THE ARCHIPELAGO AND THE HUB: UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT

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Whenever a territorial state or other state with a relevant link to a core international crime—a crime against humanity, genocide or war crime—does not prosecute the crime in question, universal jurisdiction prosecutions by individual states and the International Criminal Court (ICC or the Court) are the only two permanent criminal law enforcement regimes available.1 This chapter will propose a theoretical framework to analyze what the relationship between these two regimes should be and has actually been. The core argument for this framework is that the International Criminal Court and its Prosecutor have more legitimacy than universal jurisdiction prosecutions because they are more representative, accountable and transparent to humanity, and more respectful of state sovereignty.

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1 Other international criminal tribunals have been created through an international agreement—such as Nuremberg and Tokyo—or by the United Nations Security Council under Chapter VII of the United Nations Charter—such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). But these tribunals have had only a temporary character.
This theoretical framework will then enable me to analyze three central issues in the relationship between the two regimes. The first of these issues is whether universal jurisdiction prosecutions have any role to play after the creation of the ICC. I will argue that although the ICC has more legitimacy, universal jurisdiction still has a role to play in the prosecution of core international crimes given the substantial jurisdictional gaps, institutional and political constraints, and limited capacity of the ICC. Secondly, based on a global survey of universal jurisdiction cases, the chapter will demonstrate that universal jurisdiction has played a very limited role in supplementing the work of the Court and its Prosecutor, and it will articulate possible reasons for this lack of collaboration. Finally, this chapter will contend that the ICC’s principle of complementarity that regulates the relationship between the ICC and domestic prosecutions should not regulate the relationship between the ICC and universal jurisdiction. Rather, the ICC and its Prosecutor should adopt a more flexible approach in this area that acknowledges the higher legitimacy of the Court while also encouraging universal jurisdiction prosecutions that supplement the Court’s work.

I. Two International Criminal Law Regimes

Under universal jurisdiction, any state in the world may prosecute and try the core international crimes without any territorial, personal, or national-interest link to the crime in question when it was committed. Instead, the jurisdictional claim is based on the nature of the crime. The classical universal jurisdiction crime is piracy. In this case, the universal jurisdiction rationale is that since piracy is committed in the high seas beyond the territorial reach of any

state and every state has an interest in free maritime travel and commerce, any state that manages to arrest pirates should be able to try them.\textsuperscript{3}

The universal jurisdiction rationale for crimes against humanity, genocide, and war crimes is very 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 typically committed by or with the consent of state officials. States thus waive their sovereignty over these crimes when their officials commit or acquiesce to their commission.\textsuperscript{4} Second, these crimes in some sense affect humanity as a whole. Depending on the theory, these crimes affect humanity because they are committed by or with the consent of state or quasi-state officials, are widespread, are committed against groups of people, or dehumanize victims in particular ways. According to this second set of arguments, since these crimes affect humanity, any state may claim jurisdiction over them.\textsuperscript{5} While states have exercised universal jurisdiction over the crime of piracy for over

\textsuperscript{3} It is in this sense that pirates are \emph{hostis generis humani} (enemies of humanity). On possible justifications for the exercise of universal jurisdiction over piracy, see, e.g., ROBIN GEIß AND ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA 145-48 (2011).

\textsuperscript{4} See, e.g., LARRY MAY, CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT (2005); Win-Chiat Lee, \textit{International Crimes and Universal Jurisdiction, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY} 15 (Larry May ed. 2009).

\textsuperscript{5} For philosophical justification in this direction or, at least, for the proposition that the core international crimes affect humanity as such, see, e.g., HANNAH ARENDT, \textit{EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL} 253-79 (1994) [hereinafter ARENDT, EICHMANN IN JERUSALEM]; LARRY MAY, \textit{SUPRA} NOTE 4; LARRY MAY, WAR CRIMES AND JUST WAR (2007); LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT (2010); Antony Duff, \textit{Authority and Responsibility in International Criminal Law, in THE PHILOSOPHY OF INTERNATIONAL LAW} 589 (Samantha Besson & John Tasioulas eds. 2010); Lee, \textit{supra} note 4; David Jay Luban, \textit{A Theory of Crimes Against}
two hundred years, the exercise of universal jurisdiction over crimes against humanity, genocide, and war crimes is a twentieth-century phenomenon that reflects a commitment to the protection of human rights and the humanization of armed conflict.6

Universal jurisdiction as an enforcement regime does not have its own institutions. It rather relies on the domestic institutions—police, prosecution office, courts, legal profession, prisons—of individual states. It is also a regime without an institutional center because no state may formally claim a differentiated role in it. In this sense, one can think of universal jurisdiction as an archipelago of domestic institutions.

The tectonic structure that constitutes this archipelago consists of a set of distinctive substantive, jurisdictional, and procedural rules—as well as a set of theoretical justifications such as the ones mentioned above. The substantive rules include the international definitions of crimes against humanity, genocide, and war crimes that can be found in treaty and customary international law,7 as well as general doctrines such as the personal immunity defense.8

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jurisdictional rules include those treaties, customary law rules, and general principles of law that states rely on in order to make their universal jurisdiction claims, as well as a transnational complementarity or subsidiarity principle rule that gives priority to the territorial state over universal jurisdiction prosecutions.9 Its procedural rules include the *aut dedere aut prosequi* principle and the right to a fair trial.10 States, policy-makers and scholars are also engaged in an ongoing discussion on whether other rules—such as the requirement that the defendant be present in the prosecuting state territory, the double criminality principle, the prohibition against

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9 See, e.g., Genocide Convention, *supra* note 7, art. VI; First Geneva Convention, art. 49; Second Geneva Convention art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146; *Congo v. Belgium*, 2002 I.C.J. 11 ¶¶ 59 (joint separate opinion of Judges Buergenthal, Higgins & Koojmans).

10 See, e.g., Fourth Geneva Convention, art. 146; Nuremberg Principles, *supra* note 7, Principle V; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, art. 75.4 [hereinafter Additional Protocol I]; *Congo v. Belgium*, 2002 I.C.J. 11 ¶¶ 59 (joint separate opinion of Judges Buergenthal, Higgins & Koojmans) (universal jurisdiction charges may only be laid by a prosecutor or investigating judge who acts in full independence).
double jeopardy, and the functional immunity defense—should regulate states’ exercise of universal jurisdiction.11

The ICC was created through a treaty adopted in July 1998 that, as of October 11, 2011, has been ratified by 119 states. It has jurisdiction over crimes against humanity, genocide, and war crimes.12 The ICC has territorial and active nationality jurisdiction over the states that have...

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11 On whether the defendant has to be present in the territory of or have another link with the prosecuting state, see, e.g., Congo v. Belgium, 2002 I.C.J. 11 (joint separate opinion of Judges Buergenthal, Higgins & Koojmans); id. (separate opinion of President Guillaume); and Máximo Langer, The Diplomacy of Universal Jurisdiction: The Regulating Role of the Political Branches in the Transnational Prosecutions of International Crimes, 105 AM. J. INT’L L. 1, footnotes 42, 54, 64, 93, 170-71, 235-37, 240, 264, 266, and accompanying text (2011). On whether functional immunity prevents prosecution in this type of cases, see, e.g., Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 11 (Feb. 14); R v. Bartle and the Commission of Police for the Metropolis and Others, Ex Parte Pinochet; R. Evans and Another and the Commission of Police for the Metropolis and Others, [1999] UKHL 17 (24th March, 1999); and Langer, id. at footnotes 61, 81, 86, 134, 171, and accompanying text. On the double criminality requirement, compare, for instance, R v. Bartle and the Commission of Police for the Metropolis and Others, Ex Parte Pinochet; R. Evans and Another and the Commission of Police for the Metropolis and Others, [1999] UKHL 17 (24th March, 1999); and the new Article 689-11 of the French Criminal Procedure Code; with the Princeton Principles on Universal Jurisdiction, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2003) (while the former two included a double criminality requirement, the Princeton Principles did not).

