# THE INTERNATIONAL CRIMINAL COURT AND UNIVERSAL JURISDICTION: A FRAUGHT RELATIONSHIP?

*Cedric Ryngaert**

*This article deals with the relationship between the principle of universal jurisdiction and the jurisdiction of the ICC. Voices have been raised to expand the jurisdictional basis of the ICC's Rome Statute to include the universality principle. The author does not support this expansion, however, mainly on practical grounds. At the same time, however, he does support, albeit cautiously, taking into account the universality principle for purposes of the admissibility analysis under Article 17 of the Statute. The ICC's principle of complementarity indeed requires that the ICC defer to any state that might have jurisdiction, including a state having universal jurisdiction over serious crimes. It is proposed that the ICC Prosecutor encourage certain "bystander" states that can provide an effective forum to investigate and prosecute atrocity cases, at least if the territorial state, or the state of nationality, proves unable and unwilling to do so.*

## I. INTRODUCTION

Under the heading "the International Criminal Court (ICC) and universal jurisdiction," one could discuss two rather unrelated questions. The first one relates to whether the ICC should have the authority to exercise universal jurisdiction. The second one relates to what the relationship should be between the Court and individual "bystander" states exercising universal jurisdiction. We will deal with both questions in turn.

*Assistant professor of international law, Leuven University and Utrecht University

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In this article, universal jurisdiction is understood as the exercise of jurisdiction over a crime by either the ICC or a state in the absence of a territorial, personal, or other nexus to the crime. It is jurisdiction that is based solely on the (heinous) nature of the crime.[1] If the ICC Prosecutor exercised universal jurisdiction, he could prosecute any international crime, wherever in the world committed. He would thus not be constrained by the ICC's current restrictions on its jurisdiction *ratione territorii* and *ratione personae*. While the ICC Statute as adopted at the Rome conference in 1998 does not provide for universal jurisdiction, it is recalled that proposals were tabled at the time to the effect of conferring universal jurisdiction, whether a limited version of it or not, on the Court. The question now is whether it amounts to sound policy for states parties to table these proposals again at the next review conference.

While the desirability of granting the *Court* universal jurisdiction is the subject of the first section, the second section turns its gaze towards the exercise of universal jurisdiction by states *ut singuli* (it is at the state level that universal jurisdiction originated). The research question in this section is whether "bystander" states exercising universal jurisdiction still have a role to play in an ICC era. In particular, I explore whether such states could qualify as "able and willing" states in relation to the ICC's complementarity principle. More generally, I examine what the role of bystander states in the Rome system of international criminal justice ought to be.

## II. SHOULD UNIVERSAL JURISDICTION BE CONFERRED ON THE INTERNATIONAL CRIMINAL COURT?

As is known, the ICC does not have universal jurisdiction, at least not in the strict sense of the word. Stating that the ICC does not have universal

1. Principle 1(1) of the Princeton Principles on Universal Jurisdiction (2001), reprinted in Universal Jurisdiction 21 (Stephen Macedo ed., 2004) ("without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction"); also Principle 13 of the Brussels Principles Against Immunity and for International Justice (2002), in Combating Impunity: Proceedings of the Symposium Held in Brussels from 11 to 13 March 2002, at 149, 157, which defines universal jurisdiction as "the right of a State to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim."

jurisdiction is stating that the ICC cannot exercise jurisdiction over whomever committed the crimes, or wherever the crimes may have been committed. The Court's jurisdiction is indeed strictly circumscribed: the Court only has jurisdiction on the basis of the territoriality principle (i.e., in case the crimes have occurred in the territory of a state party, or on board a vessel or an aircraft registered in a state party) and on the basis of the nationality principle (i.e., in case the crimes have been committed by a national of a state party).[2] The Court can also exercise jurisdiction in other, rather exceptional circumstances, namely in case a state consents ad hoc to the jurisdiction of the Court over crimes committed on its territory or by its nationals,[3] and in case the U.N. Security Council refers a case to the ICC.[4] One might argue that the exercise of jurisdiction in those circumstances could be considered as based on the universality principle. In fact, however, the exercise of jurisdiction in the former case is based on the territorial or nationality principle, and in the latter case on the inherent powers of the Security Council to deal with threats and breaches of international peace and security (on the basis of which it has also set up the ICTY and ICTR).

