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The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes

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THE NEW UNIVERSAL JURISDICTION:
IN ABSENTIA SIGNALING OVER CLEARLY DEFINED CRIMES

ANTHONY J. COLANGELO*

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I. INTRODUCTION

This Article explores the controversial international legal principle of universal jurisdiction—i.e., the principle that criminal jurisdiction

* Associate, Cleary Gottlieb Steen & Hamilton, LLP, New York. I would like to thank and dedicate this Article to my father for his invaluable administrative assistance during the submission process.
by all states arises solely from the nature of the crime committed. The Article deals with two main issues confronting the modern doctrine and application of the principle: (i) whether a state may assert universal jurisdiction absent the presence of the accused on that state's territory, and (ii) what crimes give rise to universal jurisdiction. The purpose of this Article is to explore these issues fully, taking into consideration both theoretical and practical concerns, and to resolve the issues in favor of a modern principle of universal jurisdiction tailored to the oftentimes competing needs of international justice and peaceful relations among states.

A. Universal Jurisdiction in International Law

The term "jurisdiction" is a legal proxy for the power to apply and enforce laws over a defined group of persons. The persons may be defined by their physical presence in a given territory or by a legal relationship to that territory (for example, the relationship of citizenship or nationality). One of the most general forms of jurisdiction is that of a nation state over its own territory, which is called by such diverse names as "national jurisdiction," "state jurisdiction," "domestic jurisdiction," or just "sovereignty." One jurisdiction may overlap with another jurisdiction; in such cases there is concurrent jurisdiction. Of intense interest in recent international relations and academic debate is the legal question of when a state can assert its criminal jurisdiction over conduct that occurs outside its own borders.

Jurisdiction in international law is seldom clear because its "international" dimension contemplates various and fluid factors, not the least of which is the potential impact of a given jurisdictional assertion on other states with concurrent jurisdictional claim over the accused.


2. Consider two states, A and B, each having jurisdiction over its own territory. Can state A extend its jurisdiction to all or part of state B's territory? When it can, the jurisdiction is called "concurrent." Examples of concurrent jurisdiction might be jurisdiction over a vessel of A docked in B's territorial waters, or A's embassy building located in B's capital city. It is also possible for A to extend its jurisdiction over its nationals who are visiting B or doing business in B; those, too, would be examples of concurrent jurisdiction. But, under existing international law at least, and for the foreseeable future, A cannot extend its jurisdiction to a boundary dispute between two counties in B. Such a dispute falls clearly within B's exclusive jurisdiction.

3. See generally Bassiouni, supra note 1, at 40; Luc Reydams, UNIVERSAL JURISDICTION (2003).
offender. There are a number of established bases or principles in customary law that describe jurisdiction. The territoriality principle is invoked when the act over which a state wishes to assert jurisdiction takes place or has an effect on the territory of that state. The so-called "flag principle" may be considered an extension of the territoriality principle because it holds that vessels carrying a state's flag are subject to that state's jurisdiction, or put differently, the vessel is that state's territory. The nationality or active personality principle is invoked where the perpetrator of the offense is a national of the state, and the passive personality principle is invoked when the victim of the offense is a national of the state. The protective principle is invoked where the offense "harms the state's interests." The representation principle is applied where a custodial state—the state on whose territory the offender is found—prosecutes an offense by acting as a surrogate for the territorial state. Under the representation principle the crime need not be proscribed as a matter of international law, and some form of understanding or cooperation between the territorial and prosecuting state is necessary.

Finally, the most controversial principle of jurisdiction is the universality principle. This principle holds that international law considers certain acts to be so egregious that the nature of the crime itself engenders jurisdiction by any state irrespective of territorial or national links. Serious crimes under international law that are potentially subject to universal jurisdiction include genocide, slavery, torture,
crimes against humanity, war crimes, and perhaps terrorism. The focus of this Article is on universal crimes and the nature of the jurisdiction they engender.

B. Two Main Issues Confronting Universal Jurisdiction

The controversy surrounding the universality principle stems from two main issues raised in modern theory and practice, both of which are fundamentally jurisdictional. The first issue focuses on the state asserting jurisdiction and asks whether that state may do so absent the presence of the accused on its territory—or what this Article will call “universal jurisdiction in absentia.” The second issue focuses on the alleged universal criminal’s jurisdiction-triggering conduct and asks what crimes give rise to universal jurisdiction.

In response to the first issue, Part II of this Article will take the position that states may assert universal jurisdiction in absentia—a position that has met with grave skepticism by courts and commentators alike. This Part will first briefly define universal jurisdiction in absentia and distinguish it from issues associated with trials in absentia. It will then confront the difficulties inherent in universal jurisdiction in absentia—most particularly, the potential for serious clashes among states with concurrent jurisdiction and the resulting threats to sovereignty that in absentia assertions pose. The discussion will observe that much of the difficulty a traditional sovereignty analysis has with universal jurisdiction is based on a formalistic understanding of jurisdictional
interplay among states whereby jurisdiction derives from an exclusive list of well-defined interests, most prominently, territorial and national. These interests measure the objective link that a given state has to an offense and provide for jurisdiction accordingly.

Of course, the problem with universal jurisdiction is that the objective link—the offense itself—theoretically exists for all states (that is, jurisdiction stems from all states having an interest in bringing universal criminals to justice). Thus, in order to cabin in the potentially arbitrary and sovereignty-destructive reach of this form of jurisdiction, some other objective criterion must be added. Although arguably unique to and theoretically inconsistent with universal jurisdiction, the requirement that the accused be present on the state’s territory serves this function. While the presence criterion is external to the universal principle itself, it serves as a practical check on the ability of states to dilute and disrespect other states’ sovereignty through in absentia assertions.

Accordingly, in resolving the threat that universal jurisdiction poses to sovereignty, Part II will identify a procedure whereby states practice universal jurisdiction in a way that respects sovereignty by balancing well-defined, established interests. The procedure uses established jurisdictional bases to describe a burgeoning custom underlying the increased—albeit still limited—practice of universal jurisdiction. The procedural model distributes jurisdictional competences according to a hierarchy of these established bases or interests: territoriality, nationality (active personality), passive personality, the extent to which the offense harms the state’s interests, etc. The distribution of jurisdictional priority determines which state has a stronger jurisdictional claim over the offense and the accused. Those states having the strongest link to the offense and the accused will always have superior jurisdictional priority. However, absent their willingness to assert jurisdiction, the accused will not enjoy an effective grant of impunity because some other state may always step up to close the jurisdictional loophole. In this respect, an assertion of universal jurisdiction in absentia will act as a last resort option since any state on whose territory the accused is found—i.e., the custodial state—will have priority over another state which, absent traditional jurisdictional links, is looking to assert universal jurisdiction. Through this procedure, traditional jurisdictional bases, each rooted in self-contained notions of sovereignty (in that jurisdiction stems from the strength of a state’s autonomous interest in prosecuting the harm), work together in a sovereignty-respectful way to protect not only a state’s autonomous interest, but the larger international interest as well.
Part II will explain further how universal jurisdiction in absentia actually strengthens interstate relations because it provides for signaling among states. It will argue that such signaling develops and clarifies custom in a way that affords states more options to act against perpetrators of international crime. In this regard, it will show how in absentia assertions provide a means of communication among states whereby universal jurisdictional claims may be evaluated prospectively and reacted to by interested states, invariably adding to and refining the currently vague rule of universal jurisdiction and freeing states to act pursuant to a surer custom. Moreover, it will describe how this new form of universal jurisdiction through signaling is more respectful of sovereignty than the usual exercise of universal jurisdiction (where the accused is found on the state’s territory), and even tends to focus international relations on human rights.

Last, Part II will demonstrate how universal jurisdiction in absentia combats impunity by providing a measure of punishment and deterrence of serious international crime where the alternatives in international legal practice are judicial paralysis on the one hand and more intrusive and belligerent self-help measures, like abducting the accused or taking military action against the harboring state, on the other. Part II will conclude that universal jurisdiction in absentia may be asserted in a way that offers a moderate and flexible approach to international crime capable of accommodating the potentially conflicting interests of sovereignty maximization and international justice.

In response to the second issue—what crimes give rise to universal jurisdiction—Part III will explore the category of crimes conventionally considered to be universal in nature. In so doing, it will explain how the category of crimes susceptible to universal jurisdiction has undergone radical transformation since the end of World War II and now potentially includes genocide, slavery, torture, crimes against humanity, war crimes, and perhaps terrorism. The discussion will canvass the rationales behind the inclusion of genocide, slavery, and torture under the universal jurisdiction rubric. It will then discuss serious problems raised by the use in practice of war crimes and crimes against humanity as bases of universal jurisdiction. Specifically, it will examine why, while these crimes may conventionally be considered universal in nature, aspects of their definition and scope lead too easily to abuse of universal jurisdiction for purely political or sensationalist motives and,}

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17. See THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, supra note 12, princ. 2(1), at 29 (Serious Crimes Under International Law); see also SCHACHTER, supra note 14, at 268.
consequently, why use of these crimes as jurisdictional bases invokes powerful opposition by interested states. The discussion will contend that, in the end, universal jurisdictional assertions over these crimes at the present time might work only to undermine customary development of the principle. Finally, Part III will argue that while “terrorism” generally defined is not subject to universal jurisdiction, certain well-defined acts of terrorism—like planting a bomb on civilian aircraft—are. These acts have clearly spelled-out meanings in positive international law instruments like treaties and conventions, instruments that moreover provide for extraterritorial and extra-national jurisdiction to reflect the underlying customary law as to the universal nature of the crimes.

II. Universal Jurisdiction in Absentia

A. Defining Universal Jurisdiction in Absentia

In absentia assertions over crimes of universal jurisdiction contemplate jurisdiction over defendants who are either in hiding or openly living in harboring countries. This basis of criminal jurisdiction argues for an extension of territorial jurisdiction to encompass the globe with respect to certain crimes because the crimes themselves jeopardize the globe. In contrast, if an individual is physically on the territory or before the court with the appropriate jurisdiction in, say, a routine war crimes case conducted in an international tribunal or municipal court, much of the following discussion becomes irrelevant. In other words, the discussion is critical to cases where serious international criminals evade more routine forms of criminal jurisdiction.

Universal jurisdiction in absentia can be roughly defined as the conducting of an investigation, the issuing of an arrest warrant, and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state.\(^\text{18}\) This definition does not include adjudication of the case. A joint separate opinion in the International Court of Justice (ICJ), for example, has explicitly distinguished between universal jurisdiction in absentia and trials in absentia, observing that

Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction under international law.¹⁹

Thus, for purposes of defining universal jurisdiction in absentia, it is the nature of in absentia jurisdiction—i.e., universal jurisdiction in absentia—not the nature of an in absentia trial that most implicates international law. The latter question is largely considered one of general principles of international law,²⁰ and any positive obligation

¹⁹. See id. ¶ 56. It follows that issues of due process in a trial in absentia conducted pursuant to universal jurisdiction in absentia do not impact the legal validity of the jurisdiction and vice versa. The Princeton Principles, a progressive academic restatement on the subject of universal jurisdiction, takes a similar approach to universal jurisdiction in absentia. The Principles specifically allow for the possibility of universal jurisdiction in absentia as envisaged by the joint separate opinion. The official commentary accompanying The Principles states that subsection (2) of Principle 1 holds that a "competent and ordinary" judicial body may try accused persons on the basis of universal jurisdiction "provided the person is present before such judicial body." The language of Principle 1 (2) does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition, when the accused is not present.

²⁰. See M. Cherif Bassiouni, The Sources and Content of International Criminal Law: A Theoretical Framework, in 3 INTERNATIONAL CRIMINAL LAW: CRIMES 109 (M. Cherif Bassiouni ed., 2d ed. 1999) (explaining that "[t]he rules of procedure and evidence which have been developed by the [international tribunals] are based on general principles of procedural law which emerge from the laws and practices of the world’s major criminal justice systems"); M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT’L L. 235, 239-40 (1993) (observing in a review of international criminal procedural rights that his "study uses a purely empirical model of searching for repetition and similarity among the various rights to prove that similar rights evidence the existence of principles common to international law and national law, and that they are binding 'general principles of law'"); see also SCHACHTER, supra note 14, at 51 ("The use of municipal law rules for international judicial and arbitral procedure has been more common and more specific than any other type of application."); HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 210 (1927) ("It is in their capacity as courts of justice that international tribunals have taken over and adapted for their purposes private law rules of evidence and procedure."). For specific examples, see Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 51-53 (Jan. 14) (citing res judicata as
such principles pose among states, for example via international treaty or covenant, enjoy a wide margin of appreciation.\textsuperscript{21}

As to the issue of in absentia jurisdiction, in absentia territorial or national jurisdiction is relatively uncontroversial. Indeed, these types of in absentia jurisdictional assertions can lead to the most routine requests for extradition, or "the right for a State on the territory of which an accused or convicted person has taken refuge, to deliver him up to another State which has requisitioned his return and is competent to judge and punish him."\textsuperscript{22} Further, if a request for extradition is denied or simply not pursued, a territorial or national state may proceed with a trial in absentia under the prosecuting state's municipal law. For instance, France's in absentia trial and conviction of Argentine Captain Alfredo Astiz in 1990 for the kidnapping and disappearance of two French nuns in Argentina\textsuperscript{23} was based on an accepted passive

\begin{quote}
International law has recruited and continues to recruit many of its rules and institutions from private systems of law . . . . The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", [sic] ready-made and fully equipped with a set of rules . . . . In my opinion the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.
\end{quote}

\textsuperscript{21} The margin of appreciation is a doctrine first developed by the European Court of Human Rights that "grants varying degrees of deference to the national authorities' evaluation of how [an internationally agreed-upon] right applies in particular circumstances." Gerald L. Neuman, \textit{The United States Constitution and International Law: The Uses of International Law in Constitutional Interpretation}, 98 Am. J. Int'l. L. 82, 87 n.29 (2004). With respect to a trial in absentia the right would be the right to a fair trial or perhaps the right to be present at trial, see ICCPR, supra note 19, art. 14, at 177.


nationality principle, and thus France’s decision to proceed with a trial in absentia was a question for its municipal code\textsuperscript{24} rather than international custom. The same was true of Italy’s in absentia prosecution of the terrorist Abu Abbas, the hijacker of the Italian cruise liner the \textit{Achille Lauro},\textsuperscript{25} which could be justified under the territoriality or flag principles.\textsuperscript{26}

While there is little question that in absentia jurisdictional assertions based on territoriality or nationality are permissible under international custom, for the reasons discussed below, in absentia jurisdictional claims based solely on the principle of universality have created much controversy.\textsuperscript{27} Thus, this Section addresses situations where a state asserts in absentia jurisdiction over a universal crime absent territorial or national links, i.e., universal jurisdiction in absentia.

