45

The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes

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SUMMARY

Since recourse to the territorial and active nationality principles is unlikely with respect to 'core' international crimes, the emerging culture of accountability for these crimes necessitates the expansion of domestic criminal jurisdiction on the basis of other principles. Whether and to what extent this is possible under international law ultimately depends on the approach one takes in relation to the notion of sovereignty and the competences of sovereign states under international law. Paradoxically, the positivistic approach followed by the majority of the judges of the Permanent Court of International Justice (PCIJ) in *Lotus* will be more favourable to the expansion of criminal jurisdiction over international crimes. By contrast, the more modern approach, according to which criminal jurisdiction is principally territorial, would imply that one should point to a rule of international law expressly allowing extraterritorial criminal jurisdiction. In any event, it seems undisputable that for the repression of international crimes customary international law allows extraterritorial jurisdiction also on the basis of the passive personality and the protective principles. As for universal jurisdiction, controversy exists, inter alia, as to the need for a jurisdictional link to the forum state, in particular the presence of the suspect in the territory of the state. It is suggested that to put the exercise of universal jurisdiction in conformity to the principle of legality the presence of the suspect should be at least a requirement for the exercise of adjudicatory/enforcement jurisdiction (while this requirement is not strictly necessary for legislative jurisdiction). In addition, the judge exercising universal jurisdiction should be allowed to apply substantive criminal law which is most favourable to the accused among those of the forum state, the state of nationality, and the territorial state to fill the lacunae of international criminal law particularly in relation to penalties. It is hoped that the UN will start a process of codification that will take into account

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these solutions, which can help to challenge the suspicions levelled by some states that universal jurisdiction is a tool of legal imperialism, and to build a true international community for the repression of international crimes.

1. The problem outlined

The concept of international crimes seems to be ineluctably predicated on the necessity to expand the reach of national jurisdiction beyond the traditional bases of territoriality and active nationality. These two jurisdictional principles, the legality of which under international law is indisputable, are scantly used for the repression of international crimes usually described as core crimes, or international crimes proper: namely genocide, war crimes, and crimes against humanity. These are crimes that express a sort of 'system criminality',[1] in that they are normally perpetrated by state officials with the acquiescence, tolerance, or support of the authorities of the state, which makes domestic prosecution in the state of the *locus commissi delicti* or of the nationality of the alleged perpetrators unlikely.[2] It comes therefore as no surprise that the emerging culture of accountability with respect to international crimes increasingly necessitates the exercise of criminal jurisdiction on the basis of extraterritorial principles other than active nationality.

The notion of international crimes also unavoidably calls for the necessity to expand the jurisdictional reach of domestic courts *ratione personae*, by virtue of the inapplicability of the national and international rules on immunities. As noted above, these crimes are usually committed by state officials. Hence, to uphold the doctrine of immunities in respect of these crimes not only 'may lead to ensuring impunity for the perpetrators', but also

> would mean to bow to and indeed strengthen traditional concerns of the international community (chiefly, respect for state sovereignty), which in the current international community should instead be reconciled with new values, such as respect for human dignity and human rights.[3]

Clearly, were domestic courts to be empowered to prosecute international crimes on the basis of wide titles of extraterritorial jurisdiction, in particular universality,

[1] B.V.A. Röling, 'The Significance of the Laws of War', in A. Cassese (ed.), *Current Problems of International Law* (Milan: Giuffrè, 1975), 137–9.

[2] When committed in the state's own territory (as could be the case for crimes against humanity, genocide, or war crimes in non-international armed conflicts), domestic prosecution grounded on the territoriality principle probably depends on a change of government, as well as on the lack of amnesty laws or other legal impediments expressly set out to avoid criminal repression. Similarly, when committed by a state's national abroad, eg in the context of an international armed conflict, it is unlikely that domestic courts will act on the basis of the active nationality principle, as state authorities would tend to shield their nationals (usually state officials) from criminal responsibility. In the last scenario, even the territorial state might tend to avoid prosecution of crimes committed by enemy belligerents, in particular at the end of hostilities, because of the necessity to restore peaceful relations with the former enemy.

