Criminal Law as Ethics of Globalisation

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1. Introduction

The current globalisation is not the first in history, but it is characterised for the first time by technologies which allow the circulation of goods and capital and the flow of cultural or scientific news to be almost instantaneous. Globalisation simultaneously reinforces interdependencies and weakens States and their legal systems.

Legally, the process is twofold. Economic globalisation opens the market to practices of a transnational nature (criminal as well as commercial), while human rights, based on the 1948 Declaration, put forward the existence of universal values.

However, the symmetry between the market and human rights is only illusory, as economic globalisation is much quicker and effective than the rapprochement of national rights under the influence of human rights. The relationship is one of conflict between sharing, which is inherent in the idea of universalism, and competition, which regulates the market society. This conflict is already evident in increased social inequality.

The hypothesis I would like to explore here is that criminal law, unlike business law, includes an ethical dimension which might contribute to re-establishing a balance between market and non-market values, to resolving the contradiction between economic globalisation and the universalism of human rights, and more generally to redistributing power between political, economic and legal actors and institutions.

Such a hypothesis may appear paradoxical, as it puts criminal law in the first wave of globalisation, while the right to punish, conceived since the modern age as the emblem of State sovereignty, is essentially limited by the principle of territoriality. Globalisation, which respects neither sovereignty nor territoriality, is perceived by many as the mark of a 'post-modern' law which constructs itself either in opposition to ('anti-modern') or in extension of ('hyper-modern'), Enlightenment philosophy and so-called 'modern' law.[1]

But terminology does not matter. The fact is that States still exist today, linking law to the State and the State to symbols such as territoriality and sovereignty. The legal landscape has changed, however. We know since 11 September 2001 that even in the most powerful State in the world, territory is no longer a sanctuary, and we are discovering at present that sovereignty ought to be shared. During the last G8 meeting in May 2003, President Lula suggested that the rich countries create a world fund against hunger.[2] The road from proposal to achievement promises to be long, but at least it is open. Criminal law might help point us in the right direction, if it becomes more tolerant of the poor and more demanding of the powerful.

Criminal norms are indeed acquiring international recognition, as is shown by the successful experiments that are the *ad hoc* International Criminal Tribunals (ICTs) and now the International Criminal Court (ICC), which is the first truly global permanent tribunal. Optimists would say that global criminal law expresses today, worldwide, what it expressed nationally yesterday, namely the emergence of a community of values. Sceptics would instead see here a trick designed to impose a (western-dominated) hegemonic conception of the world order.

My position is more inquisitive. I shall commence by two critiques, because this global criminal law in gestation expresses an ambiguous ethic (2) of variable implementation (3). I shall then try to identify the path towards an ethic of globalisation yet to be constructed.

2. Ambiguous Ethic of Globalisation

The ambiguity lies in a criminal discourse which is humanist, but which also strongly focuses on security matters. It mixes up the instrumental function of criminal law, namely pointing at the weaknesses of international co-operation in dealing with *trans*national criminality, with its symbolic function, namely asserting and protecting common values of humanity, the victim of *supra*national criminality.

In terms of criminal justice policy, ambiguity becomes contradiction. On the one hand, utilitarianism encourages favouring an authoritarian model, which can go so far as to justify a war without mercy against crime (totalitarian model). On the other, idealism favours a liberal-type model, taking into consideration international instruments for the protection of human rights.[3] International conventions on transnational crimes belong to the former model (money laundering, international terrorism, corruption in international trade, and more generally organised crime), whereas supranational crimes judged by the international criminal tribunals and the ICC fit into the latter model.

I shall illustrate my remarks with a few examples taken from both areas.

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1 Cartuyvels, Y., "Le droit pénal: des frontières 'naturelles' en question", in Henzelin M. & Roth R. (ed.), *Le Droit pénal à l'épreuve de l'internationalisation*, LGDJ, Bruylant, Bruxelles, 2003, p. 3 ff.