12 Article 5(1) of the Rome Statute, 1998, 2187 UNT.S. 90 [hereinafter Rome Statute] mentions also the crime of aggression among the crimes the ICC has jurisdiction over. But article 5(2) of the Statute provides that the Court will not exercise jurisdiction over this crime until such time as state parties agree on its definition and conditions for the exercise of jurisdiction. At the ICC’s first review conference concluded in June 2010, state parties agreed on a definition and conditions, but the actual exercise of jurisdiction by the Court is subject to a decision after January 1, 2017, by the same majority of state parties as is required for the adoption of an amendment to the Statute.
ratified its statute or accepted the jurisdiction of the Court with respect to a specific instance of an ICC crime.\textsuperscript{13} In these cases, the jurisdiction of the Court is based on the voluntary participation of the ratifying states in the ICC regime. Acting under Chapter VII of the United Nations Charter, the United Nations (UN) Security Council may also refer cases to the ICC that take place anywhere in the world—including those in the territory and committed by the nationals of non-party states.\textsuperscript{14} In these particular cases, the jurisdiction of the ICC is derived from the legal power of the UN Security Council to adopt measures to maintain and restore international peace and security.\textsuperscript{15}

Unlike the universal jurisdiction regime, the ICC has its own institutions and bodies, which include an office of the prosecutor with its own investigators; a court composed of pretrial, trial, and appeal chambers; a bar of attorneys who can represent defendants and victims; and a few other administrative units.\textsuperscript{16} But the ICC regime also includes the domestic institutions of its state parties that have their own roles to play. The ICC’s principle of complementarity integrates the Court and domestic institutions of ratifying states into a single regime by giving priority to domestic institutions to prosecute and try these international

\textsuperscript{13} Id. art. 12(2) and (3).
\textsuperscript{14} Id. art. 13(b).
\textsuperscript{15} United Nations Charter, art. 39 and 41. On the legal power of the UN 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).
\textsuperscript{16} Other units include the Presidency, responsible for the overall administration of the Court; the Registry, responsible for the non-judicial aspects of the Court’s functioning; the Office of Public Counsel for victims; the Office of Public Counsel Defence; and a Trust Fund for the benefit of crime victims and their families.
crimes. The ICC Statute and other basic documents also provide a common frame of reference that ratifying states are supposed to follow, including substantive, jurisdictional, and procedural rules.

In this sense, while universal jurisdiction is an archipelago, the ICC regime is a wheel with a center or hub composed of the institutions of the Court that have a unique role within the regime, and a perimeter composed of the institutions of domestic states that have the primary function of preventing and prosecuting the core international crimes committed in their territory or by their nationals.

II. Higher Legitimacy of the ICC and its Prosecutor

Any sound analysis about the relationship between universal jurisdiction and the ICC has to start from an explicit or implicit understanding on the relative strengths and weaknesses of each of these regimes. A few commentators and policy-makers have argued that the Court would be more legitimate than universal jurisdiction because the Court would be less political, more respectful of due process, less selective against leaders of developing countries, and more effective in bringing defendants to justice.

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17 Rome Statute, art. 17. The principle of complementarity also arguably applies to the relationship between the ICC and prosecutions by non-party states. See, e.g., CASSESE, INFRA NOTE 91, AT 352.

18 For examples of implementation legislation by states, see Crimes Against Humanity and War Crimes Act (2000, c.24) (Canada); International Criminal Court Act (c.17) (United Kingdom); International Criminal Court Act 2002, No.41 & ICC (Consequential Amendments) Act 2002, No.42 (Australia).

However, although it is still early in the life of the Court to make a definitive judgment, I would like to argue that there are no substantial differences between the two regimes on the basis of these criteria. First of all, even if political incentives may be different under the two regimes, they may equally affect prosecutorial decisions in each of them.\textsuperscript{20} Second, universal jurisdiction trials have tended to be true adjudicatory processes and the ICC has not been exempted from criticism for its due process standards.\textsuperscript{21} Third, both universal jurisdiction and ICC prosecutions have tended to concentrate on politically weak defendants and the ICC has opened investigations only regarding situations in Africa.\textsuperscript{22} Finally, a large percentage of those against whom the ICC has issued formal charges are still at large, such as Joseph Kony, leader of the Lord’s Resistance Army, Sudanese President Omar al Bashir, and Muammar Gaddafi.

But even if the two regimes are not clearly distinguishable on these criteria, I would like to claim that the ICC and its Prosecutor are indeed more legitimate than universal jurisdiction for reasons different from those advanced in the recent literature. To start with, the ICC has more legitimacy because it represents and is accountable to the (people of) 119 states that have ratified its statute and also, to a certain extent, to the (people of) all UN members since the UN Security Council may refer cases to and defer cases at the ICC.\textsuperscript{23} In contrast, domestic prosecutions

\textsuperscript{20} See Langer, \textit{supra} note 11, at 47.


\textsuperscript{22} Langer, \textit{supra} note 11. On politicization, due process problems and selectivity as three of the traditional problems of international criminal law, see MARTHA MINOW, \textit{BETWEEN VENGEANCE AND FORGIVENESS} 25-51 (1999).

\textsuperscript{23} Rome Statute, arts. 13(b) and 16. I use the phrase “(people of) … states” because this argument about representation and accountability is formal in the sense that it works with statist and cosmopolitan conceptions of
based on universal jurisdiction are carried out by domestic authorities that may act on behalf of humanity, but only truly represent and are accountable to their own society.24

The broader representativeness and accountability of the ICC are crucial in this context given that one of the philosophical arguments for considering core international crimes as different from domestic ones is that the former affect humanity.25 As Karl Jaspers argued in his exchange with Hannah Arendt about the Eichmann case, the institutional apparatus that

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24 It is in comparison to universal jurisdiction prosecutions by individual states that the UN Security Council is more representative to the (people of) all UN members even acknowledging the representativeness defices that the UN Security Council presents with its five permanent members with veto power.

25 See supra note 5. “Affect humanity” may refer to the idea that these crimes harm humanity—see, e.g., MAY, CRIMES AGAINST HUMANITY, supra note 4—or that they concern humanity—see Duff, supra note 5. I have purposely used the phrase “affect humanity” throughout the chapter in order not to have to take position here on this debate.
prosecutes these crimes should then also represent and be accountable to humanity as a whole.\textsuperscript{26} The ICC may not claim to represent humanity as a whole, but it surely represents a much larger part of humanity than any single society acting upon universal jurisdiction, and it is open to (the people of) any state that wants to join the regime.