[3] A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 13 EJIL (2002) 853, 873–4.

and at the same time permitted to disregard the international rules on immunities, they could be at the forefront of the struggle against impunity for international crimes.[4]

In Chapter 18 of this volume, I discuss the question of the applicability of the doctrine of international immunities in cases of international crime. I therefore focus here only on the question of the extraterritorial expansion of criminal jurisdiction over international crimes.

2. The *Lotus* approach to extraterritorial criminal jurisdiction and beyond

Back in 1927, in the *Lotus* case, the PCIJ delivered a judgment which still constitutes the inescapable starting point for any discussion about the relationship between public international law and states' jurisdiction in criminal matters, in particular the legality under international law of the exercise of extraterritorial criminal jurisdiction by domestic courts.[5]

[4] It is, however, precisely because of this combined effect that the application of the principle of universality, which has never been disputed for the repression of forms of criminality such as piracy, money laundering, trafficking of human beings, or attacks against marine cables, has been challenged instead with respect to international crimes. Once the inapplicability of the rules of international law on immunities is admitted, domestic courts acting on broad extraterritorial titles could accuse former or sitting foreign state officials, regardless of their seniority, of international crimes, with all the ensuing serious political consequences. There is also the fear that national courts may abuse this possibility. International immunities are therefore perceived as a necessary bulwark to protect sitting or former state officials (especially those holding senior positions) from abusive prosecution in foreign countries. As Lord Goff put it in *Pinochet*, the doctrine of international immunities:

> can . . . be effective to preclude . . . process [in foreign countries] in respect of alleged crimes, including allegations which are misguided or even malicious—a matter which can be of great significance where, for example, a former head of State is concerned and political passion are aroused. Preservation of State immunity is therefore a matter of particular importance to powerful countries whose heads of State perform an executive role, and who may therefore be regarded as possible targets by governments of States which, for deeply felt political reasons, deplore their action while in office. (*R v Bow Street Stipendiary Magistrate and others, ex p Pinochet Ugarte*, House of Lords, Judgment of 24 March 1999 (1999) 2 All ER 97)

[5] The case is well known. It concerns a collision in the high seas, off the coast of Turkey, between the French mail steamer *Lotus* and the Turkish collier *Boz-Kourt*, which resulted in the sinking of the latter and the death of eight Turkish nationals. Turkey started criminal proceedings against, among others, Lieutenant Demons, a French national, who was the officer of the watch on the *Lotus*. After rejecting the objection raised by Lieutenant Demons that Turkey had no jurisdiction, the Criminal Court of Istanbul convicted him for involuntary manslaughter and sentenced him to 80 days' imprisonment and a fine. France's reaction of diplomatic protection led the case to come before the PCIJ, which had to decide whether the criminal proceedings against Lieutenant Demons had breached Art. 15 of the 1924 Convention on Lausanne on Conditions of Residence and Business and Jurisdiction. This provision required 'all questions of jurisdiction shall . . . be decided in accordance with the principles of international law'. France contended, inter alia, that the exercise of criminal jurisdiction by Turkey, which asserted its criminal jurisdiction on the basis of its national criminal code provision on the passive personality principle, was not in accordance with international law.

As is well known, the Court started from the assumption that '[r]estrictions upon the independence of states cannot be . . . presumed' and stated as follows:

> Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.[6]

This assertion was vigorously challenged by the dissenting judges. They opined that international law—far from being inspired by a laissez-faire approach—regulates directly the ambit of criminal jurisdiction of states and provides that it is mainly territorial. According to them, extraterritorial titles of jurisdiction could only be resorted to if this power was expressly provided for in an international rule, as was clearly the case for the active nationality principle.