2 Sévilla, J.-J., "Le président Lula propose au G8 un Fonds mondial contre la faim", *Le Monde*, 29 May 2003, p. 2. See also Delmas-Marty, M., *Trois défis pour un droit mondial*, Seuil, Paris, 1998; in English, translation by Norberg, N., *Global Law: a triple challenge*, Transnational Publishers, New York, 2003.

3 Delmas-Marty, M., *Modèles et mouvements de politique criminelle*, Economica, Paris, 1983.

2.1. Transnational Crime

Whatever its specific form – money laundering, terrorism, corruption, organised crime – transnational crime shows an evolution from territories (geographical extension and topography) to networks (global organisation and topology)[4] and from amateur criminals to '*entrepreneurs* of crime'[5] (term including white collar and organised criminals). While domestic criminal law remains mostly attached to territory and adapted to isolated individuals, transnational crime, going hand in hand with organisation in transborder networks, calls for the reinforcement of international co-operation *stricto sensu* and for the adoption of common norms which, while not completely unified, are at least compatible with each other.

Numerous conventions illustrate this evolution. Imposed upon States in the name of the fight against criminal organisations, harmonisation – or as the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery puts it, functional equivalence – encourages criminalisation. There is thus a risk of "criminal over-investment,"[6] sometimes encouraged by judges themselves.[7]

There are two ways to respond. First, by reasserting, worldwide, the necessary plurality of a criminal justice policy which should avoid solely criminal penalties and combine recommendations and sanctions, spontaneous orders and imposed orders, and criminal, civilian and administrative sanctions. Second, by imposing a strict definition of concepts such as terrorism or money laundering, which are too often criminalised for purely political reasons.

Nuanced thusly, utilitarianism does not preclude an ethical basis. The opening up of markets, combined with scientific and technical progress, creates a globalisation which favours commercial values. The market not only "multiplies the unregulated spaces slipping out of State control", but also "invades the structures of the State itself, which is undermined from within by a law not its own which slowly erodes it."[8] Neither the *lex mercatoria* nor the regulations of the World Trade Organisation (WTO) allow the reintroduction of non-commercial values in the face of the market's absolutism.[9] Going from *free trade* to *fair trade*, then to *safe trade* and *moral trade*,[10] requires a global criminal law enforceable against everyone, including the most powerful economical or political actors. In this sense the ethical basis leads to a *supra*national conception which aims to protect all of humanity.

2.2. Supranational Crime

Unlike 'ordinary' crimes, such as murder or theft, which are defined nationally and may therefore have definitions that differ from one legal system to another, crimes 'against humanity' are committed on a global level. Unlike war crimes, which protect combatants on behalf of *inter*national law, crimes against humanity are straightaway situated on a *supra*national level, thereby indicating the desire to protect 'humanity', a universal notion by nature, even if undefined.

The Rome Statute (1998) completely separates crimes against humanity from war crimes. On the other hand, the notion of humanity is still not defined, other than by an ever-restated enumeration in which one can read a kind of list of current fears relating to "atrocities that deeply shock the conscience of humanity", to quote the Preamble.

The specificity which would enable a distinction between crimes against humanity and ordinary crimes implicitly conditions the whole system, but it is never spelled out. Even when the International Criminal Tribunal for the former Yugoslavia (ICTY) points to humanity as a victim – "As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole" (*Erdemovic* case, 1996) – it is careful not to define it.

The common denominator of the several prohibitions enumerated as crimes against humanity is, without doubt, their collective dimension. Indeed, the Nuremberg statute deals with crimes committed "against all civilian populations" and the expression is then found, with weaker variations, from one text to another. More explicitly, the Federal High Court of Germany expounds its concept of genocide: "It is not therefore the individual legal assets of the individual persons affected by the material acts that are the protective asset of the crime of genocide, but the existence of the group as such, in which the inhuman, the particular characteristic of injustice as compared to the crime of murder, is that the perpetrators no longer see the human being in the victim but only the member of the persecuted group."[11]

