Paul Kagamé, which was subsequently closed after Belgium restricted its universal jurisdiction regulations in 2003.⁷¹ The second is the Spanish investigation of crimes against humanity, genocide, and war crimes committed by RPF members. A Spanish investigating judge collected evidence and issued an incriminating decision against more than forty individuals, detailing various allegations and supporting evidence.⁷²

Universal jurisdiction prosecutions have the potential to play a similar role in cases formally under the jurisdiction of the ICC that should be

prosecuted to advance the objectives of international criminal law but have not been as a consequence of the ICC's jurisdictional gaps or institutional and political constraints. The concurrent jurisdiction, or "jurisdictional redundancy," between universal jurisdiction and the ICC enables the former to fill these gaps.⁷³

The Limited Capacity of the ICC and the Goals of International Criminal Law

A second reason for continuing prosecutions under universal jurisdiction is that even in those situations in which legal, institutional, and political constraints do not preclude prosecutions, the OTP can prosecute only a small group of defendants. The ICC may thus have limited ability to advance its goals.⁷⁴ In such situations, universal jurisdiction prosecutions may have functional legitimacy because they can advance these goals.

While, in general, crimes against humanity, genocide, and war crimes are committed by hundreds or thousands of perpetrators who are members of states or other organizations, the ICC has only eighteen judges total at the pretrial, trial, and appellate levels, its proceedings are expensive, and it has jurisdiction over situations occurring worldwide.⁷⁵ Even if the ICC concentrated on one situation of mass atrocity among the many potential candidates, it could prosecute only a handful of perpetrators.

To put this in perspective, compare the work of the ICC with that of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR. While the ICTY and ICTR indicted 161 and 92 individuals respectively for crimes committed in the former Yugoslavia and Rwanda (or by Rwandans in neighboring states), as of December 5, 2012, the ICC had issued arrest warrants or summons to appear against the following numbers of individuals in the situations in which it has opened investigations: Darfur, Sudan, 7; Democratic Republic of the Congo (DRC), 6; Kenya, 6; Uganda, 5; Libya, 3; Côte d'Ivoire, 2; Central African Republic, 1.⁷⁶ It is politically and practically infeasible for the ICC to greatly increase its capacity in the near future, given that states parties have been reluctant to approve increases in its annual budget—and that some have resisted any increase at all. If the Court did increase its capacity—by a factor of ten, for example—it would still be able to try only a fraction of those who commit core international crimes. These limitations have justifiably led the OTP to focus on "those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes."⁷⁷

This low prosecution rate may jeopardize the Court's ability to fulfill its

stated goals, which include traditional goals of punishment, such as retribution, spreading or reinforcing a social norm against the commission of core international crimes, and deterrence.⁷⁸ From the perspective of retribution, justice would in principle require that every participant in an international crime be punished. It is reasoned that even if the top leaders who order or unleash the commission of these crimes may be more blameworthy—and should thus be subjected to stricter sentences where possible—it would still be hard to justify why chain commanders and actual perpetrators should remain unpunished, absent consequentialist considerations that may be relevant in specific cases.⁷⁹

As for inculcating social norms, it could be contended that punishing top leaders is sufficient to establish or reinforce an international social norm against the commission of core international crimes. But although punishing top leaders is important, it is inadequate for establishing all the necessary norms in light of the typical context in which these crimes take place. As Arendt indicated in her analysis of the Eichmann trial, one of the characteristics of the mass commission of international crimes is that many participants may be ordinary citizens who instead of hating the victims or having evil personalities are responding to the norms and incentives of the state or organization that sponsors or consents to the atrocities.⁸⁰ Prosecuting and punishing chain commanders and direct perpetrators is one method for reminding individuals in these positions that international law also applies to them and for fostering their critical judgment against such official or organizational policies.

As to deterrence, it is empirically unclear whether the threat of international criminal punishment affects the behavior of heads of states or organizations and other participants in crime.⁸¹ However, if the threat of punishment did affect their behavior, deterring chain commanders and direct perpetrators in addition to top leaders would create additional disincentives and coordination problems within the state or organization that may prevent international crimes.⁸²

Aside from the traditional goals of punishment, the ICC in particular and international criminal law in general may seek to promote the goals of transitional justice by providing a mechanism for victims to be heard and establishing a historical record of the atrocities.⁸³ Arguably punishing those most responsible is sufficient to accomplish these purposes, given that their trials would sufficiently document the international crimes sponsored by the state or organization. However, in practice, contemporary international criminal trials have faced difficulties in trying leaders for all the atrocities that took place within a certain territory or situation.

The death of Slobodan Milošević during his trial testifies to these challenges, with later international prosecutions taking note of these difficulties.⁸⁴ At the ICC, prosecutions have concentrated on only a portion of the crimes alleged against defendants.⁸⁵ While limiting the scope of trials against the most responsible is an understandable prosecutorial strategy as it restricts the complexity of cases, this strategy does not represent all of the victims or provide a complete historical record.

Universal jurisdiction prosecutions can thus support the ICC's efforts to advance both the traditional goals of criminal justice and transitional justice.

The Legality and Political Legitimacy of Universal Jurisdiction

A third reason for maintaining the universal jurisdiction regime as a supplement to the ICC is that universal jurisdiction over core international crimes has sufficient political legitimacy. This legitimacy arises from the large portion of states and global civil society actors embracing universal jurisdiction and from its legality under customary international law.⁸⁶ This line of reasoning will be sketched here, as space limitations do not permit a thorough analysis.

Without question, substantial controversy has arisen regarding the legality of universal jurisdiction over core international crimes.⁸⁷ However, most of this legal disagreement concerns the legal requirements for the enforcement of universal jurisdiction, not the legality per se of universal jurisdiction claims over these crimes. A crucial distinction must be made between prescriptive and enforcement jurisdiction.⁸⁸ In criminal law, prescriptive jurisdiction refers to a state's authority to apply its criminal law to certain types of conduct, generally through legislation. Enforcement jurisdiction refers to a state's authority to apply its criminal law to particular persons—that is, to prosecute, try, and eventually punish specific individuals for violating the state's criminal law.⁸⁹

Traditional jurisdictional principles—territoriality, active nationality, passive personality, protectiveness, and universality—refer to prescriptive jurisdiction. For example, when a state invokes the territorial principle for certain crimes, this state is declaring that all conduct fitting into the definition of these crimes that takes place within its territory is subject to that state's punishment. If an individual leaves the state's territory after committing one of these crimes inside that territory, the territorial principle still applies—the criminal law of this state is applicable to the crime. However, the departure of this individual from the state's territory after com-

mitting the crime may undermine the state's enforcement jurisdiction—in other words, it may frustrate the prosecution, trial, and punishment of this individual for the commission of the crime. For example, if the state in question does not allow trials in absentia, it will not prosecute or punish the individual unless or until the arrest can be carried out.

Under universal jurisdiction, any state in the world may prosecute certain crimes, even without a territorial, personal, or national interest link to the crime when it was committed.⁹⁰ As a jurisdictional principle, universal jurisdiction refers to prescriptive jurisdiction. By way of example, international law permits all states to invoke universal jurisdiction regarding the crime of piracy. Any state may apply its criminal laws to conduct that fits the crime of piracy, even though the relevant conduct did not take place in its territory or on a vessel sailing under its flag, was not committed by or against its nationals, and did not affect its national interests. Where a state claims prescriptive universal jurisdiction over piracy, that state may limit its exercise of enforcement jurisdiction over acts of piracy with certain preconditions—such as the ability to arrest the defendant.

In the case of the core international crimes—crimes against humanity, genocide, and certain war crimes—legal disagreement centers on enforcement, not prescriptive, jurisdiction.⁹¹ There are strong arguments that any state has authority under customary international law to invoke prescriptive universal jurisdiction over core international crimes for several reasons.⁹²

First, these crimes are usually considered to be customary international law crimes—that is, crimes established by customary international law.⁹³ Though it does not necessarily follow that customary international law also allows the exercise of prescriptive universal jurisdiction over them, this position is a small logical step, especially if core international crimes are considered not simply as customary international law crimes but *ius cogens* crimes.⁹⁴

Second, numerous states have passed legislation making their criminal law applicable to crimes against humanity, genocide, and/or certain war crimes based on prescriptive universal jurisdiction—including states that have protested the exercise of universal jurisdiction in individual cases.⁹⁵ The passing of universal jurisdiction legislation by such a large number of states may reflect state practice and *opinio juris* as well as political support for universal jurisdiction over core international crimes.⁹⁶

Third, hundreds of individuals have been investigated and been subject to formal proceedings for at least one of these core international crimes, totally or partially on the basis of prescriptive universal jurisdiction.⁹⁷ In addition, by the end of 2009, twenty-seven individuals had been

tried for these crimes, at least partially based on prescriptive universal jurisdiction under customary international law.⁹⁸ Decisions by state authorities to investigate cases, open formal proceedings, and try core international crimes based on prescriptive universal jurisdiction evidences evolving state practice and *opinio juris*. This state practice, coupled with the support and participation of global civil society in many of these complaints and proceedings, also indicates substantial political approval for the exercise of universal jurisdiction over core international crimes.

Though they do not always adequately distinguish between prescriptive and enforcement jurisdiction, many authorities agree that the exercise of prescriptive universal jurisdiction over one or more of the core international crimes is legal under customary international law.⁹⁹ The legal disagreement over universal jurisdiction has mostly concerned the special conditions required for exercising enforcement jurisdiction in universal jurisdiction cases. In this context, international judges and commentators, among other authorities, have reasoned that under customary international law, enforcement jurisdiction over core international crimes may not be exercised unless the defendant has a relevant link with the prosecuting state—such as being physically present in or becoming a citizen of the prosecuting state after committing the crime.¹⁰⁰

The debate over enforcement jurisdiction as part of universal jurisdiction is beyond the scope of this chapter. Provided that the legality of prescriptive universal jurisdiction under customary international law is accepted for the reasons given here, there is no legal justification for eliminating universal jurisdiction. To the extent that customary international law is formed through state practice and *opinio juris*, universal jurisdiction also has sufficient political legitimacy—a large number of states have accepted its existence and a substantial portion of global civil society supports universal jurisdiction claims over core international crimes.

Analysis of Possible Objections

Even if the arguments I have advanced are accepted, could universal jurisdiction interfere with the work of the ICC, doing more harm than good for international criminal law? There are at a minimum three potential concerns in this respect, but I believe that the problems highlighted by these concerns have been overstated because universal jurisdiction prosecutions have generally met international due process standards and because the international community has subjected such prosecutions to informal accountability mechanisms.