If the Court had truly *universal* jurisdiction, it would be able to deal with crimes that are committed in any part of the world, irrespective of whether the territorial state or the state of nationality of the offender has ratified the Statute, or whether the Security Council has referred the situation to the Court. Under the Rome Statute, the Court does not have such jurisdiction. Proposals by Germany and South Korea in this respect failed. Accordingly, absent a Security Council resolution, the Court does not have jurisdiction over all international crimes. This obviously runs counter to the stated purpose of the Rome Statute: putting an end to impunity for international crimes.[5] It would therefore make sense to expand the jurisdictional basis of the Rome Statute so as to include the universality principle. A sensible proposal would probably be to confer limited or secondary universal jurisdiction on the Court, by conditioning the exercise of such jurisdiction on the presence of the presumed offender on the territory of a state party (although he may have committed his crimes on another

2. ICC Stat. art. 12.2.
3. ICC Stat. art. 12.3.
4. ICC Stat. art. 13.b.
5. ICC Stat., Preamble para. 5.

territory).[6] This would ensure that states parties to the Rome Statute do not become safe havens for perpetrators of heinous crimes.

There are strong legal arguments *in favor* of a grant of universal jurisdiction to the ICC. The strongest argument is probably the one that is based on the theory of delegated jurisdiction: the ICC can do whatever its states parties can do *ut singuli*. If international law allows states to exercise universal jurisdiction, those states could pool their sovereign powers and delegate the exercise of universal jurisdiction to the Court.[7] It is widely accepted that states can exercise universal jurisdiction over the crimes over which the Court has jurisdiction *ratione materiae*, at least provided that the perpetrator can be found on the territory of the asserting state at the moment of the initiation of the investigation/prosecution.[8] Universal jurisdiction in absentia, in contrast, remains problematic.[9] In any event, if states can exercise presence-based universal jurisdiction under international law, they can also confer this jurisdiction on an international court. This would, moreover, shore up the legitimacy of the universality principle: conferring universal jurisdiction on the ICC would undercut arguments against universality that are based on the assumption that national prosecutors and courts are not independent from the political branches and generally lack specific expertise to conduct international crimes prosecutions

6. See on custodial jurisdiction: Olympia Bekou & Robert Cryer, The International Criminal Court and Universal Jurisdiction: A Close Encounter?, 56 Int'l & Comp. L.Q. 49, 58–60 (2007).

7. See also Bekou & Cryer, supra note 6, at 50–51. Given the complementary nature of ICC proceedings, this transfer of the power of universal jurisdiction would of course not mean that the transferring states would forfeit the right to bring universality-based proceedings in their own courts. After all, any exercise of jurisdiction over a case of the Court is subject to an admissibility determination under articles 17 through 19 of the Statute.

8. Cf. Cedric Ryngaert, Jurisdiction in International Law 115–19 (2008). It is not entirely clear, though, whether international law also authorizes states to exercise jurisdiction over war crimes committed in non-international armed conflicts (ICC Stat. art. 8.2(c) and (e)). The influential ICRC study on customary international humanitarian law, for its part, believes it does. See Customary International Humanitarian Law, Vol. I: Rules, Rule 157, 604–07 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). If international law aspires to be a coherent system and if it wants to protect all victims of war crimes, it is surely not warranted to draw a jurisdictional distinction between similar crimes that is based solely on the nature of the conflict.

9. In favor of universal jurisdiction *in absentia*: Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ 3 (Feb. 14) (van den Wyngaert, J., dissenting, ¶¶ 40–67).

and trials.[10] In addition, the ICC, unlike a bystander state exercising universal jurisdiction, may, as a multilateral institution, be more able to withstand pressure from a powerful state wishing to protect its nationals from prosecution.