In the end, what the charge of crimes against humanity, including genocide, means is that the human being, even deeply rooted in a group, should never lose its individuality and be reduced to merely an interchangeable element of this group and be rejected as such. While human beings feel a need to belong to a particular group, they cannot be chained to their group without losing their status within humanity. This de-

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[4] See the word *'espace monde'* in the alphabet primer of Beaud, M., Dollfus, O., Grataloup, C., Hugon, Ph., Kébadjian, G. & Lévy, J. (ed.), *Mondialisation, Les mots et les choses*, GEMEDEV, Éditions Karthala, Paris, 1999, p. 299.

[5] Pieth, M., "The harmonisation of law against economic crime", (1998/99) 1 European Journal of Law Reform 543; see also Pieth, M. (ed.), *Financing Terrorism*, Kluwer, The Hague, 2002.

[6] Cartuyvels, Y., *supra* note 1, p. 24.

[7] de Maillard, J., *Un monde sans loi, La criminalité financière en images*, Stock, Paris, 1998.

[8] Mazères, J.A., *L'un et le multiple dans la dialectique marché-nation*, in Stern, B. & Destanne de Bernis, G. (eds.), *Marché et nation, regards croisés: internationalisation de l'économie ou retour des nations?*, Montchrestien, Paris, 1995, p. 123.

[9] Kahn, Ph. & Kessedjian, C. (eds.), *L'illicite dans le commerce international*, Litec, Paris, 1996; Fouchard, Ph., *Droit et morale dans les relations économiques internationales*, (1997) 3 Revue des Sciences Morales et Politiques 3; Racine, J.B., *L'arbitrage commercial international et l'ordre public*, LGDJ, Paris, 1999.

[10] In English in the original text.

[11] *Jorgic* case, BGH 30.4.1999, No.6.3.1; Lelieur, J., "Le crime de génocide en Allemagne", in Delmas-Marty, M. (ed.), *Les processus d'internationalisation du droit pénal* (Vol.7), Collection *Vers des principes directeurs internationaux de droit pénal*, Éditions de la Maison des Sciences de l'Homme, Paris, 2001, at 227 ff.

personalisation of the victim calls into question alterity, *i.e.*, the singularity of each person as a unique being and equal member of the human community.[12]

Admittedly, the weaknesses of international criminal law are well known. It is imprecise in its definitions, so much so that it targets all 'other inhuman acts' by analogy, and it is incoherent in its relation to domestic law, as there is a discontinuity in the hierarchy of sentences (whether the issue is the death penalty or length of imprisonment) created by international criminal law, which is less severe than many national laws.[13] It seems, however, that the emergence of *supra*-national crimes might express, without calling on a transcendental source, a sort of common symbolism, which would unite us. The philosopher Anne Fagot-Largeault, when invited to think about global criminal justice, warned about moral syncretism, a "mix of water and fire". Yet she recognises that it is undoubtedly in criminal law that we can attempt it "because one identifies more clearly, more consensually, what shocks moral conscience than what pleases it."[14]

For a global criminal norm to one day express this shared conscience, it should be effectively implemented.

3. An Ethic of Variable Implementation

The process has barely been outlined, but critiques of the imperfections of global criminal justice are already numerous. For some, its ambition "to be for right against might" would be implemented unevenly: when the mighty are "not too mighty".[15] Others fear that "the utopia of universal justice" may result in "relieving the political power of responsibility, as we have seen in Bosnia where we have created an international tribunal in order not to intervene militarily", and conclude that "justice cannot reach anything without the use of force, which is the only means to stop crime."[16]

But the debate over the force of the law splits into two since, besides global criminal justice, one must also take into account the opposite process. The landmark decision of the House of Lords in the *Pinochet* case evidences the growing globalisation of national criminal judges.

