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Resisting Domestic Courts' Universal Jurisdiction over International Crimes: Comparative Notes on China and Italy

1. Why this study?[1]

1.1 The shortcomings of prosecuting international crimes internationally

The prosecution of international crimes by specialised non-domestic courts and tribunals established either by treaty or through ad hoc arrangements under United Nations (UN) mandate, raises several procedural and substantial concerns which are making the path of international justice tortuous and increasingly contested. Some of those concerns, like those investing privacy rights and equality of arms in evidentiary assessments,[2] are so profound that they appear unresolvable under the current state of affairs; it is thus widely acknowledged that the future of international criminal justice shall

[1] In addition to the conference in Warsaw (held remotely) whose papers are published in this collection, an earlier version of the present work was presented on October 23, 2021, at the online meeting of the Younger Comparativists Committee of the American Society of Comparative Law, hosted by the University of Wisconsin–Madison and chaired by Dr Antonia Baraggia (University of Milan). Most of the research leading to this publication was performed in the author's capacity as the Talent Program PhD Candidate in International Law at the Department of Global Legal Studies (Faculty of Law) of the University of Macau (China), as well as in his role as a Visiting PhD Researcher at the Centre for Law & Technology (School of Law) of the University of California, Berkeley (US). Accuracy of facts, definitions, and doctrines as presented here is only current at the time of last substantive revision (early January 2022) and should *not* be presumed valid at later date – in fact, this is a remarkably fast-evolving field. The author wishes to thank Prof. Patrycja Grzebyk for her insightful comments during the editing process.

[2] See further R. Vecellio Segate, 'Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution', *International Criminal Law Review*, vol. 21, no. 2, 2021, pp. 278–279.

be gradually relocated to domestic trials by reliance on a specific legal device known as universal jurisdiction (UJ).

UJ is a relatively ancient but still controversial and multifaceted legal device. It mostly refers to the right presumably held by domestic courts worldwide to prosecute alleged criminals for international – rather than domestic – crimes, applying either international criminal law ("ICL") directly, or deemed-equivalent provisions as transposed into the relevant domestic criminal code, with weak to no nationality and/or territorial nexus between the prosecuting jurisdiction and the defendants or their conduct. Nevertheless, one may also speak of UJ with reference to the practice of the International Criminal Court (ICC), insofar as it extends its jurisdiction over citizens of states that did not ratify its founding treaty (also known as the "Rome Statute"), as a corollary to the "complementarity principle" underpinning the latter or as a follow-up to UN Security Council (UNSC) mandate.[3] Both domestic and ICC-practiced manifestations of UJ will be considered for the sake of the present analysis. The no-nexus *domestic* form of UJ will be referred to as its "pure" form, the weak-nexus *domestic* form thereof will be defined as "qualified", while any reference to the "international" (or "global") ICC expression of UJ will be treated separately and thus rendered explicit to the reader. To summarise, I identify three UJ forms: *domestic pure* UJ, *domestic qualified* UJ, and *international* UJ.[4] In most instances, the reader will be able to learn from the textual context what UJ form is being referred to over specific passages.

[3] Refer further to X. Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?', *International Review of the Red Cross*, vol. 88, no. 862, 2006, pp. 388–389; A. Abass, 'The International Criminal Court and Universal Jurisdiction', *International Criminal Law Review*, vol. 6, no. 3, 2006, pp. 349–385. The reader is advised to note that certain authors define the third form of UJ as the ICC's "international jurisdiction"; see, e.g., C. Ryngaert, 'Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union', *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 14, no. 1, pp. 47–56. While terminology is not definitely settled in scholarship, what matters most is to agree on what it is being pointed to through one's preferred language.

[4] The reader may wish to compare these three forms with those ("unilateral", "delegated", and "absolute") proposed in M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Antwerpen–Oxford 2005), pp. 110–121.

Despite the difficulties inherent to any – and particularly this – transition towards a more ordinary recourse to UJ, a few "Western" jurisdictions (including Germany, Sweden, Finland, and The Netherlands) have recently (re-)started to employ this (on-paper long-standing) solution,[5] which provided them with an opportunity to redraft relevant sections of their penal codes consistently with the Rome Statute.[6]

Besides the full allocation of adjudicatory rights and duties to States, UJ might also be introduced in a more hybridised fashion, for instance as a second-stage procedure after prosecutorial activities still centrally conducted by a global prosecutorial authority building upon the better seeds of the ICC's legacy.[7] And yet, the major caveat one shall note with regards to UJ potentially thriving is the actual degree of state participation, signalling very few enthusiastic jurisdictions (like the ones just listed above) accompanied by evident patterns of resistance or "qualitative resizing", so much that someone conjectures a stasis[8] or even an effective *downward* trend – in other regions, but also within Europe itself. Indeed, most "Eastern" and "Global South" jurisdictions have consistently voiced suspicion at this trend, while other Western jurisdictions from the "Global North" seem not yet ready to embrace it, either.

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[5] See, e.g., to K. Aksamitowska, 'Digital Evidence in Domestic Core International Crimes Prosecutions', *Journal of International Criminal Justice*, vol. 19, no. 1, 2021, pp. 189–211; F. Jeßberger, *Towards a 'Complementary Preparedness' Approach to Universal Jurisdiction: Recent Trends and Best Practices in the European Union*', Briefing for the Policy Department for External Relations of the European Parliament's Directorate General for External Policies of the Union (2018), PE 603.878, EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/21, p. 4.

[6] Refer, e.g., to the French Code of Criminal Procedure of 2010, Article 689, and the German Code of Crimes against International Law, *Völkerstrafgesetzbuch* (VStGB) of 2002.

[7] This means that rather than having an international criminal court as we have today, which is theoretically global but severely limited in multiple practical respects, we could have an international criminal prosecutorial agency that starts or even completes investigations, to then transfer the case to relevant domestic courts for further adjudicatory handling. This would make sense of those domestic courts' UJ, while ensuring prosecutorial uniformity at the international level.

[8] Check for instance I.B. Wuerth, 'International Law in the Post-Human Rights Era', *Texas Law Review*, vol. 96, no. 2, 2017, p. 293.

1.2 China and Italy

Among those jurisdictions which have already been identified in literature as declaring themselves unwilling or unready to face this relatively new challenge, the People's Republic of China (PRC, hereinafter also "China") and Italy can be deemed to stand out, owing to their regional appeal expressed as geoeconomic might and normative leadership respectively, to their involvement in (genuinely alternative?[9]) discourses on global justice, as much as to the millenary and mutually tied roots of their civilisations[10] and legal traditions.

As for the regional appeal, China's extends not so much into East Asia, but rather across Sub-Saharan Africa, Latin America, Russia, Central Asia, and generally all those regions which do not situate themselves within a neoliberal, US-championed global order; Italy, instead, is naturally projected onto the Mediterranean basin, with political appeal being socialised throughout Mediterranean European and non-European countries alike.