The first of these concerns derives from claims by critics of international criminal law that the ICC and universal jurisdiction rely on a dangerous idealism that disregards the realities of international and domestic power structures and is likely to do more harm than good.¹⁰¹ According to these critics, by ignoring the international power structure, prosecutions under these legal regimes could seriously disrupt international relations and even lead to war. By disregarding domestic power structures, these regimes may jeopardize peace agreements or states transitioning to democracy by prosecuting those who can guarantee and enforce such transitions and agreements. Under this line of reasoning, universal jurisdiction compounds the threats that the ICC already poses to international relations and to domestic transitions to peace and democracy.¹⁰²

However, although these risks are substantial in theory, these critics have overlooked existing political safeguards that make the risks unlikely in practice. The same criticisms have been applied to the ICC. In discussing political checks and consequentialist considerations within the ICC regime, both supporters and critics of the Court have tended to concentrate on the power of the U.N. Security Council to defer investigations or prosecutions in addition to the requirement that the ICC prosecutor must consider the “interests of justice” when deciding whether to launch investigations and prosecutions.¹⁰³ Most supporters and critics, however, have tended to neglect an even more crucial safeguard—that is, the ICC does not have a monopoly on force anywhere in the world, not even in its seat, the Hague.¹⁰⁴ For all its investigative and coercive measures, the Court relies on the cooperation of states.¹⁰⁵ As a result, states’ political branches have formal and informal ways to ignore or neutralize measures taken by the ICC with which those states’ disagree.¹⁰⁶ Thus, in practice, the ICC regime provides for political and consequentialist considerations and restraints.

It could be reasoned that, even if these checks help prevent the realization of these potential dangers within the ICC regime, such dangers are more serious in the universal jurisdiction regime. First, the decentralized nature of the universal jurisdiction regime makes it harder to steer in any particular direction. Second, states exercising universal jurisdiction have a monopoly on force within their territories. However, as I have established elsewhere, both supporters and critics of universal jurisdiction overlook the roles that the executive and legislative branches of universal jurisdiction states play in regulating this decentralized regime. By analyzing the asymmetric incentives and disincentives of these political branches, I have demonstrated that in general, universal jurisdiction prosecutions focus on what I have called low-cost defendants—that is,

those defendants that no state or only weak states would be willing to protect—about whom the international community has broadly agreed that they may be prosecuted and punished, and in practice universal jurisdiction trials have targeted such defendants.¹⁰⁷ If universal jurisdiction continues in this equilibrium, it is unlikely that these prosecutions would substantially increase the risk of a strong disruption to international relations, judicial chaos, or interference with political solutions to armed conflict and mass atrocities.

The second concern is that states' selection of low-cost defendants may in fact inadvertently harm international criminal law by undermining its rule-of-law nature—that is, the equal application of the law across all cases. Selectivity traditionally has been a challenge for international criminal law, including for the ICC.¹⁰⁸ As already noted, leaving aside referrals by the U.N. Security Council, the Court lacks global jurisdiction, which limits the selection of situations for investigation by the prosecutor. In addition, the ICC's limited resources permit prosecution of a mere handful of defendants, forcing the Court to be extremely selective. Furthermore, the Court's operation requires the economic, logistical, and political support of states. This provides incentives for the Court to concentrate on crimes committed in or by nationals of weak states as opposed to crimes associated with powerful states, on which the ICC depends for most of its economic and political support.

However, this selectivity of universal jurisdiction may alleviate rather than worsen the selectivity challenges faced by the ICC in particular and international criminal law more generally. First, in contrast to the ICC, the universal jurisdiction regime is truly universal. This universality provides reasons to abide by the norms of international criminal law for all individuals, including “high-cost” defendants and those whose states are not parties to the ICC.¹⁰⁹ Furthermore, the prosecution by the universal jurisdiction regime of defendants in situations under investigation by the ICC would alleviate rather than aggravate the selectivity challenges faced by the Court. It is likely that each legal regime will concentrate on different categories of defendants—the ICC on those of higher rank and universal jurisdiction on those of lower rank. I do not intend to suggest that universal jurisdiction is a panacea for the selectivity challenges faced by the ICC and international criminal law. Selectivity is a problem within international criminal law, a consequence of the political and practical obstacles involved in prosecuting core international crimes. My point is that universal jurisdiction is more likely to alleviate than to worsen these selectivity problems.

A third concern surrounding the continuing existence of universal jurisdiction is whether universal jurisdiction increases the politicization of international criminal law, thereby undermining the legitimacy of the whole enterprise.¹¹⁰ Though the term *politicization* has multiple possible meanings,¹¹¹ here the main reservations are that prosecutions under universal jurisdiction fail to respect due process standards and are politically motivated—that is, used to harass or eliminate political or military enemies of prosecuting states. By this argument, such concerns would be more acute in universal jurisdiction prosecutions than for the ICC, because the decentralized character of the former would increase the opportunities for states to use prosecutions for political ends.

Although these concerns warrant consideration, I have shown elsewhere why they have not represented substantial or prevalent challenges for universal jurisdiction.¹¹² The actual exercise of universal jurisdiction over core international crimes thus far has mainly been a practice of developed Commonwealth and Western European states.¹¹³ In other words, although many states have passed universal jurisdiction legislation covering core international crimes, actual official investigations, formal proceedings, and trials have been overwhelmingly concentrated in developed Western states. Such states typically meet international due process standards and have put in place safeguards against politically motivated uses of criminal justice procedures. Moreover, while other states could commence prosecutions by applying universal jurisdiction, those states most likely to make them political in character in the senses indicated here—authoritarian states—have incentives not to engage in universal jurisdiction prosecutions, which may highlight the state's human rights abuses and have a boomerang effect.¹¹⁴

Universal Jurisdiction's Actual Practice in Relation to the ICC

In the previous section, I provided four sets of reasons supporting the continued existence of universal jurisdiction, notwithstanding the ICC's greater structural legitimacy—that is, the higher degree of relative legitimacy of the ICC based on noncontingent factors. I reasoned that universal jurisdiction statutes and prosecutions display sufficient functional legitimacy. In terms of its functional legitimacy, universal jurisdiction could advance the goals of international criminal law by prosecuting cases in situations that the ICC has not investigated (what I term the universal ju-

risdiction regime's *horizontal complementarity* to the ICC) or, in situations under investigation by the Court, by prosecuting those cases not prosecuted by the ICC because it chooses to concentrate on other cases arising from the same situation (what I term *vertical complementarity*). This section analyzes whether the universal jurisdiction regime has fulfilled either or both of these functions.

At the statutory level, states have not generally invoked the ICC regime to justify repealing preexisting universal jurisdiction statutes. In contrast, the number of universal jurisdiction statutes has seemingly increased since the adoption of the ICC Statute in July 1998, with several states passing new universal jurisdiction legislation as part of their domestic implementation of the ICC Statute on the grounds that cooperation with the Court may require the exercise of universal jurisdiction.¹¹⁵ In addition, those states that have restricted the scope of legislation on universal jurisdiction, such as Belgium and Spain, acted in response to pressure from other states, not because of the ICC regime.¹¹⁶

While a good number of yearly data on universal jurisdiction complaints is presently unavailable, particularly prior to 2002, the available data suggest that the creation of the ICC has not (substantially) diminished the total number of universal jurisdiction complaints.¹¹⁷ According to a global survey I conducted for a broader project on universal jurisdiction, there have been universal jurisdiction complaints—or cases considered by authorities of their own accord, *sua sponte*—against at least 249 individuals, from the entry into force of the ICC Statute on July 1, 2002, until the end of 2009, out of a total of 1,050 universal jurisdiction complaints recorded since 1983.¹¹⁸

Turning to an examination of the roles played by the universal jurisdiction regime in relation to the ICC, this survey indicates that from the entry into force of the ICC until 2009, universal jurisdiction complaints almost exclusively concentrated on situations not under investigation by the ICC—the horizontal complementarity function. In fact, from the more than 200 individuals against whom universal jurisdiction complaints were brought, only 2 individuals, in two different investigations partially relying on universal jurisdiction, were accused of participation in a situation under ICC investigation.¹¹⁹

These patterns in universal jurisdiction complaints and cases may be considered problematic. Considering that a foundation for the functional legitimacy of universal jurisdiction is its potential to vertically supplement the Court in advancing its objectives, the nearly absolute lack of universal jurisdiction complaints and cases in situations under investigation by the

ICC may reveal a flaw in the universal jurisdiction regime. In addition, such patterns may suggest that the ICC has been underutilizing a potentially beneficial tool for reaching its goals.

To shed light on these patterns, it could be hypothesized that as an empirical matter, universal jurisdiction cases have not focused on situations under ICC investigation precisely because the Court is handling these situations. According to this hypothesis, when an international criminal authority investigates a situation, victims, NGOs, and domestic authorities will not pursue their own investigations because an international authority already is doing so.

Although legal practitioners involved in universal jurisdiction cases that I interviewed mentioned this hypothesis,¹²⁰ the first problem is that it does not explain the pattern of universal jurisdiction cases vis-à-vis the ICTY and the ICTR. In contrast to the ICC, universal jurisdiction cases have vertically supplemented the work of the ad hoc tribunals in substantial numbers. According to this survey, there have been universal jurisdiction complaints or *sua sponte* cases involving 185 individuals from the former Yugoslavia, of whom 8 have been tried. In addition, universal jurisdiction complaints or *sua sponte* cases have arisen regarding 87 Rwandans, of whom 11 have been tried. These numbers are not negligible, considering that as of August 24, 2011, the ICTY had indicted 161 individuals and adjudicated cases against 77, with cases still pending against 35,¹²¹ and the ICTR had indicted 92 individuals, adjudicated 65 cases, and had 11 pending cases.¹²²

The second problem is that if this hypothesis is accurate, it would be expected that there are more universal jurisdiction cases in situations under investigation by the ICC than by the ICTY and ICTR, given that the ICC has indicted substantially fewer individuals than those tribunals (a maximum of seven per situation) and thus arguably has less fully addressed these situations. Yet the opposite has been true.

Explaining these case selection patterns in the universal jurisdiction regime would require a rigorous qualitative and quantitative empirical study that I cannot undertake here. Nevertheless, for future study, I suggest three tentative explanations for these varying patterns in universal jurisdiction prosecutions for the ICC and the ICTY and ICTR. These explanations may also suggest ways that the ICC could encourage the universal jurisdiction regime to prosecute cases in situations under investigation by the ICC.