There are equally strong arguments *against* a grant of universal jurisdiction, however. The strongest arguments *contra* are probably of a *practical* nature. For one thing, arguably, the ICC has currently more than a full-time job addressing the situations that have been referred to it, in particular the self-referrals by states (which were never seriously contemplated by the drafters of the Rome Statute). An extension of the Court's jurisdictional basis *ratione territorii* so as to include the universality principle would only serve to overburden the Court, or to raise expectations that it can never fully meet. For another, no ICC investigation can be successful without the cooperation of the territorial state, where normally most evidence *and* the suspect are located; the ICC Prosecutor will have to negotiate access to local evidentiary sources with the state (non-party) that is the target of the investigation, and request that state to effectuate the arrests of the sought persons. If the investigation has been initiated on the basis of the universality principle, one may assume that it has been triggered by the *proprio motu* powers of the Prosecutor, and not by self-referral. As the target state will not have given its consent for such an investigation in the first place, it may be very optimistic to expect that cooperation will be forthcoming.[11] Possibly, only sustained pressure of the international community, perhaps even on the basis of a Security Council resolution adopted under Chapter VII of the U.N. Charter, will be likely to cause the target state to cooperate with the tribunal. Of course, in case the limited version of the universality principle is adopted (presence-based universality), the arrest warrant may more readily be executed (as in that case the suspect will be present outside the jurisdiction, on the territory of a state party that is required to cooperate with the Court); nevertheless, also in this situation, evidentiary problems will remain.

10. I have actually defused these arguments, in relation to national proceedings, in a previous publication. See Cedric Ryngaert, Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union, 1 Eur. J. Crime, Crim. L. & Crim. Just. 46 (2006).

11. Also Bekou & Cryer, supra note 6, at 66.

The case against conferring universal jurisdiction on the ICC is not based on principle, but on an estimation of what the ICC can realistically achieve. It should be borne in mind that moral righteousness, informing an argument in favor of ICC universality, may in the final analysis have a perverse impact on the fight against impunity. Universality of jurisdiction greatly increases the number of situations that warrant the attention of the Prosecutor. Indeed, many of the worst crimes may precisely have been committed in states that have chosen not to become a party to the Statute. The Prosecutor then risks becoming overstretched and not being able to deliver on any of the situations that call for his attention. In addition, the inclusion of universal jurisdiction in the Rome Statute risks discouraging states from becoming parties to the Rome Statute. Indeed, if the ICC is entitled to exercise universal jurisdiction, it would not make much sense for states to become parties: situations occurring on their territory would fall within the (universal) jurisdiction of the Court anyway, irrespective of the status of the state, as a party to the Statute or not.[12] In the interest of having the Rome Statute as widely ratified as possible, and thus of universalizing the scope of the Statute,[13] any amendment that might dissuade states from ratifying the Statute (either because the amendment renders the obligations of states parties more burdensome or because the amendment does not actually change the position of states compared to their staying outside of the ICC regime) should be avoided.[14]

For the time being, absent an expansion of the resources of the Prosecutor and the Court, and awaiting more widespread ratification of the Rome Statute, it appears to be wise policy not to expand the jurisdictional basis of the ICC. In the meantime, the most outrageous situations could be referred to the ICC through the "universal jurisdiction *lite*" vehicle of a Security Council resolution (compare the referral of the situation in Darfur, Sudan by the Security Council).[15] If the ICC's jurisdictional

12. If a limited, presence-based version of the universality principle were adopted, the ratification fallout of the expansion of the Court's jurisdictional basis might of course be mitigated.

13. As of July 1, 2008, 108 states were parties to the Rome Statute. 139 states were signatories to the Statute.

14. Bekou & Cryer, supra note 6, at 68. The same rationale militates against defining the crime of aggression and setting out the conditions under which the Court shall exercise jurisdiction with respect to that crime. See Article 5.2 of the Rome Statute.

15. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

regime remains as it is, other methods of bringing to justice the perpetrators of crimes that do not fall within the Court's jurisdiction will have to be explored. Apart from a Security Council referral to the ICC, one could think of establishing ad hoc international or hybrid tribunals, or of strengthening national prosecutorial capacity (in the territorial state, or even in other states). It exceeds the scope of this contribution to further elaborate on the alternatives for ICC jurisdiction, however.