With regards to Sino-Italian ties (both on a general historical level and, perhaps counterintuitively, in terms of legal heritage), one would probably think of the celebre examples of Marco Polo and Matteo Ricci (from Venice and Rome, to – reportedly – Beijing and Macao respectively), first modern venturers in the "Far East", as immediate references. Four centuries later, Italians ruled over an imperialistic concession in Tianjin (天津意租界; *Tiānjīn Yì Zūjiè*: 1901–1943), and then Italian Fascists tried to subjugate part of today's Mainland China, but one should most importantly bear in mind, more recently, several instances of law-termed "rapprochement" between Atlanticism and Communism, culminated with the speech on human rights (HR) by former (communist) Italian President of the Republic, Mr Giorgio Napolitano, in Beijing.

And yet, all these Italo-Chinese exchanges are symbolised most powerfully by evidence that the Ancient Roman and Ancient Chinese civilisations have

[9] Doctrinally speaking, Italy's global-justice discourses are premised upon internationalism, democratisation, and the pursuit of absolute standards of conduct, while Chinese ones primarily emphasise sovereignty and the right to development as a mitigating circumstance for the perpetuation of certain injustices understood as transitional (i.e., as related to a certain stage of development and thus temporarily justified or at least acceptable).

[10] Refer to M. Marinelli, G. Andornino (eds.), Introduction to *Italy's Encounters with Modern China: Imperial Dreams, Strategic Ambitions*, Basingstoke 2014, pp. ix–xix, xii.

been (among) the first to become aware of each other's existence between the "West" and the "East", with the Roman and Han Empires having left tangible trace of mutual curiosity since at least the second century AD. It will not surprise anyone, then, if the newly issued Civil Code of China results from decades of engagement with Italian (and German) scholars on Roman Law, which shaped not only China's civil law, but also some facets of its approach to criminal law. UJ itself, at least as a doctrine, is not confined to criminal law, with interfaces with civil law having risen to prominence, e.g., through the United States' (US) Alien Tort Statute (ATS); in numerous instances, civil law[11] UJ claims of compensation may follow criminal charges. Relevantly here, China submitted *amicus curiae* briefs to American courts in ATS cases, opposing the exercise of civil UJ under the ATS; this is a position that China consistently adopts vis-à-vis UJ moves (no matter the field), and that Italy would have possibly opted for as well (but ultimately refrained from making it explicit owing, I suppose, to geopolitical alliance reasons).

Comparing to Germany, it is exceedingly interesting to observe how similar legal roots built on Roman Law are distorted to such an extent as to originating diametrically opposite responses to UJ, at least on its criminal law side, but this brief work will rather be focusing on Italy. In fact, it will be shown that on top of the obvious differences between China and Italy, these two jurisdictions share a number of commonalities which may prove of relevance for the future of UJ and global justice.

Hence, the present study is premised to investigate these two jurisdictions comparatively, as far as their stances regarding UJ's applicability over international crimes (and practice related thereto) are concerned. Both China and Italy, on their own, have already been identified as UJ-resistant in literature, but are there common concerns underpinning such a choice? And what are the long term systemic consequences of the potential convergence between these two countries and their legal systems over this policy dossier?

[11] Referring here to civil lawsuits rather than to civil law legal systems.

2. Chinese suspicion

To analyse why China refrains from supporting UJ, I will sort potential explanations in two categories: crime specific – i.e., relevant for genocide, crimes against humanity (CAH), war crimes, or the crime of aggression (CA) only – and general ones. The analysis will take stock from the second category.

2.1 General reasons

2.1.1 Political background

To begin with, one shall appreciate the political landscape within which Chinese policymakers assess UJ. Under the flag of stability and growth, which stand as the core Chinese Communist Party's legitimising deliverables to stay in power, China's aim is to avoid tit-for-tat moves, thus preventing vexatious inter-state litigation for political purposes, and political retaliation generally; consistently, it is important for China not to set non-amicable precedents that could be later replicated against itself by courts in other jurisdictions. Spectacularly, this also confers credibility to China's own criticisms against interferences by foreign courts, which have materialised quite vividly, e.g., during the 2013 Spanish ordeal, when the *Audiencia Nacional* convicted Chinese officials (including former president Hú Jǐntāo) over vicissitudes in Tibet. Back then, arrest warrants were issued and passed onto Interpol, but the unprecedented judicial hazard was met with such a grave degree of governmental scepticism and diplomatic condemnation (well beyond China) that the Congress of Deputies amended Spain's UJ law in 2014, with the Supreme Court of Spain taking note of this amendments immediately after, and introducing prerequisites of jurisdictional nexus and inter-State mandatory pre-coordination to turn the previously "pure" UJ into a "qualified" one. Having learnt the lesson, Chinese leaders realised the dangers of endorsing UJ rules, eventually resolving to strengthen their opposition thereto.

More broadly, because most international crimes globe-wide are now documented and/or denounced by non-state actors (NSAs), and the global public opinion is instigated thereby, Chinese leaders' opposition to UJ is coherent with their intention to contest non-governmental organisations' (NGOs) role

in raising HR concerns as well as attempted intrusions by NSAs into China's domestic affairs. This latter stance is observable both internally and vis-à-vis foreign governments, and to a certain degree, it even extends to China's moves in the context of international humanitarianism.[12] What is more, the geographical embeddedness of the ICC within the European sociolegal space might also contribute its share towards extra-European discontent with the Court's jurisdictional reach[13] – "emotion" is a too often dismissed and yet most powerful driver of international relations (IR), though perhaps a controversial one for lawyers to track.

At the domestic level, China expressed its disappointment about Human Rights Watch's insistence on characterising "re-education camps" and other policies in the Xinjiang Autonomous Region as genocide (most recently rephrased by HRW, perhaps more strategically, as CAH allegations).

Internationally, China did not veto the UNSC's referral of Sudan (over Darfur) and Libya to the ICC, while it later vetoed Syria's deferral, not so much for obsequious political kinship with the "allied" Syrian regime, but owing to policy backtracking instigated by prospected Western misuse of the Responsibility to Protect (R2P) framework.[14] In fact, China generally fears that every formal concession made to Western powers will sooner or later be turned by the US and "like-minded coalitions" into abusive interventionism, *which could equally apply in the ICL realm*. It is not just a matter of China's inward-looking interests, but of generally striving for not destabilising IR broadly conceived, under the mantra that political conservation is by definition a virtue for development, and that promoting a post-Cold War mentality implicates dialogue with all actors multilaterally via the disapplication of blocks of "deserving" versus "undeserving" state interlocutors.

From a theoretical perspective, it can be hypothesised that contrasting UJ (an originally Western legal product, after all) is for China a powerful channel

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[12] See, e.g., L. Gong, 'Humanitarian Diplomacy as an Instrument for China's Image-building', *Asian Journal of Comparative Politics*, vol. 6, no. 3, 2021, pp. 242–243.

[13] Read extensively M.J. Christensen, 'Justice Sites and the Fight against Atrocity Crimes', *Law & Social Inquiry*, First View, pp. 1–29, https://doi.org/10.1017/lsi.2022.46.

