The Legality and Scope of Universal Jurisdiction in Criminal Matters: Is There Any Question to Answer?

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The Legality and Scope of Universal Jurisdiction in Criminal Matters: Is There Any Question to Answer?[1]

Keywords: universal jurisdiction, enforcement, territoriality, prescription, mandatory, *Lotus* case, legality, criminal law.

Abstract

Universal jurisdiction in criminal matters has been a hot topic for many decades already. In discussions on its legality and scope, waters are usually muddied by the inclusion of unrelated issues or by the use of inappropriate methodologies. The purpose of this article is to discuss the legality and scope of universal jurisdiction, mainly by clarifying the concept and addressing the main misunderstandings characterising the discussions on its legality. The main claim is that objections to the legality and to the extended (unlimited) scope of universal jurisdiction in criminal matters are based on two confusions/conflations of notions. Firstly, this paper demonstrates that the so-called conflicts between the exercise of universal jurisdiction and general norms of international law are only imaginable in a framework that misrepresents/misunderstands the concept of jurisdiction itself by conflating the notions of jurisdiction to prescribe and jurisdiction to enforce. Secondly, it argues that the view which limits the scope of universal jurisdiction to a few crimes fails to clearly distinguish states' international duties and rights in criminal law matters. In terms of methods, the paper takes the (traditional) view that states are allowed to do everything international law does not prohibit.

1. Introduction

Universal jurisdiction is slowly regaining interest after a relatively long silence on the topic both in doctrine and in practice. A few recent examples include the trial of Hissène Habré, the former Chadian leader in Senegal,[2] the series of trials of Syrian suspected war criminals in Germany[3] and Switzerland[4], the proceedings in Argentina in relation to allegations of genocide against the Rohyinga in Myanmar[5], etc. Nevertheless, it would be untrue and naïve to claim that the contours of

[1] The author wishes to express his gratitude to Prof. Gentian Zyberi and all the members of the Research Group on Human Rights, Armed Conflicts, and the Law of Peace and Security of the Faculty of Law, University of Oslo, for the encouragement and comments provided during a seminar in which a draft of this article was presented. A special debt of gratitude is also owed to Prof. Geir Ulfstein, Director of Pluricourts, the Centre for the Study of the Legitimacy of the Judiciary in the Global Order, for his valuable comments.

[2]Details on the trial can be found on the website of the Extraordinary African Chambers, see www.chambresafricaines.org, visited on 15.02.2022.

[3]See, among many news sources, 'Syria torture: German court convicts ex-intelligence officer', BBC, www.bbc.com, visited on 15.02.2022. See also 'Germany arrests alleged Syrian war criminal', DW, www.dw.com, visited on 15.02.2022.

[4]See, for instance, Trial International, '*Rifaat Al-Assad case*', www.trialinternational.org, visited on 15.02.2022. On October, 7th, 2021, escaping the French justice system, Rifaat Al Assad succeeded in fraudulently returning back to Syria. The investigation before the Office of the Attorney General of Switzeland continues, neverltheless. See, for instance, Trial international, '*Rifaat al-Assad's return to Syria: a severe blow to the fight against impunity'*, *www.trialinternational.org*, visited on June, 30th, 2022.

[5]See, for instance Trial International, '*Universal Jurisdiction case in Argentina: An important decision for the Rohingyas*', www.trialinternational.org, visited on 15.02.2022.

the concept are clearly established in today's international law.[6] To use Harmen van's phrase, the law is still "in limbo".[7]

The question discussed in this article is whether states are free – and to what extent if they are – to establish laws that allow for the prosecution of crimes with no link to their territories, citizens (or residents) or fundamental interests. In other words, the article addresses the question of the legality and scope of the doctrine of universal jurisdiction in criminal matters.

The main addition of this article to existing literature lies in addressing the objections raised against the extended notion of universal jurisdiction. The main point it makes is that those objections are methodologically fraud. In other words, it is this author's view that those objections do not raise valid questions. This article discusses that by addressing the question of states' rights in public international law and their limitations. By the same token, it highlights the fundamental problem with the dominant view in today's doctrine according to which universal jurisdiction is only permitted for a limited number of crimes of the biggest concern for the international community. That problem consists in conflating states' rights with their obligations.

In terms of structure, this article is made of six sections. After this introduction, section 2 discusses the method followed in the article. In any discussion regarding the international legality of a state's action, it is highly important to make explicit whether the researcher is looking for a permissive rule or, alternatively, proving the absence of a prohibitive one. The justification of the method chosen is a question on its own. This article touches on it throughout the text. Section 3 is dedicated to the clarification of the concept of universal jurisdiction. A special focus is put on the characterisation of the misunderstanding of the concept of jurisdiction itself in the academic literature. There are important implications of this misunderstanding on the discussion of the legality of universal jurisdiction. Section 4 is the most important. Building upon the conclusions of the two previous sections as well as on the historical cases in which extraterritorial jurisdiction has been discussed, it suggests a response to the question of legality and scope of universal jurisdiction. Section 5 discusses the potential implications of an unlimited notion of universal jurisdiction with a special focus on the question of conflicts of jurisdiction. Section 6 concludes the discussion.

2. Methodology

Erroneous doctrinal positions on the legality and scope of universal jurisdiction sometimes originate from the bisemic character of the concept of "jurisdiction" itself (jurisdiction to prescribe or jurisdiction to enforce). Disciplinary perspectives are sometimes behind the confusion about species of jurisdiction. As it will be demonstrated in this article, some scholarly works discussing that concept – including the most influential ones – are not clear enough on the perspective from which the

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[6] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* 14 February, 2002, ICJ, dissenting opinion of Judge Van den Wyngaert (to the main judgment), para 45, https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-09-EN.pdf, visited on June, 30th, 2022.

[7] H.Van der Wilt, 'Sadder but Wiser'? NGOs and Universal Jurisdiction for International', *Journal of International Criminal Justice 13* (2015), p. 241.

question is discussed. Traditionally, criminal lawyers writing on universal jurisdiction have been tempted to look at it with the domestic court in mind and therefore with an enforcement bias while international public lawyers have been concerned with the right (or absence thereof) of a state as such to prescribe quasi-unlimited extraterritorial application of their criminal legislation. International criminal law being the small "church" in which the two other disciplines (criminal law and public international law) meet and interact, differences – confusions even – of that kind are not an impossibility.

This paper discusses universal jurisdiction from a public international law perspective. The concept is looked at as a state's right/duty in international law and not as a measurement of the competence of a state's court applying domestic law. The real question is therefore whether states are allowed to adopt legislations allowing their courts to adjudicate criminal conducts (or some of them) with no direct link with their territory, citizens (residents) or fundamental interests. To anticipate on concepts that will be defined further in this article, the focus is therefore on jurisdiction to *prescrib*e rather on jurisdiction to *enforce.* This is indeed the only valid question because in principle – and we are not here concerned with exceptions – enforcement is always territorial.