Perhaps the most famous example of a universal jurisdiction in absentia claim is Belgium’s issuance of an international arrest warrant for Yerodia Ndombasi, Congolese Minister of Foreign Affairs,\textsuperscript{28} for war crimes and crimes against humanity, including genocide.\textsuperscript{29} Belgium issued the arrest warrant although Belgium had no national link to Ndombasi, no territorial or national link to the alleged crimes he had

\begin{itemize}
\item \textsuperscript{24} Richard Vogler, \textit{Criminal Procedure in France, in Comparative Criminal Procedure} 14, 83 (John Hatchard et al. eds., 1996).
\item \textsuperscript{26} See discussion supra Part I.A.
\item \textsuperscript{28} Ndombasi was, at the time the arrest warrant was issued, the Minister of Foreign Affairs. However, his position changed subsequent to the arrest warrant issuance. See \textit{Press Statement of Judge Gilbert Guillaume, President of the International Court of Justice} (Feb. 14, 2002), \textit{at} http://www.icj-cij.org/icjwww/presscom/SPEECHES/iSpeechPresident_Guillaume_cobe%20judgement_20020214.htm. See also Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) ¶ 13, 18, \textit{available at} http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF. The International Court of Justice decided the case on the issue of Ndomasi’s immunity as Minister of Foreign Affairs and found that because of his immunity, the arrest warrant violated international law. The question concerning the validity of the warrant in absentia, apart from the immunity issue, did not directly contribute to the court’s decision. \textit{See} id. ¶ 78(2).
\item \textsuperscript{29} For a specific account of the charges, see Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶ 64 ("The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. . . . [There is precedent] that liability for a crime against humanity includes liability through incitement to commit the crime concerned.").
\end{itemize}
committed, and no evidence of Ndombasi's presence on Belgian territory.\textsuperscript{30} Because Belgium issued the warrant absent any territorial or national link, Belgium's jurisdiction over Ndombasi could only be justified under the principle of universal jurisdiction.\textsuperscript{31} And because the warrant was issued absent the presence of the accused on Belgian territory, it can be categorized only as an assertion of universal jurisdiction in absentia.

Congo brought the case to the ICJ, which issued its judgment in \textit{Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)} on February 14, 2002.\textsuperscript{32} In the ICJ majority's opinion, the case turned on the issue of diplomatic immunity rather than jurisdictional questions, as Ndombasi was, at the time of the warrant's issuance, the Congolese Minister of Foreign Affairs and was therefore immune from criminal jurisdiction under international law.\textsuperscript{33} After the ICJ's ruling against Belgium, Belgium repealed the arrest warrant and, in an interesting twist, its pre-trial Court of Appeals chamber ruled that the proceedings against Ndombasi were not valid from the start, as Ndombasi had not been voluntarily present in Belgium.\textsuperscript{34}

Nonetheless, the Belgian arrest warrant set the stage for discussion of whether universal jurisdiction in absentia is, and should be, permissible as a matter of customary international law. Some of the judges took up the question in separate opinions. Judge Guillaume and Judge Rezek rejected the idea of universal jurisdiction in absentia chiefly on the rationale that such a doctrine would lead to arbitrary assertions by more powerful states against nationals of weaker states and erode international cooperation.\textsuperscript{35} Judge Koroma supported the assertion of universal jurisdiction in absentia without much explanation.\textsuperscript{36} Examining the issue in detail, the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal broke new ground in observing that

\textsuperscript{30} See id. \textsuperscript{2}.
\textsuperscript{31} Cf. id. \textsuperscript{19-20}.
\textsuperscript{32} Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121.
\textsuperscript{33} Id. \textsuperscript{54}, 71.
\textsuperscript{34} See REYDAMS, supra note 3, at 116.
\textsuperscript{35} Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (separate opinion of President Guillaume) \textsuperscript{15}, (separate opinion of Judge Rezek) \textsuperscript{9}.
\textsuperscript{36} Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (separate opinion of Judge Koroma), \textsuperscript{8} ("Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation."), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_koroma.PDF.
universal jurisdiction may be exercised in absentia.\textsuperscript{37}

The joint separate opinion found that although customary international law did not yet promote a rule of universal jurisdiction in absentia, neither did it preclude such jurisdictional assertions.\textsuperscript{38} The opinion also proposed certain safeguards for the implementation of this type of universal jurisdiction\textsuperscript{39} necessary to "prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States."\textsuperscript{40} The joint separate opinion made clear that while the universality principle is relatively straightforward in its argument that states may assert universal jurisdiction,\textsuperscript{41} more confusion surrounds the questions of how and when this jurisdiction may be asserted—that is, under what conditions can universal jurisdiction be exercised in absentia?\textsuperscript{42} To be sure, even some of the most progressive academic commentary on the issue has not taken a firm stand one way or the other on this issue.\textsuperscript{43} This Article argues that the accused need not be present on the territory of the state when universal jurisdiction is asserted provided that certain safeguards against abuse are followed.

B. The Threat to Sovereignty

Universal jurisdiction in absentia is presently caught in a customary twilight that will witness either the development or the dismissal of the practice depending on the actions and reactions of states in the next part of this century. State practice has not yet worn into the fabric of

\textsuperscript{37.} Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶ 59.

\textsuperscript{38.} Id. ¶ 45.

\textsuperscript{39.} According to the joint separate opinion of Judges Higgins, Kooijmans, and Burgenthal, the safeguards would relate specifically to universal jurisdiction in absentia as opposed to universal jurisdiction where the alleged criminal is in the territory of the state that is asserting jurisdiction. Id. ¶ 59.

\textsuperscript{40.} Id.

\textsuperscript{41.} Id. ¶ 58-59; see also SCHACHTER, supra note 14, at 268-69.

\textsuperscript{42.} Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶ 54.

\textsuperscript{43.} See, e.g., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, supra note 12, at 43:

Should the Principles insist at least that the accused is physically present in the territory of the enforcing state? Should other connecting links also be required? Participants decided not to include an explicit requirement of a territorial link in Principle 1(1)'s definition. This was done partly to allow for further discussion, partly to avoid stifling the evolution of universal jurisdiction, and partly out of deference to pending litigation in the International Court of Justice.
international law an affirmative custom of universal jurisdiction in absentia assertions. At the same time, however, an incipient trend supporting this type of assertion is emerging, and those who take a permissive view of international law might legitimately submit that custom does not explicitly prohibit universal jurisdiction in absentia.

The most obvious objection to universal jurisdiction in absentia is that its use is hostile to basic principles of state sovereignty. The sovereignty argument holds that such jurisdiction undermines state sovereignty in both an abstract and a concrete manner. In the abstract, the universal jurisdiction in absentia claim disposes of the classical notion of jurisdiction as being rooted in state sovereignty; that is, the practice tends to dilute or negate the jurisdictional prerogative granted to the sovereign state by international law. Reydams explains:

To be sure, in absentia proceedings in [universal jurisdiction] cases do not interfere with the domestic affairs of other States since the alleged crimes are indeed crimes under international law. Nevertheless, the fact is that jurisdiction exercised by a State without its having an objective or legal link with either the offence or the offender erodes the very concept of jurisdiction. Unlimited (hence arbitrary) jurisdiction is a contradictio in terminis and runs counter to one of the fundamental goals of international law: a rational distribution of competences among equal sovereigns. Thus, while not violating the non-interference principle, universal jurisdiction in absentia contravenes the more fundamental principle of sovereign equality of States, of which non-interference is only one aspect.

But this criticism is even too generous because it ignores the concrete face of the sovereignty argument: the possibility that in absentia proceedings could be abused by national courts for their own political ends, thereby creating very real interference in the domestic affairs of states protecting the accused. In this regard, the practice of universal jurisdiction plays an active role in deconstructing state sovereignty, not

44. Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (separate opinion of President Guillaume) ¶ 16; REYDAMS, supra note 3, at 224.

45. See, e.g., Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶¶ 44-52. But see REYDAMS, supra note 3, at 230 (disagreeing with points made by the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

46. REYDAMS, supra note 3, at 224.

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only by diluting the state's jurisdictional prerogative, but also by using the expansive jurisdictional claim to attack that state's decision not to prosecute and even to protect the accused. Mutual respect for sovereignty and the desire to maintain interstate relations through non-interference with other (harboring, and perhaps territorial and national) states will therefore tend to block the operation of universal jurisdictional assertions and proceedings. As a result, in absentia jurisdiction over universal crimes is viewed with a great deal of skepticism or flat rejection by those who seek to maximize state sovereignty at the expense of international justice. As will be discussed in Part III, the interest of sovereignty maximization provides an excellent reason for limiting the category of universal crimes to those which are most clearly defined under international law; opening the floodgates of in absentia prosecutions to an expansive list of crimes would ensure that these proceedings are never born as a matter of practice.47

The argument that universal jurisdiction in absentia threatens sovereignty is premised on the notion that because universal jurisdiction has no objective criteria limiting its seemingly random application (other than the presence of the accused), in absentia assertions would create a chaotic and arbitrary method of enforcing international law.48 This speculation does not, however, accurately reflect how universal jurisdiction actually works. The practice of universal jurisdiction by states, including those limited instances of universal jurisdiction in absentia, points not to randomness, but rather to a somewhat balanced approach that contemplates the competition of traditional (and sometimes non-traditional) state interests. While the burgeoning custom of universal jurisdictional assertions in general may not have established a clear rule promoting the use of universal jurisdiction in absentia,49 it has suggested a customary procedure among states wishing to assert jurisdiction over universal crimes. The procedure protects individual state sovereignty, encourages coordination among states in bringing international criminals to justice, and presents the in absentia assertion only as a last resort option.

47. See discussion infra Part III.D.
48. Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (separate opinion of President Guillaume) ¶ 15; REYDAMS, supra note 3, at 224.
49. See Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (separate opinion of President Guillaume) ¶ 15, (separate opinion of Judge Rezek) ¶ 6, (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶ 45.
C. Identifying a Practice of Jurisdictional Assertions Among States

Instead of viewing universal jurisdiction as an exceptional jurisdictional base that steps in only when more prevalent bases like territoriality or nationality have failed to produce results, universality can be understood as the governing jurisdictional base for all situations involving the limited class of crime. Taking this view, crimes of universal jurisdiction are most often dealt with on the basis of territorial or national interest. State practice in this regard does not erode the grave or “universal” nature of the crime itself—indeed, it shows that territorial or national states often take the prosecutions of these types of crimes very seriously. And importantly, nor do territorial or national state prosecutions erode the universal nature of the jurisdiction. If a consensus of states’ positive law, either through treaties or municipal legislation or both, allows for jurisdiction over a crime absent territorial or national links, that crime is subject to universal jurisdiction. While judicial action enforcing such expansive jurisdictional provisions may be icing on the customary cake, lack thereof resulting from a territorial or national state taking up the gauntlet based on its direct interest in the matter does not undermine the applicability or legitimacy of the jurisdiction of other, non-prosecuting states. It merely means that a state with a stronger interest got there first. This last statement is, in essence, the crux of a revised jurisdictional panorama from which a procedure emerges for pursuing universal jurisdiction in absentia. That procedure holds that whichever state has the stronger interest in prosecuting the crime—as measured by traditional jurisdictional sovereignty interests—has superior jurisdictional priority in prosecuting the crime. Any state with inferior jurisdictional priority may only prosecute if those states with superior claim have declined. At the bottom of this distribution of jurisdictional competence is the state that has no

50. For instance, prosecutions for ethnic cleansing conducted in the former Yugoslavian or Rwandan municipal legal systems, or prosecutions for certain terrorist acts by states on whose territory or against whose nationals the acts were perpetrated, represent a large number of prosecutions of universal crimes.

51. See, e.g., Bassiouni, supra note 1, at 48 (noting that "[p]ositive international law in the twentieth century has clearly established universal jurisdiction for piracy" through expansive jurisdictional provisions of the 1958 Geneva Convention on the Law of the High Seas and the 1982 Montego Bay Convention on the Law of the Sea even though there appear not to be instances of courts trying actual pirates). To be sure, the presence of universal jurisdiction in customary law may really only be justified by interpreting these forms of state action as evidence of state practice since there has not been a consensus of states practicing universal jurisdiction in their courts.

52. See id.
A review of assertions of universal jurisdiction by non-territorial, non-national courts reveals that states do not act arbitrarily in asserting universal jurisdiction but instead typically have some sort of other objective interest in prosecution or some link to the accused or the crime—for example, victims of the crime now living in the state may be petitioning the state for a prosecution. Even more importantly, there is usually a good reason why the prosecution falls to the state asserting universal jurisdiction—namely, the territorial or national state is unable or unwilling to prosecute. It is in this circumstance that an assertion of universal jurisdiction by non-territorial and non-national states is most appropriate. Similarly, only if the territorial, national, and custodial state(s) refuse to prosecute will universal jurisdiction in absentia be suitable. By looking at how states behave with respect to universal jurisdiction in general, we may identify an underlying custom for distributing jurisdictional competences while respecting sovereignty and apply this custom in the context of universal jurisdiction in absentia.

It is almost inevitable that those cases of universal jurisdiction that produce the most interstate conflict in the form of claimed sovereignty infringements receive the most attention. However, many cases proceed under the radar on grounds of universal jurisdiction where territorial and national states have failed to voice objections or have affirmatively acquiesced in the jurisdiction of a third state. This may occur for a number of reasons; for instance, the territorial or national state may be unable to prosecute because it is in a state of war or internal turmoil, or the state may simply have no interest in prosecuting.

Cases in municipal courts concerning serious human rights abuses in

53. Many of the cases discussed in the following pages are outlined and translated into English in Luc Reydanis' extremely comprehensive and helpful work, Universal Jurisdiction, supra note 3.


55. For example, the Belgian arrest warrant against Ndombasi and the various states' interests in bringing former Chilean dictator Pinochet to trial have been reported in numerous newspaper articles and have sparked much academic commentary. Even potential universal jurisdictional claims have garnered media attention. See, e.g., Glenn Frankel, Belgian War Crimes Law Undone by Its Global Reach; Cases Against Political Figures Sparked Crises, WASH. POST, Sept. 30, 2003, at A1 (describing the "diplomatic crises" caused by the filing of cases in Belgian courts against Ariel Sharon, Fidel Castro, and George H.W. Bush among others).
the former Yugoslavia and in Rwanda during or immediately after the respective conflicts provide good examples of universal jurisdiction at work where territorial and national courts are unable to perform because of internal instability. In *Public Prosecutor v. Cvjetkovic*, Austria asserted universal jurisdiction over the defendant for genocide and complicity in genocide, among other crimes, during the conflict in the former Yugoslavia. After arresting the defendant, Austria notified Bosnia, which took no action due to its then-ongoing internal conflict. The Austrian Supreme Court explained that because there was no functioning criminal justice system in Bosnia—the territorial state—Austria was competent to try the defendant under the Genocide Convention even though the convention locates jurisdiction only in the territorial state or in an international criminal body. In another case involving ethnic cleansing in the former Yugoslavia, Danish authorities prosecuted and convicted a defendant where the territorial state was incapable of cooperating or handling the prosecution because of the continuing conflict and where the relevant international tribunal, the ICTY, had declined to take over the proceedings. The Netherlands and Spain have also, through their courts, indicated a willingness to prosecute universal criminals from the former Yugoslavia.