[14] See further M. Contarino, M. Negrón-Gonzales, K.T. Mason, 'The International Criminal Court and Consolidation of the Responsibility to Protect as an International Norm', *Global Responsibility to Protect*, vol. 4, no. 3, 2012, pp. 287–294; S. Breslin, 'China and the Global Order: Signalling Threat or Friendship?' *International Affairs*, vol. 89, no. 3, 2013, p. 632.

for expressing its dissatisfaction with the wealthy and long nihilist West's sudden and hypocritical HR awakening, after Western powers have "developed" over centuries through exploiting and subjugating populations worldwide (from American Indians to Africans, to South Asians, Aboriginal Australians, and well-settled civilisations in the Middle East), committing countless crimes indeed "against the whole of mankind" all over the globe, then conveniently considered "civilising" and thus "lawful". My hypothesis could have been just speculation, if it were not framed against the overall picture of Chinese championship of legal discourses on south-to-south solidarity, international law ("IL") alternativeness, and "third-worldism". Sceptical nihilism towards UJ shall be read as a symptom of China's broader suspicion at Western doctrinal alliances based on narratives of what is "just", "moral", or "ethical" under the Law of Nations.

At the same time, walking a not-so-fine line between "developing country" and "economic superpower" status, China strives to carve out instances of exceptionalism from its overall low-toned international legal cooperation, as to project itself already as the forthcoming superpower, on the *primus inter pares* style of the US. This process of hopeful replacement is prepared moderately through current IL negotiations across a wide range of dossiers,[15] as to lay the foundations for an independent, unaccountable, US-styled supremacy *later on*, which frequently cooperates in establishing legal frameworks for other jurisdictions to abide to and for itself not to subscribe to (resembling, e.g., the American *ad libitum* path of engagement with – and disengagement from – the ICC).

2.1.2 Legal arguments

Besides the political motives outlined above, one may posit that the overarching reason why China constrains itself from exercising UJ over international crimes rests again with *geopolitical* caution and self-restraint, but expressed *in legal terms* through the respect for third jurisdictions' sovereignty[16] (and,

[15] Check, e.g., R. Vecellio Segate, 'Horizontalizing Insecurity or Securitizing Privacy? Two Narratives of a Rule-of-Law Misalignment between a Special Administrative Region and Its State', *The Chinese Journal of Comparative Law*, vol. 10, no. 1, 2022, p. 85.

[16] See also S. Freeland, 'International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime', *Journal of International Criminal Justice*, vol. 11, no. 5, 2013, p. 1036.

where applicable, related officials' immunities) in accordance with the well-established principles of sovereign equality of States, non-interference in domestic affairs,[17] as well as state consent[18] in IR, including vis-à-vis international organisations (which are, in turn, understood as expressive of state consent as grounded in treaty stipulations).[19] Normatively, non-interference and non-intervention are of the essence to China, as to (temporarily?[20]) distance itself from the competing world power: the US.

For China, adjudicatory jurisdiction (AJ) can only be territorial, personal, or protective; the latter, framing peace through a lexicon of stability and conservation, traces its historical root to the Tokyo Trials where both US and British allies were deemed collectively immune from prosecution. For China, these are the three only possible forms of AJ, which already represent a step forward compared to the US, whose Restatement on Foreign Relations Law implies that AJ cannot even be considered part of public international law (PIL).[21] In any case, China's preference lies with (more or less traditional) territorial expressions of jurisdiction; to exemplify, in handling the *Gadji-ogly* case about a USSR aircraft hijacked before it entered the aerial space of China in 1986, the Harbin Intermediate People's Court made recourse to the "effect-continuation" doctrine as to circumvent the application of UJ[22] and affirm a derivative of China's "territorial" jurisdiction instead.

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[17] See also E. Wong, 'Australia's Extraterritorial Legislation and the Financial Sector: Challenges and Options in the Asian Century', unpublished MPhil dissertation in Business Law at the University of New South Wales in Sydney, 2019, p. 102.

[18] See also Zhu Dan, 'China, the Crime of Aggression, and the International Criminal Court', *Asian Journal of International Law*, vol. 5, no. 1, 2014, p. 117 (note 147).

[19] Cf. T. Clark, 'The Teleological Turn in the Law of International Organisations', *International and Comparative Law Quarterly*, vol. 70, no. 3, 2021, p. 538 (note 29).

[20] China is currently employing international law to challenge US supremacy, but one plausible expectation is that it will later (that is, once established as a superpower) make recourse to it exactly like the US is availing itself of it now (i.e., through claims revolving around "exceptionalism").

[21] See extensively A.L. Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach', in P.B. Stephan, S. Hull Cleveland (eds.), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, Oxford 2020, pp. 303–318.

[22] Interestingly, some scholars address "the effects principle as a 'slippery slope' towards universal jurisdiction", see Danielle Ireland-Piper, (2013) 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine', *Utrecht Law Review*, vol. 9, no. 4, 2013, p. 79.

What is more, in the view of China, UJ has not yet become customary in its purest form, due to it being other from the obligation of *aut dedere aut judicare* in treaties (which upholds the principle of state consent), from the moderate practice of extraterritorial jurisdiction of *relevant* States, and even from the jurisdiction of international judicial bodies under UN or treaty mandate (which, again, stem from direct or indirect state subscription, and thus sovereign consent).

As a result, China could not second the Rome Statute's UJ rules because of their alleged violation of Article 34 of the Vienna Convention on the Law of Treaties (VCLT),[23] which has arguably gained the status of customary law. In fact, China did not join the Statute despite acting as a norm entrepreneur during its entire drafting and development process: as a member of the Preparatory Committee, an active participant of the 1998 Diplomatic Conference in Rome (also serving in the capacity as vice-president, like India), and an observer to the Assembly of States Parties' meetings, especially the Special Working Group on the Crime of Aggression – and despite preferring the ICC solution as treaty-based instead of previous ad-hoc arrangements (ICTY, ICTR, and so forth), regardless of the latter's UNSC mandate.

With respect to the Statute, China shares with Russia and India serious objections to its UJ rule, whereby the consent of the territorial state (the one where the crime was committed) suffices to bring an accused before the ICC, regardless of the state of citizenship of the accused themselves. Even more crucially, China objects to jurisdiction-disjointed UNSC referrals as violating the *pacta tertiis nec nocent nec prosunt* rule as per Articles 34–35 VCLT on non-contracting parties, which acquired customary status. While China does not consider itself bound to it regardless, specific positions from the legal concerns it raised[24] are to be taken seriously and further perused in doctrine, despite scholars seem to believe the whole discussion is exhausted once one underlines the formal (and definitely not *bona fide*) difference between

[23] See H. Deng, 'What Can China Do to Develop International Criminal Law and Justice Further from the Perspective of the International Criminal Court?', *Revista Tribuna Internacional*, vol. 5, no. 9, 2016, pp. 19–27, 21. See also S. Linton, 'India and China *Before*, *At*, and *After* Rome', *Journal of International Criminal Justice*, vol. 16, no. 2, 2018, p. 274.

[24] See also A. Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Leiden 2019, p. 68.