Relatedly, the ICC is more transparent to states, media, NGOs, activist and expert networks and other domestic and global groups than most universal jurisdiction prosecutions because of its international nature and institutional setting. The Court works in two languages—English and French—and has four other official languages—Arabic, Chinese, Russian, and Spanish. This alone makes its documents and proceedings more globally accessible. In addition, the ICC’s work is closely followed by a large group of media, NGOs, governments, and scholars from around the world. These factors explain in part why the ICC makes its decisions, budget, and other information available online for anyone to observe and judge. Furthermore, experts from many different countries can explain to domestic constituencies how the ICC regime works. In contrast, universal jurisdiction prosecutions tend to be carried out in the language of the domestic legal system, by offices of the prosecution and courts that in most cases are less transparent than the ICC, and following proceedings and rules that are often obscure or unknown to an international audience.\textsuperscript{27}


\textsuperscript{27} Like the argument about representation and accountability, the argument about transparency is formal in the sense that works with the different conceptions of international law described \textit{supra} note 23.
The ICC also has a higher legitimacy than universal jurisdiction because it has a clear and mostly uncontroversial legal basis and it is more respectful of state sovereignty. The ICC is the creation of a treaty that its state parties voluntarily ratified, explicitly accepting the jurisdiction of the Court over their territory and nationals. And in those instances when the UN Security
Council, relying on its Chapter VII powers, refers a situation to the ICC regarding a non-party state, the referral is legitimized by the UN framework.29

In contrast, even if there is a plausible case to make for why universal jurisdiction over crimes against humanity, genocide, and war crimes is legal under international law, making this case requires interpretative work, and there is no overwhelming consensus over the issue. Treaty law provides a weak legal basis for universal jurisdiction given that there is no international convention on crimes against humanity,30 and the Genocide Convention does not explicitly require or authorize the exercise of universal jurisdiction over genocide by its state parties.31 Only the Geneva Conventions of 1949 and its Additional Protocol I provide a textual basis for

29 The authority by the UN Security Council to create international criminal tribunals—that is the basis for its authority to refer cases to the ICC—was controversial when it was initially exercised to create the ICTY. See, e.g., Tadic, Case No. IT-94-1 ¶¶ 32-36. But prosecution by this type of tribunals still seems to be more legitimate than universal jurisdiction prosecutions because, first, the treaty basis of the latter is not stronger than the former as I will analyze in the following paragraph. More substantively, even with the representativeness deficit that the UN Security Council presents, the UN Security Council and the ad-hoc tribunals are generally more representative, accountable and transparent to humanity and states than universal jurisdiction prosecutions by individual states for the reasons already explored in this section regarding the ICC.

30 Although crimes against humanity were elaborated in the Nuremberg Charter, they have never been set out in a comprehensive international treaty. However, attempts to create a convention on crimes against humanity are ongoing: in 2009, prosecutors from the five major international tribunals called for the establishment of a convention; additionally, international criminal law scholars and practitioners have begun work on a draft Specialized Convention on Crimes Against Humanity. See FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed. 2011).

31 Genocide Convention, supra note 7, art. 6.
the exercise of universal jurisdiction over certain war crimes—i.e., over grave breaches of these conventions—and even in this case, there are those who question this interpretation.

The most authoritative supporters of universal jurisdiction over the core international crimes have thus argued that customary international law provides its main legal basis. The thrust of their argument has been that there is no prohibition in customary international law against the exercise of universal jurisdiction over these crimes. Because, according to the Lotus principle, everything which is not forbidden is allowed by international law, universal jurisdiction would be legal under customary international law. But equally authoritative legal interpreters reject this interpretation of the Lotus case and claim that there is no permissive customary international rule authorizing the exercise of universal jurisdiction, at least in its pure form. And even if one accepts the argument on the legality of universal jurisdiction, customary international rules do not require the consent of every single state in order to become legally valid. A sovereign state may thus find crimes committed in its territory or by its nationals

32 First Geneva Convention, supra note 7, art. 49; Second Geneva Convention, supra note 7, art. 50; Third Geneva Convention, supra note 7, art. 129; Fourth Geneva Convention, supra note 7, art. 146; Additional Protocol I, art. 85.

33 See, e.g., Congo v. Belgium, 2002 I.C.J. 11 ¶ 17 (separate opinion of President Guillame) (arguing that the Geneva Conventions do not create any obligation to arrest or prosecute offenders not present in the state’s territory and do not confer universal jurisdiction in absentia).


35 See id. ¶¶ 13-16 (separate opinion of President Guillaume) (arguing that the current body of international criminal law precludes the exercise of universal jurisdiction); id. ¶ 8 (declaration of Judge Ranjeva) (stating that “[s]cholarly acceptance of the principle laid down in Lotus in the context of combating international crimes has not yet found expression in a consequential development of the positive law relating to jurisdiction”).
subject to a universal jurisdiction prosecution without having ever consented to a rule not prohibiting this type of prosecution.

III. The Value of Universal Jurisdiction after the Creation of the ICC

The first issue to analyze in the relationship between universal jurisdiction and the ICC is whether they are mutually exclusive regimes. Even long before the creation of the ICC, Hannah Arendt and Karl Jaspers argued that it was not Israel but an international criminal court—or some other institution representing humanity—that should try and punish Eichmann given the nature of his crimes.36 After the creation of the Court, a few commentators and policy-makers have argued that universal jurisdiction over the core international crimes should simply disappear now that the ICC is functioning because the ICC is more legitimate than universal jurisdiction—though, as already mentioned, for reasons different from the ones here advanced.37 In this section, I will argue that universal jurisdiction still has a role to play after the creation of the ICC.

A. Jurisdictional Gaps and Institutional and Political Constraints of the ICC Regime

The first reason why universal jurisdiction over the core international crimes should not disappear is that the ICC regime presents substantial jurisdictional gaps and institutional and political constraints that legally or de facto may prevent the Court from prosecuting many international crimes that should be prosecuted to advance the goals of international criminal law. In these cases, whenever the territorial state or other state with a relevant link does not prosecute the offenses in question—or implement some other legitimate alternative non-penal response to

36 See works and pages cited supra note 26.

37 See, e.g., Bottini, supra note 19.
international crimes or mass atrocities, universal jurisdiction is still the only permanent enforcement regime left.

As for the ICC’s jurisdictional gaps, the Court’s personal jurisdiction is limited to those who commit core international crimes in the territory of state parties or who are nationals of state parties.\textsuperscript{38} At the moment, this limitation means that there are over seventy states with territories that are beyond the jurisdiction of the Court. And even if this number is likely to go down, it is unlikely to be anywhere near to zero or to include powerful states such as China, Russia, and the United States in the foreseeable future.

The only exceptions to this rule are the cases that the UN Security Council refers to the ICC that include crimes committed anywhere in the world.\textsuperscript{39} But the UN Security Council often falls into deadlocks about how to deal with specific situations, given that its five permanent members have geo-political interests all over the globe and veto power to block its resolutions.

Even when the ICC has jurisdiction over a case, the Court and its Prosecutor may face institutional constraints and political incentives that prevent it from proceeding with the prosecution of 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 UN 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 in neighboring states by Rwandans.\textsuperscript{40} This language meant that besides having jurisdiction over the genocide and other mass atrocities committed by extremist Hutus over Tutsis and

\textsuperscript{38} Rome Statute, art. 12.

