Concurring Criminal Jurisdictions under International Law

1. Introduction

a.

The European Center for Constitutional and Human Rights (ECCHR), through its advisory board member Professor Dr. Florian Jessberger[1] and its General Secretary Wolfgang Kaleck[2], prepared this expert opinion on concurring criminal jurisdictions and the standards of investigations under international law. ECCHR – based in Berlin – is a non-profit civil society organization of international lawyers with in-depth expertise on universal jurisdiction cases, having worked on the issue for many years. This expert opinion is designed to provide the Court with an in-depth analysis on concurring criminal jurisdictions focusing on the principles of territoriality and universality. Additionally, it analyzes which universal standards for investigations have to be fulfilled for an adequate investigation. Finally, this expert opinion takes a position on the relevance of the *ne bis in idem* principle in inter-state relations.

b.

To begin with, it is to be noted that international law recognizes different forms of criminal jurisdiction. In addition to the territoriality principle that connects jurisdiction to the place where a crime was committed, there are several other grounds of extraterritorial jurisdiction. The main forms of extraterritorial jurisdiction are the protective principle, the active personality (or nationality) principle, the passive personality principle and the universality principle.[3]

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2 Curriculum vitae attached as exhibit #2.

3 See Cedric Ryngaert, Jurisdiction in International Law. Oxford: Oxford University Press (2008), pp.

Whether the passive personality principle can be invoked, that is to say the exercise of jurisdiction based on the nationality of the victim, is a matter of controversy under international law. The principle is established as basis of jurisdiction in numerous domestic laws and in a number of international treaties.[4] Yet some states do not provide for this form of jurisdiction in their domestic legislation. Still, according to the majority view, which is shared by the authors of this expert opinion, there is sufficient support for the position that, under international law, the fact that the victim holds a state's nationality forms a firm basis for the exercise of extraterritorial jurisdiction by this state.[5] It should be noted, however, that some cases which from the viewpoint of international law can be regarded as exercise of the passive personality principle may, from the perspective of specific national legislation, be dealt with as exercise of another jurisdictional principle, for example the universality principle.

Unlike the other principles of extraterritorial jurisdiction the universality principle requires no specific nexus between the crime and the forum state. Jurisdiction is solely based on the nature of the crime, without regard to where the crime was committed, the nationality of the (alleged) perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[6] This principle recognizes the authority of each state to prosecute especially "heinous" crimes, which due to their specific characteristics, affect the international community as a whole. By allowing all

85-133.

4 E.g., Spanish law established the passive personality principle in Article 23.4 and 5 of the Spanish Law of the Judiciary by the Organic Law 1/2009 on 3 November 2009; according to Article 5(1)(c) of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states are authorized but not obliged to establish criminal jurisdiction on the basis of the passive personality principle.

5 See, e.g., Tom Vander Beken et al., Finding the Best Place for Prosecution. Antwerp: Maklu (2002), p. 13: Bundesverfassungsgericht, Juristenzeitung 2001, pp. 975, 979; see also Restatement (Third) of Foreign Relations Law (1987), § 402.

6 See, e.g., Princeton University Program in Law and Public Affairs, 2001 Princeton Principles on Universal Jurisdiction, the steering committee was composed of Professors Macedo, Bass, Falk, Flinterman, Butler, Oxman and Lockwood; see also the definition of the *Institut de Droit international* of 26 August 2005, seventeenth commission, universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, resolution, para. 1; members of the 17th Commission of the *Institute de Droit international* in Krakow 2005 were Professors Ando, Barberis, Bennouna, Caflisch, Cassese, Conforti, Crawford, Dinstein, Lee, Momtaz, Orrego Vicuna, Rozakis, Salmon, Tomuschat, Torres Bernárdez, Vinuesa and Yusuf.

states to prosecute those international crimes such as genocide, war crimes, crimes against humanity, and, arguably, torture, the principle of universal jurisdiction protects and upholds fundamental values of the international community. The universality principle for those crimes is rooted in customary international law.[7]

Drawing on this background information, this expert opinion will now address the following questions:

- Does international law provide for the priority of territorial jurisdiction over extraterritorial, in particular universal jurisdiction?
- Does the *ne bis in idem* /double jeopardy principle, under international law, bar prosecution in a foreign jurisdiction?