"obligation" and "interest" which premises the ICC's UJ rule to infringe upon non-contracting parties' *interests* without creating strict *obligations* bearing on them (because no international responsibility arises from non-contracting parties' failure to cooperate with the Court).[25]

Scholars further emphasise that in deference to the *Lotus* principle, nothing prevents States from supranationally delegating their territorial jurisdiction to an international judicial body, regardless of the accused's citizenship.[26] All in all, this is a purely legalistic matter (which is not the same as to dismiss it as irrelevant), because in practical terms, China could anyway veto any UNSC referral to the ICC which is issued under Chapter VII of the UN Charter. Nevertheless, the normative dimension of China's uncompromising posture on this issue shall be tributed due weight: by advocating for a UJ rule not entirely dependent on the UNSC's will, China conveyed its diplomatic respect to all those sovereigns which, differently from itself, could not have vetoed any referrals; this is part of its current normative discourse, subsumed under "counterhegemonic" narratives to be defended on the global scale. The eventually upheld compromise on the UJ was not the purest the ICC's parties could have selected: in fact, as retrievable from the *travaux préparatoires*, Germany had proposed an even more absolute UJ reach for the ICC, which will make its generous today's stances towards UJ unsurprising.

Moreover, the PRC objected to the inclusion of war crimes in non-international armed conflicts (NIACs) within the scope of mentioned Statute's provisions, arguing that UJ should be grounded in codification (rather than progressive development) of international customs. The ICC's prosecutorial *motu proprio* placed China at discomfort as well,[27] transforming the ICC's complementarity in even more biased and potentially dangerous a tool in the hands of the prosecution's discretion; for China, international (criminal) tribunals' founding rationale shall always lie with either state-consented explicit complementarity or a codified mandate by States themselves. In any event, rather than an all-comprehensive instrument, China would have preferred

[25] See further D. Zhu, *China and the International Criminal Court*, Berlin 2018, pp. 60–62.

[26] Refer extensively to M. Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, Sydney 2020, pp. 40–50.

[27] Check A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', *European Journal of International Law*, vol. 10, no. 1, 1999, p. 161.

the pursuance of a crime-by-crime "opt-in" approach, in line with its more general concern over the compulsory jurisdiction of international judicial bodies – a concern which within the Asian region, it shares at least with India.[28]

On a different note, China does not support any violation of *ratione personae* and/or *ratione materiae* immunity of foreign state officials and/or of diplomatic and consular privileges, especially before domestic courts, as a matter of IR comity and deference to other States' sovereignty; Judge Liu Daqun, former vice-president of the International Criminal Tribunal for the Former Yugoslavia (ICTY), lucidly reiterated the conceptual difference between immunities before domestic and international courts (being absolute and potentially restrictive, respectively). Despite this precept, it shall be noted here that there are, in fact, Chinese public order exceptions to this rule domestically, so that not even domestic immunity is truly absolute; still, an explicit treaty provision as *lex specialis* is needed for international adjudicators to side the customary and treaty rules on immunity.

To complete the puzzle of China's general legal approach to UJ internationally, it is crucial to trace its attitude regarding the work on this subject pursued by the United Nations General Assembly's (UNGA) Sixth Committee.[29] China interprets the Committee's lack of agreement as *negative* evidence of international customs – or of desuetude, if one believes consensus around UJ was once stronger among nations. Furthermore, China attempted to withdraw this topic from the Committee's agenda in multiple occasions, exercising political pressure in order to suppress potential agreement which could have encouraged further state practice and/or demonstrated *opinio juris*.

Mirroring its stance vis-à-vis the ICC, China is wary of deferring to UJ both conceptually and operationally even at the domestic level. Indeed, even though Article 9 of China's Criminal Law (CL) – drafted also with a view to bringing the PRC into compliance with its obligations under the

[28] See also G. Ulfstein, 'International Courts and Tribunals and the Rule of Law in Asia', in T. Suami, A. Peters, D. Vanoverbeke, M. Kumm (eds.), *Global Constitutionalism from European and East Asian Perspectives*, Cambridge 2018, p. 526.

[29] All documents pertaining to such work are retrievable from https://www.un.org/en/ga/sixth/73/universal_jurisdiction.shtml.

common criminal jurisdiction clause in the 1949 Geneva Conventions[30] – concedes to the exercise of UJ over those crimes which are listed by treaties China has joined, such a jurisdictional duty will still be fulfilled through the enactment and enforcement of provisions on relevant *domestic* crimes,[31] which means, without necessarily transposing or "applying" *international* criminal law directly – not even ICL's *customary* definitions of international crimes.[32] Nonetheless, fixing the teleological interpretation of this provision might prove remarkably more complicated than it appears at first sight.[33] Article 9 CL reads (roughly translated) as follows:

> This Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, *it agrees to perform*.

The last segment, emphasised in italics, is the problematic one: it seems to stress that no reservations should have been attached by China to those treaties for the Article to apply thereto, but some scholars claim (probably improperly) it means that China shall have already included those crimes in its 1997 CL.[34] This is perhaps a matter of linguistic indeterminacy, but if the first reading were to be accepted, then such last segment would be somewhat redundant. This seems an open question that Chinese lawmakers are invited to settle.

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[30] See Z. Lijiang [人权研究院], 'The Chinese Universal Jurisdiction Clause: How Far Can It Go?', *Netherlands International Law Review*, vol. 52, no. 1, 2005, p. 93.

[31] See C. Qi, 'Death Penalty Reform in China: International Law Context', unpublished PhD thesis in Law at the University of Central Lancashire, 2018, p. 93.

[32] See also Z. Huo [霍政欣], M. Yip, 'Extraterritoriality of Chinese Law: Myths, Realities and the Future', *The Chinese Journal of Comparative Law*, vol. 9, no. 3, 2021, pp. 13–14.

[33] Check also Liu Daqun, 'Chinese Humanitarian Law and International Humanitarian Law', in L. van den Herik, C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, Leiden 2012, p. 356 (note 36).

[34] See, e.g., R. White, 'Plugging the Leaks in Outer Space Criminal Jurisdiction: Advocation for the Creation of a Universal Outer Space Criminal Statute', *Emory International Law Review*, vol. 35, no. 2, 2021, p. 365: "China is automatically empowered to *apply its criminal codes* to crimes defined by treaties to which it is a party" (emphasis added).

All in all, Chinese courts are understandably reluctant to initiate cases for *international* crimes under customary UJ without such crimes having been specified in the domestic CL; indeed, this judicial hesitance is particularly widespread in autocracies, where judges are *expectedly or factually* prone to subservience to the executive and legislative powers (which in turn, in the PRC, *de facto* overlap, regardless of the State Council and National People's Congress being formally distinct bodies). It would be insightful to inspect China's Special Administrative Regions' (SARs) reasons for exercising a similar degree of self-restraint, which probably results from a combination of criminal law *substantial* issues, criminal law *procedural* issues, the complex proto-constitutional geometry of the two SARs, and further bureaucratic, administrative, sociopolitical, and possibly even budgetary constraints.

2.2 Crime-specific reasons

As introduced above, China's reluctance to exercise UJ can also be inspected on a crime-by-crime basis; this investigation will be performed *very succinctly* in the sections to follow.