\textsuperscript{39} Rome Statute, art. 13(b).

\textsuperscript{40} Statute of the International Tribunal for Rwanda, supra note 7, arts. 1-4.
moderate Hutus, the ICTR has jurisdiction over any international crimes committed by the Rwandan Patriotic Front (RPF), which defeated the extremist Hutu government and remains in power.

However, although there are allegations that RPF members committed a number of international crimes, the ICTR has never brought formal charges against any of them. In fact, when the ICTR Office of the Prosecutor (OTP) investigated some of these allegations, the Rwandan government forcefully threatened to withdraw any support of ICTR investigations. Because the ICTR OTP has needed the collaboration of the Rwandan government to investigate and try cases against extremist Hutus who participated in the genocide, the threat created strong institutional constraints and political incentives for the ICTR prosecutors not to bring these charges against RPF members.41

But two universal jurisdiction prosecutions have provided alternative forums for the investigation of these allegations and have endeavored to fill the institutional and political gaps. The first was the Belgian investigation against Rwandan president Kagamé that was closed after Belgium substantially restricted its universal jurisdiction regulations in 2003.42 The second is the Spanish investigation of crimes against humanity, genocide, and war crimes committed by RPF members. A Spanish investigating judge collected evidence on the case and issued an

42 Eric David, Belgium, in 8 Y.B. INT’L HUMANITARIAN L. 396, 400–02 (2005) (describing the role of the Court of Cassation and the Cour d’arbitrage in the dismissal of the Kagamé case).
incriminating decision against more than 40 people, which describes in detail different allegations and explains the supporting evidence.\textsuperscript{43}

Universal jurisdiction prosecutions could eventually play a similar role regarding cases that are formally under the jurisdiction of the ICC and should be prosecuted to advance the goals of international criminal law, but that are not prosecuted due to the ICC’s jurisdictional gaps, and institutional and political constraints. The concurrent jurisdiction or “jurisdictional redundancy” between the universal jurisdiction regime and the ICC could enable the former to fill these gaps.\textsuperscript{44}

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

The second reason for the continuing existence of universal jurisdiction is that even in those situations in which legal, institutional, and political constraints do not exclude ICC prosecutions, the ICC Prosecutor can normally prosecute such a small group of defendants that the Court may not be able to achieve its goals—including the traditional goals of punishment and transitional justice goals.\textsuperscript{45}

\textsuperscript{43} Juzgado Central de instrucción No 4, Audiencia National, \textit{Sumario 3/2008 – D. Auto.}

\textsuperscript{44} On the possible functions that jurisdictional redundancy plays in the American legal system, see Robert M. Cover, \textit{The Uses of Jurisdictional Redundancy: Interest, Ideology, and 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 UN Security Council that block the referral of cases to the ICC.

\textsuperscript{45} Addressing insufficient economic and human resources can thus be another explanation or justification for jurisdiction redundancy different from the three identified by Cover, \textit{supra} note 44: self-interest, ideology and innovation.
While crimes against humanity, genocide, and war crimes are usually committed by hundreds or thousands of perpetrators who are members of state or quasi-state organizations, the ICC has only eighteen judges, including at the pretrial, trial, and appeal level; its proceedings are expensive; and it has jurisdiction over situations occurring around the globe. Even if the ICC concentrates on only one of these situations, it can try just a fraction of perpetrators; while it must consider situations from around the world, the Court can only prosecute a very small handful of perpetrators in each of these situations.

A way to bring this point about the ICC’s limited capacity home is to compare its work with that of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR. While the ICTY and the ICTR respectively indicted 161 and 92 individuals for crimes committed in only the former Yugoslavia and Rwanda (or by Rwandans in neighboring states), the ICC has formally charged 1 individual for the situation in Central African Republic, 5 for the situation in the Democratic Republic of Congo (DRC), 6 for the situation in Kenya, 3 for the situation in Libya, 6 for the situation in Darfur, Sudan, and 5 for the situation in Uganda. It is also politically and practically unfeasible for the ICC substantially to increase its court capacity in the near future. And even if it did—let us say, by a factor of ten—the Court would still be able to try only a fraction of those that commit crimes against humanity, genocide, and war crimes around the world. These limitations have understandably led the ICC OTP to focus on “those who bear

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46 There have been yet formal charges against individuals in the investigation of the situations in Ivory Coast opened in early October, 2011.
the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.”

These low numbers of prosecuted defendants may put at risk the Court’s ability to achieve its goals. These goals include, first of all, the traditional goals of punishment, such as retribution, spreading or re-enforcing a social norm against the core international crimes, and deterrence. From the perspective of retribution, justice would require that, in principle, every participant in an international crime be punished. For instance, if mass rapes or killings take place, one could try to argue that the top leaders who order the commission of these crimes are more blameworthy—and should thus be sentenced more seriously, if this is possible—than chain commanders and physical perpetrators of the offenses. But unless one accepts a strong defense of superior orders that has been discarded by domestic and international authorities, or there are relevant consequentialist considerations (some of which are discussed in the next subsection), it would be hard to explain to victims and to justify theoretically why chain commanders and physical perpetrators should go unpunished.

As for the second traditional goal of punishment mentioned above, one could try to argue that punishing top leaders is enough to spread or re-enforce an international social norm against the commission of core international crimes. But I would like to argue that, although important,


48 See, e.g., Rome Statute, Preamble; Dierdre Golash, The Justification of Punishment in the International Context, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY, supra note 4, at 201.

49 On the main positions on the superior orders defense in international criminal law, see, e.g., GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW § 581-95 (2nd ed. 2009).
punishing only the top leaders would be insufficient under this punishment rationale given the typical context in which these crimes take place. As Hannah Arendt showed in her analysis of the Eichmann trial, one of the characteristics of the mass commission of international crimes is that many crime participants may be ordinary citizens who, instead of having hatred towards the victims or an evil personality, are simply responding to the norms and incentives of the state or organization that sponsors or consents to the atrocities.\footnote{ARENDT, EICHMANN IN JERUSALEM, SUPRA NOTE 5.} Prosecuting and punishing chain commanders and physical perpetrators is a way to remind people in those positions that the norm against the commission of core international crimes also applies to them and to help them develop a critical judgment against these types of organizational policies.

As for deterrence, it is empirically unclear whether the threat of international criminal punishment may affect the behavior of heads of states or quasi-states and other crime participants.\footnote{See, e.g., Lee, supra note 4, at 11.} But if it did, deterring chain commanders and physical perpetrators in addition to top leaders would create additional disincentives and coordination problems for them that could prevent the commission of international crimes.\footnote{For an argument in this direction by the ICC, see International Criminal Court, The Appeals Chamber, 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”, 13 July 2006, Situation in the Democratic Republic of the Congo, No. ICC-01/04, para. 73.}

Besides the traditional goals of punishment, the goals of the ICC and international criminal law may also include those of transitional justice, such as giving a voice to victims and
establishing a historical record of the atrocities. One could try to argue that punishing those most responsible would be sufficient to accomplish these purposes, given that their trials would be enough to document all the international crimes sponsored by their states or organizations. But, in fact, contemporary international criminal trials have had problems trying the highest leaders for all the atrocities that took place in a certain territory. The abruptly finished trial of Slobodan Milosevic is testimony to these challenges, and later international prosecutions have taken note of it. For example, at the ICC, prosecutions have concentrated on only some of the crimes alleged against defendants. While this is an understandable strategy because it keeps cases more manageable, it does not give voice to all victims or present a full historical record. Universal jurisdiction prosecutions can supplement the work of the Court in this respect.