To respond to the question above, the starting point for the enquirer is to position him/herself with respect to one of the oldest and possibly the most fundamental debates in international law in relation to how to assess the international legality of state's domestic action, be it legislative or of another kind. Indeed, two approaches are possible. The first is to consider that legality requires an explicit licence under international law. The whole exercise is therefore to identify the rule(s) granting that licence and to discuss his (their) scope. Put differently, from that point of view, a positive international authority is required for a state to claim jurisdiction. In other words, a state claiming to have jurisdiction – including universal jurisdiction – needs to indicate on which rule of international law it is founded, be it in treaty or customary law. The second approach is to consider that states are free to do whatever they like on their territory unless it is prohibited by international law. From that perspective, all action that international law does not prohibit is allowed, including legislation on criminal jurisdiction.[8] If one follows the second approach, the burden of proof – if the phrase can be used – is shifted. In other words, until a rule prohibiting an action is established, the action will be considered legal or not illegal, at least. This article embraces the second approach because it considers it to be the most in accord with the nature of international law as it stands today. The approach allows to highlight the conceptual shortcomings and fallacies of the alternative approach, i.e., the supposed illegality of unlimited universal jurisdiction on the basis of the so-called lack of sufficient backing, either in treaty or in customary law.

The two doctrinal positions above have wider implications beyond the technical question of state's extraterritorial jurisdiction in criminal matters. Expanded to international law in general, the first position assumes that a state gets its rights from the international legal order. In other words, law precedes sovereignty. The second position goes the opposite direction. It considers that states keep the entirety of their sovereignty and rights – one of them being the right to legislate – including the

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[8] For this methodological point, see J. Stigen, 'The right or Non-Right of States to Prosecute Core international Crimes under theTitle of 'Universal Jurisdiction', *Baltic Yearbook of International Law*, Volume 10(2010), p.99.

right to regulate, except the portions of it that it gives away, by treaty or custom. The aim of this paper is not to reconcile the two positions – if this is even possible. It is itself positioned. It embraces the second view. Roughly put, it is influenced by the view of international law commonly associated with the *Lotus* jurisprudence. To be precise, the *Lotus* case is only relevant in this article for its methodological approach. In other words, the findings of the Permanent Court of International Justice (PCIJ) on the existence (or lack thereof) of jurisdiction in the hands of Turkey are of no relevance here. *Lotus* is preferred for the approach the Court took in it as far as the assessment of states' jurisdiction is concerned. Generally speaking, the ultimate theory behind the approach (state sovereignty precedes international law and creates it) seems to account for the reality of today's international law better than its alternative (sovereignty derives from international law).

Proponents of a limited notion of universal jurisdiction (UJ) consider that UJ is founded on a hierarchical consideration concerning global common interests as superior to state sovereignty, rather than a horizontal consideration concerning a freedom of regulation for states only restricted by explicit prohibitions.[9] From this perspective, universal jurisdiction will be limited to the (very short) list of crimes, comprising, according to the least controversial list, the crimes of genocide, crimes against humanity, war crimes – as reduced to grave breaches of IHL – and torture.[10] A bit confusingly though, the list is drawn on the basis of treaties and customary sources creating an obligation for states to make their courts and tribunals competent to adjudicate core international crimes on the basis of the universality principle. There is therefore a conflation between states' obligations and states' rights. However, it is this author's view that, definitionally, jurisdiction can only be looked at as a state's right, rather than a duty.

3. Defining Universal Jurisdiction

To clarify the concept of universal jurisdiction, it is imperative to first clarify the concept of jurisdiction itself.

3.1. The Concept of Jurisdiction in Public International Law

In public international law, the term "jurisdiction" is generally deemed to describe the ability (as well as the limits thereof) for a state or other regulatory authority to exert legal power – in making, enforcing and adjudicating normativity – over persons, things, and places. The description obviously involves the indication of the limits to this ability.[11] This article is only concerned with states'

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[9] *Ibid*, p.102.

[10] *Ibid*.

[11] B.Simma & A.Müller, 'Exercise and Limits of Jurisdiction', in J. Crawford & M. Koskenniemi (eds.), *Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), p.134.

jurisdiction. This is understood to mean state's authority, by reference to international law, respectively to prescribe and to enforce legal rules, including by means of adjudication.[12]

Jurisdiction to prescribe – sometimes called, potentially confusingly, "legislative" jurisdiction – refers to a state's authority under international law to assert the applicability of its own law to given persons, natural or legal, or to property, whether by means of primary or subordinate legislation, executive decree or judicial action. Questions of jurisdiction to prescribe centre in practice on whether a state may, as a matter of international law, permissibly regulate acts or things outside its territory.

Jurisdiction to enforce – sometimes called, again possibly confusingly, "executive" jurisdiction – refers to a state's authority under international law to exercise investigative, coercive or custodial powers in support of law, be its own or another state's, whether through police or other executive action or through its courts.[13] Questions of jurisdiction to enforce centre in practice on whether a state's police and other relevant executive organs may, as a matter of international law, permissibly operate and its courts permissibly sit outside its territory and whether injunctions and subpoenas issued and orders made by those courts may permissibly extend to persons and property outside that territory. It is therefore obvious that jurisdiction to prescribe and jurisdiction to enforce do not necessarily go hand in hand. For that reason, any discussion of their international lawfulness must separate them. As a general rule, jurisdiction to enforce cannot extend to the territory of another state.[14] In other words, it is always territorial. Possible exceptions to that rule, for instance in the law of belligerent occupation fall outside the focus of this study. A state's jurisdiction to prescribe can, on the other hand, allow it to state the applicability of its legislation on events happening outside of its territory, for instance, to its citizens living abroad or for purposes of protecting its vital interests (its currency, for example). In that sense, it can be extraterritorial. This article argues that this state' prerogative knows no limit, as such.

3.2 The Notion of Universal Jurisdiction

The developments above have not defined universal jurisdiction. They have however made clear the category error often made by scholars while conceptualising it. In that regard, it has been highlighted that universal jurisdiction cannot possibly be of the *enforcement* species because, in principle, a state can only enforce law on its territory. In principle, extraterritoriality is therefore only imaginable in relation to prescription.

Universal jurisdiction is however still an ill-defined concept. Van den Wyngaert had rightly stated that there is no generally accepted definition of universal jurisdiction in customary international law

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[12] R. O' Keefe, *International Criminal Law* (Oxford International Law Library, 2015), p.3. See also, D.J. Harris. *Cases and Materials on International Law*, 14th edition (Sweet and Maxwell, 1991), p.250.

[13] R. O' Keefe. 'Universal jurisdiction, clarifying the basic concept', *Journal of International Criminal Justic*e, 2, (2004), p. 736.