2.2.1 CAH

The first salient exemplification comes from CAH, which are peculiarly understood by China as necessarily related to armed conflicts and contingencies related thereto,[35] and as addressing the gravest and most large-scale instances only, otherwise they would enter the realm of international human rights law (IHRL).[36] International customary law vindicates some support for this claim, but equally tenable is that if confined to armed conflicts, most CAH would become redundant in that already covered by war crimes. Moreover,

[35] See extensively B.B. Jia, 'China and the International Criminal Court: The current situation', *Singapore Yearbook of International Law*, vol. 10, 2006, p. 92; see also L. Jianping, W. Zhixiang, 'China's Attitude Towards the ICC', *Journal of International Criminal Justice*, vol. 3, no. 3, 2005, pp. 615–617.

[36] See D. Zhu, 'China, Crimes Against Humanity and the International Criminal Court', *Journal of International Criminal Justice*, vol. 16, no. 5, 2018, pp. 1035–1036.

the independence of *some* CAH from armed conflicts bears a deeply rooted history, at least in the post-WW2 era (which arguably suffices to make it customary).

Even more cogently though, what is an "armed conflict" today? And who are its "lawful combatants"? Asymmetric and hybrid warfare, private militia and military contractors, automated weapons, randomised treatments of civilians, abuse of "terrorism"-related terminology to hit civilian targets (but also for soldiers to hide therein), cyber-disinformation campaigns, as well as "proxy" and "new" wars generally, are challenging all established legal paradigms[37] to such an extent that traditional war crimes would only end up covering a slight minority of contemporary "war" incidents.

In China's view, armed conflicts, in turn, should be addressed comprehensively by siding the reputedly obsolete Western distinction between *ius ad bellum* and *ius in bello*: in Chinese legal thinking, whether a belligerence purpose is lawful *does* depend on the actual belligerent conduct. For China, "behaving" makes any belligerence lawful: no moral or legal authority can pre-sort "right" (once they would have been called "holy") wars from the others; phrased differently, the honourable way in which an army acts makes the purpose of its conduct lawful, and not vice versa, because actual war is "a moral duty of a belligerent which is eager to prove its justness under *ius ad bellum*; refusing to undertake such a duty leads to the forfeiture of its moral standing."[38] An *ad bellum* act can, of course, be deemed unlawful *retroactively*, depending on its consequences: in the case of Pearl Harbour, the Japanese aggression would have not been per se unlawful because it violated the duty to declare war, but it would have *become* so due to the massacre of China's civilians it allowed Japan to continue perpetrating in its aftermath.[39] Mentioned alternative "applied philosophy", which is to be taken seriously, might

[37] Check, for instance, A.L. Paulus, M. Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization', *International Review of the Red Cross*, vol. 91, no. 873, 2009, pp. 95–125.

[38] Z. Liang, 'Chinese Perspectives on the *ad bellum*/*in bello* Relationship and a Cultural Critique of the *ad bellum*/*in bello* Separation in International Humanitarian Law', *Leiden Journal of International Law*, vol. 34, no. 2, 2021, p. 317.

[39] In this sense, refer also to Y. Totani, 'The Case against the Accused', in Y. Tanaka, T. McCormack, G.J. Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, Leiden 2010, pp. 151–152.

partly address the obsolescence of war crimes codification when confronted with contemporary conflicts, but would arguably still not call for a complete dismissal of CAH.

2.2.2 Genocide

With regards to genocide, political arguments from the Chinese standpoint can be posited both against and in favour of a deeper engagement with UJ. Against it, the argument goes that China would solicit other jurisdictions to scrutinise its own alleged genocidal acts (namely in Xinjiang and Tibet) by means of UJ, after having endeavoured to avoid this by attaching a reservation to Article 9 – on the jurisdiction of the International Court of Justice (ICJ) – of the Convention on the Prevention and Punishment of the Crime of Genocide when it joined the latter in 1983.

And yet, proving China's "technical" ability and "genuine" willingness to prosecute *génocidaires* would shield it from the ICC's complementary jurisdiction over non-parties under Article 17(1) of the Rome Statute[40] (which China, however, does not legally recognise nor should practically be concerned about, owing to its geoeconomic weight and relatively few troops deployed for "humanitarian" missions abroad). Most notably, there is no need for a jurisdiction to enact provisions on *international* crimes in its criminal code in order to prove genuine prosecutorial will. At the same time, little incentive is placed on China to prosecute domestically, as the ICC – under its Statute's Article 17(2) – was granted the prerogative to "review" domestic courts' verdicts regardless, as to ascertain states' genuine willingness to prosecute.

In any case, because the ICJ's jurisdiction is disapplied, China is urged to decide how to comply with Article 6 of the Genocide Convention: it can either introduce the crime of genocide in its CL or accept the ICC's or foreign domestic courts' jurisdiction. This urgence holds even truer as punishing genocide is a peremptory norm (*ius cogens*) in Article 53 VCLT's sense (*a fortiori* so because China has ratified the VCLT, thus accepting at least the existence of peremptory norms, whose identification is practically delegated

[40] See W. Zhu, B. Zhang, 'Expectation of Prosecuting the Crimes of Genocide in China', in R. Provost, P. Akhavan (eds.), *Confronting Genocide*, Berlin 2011, p. 188.

to the ICJ). Indeed, the ICTY has affirmed a duty to criminalise genocide under general international law,[41] and the ICJ itself has ruled (e.g., in *Bosnia-Herzegovina v. Yugoslavia* 1996 or *Barcelona Traction* 1970) that punishing genocide falls even beyond conventional obligations as an obligation *erga omnes*.[42] Hence, it is quite remarkable that China insists with its official assertion that applying UJ stands as *ius cogens* only vis-à-vis piracy[43] (and not to punish e.g. torture, slavery, apartheid, forced transfer, narcotraffic, terrorism, forced disappearance, compelled medical experiments, biological degradation, despite condemning them all – and many other – verbally in multiple occasions) – in fact, two out of five cases of piracy-related UJ since 1705 are Chinese, and confined to piracy,[44] China even (informally) accepts inter- or supra-State *delegated* UJ!

One could summarise as follows. Allegations of genocidal acts committed within the PRC (including the two SARs due to the declaration China attached to the Genocide Convention) will be handled by Chinese domestic courts relying on the same Convention and Article 9 CL, but under the definition of ordinary domestic crimes only (such as homicide, rape, extorting confession through torture, or incitement to ethnic hatred) – in compliance with Article 3 CL (*nullum crimen, nulla poena sine legem*) – because CL features no "crime of genocide". In a system that still lacks proper checks and balances

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[41] Cf. D. Amoroso, 'The Duties of Criminalization under International Law in the Practice of Italian Judges: An Overview', *International Criminal Law Review*, vol. 21, no. 4, 2021, p. 643 (note 10).

[42] Read further J.M. Florent Wouters, S.I. Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide', *International Criminal Law Review*, vol. 5, no. 3, 2005, pp. 401–416; P. Urs, 'Obligations *Erga Omnes* and the Question of Standing before the International Court of Justice', *Leiden Journal of International Law*, vol. 34, no. 2, 2021, pp. 505–525; G.I. Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"', *Yearbook of International Law*, vol. 83, no. 1, 2013, pp. 13–60.