The most prolific state with regard to universal jurisdiction prosecutions based on events in the former Yugoslavia has been Germany. In *Public Prosecutor v. Tadic*, German authorities arrested the defendant on charges of aiding and abetting genocide and handed him over to the ICTY. In two other cases, however—*Public Prosecutor v. Djajic* and *Public Prosecutor v. Jorgic*—both the ICTY and Bosnia—the territorial

56. REYDAMS, *supra* note 3, at 99 (citing Landesgericht Salzburg, 31 May 1995 (trial judgment); Oberste Gerichtshof, 13 July 1994 (appeals judgment)).
57. *Id.*
58. *Id.* Also, the international criminal body that could have taken up the case against Cvjetkovic, the ICTY, did not do so.
63. *Id.* at 150.
state—declined to take over the proceedings, and German courts obtained convictions. In Djajic, the Bavarian Supreme Court noted that “since the ICTY and the competent territorial State do not wish to take over the proceedings, Germany has an interest not to be perceived by the international community as a haven for international criminals.” And the Federal Supreme Court in Jorgic explained that because the ICTY already had its hands full, “the repression of the many crimes committed in execution of the policy of ‘ethnic cleansing’ urges itself upon national courts.”

Although the cases mentioned thus far required a link to the accused, such as his presence on German territory, a more recent decision of the Federal Supreme Court signaled that such a link is unnecessary. In Public Prosecutor v. Sokolovic, the Federal Supreme Court noted the defendant’s links to Germany, consisting of his living and working in Germany for a period of time and returning regularly to collect payments from the Employment Office, but found that “such additional legitimizing links are not necessary.” The court answered the standard sovereignty concerns of non-interference as follows: “Indeed, when Germany, in executing an internationally legally binding obligation—based on an international convention [the Fourth Geneva Convention in this case]—prosecutes an extraterritorial offence by a foreigner against a foreigner and punishes according to German law, a violation of the non-interference principle can scarcely be alleged.”

This decision is in conformity with the revolutionary, and perhaps prescient, German law entered into force in June of 2002, The Code of Crimes Against International Law. The Code makes core International Criminal Court crimes subject to universal jurisdiction. Further-

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64. Id. at 151-52 (summarizing Public Prosecutor v. Jorgic, Oberstes Landesgericht Düsseldorf, Sept. 26, 1997; BGH, Apr. 30, 1999, reprinted in part in Neue Zeitschrift für Strafrecht 396 (1999)).
68. Id.
69. Id.
70. Id. at 144 n.24.
more, it explicitly authorizes universal jurisdiction in absentia.\textsuperscript{71} The Code’s commentary explains:

Because of their particular impact, prosecution of extraterritorial offences, even those committed by foreigners, does not constitute an illegitimate interference with the sovereignty of other States. The application of German criminal law to extraterritorial acts that constitute an offence under the [Code] is therefore not dependent on the existence of a special domestic connection. Because the federal Supreme Court has so far given a different interpretation to [the prior Code provision], the unambiguous wording of [the Code] now makes it very clear that offences under the [Code], in any event, do not require a special domestic link.\textsuperscript{72}

The Rwandan genocide in 1994 has led to municipal court universal jurisdiction prosecutions as well. In \textit{Public Prosecutor v. Higaniro}, Belgium asserted jurisdiction over a number of Rwandan nationals.\textsuperscript{73} Those cases that had not been deferred by Belgian authorities to the International Criminal Tribunal for Rwanda (ICTR) on the tribunal’s request\textsuperscript{74} were joined and resulted in convictions of the accused in Belgian courts.\textsuperscript{75} Not only did Rwanda not protest Belgium’s jurisdiction in these cases, it actively collaborated with Belgium by allowing Belgian rogatory missions on Rwandan territory.\textsuperscript{76}

Another highly successful prosecution of Rwandan genocidiaries through the use of universal jurisdiction was the Swiss case \textit{Military Prosecutor v. Niyonteze}.\textsuperscript{77} The defendant had fled to Switzerland after the genocide and was arrested there. The ICTR did not request transfer of the proceedings. Although it appears that Switzerland denied a Rwandan extradition request, Rwanda later fully cooperated with the Swiss investigation and proceedings, involving among other things a visit by

\textsuperscript{71} \textit{Id.} at 144-45 (discussing Act of 26 June 2002 to Introduce the Code of Crimes Against International Law (\textit{Gesetz zur Einfuhrung des Volkerstrafgesetzbuches}) Bundesgesetzblatt Teil I, 2002 Nr 42, 2254).

\textsuperscript{72} \textit{Id.} at 145.

\textsuperscript{73} \textit{Id.} at 109-11 (citing Assize Court of Brussels 8 June 2001).

\textsuperscript{74} \textit{Id.} at 144 (noting that the ICTR took over the proceedings of six suspects).

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.} at 196-200 (citing Tribunal militaire, Division 2, Lausanne, 30 Apr. 1999 (trial judgment); Tribunal militaire d’appel 1A, Geneva, 26 May 2000 (appeals judgment); Tribunal militaire de cassation, 27 Apr. 2001 (cassation judgment)).
the Swiss court to the site of the alleged universal crime and the gathering of witness testimony in foreign territory. 78

The above-mentioned cases exemplify instances where the territorial and national states were unable to effectively prosecute criminals because of internal turmoil. An example of a competent state, free from destabilizing conflict or its aftermath, simply allowing another state to prosecute its national was Germany's assent to the Israeli prosecution of the Nazi war criminal Adolf Eichmann following his abduction from Argentina. 79

Thus, in practice, there is a degree of cooperation between third states asserting universal jurisdiction and territorial and national states. This cooperation hints at an underlying custom whereby, as a general matter, territorial and national states are notified and given priority over the prosecution, should they wish to pursue it, by states looking to assert universal jurisdiction. Where territorial or national states decline to assert jurisdiction, the custodial state proceeds and each state's sovereignty remains fully intact. This process fits just as well with assertions of universal jurisdiction in absentia. If a state wishes to assert universal jurisdiction in absentia and notifies the territorial or national state, which in most cases will also be the custodial state, and the territorial or national state declines to assert jurisdiction and acquiesces in the universal jurisdictional claim, no sovereignty infringement issue arises. Moreover, the in absentia assertion may result in transfer of the accused to the prosecuting state through extradition or other means.

More problematic cases are those where the territorial or national state protests the universal jurisdictional assertion of the third state either because the territorial or national state wishes to assert jurisdiction and prosecute the accused itself or because it wishes to shield the accused from all prosecution. Where both states—the territorial/national state and the third state—are looking to prosecute, the problem is one of extradition. The custodial state will either extradite or not, usually based upon extradition treaties and what those treaties say. 80 Thus, cases involving two states looking to prosecute should be

78. Id. at 197-98.
79. Id. at 161.
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dealt with by those states’ extradition treaties. But what about the territorial or national state that objects to a universal jurisdictional assertion by another state because it wishes to insulate the accused from prosecution? This state will immediately object to the universal jurisdiction in absentia assertion as an infringement of its sovereignty. To cogently counter this objection, international law must provide a way for universal jurisdiction in absentia to function that continues to respect state sovereignty. As will be discussed in the next Section, international law can and to some extent already does strike this balance.

D. A Procedure for Pursuing Universal Jurisdiction in Absentia

Any framework for resolving jurisdictional tensions must take account of the dual, often competing goals of international law: maintaining the international system through peaceful interstate relations on the one hand and achieving justice or combating impunity on the other. We begin by looking at the safeguards that the ICJ joint separate opinion put forth in the Arrest Warrant case.81

The joint separate opinion sets forth five main safeguards to protect against abuse of universal jurisdiction in absentia.82 First, “[n]o exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned[,] but] commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles.”83 Second, the state wishing to assert universal jurisdiction in absentia “must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.”84 As we have seen, the territorial state, or state on whose territory the crimes occurred, also has a “first dibs” claim, along with the state whose nationals were the victims of the crimes in question and the custodial state if one exists apart from the national or territorial state. Third, the charges “may only be laid by a prosecutor or juge d’instruction who acts in full independence, without links to or control by the government of that State.”85 Fourth, there must exist “some special circumstances that

82. Id.
83. Id. ¶ 59.
84. Id.
85. Id.
do require the exercise of an international criminal jurisdiction and [these must be] brought to the attention of the prosecutor or juge d'élucidation. 86 Fifth, universal jurisdiction in absentia must "be exercised only over those crimes regarded as the most heinous by the international community." 87

The first safeguard, that immunities be respected but investigations may still be conducted, relates to the case that was directly before the ICJ, as Ndombasi was Congo's Minister of Foreign Affairs. 88 Immunities should apply, however, only with regard to actual in absentia assertions of jurisdiction over alleged criminals. Respect for official immunities obviously protects against the destabilization of international relations. 89 However, investigations should be permitted because, as the joint separate opinion noted, "[t]he function served by the international law of immunities does not require that States fail to keep themselves informed." 90 Moreover, those crimes that are subject to universal jurisdiction are not subject to statutes of limitations under international law. 91 So once the cloak of immunity lapses because the individual has left office, the state wishing to assert universal jurisdiction in absentia could potentially assert jurisdiction over the offense within the joint separate opinion's criteria. 92 Importantly, the in absentia investigations could serve as a powerful deterrent by signaling to

86. Id. The joint separate opinion cites as an example of this one in which "persons related to the victims of the case will have requested the commencement of legal proceedings." Id.
87. Id. ¶ 60.
88. See id. ¶¶ 84, 87.
92. This type of jurisdiction, based on the crime and asserted after immunity of the accused has lapsed, would constitute "substantive jurisdiction" within the language of the ICJ majority opinion. The opinion explains:

[Immunity from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 ¶ 60.
perpetrators of international crimes that their official positions will not protect them forever.

The joint separate opinion’s second safeguard seeks to ensure the stable maintenance of international relations as well. By giving the national state of the prospective accused person “first dibs,” the safeguard would allow national states to protect against politically motivated accusations by foreign jurisdictions. Moreover, the geopolitical scrutiny that would accompany a national investigation and trial occurring in the face of a lurking foreign claim would most likely guarantee at least a threshold good faith effort to investigate and prosecute serious violations of humanitarian and human rights law.93 Implicit in this idea of national courts having first priority would, of course, be that other states respect the rule against double jeopardy.94

This safeguard should be qualified, however, for cases where harboring states intent upon letting grave human rights violators off the hook engage in a sham investigation/trial to disqualify other claims. For example, if a foreign state wishing to assert universal jurisdiction in absentia can prove to a competent international organ, like the ICJ, that the domestic trial was a sham designed to protect the accused, the foreign state may pursue the jurisdictional claim in spite of the national proceeding. Thus, while giving the national state priority is a good idea insofar as it protects interstate relations, it should not wholly foreclose the opportunity for other states to prosecute the defendant if the domestic investigation or trial is proved to be a farce.

Additionally, the state on whose territory the offense occurred (the territorial state) has a stronger jurisdictional claim and therefore must have an opportunity to seek prosecution before states that have only universal jurisdiction in absentia claims. For example, to the extent

93. See Rudiger Wolfrum, The Decentralized Prosecution of International Offences Through National Courts, in WAR CRIMES IN INTERNATIONAL LAW 233, 244 (Yoram Dinstein & Mala Tabory eds., 1996). National courts, for example, have a customary obligation under the Geneva Conventions to pursue such a course of action:

In so far as grave breaches of humanitarian law are prosecuted by national courts, according to Article 49 paragraph 2 of Geneva Convention (I) . . . ; Article 129 paragraph 2 of Geneva Convention (III); Article 146 paragraph 2 of Geneva Convention (IV), the States have a corresponding obligation to investigate and prosecute such violations.

Id.

that international law considers the cruise ship Achille Lauro Italian "territory," or subject to jurisdiction via the flag principle, 95 Italian courts have a stronger jurisdictional claim to prosecute Abu Abbas—the terrorist who hijacked the ship—than, say, Belgium, even though, as will be discussed below, 96 hijacking a ship is an act of terrorism subject to universal jurisdiction.

Another jurisdictional claim that should be respected before that of universal jurisdiction is the passive personality claim. The passive personality principle "authorizes states to assert jurisdiction over offenses committed against their citizens abroad. It recognizes that each state has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries." 97 In the Achille Lauro case, then, because the hijackers murdered an American national, the elderly Klinghoffer, the United States would have a passive personality claim that takes precedence over a claim of a state asserting jurisdiction based only on the principle of universality. Lastly, a universal jurisdictional claim should not be pursued in absentia by a non-territorial, non-national state if the custodial state is willing and able to assert jurisdiction.

The idea behind the third safeguard, that the investigation or prosecution be conducted by a prosecutor or juge d'instruction independent of any state organ, would theoretically be to prevent charges brought solely for political motives. Yet, insofar as the jurisdictional assertion constitutes an exercise of a state's sovereign police power, 98 and decisions of national courts evidence state practice and cultivate rules of customary law, 99 wholesale prosecutorial independence seems somewhat inconsistent with the mechanics of international lawmaking. Moreover, it appears unlikely that such independence could ever in fact be achieved—the prosecutor would at least be dependent upon the state for resources with which to conduct investigations and pursue indictments. 100

96. See discussion infra Part III.E.
97. INTERNATIONAL CRIMINAL LAW 188 (Jordan J. Paust et al. eds., 2d ed. 2000).
100. This type of resource dependence certainly exists within the workings of international criminal tribunals created under the auspices of the United Nations. For example, the Office of the Independent Prosecutor for the International Criminal Tribunal for the Former Yugoslavia
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The joint separate opinion's fourth safeguard also attempts to depoliticize universal jurisdiction in absentia assertions by requiring "special circumstances"—or a source external to the state prosecutor's office, such as the victim's family—to request commencement of the proceedings.\textsuperscript{101} By divesting the state of the power to assert universal jurisdiction in absentia on its own, the safeguard intends to divorce political motivations of the state from the initiation of the jurisdictional claim. Hence, investigations and prosecutions may not be used as strategic tools against states hostile to the state asserting jurisdiction.\textsuperscript{102} However, while the presence of victims and their request to the state to assert jurisdiction creates an interest for that state, making the assertion dependent upon such a request may be inadequate when viewed from the standpoint of combating impunity. The political motivation behind an assertion of universal jurisdiction should have no impact on the validity of the jurisdictional claim if all other higher-priority states have declined and any prosecution resulting from the claim is conducted in line with fundamental due process norms.\textsuperscript{103} Thus, if a state wishes to assert universal jurisdiction in absentia \textit{sua sponte}, it should be able to do so under international law, so long as no other interested state asserts jurisdiction and the prosecuting state provides for a fair procedure.\textsuperscript{104} States' political policy motivations might prove crucial with regard to efforts to investigate, arrest, try, and convict perpetrators of

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102. This appears to be a prevalent theme in criticism of universal jurisdiction in general. See Morris, \textit{supra} note 89, at 338, 354.

