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FOR UNIVERSAL JURISDICTION: AGAINST FLETCHER'S ANTAGONISM

Albin Eser*

Of course, it appears unfriendly to make a contribution “against” the person who is to be honored. But when George P. Fletcher wrote his editorial comment “Against Universal Jurisdiction,”¹ he expressed the hope that someone would carry forth the dialogue by responding. Here is a response in terms of a plea “for universal jurisdiction” to show that most of his antagonism is to be rejected. My criticism of his anti-universality position will not be completely new to him, however, since we already had some discussion on our contrary views when jointly giving a course on international criminal law at Columbia Law School in 2003. Therefore, I am confident that our mutual respect and long-lasting friendship will be strengthened rather than weakened by this controversy.

I. SETTING THE TUNE

If one is a sensitive person, one may already feel affected by Fletcher’s opening characterization of those who “favour universal jurisdiction for serious crimes of cruelty and violence”² as “compassionate ‘right-thinking’ lawyers of the world”³—as if these people are led more by sentiment than by reason, as if in their self-righteous conviction of knowing what is good for mankind and the world, they seem to relate with outer space more than with earthly realities.

As a supporter of universal jurisdiction, I must confess not to feel amused by finding myself put in the corner of passionate but brainless “good people.” Nevertheless I could live with this prejudice if Fletcher recognized that universal jurisdiction—at least at its true core—is thought of as a way to secure the prosecution of crimes against universally recognized values even in cases in which states with primary jurisdictions (such as the state of the territory where the crime was committed or the state the accused is a national of) do not function properly.⁴

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1. George P. Fletcher, *Against Universal Jurisdiction*, 1 J. Intl. Crim. Just. 580, 580 (2003).

2. *Id.*

3. *Id.*

4. There are, of course, more facets of “universal jurisdiction” than can be briefly described in this analysis. For the variety of approaches, see A. Hays Butler, *The Doctrine of Universal Jurisdiction: A*

Calling supporters of this proposition “compassionate ‘right-thinking’ lawyers” would come close to an insult, however, if it were to imply that a person committed to universal jurisdiction would readily disregard sacred principles and standards of ordinary criminal justice. Now, whatever Fletcher wanted to hint at with his dubious comment, he leaves no doubt that in his eyes “universal jurisdiction is both unwise and unjust.”⁵

When turning to the reasons he propounds for his position, it might appear proper to follow his line of arguments. Although this will be done to a certain extent, some variations seem appropriate, partly because Fletcher himself takes up similar arguments at different stages (as he does, for instance, with questions of double jeopardy), arguments will here rather be addressed at one place, and partly because he evaluates the interests of the defendant and the victim (as well as other parties involved in the criminal justice system) from a perspective different from that preferred here. Another difficulty of following his reasoning lies in the fact that it is not always clear whether he speaks of universal jurisdiction in terms of a general principle (with possible variations in one way or another) or of universal jurisdiction as it is regulated on the national level (in domestic penal codes) and/or on a supranational level (as, in particular, by the Rome Statute for the International Criminal Court⁶). Nevertheless, I shall try my best to do justice to his propositions, be it in this or in that context.

II. AMBIVALENT CONCEPTIONS OF UNIVERSAL JURISDICTION

No doubt, the opening of Fletcher’s plea against universal jurisdiction may impress some by recalling that “many are outraged by Belgian, Canadian, German and other claims to have the right to judge crimes no matter where they are committed”⁷ and by reminding us of “some unseemly threats of retaliation”⁸ by officials in the Bush administration “if Belgium refuses to draw in its net of asserted jurisdiction.”⁹ Before coming to the propositions and implications of this statement, I must first express astonishment about the timing of such excitement. Universal jurisdiction has been recognized, if not as an international mandate, then at least in terms of being empowered to proscribe, for many decades, as

Review of the Literature, 11 Crim. L. Forum 353 (2000). As to my own view on universal jurisdiction so far, see Albin Eser, *Harmonisierte Universalität nationaler Strafgewalt: ein Desiderat internationaler Komplementarität bei Verfolgung von Völkerrechtsverbrechen*, in *Strafrecht, Strafprozessrecht und Menschenrechte: Festschrift für Stefan Trechsel zum 65. Geburtstag* 219 (Andreas Donatsch, Marc Forster & Christian Schwarzenegger eds., Schulthess 2002) [hereinafter Eser, *Harmonisierte Universalität*]; Albin Eser, *National Jurisdiction over Extraterritorial Crimes within the Framework of International Complementarity: A Comparative Survey on Transnational Prosecution of Genocide According to the Principle of Universality*, in *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* 279 (Lal Chand Vohrah et al. eds., Kluwer L. Intl. 2003) [hereinafter Eser, *National Jurisdiction*].

5. Fletcher, *supra* n. 1, at 580.

6. Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF. 183/9 (July 17, 1998) [hereinafter Rome Statute].

7. Fletcher, *supra* n. 1, at 580.

8. *Id.*

9. *Id.*

evidenced by the famous *Lotus*¹⁰ case of 1927. Even more remarkably, many infamous criminals would not have been tried and convicted if not—at least in an auxiliary way—for the principle of universal jurisdiction. Consider two examples: the trial of German war criminals after World War II by the International Military Tribunal of Nuremberg⁸ and the trial of Adolf Eichmann by the Israeli Supreme Court.⁹ In both instances it is very doubtful that Germany, the jurisdiction where the relevant crimes had been committed, would have been willing to put the criminals on trial and to punish them in a way which would have been considered just worldwide. That means, without taking resort to the principle of universality these crimes might have remained unpunished.

This basic fact seems to be overlooked by Fletcher when, in connection with the Eichmann case, he argues against universal jurisdiction using the example of Argentina.¹¹ Even if he is right in assuming that Argentina (as the long term domicile of Eichmann) could have claimed universal jurisdiction and ended up with an acquittal, this is not an apt argument against universal jurisdiction as such; rather this only points to a general pitfall of international or transnational criminal law, that of concurrent (national and/or international) jurisdictions. When the state of the commission of the crime claims territorial jurisdiction and the state the defendant is a citizen of asserts jurisdiction based on the nationality principle, it can easily come to pass that one is driving at a conviction and the other at an acquittal. Although these are certainly serious inter-jurisdictional conflicts which deserve to be dealt with separately, and in particular with regard to “*ne bis in idem*,”¹² concurrencies of this sort are not peculiar to universal jurisdiction. Rather, they are common for all combinations of different principles for applying national criminal law to extraterritorial crimes.¹³ And this, by the way, would be true even if all jurisdictions of the world restricted themselves to the principle of territoriality; for even within such a seemingly clear-cut territorial demarcation it may happen that a criminal act was started in one country, continued in a second, and finally effected in a third, and that—on the basis of “ubiquity” (as this principle is called in European continental tradition),¹⁴ or the common law terms of “objective” and “subjective” territoriality, or the new American paradigm of “defensive territoriality”¹⁵—each state concerned claims jurisdiction, though perhaps for different ends.

10. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 20 (Judgment No. 9 of Sept. 7); see generally Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in *International Criminal Law* vol. 2, 33, 45-47 (M. Cherif Bassiouni ed., 2d ed., Transnatl. Publishers 1999).

11. Fletcher, *supra* n. 1, at 583.

12. See *infra* pts. V & VIII.

13. Eser, *National Jurisdiction*, *supra* n. 4, at 280-84. For a broad survey on concurrent jurisdictions that is both historical and comparative, see generally Christopher L. Blakesley & Otto Lagodny, *Competing National Laws: Network or Jungle?*, in *Principles and Procedures for a New Transnational Criminal Law* 47 (Albin Eser & Otto Lagodny eds., Eigenverlag Max-Planck-Institut 1992); Blakesley, *supra* n. 10, at 33-36.

14. Blakesley & Lagodny, *supra* n. 13, at 49.

15. Ellen S. Podgor, “Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 Ga. J. Intl. & Comp. L. 1 (2002).

Thus, Fletcher may rightly complain about the risks of concurrent jurisdictions; nevertheless, he should refrain from attributing them solely to universal jurisdiction. Even when national jurisdictions are concurring on the basis of classical links, such as territoriality or nationality of the offender or victim, this can result in international conflicts. In order to solve them, it would be hardly imaginable to abandon all classical principles for the application of national law to extraterritorial crimes altogether, rather than to resolve the concurrence problem by rules of conflict. In the same way, the principle of universality must not totally be abolished, but should rather be “tamed,” as will be shown later.¹⁶ For otherwise, crimes against universally recognized values (crimes like genocide, crimes against humanity, and war crimes)—particularly if committed or supported by a state’s agents against own co-citizens and therefore not prosecuted by the state concerned—would remain unpunished. This category would include the terrible crimes of Eichmann and the war criminals of Nuremberg—a result hardly reconcilable with true justice.