2. Does International Law Provide for the Priority of Territorial Jurisdiction over Extraterritorial, in Particular Universal Jurisdiction?

a.

International law envisions a system of concurrent jurisdictions. There is no rule prohibiting states from establishing domestic criminal jurisdiction on the basis of active or passive nationality, or universality over an extraterritorial situation that is already covered by the jurisdiction of other states, especially the territorial state.[8] As the Permanent Court of International Justice stated in its famous *Lotus* case:

> "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

[7] See, e.g., Princeton Principles, *supra* note 6; see also Claus Kress, Universal Jurisdiction over International Crimes and the *Institut de Droit international*, in: Journal of International Criminal Justice 4 (2006), 561 – 585 (566).

[8] Ryngaert, *supra* note 2, at 129.

> law (allowing exercising jurisdiction outside its own territory). (…) The territoriality of criminal law (…) is not an absolute principle of international law and by no means coincides with territorial sovereignty."[9]

Moreover, the Fourth Geneva Convention in its Article 146 even obliges all states to establish their domestic criminal jurisdiction over one and the same act of a grave breach of the Fourth Geneva Convention as defined in its Article 147.

b.

International customary law recognizes no hierarchy among the different types of criminal jurisdictions outlined above. In particular, there is no conclusive evidence regarding the existence of a rule of customary international law which may provide for the priority of the territoriality principle. It follows that, under international law, a state which practices universal jurisdiction – the so-called third state – is under no legal obligation to accord priority in respect of investigation and prosecution to the state where the criminal acts were committed.[10]

Equally, the Fourth Geneva Convention in its Article 146 does not establish any hierarchy between jurisdictional principles. This provision simply obliges state parties to provide effective personal sanctions for persons committing any of the grave breaches of the Convention in order to avoid safe havens for perpetrators; it does not establish an order of priority whatsoever among different grounds of jurisdiction.

To conclude, a state exercising extraterritorial jurisdiction by investigating and prosecuting a crime on the basis of one of the acknowledged jurisdictional principles is not violating international law even if the crime is already investigated or prosecuted by the authorities of the state where it was committed.

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[9] Permanent Court of International Justice, Series A, No. 10, 7 September 1927, *The case of S.S. "Lotus"*, pp. 18-20.

[10] See AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, Report (2009), 8672/1/09 Rev 1 Annex, para 14, at 11.

c.

Notwithstanding the absence of a positive rule of customary international law providing for the priority of territorial jurisdiction, jurisdiction exercised on the basis of the territoriality principle is accorded a special place. This follows not from a firm rule of international law but as a matter of policy. In fact, there is reason to believe that states prosecuting international crimes on the basis of the universality principle should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction.[11] State practice accompanied by what appears to be an emerging sense of *opinio juris* indicates that states consider a prosecutorial effort by the territorial state to foreclose the possibility of a prosecution by states with universal jurisdiction.[12]

There are several reasons for the preference of territorial jurisdiction, which are based, *inter alia*, on procedural as well as political considerations and the recognition of a legitimate primary interest of those states that are most directly connected with the crime. While third states act in the interest and, thus, as agents of the international community as a whole, the territorial state by prosecuting alleged offenders in the first place pursues its own interests.

As regards the said priority of territorial jurisdiction, however, three points must be stressed:

- First, it is to be emphasized that territorial jurisdiction enjoys such priority relative to universal jurisdiction as a ***matter of policy*** only and not as a matter of international law.
- Second, the priority of territorial jurisdiction is ***not*** under discussion ***relative to other principles of extraterritorial jurisdiction, such as the passive personality***

[11] See AU-EU Technical Ad hoc Expert Group, *supra* note 10, recommendation R9, at 42.
[12] Spanish Constitutional Court Judgment 237/2005, of September 26, II. conclusions of law, para 4.; Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, 86 Wash. U. L. Rev. (2009), 769 (835).

principle, but only relative to the universality principle where no link whatsoever exists between the crime and the third state.