Although the positivistic approach to international law, that inspired the majority in *Lotus*, seems to have been abandoned in contemporary legal thinking, the philosophical divide evinced in *Lotus* still persists in discussions concerning the ambit of states' jurisdiction. This divide is of course linked to one's own understanding of sovereignty and of the role and function of international law in a society whose primary subjects are sovereign states. A *factual* notion of sovereignty, according to which states are meta-legal entities whose formation is not regulated by international law, would lead one to believe that they were born free from obligations and rights, and that international law only intervenes to restrain their otherwise unfettered freedom. International law, however, would not attribute to them competences or powers (as Anzilotti put it, 'nothing is more repugnant [to states] than the notion that they exercise powers and authority granted to them by international law')[7] let alone in criminal matters. By contrast, those (like Kelsen) who propound a legal notion of sovereignty consider that international law regulates the formation of states, and that it confers upon them rights and obligations in relation to their territories only in accordance with the principle of sovereign equality. According to this view, criminal jurisdiction is principally territorial; only exceptionally, namely once a rule of international law so establishes, can states assert their criminal jurisdiction over facts committed outside their territories.

Clearly, following the majority view in *Lotus*, the exercise of extraterritorial jurisdiction over international crimes would always be possible unless one can point to the existence of a rule of international law prohibiting it. In *Lotus*, the judges did not provide a list of possible rules to that effect. They confined themselves to demonstrating that the exercise of criminal jurisdiction in the case at stake, reclassified by the Court as a form of territorial jurisdiction, was not forbidden by international law. In the end, therefore, the Court did not offer any clue at all as regards the possible impediments placed upon the exercise of extraterritorial

[6] Judgment, 7 September 1929, *The Case of the SS Lotus*, PCIJ, Series A, no. 10, 2ff at 19.

[7] 'Niente più ripugna [agli Stati] dell'idea di esercitare una potestà loro concessa dall'ordinamento internazionale', in D. Anzilotti, *Corso di diritto internazionale*, vol. I, 4th edn (Padua: Cedam, 1955), 53.

criminal jurisdiction. In addition, since it considered that after all the case concerned the exercise of *territorial* criminal jurisdiction, it could even have avoided the general statement concerning the restrictions to states' freedom that cannot be presumed. However, the fact remains that, from the point of view of the need to expand the jurisdictional reach of states for the repression of international crimes, the positivistic approach followed in *Lotus* would be the most suitable. According to this approach, there would exist a presumption in favour of the exercise of extraterritorial criminal jurisdiction, and it would be for the states challenging it to prove the existence of a specific prohibitive rule. This is perhaps rather paradoxical. The positivistic approach dominating the majority view in *Lotus* is indicative of a state-centric view of international law, which is at odds with the communitarianism that inspired the evolution of international criminal law.

The opposite (and I would say, more modern) approach, according to which criminal jurisdiction is principally territorial, obviously implies that in the matter of repression of international crimes one should point to a rule of international law allowing the exercise of extraterritorial jurisdiction. At the *treaty* law level, the task could be relatively easy since one can find rules allowing, if not obliging, the establishment of extraterritorial jurisdiction on the basis of specific heads.[8] Nonetheless, a few problems still persist.

First, these treaties do not regulate the national criminal repression of all international crimes: the list comprises genocide, grave breaches of the 1949 Geneva Conventions and Additional Protocol I, and torture, but leaves out crimes against humanity and those war crimes outside the grave breaches regime. For these crimes the question therefore remains of whether a rule of customary international law allows their extraterritorial domestic criminal repression. Secondly, the treaty regulation for the crimes mentioned above is not always crystal clear as regards the particular heads of extraterritorial jurisdiction, if any, which are allowed or imposed upon state parties.[9] Thirdly, since treaties can only derogate from rules of customary international law among state parties, the permissive or mandatory jurisdictional provisions can only be lawfully applied among contracting states: the exercise of extraterritorial jurisdiction over crimes committed by nationals of states not parties on the basis of such provisions would therefore violate customary international law vis-à-vis those states.