3.1. Global Criminal Justice

At a global level, the only true tribunals whose jurisdiction is imposed rather than consented to are of criminal a nature. But the problems involved in their creation, delayed for more than a century (the idea appeared in the Treaty of Versailles in 1919), bear witness to the narrow alternative in which international law is caught, between an ineffective universalism, which depends on the will of all States, and an imperialist effectiveness, imposed by the will of a few superpowers.[17] Reality illustrates both alternatives. Indeed the ICTs were imposed by a resolution of the United Nations (UN) Security Council, which is compulsory. But they were given *ad hoc* jurisdiction, limited both territorially (former Yugoslavia and Rwanda) and temporally (the conflict referred to in each resolution). On the other hand, the ICC has potentially permanent and universal jurisdiction, but this competence is, in fact, compulsory only for the countries having ratified the Rome Statute. It extends to the nationals of third countries only under certain conditions, restrictively spelled out in articles 12 and 13. This has lead some non governmental organisations (NGOs), citing the example of the crimes committed in Chechnya and Tibet, to declare that the system consists in winning the agreement of the executioner before being able to judge him.[18]

In spite of these precautions, the United States, which fought the text and has withdrawn its signature, managed to obtain on 12 July 2002 the adoption of a resolution (1422) precluding prosecution of personnel involved in UN peacekeeping operations who are nationals of countries which are not party to the Statute, for a one-year renewable period of time (which was renewed on 12 June 2003). It has also concluded, with about forty countries, non-extradition agreements (agreements not to transfer American citizens to the ICC), the validity of which seems questionable in view of the Statute.[19] To increase pressure, in particular on the Balkan countries, an American law adopted in August 2002 (*The American Service Members' Protection Act*) forbids any military aid to countries which refuse to sign the agreement. The result is sometimes surprising: Serbia was summoned by the United States, under threat of economic sanctions, to transfer to The Hague some of its nationals accused by the ICTY, and at the same time asked to agree, under threat of retaliation, to shield American nationals from the ICC's jurisdiction.

The harshness itself of the anti-ICC offensive is an indirect tribute, if not to the legitimacy, at least to the effectiveness, of the ICC. But by making the ICC fragile, it is also an appeal to the globalisation of national judges.

3.2. The Globalisation of National Judges

As international norms are little by little incorporated into domestic law, national judges become the guardians of international law (regional or global) under conditions which vary depending on whether or not their legal system accepts direct implementation of international norms. But the 'globalisation

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[12] See Delmas-Marty, M., "Le crime contre l'humanité, les droits de l'homme et l'irreductible humain", (1994) 3 Revue de Science Criminelle et de Droit Pénal Comparé 477; also Delmas-Marty, M., "L'humanité saisie par le droit", in Abel, O., Brauman, R. & Delmas-Marty, M. (eds.), *Humanité, humanitaire*, Publications des Facultés Universitaires de Saint-Louis, Vol. 77, Bruxelles, 1988, p. 27 ff.

[13] See Chapter IV, "Punir les criminels internationaux", in Henzelin, M. & Roth, R. (eds), *supra* note 1, especially Poncela, P., "Mesure et motivation de la peine dans la jurisprudence du TPIY", at 305–336.

[14] Fagot-Largeault, A., "Sur quoi fonder philosophiquement un universalisme juridique?", Cassese, A. & Delmas-Marty, M. (eds.), *Crimes internationaux et juridictions internationales*, PUF, Paris, 2002, at 91.

[15] Todorov, T., *Mémoires du mal, tentation du bien, Enquête sur le siècle*, Robert Laffont, Paris, 2000, p. 298.

[16] Garapon, A., *Des crimes qu'on ne peut ni punir, ni pardonner, Pour une justice internationale*, Éditions Odile Jacob, Paris, 2002, p. 64, 47 and 68.

[17] Chemillier-Gendreau, "Le droit international entre volontarisme et contrainte", *Mélanges offerts à Hubert Thierry*, Pedone, Paris, 1998, p. 93 ff.

[18] Bourdon, W., *La Cour pénale internationale, le statut de Rome*, Seuil, Paris, 2000, p. 80; see also Cassese, A. (ed.), *The ICC Statute*, Oxford University Press, Oxford, 2002.