[14] *Ibid,* p.740.

and that many views exist as to its legal meaning.[15] Scholarly attempts to define that concept have been made. Critically summarising them, R. O'Keefe writes that the concept refers to the competence of a state under international law to criminalize and, should the occasion arise, prosecute conduct when no other internationally recognized prescriptive link, chief among them territoriality, nationality, passive personality and the protective principle, exists at the time of the alleged commission of the offence. In other words, according to that legal scholar, universal jurisdiction – more precisely, universal prescriptive jurisdiction or jurisdiction to prescribe on the basis of universality – can be defined in the criminal context as "*prescriptive jurisdiction over offences committed extraterritorially by non-nationals against non-nationals, where the offence constitutes no threat to the fundamental interests of the prescribing state and does not give rise to effects within its territory*". [16]

Together with other experts but acting in a different capacity, the same scholar gives a similar definition of that concept but in slightly different words. He presents universal jurisdiction as the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction.[17] It is therefore obvious that the concept is better defined negatively. It is the claim by a state of its right to prosecute crimes in circumstances where none of the traditional links of territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence.[18]

3.2.1. The First Route to Confusion: Conflating Species of Jurisdiction.

Legal scholarship does not always depart from the (only tenable) position that universal jurisdiction can only be envisaged as *jurisdiction to prescribe*. In some instances, it even explicitly departs from the opposite position. Bassiouni, for instance, sees universal jurisdiction as an *enforcement mechanism* of international criminal law.[19] In his effort to conceptualise the enforcement of international criminal law, Bassiouni makes the distinction between *direct* and *indirec*t enforcement mechanisms. According to that scholar, direct enforcement is in the hands of international criminal courts and tribunals while indirect enforcement is the prerogative of domestic courts, relying mostly

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[15] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*), *supra* note 6, paras 44-45.

[16] R. O'Keefe, *supra* note 13, p. 745.

[17] AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, *Report*, 2009, p.3.(The experts group were made as follows: On the European Union side, Professor Antonio Cassese (Italy), Professor Pierre Klein (Belgium) and Dr Roger O'Keefe (Australia) . On the African side, the group was composed of Dr Mohammed Bedjaoui (Algeria), Dr Chaloka Beyani (Zambia) and Professor Chris Maina Peter (Tanzania).

[18] *Ibid*.

[19]C. Bassiouni, 'Universal jurisdiction for international crimes: Historical perspectives and contemporary practice', *Viriginia Journal of International Law,* vol.24 (2001), p.82.

but not exclusively on universal jurisdiction. Along the same lines, Langer conceives universal jurisdiction as a tool of a "global enforcer".[20]

This instrumentalist view of universal jurisdiction is also shared by the International Association of Criminal Law (IACL). This scholarly society considers universal jurisdiction as an important *tool* for the prevention and punishment of the most serious crimes of concern to the international criminal as a whole, in particular the ones defined in the Rome Statute.[21]

An implicit suggestion in the respective positions of Bassiouni, Langer and the IACL is that states are not enforcing their own laws when they exercise universal jurisdiction. The law to enforce being international, the states in question are acting as agents of the international community. It becomes therefore necessary that they would need to prove that they have been mandated to do so.[22] From this perspective, it appears that "jurisdiction" as a state prerogative is not at issue. Instead of exercising a right, states are rather complying with an international law obligation they are already bound by. In that case, jurisdiction cannot be disputed by definition. One always has the right to do what he /she is obliged to do. The same goes for states. There can be no farther position from the issues discussed in the *Lotus* case than this.

Nevertheless, that view is problematic. It is not correct that by the universality principle states enforce international criminal law. The correct position is that they enforce their own laws. It does not matter whether the laws in question and/or their enforcement have been inspired/made obligatory by international law. It is therefore not legally correct to state that universal jurisdiction is an *enforcement tool* of anything. In lay or political terms, it is however true that it plays a role in combating impunity.

From the developments above, it is clear that any discussion on the legality of universal jurisdiction must start with the recognition that universal jurisdiction is of the "prescribe" species. Therefore, the question discussed here is whether a state has the right to prescribe that, in the laws applicable on its territory, certain crimes (or all crimes) will be punishable, whatever territory they have been committed on and whatever the nationality of the victims and authors and whether or not they offend their fundamental interest.

3.2.2. The Second Route to Confusion: Conflating Jurisdiction as a Right and the Obligation to Prosecute or Extradite

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[20] M. Langer, 'Universal Jurisdiction is NOT disappearing, The Shift from'Global Enforcer'to'No Safe Haven' Universal Jurisdiction, *Journal of International Criminal Justice*, 13 (2015), pp.245-256.

[21] International Association of Criminal Law, Universal Jurisdiction, Resolution of the XVIIIth International Congress of the International Association of Penal Law (Istanbul, Turkey, 20- 27th September 2009), in *Revue Internationale de Droit Pénal*, 2009, Issue 3, Second paragraph of the preamble, p.553.

[22] The resolution of the IACL is actually explicit on the fact that universal jurisdiction cannot cover crimes other than "*the most serious crimes of concern to the international community as a whole and particularly those defined in the Statute of the International Criminal Court*" (Section I, Para 3). It also calls for the future international legal instruments concerning those crimes to confirm the applicability of universal jurisdiction (Section I, para 4).

One of the restricted notions of extraterritorial jurisdiction is found in the conventions creating for states parties an obligation to prosecute atrocity crimes they are concerned with or extradite suspects of those crimes towards a state willing to prosecute. It is very important not to conflate jurisdiction clauses and prosecution clauses in those treaties. On the one hand, those conventions oblige state parties to vest their courts with universal jurisdiction. On the other, they create the obligation to prosecute suspected offenders on their territories or to extradite them.[23] To be accurate, the obligation for states is not to prosecute as such but to submit the case to their competent authorities for the purpose of prosecution if they do not extradite.[24] The nuance is important because, contrary to what is held by a few NGOs, the provision does not vitiate the prosecutorial discretion to abstain from prosecution.[25] The *aut dedere, aut judicare* obligation only exists when the offender is present on the state party's territory. The two types of obligations are sometimes found in the same provision. Overlooking the distinction between the two can lead to the mistaken conclusion that universal jurisdiction *in absentia* is impermissible.[26]

Conflating jurisdictional clauses and prosecution provisions presents the further risk of obscuring the crucial fact that, whether it arises under the 1949 Geneva Conventions or under virtually any of the later international criminal conventions, the obligation to prosecute or extradite is not limited to situations where the underlying jurisdiction to be exercised is universal. Indeed, the *aut dedere aut judicare* obligation applies whether the underlying jurisdiction is based on territoriality, nationality, passive personality, the existence of a fundamental interest (the protective principle) or any other basis of criminal jurisdiction.

Most of the treaties with an *aut dedere, aut judicare* provision will require the presence of the accused on the territory. For instance, in the specific context of the grave breaches' provisions, the obligation on a High Contracting Party to bring the suspect before its courts only exists – and this is common sense – when the accused is present on the territory of the concerned state party. The relevant provisions oblige the High Contracting Parties to prosecute only when the suspect is present on their territory: they do not oblige them to try such persons *in absentia*. The presence requirement makes practical sense. Indeed, international law can realistically create the alternative obligation only if the person to try or extradite is within the reach of that state's authorities, i.e. if the person is present on that state's territory. To conclude from there that the exercise *in absentia* of the universal jurisdiction mandated by the grave breaches provisions is prohibited is to confuse what is not mandatory with what is impermissible.

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[23] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *supra* note 6, paras 60-62.

[24] See the wording of Article 7(1) of the Convention Against Torture, for instance. It states as follows: "*The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him,* ***submit the case to its competent authorities*** *for the purpose of prosecution*."(emphasis ours)

[25] E. Kontorovich, 'The Inefficiency of Universal Jurisdiction', *University of Illinois Law Review*, (2008) 389- 418, pp. 409-411.

[26] R. O'Keefe, *supra* note 13, pp.750-752.