The *punctum pruriens* concerns, therefore, the content of customary international law on the matter. In this regard, it seems undisputed that customary international law allows extraterritorial criminal jurisdiction on the basis of the *active nationality* and the *protective* principles. In addition, elements of state practice clearly indicate

[8] See, eg, Art. 5 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[9] For genocide, Art. VI of the UN Convention against the Prevention and Repression of the Crime of Genocide imposes the exercise of criminal jurisdiction upon the territorial state. For grave breaches, again, the emphasis is on the duty to bring the alleged perpetrators before the courts of the state party to the Geneva Conventions and Additional Protocol I on whose territory they are found, but there is no express reference to the heads of criminal jurisdiction that the state must possess in this regard.

that the traditional opposition by common law countries to *passive personality*, at least as a basis to prosecute international crimes, has been overcome.[10] Things are more complex with respect to *universal jurisdiction*. Although there is a trend towards considering that universal jurisdiction is allowed for the prosecution of international crimes generally speaking, strong disagreement persists among states and legal experts as regards the need for a jurisdictional link to the forum state, in particular the presence of the suspect in the territory of the state.[11]

3. 'Pure' universal jurisdiction? A tentative solution in light of concern for respect of the principle of legality

The debate on whether the presence of the suspect in the territory of the state claiming jurisdiction is a necessary condition for universal jurisdiction is somewhat confused because the distinction between legislative and adjudicatory/enforcement jurisdiction is often not clearly maintained. As is well known, legislative jurisdiction indicates the authority of the state to determine the scope of application of its laws, in this case criminal legislation. Adjudicatory/enforcement jurisdiction refers to the ability of the state to apply its own laws to specific cases, through its courts and enforcement agencies. Clearly, legislative jurisdiction determines the scope of intervention of the judiciary and the enforcement agencies, since the latter cannot but intervene to apply and enforce a law that is applicable to a particular case. If adjudicatory/enforcement jurisdiction is by necessity territorial, in the sense that it can only be exercised within the territory of the state, legislative jurisdiction can extend to extraterritorial acts.

The issue with universal jurisdiction is whether the criminal legislation of a state can regulate acts committed abroad by foreigners against foreigners, when the suspect has never entered the territory of the state after the commission of the crime and there is no prospect that he will, at least not voluntary. This is what is called 'pure' or 'unconditional' universal jurisdiction. This broad form of (legislative) jurisdiction would imply a corresponding form of adjudicatory/enforcement jurisdiction, in the sense that investigation and prosecution can be started without the presence of the accused in the territory of the state; in

[10] Some common law countries have clearly accepted the application of the passive personality principle (traditionally perceived by them as an exorbitant title of jurisdiction for the repression of ordinary offences) over war crimes, crimes against humanity, and genocide. See in this regard P. Gaeta, 'Il principio di nazionalità passiva nella repressione dei crimini internazionali da parte delle giurisdizioni interne', in G. Venturini and S. Bariatti (eds), *Diritti individuali e giustizia internazionale, Liber Fausto Pocar* (Milan: Giuffrè, 2009), 325.

[11] According to the 2010 UN Secretary-General's Report, 'The Scope and Application of the Principle of Universal Jurisdiction', as for the jurisdictional link, the uncertainty is greater since states adopt a variety of links for the assertion of universal jurisdiction and very few states, eg Spain, consider that 'unconditional' universal jurisdiction is allowed for the prosecution of international crimes. Disagreement also persists as regards the list of crimes: some states consider that universal jurisdiction is permitted under general international law over genocide, crimes against humanity, war crime, torture, and piracy, while other states deem that it is limited to piracy, genocide, and torture, or according to other states, to piracy only.

addition, the competent authorities could issue an arrest warrant and circulate it internationally (as was the case for Mr Yerodia, subject to an arrest warrant by Belgium) and they can issue a request for extradition if they know where the accused is located (as was the case with Pinochet, subject to an arrest warrant by Spain). If the domestic system allows it, a trial *in absentia* could be held and, in case of a conviction, an extradition for the enforcement of the sentence could be requested.

One of the major concerns with this very broad form of universal jurisdiction is respect for the principle of legality. True, one could contend that if the crimes with which the accused is charged were provided for in customary international law at the time of the commission of the offence this concern should not arise at all. However, respect for the principle of legality not only requires that the accused be aware that his act amounts to a criminal offence, but also that he knows the range of penalties attached to it, as provided by the maxim *nullum crimen, nulla poena sine lege*. The great disparity among states in sentencing policies and legislation could therefore impose in the state exercising pure universal jurisdiction a penalty which is excessive in comparison to the maximum penalty applicable in the territorial or the national state. For instance, for a war crime, the territorial state could provide for a penalty of, say, a maximum 20 years' imprisonment, while in the state exercising pure universal jurisdiction the same crime could receive the penalty of life imprisonment.