[19] Zappalà, S., "The reaction of the US to the entry into force of the ICC statute", (2003) 1 Journal of International Criminal Justice 114.

of judges' leads to an extension of their competence to facts having no link with the State (acts committed abroad, by foreigners, on foreign victims).

The so-called principle of 'universal jurisdiction' should, in theory, apply each time the protection of universal values is at stake. In fact, it is applied only in exceptional circumstances, and it took the creation of the ICTs to "awaken"[20] the judges before they started to apply texts which they had neglected until then. Once awakened, they became enterprising, and there is a risk of them turning into the "knights errant of human nature" of Beccaria's troubling image.[21]

We are now learning that universal jurisdiction requires not only that we improve international law, but also that we harmonise national laws – a still largely idealistic goal at the global level, as the current debates over harmonisation among the fifteen member States of the European Union attest.[22]

Hence the interest in alternative or complementary formulae, such as 'Truth and Reconciliation'[23] commissions, or mixed tribunals. The latter might contribute to harmonisation, as they are composed in part by national judges and in part by so-called international judges, who come from foreign countries but represent the international community, not their country of origin. Indirectly, their creation may also favour the emergence of a shared legal culture: a community of jurists waiting for a community of values.

Many experiments are under way (Kosovo, Sierra Leone, East Timor) and an agreement between the United Nations and Cambodia was signed on 6 June 2003 to judge the main persons responsible for crimes committed between April 1975 and January 1979. It has even been suggested,[24] that since there will be no *ad hoc* tribunal to try the perpetrators of the terrorist attacks of 11 September 2001, the formula of mixed tribunals would facilitate the search for evidence spread over several continents and would improve the respect of the rights of the accused, compared to the exceptional procedure put in place by the Bush order of 13 November 2001.[25]

Whether they are international judges, 'globalised' national judges or judges of mixed tribunals, the rise in power of criminal judges revives the eternal question of checks and balances between powers, but under circumstances that Montesquieu would not have been able to imagine. Indeed, the absence of any global legislative or executive power deals a different hand: under the arbitration of the media and of a more and more engaged civil society, a new triangle is being drawn between law, politics and economics. Weakened and strengthened at the same time by the absence of any executive and legislative power, the judiciary stands almost alone to face the political and economical powers.

4. An Ethic of Globalisation To Be Constructed

As judges grow bolder and prosecute the most powerful political and economical actors, thus establishing a new balance between powers, the principle of universal jurisdiction becomes the emblem of an ethic to be built.

Yet this principle is very old. Applied in numerous European towns and principalities from the Renaissance to the Classical Age,[26] it was defended with fervour by Grotius, on behalf of the law of nature, or of people. "Kings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other States and subjects".[27] Grotius adds that this in fact means, "to provide, by punishment, for the interests of human society." Yet he was criticised by Voltaire as being confused, and even wrong, as he seemed to ignore that "each country has its legal impertinences and its crimes of time and place."[28]

Hence the predominance of the principle of territoriality, defended by the philosophers of the Enlightenment, and also by Beccaria. "There are also those who think that an act of cruelty committed, for example, at Constantinople may be punished at Paris, for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration; as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between them."[29]

Ironically, it was in a conflict between Turkey and France – the famous *Lotus* case – that the International Court of Justice (ICJ) set out the principle authorising States to extend their jurisdiction beyond their national territory.[30] Thus Turkey, invoking the principle of passive nationality (law of the state of the victim) against the law of the ship's nationality (by extension of the principle of territoriality invoked by France), was authorised to try, for reckless homicide, the French captain of a steamship which had collided on the high seas with a Turkish coal ship and drowned members of the crew.

Universal jurisdiction relating to piracy matters had been recognised since the end of the 17th century, but the ICJ added

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[20] Cassese, A., "L'incidence du droit international sur le droit interne", in Cassese, A. & Delmas-Marty, M. (eds.), *supra* note 13, p. 259.