So why now the outcry against universal jurisdiction, as proclaimed by Fletcher? Two explanations seem at hand. A more pragmatic one could be found in states’ traditional loathness with regard to crimes they are not directly concerned by, and this even more so when the exercise of jurisdiction would create the risk of conflicting with another state’s sovereignty interests. So in order to avoid both investigatory efforts and international troubles, even countries whose laws already allowed them to exercise universal jurisdiction to prosecute crimes against universally recognized interests—such as Belgium, Germany, and Spain—refrained from exercising this power for a long time.¹⁷ Consequently, there was no reason for opponents of universal jurisdiction to get excited.

The level of acquiescence with the rather broad universal powers already in the books changed dramatically when various countries started to become more and more aware of the need to safeguard universal values and to not leave their criminal violation unpunished. And even if this may have been an unconscious process, as described by Cassese, universal jurisdiction was now no longer merely conceived of as a “joint concern of all [s]tates”¹⁸ in terms of protecting their own interests and at the same time those of other states. Rather, universal jurisdiction was now seen as authorization for states to act as “universal guardians” in that it allowed any state, without regard for its own concerns, “to substitute itself for the natural judicial forum, namely the territorial or national State, should neither of them bring proceedings against the alleged author of an international crime.”¹⁹ Thus, in fact, it was nothing else than taking this “supranational” responsibility seriously when Germany initiated the prosecution of a Serb who, except for having immigrated, had no other ties with the country, and who after his deferral to the International Criminal Tribunal for the Former Yugoslavia (ICTY)

16. *Infra* pt. VIII.

17. See Antonio Cassese, *International Criminal Law* 286-98 (Oxford U. Press 2003).

18. *Id.* at 284.

19. *Id.* at 284-85.

happened to become that court's first convict,²⁰ or when Spain requested that the United Kingdom extradite the former President of Chile. So when it became apparent that these jurisdictions were seriously determined to bring the universal powers in their penal codes to life, it was time for skeptics to wake up.

Yet, there could be a still more delicate explanation for the fact that universal jurisdiction in the aforementioned postwar cases was almost universally accepted, while the modern Belgian, Canadian, and German claims of universal jurisdiction have caused the outrage described by Fletcher. If universal jurisdiction was welcome in former times, why should it be rebutted from the very outset when politicians of our time and political sphere are charged with an international crime and effectively prosecuted by way of universal jurisdiction when the territorial or national state fails to do so? Only because one class of suspects appears closer to us and less abhorrent than the other? But would this be reconcilable with impartiality and the presumption of innocence, which is guaranteed to the ones no less than to the others?

III. *IMPUNIDAD*, FAIRNESS, AND "IMPERFECT JUSTICE"

Maybe Fletcher would counter my proposition to prosecute suspects of international crimes with unbiased determination and on equal terms by suggesting that justice should remain "imperfect" rather than being unfair.²¹ *D'accord* if he meant to say that there is no justice without fairness. I am not sure, however, whether this plain truism is really what he had in mind. My doubts arise from the observation that Fletcher is using the keywords of *impunidad*, justice, and fairness in an ambiguous way or from perspectives not at all common.

So just to give some examples, Fletcher, on the one hand, calls universal jurisdiction "unjust,"²² and on the other hand, purports that "justice is imperfect."²³ I guess that these contradictory pronouncements may be reconciled with each other by assuming that in these two sentences "justice" is not meant in the same sense. Whereas universal jurisdiction is denounced as "unjust" since performed at the cost of fair prosecution; "imperfect justice" is welcome for ensuring fair trials, even if deliberately letting some guilty offenders go free.²⁴ While in the context of universal jurisdiction "unjustness" is obviously meant in terms of lack of fair trial (thus equating justice and fairness), in the other context fairness of the trial appears opposed to justice in terms of punishment, thus confronting procedural fairness (toward the accused) with punishment (asked for by the victim and the people).

20. Prosecutor v. Dusko Tadic, 1997 ICTY IT-94-1. On the German decision to extradite Tadic, see generally Kai Ambos & Guido Rugeberg, *Internationale Rechtsprechung zum Straf- und Strafverfahrensrecht*, 3 NStZ – Rechtsprechungs-Report (NStZ-RR) 161, 168 (1998).

21. See Fletcher, *supra* n. 1, at 581.

22. *Id.* at 580.

23. *Id.* at 581.

24. *Id.*

This second understanding of justice—eventually even in terms of retribution—seems to be present when Fletcher speaks of victims “clamour[ing] not for fair trials for the accused but primarily for justice for themselves,”²⁵ or when he contends that “[a]nything short of perfect justice is called *impunidad*.”²⁶ Although it would be interesting to know who is making the last contention, Fletcher’s supposition is patent: in his eyes, the determination in the Preamble of the Rome Statute “to put an end to impunity” means that “*impunidad* has become one of the evils of our time: the failure to prosecute serious crimes is considered as bad if not worse than the crime itself.”²⁷ Although he does not tell who assumes such an extreme position, at any rate he thus equates justice with unconditional punishment. So in the end he seems to consider (the search for) justice as siding with the victim and (the ensuring of) fairness as siding with the accused.

This exposition provokes some questions with regard to universal jurisdiction:

- When justice is equated with the punishment of guilty offenders, how then can the aim of universal jurisdiction to prevent impunity of international crimes be “unjust”?
- Why are victims supposed to clamor not for fairness but merely for justice in terms of retribution or even revenge?
- Why shall fairness only be owed to the offender and not to victims as well?

As these and similar points will also be considered in other contexts, only a more basic issue may be addressed here: the repetitious invocation, if not praise, of “imperfect justice.” In addition to the instances already mentioned, Fletcher criticizes the Rome Statute for its aim of “ensuring prosecution to prevent gaps and *impunidad*”²⁸ and not of seeking the opposite result in terms of “imperfect justice” as created by the constitutional protection of the accused.²⁹ Yet, not only do I have sincere doubts whether the Rome Statute may fairly be interpreted as intentionally sacrificing the rights of the accused for preventing impunity at any cost,³⁰ I am even more irritated by Fletcher’s subliminal confusion of the “imperfectness” of justice as a deplorable fact and “imperfect justice” as a normative maxim, if not end. Of course, the administration of justice as a human enterprise can never be perfect, either in terms of substantive justice (by punishing all crimes equally), or in terms of procedural justice (by granting equal fairness to all parties concerned by a criminal proceeding, especially by treating the defendant in a fair and impartial manner). In this respect any balancing of contrary interests, as they are unavoidable in the administration of justice, will

25. *Id.*

26. Fletcher, *supra* n. 1, at 581.

27. *Id.* at 580.

28. *Id.* at 582.

29. *Id.*

30. *See infra* pt. IV, including accompanying text at note 38.

leave some injustice as an unwanted side effect. This must not mean, however, that justice may be “imperfect” by purpose: even if we will never reach “perfect justice,” at least the search for it remains part of justice.

IV. DUE PROCESS: PROCEDURAL GUARANTEES

Beyond the conceptual understanding and relation of justice and fairness, the question is whether universal jurisdiction is in fact as unjust or unfair as Fletcher suggests.

A general concern silently running through Fletcher’s entire comment is his assumption that basic guarantees of a fair trial could not be complied with if the prosecution and trial took place in a jurisdiction which has no connection whatsoever with the case, either by way of the territory where the crime is committed or of the nationality of the offender or victim.³¹ Fletcher obviously—though not explicitly—judges the Rome Statute against the background of the American Constitution and tradition, and finds the Rome Statute to fall short because neither its preamble “even mentions the duty to ensure a fair trial of the accused”³² nor does the Statute itself contain a “catalogue of procedural guarantees.”³³ Even worse, in universal jurisdiction Fletcher sees the rights of the accused being put behind those of the victims³⁴ who, as already mentioned, he considers as “clamour[ing] not for fair trials for the accused.”³⁵

We cannot ignore the fact that the standards of a fair trial differ among the numerous and varied jurisdictions of the world, some of which even lack any kind of procedural guarantees whatsoever. Again, however, the question is whether and to what degree such deficiencies may fairly be attributed to universal jurisdiction. Without wanting to take Fletcher’s concerns too lightly, some objections may be raised:

Should Fletcher’s concerns mandate distrust of all justice systems that do not live up to the fair trial standards of the United States (or comparable countries cherishing the rule of law), then all countries that do not meet these standards would have to be excluded from concurrent extraterritorial jurisdiction, regardless of whether it is founded on the principle of universality or on any other connection with the case (be it defensive territoriality or the nationality of the perpetrator or victim). This, however, would necessarily lead to discrimination between reliable and unreliable jurisdictions. If this were not restricted to individual abuse cases such as “sham trials,”³⁶ but performed by excluding certain countries from extraterritorial jurisdiction in general, that would be hardly be reconcilable with the principal equality of sovereign states, as long as they are members of the United Nations.