C. Analysis of Possible Objections

In the two previous sections, I have advanced two sets of arguments for why universal jurisdiction still has a role to play in the prosecution of international crimes after the creation of the ICC. But even if these arguments were correct, could universal jurisdiction interfere with the work of the ICC and its Prosecutor and do more harm than good to the goals of international criminal law? One could articulate at least three concerns in this respect.

The first of these concerns would rely on the claim by critics of international criminal law that the ICC and universal jurisdiction rely on a dangerous idealism that disregards the international and domestic power structure and is thus likely to do more harm than good. According to these critics, by disregarding the international power structure, universal jurisdiction and the ICC would create a strong disruption of international relations—that may even lead to war—with their prosecution of state leaders for alleged international crimes. By overriding domestic power structures, universal jurisdiction and the ICC would put transitions to democracy or peace deals at risk by prosecuting those who can guarantee and enforce such transitions and deals.56 The concern here would thus be that the continuing existence of universal jurisdiction would substantially increase the likelihood of these scenarios taking place.

by adding prosecutions in situations already under investigation and prosecution by the ICC or by prosecuting cases in situations that the ICC is not investigating and prosecuting.\footnote{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 Landman Goldsmith, The Self-Defeating International Criminal Court, 70 The University of Chicago Law Review 89 (2003). Following that argument, one could argue that universal jurisdiction acting in combination with the ICC would do even more harm to human rights by discouraging United States’s participation in human rights operations even further. I cannot analyze this criticism in detail here but two comments are in order. The first is that as I will argue infra and I have argued in Langer supra note 11, the United States and other powerful states have had more leverage over the ICC and universal jurisdiction prosecutions than the one many of their critics acknowledged. The second comment is that there is not strong evidence that the ICC and universal jurisdiction have actually had the disengaging effect just described over the United States. For a broader empirical debate on whether human rights treaties and criminal prosecutions would do more harm than good to human rights, see, e.g., 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); Hunjoon Kim and Kathryn Sikkink, Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries (2009, on file with the author).}

However, although these risks should not be dismissed outright, these critics have overlooked political checks already in place that make the realization of such risks unlikely. As a necessary background, let’s start by discussing these criticisms regarding the ICC. In discussing political checks and consequentialist considerations in the ICC regime, both supporters and critics of the Court have tended to concentrate on the power of the UN Security Council to defer investigations or prosecutions, and in the “interests of justice” that the ICC Prosecutor has to consider when deciding whether to launch investigations and prosecutions.\footnote{The Rome Statute provides that the UN Security Council may defer an investigation or prosecution for a renewable 12-month period (art. 16) and directs the Prosecutor to evaluate whether prosecution is in the interest of...}
But most supporters and critics have tended to overlook an even more important check: the ICC does not have a monopoly on violence anywhere in the world—not even in its seat, The Hague. For all its investigative and coercive measures, the Court needs the collaboration of states. The need for this collaboration means that the political branches of states have formal and informal ways to ignore or neutralize the ICC’s measures whenever they disagree with them. The ICC regime thus leaves room for political and consequentialist considerations that would help prevent the chaotic scenarios forecasted by critics of the Court.

One could argue that even if these checks would help prevent the realization of these risks in the ICC regime, the risks would be more serious in the case of universal jurisdiction given its decentralized character that would make harder to steer the universal jurisdiction.

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59 For an exception, see Goldsmith, supra note 57.

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

61 For good or bad, the al Bashir case provides examples of this phenomenon to the extent that, despite ICC’s arrest warrant issued against him, 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 southern Sudan.
regime in any given direction, and given that universal jurisdiction states have monopoly on violence over their territories. But elsewhere, I have shown that both supporters and critics of universal jurisdiction have overlooked the role that the executive branch and the legislature of universal jurisdiction prosecuting states play in the regulation of this decentralized regime. By analyzing the asymmetric incentives and disincentives that the political branches have in these cases, I have argued that universal jurisdiction prosecutions would concentrate on low-cost defendants—i.e., on defendants that no state or only weak states would be willing to protect—and I have demonstrated that universal jurisdiction trials have in fact concentrated on such defendants.\textsuperscript{62} If universal jurisdiction continues in such an equilibrium, it is thus unlikely that universal jurisdiction prosecutions would substantially increase the risk of strong disruption of international relations, judicial chaos, or interference with political solutions to armed conflict and mass atrocities.

A second concern about the continuing existence of universal jurisdiction could be that universal jurisdiction’s selectivity over low-cost defendants would do more harm than good to international criminal law by undermining its rule-of-law character that assumes the equal application of the law across cases. A first background observation that should be noted regarding this concern is that selectivity has been, in fact, one of the traditional problems of international criminal law\textsuperscript{63} and that the ICC has not been exempted from this problem. As we already analyzed, if we leave referrals by the U.N. Security Council aside, the Court does not have jurisdiction over the whole globe which in itself makes the Court selective. And as we also already mentioned, the ICC can only prosecute a handful of defendants which also forces the

\textsuperscript{62} See Langer, \textit{supra} note 11.

\textsuperscript{63} See MINOW, \textit{SUPRA} NOTE 22.
Court to be extremely selective. In addition, as an institution that depends on states to enforce all its decisions, the Prosecutor and the Court need the support of powerful states and thus have incentives to concentrate on situations in weak states.

However, universal jurisdiction’s selectivity is actually likely to alleviate rather than worsen these structural selectivity problems of the ICC in particular and international criminal law more generally. First, unlike the ICC, the universal jurisdiction regime has jurisdiction over the whole globe. Universal jurisdiction thus provides reasons to abide by international criminal law’s norms even to defendants whose states are not members of the ICC and to high-cost defendants.64 Furthermore, if universal jurisdiction prosecutes defendants in situations under investigation by the ICC, universal jurisdiction would alleviate, rather than aggravate, the selectivity problems by the Court given that each of these regimes is likely to concentrate in different types of defendants. None of these arguments mean to suggest that universal jurisdiction is a panacea for the selectively problems of the ICC and international criminal law.

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64 It is worth noting that even if the regime concentrates in low-cost defendants given the incentives by political branches in universal jurisdiction prosecuting states, the universal jurisdiction regime still provides reasons to officials that do not fit into the “low-cost” category to abide by the regime’s norms. First, the category “low-cost defendant” is not fixed and a high-cost defendant can become 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 such as the presentation of a complaint, initiation of formal proceedings, the issuing of an arrest warrant, or being arrested, still can create incentives for defendants to abide by international criminal norms and give them reasons to internalize its norms. In this respect, notice that even a very high-cost defendant like former president Bush recently had to cancel a trip to Switzerland for concerns about this regime due to interrogation policies during his administration. See 5-23 War Crimes Prosecution Watch, Feb. 14, 2011, available at [http://publicinternationalallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol05issue23.html](http://publicinternationalallawandpolicygroup.org/wp-content/uploads/2011/04/wcpw_vol05issue23.html).
Selectivity is a structural problem of international criminal law due to the political and practical obstacles involved in prosecuting the core international crimes. But the point is that universal jurisdiction is more likely to alleviate rather than worsen these selectivity problems.