[43] The same stance is shared by India; refer to K.Y. L. Tan, ed., *The Asian Yearbook of International Law*, vol. 19, 2013, p. 333. UJ has been consistently applied to – or at least doctrinally provided for – cases of piracy in PIL, even though the convenience of this legal device vis-à-vis piracy is being challenged nowadays; see M. Gavouneli, *Functional Jurisdiction in the Law of the Sea*, Leiden 2007, pp. 25–26.

[44] Refer to S.P. Shnider, 'Universal Jurisdiction over Operation of a Pirate Ship: The Legality of the Evolving Piracy Definition in Regional Prosecutions', *North Carolina Journal of International Law and Commercial Regulation*, vol. 38, no. 2, 2013, p. 494.

and whose highest political leaders seem factually unaccountable before the courts, this internal process is obviously reduced to a purely fictional scenario; it is further problematic because genocide is premised upon a *dolus specialis* which cannot be captured by common-crime definitions.

For those alleged genocidal acts which are committed outside the PRC's territory, instead, the implementation of China's conventional (Genocide Convention) and *ius cogens* obligations is still pending. On international crimes prosecuted in China as ordinary ones, beyond genocide, one may mention the 2003 *Atan Naim et al.* case decided by the Shantou Intermediate People's Court, holding that plundering and controlling ships by illegally boarding on other countries' ships was prosecutable under the domestic crime of robbery although only the arrest (and not the criminal act) occurred within Chinese territorial waters.[45]

Another lesson to learn from China's approach to genocide-related UJ is that the *nullum crimen sine praevia lege poenali* principle is deemed to apply even when China did join a convention, but the latter does not specify the penalty to be imposed for the crime and/or is not transposed domestically.

2.2.3 War crimes

China's position is that only *international* armed conflicts should fall within the ICC remit,[46] while NIACs could be most properly addressed through domestic trials, under ordinary-crime definitions.

Besides this, "war crimes" as codified in the Rome Statute are considered overbroad, stretching the progressive development of international customary law too far.[47]

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[45] Refer to C.ongyan Cai [蔡从燕], 'International Law in Chinese Courts during the Rise of China', in A.E. Roberts, P.B. Stephan, P.-H. Verdier, and M. Versteeg (eds.), *Comparative International Law*, Sydney 2018, p. 315; *idem*, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously*, Beijing 2019, p. 262.

[46] Refer, e.g., to D. Momtaz, 'War Crimes in Non-international Armed Conflicts under the Statute of the International Criminal Court', *Yearbook of International Humanitarian Law*, vol. 2, 1999, pp. 177–192, 179 (note 15).

[47] See S.W. Becker, 'The objections of larger nations to the International Criminal Court', *Revue internationale de droit pénal*, vol. 81, no. 1–2, 2010, p. 58.

2.2.4 CA

In compliance with Article 39 of the UN Charter, only the UNSC can determine *the existence of* a "threat to peace"; thus, in China's view, a UNSC mandate is needed before prosecuting domestically for this crime. Indeed, declarations of war are the most long-standing, paradigmatic, and supreme acts of sovereign States, therefore the identification of what represents "aggression" among those acts cannot be left to subjective world-politics, including politicised supranational judicial bodies. If war per se can be disciplined and made lawful (as its conduct is in fact, by definition, in international humanitarian law), then waging war should be ordinarily lawful as well (also by virtue of the *in bello*/*ad bellum* recomposition illustrated before), with "aggression" representing *the rare exception* thereof. Considering that China has proven to be one of the least externally belligerent countries over the last few centuries, this war-friendly stance is fairly curious (…or worrisome, depending on one's standpoint!).

In any case, China commented that because the ICC shall observe a 6-month deadline for the UNSC to formally determine the occurrence of an aggression (Article 15 *bis* of the Rome Statute), and it might be further instructed by the UNSC to halt its investigations for 12 months (Article 16), even this international mechanism could prove unserviceable. It is also a matter of shame and "face" (by its proper sociological meaning in Chinese culture): if an ICC's judgement eventually contradicts a UNSC's stance (thus necessarily China as a P5 member – not to mention potential individual Chinese judges sitting on the ICC bench…), the credibility and standing of both representatives of the PRC is likely to be compromised.

Not secondarily, CA is an act of state *par excellence*, so that no individual official is responsible for it alone, except formally for the head of State, who is in turn, for China, automatically immune from prosecution (also *post bellum*, and especially before benches in foreign jurisdictions). Slightly simplistically, one might conclude that for China, CA should not be prosecuted through AJ at all – neither domestically, nor internationally.

3. Italian inefficiency

Contrary to China, Italy's lack of *domestic* UJ practice can be explained through the lenses of its overenthusiastic support for the ICC as the most appropriate forum for prosecuting international crimes. Not only was Italy the fourth ratifier of the Rome Statute, but the latter's denomination itself speaks volumes about Italy's rhetorical endorsement of international criminal justice mechanisms, within a broader support for West-led PIL-humanisation trends.[48]

Other diplomatic reasons may rest in the background, too. For instance, Italy has long advocated for democratising UNSC reforms, and the more States are parties to the Rome Statute, the less influence UNSC veto powers will exercise over non-party referrals. The latter's concern is shared with China, but the response (higher or lower support for jurisdictions joining the Statute) is diametrically different in light of all other concerns which concur to shaping said response.

It is also salient to assess Italy's views before UN fora. For instance, it declared that UJ can be operated through extradition treaties when relevant, but if one had to consider scholarly reactions to the (admittedly succinct) resolution of the 2005 Institute of International Law in Kraków,[49] that seems an inaccurate understanding of the "true" UJ on the part of Italian authorities. Compare this approach to China's historical one: in adjudicating a 1956 case on the crime of trafficking opium committed *by aliens against aliens* within China, the Supreme People's Court held that "in the cases that the Chinese

[48] On these trends, refer further to L. Pasquet, 'Litigating the Immunities of International Organizations in Europe: The "Alternative-Remedy" Approach and its "Humanizing" Function', *Utrecht Journal of International and European Law*, vol. 36, no. 2, 2021, pp. 192–205; E. Lieblich, 'The Humanization of *Jus ad Bellum*: Prospects and Perils', *European Journal of International Law*, vol. 32, no. 2, 2021, pp. 579–612; G. Oberleitner, '*Human Rights in Armed Conflict: Law, Practice, Policy*, Cambridge 2015, pp. 232–238.

[49] The text of the resolution is available online at https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf. It emphasises the importance of extradition, but scholars have cautioned about this approach. See, e.g., J. d'Aspremont, 'Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction', *Israel Law Review*, vol. 43, no. 2, 2010, p. 307: "It must be made clear that the I mechanism of try-or-extradite does not necessarily provide for the empowerment of domestic courts to exercise universal jurisdiction. Indeed, the obligation to prosecute or extradite can possibly also apply to situations where judges have been seized of a matter for which they exercise a non-universal jurisdiction that is a case which is directly linked to the public order which they protect."

courts cannot try while the defendants are in the PRC, the organs of foreign affairs may deal with it *if* the Korean government requests the extradition of them" (emphasis added); such non-prosecution might have embodied a genuine anti-imperialist, anti-hegemony positioning of the Court against the snobbish "bourgeois class", but would have extradition worked with more "enemy" governments compared to the Korean one? Attempting to reply would be tantamount to speculating, but Chinese textbooks supported the Court's take, which is also interestingly in line with contemporary scholarly approaches to the so-called "comparative IL." Italy's official position could further be contrasted with the Statement by Mr Xiang Xin at the UNGA in 2013:

> universal criminal jurisdiction is different from both the jurisdiction exercised by international criminal judicial organs and the obligation of a State to extradite or prosecute as a means of exercising jurisdiction.[50]

Furthermore, Italy is concerned about the criteria jurisdictions would adopt to "rank" competing jurisdictional claims to prosecute international crimes through domestic UJ.