31. Fletcher, *supra* n. 1, at 582-83.

32. *Id.* at 582.

33. *Id.*

34. *Id.* at 583.

35. *Id.* at 581; *supra* text accompanying n. 25.

36. *Infra* pts. V.B. & V.C.

Even if this radical step could be avoided and the risk of presumably unfair trials could be minimized by restricting extraterritorial jurisdiction to the “classical” connections of territoriality and nationality of the offender or victim, it may be questioned whether this really hits the decisive point. For why should a court that bases its jurisdiction on one of these “classical” connections be more likely to abide by the rules of fair trial than a court that acts according to the principle of universality? Should the only explanation be that “‘disconnected’ jurisdiction[s],” as Fletcher likes to describe (or rather, to devalue?) jurisdictions basing their judicial power on the universality principle,³⁷ could, in absence of any local or national interest in the case, be motivated only by political bias or wild-running victims? Although admittedly, such abuse can never completely be excluded, prosecutions based on the principles of territoriality or nationality are no less safe from political bias. This is even more true in jurisdictions that—instead of being governed by the principle of mandatory prosecution—even in cases with sufficient evidence leave the prosecution under the discretion of the state attorney who is under supervision all the way up to the attorney general who, in turn, is a member of the government and, thus, a political figure. If we further keep in mind that international crimes—the main instances of universal jurisdiction—are classic examples of so-called “state supported crimes,” isn’t then the chance of political bias in refraining from prosecution particularly great with regard to jurisdiction based on territoriality and/or nationality?

Could not therefore the potential lack of prosecutorial interest of countries connected to the case be exactly the reason why we need impartial and neutral jurisdiction by countries that are not directly involved, namely those that step in for no other reason than to protect universal values? And if a jurisdiction is taking this burden, why should it not be prepared to perform a fair trial? If one wants examples of non-partisan universal jurisdiction and fair treatment of the accused, Germany could provide them: one in the *Tadic* case, where the prosecution was guided by no other motive than the prosecution of an international crime,³⁸ and another in the *Mounir El Motassadeq* and *Abdelghani Mzoudi* cases, in which the German courts, by discharging the defendants when U.S. authorities withheld evidence for reasons of “national security,” adhered even more closely to the requirements of fair trial than was desired by the United States.³⁹ Is there any reason to believe that in such cases the treatment of the accused would have been different if instead of the territoriality principle the prosecution had proceeded via universal jurisdiction?

Last but not least, as to the due process concerns voiced by Fletcher with regard to the Rome Statute,⁴⁰ he may be right in missing a “catalogued” list of

37. Fletcher, *supra* n. 1, at 582-83.

38. *Supra* n. 20 and accompanying text.

39. BGH decision of 4 March 2004, Case No. 3 StR 218/2003, reprinted in: *Neue Juristische Wochenschrift (NJW)* 2004, 1259; Roger Boyes, *US Clash Looms as Germany Quashes 9/11 Conviction*, *Times (London)* 22 (Mar. 5, 2004).

40. Fletcher, *supra* n. 1, at 582-83; *supra* text accompanying note 31.

procedural guarantees (although I am not sure whether the guarantees in American law may indeed be called a “catalogue”). But be it as it is, the absence of a catalogue does not mean the absence of procedural guarantees, including fairness of the trial. For what else than “procedural guarantees” could one call the various rights of persons during an investigation and the duties of the prosecutor and the court, which are found in Articles 53 to 76 of the Rome Statute? Taken together, these provisions amount to a list many national criminal procedure codes could be proud of. Even compared to American procedural guarantees, contrary to widespread criticism, the Rome Statute does not fall substantially short,⁴¹ a fact demonstrated by a representative of the American Bar Association’s statement to Congress that “the Treaty of Rome contains the most comprehensive list of due process protections which has so far been promulgated.”⁴²

V. “DOUBLE JEOPARDY”—“*NE BIS IN IDEM*”

Particularly harsh are Fletcher’s repetitive attacks toward “double jeopardy.” He sees this constitutional prohibition ignored to such a degree that “[t]his issue in itself demonstrates the fundamental injustice of universal jurisdiction.”⁴³ Guided by the Fifth Amendment of the U.S. Constitution, implying that “a verdict of not guilty is final,”⁴⁴ Fletcher seems concerned in particular by three transnational scenarios. In the first one the victims again play the “bad guys”: in the exercise of universal jurisdiction he sees “no guarantee whatsoever against hounding an accused in one court after another until the victims are satisfied that justice has been done.”⁴⁵ A second source of multiple trials may be that countries eager to wield “primary responsibility” (because of the territory concerned or the nationality of the defendant) will—in his eyes—not be prepared to accept a prior judgment by a “disconnected” country claiming universal jurisdiction.⁴⁶ He sees a third gate to repetitive prosecution in the Rome Statute’s allowing the ICC to reopen a case if the trial by a national jurisdiction “was inconsistent with an intent to bring the person concerned to justice.”⁴⁷

A

By referring to “double jeopardy,” from which the defendant shall be protected by the principle of *ne bis in idem*,⁴⁸ Fletcher certainly hits a crucial point,

41. For a comparative analysis, see Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. 381 (Supp. 2002).

42. H.R. Comm. Intl. Rel., *H.R. 4654, American Servicemembers’ Protection Act*, 106th Cong. (July 25, 2000) (testimony of Monroe Leigh). This source is cited by Amann & Sellers, *supra* n. 41, at 390.

43. Fletcher, *supra* n. 1, at 582.

44. *Id.* at 580.

45. *Id.* at 582.

46. *Id.* at 582-83.

47. Rome Statute art. 20; see Fletcher, *supra* n. 1, at 582 (deviating somewhat from the wording of the Statute).

48. Although “double jeopardy” and *ne bis in idem* are closely connected with each other, it remains questionable whether the concepts are completely identical, as Fletcher seems to suggest by

for there can be no doubt that so far the protection of a defendant against a second or third prosecution beyond national borders is far from satisfactory. Even where international instruments take notice of the principle of *ne bis in idem*,⁴⁹ they are primarily, if not exclusively, directed at obliging the treaty member states to guarantee *ne bis in idem* within their own national jurisdiction, rather than barring concurrent or consecutive prosecutions transnationally between member states. To mention only two prominent examples, Article 14(7) of the International Covenant on Civil and Political Rights as well as Article 4 of Protocol No. 7 to the European Convention of Human Rights oblige the member states to do nothing more than protect a person who has already been finally acquitted or convicted against being tried or punished again in criminal proceedings under the jurisdiction of the same state.⁵⁰ Although certain international instruments go further and bar multiple prosecutions beyond national borders as well, such hopeful exceptions from a general lack of transnational *ne bis in idem* can so far only be found among certain regions, in particular the so-called Schengen-States in Europe,⁵¹ or as drafted in the Charter of Basic Rights of the European Union (Article 50).⁵² Therefore, as long as we do not have an internationally binding prohibition against consecutive prosecutions of a person who has already been tried finally (and convicted or acquitted) in another foreign jurisdiction, it remains up to the national sovereign how to react to a final judgment by another jurisdiction. This has been done up to now in three main ways. First, very few countries, such as the Netherlands, recognize foreign judgments and thus refrain from their own prosecution. The second approach is the most common, and the one adopted by the U.S. jurisdiction:⁵³ to simply ignore foreign proceedings and allow for a new prosecution. Third is the middle course, adopted by countries like Germany that do not bar a new prosecution, but do at least take a foreign conviction into account when deciding on a new sentence, according to the so-called “deduction principle.”⁵⁴

speaking of “the prohibition of double jeopardy (*ne bis in idem*).” Fletcher, *supra* n. 1, at 580; *see also infra* n. 68 and accompanying text.