A third set of concerns about the continuing existence of universal jurisdiction could be that universal jurisdiction would increase the politicization of international criminal law, thus undermining the legitimacy of the whole enterprise. Though politicization has multiple possible meanings, two of the main concerns here would be that universal jurisdiction prosecutions do not respect due process standards or that they be politically motivated—i.e., that universal jurisdiction states use these prosecutions to harass or eliminate their political or military enemies. According to this argument, these concerns would be more acute in universal jurisdiction than in the ICC given the scattered character of the former that would increase the chances that any or several of its many states use universal jurisdiction prosecutions for their own ends.

But though once again these concerns should not be discarded outright, I have shown in more detail elsewhere that they have not been substantial or prevalent problems in the universal jurisdiction regime. One of the main reasons is that universal jurisdiction over the core international crimes has been so far a project by developed Commonwealth and Western

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65 On politicization as one of the traditional problems of international criminal law, see MINOW, supra note 22.


67 See Langer, supra note 11.
European states. These states thus tend to meet international due process standards and have safeguards against politically motivated uses of the administration of criminal justice. In addition, though this situation could change and other states could start using universal jurisdiction prosecutions, the states more likely to present these politicization problems—i.e., authoritarian states—have incentives not to engage in universal jurisdiction prosecutions because they may highlight the state’s own human rights abuses and create a boomerang effect against the state in question.\textsuperscript{68}

IV. Universal Jurisdiction’s Actual Practice in Relation to the ICC

Section III has articulated two sets of reasons for the continuing existence of the universal jurisdiction regime, despite the higher legitimacy of the ICC. But leaving this theoretical discussion aside, what has been the actual impact of the creation of the ICC on the universal jurisdiction archipelago? The academic and policy literature has not analyzed this issue, even anecdotally. Although there are no data available at the moment about the evolution of the universal jurisdiction regime over time, the available data suggest that the creation of the ICC has not (substantially) diminished the number of universal jurisdiction statutes and complaints.

At a statutory level, states have not invoked the coming into effect of the ICC regime to repeal pre-existing universal jurisdiction statutes. In fact, several states have passed new universal jurisdiction statutes as part of their domestic implementation of the ICC regime, with the argument that collaboration with the Court may require the exercise of universal

\textsuperscript{68} Id.
jurisdiction.\textsuperscript{69} In addition, those states that have restricted the scope of their universal jurisdiction regulations, such as Belgium and Spain, have done it in response to pressures by other states, rather than following the coming into effect of the ICC Statute.\textsuperscript{70}

At a complaint level, victims and NGOs have continued to present universal jurisdiction complaints after the coming into effect of the ICC regime. According to a global survey that I carried out for a broader project on universal jurisdiction, there have been universal jurisdiction complaints presented (or cases considered by authorities on their own motion) against over 200 individuals since the ICC regime came into effect on July 1, 2002, until the end of 2009, out of a total of 1050 universal jurisdiction complaints presented since 1986.\textsuperscript{71}

Has the Court as the hub of the ICC regime influenced the pattern of complaints of the universal jurisdiction archipelago? In other words, has the Court become also the hub or at least a centripetal force of the universal jurisdiction regime? The survey mentioned above indicates that, since the creation of the ICC, universal jurisdiction complaints and cases considered by authorities on their own motion have concentrated almost exclusively on situations not investigated by the ICC. In fact, out of the over 200 persons against whom universal jurisdiction complaints have been presented, only 2 people, in two different investigations partially relying

\textsuperscript{69} See, \textit{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 (Germany); International Criminal Court Act, 2001, c. 17, §53(3) (United Kingdom).

\textsuperscript{70} See Langer, \textit{supra} note 11.

\textsuperscript{71} For a description of how this global survey was carried out, see Langer, \textit{supra} note 11, at 7.
on universal jurisdiction, have been accused of participating in one of the situations under the investigation of the Court.\textsuperscript{72}

In trying to explain these patterns, one could hypothesize that universal jurisdiction cases have not focused on situations under ICC investigation because the Court is already working on them. According to this hypothesis, whenever an international criminal body investigates a situation, victims, NGOs, and domestic authorities will leave that situation alone because the international criminal body is already taking care of it.

Although this hypothesis has been mentioned by universal jurisdiction practitioners that I have interviewed as part of a broader project on universal jurisdiction,\textsuperscript{73} the first problem with this hypothesis is that it would not explain the pattern of universal jurisdiction cases regarding the ICTY and the ICTR. In contrast with the ICC, universal jurisdiction cases have substantially supplemented the work of the two ad-hoc tribunals. According to the survey mentioned above, there have been 185 complaints or cases considered by authorities on their own motion against former Yugoslavs, out of whom 8 have been tried. There have also been complaints or cases

\textsuperscript{72} 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 Democratic Republic of Congo. A first investigation against them by German authorities was dismissed for insufficient evidence. A second investigation against them is ongoing in Germany. \textit{See} Horand Knaup, \textit{Germany Arrests Rwandan War Crimes Suspects}, Spiegel Online, November 18, 2009, available at \url{http://www.spiegel.de/international/world/0,1518,druck-661965,00.html} (visited on March 18, 2010); BGHSt, AK 3/10, Decision of June 17, 2010. Since the defendants were residing in Germany during the commission of the alleged crimes, but the alleged crimes took place in DRC, the cases against them have relied on the territorial and universal jurisdiction principles. I am grateful to Kai Ambos for discussing this issue in detail with me.

\textsuperscript{73} \textit{See}, \textit{e.g.}, Interview with anonymous member of the European Center for Constitutional and Human Rights, New York City, March 24, 2011.
considered by authorities on their own motion against 87 Rwandans, out of whom 11 have been tried. These numbers are not negligible if we take into account that as of August 24, 2011, the ICTY indicted 161 individuals, adjudicated cases against 77, and has pending cases against 35; and the ICTR indicted 92 individuals, adjudicated cases against 65, and has pending cases against 11.75

The second problem is that if this hypothesis were correct, one might expect more universal jurisdiction cases regarding ICC’s investigations than those of the ICTY and the ICTR because the ICC indicted substantially fewer individuals than the ICTY and the ICTR (a maximum of 6 per situation as we have seen before), and thus arguably has taken less care of its situations due to its more limited indictment capacity. But, as we have seen, the opposite has been true.

Explaining this pattern in case selection in the universal jurisdiction regime would require a rigorous qualitative and quantitative empirical study that I cannot undertake here. But I would like to suggest three tentative explanations for why we find these different patterns of universal jurisdiction cases regarding the ICC, on the one hand, and the ICTY and the ICTR, on the other hand, that future studies could test.

74 See http://www.icty.org/sections/TheCases/KeyFigures (visited on August 24, 2011). By “adjudicated cases” I refer to cases in which the defendant was tried or entered a guilty plea. If we also include cases referred to national jurisdictions or that had their indictment withdrawn or the defendants passed away before they could be tried, the ICTY has completed proceedings against 126 defendants.