Potentially enlightening parallelisms have been drawn in literature with the Belgian, British, and Spanish experiences, which have abandoned any "pure" reception of UJ in favour of a softer – and factually dismissed – version thereof, following the establishment of the ICC, the fragmentation of interpretative scholarly communities, as well as relevant ICJ pronouncements on sovereign immunities.[51]

In any case, the upcoming two sections will dig deeper into the specificity of Italy's inefficiencies, that impair its ability to conduct UJ trials *even if it wanted to*. Those lacunae are sorted, by way of simplicity, in two wide

[50] Available at http://chnun.chinamission.org.cn/eng/chinaandun/legalaffairs/sixthcommittee1/t1091531.htm.

[51] See A. Panetta, 'L'immunità dalla giurisdizione penale degli organi costituzionali in carica accusati di crimini internazionali', unpublished PhD thesis in International and EU Law at Sapienza University of Rome, 2012, pp. 112–122, 161–169.

categories: substantial, and procedural. Needless to specify, the two are nearly always interlinked in practice.[52]

3.1 Substantial shortcomings

On the whole, Italian legislation, as it stands today, does not satisfactorily cater for international crimes, with legislative shortcomings on the substance being traceable in both its *Codice Penale*'s (CP) *parte generale* (applicable to all crimes, or "crime" in general) and *parte speciale* (providing for each crime).

As for the first, one (not-so-)trivial exemplification could be the minimal age for criminal liability: 18 under the Rome Statute, 14 under the CP – this proves decisive in cases involving young terrorist combatants or child soldiers, with Italy being prevented from drawing accurate inferences from ICC's jurisprudence tailored to slightly older young defendants (e.g. on their mental maturity). Other general misalignments between the Statute and the Italian CP concern the treatment of *mens rea*, joint criminal enterprise, extenuating circumstances (e.g., *responsabilità del superiore*), the *estinzione degli effetti penali (prescrizione) della condotta criminogena*,[53] and arcane provisions such as that on the *concorso omissivo in reato commissivo con dolo anche eventuale*, which I only mention but refrain from examining here.

As for the *parte speciale*, there are no satisfactory provisions on international crimes in the CP, namely for genocide (e.g. the "intent to destroy a group" is missing) and CAH (such as a missing reference to "extensive

[52] I will offer a humble overview only, to fulfil my comparative aim between Italy and China. Most recently, other authors have inspected Italy's substantial and procedural shortcomings in far greater detail. The reader may want to refer to Special Issue 21(4) of the *International Criminal Law Review*, entitled "Italy's Legal Obligations to Criminalise" and available at https://brill.com/view/journals/icla/21/4/icla.21.issue-4.xml. In particular, the reader might appreciate the articles by Giulio Bartolini (on war crimes) and Luigi Prosperi (on crimes against humanity and genocide), retrievable from https://doi.org/10.1163/15718123-bja10069 and https://doi.org/10.1163/15718123-bja10058, respectively.

[53] And indeed, statutes of limitations are frequent sources of frustration when it comes to dual criminality as relevant for extradition procedures, as well; refer e.g. to I. Milazzo, 'Justice for desaparecidos: Italian Court grants extradition of former Pinochet military officer', *Extradando*, 2020, available at https://www.extradando.com/post/justice-for-desaparecidos-italian-court-grants-extradition-of-former-pinochet-military-officer.

and systematic attack[s] against civilian populations", e.g., beyond "ordinary" sexual violence), but also on war crimes – the Italian Criminal Military Code for Wartime is extremely outdated, so that, for instance, only military personnel is listed as potential agent of war crimes, and pillage (looting) is only addressed in relation to a conflict. On top of all this, while Italy has just ratified the 2010 Kampala Amendment regarding crime of aggression, domestic legislation criminalising the crime of aggression has not yet been enacted, and there are not even draft laws pending to that end.[54] In a more general fashion, one could concede to speculations that Italian enthusiasms towards UJ might have further dampened significantly, by analogy, after the 2012 ICJ's adverse ruling on the *Jurisdictional Immunities of the State (Germany v. Italy)*, which confirmed the usual conservative approach by the Court towards extending UJ over acts by foreign state officials – although this time the judgement concerned state responsibility rather than individual criminal liability.[55] In this respect,

> a strong argument can be made that any rule permitting the exercise of universal jurisdiction with respect to war crimes committed in international armed conflicts will clearly contemplate the prosecution of state officials and is, thus, practically co-extensive with immunity *ratione materiae*.[56]

Interfaces are indeed sound.

[54] Read further L. Prosperi, 'Legal Effects of the Ratification by Italy of the Amendments to the ICC Statute on Aggression', *The Italian Review of International and Comparative Law*, vol. 2, no. 1, 2022; A. Lanciotti, 'La punibilità per il crimine internazionale di aggressione', *Federalismi.it*, 2022, no. 17.

[55] See further N.M. Saputo 'The *Ferrini* Doctrine: Abrogating State Immunity from Civil Suit for *Jus Cogens* Violations', *University of Miami National Security & Armed Conflict Law Review*, vol. 2, no. 1, 2018, pp. 6, 20–22.

[56] D. Akande, S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law*, vol. 21, no. 4, 2011, p. 843.

3.2 Procedural shortcomings

Article 88 of the Rome Statute features no statutory-reform obligations: it only requires State parties to "ensure that there are procedures available under their national law for *all of the forms of cooperation*" (emphasis added): What does this truly mean? Of course, it means, for example, that State parties should cooperate in arresting suspects; regrettably, Italy seems unready to cooperate in this sense,[57] as demonstrated by similar forms of cooperation which would have been due at the EU level. To exemplify, the European Center for Constitutional and Human Rights has filed a complaint before the European Commission on 28 June 2017 because Italy did not arrest Mr Ali Mamluk, a Syrian intelligence chief who travelled to Italy, despite UJ was specifically called for in the European Parliament resolution of 15 March 2018 on the situation in Syria. In fact,

> it is possible that Italy is bound to adopt some criminal provisions to implement international instruments which, as such, do not embody obligations of domestic criminalisation. The best example is that of the ICC Statute. Under this treaty, [S]tates do not have a legal duty to enact domestic criminal legislation in relation to the crimes punished therein […]. However, the lack of incorporation of the crimes in the Italian legal system may make it difficult for Italy to comply with some of its obligations of cooperation under Part 9 of the Statute, which may require, for instance in the case of surrender of suspects, that the charges are criminalised at [the] domestic level.[58]

Law no. 237/2012 on procedural cooperation with the ICC attempted to fill some gaps, but necessary professional operative norms are still missing from the Italian CP;[59] these are of the essence, as they would endow Italian

[57] However, a few positive exceptions do exist. Refer, e.g., to J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Oslo 2010, p. 60.