First, with the possible exception of the situations in Darfur and Libya, none of the other six situations under investigation as of March 10, 2013—the Central African Republic, the DRC, Côte d'Ivoire, Kenya, Mali, and

Uganda—have generated the same level of global concern, especially in the main universal jurisdiction states in Europe and the developed Commonwealth, as did the situations in the former Yugoslavia and Rwanda. The violence in the former Yugoslavia constituted the worst mass atrocities committed in Europe since the Second World War and caused high levels of interest and concern in several European countries.¹²³ In the case of Rwanda, the genocide occurred while atrocities in the former Yugoslavia were still ongoing, helping to generate concern for the even more serious atrocities in an African country. In addition, Belgium and France were directly affected by the Rwandan genocide because their troops were involved, either as U.N. peacekeepers or because they were providing military training and support to the Hutu government.¹²⁴

The level of domestic political concern that the core international crimes generate in states actively exercising universal jurisdiction may or may not reflect the actual gravity of international crimes—the relatively low level for the long-standing conflicts and commission of international crimes in the DRC suggests the latter. Nevertheless, this level of concern is significant as it may help explain which situations are more salient for NGOs and the general public in such states, thus creating incentives for these NGOs and the political branches and prosecutors of these states to present universal jurisdiction complaints and initiate universal jurisdiction prosecutions.¹²⁵

A second basis for case selection patterns in the universal jurisdiction regime has to do with the availability or unavailability of victims, elements of proof, and potential defendants in states exercising universal jurisdiction. Victims may bring universal jurisdiction claims and evidence before domestic authorities. In addition, the work of international NGOs on universal jurisdiction cases is usually triggered by requests from victims or other NGOs originating where the alleged international crimes took place. The presence or residence of defendants in a potential prosecuting state is also important because it is a prerequisite for universal jurisdiction prosecutions in many legal systems.¹²⁶

In this sense, the low level of organization of civil society and weak NGOs in the DRC may, in part, explain the failure of international NGOs to bring universal jurisdiction claims regarding this situation.¹²⁷ In addition, the conflicts in the former Yugoslavia and Rwanda brought waves of refugees to Europe and elsewhere in the West, unlike most situations under investigation by the ICC. The absence of defendants located in the territory of potential prosecuting states may also help explain, for example, why participants in international crimes in Darfur have not been

prosecuted based on universal jurisdiction despite the international concern that these crimes have generated. Most of these participants have likely had no need to emigrate, given that the regime that allegedly has sponsored the atrocities remains in power.

Finally, the ICTY and the ICTR, together with the U.N. Security Council, have encouraged prosecutions under universal jurisdiction in a way that the ICC thus far has not. For example, the U.N. Security Council issued resolutions encouraging states to prosecute those responsible for the commission of international crimes in the former Yugoslavia and Rwanda.¹²⁸ As a consequence, a few states passed special statutes granting their courts universal jurisdiction over ICTY and ICTR crimes or used preexisting statutes to exercise universal jurisdiction.¹²⁹

The ICTY and ICTR also worked with national jurisdictions by “downloading” and “uploading” cases from them in a way that may have encouraged the use of universal jurisdiction.¹³⁰ There have been a few universal jurisdiction cases that the ICTY and the ICTR prosecuted but later transferred to national jurisdictions for completion.¹³¹ The ICC has made almost no use of universal jurisdiction in this manner.¹³²

These tentative explanations suggest several measures that the OTP of the ICC could explore or expand to foster universal jurisdiction prosecutions where such prosecutions could further the Court’s goals. For example, the OTP could try to persuade human rights NGOs and domestic constituencies of the seriousness of past or ongoing international crimes in specific locations or of the need for universal jurisdiction prosecutions in certain situations. The ICC could foster more domestic prosecutions based on territoriality, active nationality, or universal jurisdiction by providing technical support or sharing information and evidence with states.¹³³ Furthermore, the ICC could encourage domestic prosecutions by interpreting the complementarity principle strictly to render it more difficult for states to refer situations to the Court¹³⁴ or by calling on states to exercise universal jurisdiction over specific situations.¹³⁵

In fact, the (further) use of these and similar tools would complement the conception of the prosecutor’s role advanced in this collection of essays, according to which the ICC Statute “creates a role for the prosecutor as catalyst and negotiator, authorized and expected to build commitment to the norms and practices of international criminal justice.”¹³⁶

Nevertheless, the ICC prosecutor faces greater challenges than did the ICTY or ICTR in encouraging states to exercise universal jurisdiction in particular and to support the work of the Court in general. The U.N. Security Council created the ICTY and ICTR because its permanent members

felt obliged to respond to past and ongoing mass atrocities that had already generated great public concern around the world.¹³⁷ Thus, some of the world's most powerful states committed themselves to the position that an international criminal law response to these atrocities was appropriate. As a result, powerful states and organizations, among them the European Union and the North Atlantic Treaty Alliance, have been willing and able to use their leverage to ensure that defendants are surrendered and evidence is provided to these tribunals.¹³⁸

In contrast, the ICC responds to situations that took place after the Court's regime came into effect and that may not produce similar levels of concern. It is the first international criminal authority that is not a top-down creation by the U.N. Security Council or the main world powers. Moreover, it must compete with diplomatic approaches to mass atrocities even among those states that support the Court in principle. These variances have meant that the prosecutor virtually has to start from scratch in investigating new situations. To receive logistical and political support, the prosecutor must persuade a sufficiently large number of powerful states that the situation warrants an international response and the sustained mobilization of international resources. The prosecutor must then convince powerful states that a criminal law approach to resolving the situation (as opposed to an exclusively diplomatic approach) would do more good than harm.

This represents one of the main paradoxes of international criminal law. The ICC can be seen as the institutional culmination of the international criminal justice project, yet it faces greater difficulties to overcome before it can successfully advance that project's goals.¹³⁹ In the specific case of universal jurisdiction, the ICC requires more assistance from universal jurisdiction prosecutions than do the ICTY or ICTR, given the ICC's permanent character, global reach, and implicit challenge to the world's power structure. However, precisely these features of the ICC make it more difficult and therefore less likely for NGOs and states even to consider supplementing the Court's work through complaints and prosecutions under universal jurisdiction.

Why the ICC Principle of Complementarity Should Not Regulate the Relationship between the Two Regimes

The previous section discussed how the universal jurisdiction regime has assumed only one of two potential roles that supplement the work of the

ICC. Yet if universal jurisdiction prosecutions focused more on situations under investigation by the ICC, one of the central questions sure to arise would be which prosecution should have priority when ICC and universal jurisdiction prosecutions overlap in cases from the same situation. Based on the theoretical framework set forth in this essay, I argue in this section that a weak primacy principle should regulate the relationship between the ICC and universal jurisdiction prosecutions, given the Court's greater legitimacy and that none of the rationales for the complementarity principle apply in this context.

A Contextual and Teleological Interpretation of Article 17 of the ICC Statute

Article 17 of the ICC Statute regulates the relationship between domestic prosecutions and the ICC through the complementarity principle—holding that a case is inadmissible before the ICC if it has been or is being investigated, prosecuted or tried “by a State which has jurisdiction over it.”¹⁴⁰ Commentators examining the relationship between prosecutions under universal jurisdiction and those by the Court support the application of this principle of complementarity to universal jurisdiction, at least when the exercise of universal jurisdiction is legal under domestic and international law. In defense of this position, such commentators have argued that the phrase “by a State which has jurisdiction over it” does not distinguish between different types of jurisdiction and thus, under a strict textualist interpretation, includes universal jurisdiction. Some commentators also claim that this interpretation of the complementarity principle would prevent the ICC docket from becoming overloaded.¹⁴¹ Under this interpretation, as long as the state exercising universal jurisdiction is willing and able to prosecute in earnest, universal jurisdiction should always trump the ICC's jurisdiction.

But this reading of article 17 is questionable when the article is interpreted in its context, as article 31 of the Vienna Convention on the Law of Treaties urges.¹⁴² Under a contextual reading of this article, one can interpret the phrase “a State with jurisdiction over the case” as limited to territorial and active nationality jurisdiction—the two types of jurisdiction established as a general rule elsewhere in the ICC Statute.¹⁴³

More substantively, from a teleological perspective, none of the main rationales for the complementarity principle favor granting priority to universal jurisdiction prosecutions over the ICC. The first rationale for complementarity is that it respects state sovereignty.¹⁴⁴ This applies to

crimes that either take place in the territory or are committed by the nationals of a state—uncontroversial bases of jurisdiction grounded in the idea that states have a privileged relationship with their territory and nationals.¹⁴⁵ This reasoning does not apply, however, if an outside state claims jurisdiction over a crime based solely on universal jurisdiction. In fact, as previously discussed, prosecutions under universal jurisdiction are less respectful of other states' sovereignty than are prosecutions by the ICC.

Another rationale for complementarity is that giving priority to states to investigate and prosecute international crimes better advances the objectives of international criminal law, including traditional goals of punishment and transitional justice goals.¹⁴⁶ For example, international crimes generally involve situations of serious or total collapse of the rule of law and are fed by deep political, social, or military conflicts. If domestic prosecutorial authorities and courts are able and willing to impartially investigate the crimes, they are better positioned to reestablish the domestic legal system and provide local constituencies with an authoritative account of the atrocities.

However, this reasoning applies when the prosecutorial authorities and courts of the territorial state address the international crimes, not when an outside state prosecutes them based on universal jurisdiction.¹⁴⁷ In fact, all else being equal, the ICC may be in a better position to advance the traditional goals of punishment, to reestablish the domestic legal system (for example, through positive complementarity),¹⁴⁸ and to provide a credible account of the international crimes because it displays greater relative structural legitimacy.

Another argument for complementarity based on practicality holds that states are better situated to investigate and prosecute international crimes than is the ICC.¹⁴⁹ The line of reasoning is that the territorial—and at times the active nationality—state can more easily gather elements of proof because witnesses and other evidence are available in the state's territory. In contrast, the OTP must investigate from a distance and rely on the cooperation of local authorities to provide evidence to the ICC and to permit the Court's investigators inside the state's territory.