## III. THE RELATIONSHIP BETWEEN THE ICC AND STATES EXERCISING UNIVERSAL JURISDICTION: THE ROLE OF THE COMPLEMENTARITY PRINCIPLE

Having concluded that maintaining the jurisdictional status quo at the ICC is not such a bad idea after all, it is now appropriate to examine the desirable relationship between the ICC and bystander states exercising universal jurisdiction. As has been observed above (in the context of the transfer of preexisting state powers to the ICC), it is not seriously contested that states could exercise universal jurisdiction over most crimes that fall within the subject-matter of the ICC. The question then arises whether the ICC should defer to states that are able and willing to genuinely investigate and prosecute cases under the universality principle.

Under the complementarity principle as enshrined in Article 17.1(a) of the Rome Statute, the Court shall determine that a case is inadmissible where the "case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable to genuinely carry out the investigation or prosecution." On its face, a state genuinely investigating and prosecuting a case under the universality principle appears to qualify as "a State which has jurisdiction over it." Accordingly, the ICC would have to defer to such a state pursuant to the complementarity principle. Of course, Article 17 of the Rome Statute was primarily designed to negotiate the sovereign demands of the territorial state or the state of nationality, and the demands of international justice. Yet while there is no evidence of an express intention of drafters to have bystander states exercising universal jurisdiction covered by Article 17, there is no evidence either of an express intention to exclude bystander states from the scope of application of Article 17. In fact, the text of Article 17 is clear: the ICC

should defer to any state that has jurisdiction over a case, irrespective of the legal basis on which this jurisdiction rests.[16]

Arguably, only to the extent that the jurisdictional basis is *not* an accepted legal basis under international law may the ICC declare a case directly admissible without inquiring in detail whether the state has met the "able and willing" test. Incidentally, the ICC could thus have the opportunity to decide on the lawfulness of universal jurisdiction, particularly its in absentia variant. Such decision is obviously not dispositive of the question of the lawfulness of universal jurisdiction: given the limited mandate of the ICC, this decision rather lies with states (customary international law) and the International Court of Justice. Nonetheless, an ICC decision on state criminal jurisdiction will be endowed with considerable authority and legitimacy, in view of the uncontested expertise of the ICC.

In any event, if the ICC acknowledges state jurisdiction, it will have to conduct a substantive complementarity analysis under Article 17 of the Rome Statute. This begs the question of whether bystander states that are eager ("willing") to exercise universal jurisdiction over crimes within the jurisdiction of the ICC could be considered as "able" to genuinely investigate and prosecute under such an analysis. Willingness should obviously not be conflated with ability; the distinction in the Rome Statute serves a purpose after all. Yet evidently, bystander states exercising universal jurisdiction will normally only be willing if they consider themselves to be able to bring the case.

Recent practice shows that bystander states that are willing to exercise universal jurisdiction over international crimes can be successful, provided that a number of practical requirements are met. For one thing, the state should be able to commit sufficient resources to carry out the investigation, the prosecution, and the trial (it should, for instance, be able to conduct

16. See also Office of the Prosecutor, ICC, Informal Expert Paper: The Principle of Complementarity in Practice ¶ 63 (2003), available at http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf ("It goes without saying that a State's acknowledgement that it is not investigating or prosecuting does not affect the primacy of any other State that wishes to investigate or prosecute. Thus, for example even if a territorial State agreed to non-exercise of jurisdiction over certain crimes in favour of ICC prosecution, other States would remain entitled to investigate and prosecute on other jurisdictional bases (active nationality, passive nationality, *universal jurisdiction*) and admissibility could accordingly be challenged by such States or by the accused." (Emphasis added.)) See for a more conservative approach: Jo Stigen, The Relationship Between the International Criminal Court and National Jurisdictions 192–93 (2008).

on-site investigations and to fly in witnesses for trial). For another, it should be able to have access to the crime scene in the territorial state. Cooperation of the latter state is crucial as lack of access will normally translate into lack of evidence to support the case against the presumed offender.

If these (cumulative) requirements are not satisfied, there is reason for caution and even distrust of national proceedings under the universality principle. Preliminary proceedings may have been jump-started by victims filing a complaint with a national prosecutor or an investigating judge, who may be required by law to start an investigation without actually having the wherewithal to adequately investigate international criminal situations. Also, zealous prosecutors may initiate proceedings so as to make a statement against impunity without seriously contemplating the commitment of resources and the degree of international cooperation required to render the proceedings eventually successful.