49. *See generally* Gerard Conway, *Ne Bis in Idem in International Law*, 3 Intl. Crim. L. Rev. 217 (2003).

50. This restriction of international instruments on the enforcement of *ne bis in idem* within a state’s own jurisdiction is unfortunately not always made clear, even in general surveys such as Immi Tallgren, *Article 20: Ne Bis in Idem*, in *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 419 (Otto Triffterer ed., Nomos Verlagsgesellschaft 1999); Christine Van den Wyngaert & Tom Ongena, *Ne Bis in Idem Principle, Including the Issue of Amnesty*, in *The Rome Statute of the International Criminal Court: A Commentary* vol. 1, 705, 706 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., Oxford U. Press 2002).

51. M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 693-94 (4th ed., Oceana Publications 2002); Tallgren, *supra* n. 50, at 423.

52. For details concerning these international instruments, see Albin Eser, *Justizielle Rechte*, in *Kommentar zur Charta der Grundrechte der Europäischen Union* 548-55 (Jürgen Meyer ed., Nomos Verlagsgesellschaft 2003).

53. *See infra* nn. 78-83.

54. For a detailed comparative survey, also with regard to different ways of taking a former judgment into account, see Herbert Thomas, *Das Recht auf Einmaligkeit der Strafverfolgung: Vom Nationalen zum Internationalen Ne Bis in Idem* 40 (Nomos Verlagsgesellschaft 2000); *see also* Van den

Yet again, even though the protection against transnational multiple prosecutions is admittedly unsatisfactory, it is not universal jurisdiction that is uniquely to be blamed. On the contrary, these deficiencies are rather characteristic of concurrent national jurisdictions in general and thus no less true with regard to jurisdiction based on the “classical” connections of territoriality and nationality of the offender or victim. Perhaps one could dare to guess that the competition between different national jurisdictions to try a case may be even more uncompromising if “classical” connections are in concurrence with each other. If, for example, a German terrorist bombed an American tour bus in Madrid and fled to Paris, why should not each of the countries concerned attempt to get the perpetrator extradited: to Spain based on the territory of commission, to Germany based on the nationality of the defendant, or to the United States based on the nationality of the victims? Further, under current paradigms, why should these states not reopen the case if they were not satisfied with the judgment of a concurrent jurisdiction? As these “connected” jurisdictions can very well be biased for a multitude of reasons, particularly their own national interest, would it not then be wiser to conduct the trial in France, a “disconnected” and thus less directly concerned jurisdiction, according to the principle of universality (for fighting international terrorism)?⁵⁵ And would it be really out of line to deem “disinterested impartiality” also wise in the reverse case in that “connected” jurisdictions—for whatever reason—do not want or dare to take the responsibility and would rather leave the prosecution to a “disconnected” neutral country according to the principle of universality?

B

As Fletcher was focused on universal jurisdiction instead of realizing the risks of double jeopardy as a problem common to all types of concurrent national jurisdictions (including those based on “classical” connections of territoriality and nationality of the defendant or victim), he also missed the Rome Statute’s noteworthy focus on *ne bis in idem*. Without first paying due attention to the rule—that is, the principal recognition of *ne bis in idem*⁵⁶—he directly criticizes the exception—the “sham clause”—for allowing a new prosecution if the first proceeding was a “fake trial.”⁵⁷ Even if such exceptional provisos bear the risk of undermining the principle of *ne bis in idem* (although it may be noted that similar “sham clauses” are not foreign to the American understanding of “double jeopardy” either⁵⁸), Fletcher either does not witness or at least does not sincerely appreciate the fundamental message resonating in the principal reaffirmation of the transnational *ne bis in idem* in the Rome Statute’s Article 20—this being a

Wyngaert & Ongena, *supra* n. 50, at 710-13; Tallgren, *supra* n. 50, at 424-33 (particularly with regard to the genesis of the *ne bis in idem* regulation in the Rome Statute).

55. Concerning this “distancing” from local concern, see *infra* pt. VII & n. 91.

56. Rome Statute art. 20(1), 20(2).

57. Rome Statute art. 20(3).

58. See *infra* n. 75 and accompanying text.

concept that has already been recognized in the Statutes of the International Criminal Tribunals for the Former Yugoslavia (Article 10) and Rwanda (Article 9).⁵⁹ Even if its bar against a renewed prosecution is not absolute, the Rome Statute proclaims that as a matter of principle final judgments (convictions as well as acquittals) of national and international courts should indeed be final; and even if justice, because of having been gravely abused, calls for a new proceeding, this is not a matter of the ICC's sovereign arbitrary discretion, but can be done under certain conditions only.⁶⁰ This relationship of rule and exception is hardly described correctly, if not even reversed, when Fletcher writes "the ICC will decide on a case-by-case basis whether the judgments of other courts are worthy of its respect."⁶¹ If this meant that the ICC would have to respect prior national judgments only if it found that the national court "had an intent to bring the person concerned to justice," as Fletcher suggests by questionably transforming the negative phrasing of the Rome Statute into a positive intent-requirement,⁶² the ICC would be upgraded to a sort of supranational appeal court by which a proceeding would not be final until the ICC had spoken. Even if envisioning "global justice,"⁶³ this is certainly not the picture the parents of the ICC had in mind.

So, contrary to Fletcher's impression that the Rome Statute's protection against double jeopardy lags behind "the kind of guarantee against repetitive prosecution that is anchored in all the civilized constitutions of the world" and that this endangerment of the dignity of the accused is getting even worse by the exercise of universal jurisdiction by national courts,⁶⁴ I find that, thanks to the proclamations of the *ne bis in idem* principle in the Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda and in the Rome Statute, the transnational protection against repetitive prosecutions has improved rather than worsened. What is more, one might expect that the growing consciousness toward "double jeopardy" will also influence national courts to handle universal jurisdiction in a cautious way, particularly in refraining from repetitive prosecutions. At any rate, even on the level of horizontal concurrence between national jurisdictions on extraterritorial crimes it does not matter very much

59. As to certain differences with regard to the "upward" and "downward" effects of the *ne bis in idem* provisions in the Rome Statute and the Ad Hoc-Tribunals, which are partly due to the (mere) complementarity jurisdiction of the ICC and not of essential relevance here, see Van den Wyngaert & Ongena, *supra* n. 50, at 723-26; Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/Res/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/Res/955 (Nov. 8, 1994).

60. Although Rome Statute Article 20(3) does not explicitly state which jurisdiction has the burden of proof, that the first proceeding was (a) "for the purpose of shielding the person" or (b) "not conducted independently or impartially," in view of the principal priority of the national courts and the mere complementarity of the ICC the burden of proof must evidently be with the latter one. This would also be in accordance with "[t]he emphasis of the paragraph . . . to underline the generality of the *ne bis in idem* principle and the marginality of the exceptions." Tallgren, *supra* n. 50, at 430.

61. Fletcher, *supra* n. 1, at 582.

62. *Id.* As to Fletcher's own wording of the Rome Statute, see Fletcher, *supra* n. 1, 582-583; text accompanying *supra* n. 46.

63. *Infra* pt. VII.

64. Fletcher, *supra* n. 1, at 582.

whether a proceeding is based on universal jurisdiction or on a “classical” connection. This does not mean that the situation is already completely satisfactory and does not need improvements, as will be discussed later,⁶⁵ but still the picture is not as dark as that drawn by Fletcher.

C

However, could he not argue that the picture on the universal scene is still darker than the national protection against double jeopardy in the United States, thus explaining why this government refrained from joining the Rome Statute? I must confess that I was very impressed when—many years ago—I learned of the U.S. Constitution’s protection against double jeopardy, which appeared far more solid and comprehensive than the guarantees to be found in European constitutions or criminal procedure codes. Therefore, at first sight, Fletcher appeared to be convincing when he compared shortcomings in foreign and international guarantees of *ne bis in idem* with the seemingly more fortified protection against double jeopardy under American law. At a closer comparison, however, I am not so sure any more that the American guarantees against double jeopardy are as good as represented or even superior to others. Without pretending to give a full picture, some doubts may be raised.