However, once again, this rationale does not apply to prosecutions under universal jurisdiction, which face the same obstacles as the ICC. Indeed, such obstacles may be even more significant in universal jurisdiction prosecutions because those states that ratify the ICC Statute promise to cooperate with the ICC's investigations and the international nature of the ICC may avert potential turf wars with domestic authorities. As a con-

sequence, a territorial state may be more likely to cooperate with the ICC than with a state exercising universal jurisdiction.¹⁵⁰

A Weak Primacy Principle

There are strong reasons for the principle of complementarity not to govern the relationship between universal jurisdiction and prosecutions by the ICC. Instead, given its superior structural legitimacy—that is, a higher degree of legitimacy based on noncontingent factors—the ICC should adopt a weak primacy principle, thereby granting formal priority over universal jurisdiction prosecutions to the ICC.

Generally, the ICC should defer to universal jurisdiction prosecutions. First, the Court may otherwise discourage states from exercising universal jurisdiction over situations under ICC investigation, which could be detrimental to the Court's ability to advance its goals. Given that there have been almost no prosecutions under universal jurisdiction that support the work of the ICC, this would be especially unwise at present.

Second, adopting a weak primacy principle would acknowledge that there may be situations and cases in which prosecutions under universal jurisdiction are best placed to advance the goals of international criminal law. Previously, I conducted a detailed analysis on why, leaving aside contingent and case-specific considerations, prosecutions by the ICC hold more structural legitimacy in comparison to prosecutions under universal jurisdiction. Nevertheless, in some situations and cases, such contingent and case-specific considerations may outweigh structural reasons to provide greater legitimacy to a universal jurisdiction prosecution. For example, should the defendant, witnesses, or other evidence be available in the state exercising universal jurisdiction, giving priority to this prosecution may be justified for practical reasons. Alternatively, the state exercising universal jurisdiction may have linguistic, cultural, or political links—other than problematic (post)colonial ones—enabling the resulting trial to strongly affect the population of the state in which the atrocities took place and thus better advance international criminal law goals. Or the state exercising universal jurisdiction may be able to deliver justice in a substantially shorter time than the ICC. The prosecutor and the Court should consider such contingent and case-specific factors together with the structural advantages that the ICC provides when determining whether to defer to a domestic prosecution under universal jurisdiction.

Three principal distinctions exist between the proposed weak primacy principle of the ICC and the primacy principles of the ICTY and the ICTR.

First, this weak primacy principle would apply solely to domestic prosecutions under universal jurisdiction, not to territorial or active nationality prosecutions. Second, the weak primacy principle would be more limited than at the ICTY and ICTR by acknowledging that in many circumstances, universal jurisdiction prosecutions are better placed than an international authority to advance international criminal law goals. Finally, this weak primacy principle would not necessarily require the ICC solely to target the most senior and culpable defendants, while universal jurisdiction prosecutions target the rest—as has been the case at the ICTY and ICTR. Instead, the prosecutor and the Court would make determinations on a case-by-case basis, weighing the categories of factors as articulated in this chapter. However, despite these differences, these principles are also similar in that proceedings under universal jurisdiction would not automatically trump proceedings before an international authority.

This weak primacy principle could be implemented in two ways. First, it could be implemented informally by the OTP, which could convey to domestic authorities that may exercise universal jurisdiction any OTP's preference to prosecute a case in certain circumstances. This method would be most easily employed for those states (for example, Belgium and Germany) that, contrary to the position of the majority of commentators, give priority to ICC prosecutions over their own universal jurisdiction prosecutions.¹⁵¹ Alternatively to, or in conjunction with, this informal implementation, this principle could be formally applied through adopted prosecutorial guidelines or a court decision which interprets Article 17 of the ICC Statute as not applicable to prosecutions under universal jurisdiction.

Conclusion

This chapter analyzes the relationship between prosecutions of core international crimes under universal jurisdiction and by the ICC. Prosecutions before the ICC display a higher level of state consent, political, procedural, rational, and functional legitimacy than do universal jurisdiction prosecutions. Nonetheless, universal jurisdiction prosecutions continue to play a supplementary role in the enforcement of core international crimes as a consequence of the minimum requirements of legitimacy met by universal jurisdiction, coupled with the jurisdictional gaps and institutional, political, and resource constraints of the ICC, which may limit the Court's ability to advance the goals of international criminal law.

Since the entry into force of the ICC Statute, prosecutions under universal jurisdiction have taken virtually no action in situations under investigation by the Court. This chapter explores potential reasons for such a pattern of universal jurisdiction prosecutions and suggests tools for use by the ICC to change this pattern. Simultaneously, the chapter identifies the challenges particular to the ICC regime (and not present in the ICTY and the ICTR) that must be surmounted.

Finally, this chapter articulates reasons to reject the application of the ICC's principle of complementarity in the relationship between the two regimes. A weak primacy principle would not discourage prosecutions under universal jurisdiction, which may advance the ICC's goals while recognizing the Court's higher degree of structural legitimacy.

NOTES

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1. For critical analysis of the objectives of international criminal law, *see, e.g.*, MARK A. DRUMBL, *ATROCITY, PUNISHMENT, & INTERNATIONAL LAW* 149–80 (2007); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, & THE LAW* (1997); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000).

2. Other international criminal tribunals have been created through international agreements (e.g., the International Military Tribunal at Nuremberg) or by the U.N. Security Council acting under chapter VII of the U.N. Charter (e.g., the ICTY and the ICTR). However, these tribunals only had a temporary character. On noncriminal responses to mass atrocities, *see, e.g.*, *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* (Robert I. Rotberg & Dennis Thompson eds., 2000); Mnookin, in this volume.

3. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§402 & cmts. c–g, 404 & cmts. a–b, 423 (1987).

4. In this sense, pirates are *hostes generis humani* (enemies of humanity). On possible justifications for the exercise of universal jurisdiction over piracy, see, e.g., ROBIN GEISS & ANNA PETRIG, PIRACY & ARMED ROBBERY AT SEA 145–48 (2011).

5. See, e.g., LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2005); Win-Chiat Lee, *International Crimes & Universal Jurisdiction*, in INTERNATIONAL CRIMINAL LAW & PHILOSOPHY 15 (Larry May ed., 2009); Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT’L L. 111 (2003).

6. On different ways in which a crime may affect humanity, see, e.g., MAY, *supra* note 5, at 84–85.

7. For philosophical justification in this direction, or at least for the proposition that core international crimes affect humanity, see, e.g., HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253–79 (1994); ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT (2010); MAY, *supra* note 5; LARRY MAY, WAR CRIMES & JUST WAR (2007); LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT (2010); Antony Duff, *Authority & Responsibility in International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 589 (Samantha Besson & John Tasioulas eds., 2010); Lee, *supra* note 5; David Jay Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT’L L. 85 (2004); Richard Vernon, *What Is a Crime against Humanity?*, 10 J. POL. PHIL. 231 (2002).

8. See, e.g., LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL & MUNICIPAL LEGAL PROTECTIONS (2004); M. Cherif Bassiouni, *The History of Universal Jurisdiction & Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS & THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39 (Stephen Macedo ed., 2004).

9. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide (Jan. 21, 1951), 78 U.N.T.S. 277 (hereinafter Genocide Convention); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle VI, 1 U.N. GAOR (Part II) at 188, U.N. Doc. A/61/Add.1 (1946) (hereinafter Nuremberg Principles); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces on the Field, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (hereinafter First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Forces at Sea, art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (hereinafter Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 85, Jun. 8, 1977, 1125 U.N.T.S. 3 (hereinafter Additional Protocol I); Convention (IV) Respecting the Laws and Customs of War on Land (Hague IV), Annex, Oct. 18, 1907, 36 Stat. 2277 (1911), T.S. No. 539; Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/808

(1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/Res/955 (1994).

10. See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 11 (Feb. 14) (hereinafter Congo v. Belgium).

11. See, e.g., Fourth Geneva Convention, *supra* note 9, 6 U.S.T. at 3616 (setting forth art. 146); Nuremberg Principles, *supra* note 9, at Principle V; Additional Protocol I, *supra* note 9, 1125 U.N.T.S. at 37 (setting forth art. 75.4); Institute of International Law, Seventeenth Commission, *Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity, & War Crimes* (2005), http://www.idi-il.org/idiE/resolutionsE/2005_kra_03_en.pdf.

12. On whether there is and should be a rule under international law that requires the forum state exercising universal jurisdiction to give priority to the territorial and active nationality states, see, e.g., Congo v. Belgium, *supra* note 10, at 59 (joint separate opinion of Judges Buergenthal, Higgins, & Kooijmans); COUNCIL OF THE EUROPEAN UNION, AU-EU TECHNICAL AD HOC EXPERT GROUP, REPORT ON THE PRINCIPLE OF UNIVERSAL JURISDICTION, §14, Doc. 8672/1/09REV1, (2009) (hereinafter AU-EU EXPERT GROUP); Institute of International Law, *supra* note 11; Anthony J. Colangelo, *Double Jeopardy & Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 827–35 (2009); Florian Jessberger et al., *Concurring Criminal Jurisdictions under International Law*, in COMPLEMENTARITY & THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 233 (Morten Bergsmo ed., 2010) (hereinafter COMPLEMENTARITY & UNIVERSAL JURISDICTION); Cedrik Ryngaert, *Complementarity in Universality Cases: Legal-Systematic & Legal Policy Considerations*, in COMPLEMENTARITY & UNIVERSAL JURISDICTION, *id.*, at 165; Jo Stigen, *The Relationship between the Principle of Complementarity & the Exercise of Universal Jurisdiction for Core International Crimes*, in COMPLEMENTARITY & UNIVERSAL JURISDICTION, *id.*, at 133.

13. On the double criminality requirement, compare, for example, the Article 689-11, French Criminal Procedure Code, with the *Princeton Principles on Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS & THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2003) (hereinafter *Princeton Principles*). While the former includes a double criminality requirement, the Princeton Principles do not.

14. On the prohibition against double jeopardy, see, e.g., *Princeton Principles*, *supra* note 13, including a prohibition against double jeopardy; George Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580 (2003).

15. On whether functional immunity prevents prosecution in this type of case, see, e.g., Congo v. Belgium, *supra* note 10; Regina v. Bartle and the Commission of Police for the Metropolis and Others, Ex Parte Pinochet; Regina v. Evans and Another and the Commission of Police for the Metropolis and Others, [1999] UKHL 17 (Mar. 24, 1999); Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731 (2012).

16. On whether the defendant must be present in the territory of or have another link with the prosecuting state, see, e.g., Congo v. Belgium, *supra* note 10, at 59 (joint separate opinion of Judges Buergenthal, Higgins, & Kooijmans); *id.* at 3 (separate opinion of President Guillaume).