75 See http://www.unictr.org/Cases/StatusofCases/tabid/204/Default.aspx (visited on August 24, 2011). As with the ICTR, if we include among concluded cases, cases referred to national jurisdictions or that had their indictment withdrawn or the defendants passed away before they could be tried, the ICTR has completed proceedings against 72 defendants.
First of all, perhaps with the exception of the situation in Darfur, Sudan, and the situation in Libya, none of the other five situations under the investigation of the ICC as of October 11, 2011—Central African Republic, DRC, Kenya, Uganda, and Ivory Coast—have generated the same level of concern around the world and especially in the main universal jurisdiction states of Europe and the developed Commonwealth than the situations in the former Yugoslavia and Rwanda. The violence in former Yugoslavia constituted the worst mass atrocities committed in Europe since World War II, which generated high levels of interest and concern in several European countries. In the case of Rwanda, the genocide took place while atrocities in the former Yugoslavia were still ongoing, which helped to generate concern for even more serious atrocities in an African country; and Belgium and France were directly affected by the genocide because their troops were involved in the situation as UN peacekeepers or they provided military training and support to the Hutu government.76

The level of concern that international crimes generate in universal jurisdiction states may or may not reflect the actual gravity of international crimes—as the relatively low level of concern for the long-standing conflicts and international crimes in the DRC suggests. But this level of concern is important because it may help explain which situations are more salient for NGOs and the general public, thus creating incentives for the political branches and the offices of the prosecutor of states to bring these universal jurisdiction cases forward.77

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77 See Langer, supra note 11.
A second set of explanations to account for the patterns of case selection in the universal jurisdiction regime have to do with the availability or unavailability of victims and potential defendants in universal jurisdiction states. Victims may bring universal jurisdiction claims and evidence before domestic authorities. In addition, international NGOs’ work on universal jurisdiction cases is usually triggered by requests by victims or NGOs from 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 to open formal proceedings on the basis of universal jurisdiction in many legal systems.

In this sense, the low level of organization of civil society and the weak system of NGOs in the Democratic Republic of Congo may help explain why international NGOs have not brought universal jurisdiction claims regarding the situation in that state.\(^{78}\) In addition, there were waves of refugees coming into Europe and elsewhere in the West because of the conflicts in the former Yugoslavia and Rwanda, and we may not see as many refugees in Europe and other Western countries in most of the situations under the consideration of the ICC. The absence of defendants in the territory of potential prosecuting states might help explain, for instance, why participants in international crimes in Darfur have not been prosecuted on the basis of universal jurisdiction despite the concern that these crimes have generated. Most of these participants have likely had no need to immigrate to universal jurisdiction prosecuting states given that the regime that has allegedly sponsored the atrocities is still in power.

Finally, the ICTY and the ICTR, together with the UN Security Council, have encouraged universal jurisdiction prosecutions in a way that to date the ICC has not. The UN Security Council issued resolutions encouraging states to prosecute those responsible for the

\(^{78}\) Interview with anonymous member of the Center for Constitutional Rights, New York City, April 5, 2011.
commission of international crimes in the former Yugoslavia and Rwanda. As a consequence, a few states passed special statutes giving universal jurisdiction to their courts over those crimes that the ICTY and the ICTR have jurisdiction over, or used pre-existing statutes to exercise universal jurisdiction.

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. Thus, there have been a few universal jurisdiction cases that the ICTY and the ICTR initially entertained but later decided to transfer to national jurisdictions, usually as part of their completion strategy. The ICC has made almost no use of universal jurisdiction in this direction.

These explanations already suggest several measures that the ICC OTP could explore or practice further in order to foster universal jurisdiction prosecutions when it believes that such prosecutions would help further the goals of the Court. For instance, the ICC OTP could try to persuade human rights NGOs and domestic constituencies of the seriousness of past or ongoing international crimes in certain places. It could foster more domestic prosecutions on the basis of territoriality, active nationality, or universal jurisdiction by providing technical support or

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

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

82 One if not the only exceptions are the cases of Murwanashyaka and Musoni in Germany described supra note 72.
sharing information or evidence with states.\textsuperscript{83} It could encourage domestic prosecutions by interpreting the complementarity principle more strictly to make it more difficult for states to refer situations or prosecutions to the Court;\textsuperscript{84} or it could call states to exercise universal jurisdiction over certain situations.\textsuperscript{85}

In fact, the (further) use of these and similar tools would fit well with the conception of the role of the ICC Prosecutor advanced by this collection of essays, according to which the ICC Statute “creates a role for the Prosecutor as catalyst and diplomat, authorized and expected to build commitment to the norms and practices of international criminal justice.”\textsuperscript{86} But it is important to note that the ICC Prosecutor has more challenges to surmount than the ICTY and the ICTR, when encouraging states to exercise universal jurisdiction in particular and to support the work of the Court more generally.

The UN Security Council created the ICTY and the ICTR because its permanent members felt obliged to respond to past and ongoing mass atrocities that had already generated

\textsuperscript{83} This type of sharing of information by the OTP of the ICC was apparently important to facilitate the prosecution of Murwanashyaka and Musoni in Germany.

\textsuperscript{84} See, e.g., William Schabas, ‘‘Complementarity in Practice’’: Some Uncomplimentary Thoughts, 19 CRIMINAL LAW FORUM 5 (2009).

\textsuperscript{85} On tools that the OTP of the ICC could use to encourage states to prosecute crimes under the jurisdiction of the Court, see, William Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 HARV. INT’L L.J. 53 (2008).

\textsuperscript{86} Martha Minow & Alex Whiting, Introduction: The Prosecutor Casts a Shadow: Convenor, Collaborator, and Law Enforcer, in THE FIRST GLOBAL PROSECUTOR: CONSTRAINTS AND PROMISE (Martha Minow & Alex Whiting eds., The University of Michigan Press, forthcoming 2012).
great public concern around the world. Thus, some of the most powerful states in existence made a commitment and provided support to the idea that a criminal law response to these atrocities was appropriate and one of the central tools to deal with these two situations. In these circumstances, very powerful states and organizations such as the European Union and NATO have been willing to use their leverage in order to, for instance, ensure that defendants are surrendered and evidence provided to the ICTY.

In contrast, the ICC responds to situations that took place after the Court’s regime came into effect, which may not generate similar levels of concern. It is the first international criminal tribunal or court that is not a top-down creation by the UN Security Council or the main world powers, and it has to compete with diplomatic approaches to mass atrocities even among those states that support the Court as an abstract idea or project. These differences mean that the ICC Prosecutor has to start almost from scratch in many new situations. In order to receive support, the Prosecutor must persuade a large enough number of powerful states that the situation warrants an international response and the sustained mobilization of international resources, and that a criminal law approach to the situation would do more good than harm and be better than an exclusively diplomatic approach.

This is then 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 will have

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more difficulties to overcome before it can successfully advance the goals of this project. In the specific case of universal jurisdiction, the ICC needs more help from universal jurisdiction prosecutions than the ICTY and the ICTR have, given its permanent character, global reach, and misalignment with the world’s power structure. But these very features make it more difficult or less likely that NGOs and states launch or even consider launching universal jurisdiction prosecutions supplementing the work of the Court.