Also worth mentioning is the comparative law reason behind the presence requirement in the *aut dedere aut judicare* conventions. At the drafting time of these treaties, there was a need to take into account the general unavailability of trials *in absentia* among states of the common law tradition. A conventional obligation to provide for the exercise of universal jurisdiction *in absentia* would have prevented these states from being able to become parties to the conventions in question. The territorial precondition serves as a universally acceptable lowest common denominator designed to encourage maximum participation in these treaties.[27]

4. Examining the Legality of Universal Jurisdiction

4.1. *The Legality of Universal Jurisdiction from a Historical Perspective: The Lotus Case and Its Influence*

Instances in which international courts have had to make pronouncements on states' criminal jurisdiction are rare. The famous *Lotus* judgment rendered by the PCIJ is the most important one. The ICJ *Arrest Warrant* case is also worth mentioning although of less substantive importance, as far as universal jurisdiction is concerned. Indeed, as it is well known, in that case, the International Court of Justice did not address the legality of universal jurisdiction in its judgment. However, many judges touched upon that issue in their separate or dissenting opinions. As already mentioned, the main interest of this article in historical cases is methodological. The focus will therefore be on the *Lotus* case itself. The discussion of the *Arrest Warrant* case will be limited to how judges treated what has come to be known as the *Lotus* principle.

4.1.1. The PCIJ's Position on Extraterritorial Jurisdiction and Its Theoretical Underpinning

To avoid possible confusion, the Court started by positing the territoriality principle. In unambiguous terms, it stated as follows:

> The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial, it cannot be exercised by a state outside its territory by virtue of a permissive rule derived from international custom or a convention.[28]

According to O'Keefe, the rule in customary international law is not that a state is prohibited by international law from unilaterally exercising its law enforcement powers beyond the confines of its

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[27] *Ibid*, p.751.

[28] *The SS 'Lotus'*, 7 September 1927, PCIJ, Judgment, para 18, www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf, visited on 30, June, 2022.

territory. More accurately rather, the idea is that any such exercise would violate the exclusive enforcement jurisdiction accorded by international law to that other state within its own territory.[29] The Court however qualified its statement in a paragraph which has become more famous. It indicated that the territoriality of enforcement powers was not incompatible with extraterritorial prescriptive jurisdiction:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in specific circumstances. But this is certainly not the case under international law as it stands at present. 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 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.[30]

It is often raised that the PCIJ doubted whether the above view would be applicable to criminal jurisdiction.[31] The PCIJ's point of caution was based on the fundamentally territorial character of criminal law.[32] However, further paragraphs of the judgment demonstrate clearly that the PCIJ was raising the point to give itself an opportunity to explain its doctrine fully and anticipate on criticism. In one paragraph, the Court wrote:

> Though it is true that in al1 systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that al1 or nearly al1 these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.[33]

The PCIJ pursued its discussion and concluded that it was in the obligation to find out whether there were any international rule preventing (not allowing) Turkey from exercising jurisdiction.[34] As

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[29] R. O'Keefe, *supra* note 12, p.7.

[30] *The SS 'Lotus'*, *supra* note 28, para 19.

[31] Stigen, *supra* note 8, p.99.

[32] The SS 'Lotus', *supra* note 28, para 19.

[33] *Ibid,* para 20.

[34] Ibid, paras 20-21

a methodological approach, the *Lotus* principle therefore applies both to civil and criminal jurisdiction. In essence, the *Lotus* presumption is that while jurisdiction to enforce does not, as a rule, extend to foreign territory, there is no rule of international law preventing a state from asserting the applicability of its municipal law to any and every extraterritorial situation of its choosing.[35]

Decades after *Lotus*, Fitzmaurice would brilliantly summarise the question as follows: "Do we set out to examine whether extraterritorial jurisdiction is permissible or not prohibited?"[36] Fitzmaurice's question is at the very heart of public international law. It describes the chicken and egg question in international law. In other words, are sovereign states creations or creators of international law? Put differently, do we depart from a state's freedom (sovereignty) to therefore conclude that a state's action is free until there is a prohibiting rule or do we, on the contrary, consider that the law precedes the state and therefore that a state's action is only legally valid when there is an explicit rule allowing a course of action? In essence, the question is whether international normativity is permissive or prohibitive. Answering the question, the Court took sovereignty as a point of departure and stated as follows:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[37]

The consequence of such a choice was that rules limiting states' action were to be explicit rather than implicit or presumed. A presumptive freedom of state action was proclaimed. The phrase "*Lotus principle*" has from there been understood to mean that states have a right to do whatever is not prohibited by an international convention or custom.[38] Although dissenting, Judge Loder used a phrase summing up the whole idea. Here are his words: "[U]nder international law, everything which is not prohibited is permitted …"[39] Explaining further this statement, he wrote: "[U]nder international law, every door is open unless it is closed by treaty or by established custom."[40] That reading of the judgment was correct. It was shared by another dissenting voice, Judge Nyholm's. Introducing his

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[35] R. O'Keefe, *supra* note 12, p.7

[36] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-1954: Treaty Interpretation and Other Treaty Points', *British Yearbook of International Law* (1957), pp. 7, 9-18.

[37] The SS 'Lotus', *supra* note 28, para 20.

[38] M. Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argumen*t (Cambridge University Press, 1989), p. 221.

[39] The SS 'Lotus', s*upra* note 28, dissenting opinion of Judge Loder, para 34.

[40] *Ibid*.

criticism of the majority view, he noted: "If this reasoning be followed out, a principle of public international law is set up that where there is no special rule, absolute freedoms must exist."[41]

The doctrinal position is therefore that international law is *regulative*, rather than *constitutive* (of states' rights).[42] In other words but probably more fundamentally, the Court rejected the attributive theory to embrace the immanence theory considering that the state is the source of the law. Based on the Hegelian view of international law, the immanence theory is the view that the state is the only creator of law. Sovereignty thus precedes international law. States are vested with a natural liberty, and limitations on jurisdiction are always self-imposed and can be lifted at any time. According to that school of thought, the essence of international law is not to allocate competences but to establish duties as exceptions to the initial liberty. The opposite theory is the attribution theory. It holds that sovereignty is a quality allocated to certain entities by international law. The legal order pre-exists the sovereignty of the state and remains in control thereof; accordingly, a state will always have to show a specific rule of international law entitling it to act.It might come as a surprise that since the *Lotus* principle sovereignty is the argument for the legality of extraterritorial jurisdiction in principle, while in today's political discourse and parts of the legal doctrine, the same concept (sovereignty) is mobilised to make the opposite case. With respect to universal jurisdiction, this is only made possible by the conflation of prescriptive and enforcement jurisdictions, as highlighted above.

Has international law passed the *Lotus* era and doctrine and to what extent? Nothing could be less certain.[43] There are reasons to believe that the *Lotus* presumption still prevails as a matter of general theory, despite the growth of the body of international law in the 20th and 21st centuries.

4. 1.2. The *Lotus* Theory and Subsequent State Practice

State practice suggests that the *Lotus* presumption still dominates states' approach to international law. It has been suggested that the non-referral by states of jurisdictional issues to the ICJ is itself an illustration of the continuing states' willingness to retain freedom of decision.[44] In the same logic, states' disinclination to adopt a convention on criminal jurisdiction can be seen as a further illustration of this wish.