[21] Cassese, A., "Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?" in Cassese, A. & Delmas-Marty, M. (eds.) *supra* note 13, p. 21.

[22] See for example, Delmas-Marty, M., Giudicelli-Delage, G., & Lambert-Abdelgawad, E., *L'harmonisation des sanctions pénales en Europe*, Société de Législation Comparée, Paris, 2003.

[23] Lollini, A., "Le processus de judiciarisation de la résolution des conflits: les alternatives", in Fronza, E., & Manacorda, S., *La justice pénale internationale dans les décisions des tribunaux ad hoc, Étude de cas des Law Clinics, en droit pénal international*, Giuffré, Milan, 2003; Roth, R. (ed.), Christie, R.N., *La mondialisation du monde, Le droit pénal à l'épreuve de l'internationalisation*, Bruylant, Bruxelles, 2002, p. 337.

[24] Cassese, A., *International Criminal Law*, Oxford University Press, Oxford, 2003, p. 456.

[25] Amann, D., "Le dispositif américain de lutte contre le terrorisme", (2002) 4 Revue de Science Criminelle et de Droit Pénal Comparé 774.

[26] Guillaume, G., "La compétence universelle, formes anciennes et nouvelles", *Mélanges Levasseur*, Litec, Paris, 1992, p. 23 ff.

[27] Grotius, H., *Le droit de la guerre et de la paix* (De jure belli ac pacis, 1625), L.II, Ch.XX, XL, PUF, Paris, 1999. See also Onuma, Y., *A normative approach to War and Peace, War and Justice in Hugo Grotius*, Clarendon University Press Oxford, 1993.

[28] Voltaire, "Des crimes de temps et de lieu", *Question sur l'Encyclopédie*, 1771.

[29] Beccaria, C., *Traité des délits et des peines*, para XXI (1764), translation Morellet, Franco Sciardelli, Milan, 1987, p. 95.

[30] *Lotus* case, International Court of Justice, 7 September 1927, series A, No. 10.

a broader principle of States' freedom to choose rules of jurisdiction. It is noteworthy that the issue was not the protection of universal values, but the States' ability to take control of their common interests.

It has only been since the end of the 20th century, as an extension of the current globalisation, that judges have become, if not the avengers, at least the guardians of universal values. In civil matters, this function is sometimes exercised spontaneously, and unilaterally. Over twenty years ago, American judges rediscovered a very old law (the *Alien Tort Claims Act* of 1789) which authorizes them to hear cases involving grave violations of "universal, definable and obligatory" human rights norms[31] and to order the defendant to pay compensation. They have thus heard cases of torture committed in several countries of Latin America and of other exactions committed in the Philippines, East Timor, Ethiopia and Bosnia, and they now seem to be willing to apply this law to multinational companies in cases of violations of human rights.[32]

In a more multilateral perspective, the Secretary General of the United Nations launched in Davos, in January 1999, the idea of a *Global Compact* with multinational companies,[33] and the Sub-Commission for human rights (working group on transnational corporations) has just adopted "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises."[34] Besides evaluations done by corporations themselves, the norms provide for periodical controls by national and international mechanisms and "prompt, effective and adequate [reparation] of those persons, entities, and communities, that have been adversely affected." It is specified that "these norms shall be enforced by national courts"; national judges (civil or criminal) are thereby encouraged to act.

In criminal matters, universal jurisdiction is more directly authorised (and sometimes imposed) by international conventions, but only on a case-by-case basis and according to methods which vary from one convention to the other. Some favour 'absolute' universal jurisdiction, which empowers national tribunals to try any person accused of egregious international crimes committed abroad by foreigners on foreign victims. There are no other requirements, not even the presence of the suspect in the national territory. Others favour 'conditional' universal jurisdiction: jurisdiction conditioned upon the presence of the suspect or another legal or procedural requirement. States thereby keep a significant margin of appreciation and it is not surprising to observe extreme diversity of national practices, which the silence of the Rome Statute has not reduced.