- Third, priority is subject to ***certain conditions relating to the exercise of jurisdiction*** by the territorial state and its authorities. These conditions are spelled out in the following paragraphs.

d.

Hence, the position territorial jurisdiction enjoys under international law does not lead to an absolute and unlimited subsidiarity of universal jurisdiction; rather, it is a form of conditional subsidiarity whose nature and content are not yet settled conclusively.

However, there is a widespread view that where the authorities and courts of a third state have serious reason to believe that the territorial state is manifestly unwilling or unable to prosecute the alleged offender, they may initiate criminal proceedings and take the necessary steps to prosecute the crime.[13] In other words: the argument that prosecutorial efforts by the territorial state foreclose the possibility of exercise of universal jurisdiction by third states is dependent on the condition that the territorial jurisdiction is exercised genuinely or in "good faith".[14] Further, it is difficult to assert that the principle of subsidiarity already applies at the initial investigation stage compared to the situation after the conclusion of an investigation.[15] Investigations can be initiated simultaneously in different countries and the results and evidentiary material collected be shared in legal assistance to the forum state of prosecution.[16]

The necessity of imposing the condition of subsidiarity regarding prosecution is rooted

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[13] Compare AU-EU Technical Ad hoc Expert Group, *supra* note 10, recommendation R10, at 43; See also Section 3(c) of the Resolution of the *Institute de Droit international* (2005), *supra* note 6.

[14] See Anthony J. Colangelo, *supra* note 12, 769 (835); for a similar approach, see Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, International Court of Justice, Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, I.C.J. Reports 2002, pp. 64 – 91.

[15] See Kress, *supra* note 7, at 580.

[16] See AU-EU Technical Ad hoc Expert Group, *supra* note 10, recommendation R10, at 43.

in the rationale of universal jurisdiction. Universal jurisdiction is supposed to be exercised only in cases that affect the international community as a whole and in order to prevent gaps of enforcement leading to impunity. In cases, where jurisdiction is effectively exercised on other grounds, there is no need for universal jurisdiction. However, the lack of "good faith" investigations and prosecutions in other *fora* means that the exercise of universal jurisdiction by third states is the only chance to avoid impunity.

e.

To determine the "good faith" of prosecutorial efforts in the territorial state, criteria established in international human rights law regarding universal standards for investigations should be taken into account. As such, not only international human rights courts can determine whether an investigation meets universal standards, but national courts too can apply these universal principles to determine whether the territorial state is investigating genuinely or whether a third state has to step in.

Various decisions of international human rights courts support the universal principles of independence, effectiveness, promptness and impartiality in carrying out investigations.[17] The Inter-American Court of Human Rights found in its *Moiwana Community* case that the State has the obligation to initiate *ex officio* and immediately, a genuine, impartial and effective investigation, which is not undertaken as a mere formality predestined to be ineffective.[18] The European Court of Human Rights found in

[17] Chamber Judgment of the European Court of Human Rights in the case of *Finucane v. United Kingdom*, 1 July 2003; European Court of Human Rights cases *Hugh Jordan; Kelly and others; Shanaghan; Mckerr v. United Kingdom*, 4 May 2001; *Fatma Kaçar v. Turkey*, 15 July 2005; I*sayeva (I) and (II) v. Russia* , 24 February 2005; the Inter-American Court of Human Rights has established similar jurisprudence in the case of *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, Series C No. 148, at 296 and the case of *Mapiripan Massacre v. Colombia*, Judgment of 15 September 2005, Series C No. 134, para. 223*; see also* Harmen van der Wilt and Sandra Lyngdorf, Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle, International Criminal Law Review 9 (2009), at 50 *et seq.*

[18] Inter-American Court of Human Rights case of the *Moiwana Community*, Judgment of 15 June 2005, Series C No. 124, paras 145 - 146; *Ituango Massacres v. Colombia, supra* note 17; *Pueblo Bello*

its *Finucane* decision of 1 July 2003 that certain rights imply some form of effective official investigation to secure these rights of individuals.[19] The Court reaffirmed its jurisprudence that "(f)or an investigation to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence".[20] As for the content of an investigation, the Court further noted that "(t)he authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings (…)".[21] Turning to the requirement of promptness and reasonable expedition, the Court found this "implicit in this context. (…) a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts".[22]

f.