To begin with a purported shortcoming of European codes Fletcher found worthwhile to mention, he contrasted the American rule that “a verdict of not guilty is final” with the right of a European prosecutor to appeal a non-guilty verdict or to reopen the case, though mostly on certain restrictive conditions, as, for instance, on the basis of new evidence of guilt.⁶⁶ On the one hand, perhaps American observers may not be satisfied with the explanation that a proceeding is not “final” as long as ordinary remedies are possible and therefore the appeal by the prosecutor is still the same and not a second prosecution. On the other hand, however, European observers may wonder about the American phenomenon of a “mistrial,”⁶⁷ as in cases of a “hung,” biased, or unduly influenced jury: if in such cases the defendant has to undergo a second proceeding, is this less a further jeopardy than being exposed to the ordinary appeal of a European prosecutor? At any rate, the commonly accepted rationale for not attaching double jeopardy in the United States if the first trial ended in a mistrial, that the defendant has no

65. *Infra* pt. VII.

66. Fletcher, *supra* n. 1, at 580. Fletcher’s description is difficult to address in such a general way, as he does not differentiate between “ordinary” appeals (by the prosecutor) and the “extraordinary” reopening of a case; the preconditions for these two types of remedies are substantially different and may vary from country to country. For a comprehensive comparison (including U.S. law), though not completely up to date anymore, see *Die Wiederaufnahme des Strafverfahrens im deutschen und ausländischen Recht* (Hans-Heinrich Jescheck & Jürgen Meyer eds., Ludwig Röhrscheid Verlag 1974); more recently (again, including U.S. law) see *Rechtsmittel im Strafrecht: eine international vergleichende Untersuchung zur Rechtswirklichkeit und Effizienz von Rechtsmitteln* (Monika Becker & Jörg Kinzig eds., edition iuscrim 2000).

67. For a comprehensive survey, including impressive references to case law, see David N. Cinotti, Gregory R. Jones & Scott C. Weidenfeller, *Double Jeopardy*, in *Thirty-First Annual Review of Criminal Procedure*, 90 Geo. L.J. 1528, 1533-39 (2002).

interest in preserving the finality of the judgment and must bow to the government's interest in case of a "manifest necessity" to declare a mistrial,⁶⁸ is strikingly similar to the rationale for the European notion of granting the prosecutor the right to appeal.

Still leaving the international dimension of consecutive proceedings aside, a more serious weak point within the American system is the notion of the "same offense" for which nobody shall be put twice in jeopardy. Whereas the European principle of *ne bis in idem* is open for interpreting "*idem*" (the same) as "*idem crimen*" (in normative terms of the "offense") or as "*idem factum*" (in terms of the "act" as the historical event the indictment is based on),⁶⁹ the wording of the double jeopardy clause in the Fifth Amendment is attached to the "offense." Although this difference between the American "double jeopardy" clause and the European *ne bis in idem* principle is also recognized by Fletcher,⁷⁰ he does not seem fully aware of the much broader protection available if the "same" is understood as the historical-factual "act" (with all its circumstances and consequences) than if it is restricted to the indicted "offense." This is particularly true if the same "offense" is construed in such a narrow way that basically any change of the indictment with regard to the crime provision allows a further prosecution. Even if it was not reconcilable with the plain wording of the U.S. Constitution simply to exchange "offense" (in its normative sense) for "act" (in its factual dimension), it remains difficult to understand why the "offense" is interpreted in such a narrow manner that—according to the so-called *Blockburger*⁷¹ test—any element not contained in the previously charged offense is able to constitute a new offense which, since not being the same as the previous one, may additionally be prosecuted.⁷²

As if the highly praised barrier to double jeopardy was not diminished enough, the so-called "dual sovereignty doctrine" provides further doorways for double prosecutions: because the violation of criminal provisions of two different—federal and state—sovereigns by the same act are considered to be different offenses, "a prior state prosecution is no bar to a federal prosecution, and vice-versa."⁷³ An instance of this rule, which was observed worldwide and which could hardly hide that a second prosecution for the same action in fact means a double jeopardy to the defendant, was the Rodney King case, in which police

68. David S. Rudstein, *Double Jeopardy and the Fraudulently-Obtained Acquittal*, 60 Mo. L. Rev. 607, 632-33 (1995). For a further explanation of the different common and civil law conceptions of the appeal of an acquittal or lenient sentence by the prosecution, see Conway, *supra* n. 49, at 228-29.

69. Bassiouni, *supra* n. 51, at 695; Van den Wyngaert & Ongena, *supra* n. 50, at 713-15; Thomas, *supra* n. 54, at 188.

70. Fletcher, *supra* n. 1, at 581.

71. See *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).

72. Although for three years (1990-1993) the *Blockburger* test was replaced by *Grady v. Corbin*, 495 U.S. 508, 521-22 (1990), which attached double jeopardy if an *essential* element of the offense charged constituted *conduct* for which the defendant had been previously charged, *Grady* was overturned and *Blockburger* reinstated by *U.S. v. Dixon*, 509 U.S. 688, 703-12 (1993).

73. Wayne R. LaFave, *Criminal Law* 145 n. 82 (3d ed., West 2000); see *Bartkus v. Illinois*, 359 U.S. 121 (1959) (a defendant acquitted of a federal bank robbery charge could be tried on a state bank robbery charge).

officers, after having been acquitted by a California jury of beating King nearly to death, were retried and convicted by a federal court.⁷⁴

A further way to circumvent the double jeopardy bar is the nullification of an acquittal if it was procured by fraud and collusion.⁷⁵ Although it appears understandable that an accused should not profit from having reached an acquittal by illegal means, the fact is that by considering “sham” trials and acquittals as null and void, the way is opened for a second trial with regard to the same offense. And even if the prior trial, as a fake, has not been a real “jeopardy” to the defendant, Fletcher’s statement that “a verdict of not guilty is final”⁷⁶ is not true even within the American justice system.

D

And this is even less true when we move to the transnational scene.⁷⁷ With regard to the American approach to double jeopardy in relation to foreign jurisdictions, two scenarios are to be distinguished. One in which an accused already tried by a foreign sovereign enters the defense of double jeopardy against a new trial by a U.S. court, which will commonly not accept the prior foreign conviction⁷⁸ as a bar to a new proceeding in the United States. In applying the “dual sovereignty doctrine” (or, because of the additional international dimension, the “multiple sovereignty doctrine”) in the *Rashed*⁷⁹ case, the court found that the protection against double jeopardy “does not extend to sequential prosecutions by separate sovereigns for the same offense.”⁸⁰

With regard to the other scenario, where an accused who has been previously tried by a U.S. court invokes “double jeopardy” against his extradition to a foreign sovereign, this defense is normally not successful either: first, because

74. Susan Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609, 625 (1994). For further critical appraisals of the dual sovereignty rule, see Dax Eric Lopez, *Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis in Idem*, 33 Vand. J. Transnatl. L. 1263, 1293 n. 229 (2000); David Bryan Owsley, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 Wash. U. L.Q. 765, 781-82 (2003).

75. See e.g. *State v. Howell*, 66 S.E.2d 701, 706 (S.C. 1951). For criticism, see Rudstein, *supra* n. 68, at 634.

76. Fletcher, *supra* n. 1, at 580.

77. Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. Rev. 1096, 1103 (1959).

78. Similarly, US courts hesitate to recognize foreign pardons, for instance, where the defendant is to be deported for a crime of moral turpitude for which a foreign pardon has been granted. Ronald C. Slye, *The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 Va. J. Intl. L. 173, 219 (2002).

79. *U.S. v. Rashed*, 83 F. Supp. 2d 96, 100 (1999).

80. *Id.* On the same line, the *Restatement (Third) of the Foreign Relations Law of the United States* maintains in Section 483 note 3 that the United States does not generally enforce or recognize foreign penal judgments. Exceptions from this general disregard of foreign proceedings seem only be made where an interstate treaty obligates the United States to heed foreign proceedings, see e.g. *U.S. v. Jurado-Rodriguez*, 907 F. Supp. 568 (E.D.N.Y. 1995), or where a foreign proceeding is virtually controlled by the United States, that is, where—under the so-called sham exception to the dual sovereignty rule—foreign officials have “little or no independent volition” in their states’ trial. *Rashed*, 83 F. Supp. 2d at 102 (quoting *U.S. v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1979)).

in cases in which the extradition request is governed by an interstate treaty, a double jeopardy clause therein is regularly interpreted so narrowly as to permit extradition;⁸¹ and second, because according to U.S. case law, barring multiple prosecutions by different sovereigns is not accepted as a stand-alone principle of international law, and the double jeopardy rule is therefore only binding on the United States as a treaty obligation.⁸² As stated in the *Martin* case: "The Constitution of the United States has not adopted the doctrine of international double jeopardy."⁸³

E

In summing up what remains of Fletcher's criticism that by the exercise of universal jurisdiction the defendant would lack the protection against double jeopardy as guaranteed by the U.S. Constitution and tradition, the following findings of our analysis and comparison may be remembered:

First, if a country assumes jurisdiction over an extraterritorial crime, the protection within its own national justice system against double jeopardy is in no way stronger or weaker if the prosecution or trial is based upon the universality principle than it would be if performed under one of the "classical" connections (such as territoriality by "ubiquity," "constructive presence," or "defensive territoriality," or by nationality of the defendant or victim). There are neither reasons nor indications that a national court would take the principle of *ne bis in idem* less seriously if it proceeds according to the principle of universality.