In order to bring the exercise of 'pure' universal jurisdiction into conformity with the principle of legality, one could envisage the obligation for the *forum* state to make the presence of the suspect in the territory of the state a requirement for the exercise of adjudicatory/enforcement jurisdiction. In other words, while the ambit of criminal law would extend to extraterritorial acts without a link with the forum state at the moment of their commission, this link would be required to trigger the adjudicatory/enforcement jurisdiction. The police and the prosecutor could therefore carry out investigations over the alleged commission of a crime abroad, if they wish, but criminal prosecution could be started only if the suspect enters the territory of the state after the alleged commission of the crime. His voluntary presence would imply that he subjects himself to the criminal jurisdiction of that state, knowing in advance that universal jurisdiction could be exercised in accordance with the criminal legislation of that state, which includes the range of penalties attached to the crime.

In this sense, the purpose of the presence requirement shall not be confused with the one traditionally assigned to it under the *forum deprehensionis* principle. In the latter case, the presence of the suspect in the territory of the state is a condition for determining the ambit of application of criminal law (and therefore of legislative jurisdiction), and as a consequence it amounts to a requirement for the act to be considered a crime under the legislation of the state. This means that, until the suspect is present in the territory, investigation (let alone prosecution) cannot be initiated because the criminal law of the forum state is not applicable at all. Interestingly, it is this form of *legislative universal jurisdiction*

that is mandatory for contracting states under some treaties concerning international crimes, although they make it conditional to the decision not to extradite the alleged culprit found in the territory of the state.[12] From the point of view of respect for the principle of legality, this form of universal jurisdiction, that is termed 'conditional' or 'territorial' universal jurisdiction, would be even less problematical than in the scenario outlined above, since the criminal legislation of a state would regulate extraterritorial conduct only if the alleged wrongdoer has voluntary entered the territory of the state.

Theoretically, however, one could propound another solution to align universal jurisdiction (in its 'pure' and 'conditional' variant) with the principle of legality. The assumption is that, in the matter of repression of international crimes, the national criminal judge does not primarily act as an organ of his own state, but rather as an organ of the international community as a whole. In other words, in respect of conduct that is directly criminalized under customary international law, national criminal judges would realize a sort of *dédoublement fonctionnel*[13] to remedy the lack of a centralized and mandatory system of international criminal justice. When sitting in judgment over international crimes, they would simply apply and enforce international prohibitions directed at individuals, either when they are authorized by their national criminal system to apply directly customary international law in criminal matters, or when they need to have recourse to their own national criminal law implementing international criminal prohibitions. However, as is well known, the international rules on international crimes are far from being self-executing, in particular as regards an essential component of criminal rules: that of the penalty to be attached to the criminal behaviour. Each domestic system must therefore proceed, in this matter, to enact or to apply its own criminal legislation on penalties, with the ensuing inevitable disparity from state to state.

[12] A typical example is Art. 5(2) of the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment, which obliges a contracting state to establish its criminal jurisdiction 'in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite'. A similar provision is contained in almost all the treaties for the repression of so-called 'terrorist crimes' (an exception is the 1963 Tokyo Convention). On the face of it, these treaty provisions seem to provide that universal jurisdiction can be acquired only on condition that the alleged offender *is* in the territory of the state (provided that extradition is considered but not carried out), meaning that there is no possibility to launch a criminal investigation or to exercise any form of *adjudicatory jurisdiction* before he is found there. However, this would be an incorrect conclusion. The aim of these treaties is to create a jurisdictional web for the repression of given crimes, so that the alleged culprit cannot escape justice given that there will always be a state having criminal jurisdiction to prosecute. These treaties, therefore, do not preclude the possibility for contracting states to establish criminal jurisdiction acting on bases different from those imposed by the treaties themselves. The more is so if one considers that the relevant treaties also contain another provision which clarifies that any criminal jurisdiction exercised by contracting states in accordance with their internal law is not excluded (see, eg, Art. 5(3) of the UN Convention Against Torture). These provisions could therefore be interpreted as permitting unconditional universal jurisdiction, among contracting states, if this head of jurisdiction is provided for by national legislation.