On the inter-state level, in determining the "good faith" of prosecutorial efforts in the

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Massacre, Judgment of 31 January 2006, Series C No. 140, para. 143; *Mapiripan Massacre*, *supra* note 17.

[19] *Finucane v. United Kingdom*, *supra* note 17, p. 67; see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A No. 324, p. 49, para. 161; *Kaya v. Turkey*, Judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, para. 86; the Inter-American Court of Human Rights has established similar jurisprudence in the case of *Ituango Massacres v. Colombia*, *supra* note 17, p. 297.

[20] *Finucane v. United Kingdom*, *supra* note 17, p. 68; see, e.g., *Güleç v. Turkey*, Judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, paras 81-82; *Oğur v. Turkey* [GC], No. 21594/93, paras 91-92, ECHR 1999-III; see, e.g., *Ergi v. Turkey*, Judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-1779, paras 83-84, and the recent Northern Irish cases cited above, *supra* note 17, for example, *McKerr*, para. 128, *Hugh Jordan*, para. 120, and *Kelly and Others*, para. 114.

[21] *Finucane v. United Kingdom*, *supra* note 17, p. 69; see, e.g., *Salman v. Turkey* [GC], No. 21986/93, para. 106, ECHR 2000-VII; *Tanrıkulu v. Turkey* [GC], No. 23763/94, para. 109, ECHR 1999-IV; *Gül v. Turkey*, 22676/93, para. 89, 14 December 2000.

[22] *Finucane v. United Kingdom*, *supra* note 17, at 70; see *Yaşa v. Turkey,* Judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-2440, paras 102-104; *Çakıcı v. Turkey* [GC], No. 23657/94, paras 80, 87 and 106, ECHR 1999-IV; *Tanrıkulu*, *supra* note 21, para. 109; *Mahmut Kaya v. Turkey*, No. 22535/93, paras 106-107, ECHR 2000-III; see, e.g., *Hugh Jordan*, *supra* note 17, paras 108, 136-140.

territorial state the complementarity principle of Article 17 of the Rome Statute of the International Criminal Court (ICC) is a useful reference as it establishes the preconditions that a state has to meet in order to avoid the ICC exercising its jurisdiction. Notwithstanding that the horizontal relation between two states is different from the vertical relation between a state and the ICC,[23] the standard established by the complementarity principle can be taken into consideration and may be, as a guiding principle, transferred to inter-state relations. However, it has to be emphasized that the complementarity principle itself, applicable to the state-ICC relation, does not exist on a state-to-state level where concurrent jurisdiction with conditional subsidiarity prevails.

Article 17(1)(a) states that a case is inadmissible before the ICC where "the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution". According to this wording, and particularly in regard to the element of unwillingness, the lack of efforts to genuinely prosecute the crime needs to be determined positively; it is not sufficient that investigations or prosecutions might merely be conducted more effectively by the ICC or– in the case of third party prosecutions – by other states.[24] References for this interpretation are contained in Article 17(2) of the Rome Statute:

> "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
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> a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
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> b) There has been an unjustified delay in the proceedings which in the circumstances

[23] Florian Jessberger, Universality, Complementarity, and the Duty to Prosecute Crimes under International Law in Germany, in: W. Kaleck, M. Ratner, T. Singelnstein and P. Weiss (eds.), International Prosecution of Human Rights Crimes (2007), 213 (221).

[24] Compare Cryer et al., An Introduction to International Criminal Law and Procedure (2007), pp. 127-128.

is inconsistent with an intent to bring the person concerned to justice;

c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

Thus, also on an inter-state level a positive determination whether another state is genuinely conducting an investigation or prosecution should be made. A state cannot refuse investigations simply pointing to another state claiming it is carrying out an investigation. A state has to consider whether universal standards of investigations are met by the other state. Only with an affirmative answer to that question can a state invoke the priority of the territorial state's jurisdiction as a matter of policy.