17. The Rome Statute includes the crime of aggression among the crimes over which the ICC has jurisdiction. See Rome Statute of the International Criminal Court art. 5(1),

July 17, 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute). However, the Rome Statute also provides that the ICC will not exercise jurisdiction over this crime until such time as state parties agree on its definition and conditions for the exercise of jurisdiction. See *id.* art. 5(2). At the ICC's first review conference, concluded in June 2010, state parties agreed on a definition and conditions. The actual exercise of jurisdiction by the Court, however, is subject to a decision after Jan. 1, 2017, by the same majority of state parties as is required for the adoption of an amendment to the statute.

18. *Id.* art. 12(2)–(3).

19. *Id.* art. 13(b).

20. See U.N. Charter art. 39, 41. On the legal power of the U.N. Security Council to create international criminal tribunals, see, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶28–30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

21. Other units include the presidency, responsible for the overall administration of the Court; the Registry, responsible for the nonjudicial aspects of the Court's functioning; the Office of Public Counsel for Victims; the Office of Public Counsel for the Defence; and a trust fund for the benefit of victims of crimes and their families.

22. See Rome Statute, *supra* note 17, art. 17. The principle of complementarity also arguably applies to the relationship between the ICC and prosecutions by nonparty states. See, e.g., CASSESE, *infra* note 141, at 352.

23. For examples of implementing legislation brought into force by states, see Crimes against Humanity and War Crimes Act, S.C. 2000, c. 24 (Can.); International Criminal Court Act, 2001, c. 17 (Eng.); *International Criminal Court Act 2002* (Cth) (Austl.); *ICC (Consequential Amendments) Act 2002* (Cth) (Austl.).

24. The question of the legitimacy of international law, international regimes, and international organizations has received renewed interest over the past few decades. For seminal work in contemporary scholarship on this question, see Thomas M. Franck, *Why a Quest for Legitimacy?*, 21 U.C. DAVIS L. REV. 535 (1988). The arguments in this section refer to normative, not sociological, legitimacy. At a minimum, the relative moral legitimacy of universal jurisdiction and the ICC are referenced. However, such arguments also have legal consequences to the extent that moral considerations inform or are part of legal interpretation.

25. For discussion of the legitimacy of the ICC in particular and international criminal law in general, see, e.g., Aaron Fichtelberg, *Democratic Legitimacy & the International Criminal Court*, 4 J. INT'L CRIM. JUST. 765 (2006); Madeleine Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFFALO CRIM. L. REV. (2002); and the works cited *supra* note 7.

26. This seems to be David Luban's position. See, e.g., David Luban, *Fairness to Rightness: Jurisdiction, Legality, & the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569 (Samantha Besson & John Tasioulas eds., 2010); Luban, *supra* note 7.

27. See, e.g., Gabriel Bottini, *Universal Jurisdiction after the Creation of the International Criminal Court*, 36 N.Y.U. J. INT'L L. & POL. 503 (2004).

28. See Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches & the Transnational Prosecutions of International Crimes*, 105 AM. J. INT'L L. 1, 47 (2011).

29. See *id.* at 42–43. On the due process problems in the ICC in relation to disclosure

of evidence, *see, e.g.*, Alex Whiting, *Lead Evidence & Discovery before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L L. & FOREIGN AFF. 207 (2009).

30. *See* Langer, *supra* note 28. On politicization, due process problems, and selectivity as three of the traditional challenges faced by international criminal law, *see* MARTHA MINOW, BETWEEN VENGEANCE & FORGIVENESS 25–51 (1999).

31. The exception is the U.N. Security Council, relying on its Chapter VII powers, referring a situation to the ICC. In this case, the ICC may exercise jurisdiction over the territory and nationals of nonparty states, according to the Rome Statute. In such instances, even if states have formally given their consent to the U.N. Charter and U.N. Security Council's powers under Chapter VII, the ICC arguably does not hold greater state consent legitimacy than universal jurisdiction prosecutions. Refusing to join the U.N. is prohibitively costly for states, and most states had no influence during the establishment of the powers of the U.N. Security Council. *See, e.g.*, Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 914 (2004); DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE U.N. SECURITY COUNCIL & THE MAKING OF THE MODERN WORLD (2009). However, while situations referred to the ICC by the Security Council may not have more state consent legitimacy, these situations have more political, procedural, rational, and functional legitimacy, for reasons demonstrated by the rest of this section's analysis. On the possible limits of state consent to provide legitimacy to international organizations, *see, e.g.*, Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355, 355–56, 359–60 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

32. Statist conceptions include traditional conceptions of international law, those conceptions of the international order embraced by variants of international relations theory, and the ones articulated by political philosophers such as Thomas Nagel and John Rawls. *See* JOHN RAWLS, THE LAW OF PEOPLES (1999); Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005).

33. This would be the case even if most contemporary statist conceptions consider the commission of mass atrocities and other serious human rights violations as a limit to state sovereignty or self-determination. First, the list of core international crimes includes conduct that does not necessarily consist of the commission of such actions—for example, certain limitations on the way armed conflict may be waged. For an argument in this direction, *see* Madeleine Morris, *High Crimes & Misconceptions: The ICC & Non-Party States*, 64 LAW & CONTEMP. PROBLEMS 13 (2001). Second, when mass atrocities or other serious violations of human rights are committed, the territorial or active nationality state may legitimately choose among an array of responses to these atrocities—including, under certain conditions, responses not based in criminal law. The consent by the state to the jurisdiction of an international criminal law regime may thus provide more legitimacy to this criminal response relative to other responses.

34. *See, e.g.*, DAVID HELD, DEMOCRACY & THE GLOBAL ORDER 230 (1995); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in & beyond the State*, in RULING THE WORLD: INTERNATIONAL LAW, GLOBAL GOVERNANCE, CONSTITUTIONALISM 258, 291–95 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

35. For example, assuming that, where they meet specific requirements, certain am-

nesties, such as those in South Africa, are legitimate responses to international crimes, the people of the state in which the international crimes took place are entitled to decide whether to accept such an amnesty, and this decision must be respected by the rest of the world. The express consent by the people through their state to participate in an international criminal law enforcement regime like the ICC would thus provide more state consent legitimacy to such a regime to intervene—for example, to evaluate whether the national response to specific international crimes is legitimate.

36. Attempts to create a convention on crimes against humanity are ongoing. *See, e.g., FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY* (Leila Nadya Sadat ed., 2011).

37. Genocide Convention, *supra* note 9, art. 6.

38. First Geneva Convention, *supra* note 9, art. 49; Second Geneva Convention, *supra* note 9, art. 50; Third Geneva Convention, *supra* note 9, art. 129; Fourth Geneva Convention, *supra* note 9, art. 146; Additional Protocol I, *supra* note 9, art. 85. *See also* Roger O'Keefe, *The Grave Breaches Regime & Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811 (2009).

39. *See, e.g., Congo v. Belgium, supra* note 10, at 3 (separate opinion of President Guillaume) (holding that the Geneva Conventions do not create an obligation to arrest or prosecute offenders not present in the state's territory and do not confer universal jurisdiction in absentia).

40. *See id.* at 59 (joint separate opinion of Judges Buergenthal, Higgins, & Koojmans); *id.* at 137 (dissenting opinion of Judge van Wyngert). For arguments in favor of the legality of universal jurisdiction under customary international law that do not rely on the *Lotus* principle, *see, e.g.,* Claus Kreß, *Universal Jurisdiction over International Crimes & the Institut de Droit International*, 4 J. INT'L CRIM. JUST. 561, 571–76 (2006).

41. Equally authoritative sources reject this interpretation of the *Lotus* principle and claim that there is no permissive customary international rule authorizing the exercise of universal jurisdiction, at least in its pure form. *See Congo v. Belgium, supra* note 10, at 3 (separate opinion of President Guillaume); *id.* at 57 (declaration of Judge Ranjeva).

42. Larry May argues that the ICC has more legitimacy than universal jurisdiction prosecutions as the latter represents a type of international vigilante justice, creating too great a risk for state sovereignty. *See MAY, supra* note 5, at 76. May's position is seemingly that the problem with universal jurisdiction prosecutions is that they are likely to infringe on other states' sovereignty too often. My argument here is not predictive but formal. In other words, my reasoning has not been that universal jurisdiction prosecutions are likely to infringe on state sovereignty too often. Instead, universal jurisdiction claims do not necessarily assume the consent of the territorial or active nationality state in the same manner as the default jurisdiction of the ICC. On why I do not think that universal jurisdiction prosecutions are likely to infringe too frequently on other states' sovereignty, *see* Langer, *supra* note 28.

43. *See ARENDT, supra* note 7, at 269–70 (attributing the quotation to Jaspers and subscribing to it). *See also* HANNAH ARENDT & KARL JASPERS, CORRESPONDENCE 1926–1969, at 413, 418–20, 424–25 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992) (discussing the issue before Eichmann's trial began) (emphasis added).

44. *Id.*

45. These theories may include traditional conceptions of international law as well as

a number of international relations theories such as institutionalism and interstate solidarity. See, e.g., Veijo Heiskanen, *Introduction*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS*, *supra* note 31, at 1, 5. These theories may also include statist accounts by political philosophers such as Nagel, *supra* note 32, at 138, stating, “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.” See also RAWLS, *supra* note 32, at 93, stating that for well-ordered peoples to achieve their long-term aim of bringing all societies to honor the “Law of Peoples,” they should establish new institutions to serve as a kind of a confederative center and public forum for their common opinion and policy toward non-well-ordered regimes.

46. Even if the community of states is not conceived as a political community, see, e.g., Nagel, *supra* note 32, as long as the community of states is considered the principal on whose behalf international criminal law institutions are acting, the same principles seem to follow as moral principles based on a principal agent line of reasoning. In this case, this could be termed as *principal agent legitimacy*. However, for simplicity, I have used *political legitimacy* throughout the chapter to refer to these ideas. For a more detailed articulation of these arguments and ideas, see Máximo Langer, *Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Law Code*, 11 J. INT’L CRIM. JUST. 737 (2013).

47. For example, under certain cosmopolitan democracy conceptions, participation by and accountability to not only states but also other actors, such as individuals and transnational social movements, is a condition of the political legitimacy of international institutions. See, e.g., Jürgen Habermas, *The Constitutionalization of International Law & the Legitimation Problems of a Constitution for World Society*, 15 CONSTELLATIONS 444 (2008); HELD, *supra* note 34.