Thus, although France has not criminalised violations of the Geneva Conventions,[35] it has introduced universal jurisdiction for torture (art. 689-2, CPP), on the condition that the suspect is within French territory (art.689-1, CCP). Even more minimalist are Russia and most of the Islamic countries, none of which have introduced universal jurisdiction for torture. The same is true for Senegal, where this gap prevented the complaint lodged against the former President of Chad, Hissène Habré, from leading to a judgment.[36]

Conversely, one can consider as maximalist those countries which have instituted a broader form of universal jurisdiction than that provided by international law. This was the case of Belgium, which, in 1999, broadened the scope of the 1993 law on repression of grave violations of humanitarian law. But a law of 23 April 2003 softened the 1993 text, which was then abrogated on 1 August 2003 following the insistent request of the US. Spain also seems to be willing to soften the principle which was applied, in accordance with the law of 1 July 1985 (art. 23-4) on judicial powers, to an entire set of offences, including genocide and terrorism.[37] Germany, on the other hand, has just adopted a code of international criminal law (entered into force 30 June 2002), establishing unconditional universal jurisdiction. The only flexibility results from prosecutorial discretion, an exception to the German rule of legality, to consider possible diplomatic or practical problems. This German code was designed to serve as a model for the adaptation process under way in other countries.[38]

Finally it has to be noted that by treating international crimes as grave violations of human rights, the inter-American Commission (regarding the law of self-amnesty in Chile)[39] and the Court (regarding Honduras, Colombia, Venezuela and Peru)[40] considered direct and indirect forms of self-amnesty incompatible with the American Convention on Human Rights (ACHR). Enforcing this jurisprudence, an Argentinian federal judge deemed contrary to the ACHR the laws on the duty of obedience that the new president had moreover promised to abrogate.[41]

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[31] *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

[32] Markels, A., "Multinationals pressured by Myanmar Human rights case", *The New York Times*, 22–23 June 2003. Trial in San Francisco against the giant-sized company *Unocal* for violences committed on the occasion of the construction of a pipeline of natural gas.

[33] Decaux, E., *Droit international public*, Third edition, Dalloz, Paris, 2002, p. 297 ff. See also United Nations High Commissioner for Human Rights, *Draft Guidelines: Human Rights Approach to Poverty Reduction Strategies*, 10 September 2002.

[34] E/CN.4/Sub.2/2003/38/Rev.1.

[35] Except concerning crimes in former Yugoslavia and in Rwanda (Laws 32 January 1995 and 22 May 1996); on the necessity of a national text of implementation, see Benillouche, M., "Droit français" in Cassese, A. & Delmas-Marty, M. (eds.), *supra* note 13, at 171 ff.

[36] Cour de cassation du Sénégal, 20 March 2001, *Affaire Hissène Habré*, Cissé, A., "Le Droit Sénégalais" in Cassese, A. & Delmas-Marty, M. (eds.), *supra* note 13, at 437; Gaeta, P., "The Hissène Habré case", (2003) 1 Journal of International Criminal Justice 186.

[37] For the first case of extradition based on universal jurisdiction, see the Supreme Court of Mexico, 10 June 2003, extradition to Spain of the Argentinian military Cavallo charged with genocide and terrorism.

[38] Werle, G. & Manacorda, S., "L'adaptation des systèmes pénaux nationaux au statut de Rome: le paradigme du 'Völkerstrafgesetzbuch' allemand", (2003) 3 Revue de Science Criminelle et de Droit Pénal Comparé, to be published. For genocide, see Delmas-Marty, M. (ed.), *Les processus d'internationalisation du droit*, Éditions de la Maison des Sciences de l'Homme, Paris, 2001, see in particular Fronza, E., "Introduction", at 173, and Guillou, N., "Modélisation des Processus de Réception de l'Incrimination de Génocide en Droit Interne" at 213.