If the ICC Office of the Prosecutor is interested in a person against whom proceedings are brought in a bystander state party to the Rome Statute, it is highly desirable that it remain in close contact with the state authorities. The Prosecutor should take over, invoking the complementarity principle, as soon as it becomes apparent that the state investigation and prosecution is not going smoothly and demonstrates the apparent inability of the bystander state to genuinely investigate and prosecute the case.

In this context, it may be believed that a fair distribution of tasks between the ICC and bystander states is based on the "big fish versus small fry" distinction. The ICC would be best placed to bring the most responsible persons or senior leaders to justice, whereas lesser perpetrators, of the rank-and-file variety, should be tried by a bystander state, especially if they have sought refuge in the latter's territory, and provided that the territorial state or state of nationality does not initiate investigations. Of course, the ICC will not, and should not, bring to justice small fry. Yet it is not prima facie excluded that bystander states can successfully try the big fish (at least if the latter are not protected by international immunities).[17] It

17. Cf. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ 3 (Feb. 14) (holding that a minister of Foreign Affairs is entitled to functional immunity from prosecution under customary international law). But see paragraphs 60 and 61 of the judgment (ruling that "[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it

may occur that bystander states can secure the arrest and detention of a (former) high-ranking official, either because the targeted person pays a visit to the bystander state or because the state where the person is present is willing to extradite the person to the bystander state (normally if the former state entertains good relations with the latter). In addition, the territorial state where most of the evidence is located may be willing to grant access to investigators of the bystander state; this will typically be the case after a regime has changed and the targeted person has fallen from grace. Alternatively, much evidence could possibly be located in the bystander state in the form of testimonies of witnesses who have fled to that state. If these conditions are satisfied, complementarity may require deference on the part of the ICC to states acting under the universality principle.

It does not surprise that the fulfillment of the said conditions is very hypothetical, however. No successful prosecutions and trials of high-ranking officials under the universality principle have so far been recorded. This is attributable to the role of international immunities, the fear of upsetting foreign nations, the primarily domestic focus of national prosecutors, and, of course, the projected lack of capacity and international cooperation to see an investigation through. Accordingly, in practice, the chances of a successful prosecution of high-ranking officials are minimal. The ICC, in contrast, given its greater leverage and resources, may prove more successful, although even for the ICC, indicting a high-ranking official, especially a sitting one, might turn out to be problematic.[18]

While prosecution of high-level perpetrators may be off-limits for bystander states exercising universal jurisdiction, so may in fact also be the prosecution of lower-level perpetrators. After all, many of the features

applies from all criminal responsibility" and that, "[a]ccordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances." Compare Article 27 of the ICC Statute (in conjunction with paragraph 61, fourthly, of the *Arrest Warrant* judgment), stipulating the irrelevance of official capacity of an individual for purposes of prosecution and trial by the ICC.

18. Cf. the diplomatic storm that the ICC Prosecutor's application for a warrant for the arrest of the Sudanese president al-Bashir caused, notably in Africa. See in particular the call for a deferral of ICC investigations and prosecutions by the U.N. Security Council pursuant to Article 16 of the Rome Statute: African Union to Discuss Efforts to Defer ICC Indictment of Sudan's President, Sudan Tribune, Sept. 6, 2008, available at http://www.sudantribune.com/spip.php?article28525.