48. See, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005) (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); Kumm, *supra* note 31, at 926.

49. The idea may apply in global administrative law and cosmopolitan constitutionalism accounts, and also in natural law conceptions of international crimes and universal jurisdiction. On natural law conceptions over these issues, see, e.g., Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1023, 1056–69 (2007); Luban, *supra* note 7; Luban, *supra* note 26, even if Feldman and Luban do not include this idea in their accounts.

50. See, e.g., M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443 (1999); John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court & International Lawmaking in the 21st Century*, 11 PACE INT’L L. REV. 361 (2000).

51. See ICC, *The State Parties to the Rome Statute*, http://www.icc-cpi.int/EN_Menus/ASP/States%20Parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

52. See, e.g., Rome Statute, *supra* note 17, arts. 36, 42, 46, 51, 112, 113–18, 121 (relating to the Assembly of States Parties’ various authorities).

53. Rome Statute, *supra* note 17, art. 13(b), 16. It is in comparison to universal jurisdiction prosecutions by individual states that the U.N. Security Council is more representative of all U.N. members, even acknowledging the representativeness deficit of the

U.N. Security Council, with its five permanent members and their veto power. On the legitimacy problems of the U.N. Security Council, *see, e.g.*, David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993).

54. *See* Rome Statute, *supra* note 17, art. 50.

55. For a more detailed elaboration on the three lines of reasoning articulated in the last four paragraphs in relation to the legitimacy of universal jurisdiction, *see* Langer, *supra* note 46.

56. Alternatively, one can refer to this type of legitimacy as *democratic legitimacy* or *perspectival legitimacy* or *impartiality*. These terms may be better than *rational legitimacy* for those who find value in the inclusion of a larger number of community viewpoints in judging but do not consider this inclusion an improvement in rationality. Hannah Arendt herself, one of my sources of inspiration for this idea, may fall into this category. For reasons of ease of use, I have used *rational legitimacy* to refer to this idea throughout the chapter. However, I am not taking sides in the debate on whether including a larger number of community viewpoints in judging improve rationality.

57. Different theoretical traditions embrace variations on the idea that the more viewpoints that participate in or are considered throughout the judicial process, the more impartial or valid that process is. The cross-sectional ideal of the jury in the United States is one example. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY (2000) (arguing that individual jurors are inevitably the bearers of the diverse perspectives and interests of their race, religion, gender, and ethnic background as well as that deliberations are considered impartial when group differences are not eliminated but rather invited, embraced, and fairly represented). Hannah Arendt seemed to have embraced a version of this idea in her work on judgment in politics. Jennifer Nedelsky has extended the application of Arendt's framework to legal judgment. As Nedelsky points out, "For . . . Arendt . . . the key idea of judgment is that it is neither about truth claims nor about mere subjective preference. . . . I cannot compel agreement, as I could logically with a truth claim. But I can persuade and claim that if the other judge is truly judging, is not being biased by private inclinations, he will agree. I thus claim that my judgment is valid for the community of judging others. The core of what makes such judgment possible is our 'common sense' shared by other judging subjects. It is this shared sense that allows us to exercise an 'enlarged mentality' by imagining judgment from the standpoints of others. . . . When we use this capacity for an enlarged mentality to free ourselves from idiosyncrasies and inclinations, then we are capable of true judgment, for which we claim validity." Jennifer Nedelsky, *Communities of Judgment & Human Rights*, 1 THEORETICAL INQUIRIES IN LAW 245, 249–50 (2000). My line of reasoning on the higher rational or perspectival legitimacy of the ICC thus shows a possible bridge or connection between Arendt's work on crimes against humanity and her work on judgment, not explored by Arendt.

58. Under statist conceptions of the international legal order and international institutions, the relevant community would be the community of states. Alternatively, in the case of cosmopolitan conceptions, the community would (also) include individuals and even other entities and groups.

59. Rome Statute, *supra* note 17, art. 36(4)(b), 36(7).

60. *Id.*, art. 36(8).

61. On challenges in truth determination and due process that the linguistic and cul-

tural gaps between the judges, on the one hand, and the witnesses and the defendant, on the other, have generated in the universal jurisdiction trial in Germany of Onesphore Rwabukombe for his participation in the genocide in Rwanda in 1994, see Christoph Safferling, *VStGB und Strafverfahren: Beweisaufnahme und Angeklagenrechte*, in ZEHN JAHRE VÖLKERSTRAFGESETZBUCH: BILANZ UND PERSPEKTIVEN EINES DEUTSCHEN VÖLKERSTRAFRECHTS 185 (Florian Jessberger & Julia Geneuss eds., 2013). Crucially, a greater diversity of world viewpoints in international criminal jurisdictions does not provide a perfect antidote against these risks. On these problems at the ICTR, the Special Court for Sierra Leone, and the Special Panels in the Dili District Court in East Timor, see NANCY COMBS, *FACT FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* (2010).

62. Arendt hints at or suggests this idea when she says in her analysis of the Eichmann case, “The very monstrousness of the events is ‘minimized’ before a tribunal that represents one nation only.” See ARENDT, *supra* note 7, at 270.

63. See *supra* note 43.

64. See, e.g., Bottini, *supra* note 27; Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 108–9 (2003) (considering such an argument as plausible without embracing it).

65. My position in this section could be interpreted in two ways. Under the first interpretation, my argument would be that universal jurisdiction meets the requirements of a minimal theory about the moral legitimacy of universal jurisdiction. Under the second, my argument would be that universal jurisdiction is not so far from meeting the requirements of an ideal theory about the moral legitimacy of universal jurisdiction as to be considered (completely) illegitimate. Since I am not fleshing out a full theory on the legitimacy of universal jurisdiction here, a resolution does not need to be reached between these two competing interpretations—although see Langer, *supra* note 46, for my position that an ideal theory of universal jurisdiction should include the participation of and accountability to the international community as requirements of legitimacy for universal jurisdiction. On the distinction between ideal and minimal theories of moral legitimacy, see, e.g., Richard Fallon Jr., *Legitimacy & the Constitution*, 118 HARV. L. REV. 1787, 1797–99 (2005), 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 alternatives.” As Fallon writes, “Ideal theories establish the standards of justification to which political regimes ought to aspire, even if all existing governments fall short. . . . [M]inimal theories specify the threshold conditions that a regime must satisfy in order to deserve any support or justify any official coercion.” *Id.*

66. Rome Statute, *supra* note 17, art. 12.

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

68. Statute of the International Tribunal for Rwanda, *supra* note 9, art. 1–4.

69. See, e.g., *Rwanda Tribunal Should Pursue Justice for RPF Crimes*, HUMAN RIGHTS WATCH (Dec. 12, 2008), <http://www.hrw.org/news/2008/12/12/rwanda-tribunal-should-pursue-justice-rpf-crimes>.

70. See, e.g., FLORENCE HARTMANN, PAIX ET CHÂTIMENT: LES GUERRES SECRÈTES DE LA POLITIQUE ET DE LA JUSTICE INTERNATIONALES 261–72 (2007); Luc Reydam, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977 (2005).

71. See Eric David, *Belgium*, in 8 Y.B. INT'L HUMANITARIAN L. 396, 400–402 (2005) (describing the role of the Court of Cassation and the Cour d'arbitrage in the dismissal of the Kagame case).

72. Juzgado Central de Instrucción No 4, Audiencia Nacional, *Sumario 3/2008—D. Auto*. For critical analyses of this decision, see Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription?: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L. FORUM 1 (2010); Commentator, *The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. INT'L CRIM. JUST. 1003 (2008). This case has remained open after the coming into effect of the new extraterritorial jurisdiction regulations in March 2014. See EL PAIS, March 19, 2014, *La Audiencia Nacional combate la eliminación de la justicia universal*, http://politica.elpais.com/politica/2014/03/19-actualidad/1395233699_903497.html.

73. On the possible functions of jurisdictional redundancy in the U.S. legal system, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, & Innovation*, 22 WM. & MARY L. REV. 639 (1981). In Cover's terminology, my argument in this subsection can be understood as a way to address the "dilemma of self-interest" by the ICC and the permanent members of the U.N. Security Council that block the referral of cases to the ICC.

74. Addressing insufficient economic and human resources can thus be another explanation or justification for jurisdiction redundancy distinct from the three identified by Cover, *supra* note 73—that is, self-interest, ideology, and innovation.

75. On the number of ICC judges, see Rome Statute, *supra* note 17, art. 36.

76. The list and description of arrest warrants and summons to appear is available on the ICC website: http://icc-cpi.int/EN_Menus/icc/Pages/default.aspx.

77. See Office of the Prosecutor, ICC, *Paper on Some Policy Issues before the Office of the Prosecutor* (Sept. 2003), http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

78. See, e.g., Rome Statute, *supra* note 17, pmbl.; Dierdre Golash, *The Justification of Punishment in the International Context*, in INTERNATIONAL CRIMINAL LAW & PHILOSOPHY, *supra* note 5, at 201.

79. Some of these consequentialist considerations are discussed in the subsection "Analysis of Possible Objections." Another argument against the punishment of chain commanders and actual perpetrators would be a strong defense of superior orders. However, domestic and international authorities have rejected the strong version of this defense. On the main positions regarding the superior orders defense in international criminal law, see, e.g., GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW §§581–95 (2nd ed. 2009).

80. See ARENDT, *supra* note 7.

81. See, e.g., Lee, *supra* note 5, at 11.

82. For an ICC argument in support of this idea, see Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled, "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶73 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>.

83. See generally OSIEL, *supra* note 1; TEITEL, *supra* note 1.

84. See GIDEON BOAS, THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL PROCEEDINGS (2007). The prosecutorial strategy against Saddam Hussein before the Iraqi Special Tribunal demonstrates prosecutors' reluctance to repeat the strategy used in the Milošević trial. The prosecutors focused on specific incidents in successive trials instead of trying to prosecute in a single trial all the atrocities committed during his regime. See, e.g., Michael P. Scharf, *Forward: Lessons from the Saddam Trial*, 39 CASE W. RES. J. INT'L L. 1, 10 (2006–8). On other efforts to expedite the processing time in international criminal law cases, see Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005); Máximo Langer & Joseph W. Doherty, *Managerial Judging Goes International but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms*, 36 YALE J. INT'L L. 241 (2011).

85. For example, the prosecution limited its charges against Thomas Lubanga Dyilo to conscripting and using child soldiers despite accusations of his militia's role in killing, raping, and looting portions of eastern DRC. See ICC *Prosecution Defends Its Tactics*, INSTITUTE FOR WAR & PEACE REPORTING (July 7, 2006), <http://iwpr.net/report-news/icc-prosecution-defends-its-tactics>.