There is still no general convention on jurisdiction at the global stage. Regional inconclusive attempts have been made however. Worth mentioning in that regard is, for instance, the 1933 Montevideo Convention on the Rights and Duties of States, in force since 26 December 1934. It binds

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[41] *The SS 'Lotus'*, *supra* note 28, dissenting opinion of Judge Nyholm, para 60–1.

[42] G. Fitzmaurice, *supra* note 36.

[43] S. Allen, D.Costelloe, M. Fitzmaurice, P. Gragl & E. Guntrip(eds.), The *Oxford Handbook of Jurisdiction in International Law* (Oxford Handbooks, 2019), pp.41-58.

[44] H. Fox, 'Jurisdiction and Immunities' in V. Lowe and M. Fitzmaurice (eds.) *Fifty Years of the International Court of Justice* (Cambridge University Press, 1996), pp. 210, 212–15.

16 states on the American continent, 15 from Latin America and the United States of America.[45] The treaty is however of little relevance to the matter under discussion here. While one of its key principles is that "no state has the right to intervene in the internal or external affairs of another",[46] there is no indication as to whether prescriptive criminal extraterritorial jurisdiction would be a means of the prohibited "interference". European states have adopted a convention on jurisdiction in civil matters but have not succeeded doing the same in criminal matters.[47] The *Lotus* jurisprudence has also been endorsed by domestic courts.[48]

4.1.3. The *Lotus* Theory in the Case-law of the International Court of Justice

Already in the *Barcelona Traction* judgement, Judge Fitzmaurice took the view that the *Lotus* principle was still the right approach. In his separate opinion, he wrote:

> It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction …, but leaves to States a wide measure of discretion in the matter. It does however (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what they are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.[49]

In the *Nuclear Weapons* opinion, President Bedjaoui also referred to the *Lotus* case. He considered the ruling to be in the spirit of that time, a spirit of "an international society which as yet had few institutions and was governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty".[50] President Bedjaoui was right in that characterisation of *Lotus*. He was also right in stating that the Court's reasoning derived from a

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[45] Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States of America, Venezuela.

[46]Article 8. The text of the convention can be found here, among many locations: www.oas.org

[47] S ee Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; 72/454/EEC L 299 1972,

[48] See, for instance, *Attorney General vs. Adolf Eichmann*, 29. May, 1962, Supreme Court of Israel, para 9. www.asser.nl: visited on 16.02.2022.

[49] *Barcelona Traction, Light and Power Company, Limited (New application 1962: Belgium vs.Spain, Second Phase*), 5 February 1970, dissenting opinion of Judge Fitzmaurice, para 70, www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-04-EN.pdf, visited on 30 June, 2022.

[50] *Legality of the Threat or Use of Nuclear Weapons,* 8 July 1996, ICJ, Advisory Opinion, Declaration of President Bedjaoui, para 12, www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-01-EN.pdf, visited on 30 june, 2022.

"resolutely positivist, voluntarist approach of international law".[51] What probably amounts to an exaggeration, and possibly a mistake, is the observation he made according to which the majority's view in *Lotus* "has been replaced by an objective conception of international law".[52] There is no doubt that from the moment the PCIJ ruled on the *Lotus* to when President Bedjaoui wrote his opinion, "progress" had been made towards a more integrated international society. The gradual increase of the role played by international organisations and the increase in scope of *jus cogens* are good examples of that evolution. However, as Bedjaoui acknowledged himself, the breakthrough of supra-nationalism is still very modest.[53] Therefore, it does not sound realistic to consider that a change in the fundamental approach to international law is warranted. It is also worth mentioning the wider legal context of President Bedjoui's comments. In substance, he agreed and voted for the opinion with the majority, including its *Lotus*-minded paragraph stating that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such".[54]

His rather extraordinary comments on the *Lotus* case were made, as he acknowledged himself, with the sole purpose of avoiding the Court's opinion to be interpreted as to mean that the ICJ was "leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons".[55] But it is difficult to tell what else the Court was doing by declaring that there was no comprehensive and universal prohibition of the threat or use of nuclear weapons as such, neither in customary nor conventional international law. Efforts to distinguish what is "lawful" from what is "not unlawful" might be intellectually stimulating. They are of limited value though in terms of guidance to state action. President Bedajoui's comments can only be understood if one keeps in mind the other extraordinary paragraph of the Court's opinion, probably *ultra petita*, stating that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[56] Given the substantive question at hand in that opinion, i.e. the use of nuclear weapons, the dilemma the Court and its President was faced with is not to be neglected. However, questions of lawfulness are binary by nature. Either a state's action is lawful or it is not.

More contemporary opinions of the International Court of Justice tend to support the view that the *Lotus* principle is still prevalent. In the opinion on the unilateral Declaration of Independence by Kosovo, the ICJ was asked the question, by the General Assembly of the United Nations, whether that declaration was "in accordance with" international law. According to the Court, the answer to that question turns on whether or not the applicable international law prohibited the declaration of

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[51] Ibid, para 13.

[52] Ibid.

[53] Ibid.

[54]Ibid, dispositif para 2.B.

[55] Ibid, declaration of President Bedjaoui, para 11.

[56]Ibid, dispositif, para 2.F.

independence.[57] Observing that no such rule existed, the Court concluded that the declaration did not violate international law.[58]

Although he voted for the opinion, Judge Simma criticised the methodology it followed. Part of the criticism is related to how the Court interpreted the question posed by the General Assembly and this is of no interest for this discussion. The relevant points of his criticism are the ones related to the *Lotus* principle. In Simma's view, the Court's reference to the *Lotus* case made the reasoning "obsolete", given that the contemporary international legal order is "strongly influenced by ideas of public law".[59] According to Simma, a Court can approach a question in a non-formalistic fashion which does not "equate the absence of a prohibition with the existence of a permissive rule".[60] On the same token, he argues that a Court could, should have in that particular instance, consider(ed) the possibility that international law can be neutral or deliberately silent on the international lawfulness of an act.[61] In other words, he would have preferred an opinion along the same lines as the one in the matter on nuclear weapons.

One can understand the part of Simma's criticism when he argues that the extremely consensualist vision of international law presented by the *Lotus* case is not satisfactory anymore, given today's development of notions such as obligations *erga omnes* and *jus cogens.* However, while the two concepts definitely introduced ideas of public law in a traditionally purely conventional law, it would probably be an exaggeration to hold that they have completely changed international law's nature, especially as far as the role of consent is concerned. Moreover, as with the opinion in *Nuclear Weapons*, on questions of legality, the range of options in the hands of a judicial institution is not infinite. That is probably why Judge Simma himself voted with the majority and only wrote a separate opinion.

Simma's suggestion to go beyond the lawful/unlawful categories with qualifiers such as "tolerated" or "desirable" are intellectually stimulating. However, they are not helpful as legal guidances for political action. As old-fashioned as this might sound, there is something inherently binary in legal reasoning, especially when the question is to decide on the legality/illegality of a definite action. It is a totally different story if the question is about identifying viable legal options prior to an action. In addition, the exact meaning of the proposed categories is far from clear. This appears clearly when Simma explains the concept of "toleration". According to him, that an act might be "tolerated" does not mean that it is "legal", but rather that it is "not illegal". [62]But this is what the

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[57] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo,* 22 July 2010, ICJ, para 56, www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf, visited on 30 June, 2022.