103. See sources cited \textit{supra} note 19.

104. For example, it would be regrettable if Belgium were willing to initiate investigations against war criminals but was not permitted to do so under international law because it needed to wait for an external source to bring the charges. Similarly, in light of the United States' anti-terrorist policy, it is easy to imagine the United States investigating and prosecuting terrorist hijackers of aircraft. In \textit{U.S. v. Yunis}, 924 F.2d 1086 (D.C. Cir. 1991), the Court of Appeals for the District of Columbia affirmed the conviction of the defendant hijacker, Fawaz Yunis, under the passive personality principle because there were two American citizens on board the hijacked plane (nobody, incidentally, was injured). \textit{Id.} at 1091. It would be a shame if, absent these two citizens, the United States could not investigate, arrest, and prosecute the terrorist hijackers because nobody external to the government brought the charges. See United States v. Yousef, 327 F.3d 56, 107-08 \\& n.42 (2d Cir. 2003).
certain universal crimes, like for example, certain acts of international terrorism.  

The last safeguard in the joint separate opinion warns that universal jurisdiction should only be asserted over the most egregious international violations. While this safeguard seems basic to the exercise of universal jurisdiction in absentia, it is also quite question-begging. The question is what law determines these violations? The answer is international law. Therefore, prosecutions of universal crimes by national courts invariably add to the body of international case law and help to clarify further customary definitions of the crimes. That is, because universal jurisdiction limits its reach to internationally defined crimes, its practice by courts invokes international law. Courts wishing to prosecute on a universal jurisdiction theory cannot just decide to adjudicate some subjectively determined crime. Rather, as will be discussed in Part III, the crime must be a definite and clearly articulated offense of the highest degree under international law. Thus, while universal jurisdiction provides an elastic jurisdiction to courts wishing to implement international criminal law—even where the court has no personal jurisdiction over the accused—the universality principle also limits that jurisdiction to a finite list of substantive crimes. In short, a state cannot independently determine what constitutes a crime within its universal jurisdiction—this is a matter of international, not national, law. 

Because the practice of universal jurisdiction by courts invokes international law, it also contributes to the international law governing crimes of universal jurisdiction. The jurisdictional base used to adjudicate the crime directs states to use international law as a guide. Thus, states that use the universal jurisdictional base must to some degree 

105. See Yousef, 327 F.3d at 106-08.
107. The joint separate opinion seemed to recognize the question-begging nature of this safeguard. It noted that "[t]he substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change." Id. ¶ 62.
108. See, e.g., Yousef, 327 F.3d at 100-01.
109. See discussion infra Part III.D.
110. See Diane F. Orentlicher, The Future of Universal Jurisdiction in the New Architecture of Transnational Justice, in UNIVERSAL JURISDICTION, supra note 1, at 214, 229 (providing examples and explaining how "courts charged with enforcing the law of humanity are talking to each other, shaping each other’s understanding of the law and, together, constructing a common code of humanity").
incorporate international law into their national legislation and/or implement it through judicial performance. The integration of international law into domestic legislation and its role in judicial decision-making aid in the crystallization of customary rules concerning crimes of universal jurisdiction, thus making the international law itself more sure and less subject to abuse.\textsuperscript{111} The use of international law, and perhaps even of international criminal tribunal decisions, as precedent provides national courts with a pre-established legal framework\textsuperscript{112} and guards against national courts inventing charges and abusing sentencing for nefarious reasons while at the same time providing national organs with a common point of departure.

In sum, while some of the safeguards proposed by the joint separate opinion are useful, such as respecting immunities and allowing the national state first priority to prosecute (with a safety-valve for sham prosecutions), others prove incompatible with the normative goals and implementational feasibility of the international law of universal jurisdiction. In the end, the model procedure for using universal jurisdiction in absentia requires that:

States wishing to pursue universal jurisdiction in absentia must:

1. Respect immunities with regard to the formal issuance of an arrest warrant, but this respect does not prevent investigations into criminal charges;

2. Offer to the national state, territorial state, and state whose national was harmed, as well as to the custodial state, the

\footnote{111. This idea that national law acts as an extension and activation of international law appears most clearly in the theory of monism. Monism, or the unification of international law with national law, not only actualizes international norms but also restricts national legal action. As Hans Kelsen explained:}

\begin{quote}
[T]he international legal order is significant only as part of a universal legal order which comprises also all the national legal orders . . . the international legal order determines the territorial, personal, and temporal spheres of validity of the national legal orders, thus making possible the coexistence of a multitude of states. . . . [T]he international legal order restricts the material sphere of validity of the national legal orders by subjecting them to a certain regulation of their own matters that could otherwise have been arbitrarily regulated by the state concerned.
\end{quote}


\footnote{112. The joint separate opinion seemed to implicitly recognize this by drawing upon the ICTY, ICTR, and ICC Statutes as well as precedents from the two international criminal tribunals in its discussion of whether the arrest warrant against Ndombasi alleged the commission of established crimes under international law. Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶ 61.}

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opportunity to act upon the charges concerned before asserting jurisdiction in absentia.

As noted, domestic courts also must implement international law in the proceedings. On a theoretical level, such implementation would appear unavoidable, as the definition of the crime—and hence the capacity and exercise of jurisdiction—is a matter of international law.113 Because universal jurisdiction is customary and not treaty-based (otherwise it could not be universal unless all nations in the world signed and ratified the relevant treaty—something that has not happened as to any treaty), and by its nature derives from the customary definition of the crime allowing for jurisdiction (as reflected, of course, in positive instruments), national courts are constrained to use the customary international law governing the definition of the crime in order to exercise universal jurisdiction. This confluence of international legal jurisdiction and substance is indeed perhaps the most innovative characteristic of universal jurisdiction.

E. Universal Jurisdiction in Absentia as a Vehicle for International Law and Policy

This Section will argue that universal jurisdiction in absentia helps, not hurts, interstate relations because it provides for signaling between states and clarifies custom in a way that affords states more options to act against perpetrators of international crime and, in the process, promotes international focus on human rights. It will then look at the practical effects of universal jurisdiction in absentia to argue that such jurisdiction does, in fact, combat impunity by providing a measure of punishment and deterrence of serious international crime.

1. Developing Custom and Interstate Relations

As discussed, universal jurisdiction in absentia poses a challenge to the traditional parameters of state sovereignty by disrespecting a state's prerogative to harbor accused international criminals.114 The ability of non-territorial and non-national states to undermine a harboring state's decision to protect those within its territory gives rise to concerns that the non-territorial and non-national states seeking prosecutions
will abuse universal jurisdiction toward their own political ends. To be sure, even the usual exercise of universal jurisdiction by a custodial state—for example, universal jurisdiction where the accused is physically present in the state asserting jurisdiction—has been subject to this type of criticism. Rather than damaging interstate relations, however, in absentia assertions over universal crimes offer a creative doctrinal modification of the usual exercise of universal jurisdiction that helps maintain interstate relations where these relations would otherwise be threatened through universal jurisdictional assertions based on the presence of the accused. Moreover, universal jurisdiction in absentia tends to support the development of interstate relations in a manner considerate of human rights.

Instead of acting as a threat, universal jurisdiction in absentia converges with the objective of securing stable interstate relations by promoting diplomatic state interaction and producing a more comprehensive, clear, and uniform rule of customary international law. These types of assertions do so by providing a notice or signaling function among states while supplying a diplomatic vehicle for curtailing human rights violations.

Because jurisdictional assertions constitute an exercise “peculiarly


116. Madeline Morris observes that the politicization of even usual (non-in absentia) universal jurisdictional assertions proves problematic because “criminal trials for war crimes, genocide, and crimes against humanity do not exist in isolation from those other aspects of interstate relations . . . states may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflict.” Morris, supra note 89, at 354. As a preliminary point, it is far from clear that the possibility of states employing universal jurisdiction in absentia for “political” reasons necessarily conflicts with the purposes of international criminal law. If the charges brought by a state that has strong enough interest in going after the accused are substantiated, wouldn’t the exercise of universal jurisdiction through the national judicial process be more consistent with international law than simply hunting the accused down and killing him? If the accused is found guilty under a fair trial procedure, he is one more international criminal who will not escape with impunity for failure of the national or territorial state to prosecute. See Wolfrum, supra note 93, at 235; Osofsky, supra note 98, at 564. So long as there is sufficient evidence to support the charge according to relevant municipal standards, that the motivation behind the assertion of jurisdiction may have been based in part on political considerations does not detract from the validity of the jurisdictional claim. This is especially so if the prosecuting state follows a sovereignty-respectful procedure for resolving concurrent claims among states like the one laid out above. See discussion supra Part II.D.

117. This Section will use “notice” and “signal” interchangeably depending on the context of the sentence.
sovereign in nature’ . . . [w]hen one state interferes with criminal violations of another state’s law occurring in that other state, [the interfering state] opens itself to sovereignty and legitimacy criticisms.” It follows that sovereignty and legitimacy concerns chill the potential exercise of universal jurisdiction within the international forum for fear of how the jurisdictional assertion might be perceived by other states. Yet universal jurisdiction in absentia might actually work to pre-establish the legitimacy of the extraterritorial jurisdictional claim and consequently to protect sovereignty interests. Under the model that mandates “first dibs” to the national, territorial, and passive personality states, the jurisdictional assertion acts as a notice provider to other states whose nationals are being subject to the asserting state’s jurisdictional claim. As a result of this notice, the territorial and national states, which under international law have stronger jurisdictional interests, are afforded certain options that further the maintenance of interstate relations.

For instance, a national state put on notice by another state’s assertion of universal jurisdiction in absentia may either: (i) decide to take matters into its own hands—it could conduct an investigation and prosecution of the accused, both in order to guarantee a fair trial and also effectively to counter false claims of criminality asserted against any of its own nationals; or (ii) if the state feels that the jurisdictional assertion over its national is invalid, it could take steps to resolve the conflict, for example, by bringing the issue to an international judicial organ like the ICJ.

Indeed, this latter option is precisely what the Democratic Republic of the Congo pursued when it learned that the Belgian investigating magistrate had issued the “international arrest warrant in absentia”


119. Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 840 (1988) (“[S]tates may fail to prosecute criminals . . . due to political and foreign policy considerations. The value to society of punishing one criminal, however egregious the crime, may not override the possible repercussions of another state’s jurisdictional challenge and charge of political and parochial bias.”).

120. “It had long been accepted that a State was entitled to apply its legislative (or prescriptive) authority to events and persons within its territory and to its nationals outside of the country. ‘Territoriality’ and ‘nationality’ were referred to as ‘bases’ of jurisdiction and functioned as criteria of permissible authority.” Schachter, supra note 14, at 254.

121. Although, “the fact that some States do not accept the prohibition against double jeopardy enhances the possibility that a person acquitted in one State may be tried and punished in another.” Id. at 270.
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against Ndombasi. \(^{122}\) Had Belgium waited until Ndombasi came onto Belgian soil to assert universal jurisdiction and then issued the warrant and arrested, tried, and convicted him, the consequences to interstate relations between Belgium and Congo would most likely have been more explosive and irreparable. Instead, because the Belgian court employed universal jurisdiction in absentia, Congo was put on notice and, as a result, was able to pursue peaceful avenues of international redress. \(^{123}\) Furthermore, the nature of that redress, taking the form of a World Court decision and mandate to Belgium, \(^{124}\) carried the stamp of legitimacy.

Moreover, and of equal importance, this type of interstate resolution of universal jurisdictional claims made possible through the signaling function provided by in absentia assertions engenders a more comprehensive and uniform rule of customary international law with respect to universal jurisdiction in general. Universal jurisdiction is a fundamentally customary, not treaty-based, law. \(^{125}\) Customary international law is established through state practice and \emph{opinio juris}, or the official belief that the practice is legal. \(^{126}\) These two prongs create a paradoxical effect which stunts the full development of a customary rule with regard to prosecuting crimes of universal jurisdiction. The rule can mature only from states practicing universal jurisdiction. But the fact that states fear the \emph{opinio juris} illegitimacy of universal jurisdiction because of the present vagueness of the customary rule \(^{127}\) prevents them from practicing this form of jurisdictional assertion. This lack of


\(^{123}\) See id.

\(^{124}\) Id. ¶ 78 (finding that because of Ndombasi’s immunity as Minister of Foreign Affairs, “the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated”).

\(^{125}\) As Professor Arnell has explained:

[I]t is only customary international law that can generally prescribe this type of international crime. It is incorrect to aver that treaties can generally prescribe certain acts. One of the most elementary rules of the law of treaties is that they do not create rights or obligations for States without their consent. Certainly there is nothing to prevent States from entering into agreements prescribing or proscribing certain acts \emph{inter se}, but these do not create crimes in general international law.


\(^{127}\) See Osofsky, \emph{supra} note 98, at 573.
state practice inevitably consigns universal jurisdiction to an embryonic status under international law.

However, through their signaling function, assertions of in absentia universal jurisdictional may ensure ex-ante that a given jurisdictional assertion is acceptable from the standpoint of the territorial or national state and from the perspective of the international community as a whole. This ex-ante recognition could liberate the acting state from the constraints of potential legitimacy and sovereignty concerns arising retrospectively. In turn, such freedom-to-act would lead to more assertions of universal jurisdiction and more universal jurisdiction proceedings, consequently prompting the development of a clearer and more uniform rule of customary international law through state practice, while simultaneously and reciprocally enforcing the legitimacy of that practice, thus satisfying opinio juris. Production of the customary rule along these lines would both clarify the substantive law of universal jurisdiction and construct certain features congenial to the maintenance of interstate relations in line with the procedural model for concurrent jurisdictional claims outlined above.

In line with the procedural model, the in absentia notice function would promote diplomatic recourse among states by making available options by which disputes involving universal jurisdictional claims could be settled prudently and judiciously through peaceful means. Even where interstate relations have severely deteriorated, such notice would still allow opportunity for political gamesmanship, whereas employment of a non-pre-announced arrest policy and trial would be more likely to provoke hostile and perhaps even military action (for

128. For example, Israel’s assertion of jurisdiction over Eichmann, a Nazi war criminal, for crimes committed against persons who were not Israeli citizens (Holocaust victims), came under criticism for the method of bringing Eichmann before the court after Israel had already acted. See Att’y Gen. of Israel v. Eichmann, 36 I.L.R. 277 (Isr. S. Ct. 1962); R. Higgins, Allocating Competence: Jurisdiction, in JURISDICTION IN INTERNATIONAL LAW, supra note 98, at 267. While these criticisms called into question the legitimacy of the State of Israel’s seizure of Eichmann in Argentina (where Eichmann was “hiding out”) in order to bring him to trial, no states protested Israel’s right to assert jurisdiction over the offenses. Id.

129. Again, a prime example of this would be Concerning the Arrest Warrant of 11 April 2000.

130. On October 23, 2000, the Arab League of Nations issued a statement that “Arab nations shall pursue, in accordance with international law, those responsible for these brutal practices” against Palestinians carried out by Israelis in violation of the Geneva Conventions. Arab Statement: “Criminals of War Who Committed Massacres,” N.Y. TIMES, OCT. 23, 2000, at A12. The announcement at least provides notice to Israel that Israeli perpetrators will be pursued in Arab nations. This would appear to be the best alternative for the maintenance of international relations if the other option considered would be Arab nations simply arresting Israelis without warning. Such arrests could easily incite military action.
example, if Belgian police had simply begun arresting accused universal criminals found on Belgian territory).