86. Debate has been renewed over the past couple of decades about what customary international law is and what its role is or should be (if any) in contemporary international law. For a review of part of this debate, see, e.g., Anthea Elizabeth Roberts, *Traditional & Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001). I cannot engage in this debate for the purpose of this chapter. This chapter adopts a traditional conception of customary international law. It is understood as evidence of a general practice accepted as law that has two elements: state practice and *opinio juris*. See, e.g., Statute of the International Court of Justice, art. 38, June 26, 1945, 33 U.N.T.S. 993; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) and cmts. b–d (1987).

87. See *supra* notes 41 and 42. Controversy has also arisen over whether universal jurisdiction over the core international crimes is a good idea from a policy perspective. I analyze these policy arguments in the subsection “Analysis of Possible Objections.”

88. See Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735 (2004). I rely on O’Keefe’s lucid analysis of this distinction in this subsection.

89. On the distinctions among jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce, see, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §401 & cmts. (1987). It is unnecessary for our purposes to distinguish between jurisdiction to adjudicate and jurisdiction to enforce. I thus include both ideas in jurisdiction to enforce.

90. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§402 and cmts. c–g, 404 and cmts. a–b, 423 (1987).

91. On this disagreement, see, e.g., *supra* notes 40 and 41. Which war crimes constitute core international crimes will not be addressed here. However, I am not taking a position on whether under customary international law, states may claim prescriptive universal jurisdiction over war crimes in general. For the legal controversy over this issue, see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005); John B. Bellinger III & William J. Haynes II, *A U.S.*

Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law, 89 INT'L REV. OF THE RED CROSS 443 (2007).

92. This is the case regardless whether the *Lotus* principle applies—i.e., whether it must be proven that there is no prohibition against prescriptive universal jurisdiction over the core international crimes or there is a rule permitting it.

93. See, e.g., U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, §§34–35, U.N. Doc. S/25704 (May 3, 1993).

94. The argument has been made that one of the consequences of the *ius cogens* character of a crime is that it is subject to universal jurisdiction. See e.g., *Prosecutor v. Furundžija*, Case No. IT.95.17/1.T, ¶156 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

95. The practice by protesting states is significant. This practice suggests that their protest should be interpreted as opposition not to the idea of universal jurisdiction per se but rather to the way universal jurisdiction was exercised in these individual cases. The United States protested the exercise of universal jurisdiction against its nationals—e.g., by Belgium in 2003—while explicitly providing for universal jurisdiction for its federal courts regarding genocide, torture, and the war crime of recruitment or use of child soldiers. Rwanda also falls into this category, as it has protested the use of universal jurisdiction against some of its nationals yet has also stated that its courts have universal jurisdiction over the core international crimes and has even suggested that the 2001 Princeton Principles on Universal Jurisdiction should be incorporated. See *Report 2010*, *infra* note 96, at ¶¶34, 114.

96. There is no definitive worldwide survey setting out how many states have passed this type of legislation. Several surveys of domestic legislation have suggested the existence of general state practice accepted as law in this regard. As of early 2012, the Sixth (Legal) Committee of the U.N. General Assembly is examining the scope and application of the principle of universal jurisdiction. As part of that project, the U.N. General Assembly invited member states to submit information on their domestic legal rules and judicial practice on universal jurisdiction. Among the fifty-four reporting states, the U.N. secretary-general included thirty-three states as listing crimes against humanity, genocide, or war crimes as universal jurisdiction crimes according to their criminal codes or legislation. See U.N. Secretary-General, *The Scope & Application of the Principle of Universal Jurisdiction*, tables 1–2, U.N. Doc. A/65/181 (July 29, 2010) (hereinafter *Report 2010*). The list of states is larger. The reports by the U.N. secretary-general mention other reporting states, among them Rwanda and Switzerland, as having universal jurisdiction over core international crimes. See, e.g., *id.* at ¶¶34, 65. In a recent provisional survey, Amnesty International concludes that 145 out of 193 states have provided for universal jurisdiction over crimes against humanity, genocide, war crimes, or torture. See AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 1* (2011). However, Amnesty International includes in its survey states that do not explicitly establish universal jurisdiction over these crimes but instead have provisions that can be interpreted by their courts as establishing universal jurisdiction—such as the *aut dedere aut judicare* provision or a general reference to treaty obligations to prosecute. In a survey of African and European states, the AU-EU Expert Group mentions thirty-six African states that provide for the exercise of

universal jurisdiction over at least one of the crimes under the ICC's jurisdiction. See AU-EU EXPERT GROUP, *supra* note 12, at ¶16. This report also mentions eleven European states that grant universal jurisdiction on the basis of customary international law. These reports do not always distinguish between universal jurisdiction based on treaty and customary international law. However, since only the grave breaches provisions of the Geneva Conventions of 1949 and Additional Protocol I provide a plausible textual basis for universal jurisdiction, and since many states have claimed universal jurisdiction over other core international crimes, it is fair to conclude that the list of states that have relied on customary international law to establish universal jurisdiction over the core international crimes is rather large.

97. For example, the Deschênes Commission in Canada recommended eighteen cases for prosecution and almost two hundred cases for further inquiry regarding the possible commission of war crimes by Nazis. See Commission of Inquiry on War Criminals, *Report, Part 1: Public*, at ¶¶62, 70, 74, 76 (1986). In Spain, Judge Baltasar Garzón issued incriminating decisions against roughly 120 people for their participation in the commission of international crimes in Argentina in the 1970s. See Langer, *supra* note 28, at 34.

98. I am referring here to twenty-seven trials whose charges included crimes against humanity, genocide, or war crimes different from grave breaches of the Geneva Conventions of 1949, given that there is a plausible textual treaty basis for the prosecution of grave breaches. I also do not include trials based only on torture as an independent international crime, because the Torture Convention also provides a textual basis for the exercise of universal jurisdiction. The period covered starts with the Eichmann trial in Israel in 1961.

99. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §404 and cmt. a (1987).

100. See, e.g., *Congo v. Belgium*, *supra* note 10, at 3 (separate opinion of President Guillaume) (arguing that the current body of international criminal law precludes the exercise of pure universal jurisdiction); *id.* at 57 (declaration of Judge Ranjeva). See also REYDAMS, *supra* note 8.

101. See, e.g., Jack Goldsmith & Stephen D. Krasner, *The Pitfalls of Idealism*, 132 DAE-DALUS 47, 51–52, 55 (2003); Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF. (July–Aug. 2001), at 86; Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389; Jack Snyder & Leslie Vinjamuri, *Trial & Errors*, 28 INT'L SECURITY 5 (2004).

102. A related criticism would be that by disregarding the international power structure, the ICC would do more harm than good to human rights by encouraging the United States to disengage from operations to protect human rights. See Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003). Following that argument, it could be claimed that universal jurisdiction acting in combination with the ICC would do even more harm by discouraging U.S. participation in human rights operations. I cannot analyze this criticism in detail here, although two comments are in order. First, as I argue *infra* and have argued in Langer, *supra* note 28, the United States and other powerful states have had more leverage over the ICC and universal jurisdiction prosecutions than their critics have acknowledged. Second, there is no strong evidence that the ICC and universal jurisdiction have had this disengaging effect on the

United States. For a broader empirical debate on whether human rights treaties and criminal prosecutions might do more harm than good to human rights, see, e.g., KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

103. The Rome Statute provides that the U.N. Security Council may defer an investigation or prosecution for a renewable twelve-month period (art. 16) and directs the prosecutor to evaluate whether prosecution is in the interest of justice when determining when to take up a case under art. 53(1)(c) and (2)(c). For analyses of these provisions, see, e.g., Office of the Prosecutor, ICC, *Policy Paper on Interests of Justice* (Sept. 1, 2007), <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>; L. Cordorelli & S. Villalpando, *Referral & Deferral by the Security Council*, in *THE ROME STATUTE FOR AN INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 627 (Antonio Cassese et al. eds., 2002); Richard G. Goldstone & Nicole Fritz, *"In the Interests of Justice" & Independent Referral: The ICC Prosecutor's Unprecedented Power*, 13 LEIDEN J. INT'L L. 655 (2000); Mnookin, *supra* note 2.

104. *But see* Goldsmith, *supra* note 102 (criticizing the ICC and highlighting this issue).

105. See, e.g., Rome Statute, *supra* note 17, art. 54(2)(a). A limited exception to this general rule is established in arts. 54(2)(b) and 57(3)(d). *See id.*

106. For good or bad, the al-Bashir case provides examples of this phenomenon to the extent that although two ICC arrest warrants have been issued against the Sudanese president, he has been able to travel to states parties of the ICC and states parties have included him in the negotiations on the situation in South Sudan.

107. *See* Langer, *supra* note 28.

108. On the selectivity problems of international criminal law, see, e.g., WOLFGANG KALECK, *MIT ZWEIERLEI MAß: DER WESTEN UND DAS VÖLKERSTRAFRECHT* (2012); MINOW, *supra* note 30.

109. Even if the regime concentrates on low-cost defendants, given the incentives for political branches in states exercising universal jurisdiction, the universal jurisdiction regime still provides reasons to officials who do not fit into the low-cost category to abide by the regime's norms. First, the category of a low-cost defendant is not fixed, and a high-cost defendant can turn into a low-cost defendant over time. In addition, even if the regime is unlikely to try high-cost defendants, this likelihood in most cases is not zero. Furthermore, even if the regime is unlikely to try high-cost defendants, other measures by the regime—the presentation of a complaint, initiation of formal proceedings, the issuing of an arrest warrant, or actual arrest—can create incentives for defendants to abide by norms of international criminal law and provide reasons to internalize these norms. In this respect, even a very high-cost defendant such as former U.S. president George W. Bush apparently had to cancel a trip to Switzerland based on concerns about the universal jurisdiction regime due to interrogation policies during his administration. *See Universal Jurisdiction*, WAR CRIMES PROSECUTION WATCH (vol. 5.23) (Public Int'l L. and Pol'y Group) (Feb. 14, 2011), http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol05issue23.html.

110. On politicization as one of the traditional challenges faced by international criminal law, see MINOW, *supra* note 30.