Second, even if it must be taken into account that the national guarantees against double jeopardy may differ from one country to another, that does not mean that the U.S. standard is the best possible, leaving all other jurisdictions behind, and that consequently, an American defendant could only lose if he or she is not tried in a U.S. court. With all respect, when Fletcher sees European codes falling slightly short of the American double jeopardy standard, I humbly dare to say that the opposite may be true if we remember various ways in which the bar against a second proceeding can be circumvented under American law.

Third, when it comes to the transnational recognition of foreign judgments, the U.S. position remains highly conservative in its not accepting any international *ne bis in idem* and its not following any modern movement to protect a defendant against multiple prosecutions by different sovereigns. By not recognizing the doctrine of international double jeopardy, the United States does not deem its power to initiate a new proceeding to be barred by a foreign judgment, nor does it feel obliged to take a foreign punishment into account in its own sentencing.

81. See e.g. *Sindona v. Grant*, 619 F.2d 167, 179 (2d Cir. 1980) (determining whether double jeopardy attaches, and taking into account whether the requesting state had a compelling interest to prosecute the accused); *Elcock v. U.S.*, 80 F. Supp. 2d 70, 83 (E.D.N.Y. 2000) (eventually applying the *Blockburger* test to elucidate whether the extradition request violated the Fifth Amendment).

82. Lopez, *supra* n. 74, at 1281.

83. *U.S. v. Martin*, 574 F.2d 1359, 1360 (5th Cir. 1978).

Fourth, when Fletcher criticizes the *ne bis in idem* regulation of the Rome Statute, he fails to recognize two important developments. First is the explicit acknowledgement of a transnational *ne bis in idem* that, although still not complete, is going further than most international instruments and national laws (including the American). Second is the inclusion of a “sham clause,” which must be understood less as an impairment of (hardly) legitimate rights of the defendant than as a remedy for the abuse of justice—a remedy, by the way, which is, as Fletcher is certainly aware, not foreign to American case law either.

To be sure, the rejection of Fletcher’s concerns with regard to the protection against double jeopardy in international jurisdiction is not to say that everything is fine; for even if the state of protection against double jeopardy is not as one-sidedly bad as he makes us believe, there is still no reason for satisfaction. Therefore, any improvements in the international recognition of *ne bis in idem* would be welcome. In this respect, two recent efforts may be mentioned: the *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*,⁸⁴ and—on a global scale—the Seventeenth International Conference on Criminal Law of the Association Internationale de Droit Pénal with its section on “Concurrent National and International Criminal Jurisdiction and the Principle *ne bis in idem*,” to be held in Beijing in September 2004.⁸⁵

VI. DEFENDANT—VICTIM—STATE—COMMUNITY: DIVERGENT INTERESTS

If we looked for a clue to grasp Fletcher’s reserved, if not hostile, attitude toward universal jurisdiction, it could be found in his view of the various parties to a criminal proceeding and his presumptive order of priorities.

I guess everybody can go along with him when he lists the defendant, the victim, the state, and the community as parties with possibly divergent interests. Beyond these interests, in universal settings, which are characteristic of transnational prosecutions, the sovereignty interests of concurring jurisdictions, especially member states of international treaties such as the Rome Statute, have to be taken into account.⁸⁶

Less easy, however, is it to follow his order of priorities in which the defendant is put first and the victim second. And when the victim is additionally described as screaming for justice even at the cost of an unfair trial to the defendant,⁸⁷ one gets the impression of two victims: the real victim of the crime and the offender as “victim” of the proceeding, and the latter seems to be even

84. *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union* (Anke Biehler, Roland Kniebühler, Juliette Lelieur-Fischer & Sybil Stein eds., Max Planck Inst. for For. and Intl. Crim. L. 2003) (available at <http://www.iuscrim.mpg.de/forsch/straf/docs/FreiburgProposal_nbii.pdf>) [hereinafter *Freiburg Proposal*].

85. *Id.* at preface. The national reports of a pre-colloquium to the subject held in Berlin in June 2003 will be published in *Revue Internationale de Droit Pénal* (2004). *Id.*

86. Fletcher, *supra* n. 1, at 580 (with regard to the defendant), 581 (the victim and the state), 582 (the member states of the Rome Treaty), 583 (the community).

87. *Id.* at 581.

more pitiable and in need of protection than the first one. In such a scenario, universal jurisdiction must indeed appear to be particularly detrimental if it truly "favours the rights of the victim over the rights of the accused."⁸⁸ Yet, is this really the case? And is the order of priorities truly to be seen as Fletcher describes it? I have various doubts.

To start with the most basic one, I would like to question whether the first priority must be with the accused. Although I am aware that in the American tradition the protection of the defendant from an "almighty" state plays an eminent role, I wonder why and how this should legitimize putting defendants' interests over those of the victims. When Fletcher is saying so, he seems to confuse means and ends of a criminal proceeding and to attend to the second step before having paid due attention to the first one. Of course, when a criminal proceeding has been started, the defendant must be guaranteed a fair trial. But prior to the proceeding is the commission of a crime leaving a victim who has an individual right to compensation and possibly also an interest in punishment, be it in terms of a personal right or by representation of the state and community whose laws are violated. Hence, when a criminal proceeding is performed, this is not done for the sake of demonstrating fairness to the accused, but for the sanctioning of a crime, whatever the different ends of punishment, deterrence, rehabilitation, etc., may be. Therefore, instead of one having priority over the other, we should think in terms of equality. Thus, just as the accused is entitled to be treated by fair means, the proceeding must also not lose sight of its ends with regard to the victim's interests.

Against this structural conception of integral fairness on equal terms it is difficult for me to follow Fletcher when he sees "the presumptive order [of the accused as first priority, the victim coming second] reversed,"⁸⁹ as seemingly evidenced by the Rome Statute. If he considers the Preamble to the Rome Statute, because of affirming that unimaginable atrocities to humanity must not go unpunished, as "enthron[ing] the victims as the primary interest in the trial,"⁹⁰ then this Statute is, in fact, doing nothing more than stressing the obvious aim of any criminal proceeding, without indicating anywhere that this aim should be pursued by unfair means.⁹¹ By the same token, I cannot see any evidence or reason why national courts should proceed less fairly with defendants when exercising universal jurisdiction.⁹²

Incidentally, it might be interesting to note that although Fletcher considers the accused in the Rome Statute to be disadvantaged in comparison to the victim, others—and not only promoters of victims' rights in international criminal law—

88. *Id.* at 583.

89. *Id.* at 581; *see* text accompanying *supra* n. 88.

90. Fletcher, *supra* n. 1, at 581-82.

91. As to Fletcher's further—unfounded—suggestion that the Rome Statute would not contain adequate procedural guarantees to the accused, *see supra* Part IV and notes 40-42.

92. *See supra* pt. IV & n. 39.

see the victims' role, though certainly better than in most national procedures or in the Statutes of the Ad-Hoc-Tribunals, still in need of further improvement.⁹³

Although more of factual nature, I wonder why Fletcher draws such a bad picture of victims: "clamour[ing] not for fair trials for the accused but primarily for justice," "hounding" the accused in one court after another until justice has been done⁹⁴—even if this may happen, particularly if victims are inflamed by public campaigns or professional promoters, can that be universalized as normal reality?