facilitating the prosecution of high-level perpetrators outlined above—arrest, cooperation, evidence—apply to *any* prosecution, although, of course, foreign opposition against prosecution of smaller fry may be muter (some smaller fry may also be sacrificed in order to protect higher-ups). If a bystander state struggles to fulfill the ability requirement of the complementarity principle, it may evidently be concluded that the relevant cases—in which the state makes an attempt but fails—ought to be declared admissible by the ICC (in the hypothesis that the territorial state or the state of nationality is not able and willing to genuinely investigate and prosecute). This, however, would be to underestimate the power of the concept of *positive* complementarity. Under this more "managerial" concept of complementarity, the ICC Office of the Prosecutor aims for an efficient distribution of tasks geared towards preventing impunity for international crimes.[19] The Prosecutor does not merely step in when national remedies are deficient (classic complementarity); on the contrary, he behaves *proactively* so as to ensure that national states assume their responsibility.[20] Such proactive behavior will be especially called for in relation to the prosecution of "lesser" criminals, who fall within the ICC's jurisdiction but in whom the ICC Prosecutor is not interested, given his focus on those most responsible. As far as the prosecution of such individuals is concerned, provided that calling on the territorial state or the state of nationality proves ineffective, the Prosecutor may want to encourage bystander states Parties to bring prosecutions under the universality principle (or the passive personality principle, for that matter). To that effect, the ICC could provide assistance to those states under Article 93.10 of the Rome Statute, e.g., by transmitting statements, documents, or other types of evidence obtained in the course of an investigation or trial conducted by the Court.[21] Bystander states acting under the universality principle could thus benefit from investigations and prosecutions carried out by the ICC.

19. Carsten Stahn, Complementarity: A Tale of Two Notions, 19 Crim. L.F. 87, 104 (2008) (a "(re-)definition" of positive complementarity).

20. Cf. William Burke-White, Proactive Complementarity: The International Court and National Courts in the Rome System of International Justice, 49 Harv. Int'l L.J. 53 (2008).

21. Rome Stat., art. 93.10(b)(i). Article 93.10(a) provides that "[t]he Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State."

In practical terms, the ICC might focus on those most responsible and those higher up in the military and civilian hierarchy of the state (or rebel groups), whereas bystander states could prosecute the smaller fry with some practical help from the ICC. All this is under the assumption that a state with a stronger nexus proves not able and willing to genuinely investigate and prosecute, and the bystander state that exercises universal jurisdiction over the presumed offender has the ability to bring a successful prosecution (see above).

When positive complementarity is seen as including the role of bystander states in the prosecution of international crimes, the Rome system of international justice can be further expanded. So far, this system has mainly been viewed as one encompassing the ICC and the states having a strong nexus in situations and cases of international crimes. Under the division of labor advanced here, the primary responsibility for the prosecution of international crimes remains with the territorial state or the state of nationality of the presumed offender. In line with the classic understanding of complementarity, if that state fails to assume its responsibility, complementary jurisdiction will lie with the ICC. However, in a departure from classic complementarity, (limited) complementary jurisdiction will also lie with bystander states acting under the universality principle. The ICC and bystander states then have to decide on a division of tasks between them, with the ICC focusing on the more important offenders, and bystander states on lesser offenders. Clear guidance and management should obviously be provided by the ICC lest bystander states go it alone. There ought to be open communication between the ICC Prosecutor and bystander states' prosecutors, and close supervision by the ICC of the work of bystander states, along the lines of the operationalization of the principle of positive complementarity in the relation between the ICC and the territorial state. It is observed here that, in line with the concept of positive complementarity, ICC assistance may "enable" bystander states to conduct investigations and prosecutions, and thus to facilitate their meeting the "ability" requirement of Article 17 of the Rome Statute. In so doing, the ICC may strengthen the rule and scope of international criminal justice. Or as Claude Jorda, former president of the ICTY and former judge of the ICC, has put it:

> [La Cour Pénale Internationale] nous oblige à nous interroger sur la justice internationale que nous voulons pour demain. Il ne s'agit en aucune

façon de renoncer à une organisation judiciaire internationale et universelle mais n'est-ce pas conforme à l'esprit du statut de Rome que de faire en sorte que le plus grand nombre d'Etats assument la répression du crime international? . . . En développant en même temps le concept de compétence universelle . . . permettant ainsi à chaque Etat de rechercher les suspects, de les remettre à un autre Etat, voire de les juger lui-même. Là réside, à mon sens, la véritable universalité de la justice pénale internationale.