[13] On Georges Scelle's theory of the *dédoublément fonctionnel*, see, among others, A. Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublément fonctionnel*) in International Law', 1 EJIL (1990) 210, and P.-M. Dupuy, 'Unity in the Application of International Law at the Global Level, and the Responsibility of Judges at the National Level: Reviewing Georges Scelle's "Role Splitting" Theory', in L. Boisson de Chazournes and M. Kohen (eds), *International Law and the Quest for Its Implementation: Liber Amicorum Vera Gowland-Debbas* (The Hague: Martinus Nijhoff, 2010), 417.

It is therefore suggested that, when the domestic judge exercises universal criminal jurisdiction, he fills the lacunae of international criminal law on penalties by choosing the most favourable law among those applicable (namely the criminal legislation of the state of the *locus commissi delicti*, or that of the nationality of the accused, or its own laws). Admittedly, this would directly challenge the traditional wisdom according to which criminal judges cannot but apply the criminal legislation of their own countries. The incoherence of such a postulate with respect to the development of international criminal law, however, had already been demonstrated in the 1920s by Donnadieu de Vabres.[14] In addition, as forcefully demonstrated by one commentator,[15] there is no theoretical obstacle to the application, by the national judge, of a foreign criminal law, more so if it is the one *favor rei*.

The obligation for the state asserting and exercising 'pure' universal jurisdiction to have recourse, when necessary, to the most favourable applicable national criminal legislation would not only guarantee respect for the principle of legality, but would also constitute a tangible sign that the forum state is not driven by a sort of 'legal imperialism'—a concern expressed by some African states in some situations. Recourse to the criminal law of the territorial or national criminal legislation would also represent the logical consequence of the 'subsidiary' role of the principle of universal jurisdiction with respect to territoriality and active nationality, a subsidiary role advocated by many commentators and incorporated in some international treaties under the rule *aut dedere aut prosequi*. Finally, to allow national judges to apply foreign criminal legislation would not only avoid violations of the principle of legality, but would also help to create, in the field of criminal law, a true international community.[16]

4. In quest of a clarification

As stated above, exercise of universal jurisdiction, in particular in respect to former or sitting senior state officials, has raised concerns among some states, which fear

[14] R. Donnadieu de Vabres, 'Essai d'un système rationnel de distribution des compétence en droit pénal international', 19 Revue de droit international privé (1924) 48.

[15] T. Treves, *La giurisdizione nel diritto penale internazionale* (Padua: Cedam, 1973), 20–31.

[16] As Donnadieu de Vabres put it:

> Si l'inculpé peut être jugé d'après des lois différentes, frappe de peines inégales suivant que les hasards de l'arrestation, les caprices de l'extradition l'auront amené à comparaître devant le juge territorial, le juge personnel ou le juge d'un Etat tiers, il n'existe pas de certitude dans la réglementation des rapports de droit pénal. La règle *Nulla poena sine lege*, sauvegarde essentielle de la justice et de la liberté individuelle, est violée dans son esprit, sinon dans sa lettre. Il est nécessaire, en droit pénal comme en droit civil, que la loi qui doit gouverner tel ou tel rapport soit déterminée suivant un principe de justice dans l'application soit constante, indépendante de la qualité du juge saisi. Le principe de Savigny, auquel MM. Lainé et Pillet ont donné un degré de précision supérieure, en admettant que la portée territoriale de chaque loi se détermine d'après sa 'nature', ou d'après son 'but social', était pressenti déjà, au XIV e siècle, par Bartole. Or Bartole ne prétendait pas en limiter l'application aux lois civiles : il l'étendait, certainement, aux lois criminelles. Et cette extension est nécessaire, si l'on veut réaliser, sur le terrain du droit pénal, la communauté internationale. ('Essai d'un système' cit, above n 14, at 53)

that it has been or will be used for political purposes. To smooth out these concerns, an important step has recently been taken at the level of the African Union and the European Union, which assigned to an Ad Hoc Experts group the task of preparing a report for fostering a better understanding of universal jurisdiction.[17] Other initiatives to clarify the scope of universal jurisdiction and the content of international immunities in cases of international crimes have been taken by the Institut de droit international, which in 2005 has adopted a resolution on this topic.[18]