[58] Ibid, dispositif, para 3.

[59] Ibid, declaration of Judge Brunno Simma, para 3.

[60] Ibid.

[61] Ibid.

[62] Ibid., para 9, pp.81-82.

Court did in the criticised opinion because its conclusion was that Kosovo's declaration of independence "did not violate International Law".[63] It is true that the question was positively worded, asking whether the unilateral declaration had been done "*in accordance with International Law*".[64] But what that positive formulation allowed was only a doctrinal positioning as to what "*accordance* with international law" meant. For the Court, it meant "*not in violation* of international law.

Lastly, literally speaking, Simma's characterisation of the *Lotus* approach is slightly inaccurate. It is not correct to suggest that the essence of the *Lotus* presumption is to "equate the absence of a prohibition with the existence of a permissive rule".[65] The correct position is that, according to *Lotus*, the absence of a prohibition is equal to legality or lawfulness, but not to a permissive rule. The *Lotus* approach does not assume *permissive rules* as such for the exact reason that it does not consider them necessary for legality/permissibility.

As indicated above, in the *Arrest Warrant* case, a number of judges wrote their views on universal jurisdiction in their concurring/dissenting opinions, although the case itself did not address the issue because the complainant had withdrawn its claim on that specific question. Those views are still very highly regarded despite not being conclusive. In their substance, they are, in large part, supportive of Belgium's claim although they diverge, as this paper will further demonstrate. Some of those judges referred to the *Lotus* case and made pronouncements with regard to modern-day validity of its presumption.

Judge Guillaume, the then President of the ICJ, was in the sceptical camp. In his view, arguments based on the *Lotus* presumption can only be "hardly persuasive". The scepticism was first based on the "unresolved qualifications placed on its general statement by the PCIJ in *Lotus* itself.[66] But as this paper has demonstrated, quoting directly from the Lotus judgment, by those "qualifications", the PCIJ was only introducing a discussion on territoriality in criminal law to recognise the differences in state practice between civil and criminal matters as far as extraterritorial jurisdiction is concerned. However, in the end, it reached a similar conclusion for both matters, which is that jurisdiction is the principle, lack of it the exception to be established by an explicit prohibitive rule.

President Guillaume argues that there are "cases" in which international law allows universal jurisdiction. However, in his view, the so-called "universal jurisdiction *in absentia*" is "unknown to

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[63] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, supra* note 57, para 123.

[64] Literally, here was the wording of the question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, supra* note 59, para 8.

[65] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, supra* notes 57, 59.

[66] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), supra* note 6, Separate opinion of President Guilaume, para 14.

international law"[67] As already highlighted, worries about universal jurisdiction *in absentia* are grounded in the confusion between jurisdiction to prescribe and jurisdiction to enforce. Enforcement is indeed territorial in principle, regardless of the head of jurisdiction.

Judge *ad hoc* Van Den Wyngaert was in favour of prescriptive universal jurisdiction. The *Lotus* principle was one of the "tests" she used in her assessment of the legality of the Belgian legislation as far as prescriptive universal jurisdiction is concerned.[68] In her view, even if the ICJ did not address the issue of universal jurisdiction in the end because the DRC had reduced the request to the question of immunity, it could be said that the Court implicitly agreed with Belgium's position that it enjoyed jurisdiction.[69] This sounds like a reasonable claim to make. Indeed, as a matter of logic, for *immunity from jurisdiction* to even be a valid question, and it was because the Court responded to it, jurisdiction needs to exist. Otherwise, there would be nothing to be immune from. To be precise and fair with the DRC, universal jurisdiction was not objected to in principle, even from the beginning. What the DRC rejected was its "excessive" version, i.e. universal jurisdiction *in absentia*, and indeed the possibility of prosecuting her immunity enjoying diplomats.[70]

Judges Higgins, Kooijmans, and Buergenthal did not reject universal jurisdiction. They described the *Lotus* principle as "a continuing potential".[71] However, they did not rely on the *Lotus* presumption to make their point because, in their view, "[the] vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the "*Lotus*" case".[72] In the context of universal jurisdiction, it can be assumed that the verticality the judges had in mind was a reference to the so-called *mandatory universal jurisdiction* by reference to the obligation to prosecute or extradite. However, more broadly speaking, the international legal system remains a fundamentally horizontal one, almost as it was at the time of the *Lotus*, despite the contemporary abundance of treaties and international organisations.

4.1.4. The *Lotus* Principle in Scholarly Writings and Policy Documents

From the opposite doctrinal point of view to the *Lotus* principle, a Harvard Law research initiative wanted, in 1935, to find out the jurisdictional links traditionally accepted by states.[73] The purpose

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[67] Ibid, para 16.

[68] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), supra note* 6, dissenting opinion of Van Den Wyngaert, paras 48-51.

[69] Ibid, para 41.

[70] Judgment, para 50.

[71] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), supra* note 6, Joint Sep op Higgins, Kooijmans, and Buergenthal, para 50.

[72] Ibid.

[73] D.J. Harris. *Cases and materials on International Law*, 4th Edition (Sweet&Maxwell, 1991), pp.250-251.

was to find out which jurisdictional links were "permitted by international law".[74] The first step was a survey of those links. The study consisted in an analysis of modern national legislations, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts. It found five principles on which a more or less extensive penal jurisdiction was claimed by states at that time.[75] Those principles were *territoriality*, *active and passive nationality* (reference to the nationality or national character of the person committing the offence), the *protective principle* as well as *universality*.[76] The study found that while territoriality, nationality and the protective principle were almost universally accepted as links of jurisdiction, passive personality was contested by a large number of states and universality was only accepted with respect to the crime of piracy.[77] The Harvard Law research group eventually drafted a convention in that regard.

Implicit in the Harvard Law research initiative was the idea that territoriality is the principle while extraterritorial jurisdiction is the exception. This is actually an ancient idea. At his time, Beccaria himself had criticised extraterritoriality, and universal jurisdiction by implication, in the strongest possible terms. According to that scholar, considered as the father of modern criminal law, judges are not avengers of humankind in general. Therefore, a crime is punishable only in the country where it was committed.[78] It is worth mentioning that Beccaria never concerned himself with international law. His work was neither a description of the legal position on the matter at any given time in history. As a utilitarian thinker, he was only concerned with conditions of effectiveness. In his work, territoriality is therefore an expression of a doctrinal preference rather than an opinion on the legal limits of a state's jurisdiction, *ratione locci.*

According to the Harvard Law research doctrine, for jurisdiction to legally exist, there needs to be a link between the situation and the forum state. It could be argued that from that perspective, even the universality principle would be a basis for jurisdiction if the suspect were in the "custody" of the adjudicating state while the so-called "universal jurisdiction *in absentia*" would be absolute anathema. It is interesting to note that some scholars take universal jurisdiction *in absentia* to be a jurisdictional link on its own, the legality of which is to be established separately.[79] This is however a category error. On the one hand, there is universal jurisdiction, a link of jurisdiction to prescribe

[74]Ibid.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] C. BECCARIA, *An essay on crimes and punishments,* 4th Edition (English translation, a re-edition of the 1775 Essay) (Branden Press, New York, 1983), p.64.