VII. FROM "LOCAL CONCERN" TO "GLOBAL JUSTICE"

Contrary to the detrimental role Fletcher ascribes to victims as "hounds" for universal jurisdiction, a more favorable consideration is granted to the state as third in line of his order of priorities to be taken into account in every case and, even more, to the local community within which the crime occurs.⁹⁵

This position is comprehensible insofar as, first, the state prosecuting the crime is seen as both representing—and, at the same time neutralizing—the individual victim and as defending the public interest inherently also violated by the offense, and, second, the local community is confronted with the crime and the conflict it reflects. This "principle of local concern,"⁹⁶ that Fletcher finds expressed in the accused's Sixth Amendment right to a jury trial in the "state and district wherein the crime shall have been committed,"⁹⁷ is only convincing, however, as long as a crime is indeed not more than a "local affair" in that no other people or interests than those of the state of the commission of the crime are affected. Yet, this is not the kind of crime we are dealing with in the realm of universal jurisdiction: however horrible the sexual abuse of a local prisoner by a local police officer or the killing of numerous schoolchildren by a classmate may be, to put the torture of foreign captives by soldiers or the genocide of ethnically different villagers on the same level would be like comparing apples with oranges, though both of terrible magnitude.

It is this qualitative difference between "normal" crimes of merely local scope and crimes against universally recognized values that I think Fletcher is not taking seriously enough. Doubtless, no crime is without some local concern, for even in the case in which foreign gangs, which one wants out of town anyway, are killing each other, the community is affected by the mere occurrence of the crime on its territory. But what makes "universal crimes" different is that these are not

93. Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court, in Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* 77, 88 (Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking eds., T.M.C. Asser Press 1999); David Donat-Catin, *The Role of Victims in ICC Proceedings, in Essays on the Rome Statute of the International Criminal Court* vol. 1, 251 (Flavia Lattanzi & Willam A. Schabas eds., Il Sirente 1999); Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim, in The Rome Statute of the International Criminal Court: A Commentary* vol. 2, 1387, 1408 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., Oxford U. Press 2002).

94. Fletcher, *supra* n. 1, at 581.

95. *Id.* at 581, 583.

96. *Id.* at 583.

97. *Id.* at 583 (emphasis omitted).

only of local or national interest but of transnational concern as well, such as the particularly abhorrent terrorist attacks of September 11 or crimes against humanity in Iraq. Thus, although the territorial jurisdiction, as the national jurisdiction of the defendant or victim, is certainly more closely “connected” with the crime, when we consider the interests worthy of protection, it may be questioned whether it is accurate for Fletcher to speak of the universal as “disconnected” jurisdiction.⁹⁸ It may be “disconnected” in physical terms, but not with regard to the legal interest to be protected.

Yet even more deplorable is Fletcher’s obvious unwillingness to turn his view from “local concerns” to what may be envisioned as “global justice.” As a consequence, he misses the chance to bring the exercise of universal jurisdiction by national courts and of supranational jurisdiction by the ICC into a comprehensive concept. This perspective seems blocked by the different role conceded to the “local concern” on these two levels of jurisdiction: whereas he finds “[t]he primacy of local concern . . . recognized under the ICC’s principle of complementarity,”⁹⁹ he sees it “ignored under the doctrine of universal jurisdiction.”¹⁰⁰ This observation is to some degree correct if limited to the status quo, but hardly suitable for truly comprehending the full potential of the Rome Statute.

First, when the exercise of universal jurisdiction by national courts is said to ignore local concern, then this may indeed be the case, yet not necessarily so. For even if the principle of universality stretches national criminal law onto certain extraterritorial crimes, the exercise of jurisdiction can still be made contingent on further requisites, such as the apprehension of the accused within this territory. And even if a case of this so-called “conditional universal jurisdiction”¹⁰¹ was given, the jurisdiction of the place of apprehension might still yield priority to the jurisdiction wherein the crime was committed, provided that the territorial jurisdiction takes serious steps to prosecute the accused. If the territorial jurisdiction does not do so (for instance, where the territorial jurisdiction does not even request extradition), one could hardly recognize a real local concern. If in such a situation a jurisdiction applies its power to prosecute an international crime according to the principle of universality, it would be difficult to understand why this jurisdiction should be barred by “lack of local concern.”

Second, if one objected that instead of the territorial jurisdiction perhaps the national jurisdiction of the defendant or victim would like to step in, then this again may be a reason for jurisdictions with no direct connections with the case to refrain from initiating their own actions as long as the other jurisdiction proceeds with the prosecution. To be sure, however, if in this case the prior proceeding is

98. Therefore, when in connection with “double jeopardy” I find myself using Fletcher’s language of universal as “disconnected” jurisdiction (as in Part V, in the text accompanying note 50), this should not be considered as agreement in substance.

99. Fletcher, *supra* n. 1, at 583.

100. *Id.*

101. Cassese, *supra* n. 17, at 285.

not based on territoriality of the crime but on the nationality of the offender and victim, one cannot speak of local concern anymore—unless “local” is not meant in a territorial manner but rather in terms of any connection with the case. Then, however, the question arises why the prosecution of crimes against universal values should not constitute an equal “concern.”

Third, what has been said before with regard to national proceedings is similarly applicable to supranational jurisdiction, as in the Rome Statute’s principle of complementarity, under which the ICC has no jurisdiction as long as the state which has jurisdiction by territoriality or by the nationality of the defendant is able and willing genuinely to prosecute.¹⁰² That means that on this supranational level, “local concern” in terms of territoriality is not the only primacy, but instead, the nationality of the defendant—perhaps far away from the place of commission—can be of relevant concern. At the same time, the complementarity regime also recognizes that “local concern” provides *conditional* priority only since it can be suspended if the local jurisdiction is unable or unwilling to prosecute. Thus, although the local connection with the crime may be an important jurisdictional link, it is by no means an indispensable prerequisite.

Fourth, when the complementarity principle of the Rome Statute leaves conditional priority to the territorial state, this, once more, is less for paying consideration to the “local concern” but rather, as also indicated by Fletcher,¹⁰³ for respecting the sovereignty interests of the member states.

Fifth, despite the conditional priority given to the national jurisdictions, the complementary jurisdiction of the ICC would not be comprehended in its full potential if understood, as still mostly done, as merely auxiliary in terms of providing nothing more than a subordinate substitute. This flat approach, which Fletcher seems to adopt, does not pay due attention to the so-called “competence-competence” of the ICC. According to this role, in cases of dispute on whether a national jurisdiction is unable or unwilling genuinely to prosecute, the ICC has the final word.¹⁰⁴ This means that the ultimate responsibility for prosecuting international crimes is with the supranational jurisdiction. Certainly, this vision of a “global justice,” realized in division of labor by the national jurisdictions in complementarity with the ICC, could have been better expressed in the Rome Statute by granting the ICC full universality for international crimes¹⁰⁵ rather than restricting its jurisdiction to crimes committed in a member state or by nationals

102. Rome Statute art. 17(1)(a).

103. Fletcher, *supra* n. 1, at 582.

104. Albin Eser, *Towards an International Criminal Court: Genesis and Main Features of the Rome Statute*, 20 U. Tasmania L. Rev. 1, 18 (2002); Eser, *National Jurisdiction*, *supra* n. 4, at 280; John T. Holmes, *The Principle of Complementarity*, in *The International Criminal Court: The Making of the Rome Statute* 41, 74 (Roy S. Lee ed., Kluwer L. Intl. 1999).

105. This was proposed in Rome by some delegations, particularly the German one. Elizabeth Wilmshurst, *Jurisdiction of the Court*, in *The International Criminal Court: The Making of the Rome Statute* 127, 132 (Roy S. Lee ed., Kluwer L. Intl. 1999). For a general discussion of the ICC’s jurisdiction, see Ruth B. Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 Crim. L. Forum 61, 66-71 (1999). As to the reconcilability of such a concept with international law, see Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 Vand. J. Transnatl. L. 1 (2000).

thereof.¹⁰⁶ This sectorial concession to certain sovereignty interests in favor of the national jurisdiction does not mean, however, that the basic concept of complementary cooperation between national and international jurisdictions with the ICC taking the final responsibility was suspended. In this sense, by taking the protection of universally recognized values seriously, the prosecution of international crimes according to the principle of universality is not merely a *right* as it may be claimed when proceeding on the basis of territory or nationality of the defendant or victim, but an *obligation* to the world community. In other words, in the case of international crimes, national criminal justice proceeding according to the principle of universality functions basically at the silent behest of “global justice.”¹⁰⁷

To be sure, however, this search for global justice must not necessarily be interpreted as one-sidedly only working *against* the defendant; for, as the *ne bis in idem* exception of Article 20(3)(b) of the Rome Statute suggests to be interpreted, the ICC may not only step in and retry the case if the defendant was unduly acquitted, but also if he was convicted in a trial which was “not conducted independently or impartially in accordance with the norms of due process recognized by international law.” Thus the ICC can also become active *in favor* of the accused when he was the victim of partisan justice.¹⁰⁸ Fairness as part of justice—this maxim is no less valid in global dimensions.