In addition, the in absentia claim provides national states a "first dibs" opportunity to examine international criminal charges through their own investigations and prosecutions. In this manner, the in absentia claim would force a more universal recognition and assessment of the international crimes at issue—especially, for instance, if a national state seeking to invalidate charges against one of its citizens looks to demonstrate its national's innocence on the world stage,\textsuperscript{131} perhaps to guard against states which do not accept the prohibition on double jeopardy.\textsuperscript{132} It does not necessarily follow that these domestic investigations and/or trials would be sham efforts to cover up the crime and protect the national perpetrator. The diplomatic and media publicity flowing from the foreign state's in absentia assertion based on evidentiary support would ensure a sufficient amount of international observation at home so as to secure an acceptable threshold of national investigation and legal evaluation. When measured against the alternatives of (i) no investigation and (ii) deterioration of interstate relations resulting from actual arrests (where no notice is given to the national state and its national is arrested in the foreign territory), the national investigatory/prosecutorial option afforded by the in absentia notice might provide a satisfactory solution to the competing interests of combating impunity and maintaining interstate relations.

Through the notice function, the territorial or national state, as well as the international community, also would have an opportunity to evaluate the in absentia assertion with regard to the substance of the

\textsuperscript{131} An example would be bringing a case before the International Court of Justice. Had the World Court gone to the merits of the case concerning Ndombasi, it would have had to decide the substantive question of whether universal jurisdiction applied to charges of incitement to racial hatred. As the joint separate opinion noted:

As regards . . . charges of incitement to racial hatred, which are said to have led to murders and lynchings, . . . [f]itting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. "Racial hatred" would need to be assimilated to "persecution on racial grounds", or, on the particular facts to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome Statute for the ICC.

\textsuperscript{132} See \textsc{Schacht\texttildeter}, \textit{supra} note 14, at 270.
crimes being alleged. Marked by its pliability and uncertainty, substantive international criminal law proves especially hazardous for sovereignty maximizing states (as all states by nature tend to be) looking to assert universal jurisdiction over particular offenses that marginally qualify as universal crimes. The diplomatic interplay furnished by in absentia signaling could provide more instances of extradition and adjudication of international crimes under the theory of universal jurisdiction than the vastly underutilized practice as it presently stands. Because the decisions of national courts, and the domestic legislation that provides the basis for those decisions, evidence state practice, the corpus of case law generated by in absentia assertions would contribute to formulation of the customary rule. Again, however, where a national state wishes to counter the substantive dimension of the criminal charge, the state would always have occasion to conduct its own investigation and/or trial—which would still contribute to the international custom. By encouraging this type of aut dedere aut judicare principle through its signaling function, universal jurisdiction in absentia helps combat impunity, maintain stable interstate relations, and solidify the customary rule of universal jurisdiction.

133. Arnell, supra note 125, at 63 (“Indeed, dispute and uncertainty will inevitably prevail as new acts come to be included, or as previously defined international crimes fall into desuetude.”).
134. See Randall, supra note 119, at 840.
135. Id. at 821:

[P]robably few [states] would protest the prosecution of their nationals for acts of hijacking, hostage taking, crimes against internationally protected persons, torture, or apartheid . . . . Rather than complain to the prosecuting state or to an international body, [the State] actually might distance itself from the defendant and the alleged offense, especially in light of the general condemnation of these particular acts.

136. Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans & Buergenthal) ¶¶ 22, 45; see also Danilenko, supra note 99, at 84:

An analysis of the practice of the I.C.J. reveals that in determining customary law it takes into account many diverse manifestations of state conduct. Significantly, the I.C.J. relies not only on acts and actions emanating from organs responsible for foreign relations but also on legislative acts and judgments handed down by municipal courts.

137. The aut dedere aut judicare principle holds that “[i]nstead of conducting the prosecution itself . . . the home State or detaining power may extradite a person to another State party interested in the prosecution.” Wolfrum, supra note 93, at 244.
2. Combating Impunity

The exercise of universal jurisdiction in absentia also helps combat impunity. The recent human rights explosion in international law has begun to collapse absolute state sovereignty.\(^{138}\) As a result, certain human rights abuses are now of international concern despite the absence of traditional international jurisdicational ties.\(^{139}\) In order to "fill in the gaps" and resolve the "law enforcement crisis" in international criminal law,\(^{140}\) states should have the option to prosecute crimes under the theory of universal jurisdiction, thereby constructing a more comprehensive international law enforcement mechanism.\(^{141}\) In so doing, "national courts act instead of international organs. Seen in this light, these state courts act as instruments of the decentralized enforcement of international law."\(^{142}\) Within this view, the universality principle is favorable, not inimical, toward the security of interstate relations because prosecuting states would in fact be acting for the benefit of all states by protecting fundamental interests of the international system as a whole.

By enabling states to conduct investigations and issue arrest warrants in absentia over grave violations of international law, universal jurisdiction in absentia advances the fight against impunity.\(^{143}\) Where custody

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138. See Osofsky, supra note 98, at 563; see also Ian Brownlie, Principles of Public International Law 564-80 (4th ed. 1990).

139. Brownlie, supra note 138, at 564-80; see generally Universal Jurisdiction, supra note 1; Reedams, supra note 3.

140. G.O.W. Mueller & Douglas J. Besharov, Evolution and Enforcement of International Criminal Law, in International Criminal Law: Crimes 62 (M. Cherif Bassiouini ed., 1986) ("The current state . . . of I.C.L. [International Criminal Law] is marked by a law enforcement crisis, and, unless this crisis is resolved—or resolves itself in evolutionary fashion—the development of I.C.L. will have arrived at its terminal point—short of the goal.").

141. Whether universal jurisdiction creates an option or an obligation to prosecute is a point of some debate. Whether a state has a right or an obligation to prosecute appears to turn on whether the state exercises jurisdiction pursuant to a treaty or customary international law; the treaty creating an obligation and customary law creating the right. Randall, supra note 119, at 819-24. It would seem that the joint separate opinion of Judges Higgins, Kooijmans, and Burgenthal rightly concluded that universal jurisdiction may only be exercised pursuant to customary international law and therefore creates a right rather than an obligation to prosecute. Concerning the Arrest Warrant of 11 April 2000, 2002 I.C.J. 121 (joint separate opinion of Judges Higgins, Kooijmans & Burgenthal) ¶¶ 42, 44; see also Morris, supra note 89, at 349.

142. Wolfrum, supra note 93, at 256.

over offenders may be difficult or even impossible to obtain,\textsuperscript{144} states should have the ability to pursue these types of claims. Indeed, the only other alternatives are (i) inaction and (ii) abducting the offender and bringing him within the state territory. Inaction results in an effective grant of impunity for the criminal and is therefore plainly contrary to the purpose of international criminal law. On the other hand, trans-border abduction is certainly more suspect under international law than an in absentia assertion in line with the procedural model—which is considerate of national and territorial state interests—and abduction would also no doubt lead more directly to interstate conflict.\textsuperscript{145}

Unlike inaction or abduction, which represent opposing extremes that only achieve one international objective at the expense of the other, state action taken pursuant to universal jurisdiction in absentia provides a balanced option useful to both international law goals of combating impunity and developing beneficial interstate relations. It engenders a deterrent effect on potential international criminals, communicates an important geopolitical message to harboring states, and leads to increased national judicial operation with respect to international crime.

a. Punishment/Deterrence of International Criminals

Universal jurisdiction in absentia serves as a type of punishment of offenders, keeping them in hiding and preventing them from moving

\begin{quote}
So the message has gone out. It has gone out to past and present leaders, whether political or military, that they can no longer travel freely, for it is likely that warrants for their arrest would have been issued against them. This message must have some deterrent effect. It is certainly a positive development, both from a moral point of view, and from the point of view of international justice.
\end{quote}

\textsuperscript{144} Randall, \textit{supra} note 119, at 840.

\textsuperscript{145} Abduction, or irregular rendition, is "the forceful abduction of an individual from one country by agents of another country, principally without the knowledge or consent of the former." Melanie M. Laflin, \textit{Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options}, 26 J. LEGIS. 315, 315 (2000). This rule is based upon the principle that "exercise of physical force by one State in the territory of another State without the latter's consent constitutes an excess of international jurisdiction." F.A. Mann, \textit{Reflections on the Prosecution of Persons Abducted in Breach of International Law}, in \textit{INTERNATIONAL LAW AT A TIME OF PERPLEXITY} 407 (Yoram Dinstein ed., 1989); see also Paul O'Higgins, \textit{Unlawful Seizure and Irregular Extradition}, 36 BRIT. Y.B OF INT'L LAW 279, 280 (1960) (explaining that abduction is considered illegal under international law because it is an invasion of the territorial sovereignty of the state from which the alleged offender was abducted).
freely within the international community.\textsuperscript{146} The possibility of arrest also deters future offenders by publicizing the fact that a territorial, national, or harboring state’s protection or inaction no longer provides insulation from investigations and charges of grave international law violations.\textsuperscript{147} A thorough investigation not only adds to international pressure on states harboring accused criminals, it preserves a record and evidence of the crimes. Moreover, the geopolitical impact that accompanies prosecutorial and judicial initiatives communicates a powerful message that grave violations of international law will not be tolerated. And this message discreetly, or perhaps not-so-discreetly, works to promote human rights with regard to international decision-making.

The case of Ndombasi may serve as a hypothetical example. Belgium sought to prosecute him for crimes against humanity, including genocide. In line with our model for pursuing the charges, let us assume Ndombasi does not have diplomatic immunity—say he has retired and thus his procedural immunity as a state official has expired. Further, let us assume Belgium gives Congo “first dibs” on Ndombasi—i.e., the opportunity to investigate and prosecute him first—and Congo declines this opportunity. Now suppose Belgium asserts jurisdiction in absentia by conducting an investigation and issuing an indictment and arrest warrant for Ndombasi for genocide. Because of the timeliness of the investigation and assertion, Belgium is able to use evidence that otherwise might be lost and witnesses that otherwise might die or disappear. And with this evidence Belgium establishes a strong case against Ndombasi.

To be sure, Ndombasi will not be traveling to Belgium. Indeed, he may refuse to leave Congo for fear of being served or arrested on an airplane somewhere over Belgian territory or through some other unlikely but all-the-same risky scenario. At least in this way, the in absentia assertion imprisons Ndombasi within a certain territory. Additionally, he must live out his days knowing that an arrest warrant for crimes against humanity stands against him, enduring whatever accompanying impact such a warrant has on his conscience, career, and reputation. In the end, there will be forever a full evidentiary and legal record of the charges and crimes supporting the warrant, and this in itself furthers international criminal law and human rights.

There is also the possibility that some future event will force him out

\textsuperscript{146} Goldstone, \textit{supra} note 143, at 476-77.
\textsuperscript{147} \textit{Id.}
of hiding. For example, Abbas, who had been hiding out in Iraq, could no longer evade criminal responsibility within its borders because the regime that had protected him had been taken out of power and the new authority wanted him to face justice. 148 Theoretically, something similar could happen in Congo, perhaps through a civil war or coup, or even an election, after which the government no longer wishes to protect Ndombasi. If this happens, like in the case of Abbas, evidence may be too old and too hard to marshal. It is fortunate that Italy already fully investigated the hijacking of the Achille Lauro and conducted the full trial in absentia in Abbas’ case in order to preserve the evidentiary record and prevent Abbas from escaping justice for his crimes. 149

But there is another, just as important function that the in absentia assertion could serve in the case of Ndombasi once he is no longer immune. International publication of and attention directed toward the assertion would be considerable. At some point Congo—even if it still wishes to protect Ndombasi—might become a little uncomfortable. Interstate relations may become somewhat awkward and even damaged (especially with Belgium, which may have strong ties to its former colony). 150 This discomfort and awkwardness might even impact economic and political negotiations and agreements with other states and international bodies; it could adversely affect trade, diplomacy, and even international perceptions of Congo’s sovereignty. Indeed, in light of the standing warrant, Congo might decide that protecting Ndombasi simply would not be worth the trouble and thus extradite him to Belgium or give him up to the Belgian authorities in some other manner simply to be rid of the problem. Or perhaps Congo might feel that it must demonstrate to the world that it is not harboring an international criminal and might conduct its own investigation and/or hold its own trial. At this point it would be difficult for Congo to orchestrate a complete sham trial because too many eyes would be watching, including those in Belgium. In fact, the entire purpose of the investigation and trial would be to show fairness. Further, this trial would not supersede or displace the Belgian warrant; Congo would

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149. Id. (noting that “[t]he United States also brought a criminal complaint against Mr. Abbas in the mid-1980’s, but withdrew it after problems developed with the evidence provided by foreign nations. Officials say United States prosecutors will have to grapple with some of these same problems in deciding whether to indict Mr. Abbas now . . . ”).
150. See REVDAMS, supra note 3, at 109 (describing that Belgium has maintained “many and important” contacts with another former territory, Rwanda).
already have been offered and would have declined the “first dibs” opportunity. The Belgian warrant could still have effect and Ndombasi would likely still not venture into potentially dangerous international waters. Prospectively, Congo would be careful to discourage conduct hostile to international law for fear of having to go through the entire ordeal again. To be sure, the very fact that the ICJ case took place with respect to Ndombasi’s conduct has likely already influenced Congolese governmental policy in this regard.

b. Practical Feasibility

Universal jurisdiction in absentia also allows domestic courts—and the international enforcement mechanism performed through those courts—more opportunities to fight impunity through national judicial operation. Starting from the empirical premise that universal jurisdiction is, in practice, vastly underutilized,\(^{151}\) the opportunities afforded by in absentia jurisdictional assertions provide crucial contributions to the formation and clarification of customary rules concerning the prosecution of grave international crimes.

Skeptics argue that if the state exercising universal jurisdiction in absentia has no links to the crime or the criminal, that state is in a poor position to evaluate and gather evidence, take testimonials, and build a reliable case against the accused for trial.\(^{152}\) There are at least two responses to this criticism. First, evidence- and testimony-gathering difficulties apply to other types of jurisdictional bases as well, and these types of jurisdiction have served as the basis for legitimate criminal prosecutions.\(^{153}\) Second, the failure to immediately investigate crimes

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151. See Randall, supra note 119, at 839-40.
152. See Chandra Lekha Sriram, Revolutions in Accountability: New Approaches to Past Abuses, 19 AM. U. INT’L L. REV. 301, 374-400 (2003); SCHACHTER, supra note 14, at 269:

The apparent expansion of universal jurisdiction . . . raises questions as to the protection which the accused should be accorded in view of the absence of links of territoriality, or nationality or of any special State security interest. Can the accused plead forum non conveniens or demand a trial in a country in which the evidence and witnesses would be available for his defense?

of universal jurisdiction risks the loss of crucial evidence, without which a conviction might not be possible.