[79]L. Reydams*, Universal jurisdiction, International and Muncipal Law Perspective*s (Oxford University Press, 2003), p.25.

alongside territoriality, nationality, the protective principle and passive personality. On the other, there is enforcement jurisdiction, always territorial. It can be *in absentia* or *in personam*.[80]

Regarding the authority of the Harvard Law principles, it is worth mentioning that the Harvard Law Research Draft Convention was the product of the unofficial work of a number of American international lawyers. It was therefore not binding on any state. It claimed to be representative of customary international law, but this is not unanimously accepted. More significantly, as far as jurisdiction in general is concerned, not just in criminal law matters, the Harvard Law principles did not even reflect, and would not reflect today, the doctrinal position of the United States of America itself. The traditional viewpoint of the USA is to rely on the *Lotus* principle according to which all is permissible unless prohibited, and on comity (comitas) as a leading device for accommodation, i.e. as a way to resolve possible conflicts of jurisdiction.[81]

Towards the end of the 20th century, the Rapporteur of the Commission on the Extraterritorial Jurisdiction of States of the Institute of International Law concluded his study stating that "a spirit of free appreciation of the authority of the concept [of jurisdiction] pervades the atmosphere, and it is this spirit which must be responsible for the continuing popularity of the [*Lotus*] judgment".[82] It is clear that he believed that the *Lotus* principle was still the dominant doctrine although he obviously did not like it. A few years before, the Committee on Crime Problems of the Council of Europe had taken a similar view stating that "[p]ublic international law does not impose any limitations on the freedom of States to establish forms of extraterritorial criminal jurisdiction where they are based on international solidarity between States in the fight against crime".[83]

4.2. *The Legality of Universal Jurisdiction in Today's Positive Law*

Following the methodological positioning already highlighted above, this paper is not interested in identifying rules of international law on which universal jurisdiction might be based. It seeks rather to see if its exercise today would violate or be in conflict with any rule/principle of international law in existence today. In the negative, the legality case will have been made. In the affirmative, it will not.

Reading through the critical literature of universal jurisdiction, territorial sovereignty in general and the prohibition of interference in a state's domestic affairs are intuitive candidates.[84] Territorial sovereignty is a wide concept. It refers to a state's inherent and supreme rights on its territory. It encompasses not only its exclusive jurisdiction to enforce municipal law within a given territory

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[80] R.O'Keefe, *supra* note 13, p.760.

[81] M. Bos. The extraterritorial jurisdiction of states, *Institute of International Law Yearbook*, Vol. 65, Part I, 1993, p. 39.

[82] Ibid.

[83] Council of Europe. European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (1990), para 27.

[84] A. Cassesse, 'Is the Bell Tolling for Universality?' *Journal of International Criminal Justice*, 2003, I, p.591.

(including the authority to permit the enforcement of foreign law, either by its own organs or the organs of a foreign state) but also, for example, the power to regulate the entry of persons into that territory, the power to alienate that territory by way of cession, and so on. We are concerned here with sovereignty as encompassing the exclusivity of jurisdiction as well as the prohibition of interference in domestic affairs.

When a clear distinction is made between prescription and enforcement, it becomes obvious that law enforcement raises the same legal issues whenever there is an international element in the situation, regardless of the principle on which jurisdiction is based. It becomes also clear that those legal issues are unrelated to prescriptive jurisdiction and have therefore nothing to do with universal jurisdiction. Consider that the person X, whatever his/her residence or nationality, commits a crime in state A and flees to state B afterwards, to avoid prosecution. State A obviously enjoys territorial jurisdiction because the existence of a jurisdictional nexus is assessed based on the time the putative offense was committed. However, there seems to be no controversy that A would be violating state B's territorial sovereignty if its authorities were to enter into B's territory with no authorisation for the purpose of enforcing their legislation against X. Territorial jurisdiction does not therefore make impossible the violation of rules of territorial sovereignty. The same goes, *mutatis mutandis*, with regard to jurisdiction based on nationality, the protective and the universality principles. The same reasoning applies to some legal issues with no necessary connection with jurisdiction but which are usually raised by law enforcement in situations with an international element. One example of such issues is the question of immunity. Indeed, regardless of the jurisdictional link, criminal law enforcement needs to take into consideration questions of immunity. Territorial jurisdiction does not prevent issues of immunity from arising. If, for instance, the suspect is a person enjoying diplomatic immunity, it does not make any difference that the crime investigated was committed on the territory of the forum state or not.

The prohibition to interfere in a state's domestic affairs is a treaty rule as far as the relationships between a state and the United Nations are concerned[85] and a customary rule in inter-state relations.[86] The question is therefore whether that rule can be violated by a state asserting its universal jurisdiction to prescribe. In other words, can there be interference before enforcement? Indeed, before enforcement, a state declaring the extraterritorial applicability of its criminal legislation is doing nothing more than making a statement. Even in the early years of the Cold War, a period considered as the one of almost absolute opposition to intervention,[87] it was considered that Article 2(7) of the United Nations Charter only precludes direct intervention in the domestic economy, social structure or cultural arrangements of the state concerned but does not prohibit recommendations or even

[85] Article 2(7) of the UN Charter: "[N]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

[86] See *Military and paramilitary activities in and against Nicaragua* (*Nicaragua vs. United States of America*), 27 June 1986, ICJ, para 202, www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf, visited on 30 June 2022.

[87] P. Alston. & R. Goddman., *International Human Rights* (Oxford University Press, 2013), pp. 685-689.

inquiries conducted outside the territory of such state.[88] There is no doubt that Article 2(7) of the United Nations Charter is the most solid foundation of the non-interference principle. Its customary law counterpart cannot be more rigorous.

Absent the distinction between prescription and enforcement, mistakes on the identification of the relevant rules of international law are easily made. For instance, in the *Arrest Warrant* case, the Democratic Republic of the Congo complained that with its universal jurisdiction legislation Belgium was trying to exercise authority over another state's territory. The DRC argued as follows: "The universal jurisdiction that the Belgian State attributes to itself … constituted a violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations."[89] It is obvious that the DRC considered that Belgium would be exercising authority on Congo's territory. This is a factual inaccuracy. Indeed, it was always clear that Belgium was the soil on which the legislation had been enacted and where it would be enforced.

Some critics of an extended notion of universal jurisdiction point to potential gross instances of enforcement to rhetorically make the case that universal jurisdiction is unreasonable. Cassese, for instance, argues that it is only reasonable that a Court in Paris (France) could not try a Pakistani suspected of having engaged in a robbery in Karachi against other Pakistanis, just because the Pakistani in question happens to be found in France.[90] This way of arguing willingly choses to blow the line between a right and its enforcement. Common sense, resource management and comity are criteria states use to choose when to enforce their rights or not. Judge Christine Van de Wyangaert makes a similar point in her opinion in the *Arrest Warrant* case when she argues that asserting jurisdiction without a link might be politically unwise but it is not illegal.[91] Her reservations to an extended notion of universal jurisdiction are therefore only of a prudential nature. A state is not required to legislate up to the full scope of the jurisdiction allowed by international law. In other words, while only a minimalist approach to universal jurisdiction is legally required, there is nothing to suggest that a wider – or even maximalist – approach would be contrary to international law. The minimalist approach limits that kind of jurisdiction to a limited number of crimes and on the condition of the presence of the suspect on the territory of the state.