To conclude, international law does not provide for a priority of territorial jurisdiction over extraterritorial, in particular universal, jurisdiction. It is only as a matter of policy that the territoriality principle is favored over the universality principle once there is an investigation concluded – this conditional subsidiarity requires that international human rights standards for investigations are respected.

3. Does, Under International Law, the *Ne Bis in Idem* Principle bar Prosecution in a Foreign Jurisdiction?

The *ne bis in idem* principle signifies that no one shall be tried twice for the same offence. The principle is incorporated in most national criminal justice systems and contained in many international conventions, both in the area of cooperation in criminal matters as well as human rights.[25] While most states seem to recognize the principle, there are so many qualifications and restrictions to it that it is difficult to describe its status in international law or in comparative criminal law.[26]

[25] See, e.g. Article 14(7) ICCPR.

[26] Christine Van den Wyngaert and Tom Ongena, *Ne bis in idem* Principles, Including the Issue of Amnesty, in: Cassese/Gaeta/Jones (eds.), The Rome Statute of the International Criminal Court (2002), 705-729 (706).

The first qualification that needs to be made is in regard to the extent of the *ne bis in idem* principle. With the possible exception of the formulations in the Statutes of international criminal courts, it becomes apparent that this principle is usually a safeguard only against double prosecution by entities of the same organized political power, usually the nation State. The formulation of Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) is a clear example of this:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure *of each country*. (emphasis added)

This restriction of the *ne bis in idem* principle to decisions by the same sovereign was partly abandoned in the process of European integration, as Article 54 of the Schengen Convention[27] (1990) extends this principle to the decisions of other contracting parties. This development is, however, not indicative of a wider interpretation of the *ne bis in idem* principle in international law beyond the context of the European Union.

The second qualification is that the *ne bis in idem* principle merely protects from double prosecution, once there has been a final decision. Most legal systems will only invoke the *res judicata* principle for judgments on the merits of the case, while interlocutory judgments usually do not have that effect. That means that the *res judicata* effect is generally bound to the condition that the offender has been acquitted or sentenced and that the sentence is currently being served or has already been served. Obviously, the mere opening of investigations or prosecutions carried out by another state does not fulfill these criteria as it does not put an end to a proceeding. Thus it cannot exert a *res judicata* effect since the existence of a judgment, whether convicting or acquitting, is the key rule to consider a double jeopardy situation. As we have already pointed out, a

[27] Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic, on the Gradual Abolition of Checks at their Common Borders, *ILM* (1991), p. 84.

mere investigation or ongoing prosecution will simply create a conflict of jurisdiction or a *lis pendens* which, unlike the *ne bis in idem* principle, does not prohibit another jurisdiction from investigating or prosecuting the same case.

4. Summary and Conclusions

International law envisions a model of concurrent jurisdictions. It enables states to exercise their jurisdiction on different grounds without prescribing a hierarchy between those types of jurisdiction.

However, one can recognize a policy rule to accord priority to the principle of territoriality in combination with a model of conditional subsidiarity of universal jurisdiction once an investigation is concluded. The conditionality of the exercise of universal jurisdiction, while not settled conclusively, may be based on the "good faith" exercise of the primary jurisdiction and may be construed following the case law of human rights courts and the basic concept established by Article 17 of the Rome Statute for the vertical state-ICC relation. It follows that, if the territorial state is unwilling or unable to genuinely conduct investigations or if the investigations or prosecutions are no more than sham proceedings to shield the perpetrator, then the third state may initiate its own criminal proceedings. For an investigation to be considered genuine, it must meet the universal standards of effectiveness, promptness, independence and impartiality.

Finally, it is to be noted that the mentioned policy rule does *not* extend to the exercise of extraterritorial jurisdiction other than universal jurisdiction. Thus, under international law, states exercising jurisdiction on the basis of the nationality principle or the passive personality principle need not – not even as a matter of policy – accord priority to the jurisdiction of the territorial state.