Evidence- and testimony-gathering problems are by no means unique to universal jurisdiction in absentia. Under the nationality source of jurisdiction, and certainly the passive personality source, where states exercise jurisdiction based on the nationality of the victim but the crime is committed in foreign territory, the same evidence-gathering burden exists. Despite this problem, national courts reticent to exercise universal jurisdiction in absentia have not hesitated to apply passive personality jurisdiction in absentia—or even to conduct trials, obtain convictions, and sentence criminals in absentia.

Also, any evidentiary hurdle that confronts universal jurisdiction in absentia arguably faces the usual form of universal jurisdiction (where the court has custody over the accused). Simply because the offender is located on the territory does not somehow make evidence gathering and compiling witness testimony any easier. The crimes being prosecuted under the principle of universal jurisdiction still occurred within a foreign territory. To be sure, international law should not throw out these other jurisdictional bases that involve foreign evidence gathering (and the prosecutions resulting from them) under the premise that the evidence gathering might be difficult.

On the other hand, if a state forestalls investigations and evidence gathering because the offender is not within its borders, crucial time-sensitive evidence may disappear before a thorough investigation can be conducted and a sound case brought. This delay could wipe out the possibility of conviction and result in an effective grant of impunity. Furthermore, United Nations resolutions and numerous international conventions impose on states the duty to assist in “the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons and the extradition of accused persons.”

154. See Schachter, supra note 14, at 254.


156. Unless, of course, one argues that the offender will come forward with sufficient evidence of his crimes.

In fact, state courts have successfully taken this type of extraterritorial investigative action and prosecuted universal criminals on the evidence obtained. In a case against a Rwandan national, Vincent Ntezimana, a Belgian investigating magistrate relied upon evidence obtained from several African states and from interviews with suspects in the custody of the ICTR to reject Ntezimana’s claim that there was neither sufficient nor credible evidence to support charges of genocide.\textsuperscript{158} Similarly, as already discussed,\textsuperscript{159} a Swiss military tribunal conducted a transnational investigation in order to build its case against a Rwandan national for crimes against humanity, war crimes, and genocide. Redress reports that “[t]wo rogatory missions had been to Rwanda to collect testimony and other evidence, and the court itself visited Rwanda. Exceptional measures were taken to ensure the protection of witnesses, who came from Rwanda and elsewhere in Europe to give evidence.”\textsuperscript{160}

In short, state courts presently conduct productive transnational investigations in cases under traditional notions of universal jurisdiction where the court has personal jurisdiction over the accused in order to bring well-founded charges against perpetrators of heinous international crimes, and thereby effectively combat impunity. There is no reason why states should not continue this practice through the same investigatory methodology under the principle of universal jurisdiction in absentia.

It is unfortunate that states refuse to take advantage of universal jurisdiction in absentia simply because the offender is not located within the state’s territory and cannot be brought to court. For example, in deciding the jurisdictional question with regard to Serb perpetrators accused of ethnic cleansing, the French Cour de cassation “adopted a narrow interpretation of the scope of judicial powers implied by universal jurisdiction; they declared that no universal jurisdiction exists as long as the perpetrator is not on French territory, not

\begin{thebibliography}{10}
\item \textsuperscript{158} See McKay, supra note 155, at 19-20.
\item \textsuperscript{159} See discussion supra Part II.C.
\item \textsuperscript{160} See McKay, supra note 155, at 42.
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even the jurisdiction to try to ascertain his whereabouts.\textsuperscript{161} The \textit{Cour de cassation}'s decision placed the burden on the victims to prove that the accused perpetrators were in French territory.\textsuperscript{162} As a result of this decision, the French National Consultative Commission on Human Rights immediately issued an opinion calling on the French government to better ensure French enforcement of international human rights through universal jurisdiction.\textsuperscript{163} The opinion further criticized the court's placement of the burden of proving the presence of suspects on French territory on the victims as prohibitively difficult and unfair.\textsuperscript{164} Regrettably, these perpetrators of egregious human rights violations may never face any international legal consequence for their acts because of France's unwillingness to employ universal jurisdiction in absentia.

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The theoretical premise and operational implementation of universal jurisdiction in absentia promote international criminal law objectives by advancing the struggle against impunity and providing redress for grave human rights violations where the alternative, as has been proved in practice, is international judicial inaction. Universal jurisdiction in absentia moreover may be exercised in a way that respects sovereignty and the maintenance of interstate relations. Putting these types of jurisdictional assertions into practice would cultivate a more comprehensive customary rule while, on a practical level, inducing increased international interaction in response to universal crimes. Focusing state interaction and consequently communication on universal crimes would lead to global publicity and perhaps cooperation in bringing perpetrators of these crimes to justice, thereby heightening international awareness of the crimes themselves and the legitimacy of the criminal proceedings.

III. A Modern Category of Universal Crime

As noted in the Introduction,\textsuperscript{165} expansive readings now argue for inclusion under the universal jurisdiction rubric the offenses of genocide, slavery, torture, crimes against humanity, war crimes, and perhaps

\textsuperscript{162} See id.
\textsuperscript{163} MCKAY, supra note 155.
\textsuperscript{164} Id.
\textsuperscript{165} See discussion supra Part I.A.
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terrorism. The opening up of the modern universal jurisdiction category is the result of an increase in international treaties, municipal legislation, and international and municipal tribunal decisions dealing with these crimes. The international consensus on the gravity of these offenses combines with the expansive jurisdictional provisions contained in treaties and municipal legislation to indicate the availability of universal jurisdiction over the offenses as a matter of customary law. Because the crime itself is universal under customary international law, the definition of the crime is also a matter of custom. The most handy definitions of crimes of universal jurisdiction, however, are found in positive law embodied in the statutes of international tribunals and in international treaties. But these definitions are not definitive; they merely reflect and codify the underlying customary international law.

Historically, the first crime of universal jurisdiction was piracy. Judge Moore's dissenting opinion in the famous Lotus case in the Permanent Court of International Justice has been recognized as a good starting point for describing the crime’s universal nature.

166. See THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, supra note 12, princ. 2(1), at 29 (Serious Crimes Under International Law); SCHACHTER, supra note 14, at 268.

167. See Steiner, supra note 4, at 205-06 (noting that municipal universal jurisdiction legislation might incorporate the precise definitions of these crimes that are set forth in one or another treaty—the Genocide or Torture Convention, the Geneva Conventions and their Protocols, and so on—or in other international instruments such as the Security Council-approved Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda).

168. See discussion infra Part III.E (describing the process by which certain acts of terrorism become universal).

169. See CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 2 (1965); Steiner, supra note 4, at 205.

170. PARRY, supra note 169, at 2. For example, the Nuremberg Tribunal refused to apply crimes against humanity, which had been specified in the statute conferring jurisdiction on the Tribunal, to crimes preceding 1939, the year that World War II commenced. The Tribunal held that crimes against humanity were established by customary international law by 1939, but there was no evidence that customary international law had recognized crimes against humanity at any particular date prior to 1939. See Trial of the Major War Criminals before the International Military Tribunal—Judgment (Int'l Mil. Trib., Nuremberg, 1947), reprinted in 22 THE NUREMBERG TRIALS (1950).

171. See BASSIOUNI, supra note 1, at 40.

172. See BROWNLIE, supra note 138, at 238.
Piracy by law of nations . . . is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.\(^{173}\)

The universal nature of the crime of piracy developed out of two basic necessities. One was the necessity to provide for forums to prosecute crimes committed in an area outside the territorial jurisdiction of any state—the high seas. The other necessity was to combat an offense that indiscriminately attacked all states but for which no state could be held responsible. The crime caused often severe economic and diplomatic damage in a way that threatened all states, and its harmful nature therefore stemmed from its destabilizing effect not only on individual states but also on the international order that these states comprised.

Evolutions in international law and changing global circumstances have led to the expansion of the universal jurisdiction taxonomy. As Judge Kaufman wrote for the United States Second Circuit Court of Appeals in *Filartiga v. Pena-Irala*, “it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”\(^{174}\) Finding torture a violation of customary international law, Judge Kaufman pronounced, “[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”\(^{175}\) Similarly, Malvina Halberstam draws a direct connection between acts of piracy and certain acts of terrorism:

Both the theoretical justification and the pragmatic necessity for universal jurisdiction apply to such acts. Terrorists today, like pirates of old, are a threat to all states and no state is willing to assume responsibility for their acts. Since they do not confine their attacks to the vessels of a particular state, but attack vessels and nationals of many states indiscriminately, they are *hostis humani generis* in the truest sense. Since no state has accepted

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175. *Id.* at 890.
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responsibility for their acts, there is no state against which claims for redress can be made.\textsuperscript{176}

After World War II, international law’s concentration on human rights placed crimes extremely harmful to human rights norms within the universal jurisdiction category.\textsuperscript{177} As the United States D.C. Circuit Court of Appeals explained,

[under the universal principle, states may prescribe and prosecute “certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism,” even absent any special connection between the state and the offense.\textsuperscript{178}

Like the D.C. Circuit, which recognized the application of universal jurisdiction to a terrorist who had hijacked and destroyed an airliner in the Middle East,\textsuperscript{179} states have used this principle to pursue grave

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In the past, pirates used one ship to attack another and the motive was material gain. Today, terrorists such as the hijackers of the Achille Lauro seize a ship, threaten its passengers and kill them without regard to the flag it flies or the nationality of the victims. That they do so by boarding the ship disguised as crew or passengers, rather than by attacking it from another ship, or that they are motivated by hate, revenge or a desire to call attention to a political cause rather than by a desire for material gain, does not affect the two essential elements that have justified assertion of universal jurisdiction in the past: that they are a threat to all states, and that no state can be held responsible for their acts.

\textit{Id.}
\item[177.] Jurisdiction over these offenses directly concerns each state since fundamental human rights have now been consecrated by international law as an imperious postulate of the general community of humankind. By acting in compliance with this postulate, each state protects the interests of this entire community at the same time as it safeguards its own interests.

\item[178.] United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).
\item[179.] \textit{Id.}
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violators of international law in their courts. Noteworthy examples include Israel's prosecution of Nazi war criminal Adolf Eichmann for genocide and the persecution of minorities; Spanish, Belgian, and French courts' charges against former Chilean dictator Augusto Pinochet; and obviously the Belgium arrest warrant for Ndombasi for crimes against humanity, including genocide. The Eichmann case is particularly remarkable because Adolf Eichmann's crimes were committed before Israel became a state. Although Israel nominally indicted Eichmann under Israeli law, in fact any strict application of that law to Eichmann would have been blatantly ex post facto. The Eichmann trial is justifiable, however, in that the Israeli law tracks the underlying customary international law which was in existence prior to the time that Eichmann committed his crimes. Indeed, acknowledging this justification, the Eichmann court referenced the universal jurisdictional base in its opinion. Thus in substance, although not in terms of

185. The court explained:

The abhorrent crimes defined in this Law are not crimes under Israel [sic] law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.
procedural technicality, the *Eichmann* trial was important in reaffirming the universality of the crimes of genocide and persecution.

Because universal jurisdiction in general, and universal jurisdiction in absentia assertions in particular, tend to threaten the sovereignty of territorial, national, and harboring states, only those crimes that are both most clearly defined and least subject to exaggeration and manipulation under international law should qualify as universal. This is, in effect, a very pragmatic argument: the more susceptible a category of crime is to exaggeration and manipulation by prosecuting courts, the more opportunity there is for baseless prosecutions motivated purely by political or sensationalist incentives and, consequently, the less sovereign states will pursue these types of prosecutions in practice. This non-practice by states will result not only because the prosecutions will be viewed as illegitimate from the outset by those states whose nationals are involved, but also because of the threat that these types of assertions will revisit a state wishing to assert jurisdiction any time it involves itself in an endeavor which could potentially lead to universal crimes—say, for example, a “war on terror” involving military initiatives around the globe.

There are certain crimes falling under the rubric of universal jurisdiction—genocide, torture, and slavery—whose definitions under international law, along with their increased prosecution conducted pursuant to the universality principle, create an objectivity that protects against abuse. There are other crimes—war crimes and crimes against humanity—that, while they may qualify as universal offenses, also suffer from problems of definition and scope. State governments’ anxiety over expansive definitions of these crimes would result in absolute opposition to any use of universal jurisdiction for fear that any time that state is involved in military action, its soldiers—and even its leaders, through doctrines of command responsibility—will end up the subject of some foreign jurisdiction. And the malleable definitions of these crimes are more susceptible to tampering and abuse by states that would bring unfounded charges for purely political ends. Terrorism presents an interesting problem in that as a category of crime it is impossible to define and is otherwise susceptible to the same abuses that plague war crimes and especially crimes against humanity. This Part avoids these definitional problems by arguing that certain acts of terrorism, clearly

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defined in international and municipal law, are subject to universal jurisdiction. The following Part examines the possible crimes that the consensus of nations includes under the modern universal jurisdiction rubric: genocide, slavery, torture, crimes against humanity, war crimes, and terrorism.

A. Genocide

Perhaps the most palpable crime of universal jurisdiction in international law given the history of the past century is genocide. Genocide may be roughly defined as committing certain acts against a national, ethnic, racial, or religious group with the intent to destroy that group.\textsuperscript{186} A variety of acts directed against the target group constitute genocide, including killing, causing serious mental or bodily harm, deliberately inflicting living conditions calculated to bring about the group's destruction, preventing births within the group, and transferring children of the group to another group.\textsuperscript{187} Although the jurisdictional provision of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide does not provide for extraterritorial jurisdiction by states,\textsuperscript{188} it is now relatively well established that genocide is a crime of universal jurisdiction.\textsuperscript{189}

\textsuperscript{186} Article 6 of the International Criminal Court describes:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

\textsuperscript{187} Id.


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B. Slavery

A less modern, but still unfortunately relevant, example of a universal jurisdiction crime is slavery. The universal nature of slavery is historically closely associated with the universal nature of piracy, as both offenses traditionally involved use of the high seas. Slavery is categorized as a crime against humanity by the International Criminal Court (ICC). According to the ICC Statute, enslavement "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."192

C. Torture

Torture, like slavery, is one of the most accepted universal crimes. The Torture Convention provides a universal jurisdictional base that obliges states to prosecute or extradite torturers found within that state’s jurisdiction and implicitly relies upon the principle of universality. Generally, torture is the intentional infliction of mental or physical pain or suffering on a person by authorities when the person is

190. See Bassiouni, supra note 1, at 49.
191. See ICC Statute, supra note 186, art. 7(2)(c).
192. Id.

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
   (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State;
   (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

195. See Bassiouni, supra note 1, at 55-56.
Torture does not, however, include pain or suffering that arises solely from "lawful" sanctions—which invariably means sanctions that do not constitute torture under international law.  