VIII. “TAMING” UNIVERSAL JURISDICTION

No principle is without exceptions. This also applies to universal jurisdiction. Since my first aim was to refute Fletcher’s antagonism against universal jurisdiction, my principal plea in its favor could have appeared as unconditional. This, however, would be a wrong conclusion, for as it cannot be ignored, and as was warned by Fletcher as well,¹⁰⁹ parallel assumption of universal jurisdiction by national courts for the same crime can lead to an overlapping of concurrent national jurisdictions with the risk of international conflicts.¹¹⁰ As these problems cannot be dealt with here in due depth,¹¹¹ at least a few ways may be indicated in which exaggerations of universal jurisdiction by national courts could be “tamed.”

106. Rome Statute art. 12. Eser, *supra* n. 104, at 13.

107. Albin Eser, *Auf dem Weg zu einem internationalen Strafgerichtshof: Entstehung und Grundzüge des Rom-Statuts*, 139 *Zeitschrift des Bernischen Juristenvereins* 1, 26 (2003). For an even further reaching “social function” of international criminal justice in terms of conflict regulation, prevention, documentation, and victims protection, see Frank Neubacher, *Tribunal der Vernunft oder hilfloser Versuch einer Verrechtlichung? – Acht Thesen zum ständigen Internationalen Strafgerichtshof*, 39 *Recht und Politik* 160, 167 (2003).

108. Van den Wyngaert & Ongena, *supra* n. 50, at 725.

109. Fletcher, *supra* n. 1, at 583.

110. Albin Eser, *Current Perspectives of Transnational Criminal Law*, in *Rechtsraum Europa/The European Area of Justice: Perspectives for Harmonisation* 53, 59 (Bundesministeriums der Justiz ed., Berline 2002).

111. For more details, see Eser, *Harmonisierte Universalität*, *supra* n. 4; Eser, *supra* n. 110, at 64.

First, national lawmakers should be cautious with extending their domestic law onto extraterritorial crimes. As concerning universal jurisdiction, this principle should only be employed for the protection of legal interests, which are virtually universally recognized, as is the case with international crimes covered by the Rome Statute or similar international treaties.¹¹²

Second, even after the catalogue of crimes to be subjected to universal jurisdiction has been limited to accomplish the protection of truly universal values, the exercise of universal jurisdiction can still be restricted by further conditions. This restriction can be preformed in two different ways once one acknowledges the fundamental difference between the punishability of extraterritorial crimes according to substantive criminal national law and the procedural admissibility of prosecuting said crimes:¹¹³

On the first way, one can limit the applicability of substantive criminal law on extraterritorial crimes by making it dependent on, for example, the residence or apprehension of the defendant within the territory. This type of “conditional universal jurisdiction” can, for instance, be found in Austria, France, and Switzerland.¹¹⁴

On the other way, in terms of “absolute universal jurisdiction”¹¹⁵ on the level of substantive criminal law, a country could very well declare international crimes punishable according to national law without regard to where they have been committed, and yet on the procedural level require further conditions—such as residence or apprehension of the defendant on national territory—in order to start a prosecution. This limitation of universal jurisdiction by procedural means has recently been adopted by Germany.¹¹⁶ After my reasoning before, it should not come as a surprise that I would favor this way.

112. In this respect, the German catalogue of the “Weltrechts(pflege)prinzip” in Section 6 Penal Code certainly goes much too far, in particular with regard to drug crimes, as occasionally rightly criticized by Fletcher.

113. There are two different sides of the same coin, which common law merges in the term “jurisdiction,” see Blakesley, *supra* n. 10, at 36, and which are unfortunately not disentangled in Article 5 of the Rome Statute either. As to details about the conceptual differences, which are not completely identical with the common law distinction between jurisdiction “to proscribe” and “to adjudicate,” see Eser, *Harmonisierte Universalität*, *supra* n. 4, at 226-36. With regard to international cooperation, see Albin Eser, *Basic Issues of Transnational Cooperation in Criminal Cases: A Problem in Outline*, in *Criminal Science in a Global Society: Essays in Honor of Gerhard O. W. Mueller* 3 (Edward M. Wise ed., Fred B. Rothman & Co. 1994).

114. Cassese, *supra* n. 17, at 285-86.

115. *Id.* at 286.

116. In doing so, the German legislators explicitly revoked prior federal case law which had read into the unconditioned application of “universal crime” (§ 6 German Penal Code) the requirement of a “legitimate domestic nexus.” See, in particular, the landmark decision of the Federal Supreme Court, in 45 *Entscheidungen des Bundesgerichtshofs in Strafsachen* 65 (BGHSt 1999). For details and criticism, see Albin Eser, *Völkermord und deutsche Straf Gewalt: Zum Spannungsverhältnis von Weltrechtsprinzip und legitimierendem Inlandsbezug*, in *Strafverfahrensrecht in Theorie und Praxis: Festschrift für Lutz Meyer-Gossner zum 65. Geburtstag* 3 (Albin Eser et al. eds., Verlag C.H. Beck 2001); Eser, *National Jurisdiction*, *supra* n. 4, at 281-83. For details regarding the new German legislation, but without discussion of the procedural restrictions on the exercise of universal jurisdiction according to § 153f Criminal Procedure Code, see Helmut Satzger, *German Criminal Law and the Rome Statute – A Critical Analysis of the New German Code of Crimes against International Law*, 2 *Intl. Crim. L. Rev.* 261, 279-80 (2002). For a broad substantive approach, including procedural

Third, because concurrence of national jurisdictions cannot be avoided even in cases of “classical” connections by way of territoriality or nationality of the offender or victim,¹¹⁷ the previously mentioned limitations on universal jurisdiction will eventually not suffice to prevent conflicts between concurrent jurisdictions. So, in addition to internal national limitations of extraterritorial jurisdiction, special rules of conflict on the level of international cooperation will be needed—as, for instance, suggested by the *Freiburg Proposal on Concurrent Jurisdictions*.¹¹⁸ Interestingly enough, the idea of clearing competitions between different jurisdictions by way of international cooperation is not foreign to Fletcher either: when he asks for “negotiations” when two countries claim jurisdiction over a criminal on the basis of (supposedly) “classical” connections of territoriality or nationality,¹¹⁹ why should this not provide a general model for solving concurrence on universal jurisdiction as well?

IX. ACKNOWLEDGEMENT

I do hope that this argument with George Fletcher was not too unfriendly. For many years we have known that in the academic search for truth and justice, frankness rather than friendliness must be *suprema lex*. As he himself does not shy away from provoking others if he deems necessary, I am confident that he will appreciate my candor as a sincere expression of friendship.

At any rate, even where I had to disagree, his differing views forced me to rethink my own position—in the spirit of “rethinking criminal law” as he most impressively demonstrated in his world-renowned epoch-making treatise of more than a quarter of a century ago.¹²⁰ So, as with his plea *against* universal jurisdiction, he aimed “to overcome the breakdown of reasoned argument on this issue,”¹²¹ challenging adversaries “to provide good reasons for their position,”¹²² at least for myself I find my plea *for* universal jurisdiction more reasoned now than before.

restrictions, see Gerhard Werle & Florian Jeßberger, *Das Völkerstrafgesetzbuch*, 57 *JuristenZeitung* 725, 732 (2002).

117. See *supra* pt. II & nn. 11-15.

118. *Freiburg Proposal*, *supra* n. 84, at 9-10, §§ 1-5. As to another way to web a comprehensive net of national jurisdictions, see *The Princeton Principles on Universal Jurisdiction* (Stephen Macedo ed., Program in L. & Pub. Affairs of Princeton U. 2001) (available at <http://www.princeton.edu/~lapa/unive_jur.pdf>; and Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 *Transnatl. Law* 357, 392-96 (2002). For more details on the concurrence and harmonization of national proceedings in exercise of universal jurisdiction, see Eser, *Harmonisierte Universalität*, *supra* n. 4.

119. Fletcher, *supra* n. 1, at 583.

120. George P. Fletcher, *Rethinking Criminal Law* (Little, Brown & Co. 1978).

121. Fletcher, *supra* n. 1, at 580.

122. *Id.*