[39] Inter-American Commission of Human Rights, Report 133/199, paras 79 to 82, cited in Alvarez, A., "Droit argentin" in Cassese, A. & Delmas-Marty, M. (eds.), *supra* note 13, at 317.

[40] Cases cited in Cassese. A & Delmas-Marty, M. (eds.), *supra* note 13, p. 633.

[41] Decision of 6 March 2001, Cassese. A & Delmas-Marty, M. (eds.), *supra* note 13, p. 322 ; See also "La justice argentine décide d'arrêter les militaires dont l'extradition est demandée par l'Espagne", *Le Monde*, 28 July 2003.

Less daring, the International Court of Justice took refuge behind the immunities of the then rulers to avoid dealing with the principle of universal jurisdiction in the case *Congo (Democratic Republic of Congo - Kinshasa) v. Belgium*.[42] Reading the separate opinions of the judges, it is true that the Court seemed to be divided. It is not certain they would have succeeded in reaching agreement, even by admitting the distinction between absolute and conditional jurisdiction, as the list of conditions seem to vary from one judge to another. They will have a new opportunity, with another appeal of the Republic of the Congo - Brazzaville, which questions the investigation by a French judge of a high Congolese dignitary for the crime of torture.[43]

Caught between minimalism and maximalism, and spread over internal, regional and global legal sources, current criminal practices are revealing the disorder of the world. It is urgent to clarify international law and to harmonise domestic law. Indeed, as is shown by a recent study combining comparative criminal law and international criminal law, "the erosion of immunities and privileges is a fundamental part of reversing the perspective from the sovereign to the subject, from the criminality of the subject to that of the sovereign."[44] The whole balance of powers is thus at stake, especially since the absence of any hierarchy between the different criteria relevant for the exercise of jurisdiction may increase the number of prosecutions, favour '*forum shopping*'[45] and lead to inevitable conflicts of jurisdictions. Only the Convention of 1999 for the Suppression of the Financing of Terrorism provides that States must not only recognise the primacy of the principle of territoriality, but also must attempt to co-ordinate their actions.

5. Conclusion

To conclude, I shall make two remarks, one conditional on the other.

On the one hand, one cannot become a global judge without preparation. The distribution of jurisdiction between national tribunals and the ICC calls for guiding principles of harmonisation allowing, in the end, the recognition of foreign criminal judgements and an appeal on the law (before the ICC or before the International Court of Justice).[46] These guiding principles were evoked at Porto Alegre in January 2003 during the 2nd World Forum of Judges, but they still need to be defined. To avoid having judges subservient to economic or political power (even to media power), their independence and impartiality must be guaranteed; but to avoid a government of judges, one must also improve the definitions of crimes, liabilities and punishments, because the imprecision of written law and, even more so, of international custom, can lead to judicial invention, which is an encroachment upon the other powers.

On the other hand, faced with a globalisation in which the economic dimension (WTO) is overtaking the universal principles of human rights (UN), criminal law opens the way towards a shared ethic. Between the risk of instituting an all-secure over-criminalisation and that of allowing the law to become merely an instrument at the hands of the most powerful actors, the path is, however, very narrow. But it is without doubt necessary to avoid regression, on the pretext of the clash of civilisations, towards the even more violent clash of superstitions, which would take us back to the Age of the Crusades and lead straight to a global war. ■

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[42] Cassese, A., "Peut-on poursuivre de hauts dirigeants des Etats pour des crimes internationaux ? À propos de l'affaire *Congo c/ Belgique*", (2002) Revue de Science Criminelle et de Droit Pénal Comparé 479.

[43] *Congo v. France* case, International Court of Justice, Order 17 June 2003 rejecting the demand for provisional measures.

[44] Giudicelli-Delage, G., "Justice pénale et décisions politiques", (2003) 2 Revue de Science Criminelle et de Droit Pénal Comparé 247.

[45] In English in the original text.

[46] Delmas-Marty, M., "La CPI et les interactions entre droit interne et droit international", (2003) 1 Revue de Science Criminelle et de Droit Pénal Comparé 1.