111. On different possible meanings of political prosecutions and trials, see OTTO KIRCH-

HEIMER, POLITICAL JUSTICE (1963); JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, & POLITICAL TRIALS (1964); Jenia Iontcheva Turner, *Defense Perspectives on Law & Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529 (2008); Jeremy Peterson, *Note: Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L.J. 257 (2007); Eric A. Posner, *Political Trials in Domestic & International Law*, 55 DUKE L.J. 75 (2005).

112. See Langer, *supra* note 28, at 41–45.

113. *Id.*

114. *Id.*

115. See, e.g., Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, Art. 8, J.O., Aug. 10, 2010, p. 14678 (France); Völkerstrafgesetzbuch (VStGB) (Code of Crimes against International Law), June 26, 2002, §1 (Ger.); International Criminal Court Act, 2001, c. 17 (Eng.). For a similar conclusion based on a survey of domestic legislation on international crimes and universal jurisdiction, see Beth Van Schaack & Zarko Perovic, *The Prevalence of "Present-In" Jurisdiction*, in PROCEEDINGS OF THE 107TH ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) (2013).

116. See Langer, *supra* note 28. On the role of the pressure from China that led to the restriction of universal jurisdiction in Spain in March 2014, see, e.g., EL PAÍS, June 23, 2014, *La Audiencia Nacional archiva la investigación sobre genocidio en el Tíbet*, http://politica.elpais.com/politica/2014/06/23/actualidad/1403537543_926352.html.

117. I am relying on my own database (on file with author) on universal jurisdiction complaints to make this statement due to the impossibility so far of locating the dates of presentation for a good number of the pre-2002 complaints.

118. For a description of how this global survey was carried out, see Langer, *supra* note 28, at 7. My database starts with the Eichmann case, but I exclude this case here from the total number of complaints because it took place more than two decades earlier than the second case.

119. The two persons in question are Ignace Murwanashyaka, a leader of a Hutu militia of Rwanda, and his deputy, Straton Musoni, for crimes against humanity and war crimes that took place in the DRC. A first investigation against them by German authorities was dismissed for insufficient evidence. A second set of proceedings has been ongoing in Germany since 2009 and by the beginning of 2014 no trial verdict had been issued yet. See Horand Knaup, *Germany Arrests Rwandan War Crimes Suspects*, SPIEGEL ONLINE, Nov. 18, 2009, <http://www.spiegel.de/international/world/0,1518,druck-661965,00.html>; Bundesgerichtshof (BGH) (Federal Court of Justice), June 17, 2010, BGHSt, AK 3/10, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2010-6-17&nr=52675&pos=7&anz=29&Blank=1.pdf>. Since the defendants were residing in Germany during the commission of the alleged crimes, and the alleged crimes took place in the DRC, the cases have relied on the territorial and universal jurisdiction principles. I am grateful to Kai Ambos for discussing this issue in detail with me.

120. Interview with anonymous member of the European Center for Constitutional and Human Rights, New York, Mar. 24, 2011 (on file with author).

121. See *The Cases*, ICTY.org, <http://www.icty.org/sections/TheCases/KeyFigures>. By “adjudicated cases,” I refer to cases in which the defendant was tried or entered a guilty plea. If cases that were referred to national jurisdictions, had the indictments withdrawn, or had defendants who died prior to trial are also included, then the ICTY had completed proceedings against 126 defendants.

122. See *Status of Cases*, UNICTR.org, <http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx>. As with the ICTY, if concluded ICTR cases also included those cases that were referred to national jurisdictions or had the indictments withdrawn or in which the defendants died prior to trial, the ICTR had completed proceedings against seventy-two defendants.

123. See, e.g., HAZAN, *infra* note 137.

124. See, e.g., L. Walley, *Universal Jurisdiction: Lessons from the Belgian Experience*, 5 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW (H. Fischer & Avril McDonald eds., 2002); YVES BEIGBEDER, JUDGING WAR CRIMES & TORTURE: FRENCH JUSTICE & INTERNATIONAL CRIMINAL TRIBUNALS & COMMISSIONS (1940–2005), 275–302 (2006).

125. See Langer, *supra* note 28.

126. See, e.g., Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, Art. 8, J.O., Aug. 10, 2010, p. 14678 (France); International Criminal Court Act, 2001, c. 17 (Eng.).

127. Interview with anonymous member of the Center for Constitutional Rights, New York, Apr. 5, 2011 (on file with author).

128. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, art. 2, U.N. SCOR, at 2, U.N. Doc. S/Res/955 (Nov. 8, 1994); S.C. Res. 978, U.N. Doc. S/RES/978 (Feb. 27, 1995).

129. For example, France passed Law No. 95-1 of Jan. 2, 1995 and Law No. 96-432 of May 22, 1996, which authorize the exercise of jurisdiction over international crimes committed in the former Yugoslavia and Rwanda.

130. I am grateful to Jonathan Weiner for bringing the “uploading/downloading” metaphor to my attention.

131. Both tribunals established completion strategies to finish their work by target dates. See, e.g., S.C. Res. 1503, U.N. Doc. S/Res/1503 (Aug. 28, 2003). These strategies included transferring cases to domestic courts.

132. Two exceptions are the cases of Murwanashyaka and Musoni in Germany described *supra* note 119.

133. See, e.g., Rod Rastan, *Complementarity: Contest or Collaboration?*, in COMPLEMENTARITY & UNIVERSAL JURISDICTION, *supra* note 12, at 83, 113–15. This type of sharing of information by the OTP was apparently important in facilitating the prosecution of Murwanashyaka and Musoni in Germany.

134. See, e.g., William Schabas, “*Complementarity in Practice*”: *Some Uncomplimentary Thoughts*, 19 CRIM. L. F. 5 (2009). But see Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L. F. 67 (2010).

135. On tools that the OTP, the Court itself, or the Assembly of States Parties could use to encourage states to prosecute crimes under the jurisdiction of the Court, see, e.g., Louis Arbour, *Will the ICC Have an Impact on Universal Jurisdiction?*, 1 J. INT’L CRIM. JUST. 585, 587 (2003); William Burke-White, *Proactive Complementarity: The International Criminal Court & National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53 (2008); Pocar & Maystre, *infra* note 141, at 299–301. On how the notion of positive complementarity can give a framework for such measures, see generally MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW 298–306 (2008); Burke-White, *Proactive Complementarity*, *supra*; Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L. F. 87 (2008).

136. Minow, True-Frost, & Whiting, in this volume.

137. See, e.g., PIERRE HAZAN, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (2004).

138. On the effect of these pressures, see, e.g., John Hagan & Sanja Kutnjak Ivkovic, *Structural Pre-Conditionality, Smoking Gun Evidence, & Collective Command Responsibility for War Crimes in the Former Yugoslavia*, 14 *UCLA J. INT'L L. & FOREIGN AFF.* 149 (2009).

139. See Máximo Langer, *Trends & Tensions in International Criminal Procedure: A Symposium*, 14 *UCLA J. INT'L L. & FOREIGN AFF.* 1, 17 (2009).

140. Rome Statute, *supra* note 17, art. 17.

141. See, e.g., Office of the Prosecutor, ICC, *Informal Expert Paper: The Principle of Complementarity in Practice*, §75 (2003); ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 352 (2003); JANN K. KLEFFNER, *COMPLEMENTARITY IN THE ROME STATUTE & NATIONAL CRIMINAL JURISDICTIONS* 113 (2008); JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT & NATIONAL JURISDICTION: THE PRINCIPLE OF COMPLEMENTARITY* 190–94 (2008); Christopher K. Hall, *The Role of Universal Jurisdiction in the International Criminal Court Complementarity System*, in *COMPLEMENTARITY & UNIVERSAL JURISDICTION*, *supra* note 12, at 201, 209–12; Fausto Pocar and Magali Maystre, *The Principle of Complementarity: A Means towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?*, in *COMPLEMENTARITY & UNIVERSAL JURISDICTION*, *supra* note 12, at 247; Cedric Ryngaert, *The International Criminal Court & Universal Jurisdiction: A Fraught Relationship?*, 12 *NEW CRIM. L. REV.* 498, 504–5 (2009). The minority of commentators has disagreed with this interpretation, although for reasons different from the ones I advance here. See, e.g., Kai Ambos, *Prosecuting International Crimes at the National & International Level: Between Justice & Realpolitik*, in *INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES* 55, 66 (Wolfgang Kaleck et al. eds., 2007); Federica Gioia, *State Sovereignty, Jurisdiction, & “Modern” International Law: The Principle of Complementarity in the International Criminal Court*, 19 *LEIDEN J. INT'L L.* 1095, 1110 (2006).

142. Article 31 of the Vienna Convention on the Law of Treaties establishes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The ICC has agreed with this view. See, e.g., Situation in Democratic Republic of the Congo, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶33 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183558.pdf>.

143. Rome Statute, *supra* note 17, art. 12(2)–(3). As previously pointed out, the ICC also has jurisdiction over any case referred to it by the U.N. Security Council, even where the case involves the territory and nationals of a nonparty state. This type of jurisdiction can be understood as exceptional within the ICC regime.

144. See, e.g., CASSESE, *supra* note 141, at 351; Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty & the Fight against Immunity*, 7 *MAX PLANCK Y.B. U.N. L.* 591, 594–96 (2003); Manuela Melandri, *The Relationship between State Sovereignty & the Enforcement of International Criminal Law under the Rome Statute*, 9 *INT'L CRIM. L. REV.* 531, 535–37 (2009).

145. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§402–3. It is beyond the scope of this article to discuss whether, under the complementarity principle, domestic prosecutions based on the passive personality principle should have priority over the ICC's jurisdiction.

146. See, e.g., CASSESE, *supra* note 141, at 354.

147. See Jaime Malamud-Goti, *The Moral Dilemmas about Trying Pinochet in Spain*, 32 U. MIAMI INTER-AM. L. REV. 1 (2001).

148. On positive complementarity, see *supra* note 135.

149. See, e.g., CASSESE, *supra* note 141, at 351; Benzing, *supra* note 144, at 598–99.

150. On the comparative advantage of ICC investigations vis-à-vis domestic ones, see Whiting, in this volume.

151. See CODE D'INSTRUCTION CRIMINELLE (C.I.CR.) art. 10 §1bis (Belg.) (the federal prosecutor may decide not to proceed with a case under universal jurisdiction if it appears the case should be put before an international tribunal); STRAFPROZESSORDNUNG (SGB) (SOCIAL CODE), 2002, §153(f) (Ger.) (the federal prosecutor may dismiss a case to give priority to an international court of justice, especially in those cases that have no territorial or nationality link with Germany).