All in all, nothing seems to suggest that modern international law requires the existence of a "link" between the criminal situation and the state exercising jurisdiction. The "presence" requirement in the conventions referred to above is only a condition for mandatory jurisdiction. More properly formulated, presence or "custody" is the circumstance that generates the obligation to prosecute or extradite. It is not a condition for the existence of a state's right. As highlighted above,

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[88] United Nations' Commission on the Racial Situation in the Union of South Africa, Report of the United Nations Commission on the Racial Situation in the Union of South Africa, UN Doc.A/2505(1953), pp. 16-22.

[89] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), supra* note 6, para 17.

[90] A. Casseese, *supra* note 84, p. 591.

[91] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), supra* notes 6, 68, para 56.

it is conceptually wrong to conflate the right to prosecute with the obligation to do so or to extradite. It is highly problematic both legally and logically to consider that whatever is not mandatory is prohibited. The foundation of universal jurisdiction put forward by the critics of an extended notion of that concept demonstrates that they only envision mandatory universal jurisdiction, even when the language they use is of states' rights. Stigen, for instance, argues that universal jurisdiction is founded on "a hierarchical consideration concerning global common interests superior to state sovereignty, rather a horizontal consideration concerning a freedom of regulation for states only restricted by explicit prohibitions".[92]

5. **Dealing with the Implications of an Extended Notion of Universal Jurisdiction**

There are legal and political concerns behind universal jurisdiction, especially in its so-called extended understanding.They are about conflict of jurisdiction and the so-called "judicial imperialism". In its extended version, universal jurisdiction creates a situation in which, in principle, any state could declare itself competent to adjudicate any offense committed anywhere. This creates a context of "conflict of jurisdiction" at a very large scale. Conflicts of jurisdiction can however be created by contexts other than universal jurisdiction. In any context of extraterritoriality, conflicts of jurisdiction are a possibility, either in theory or in practice. In a single situation, a state might base its jurisdictional claim on territoriality while others are founding their own on active personality, passive personality or the protective principle. The problem has therefore nothing uniquely related to universal jurisdiction. This basis of jurisdiction only multiplies the number of claimants.

Attempts to establish a hierarchy between jurisdictional grounds have historically been made but they have all failed.[93] The already mentioned Harvard Law research initiative rejected the idea of a hierarchy of jurisdictional grounds as unwarranted by anything in international law.[94] In 2008, a study by the International Bar Association's Task Force on Extraterritorial Jurisdiction arrived at a similar conclusion. It found that as matter of customary international law there is no pecking order among the various internationally lawful bases of prescriptive criminal jurisdiction. [95] Along the same lines, the so-called Goldstone Report, i.e. the United Nations Fact-Finding Mission on the Gaza Conflict, stated that universal jurisdiction is "concurrent with others based on more traditional principles of territoriality [and] active and passive nationality, and is not subsidiary to them".[96] So did the Technical *Ad hoc* Expert Group jointly put in place by the African Union and the European Union in 2009.[97]

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[92] J. Stigen, *supra* note 8, p. 101.

[93] R.O'keefe, *supra* note 12, p. 829.

[94] Harvard Law School Research in International Law, '*Jurisdiction with Respect to Crime'* (1935) 29 AJIL Supp. 583

[95]International Bar Association, Report of the Task Force on Extraterritorial Jurisdiction, 2008, pp. 22-26.

[96] Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN doc A/HRC/12/48 (25 September 2009), 397 - 8, para 1849.

[97] AU & EU, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 16 April 2009, p.11.

One way-out so far is a form of state “self-censorship” when, in comparison, they deem their exercise of jurisdiction unreasonable. For instance, the United States of America take the view that, even when there is a basis for jurisdiction, “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable”.[98] Reasonableness is determined by assessing a state’s jurisdictional claim in light of certain factors which value that state’s interest in prosecuting the case.[99]

A related problem is the so-called judicial imperialism. Judge Guillaume, for instance, has stated that universal jurisdiction – especially in its extended form – bears the risk of encouraging arbitrariness for the benefit of the powerful, acting as agent of an “ill-defined International Community”.[100] The African Union has, on its part, pointed to a risk of judicial imperialism.[101] Complaints about the so-called judicial imperialism are however not unique to universal jurisdiction. They are made even in relation to trials by international courts in the creation of which African states themselves have participated, like the International Criminal Court.[102] More intriguingly, the complaint seems to be based on the belief that the universality is only a façade or unidirectional. In other words, the assumption seems to be that enforcement of universal jurisdiction can only lead to situations in which citizens of the Global South countries are tried in the Global North, and never the other way around nor within countries of the Global South, like members of the same regional organisation. This is however not correct, at least in principle. In any case, the politics of enforcement are not determinative as far as the legal determination of the existence of a state’s right is concerned.

6. **Concluding Remarks**

This article’s objective was to highlight the misconceptions around universal jurisdiction in criminal matters as far as its legality and scope are concerned. Identifying the sources of the confusion was an important aspect of the discussion. In that regard, the article has highlighted that the (unconscious) conflation of the concepts of prescriptive and enforcement jurisdiction is the main source of the confusion. The conflation of *aut dedere, aut judicare* (an obligation) and universal jurisdiction (a right) is the other.

Implications of the conflation between prescriptive and adjudicative jurisdiction are very important, especially in relation to territoriality. From a methodological viewpoint, the paper has highlighted that while any instance of extraterritorial enforcement requires a permissive rule, i.e. a rule giving jurisdiction to the enforcing state, jurisdiction to prescribe always exists unless there is a

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[98] American Law Institute, *Restatement of the Law (3rd) of Foreign Relations Law of the United States*, para 403(1).

[99] Ibid, para 403(2) and (3).

[100] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium),* supra notes 6 & 66, para 15.

[101] A. Sammons, ‘The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts’, *Berkeley Journal of Interntional Law*, Vol. 21:111, 2003, 111-144..

[102] T. Murithi. ‘Judicial Imperialism: The Politicisation of International Criminal Justice in Africa’ (Fanele, 2019), 125p.

prohibitive rule. This part of the discussion involved a historical approach going back to the *Lotu*s case. From that point of view, the international legality of universal jurisdiction is clearly established.

As for scope, it can be deducted from the conclusion above that prescriptive universal jurisdiction knows no limit. This sets it apart in comparison with the obligation to prosecute or extradite (*aut dedere, aut judicare*) which concerns a limited number of crimes. In relation to territoriality, it is only reasonable that international law can only oblige states to prosecute or extradite suspects on their territory. In addition, it derives from the nature of international law that this obligation (*aut dedere, aut judicare*) is dependent upon a conventional or customary rule of international law while the "right" (universal jurisdiction) exists unless there is a prohibitive rule of international law.

The article has discussed whether universal jurisdiction can come into conflict with other norms of public international law. The prohibition of interference in another state's domestic affairs was the norm of reference. The article has highlighted that, understood correctly, i.e. as jurisdiction to prescribe, universal jurisdiction does not conflict with that principle.