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

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

If universal jurisdiction prosecutions started to concentrate more on situations under investigation by the ICC, one of the central questions sure to arise will be: which prosecution should have priority when ICC and universal jurisdiction prosecutions overlap over a case within a specific situation? The ICC Statute regulates the relationship between domestic prosecutions and the ICC through its complementarity principle, according to which a case is inadmissible before the Court if it is being or has been investigated, prosecuted, or tried “by a State which has jurisdiction over it.”

The commentators and experts who have analyzed the relationship between universal jurisdiction prosecutions and the Court have claimed that the principle of complementarity should apply to it, at least when the exercise of universal jurisdiction is legal under domestic and

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90 ICC Statute, article 17.
international law. In defense of their position, they 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 textual interpretation of article 17 of the ICC Statute, includes universal jurisdiction. In addition, according to some of these commentators, this interpretation of the complementarity principle would prevent the overloading of the ICC.  

In this final section, I would like to argue against such an interpretation of the relationship between the two regimes. To start with, the textual reading of article 17 of the ICC Statute can be questioned if one interprets this article in its context, as indicated by article 31 of the Vienna Convention of the Law of Treaties. 

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92 Since the ICC Statute is a treaty, this interpretative methodology is consistent with Article 31 of the Vienna Convention of the Law of Treaties, which 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., ICC Appeals Chamber, Judgment on Prosecutor’s
can interpret the phrase “a State with jurisdiction over the case” as only including territorial and active nationality jurisdiction because these are the two main types of jurisdiction established elsewhere in the ICC Statute.\(^\text{93}\)

More substantively, from a teleological perspective, none of the main rationales for the complementarity principle favor giving automatic priority to genuine universal jurisdiction prosecutions over ICC prosecutions. The first rationale for complementarity is that it is respectful of state sovereignty.\(^\text{94}\) This argument applies to crimes that take place in the territory or are committed by the nationals of a state because these are two uncontroversial bases of jurisdiction, grounded in the idea that states have a privileged relationship with their territory and nationals.\(^\text{95}\) But this reasoning does not apply when a third state claims jurisdiction over a crime based on universal jurisdiction. In fact, as we have seen in section II, universal jurisdiction prosecutions are arguably less respectful of other states’ sovereignty than those of the ICC.

\(^{93}\) Rome Statute, art. 12(2) and (3). As already point it out, the Court also has jurisdiction over any case referred to it by the UN Security Council, even if the case in question involves the territory and nationals of a non state party. But this type of jurisdiction can be understood as exceptional within the ICC regime.


\(^{95}\) See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-03. It is beyond the scope of this article whether, under the complementarity principle, domestic prosecutions based on the passive personality principle should have priority over the ICC’s jurisdiction.
Another rationale for complementarity is that giving priority to states to investigate and prosecute international crimes better advances the goals of international criminal law, including the traditional goals of punishment and transitional justice goals. For instance, 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 re-establish the domestic legal system and give an authoritative account of the atrocities that will reach local constituencies.

However, this reasoning applies best when the prosecutorial authorities and courts of the territorial state analyze the international crimes, not when a third state prosecutes them on the basis of universal jurisdiction. In fact, there are many scenarios in which the ICC may be in a better position to advance the traditional goals of punishment, to help reestablish the domestic legal system, and to give a credible account of the international crimes because, as we have seen, it has higher legitimacy than universal jurisdiction.

Another argument for complementarity is that states are better situated to investigate and prosecute international crimes than the ICC from a practical perspective. The reasoning here is that the territorial—and sometimes the active nationality—state can gather elements of proof more easily 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 let ICC investigators work in the state’s territory.

But, once again, this rationale does not apply to universal jurisdiction prosecutions because they must deal with the same obstacles as the ICC. In fact, the obstacles may be larger in universal jurisdiction prosecutions because those states that have ratified the ICC Statute have promised to collaborate with ICC investigations, and the ICC Prosecutor may be in a less competitive position vis-à-vis domestic jurisdictions than domestic jurisdictions amongst themselves.99

B. The Presumptive Principle of Complementarity

There are thus good reasons for not using the ICC’s principle of complementarity to regulate the relationship between universal jurisdiction and ICC prosecutions. But rejecting ICC’s automatic principle of complementarity does not entail adopting the opposite principle of primacy, according to which the Court would always trump universal jurisdiction prosecutions.100 Adopting the primacy principle would be ill-advised for the Court because it could discourage states from exercising universal jurisdiction over situations under investigation by the Court, which, as we have seen, could be detrimental for the Court’s ability to achieve its

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own goals. It would be unwise especially at the current moment given that there have been almost no universal jurisdiction prosecutions supporting the work of the ICC.

Rather, the ICC OTP and the Court could adopt a presumptive (as opposed to an automatic) principle of complementarity that assumes that universal jurisdiction prosecutions have a role to play in supplementing the work of the ICC and would normally be given priority over ICC prosecutions, while recognizing the higher legitimacy of the Court. This presumptive principle of complementarity could be implemented in two ways. It could be implemented informally by the ICC Prosecutor, who could convey to potential universal jurisdiction authorities his/her preference to prosecute a case in certain circumstances. This idea could be more easily implemented in those universal jurisdiction states that, contrary to the commentators’ predominant position, give priority to the ICC over universal jurisdiction prosecutions, such as Belgium, Germany, and Spain. Alternatively to or in conjunction with an informal implementation, the presumptive principle of complementarity could be formally implemented by interpreting article 17 as nonapplicable to universal jurisdiction prosecutions, by issuing prosecutorial guidelines or a Court’s decision about this matter.

\footnote{Belgium amended its universal jurisdiction statute in 2003 to provide that 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. \textit{See} Loi du 23 avril 2003, art. 16(2). Germany’s universal jurisdiction statute, the \textit{Völkerstrafgesetzbuch}, provides that the prosecution should refrain from bringing charges if “the case will be pursued in an international court of justice or in a court in the territory where the crimes occurred.” \textit{See Völkerstrafgesetzbuch [VStGB]} [International Law Criminal Code], June 30, 2002, art. 3(5). Spain has a similar statute which mandates that no case may be taken up under universal jurisdiction if it is being investigated or prosecuted by an international tribunal. \textit{See} Ley Orgánica 6/1985 del Poder Judicial, art. 23(4) (1985).}
VI. Conclusion

This chapter has analyzed the relationship between universal jurisdiction and ICC prosecutions. The chapter has argued that prosecutions before the ICC have higher legitimacy than universal jurisdiction prosecutions because the ICC is more representative, accountable and transparent to humanity, and is more respectful of state sovereignty. But the chapter has also explained why universal jurisdiction prosecutions still have a supplementary role to play in the enforcement of core international crimes due to the gaps, constraints, and limited capacity faced by the ICC and its OTP.

This chapter has also demonstrated that since the ICC Statute came into effect, universal jurisdiction has concentrated on situations in which the ICC has no jurisdiction and has done almost nothing to prosecute cases under investigation by the Court. The chapter has explored possible reasons for this pattern of universal jurisdiction prosecutions and has suggested tools that the ICC could use to change this pattern, while identifying the extra challenges that the ICC has to surmount vis-à-vis the ICTY and the ICTR to advance this goal.

Finally, the chapter has articulated reasons to reject a strict application of the ICC’s principle of complementarity to regulate the relationship between the two regimes. A presumptive complementarity principle would not discourage the universal jurisdiction prosecutions that could help advance the goals of the ICC, while at the same time allowing for the higher legitimacy of the Court.