[The International Criminal Court] obliges us to interrogate ourselves about the international justice that we want for tomorrow. It is in no way about renouncing from an international and universal judicial organization, but is it not in keeping with the spirit of the Rome Statute to ensure that the largest number of States assume their responsibility to repress internatonal crimes? By at the same time developing the concept of universal jurisdiction . . . allowing each State to track down suspects, surrender them to another State, or even to bring them to justice in the State itself. There resides, in my view, the true universality of international criminal justice.[22]

## IV. CONCLUDING OBSERVATIONS

The relationship between the concept of universal jurisdiction and the ICC is not a straightforward one, neither from the perspective of the Court exercising universal jurisdiction nor from the perspective of admissibility under the complementarity principle. It is noted that, as far as the inclusion of the universality principle in the Rome Statute is concerned, the treaty process that lies at the root of the establishment of the Court is not per se incompatible with the expansion of the jurisdictional basis of the Court. After all, the states parties could do together what they could do alone—exercising universal jurisdiction, at least if based on the territorial presence of the presumed offender. Consequently, an amended Statute providing for universal jurisdiction would not run foul of the rule that treaties cannot impose obligations on non–party states.[23] Nonetheless,

22. Claude Jorda, Op-Ed., La CPI a 10 ans: tournant décisif ou non événement?, Libération, Sept. 2008, at 3 (my translation).

23. Vienna Convention on the Law of Treaties arts. 34–35, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. *Contra*: Certain Criminal Proceedings in France (Congo v. France), Application Instituting Proceedings and Request for the Indication of Provisional Measures,

powerful arguments militate against a conferral of universal jurisdiction on the Court, in particular the danger that the widening of the jurisdictional scope could alienate prospective states parties, and the risk that cooperation of states non-parties will not be forthcoming. Therefore, the author does at this juncture not support the expansion of the jurisdiction *ratione territorii* of the ICC to include the universality principle.

In contrast, the author *does* support taking into account the investigations and prosecutions in bystander states acting under the universality principle, for the purpose of the ICC's complementarity principle as applied by the Prosecutor and the Court, at least in carefully defined circumstances. Such circumstances could be present if the investigation and prosecution could be done more efficiently by the bystander state, instead of by the ICC, in particular when the bystander state has easy access to evidence (because of the territorial presence of witnesses or because of the smooth cooperation with the territorial state), and could independently, impartially, effectively, and in full compliance with due process standards, conduct a prosecution and trial. Importantly, the ICC Prosecutor, using the principle of *positive* complementarity, may want to solicit investigations and prosecutions of certain bystander states, and provide legal and practical assistance to those states. Investigations, prosecutions, and trials by bystander states should obviously be monitored by the ICC. Yet the ICC should not declare a case too readily admissible: the benefit of the doubt should be given to the bystander state, as to any state, for that matter. After all, Article 17 of the Rome Statute itself provides, as the starting point of the admissibility analysis, that a case is ordinarily *inadmissible* where a "case is being investigated or prosecuted by a state which has jurisdiction over it." Only if the Prosecutor has adduced sufficient evidence of unwillingness or inability on the part of the bystander state "genuinely to carry out the investigation or prosecution," is deference no longer warranted. It is expected, however, that cooperation between the ICC and states parties acting under the universality principle will in practice go smoothly, and that the bystander state will normally defer to the ICC if the latter is

at 9 (Apr. 11, 2003), available at http://www.icj-cij.org/docket/files/129/7067.pdf (arguing that the Republic of the Congo is not a party to the U.N. Torture Convention, and that, accordingly, its provision on universal jurisdiction cannot be opposed to it).

clearly a more effective forum for prosecuting a given situation.[24] In the final analysis, both are disinterested players, and share the conviction that impunity for core crimes against international law should be brought to an end.[25]



24. Compare the ICC informal expert paper cited supra note 16, ¶ 61 (noting that "the third State is not compelled to compete with the ICC for jurisdiction," and that "[a]ll interested parties may agree that the ICC has developed superior evidence, witnesses and expertise relating to that situation, making the ICC the more effective forum").

25. If the international community is not convinced of the role that bystander states could play in respect of certain situations or cases, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, could possibly remove the primary jurisdiction of bystander states. See the ICC informal expert paper cited supra note 16, ¶ 69. It is noted that the experts could not agree on the prudence of this exercise of power by the Council, however.