Despite these recent developments, however, the issue has remained controversial. On several occasions the African Union members have asserted that there is the need 'for an international regulatory body with competence to review and/or handle complaints or appeals arising out of the abuse of the principle of universal jurisdiction by individual states.'[19] The UN General Assembly is currently dealing with the matter within its Sixth Committee, where representatives of some states have expressed strong concerns about the misuse of the principle of universal jurisdiction by certain national judicial bodies.[20] The General Assembly has therefore issued a resolution on the basis of the report of the Sixth Committee where it noted 'the views expressed by states that the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible and judicious application consistent with international law.'[21] The General Assembly also decided to establish a working group of the Sixth Committee to undertake a thorough discussion of the scope and application of universal jurisdiction.[22]

It is to be hoped that the establishment of such a working group will constitute the first move by the General Assembly towards the process of codification and progressive development of the content of customary international law on the matter. The outcome of such a process could be either a draft convention to be submitted to states for ratification or, more plausibly, the adoption by the General Assembly of a declaration of principles, if possible by consensus. Time is indeed ripe for such a move, as a means to complement the establishment of international criminal courts and tribunals in the fight for accountability.

It is suggested, however, that any attempt to codify and progressively develop customary international law should take a comprehensive approach to domestic prosecution of international crimes, dealing with all titles of jurisdiction (not only with universal jurisdiction). It is only by taking this comprehensive approach that the question of universal jurisdiction can indeed be tackled in an appropriate and

[17] The Report was issued on 16 April 2009. For a comment on the Report and on the immediate cause that prompted the AU-EU to establish the ad hoc Expert Group, see J. Genuss, 'Fostering a Better Understanding of Universal Jurisdiction', 7 JICJ (2009) 945.

[18] Resolution on Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crime, adopted at the Kraków Session of the Institute, available at: <http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf >. For a comment see C. Kress, 'Universal Jurisdiction over International Crimes and the Institut de droit international', 4 JICJ (2006) 561.

[19] Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/540(XVI), adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia, on 2 February 2010, point 6.

[20] See, eg, the statements by the representatives of Libyan Arab Jamahiriya and Rwanda at the 11th meeting of the UN Sixth Committee on 14 January 2001, A/C.6/65/SR.11.

[21] A/RES/65/33, 10 January 2011 (Preamble, fourth para.). [22] Ibid, para. 2.

correct way, without losing sight of the whole picture. The draft codification convention, or the General Assembly resolution, should therefore clarify that—for the prosecution of international crimes—the territorial state is usually the *forum conveniens* state, but that this does not exclude the possibility to establish extra-territorial titles of jurisdiction, including universality. It should be clarified that the establishment of universal jurisdiction is possible, but that prosecution can be initiated only if the suspect enters the territory of the state. This would constitute an important guarantee for those who fear an abuse of universal jurisdiction. In addition, it must be recommended that—if a trial is commenced—the state exercising universality applies the criminal law of the territorial or national state if, as far as penalties are concerned, one of the two is more favourable to the accused. This would bring the exercise of universal jurisdiction into conformity with the principle of legality and would go some way towards challenging the suspicions of 'legal imperialism' levelled against it by some states. Universal jurisdiction could even been made subordinate to the offer to the territorial and national states to prosecute the case.

One could envisage the establishment of an institutional mechanism to monitor the correct application of the aforementioned rules and principles.[23] Admittedly, however, up to now domestic judicial authorities do not seem to have resorted to universal jurisdiction for any ulterior motive other than the prosecution of very serious international crimes. In addition, any international institutional mechanism would create a useless burden, which would discourage—instead of encouraging—domestic prosecution of international crimes; effective domestic prosecution of international crimes being a central component for the international community to become that which it ostensibly claims to be—a true community.

[23] See, eg, the proposals formulated by Kress, above n 18, at 584–5.