D. Crimes Against Humanity and War Crimes

So far this Part has discussed certain specific crimes of universal jurisdiction that are accepted as such by the consensus of nations: genocide, slavery, and torture. These crimes have in common a well-defined and limited scope derived from international custom as evidenced by treaties and municipal legislation. Thus, the "universality" of these specific crimes is dependent not only upon their substance but also upon their definition and scope.

The same is not true of the definitions of “crimes against humanity” and “war crimes” under current international law. At this time an international consensus has not been reached as to some important dimensions of these crimes. For this reason, universal jurisdictional assertions based on war crimes and crimes against humanity not only prove difficult for courts wishing to prosecute on these grounds, any such assertions also ensure enough opposition by states that universal jurisdiction might never take hold as to these crimes in the real world of international law enforcement, and thus the attempted use of universal jurisdiction over the crimes might even undermine the legitimacy of the principle itself.

Crimes against humanity present a problem similar to terrorism. Article 7 of the ICC Statute broadly defines crimes against humanity as acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” While there are certainly clearly defined crimes against humanity that are subject to universal jurisdiction—i.e., genocide, slavery—the definitional problem of potentially expanding this class of international crime to encompass subjectively-determined conduct is great. Indeed, an exhaustive list of crimes against humanity proves unmanageably

196. The ICC Statute defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." See ICC Statute, supra note 186, art. 7(2)(e).
197. Id.
198. See infra Part III.E.
199. ICC Statute, supra note 186, art. 7.
expansive and vague,\textsuperscript{200} and unlike our other crimes of universal jurisdiction, "there is no specialized convention for crimes against humanity."\textsuperscript{201} For this reason, the safer route for international law would be to stick to detailed definitions of individual offenses as codified by international instruments for universal jurisdiction purposes. Moreover, as Bassiouni points out, positive international law dealing with crimes against humanity bases jurisdiction almost exclusively on the principle of territoriality, and, "[a]s a result, one cannot say that there is conventional law providing for universal jurisdiction for 'crimes against humanity.'"\textsuperscript{202}

Next, while war crimes and the humanitarian law governing such crimes may be elaborately defined in international positive law through, for example, the four Geneva Conventions\textsuperscript{203} and their two additional protocols,\textsuperscript{204} serious questions exist as to the scope of these crimes. It is perhaps for this reason that state practice fails to demonstrate the use of universal jurisdiction with respect to war crimes, and why, as Bassiouni points out, "[t]he recognition of universal jurisdiction for war crimes is essentially driven by academics and experts’ writings."\textsuperscript{205}

To be sure, there are clear core instances of war crimes. The napalm bombardment of the Tokyo suburbs in May 1945, under the orders of General Curtis LeMay, was as clear a war crime as one could possibly imagine: his targets were women, children, and the elderly huddled in wooden houses in the most densely populated area of the world, and his avowed purpose was to terrorize the people of Japan so that they would surrender and beg for mercy.\textsuperscript{206} But even though there are core

\begin{footnotesize}
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\item \textsuperscript{201} Bassiouni, \textit{supra} note 1, at 52.
\item \textsuperscript{202} Id.
\item \textsuperscript{205} Bassiouni, \textit{supra} note 1, at 51.
\item \textsuperscript{206} See Hofto Edion, \textit{The Night Tokyo Burned} 17-18, 100-02 (1987).
\end{enumerate}
\end{footnotesize}
cases, the problem remains that war crimes at the current juncture of world politics encompass too many peripheral cases. Further, no small part of the humanitarian law governing armed conflict is aspirational. As Theodor Meron points out, the “‘excessive’ humanization [of these rules] might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules.”207 Indeed, Meron explains that “[a]lthough the prospects for compliance with humanitarian norms may be less auspicious than for other norms of public international law, they enjoy stronger moral support.”208 As a result, we are “often prepared to accept a rather large gap between practice and the norms concerned” such that “gradual and partial compliance has been accepted as fulfilling the requirements for the formation of customary law, and contrary practice downplayed.”209 The reality of war may very well preclude absolute compliance with certain rules of humanitarian law no matter how fervently a military endeavors not to commit war crimes.

For example, the Office of the Independent Prosecutor for the ICTY opted not to pursue even an investigation into the 1999 NATO bombing campaign in the former Yugoslavia despite evidence pointing to NATO war crimes under a fastidious application of the ICTY Statute and international humanitarian law generally.210 Under standards of target selection and proportionality contained in articles 48, 51, and 85 of Protocol I of the Geneva Conventions211 and reflected in the

207. Meron, supra note 200, at 241.
208. Id. at 244.
209. Id.
211. Protocol I, supra note 204. The standards for target selection encompassed in Protocol I are as follows: 1) “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Id. art. 48; 2) “The civilian population as such, as well as individual civilians, shall not be the object of attack.” Id. art. 51(2); 3) “[M]ilitary objectives are . . . those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Id. art 52(2); 4) Attacks violate the target selection standards if they are “of a nature to strike military objectives and civilians or civilian objects without distinction.” Id. art. 51(4)(c); and 5) An indiscriminate attack is defined as an “attack by bombardment by any means or methods which treats as a single military objective a number of clearly separated and distinct military objectives
Tribunal’s statute,\textsuperscript{212} NATO was effectively absolved of all responsibility for approximately 500 civilian deaths resulting from the following: a mid-morning attack on a bridge in which the NATO pilot blew up a

located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.” \textit{Id.} art. 51(5)(a)

The standards for proportionality encompassed in Protocol I are as follows: First, article 57 provides that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” \textit{Id.} art. 57. With respect to attacks, article 57 requires that the following precautions be taken:

(a) Those who plan or decide upon an attack shall:
   (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . . .
   (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

   \ldots .

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

\textit{Id.}

\textsuperscript{212} The ICTY recently explained:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the \textit{actus reus} for the offence of unlawful attack under Article 3 of the ICTY Statute . . . . In determining whether or not the \textit{mens rea} requirement has been met, it should be borne in mind that commanders deciding on an attack have duties:

(a) to do everything practicable to verify that the objectives to be attacked are military objectives

(b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage, and to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.

civilian passenger train;\textsuperscript{213} the bombing by NATO pilots of a civilian refugee column;\textsuperscript{214} the bombing by NATO pilots of the Serbian television and radio station;\textsuperscript{215} the bombing by NATO pilots of the Chinese embassy;\textsuperscript{216} and the bombing by NATO pilots of the Yugoslav village of Korisa.\textsuperscript{217} Despite easily made allegations of war crimes, it is undisputed that the NATO bombing campaign was more calculated and more obedient of international humanitarian law than any previous military action.\textsuperscript{218} What would be the result of a state hostile to NATO initiating proceedings against Supreme Allied Commander, General Wesley Clark, under a theory of universal jurisdiction? Such an assertion would depend upon a standard of unprecedented and perhaps unrealistic compliance with humanitarian law, would likely be viewed as a farce, and yet might serve to chill any military initiative in the future where the halting of a potential genocide—and the saving of many lives—is at stake.

Even confining the discussion to the war in Iraq in the spring of 2003, again an example in which more effort was made to comply with humanitarian law than ever before, there are many problematic situations. In terms of compliance, for the first time in military history lawyers were embedded in infantry divisions to review proposed strikes.\textsuperscript{219} The lawyers gave on-the-spot advice on whether a strike was legal under international humanitarian law.\textsuperscript{220} From all accounts this advice was strictly followed; indeed, the lead lawyer, Colonel Case, reported that his advice was never overruled and sometimes commanders even rejected targets he said were legal.\textsuperscript{221} In contrast, Iraqi Ba'thist and fedayeen soldiers were directed to shield themselves with the bodies of women and children and to use civilian neighborhoods as bases of operation—directions that were followed in combat.\textsuperscript{222} Among other battle techniques, Iraqi forces lined up civilians in front of their

\begin{itemize}
\item \textsuperscript{213} See Colangelo, supra note 210, at 1401-05.
\item \textsuperscript{214} Id. at 1405-10.
\item \textsuperscript{215} Id. at 1411-17.
\item \textsuperscript{216} Id. at 1417-19.
\item \textsuperscript{217} Id. at 1419-24.
\item \textsuperscript{218} See id. at 1426-27 and accompanying footnotes.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 67-68. These orders were employed in the field. An Iraqi taxi driver and eyewitness reported that "[m]ost of the fedayeen and Ba'thists distributed and hid between houses because they thought the Americans wouldn't shoot civilians. They used civilians as shields." Id. at 67.
\end{itemize}
vehicles in order to advance safely, herded women and children out of their homes in order to fire rocket propelled grenades over their heads, and picked up children to use as shields during firefights in order to cross roads safely.\textsuperscript{223} Did the U.S. helicopter pilots flying overhead and soldiers traveling through the streets commit war crimes when they returned fire upon Iraqi snipers and militia members positioned next to or behind civilians?\textsuperscript{224} Inevitably some civilians were killed, but were these acts indictable war crimes?

Additionally, in the 2003 Iraq conflict, 67\% of the bombs dropped by U.S. and U.K. forces were precision-guided weapons designed to protect against civilian casualties,\textsuperscript{225} in contrast to 8\% in the 1991 Persian Gulf conflict, 33\% percent in the conflict in the former Yugoslavia, and 65\% percent in the conflict in Afghanistan.\textsuperscript{226} U.S. and U.K. forces also took other measures to prevent against civilian loss of life: they bombed at night, used penetrator munitions and delayed fuses to reduce fragmentation, and used attack angles that accounted for the locations of civilian facilities.\textsuperscript{227} Nonetheless, was the accurate targeting of a home in a Baghdad suburb by precision-guided bombs a war crime if civilians died in the attack where the United States acted on "time-sensitive" intelligence that Saddam Hussein and his sons were physically present in the residence?\textsuperscript{228} Finally, did the United States' use of cluster bombs violate the standard of target discrimination despite a multi-level screening system of computer and human vetting?\textsuperscript{229}

Compounding these problems are the second-order issues of command responsibility. Are the American leaders of the war in Iraq, including Secretary of Defense Donald Rumsfeld, President George W. Bush, and General Tommy Franks, vicariously liable as war criminals for the previously described actions and non-actions of the American soldiers and pilots?\textsuperscript{230}

\textsuperscript{223} \textit{Id.} at 67-68.
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.} at 16.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.} at 17.
\textsuperscript{228} \textit{Id.} at 22-25.
\textsuperscript{229} \textit{Id.} at 92-98.
\textsuperscript{230} For one concrete example, Human Rights Watch explains that

U.S. air forces carry out a collateral damage [civilian death] estimate using a computer model designed to determine the weapon, fuze, attack angle, and time of day that will ensure maximum effect on a target with minimum civilian casualties. Defense Secretary
In Kosovo and Iraq, the United States adhered more strictly to international humanitarian law and used more advanced military technology than the world has ever seen to protect against loss of civilian life. Yet it is totally conceivable that some country would, and could, assert universal jurisdiction based upon a variety of alleged war crimes. The "public relations" benefit of "standing up to the superpower" might serve as a propagandistic, rather than a legalistic, reason for going ahead. And yet the outcome would be self-destructive. The usefulness of universal jurisdiction under the right circumstances would be undermined by stretching the category to include wrongful or doubtful circumstances. The idea of accountability for universal crimes would be rendered vacuous if it could be so easily manipulated for sensationalist or propagandistic purposes.

Of course, the country that most objects to universal jurisdiction for war crimes is the United States. Why should the world's only superpower be exempt from individual accountability? Isn't the United States big enough and powerful enough to withstand occasional assaults upon its dignity as might result from a marginal assertion of jurisdiction over one of its leaders for war crimes? These charges might have merit if the United States in fact did not take war-crimes prosecutions seriously. But in fact the political leaders of the United States are just as risk-averse to the possibility of being held individually accountable for war crimes as the leaders of any other country. It is this very fact of fear of being subject to international criminal jurisdic-

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Donald Rumsfeld reportedly had to authorize personally all targets that had a collateral damage estimate of more than thirty civilian casualties.

Id. at 19.

231. For example, not only has the United States expressed its desire not to be party to the International Criminal Court and therefore subject its soldiers to ICC jurisdiction, the American Servicemembers' Protection Act 2002, H.R. 4775, 107th Cong. (2002) authorizes the President to use "all means necessary and appropriate"—i.e., including military action—to bring about the release of American soldiers in ICC custody.


233. Even though, to take our previous example, jurisdiction in absentia by a foreign court against President Bush for war crimes in Iraq would be to all intents and purposes unenforceable and therefore of no practical effect against George W. Bush, it does not follow that he would not be deeply upset by the commencement of such a proceeding against him. Indeed, the United States put significant pressure on Belgium to repeal its expansive universal jurisdiction-type legislation when cases were brought before the Belgian courts alleging war crimes by top U.S. officials in both Gulf Wars. Belgium subsequently amended the law. See Steven R. Ratner, Editorial
tion that makes the subject of the present Article significant at the present time.\textsuperscript{234}

The ostensible reason the United States objects to war crimes prosecutions based on universal jurisdiction is roughly as follows: in the foreseeable future when it falls to the United States to take military action around the world for humanitarian, peacekeeping, or inclusive world interest purposes, if any war crimes are committed in any war, that war will involve American commanders and troops. This is true with respect to UN, NATO, and multilateral "Coalition" interventions in Somalia, Kosovo, Afghanistan, and Iraq. It is no secret that the near future may envisage American military initiatives in Iran, Syria, and North Korea. Thus an overwhelmingly disproportionate number of recent and foreseeable international military engagements will involve the active participation of the American military. Although political leaders of other countries share the same theoretical risk of international prosecution for war crimes as American leaders, in fact it is the latter group that will inevitably be most exposed to these charges. This risk-in-fact of individual accountability to American leaders far outweighs the risk-in-theory to leaders in all countries.

To be sure, the foregoing is not intended to convince the reader that the United States is justified in all of its military actions (that is well outside the scope of this argument). Rather, the purpose has been to show that any armed conflict, no matter how carefully planned and executed and no matter what the justification, will involve instances that can be viewed as war crimes, and to show that involved states will object to the use of universal jurisdiction as to war crimes for this reason. At the present juncture in world history, and for the foreseeable future, the United States will be the most involved state. For this reason, the position of the United States with respect to universal jurisdiction over war crimes may well remain diametrically opposed to the stated interests of other nations in exercising jurisdiction and even proceeding with prosecutions. Discretion may be the better part of valor. In order to affirm the practice of universal jurisdiction, nations might be well advised to limit universal jurisdictional assertions to

\textit{Comment: Belgium's War Crimes Statute: A Postmortem,} 97 Am. J. Int'l L. 888, 891 (2003) (describing the amendment process due to pressure from other states, and in particular, the United States).

\textsuperscript{234} Prior to the Nuremberg trials, political and military leaders felt an immunity for any of their actions against other countries. Nuremberg was a watershed development, not so much legally (there had been previous war-crimes prosecutions) as psychologically: the lesson was brought home to every military and political leader that certain policies cannot be set in motion without committing an international crime.
crimes of genocide, slavery, torture, and certain acts of terrorism. Prosecutions for war crimes simply may be too controversial and susceptible to abuse at present to make them subject to universal jurisdiction in practice.

E. Certain Acts of Terrorism

Certain acts of terrorism are the most recent additions to the list of consensus crimes of universal jurisdiction. Even before the terrorist attack on the World Trade Center in New York in September 2001, Bassiouni noted the large catalogue of international instruments dealing with the problem of international terrorism:

The United Nations bodies and agencies have produced, between 1963-1999, fourteen international conventions, six draft conventions, thirty-four resolutions, forty-six reports, seven studies by the Ad Hoc Committee on International Terrorism, five Notes by the Secretary-General and eighteen miscellaneous documents pertaining to “terrorism,” totaling 112 instruments and documents on the subject.235

However, a controversy arises with respect to terrorism from the difficulty in arriving at a comprehensive and workable definition of the crime236 ... though its definition is unfortunately becoming clearer with each passing year. Terrorism is increasingly viewed by the international legal community as an act of war or rebellion committed by persons not self-identified as military agents against civilian non-combatants. Yet, because of its lingering definitional uncertainty it is still premature to flatly categorize “terrorism” as a universal crime.237 Like crimes against humanity, because of the flexibility of the general definition, the potential for baseless jurisdictional assertions rooted in corrupt motives would, as a practical matter, rightly block the practice of using “terrorism” as a crime of universal jurisdiction.238

Nonetheless, this does not mean that there are not certain well-defined acts of terrorism that are excluded from the universal crime category. Numerous international conventions have spelled out con-

236. See United States v. Yousef, 327 F.3d 56, 107-08 n.42 (2d Cir. 2003).
237. See id.
238. See id.
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cretely various forms of terrorism. For example, if a hijacker keeps people hostage and preconditions release on some forced act, he would violate the international law reflected in the 1979 International Convention Against the Taking of Hostages, also known as the Hostage Convention.

Perhaps the best way to present this argument is through examination of the recent United States Second Circuit Court of Appeals ruling in United States v. Yousef that terrorism is not a crime of universal jurisdiction under customary international law. The holding in Yousef that "terrorism," and implicitly that a specific act of terrorism—planting a bomb on a civilian aircraft—is not subject to universal jurisdiction is problematic for a number of reasons. Principally, the opinion's discussion of international law is exceedingly incomplete.


240. Article 1 states that:

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:
   (a) attempts to commit an act of hostage-taking, or
   (b) participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.


241. Yousef, 327 F.3d at 107-08.

242. Id.
The discussion extensively details principles for evaluating customary international law and then proceeds to ignore these principles in evaluating whether the act of planting a bomb on a civilian aircraft is subject to universal jurisdiction. In fact, the opinion issues two holdings that directly contradict one another under its international law analysis. Specifically, the universal jurisdiction holding conflicts with the effect of the opinion itself on the question of whether universal jurisdiction over the act of planting a bomb on a civilian aircraft is permissible as a matter of customary law.

The opinion holds that Yousef’s actions, consisting of planting an explosive on a civilian airliner, do not constitute a crime subject to universal jurisdiction under customary international law. In so holding, it rejects the district court’s reliance on the Restatement (Third) of the Foreign Relations Law of the United States as misplaced because the Restatement is merely the writing of publicists, which is not a valid source of international law but may be used only as a clarifying resource. In this respect the opinion is absolutely correct. What is incorrect is the opinion’s failure to consider the strong evidence of international custom reflected in the treaty upon which the opinion relies, the municipal legislation upon which the opinion relies, and the outcome of the opinion itself, which holds Yousef subject to extraterritorial jurisdiction absent a national or territorial U.S. link to the offense. Yousef is not a U.S. national, the plane on which Yousef planted the bomb was travelling between the Philippines and Japan, and the bomb killed a Japanese national (and there was further no evidence that a U.S. national was even aboard the flight).

The opinion provides an in-depth discussion of the sources of international law. It focuses primarily on article 38 of the Statute of the International Court of Justice, which is widely considered to be the authoritative touchstone for evaluating the existence of international law. Article 38, as reproduced in the text of the opinion, reads in

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243. See id. at 90-109.
244. Id. at 107-08.
245. Id. at 99-100.
249. Id. at 97.
250. Id. at 90-109.
251. Id. at 100-01.
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.  

The second most important source of international law according to this unofficial hierarchy—after treaties—is customary international law. In order to determine customary international law, the ICJ Statute quoted above and U.S. Supreme Court precedent direct that courts look to “settled rule[s] of international law” as recognized by “the assent of civilized nations” and “the general usage and practice of nations[,] or [to] judicial decisions recognizing and enforcing that law.” As the opinion itself puts it, customary law is derived “primarily from the official acts and practices of States,” and “the acts and decisions of States are sources of law.” The opinion even quotes in its text the statement that “[t]he records or evidence of international law are the documents or acts proving the consent of States to its rules. Among such records or evidence, treaties and practice play an essential part, though recourse must also be had to unilateral declarations, instructions to diplomatic agents, laws and ordinances . . . .”

253. See id.; The Paquete Habana, 175 U.S. 677, 694 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); see also Hilton v. Guyot, 159 U.S. 113, 163 (1895) (concluding that the law of nations may be ascertained “from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations”).
254. Yousef, 327 F.3d at 93.
255. Id. at 101.
256. Id. (quoting Clive Parry, The Sources and Evidences of International Law 2 (1965) (emphasis in original)).
tantly, the opinion then goes on to hold that Yousef's actions render him subject to U.S. jurisdiction under positive law pursuant to U.S. obligations under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Not only that, but the opinion holds that Yousef is independently subject to U.S. jurisdiction under the Montreal Convention's implementing municipal legislation, the Aircraft Sabotage Act, codified in relevant part at 18 U.S.C. § 32(b). All three of these sources of law—(1) the treaty, (2) the municipal legislation, and (3) the *Yousef* opinion itself—supply powerful evidence of a customary international rule that subjects people who plant bombs on civilian aircraft to universal jurisdiction.

A state's entrance into a treaty with other states and commitment to be bound thereby constitutes the maximal expression of state sovereignty and "assent" to the particular rules contained in that treaty; the state's implementing legislation pursuant to the treaty compounds this assent by demonstrating a "general usage and practice" designed to enforce those rules; and finally, "the [state's] judicial decisions recogniz[e] and enforce[e] that law" in practice.

The Montreal Convention, which was put into effect in 1971, currently has 173 states parties, which means that in the last thirty years the vast majority of states in the world have agreed to bind themselves to and put into practice through domestic legislation and judicial enforcement the provisions of the treaty. As the opinion rightly points out, the Montreal Convention "creates a basis for the assertion of jurisdiction that is moored in a process of formal lawmaking and that is binding only on the States that accede to it." But it is precisely this process of formal lawmaking between sovereign states, their mutual assent to the rule agreed upon, and their affirmative adoption and implementation of this rule in domestic legislation and judicial decision-making that constitutes evidence of the customary rule. What is important to keep in mind is that the treaty, the municipal legislation, and the judicial opinion are not *themselves* customary international law; rather they make up the absolute best evidence of what a state, the United States, and all other states party to the Montreal Convention consider to be a legally binding practice—and in this respect supply the most powerful evidence possible of customary international law there is.

257. *Id.* at 108-09; *see also* Montreal Convention, *supra* note 246.
258. *Yousef*, 327 F.3d at 110.
261. 327 F.3d at 96.
In short, the fact that Yousef is subject to U.S. jurisdiction under the Montreal Convention—which has been ratified by the vast majority of states in the world—and its implementing legislation provides perhaps the ultimate example of a customary international rule that allows for extraterritorial jurisdiction absent a national or territorial nexus to the accused where the offense involves planting a bomb on a civilian aircraft.

The existence of a customary rule of universal jurisdiction over Yousef’s crime becomes apparent upon examination of the Montreal Convention and 18 U.S.C. § 32(b). These sources of law evidence (1) a state practice of asserting extraterritorial jurisdiction absent traditional territorial or national links (2) over a specifically defined offense: planting a bomb on a civilian aircraft—not “terrorism.”

First, as the opinion observes, “[t]he purpose of the Montreal Convention is to ensure that individuals who attack airlines cannot take refuge in a country because its courts lack jurisdiction over someone who committed such an act against a foreign-flag airplane in another nation,” and “[t]he express purpose of the [Montreal] Convention is to ensure that terrorists who commit crimes on or against aircraft cannot take refuge in countries whose courts otherwise might have lacked jurisdiction over an offense against a foreign-flag aircraft that transpired either in another State or in international airspace.” Article 7 provides for a treaty-based equivalent of universal jurisdiction. It states:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Indeed, as the opinion proclaims,

262. Id. at 90.
263. Id. at 96.
264. Montreal Convention, supra note 246, art. 7.
the Convention does not condition the requirement that a State party extradite or prosecute such an individual found within the State on the existence of any additional contacts between that State and either the offender or the offense. In other words, no nexus requirement delimits the obligation of parties to the Convention to prosecute offenders.\textsuperscript{265}

Moreover, the implementing legislation enacted pursuant to article 5(2)\textsuperscript{266} and codified at section 32(b) of the Aircraft Sabotage Act provides for jurisdiction over offenses like Yousef’s “if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterwards found in the United States.”\textsuperscript{267} These provisions are clearly indicative of a universal jurisdictional base for this offense.

A useful comparative example to highlight the expansive nature of the jurisdictional provisions of the Montreal Convention and its implementing legislation is the universal crime of genocide. “Genocide” had not been defined as a crime, let alone a universal crime, at the time the International Military Tribunal prosecuted the Nazis.\textsuperscript{268} The universal nature of the crime arose out of a treaty—the 1948 Convention on the

\begin{quote}
\textsuperscript{265} 327 F.3d at 109.
\textsuperscript{266} Article 5(2) reads:

Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 (a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

Montreal Convention, \textit{supra} note 246, art. 7.

\textsuperscript{267} 18 U.S.C. \textsection{} 32(b) (1994) (emphasis added).

\textsuperscript{268} Genocide was prosecuted as a crime against humanity. Article 6(c) of the Nuremberg Charter defines crimes against humanity as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288.
\end{quote}
Prevention and Punishment of the Crime of Genocide.\textsuperscript{269} Through the process discussed above, the mutual assent and commitment by sovereign states to follow a certain practice with respect to the crime of genocide rendered it a universal offense as a matter of customary law. Expressly rejected, however, in the drafting of the Genocide Convention was the draft jurisdictional provision providing for extraterritorial jurisdiction, which read: "[Persons charged with genocide] may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for extradition."\textsuperscript{270} The jurisdictional provision eventually adopted by the Genocide Convention provided that the offender "shall be tried by a competent tribunal of the State in the territory of which the act was committed."\textsuperscript{271}

By contrast, the jurisdictional provisions in the Montreal Convention not only authorize but expressly mandate extraterritorial jurisdiction absent traditional links—the equivalent of universal jurisdiction in customary law. Thus, it is not simply the fact that all of these states agreed to prosecute the planting of bombs on aircraft that creates universal jurisdiction over the offense (as is the rationale for genocide as a universal crime), but the Montreal Convention actually provides for this type of exceptional jurisdiction so that perpetrators of this crime do not escape justice.

\textit{Yousef} holds that "terrorism" is not a crime of universal jurisdiction because there is no internationally agreed-upon definition of the crime.\textsuperscript{272} This may be so, but it is wrong to categorize Yousef's crime exclusively as "terrorism" under international law, and there is no reason to deny its universal nature on this ground when an internationally agreed-upon definition of the crime is readily apparent.

Just as the jurisdictional provisions of the Montreal Convention and its implementing legislation define the type of jurisdictional assertions that are permissible under customary law for prosecuting people who plant bombs on civilian airplanes, the definitional provisions of the treaty and municipal law define the offense itself. Article 1 of the Montreal Convention defines the prohibited conduct as follows:

\begin{itemize}
\item \textsuperscript{269} See Genocide Convention, supra note 188.
\item \textsuperscript{271} Genocide Convention, supra note 188, art. 6.
\item \textsuperscript{272} Yousef, 327 F.3d at 106-08.
\end{itemize}
Any person commits an offence if he unlawfully and intentionally:

... places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.\(^\text{273}\)

Section 32(b) defines the offense similarly.\(^\text{274}\) These definitions need not invoke the exclusive label "terrorism." Planting an explosive on a civilian aircraft is simply a crime that customary international law considers subject to universal jurisdiction irrespective of whether it is a "terrorist" act or not. If the terrorist were instead a common soldier who planted a bomb on a civilian plane, that act would absolutely qualify as a war crime and could therefore be subject to universal jurisdiction.\(^\text{275}\) Why should the result be any different for a terrorist where the crime is much more clearly articulated than under the proportionality and target discrimination standards governing war crimes?\(^\text{276}\) Indeed, this type of act—bomb planting on commercial airliners—is exactly the sort of crime for which the universal jurisdiction category was invented. As Yousef mentions, piracy was the original crime of universal jurisdiction.\(^\text{277}\) And as discussed,\(^\text{278}\) universal jurisdiction developed to deal with piracy because, like airline bombing and other terrorist acts, it attacks states indiscriminately and disrupts international stability on multiple levels, damaging the economic, diplomatic, and security foundations of the world community of states.

\(^{273}\) Montreal Convention, supra note 246, art. 1.
\(^{274}\) It defines the offender as someone who willfully places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy the aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight.


\(^{275}\) See Yousef, 327 F.3d at 105 (explaining that the United States recognizes "war crimes... as crimes for which international law permits the exercise of universal jurisdiction") (citing Demjanuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985)).

\(^{276}\) See supra notes 211-12.

\(^{277}\) Yousef, 327 F.3d at 104.

\(^{278}\) See discussion supra Part III.
Because the crimes of genocide, slavery, torture, and certain acts of terrorism are both universally condemned and may engender criminal jurisdiction absent national or territorial links, they qualify as crimes of universal jurisdiction. Moreover, unlike the general categories of “war crimes” and “crimes against humanity,” their restrictive scope makes them good candidates for in absentia assertions by curtailing the potential for abuse and exaggeration of their definitions.

IV. Conclusion

This Article has dealt with the two main issues facing the modern doctrine and application of the principle of universal jurisdiction: (i) whether universal jurisdiction can be exercised in absentia, and (ii) what crimes qualify as crimes of universal jurisdiction. As the argument has shown, these issues effect both a theoretical and practical clash between international justice on the one hand and peaceful international relations based on respect for state sovereignty on the other. Taking these competing interests into account, the Article has argued in favor of a modern principle of universal jurisdiction that allows for in absentia assertions in a way that is respectful of sovereignty while empowering international justice to deal with universal crimes. It has further argued in favor of universal jurisdiction over only the most clearly articulated universal offenses under international law to prevent against abuse of the principle and to foster development of the customary rule. In an increasingly shrinking world focused on combating universal crimes like terrorist bombings and crippling tyrannical regimes that perpetrate grave human rights violations, a modern principle of universal jurisdiction that allows for in absentia assertions and signaling among states, but limits its ambit to the most definite international offenses, provides an innovative and peaceful international law enforcement mechanism.