[58] M. Longobardo, 'The Italian Legislature and International and EU Obligations of Domestic Criminalisation', *International Criminal Law Review*, vol. 21, no. 4, 2021, p. 637.

[59] See M. Crippa, 'Sulla (perdurante?) necessità di un adeguamento della legislazione interna in materia di crimini internazionali ai sensi dello Statuto della Corte Penale

magistrati ordinari with the competence to prosecute *sua sponte* alleged international criminals regardless of the *locus commissi delicti*.

To be true, Italian authorities' general stance is not totally unsupportive of UJ through domestic courts, for instance as far as compliance with the Geneva Conventions is concerned;[60] the problem lies with countless (and apparently endless) bureaucratic impediments, worsened by judicial hurdles, parliamentary deficits, and administrative inertia. Beyond empty proclaims, the exercise of UJ by Italian domestic courts is hindered *inter alia* by the fact that courts shall be authorised by the Ministry of Justice on a case-by-case basis.[61] All of this still holds true as of early May 2022 (by the time of writing), despite multiple legislative efforts over the decades – some of these endeavours being, in truth, quite sophisticated – directed at filling this void,[62] which have consistently resulted in a *nulla di fatto*. Italy's *bicameralismo perfetto* to approve/amend laws is not helpful, either, resulting in ping-pong parliamentary games which are in turn pejorated by exceedingly disempowered and short-living governments (even by Western-democracy standards). So far, Italian judges' expected *collaborazione fattiva e leale* with national political and diplomatic authorities[63] – particularly those overseeing justice and foreign affairs – over the institution of potential UJ proceedings

Internazionale', *Diritto Penale Contemporaneo*, https://archiviodpc.dirittopenaleuomo.org/upload/CRIPPA_2016a.pdf, p. 17.

[60] Refer to Amnesty International, 'Italy: Law reform needed to implement the Rome Statute of the International Criminal Court', 2005, pp. 30–34, https://www.amnesty.org/download/Documents/84000/eur300092005en.pdf.

[61] See D. Hovell, 'The Authority of Universal Jurisdiction', *European Journal of International Law*, vol. 29, no. 2, 2018, p. 435 (note 34).

[62] Refer, e.g., to Senato della Repubblica Italiana, XV Legislatura, Disegno di Legge "Bulgarelli" N. 528, 31 May 2006, http://www.senato.it/service/PDF/PDFServer/DF/177838.pdf. Among other legislative proposals ended up in the void, are those by *Commissione Conforti* (2002); *Commissione Kessler* (2002) and related *Progetti Iovene e Pianetta*; *Progetto Cariplo* (2015). On March 22, 2022, the former Italian Minister of Justice, Professor Marta Cartabia, instituted a Ministerial Committee to be chaired by Professors Francesco Palazzo (University of Florence) and Fausto Pocar (University of Milan), aimed at drafting an Italian code for transposing international crimes into Italy's domestic legal order (Decreto Ministeriale istitutivo di una Commissione per l'elaborazione di un progetto di Codice dei Crimini internazionali). The development of this initiative deserves to be closely kept monitored, starting with the first proposal to be submitted by the Committee by May 30, 2022.

[63] For context, read extensively F. Mégret, 'The Independence of Justice in the Cauldron of International Relations', *Modern Law Review*, vol. 85, no. 2, 2022, p. 380.

has led to a prolonged season of prosecutorial lethargy rather than in fruitful and proactive institutional synergy.[64]

By now, the reason why Italy's over enthusiasm for supranational UJ solutions might also be interpreted as an ungenuine delaying strategies aimed at discharging itself from domestic-UJ burdens, especially as far as updates to its codes on the substance (particularly when it comes to genocide and CAH) would be concerned, should appear clear.[65]

3.3 A European symptom?

Prima facie, one might be tempted to align Italy's experience to other post-ICC-establishment and then post-ICJ-pronouncements European experiences, but that would be short-sighted a conclusion.

True, Belgium abrogated Article 7 of its *Loi du 10 février 1999* in the aftermath of the ICJ's Arrest Warrant holding (although the Court opted for a *non liquet* on UJ, as it confined itself to examining the remaining *ratione personae* submission by the DRC). Similarly, as recounted above, Spain replaced its *Ley orgánica 6/1985 del poder judicial* into its *Ley orgánica 1/2009*, and since 2011, subserviently to Israeli grievances,[66] the UK has been requiring the expressed consent of the Director of Public Prosecutions of England and Wales for domestic courts to prosecute under UJ.[67]

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[64] A few exceptions shall be duly taken note of, including the sentence no. 10/2017 by the *Corte d'Assise di Milano*, as confirmed at the appeal stage through the sentence no. 31/2020 (officially released on January 21, 2021) as well as by the Italian Supreme Court of Cassation through the sentence no. 480/2020 (officially released on March 4, 2021).

[65] See further L. Paredi, 'Problemi di adeguamento degli ordinamenti interni al diritto internazionale in tema di crimini internazionali', unpublished PhD thesis in International Law at the University of Milan, 2015, pp. 46–54.

[66] L. Prosperi, 'Giurisdizione universale, Corte Penale Internazionale e principio di complementarietà: Una triangolazione possibile?', *Federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato*, 20 Dec. 2013, Human Rights no. 4, p. 18.

[67] It is crucial to note here that in deciding whether to prosecute foreigners, domestic courts weigh all potential institutional costs of acting against ICC's non-compliant states, and this has been studied also with reference to the UK more specifically. See N.T. Carrington and C. Sigsworth, 'Home-State Interest, Nationalism, and the Legitimacy of the International Criminal Court', *Law & Social Inquiry*, vol. 47, no. 2, 2022.

Are these choices comparable to Italy's experience? Not quite so. In fact, the Belgian, British, and Spanish turns represented "softening processes" following initial legislation which had brought such jurisdictions in line with the Rome Statute, while Italy has never fully accommodated the latter.

4. …Any common threads?

Relevantly for the present work, China and Italy showcase a few immediate dichotomies; for instance, those between stable and unstable governmental powers, and between monist (China)[68] and dualist (Italy)[69] approaches to IL, respectively (also aided by China's executive and legislative powers factually coinciding, as reported above).

This notwithstanding, commonalities are numerous and should never be dismissed. First, both jurisdictions currently feature no "pure" UJ domestically, but only qualified (and anyway theoretical) forms thereof. Second, courts display worrying degrees of techno-administrative unpreparedness (and perhaps even independence deficiencies), although evidence that international ones are not any better should be factored in as well.

Moreover, both Italy and China have demonstrated consistent reluctance to bringing their codes in line with international crime specifications, while insisting on the problematic separation between military and civilian laws. In fairness, both countries' lawmakers have recently reiterated their concern over obsolete war-crime definitions, although China has expressed it in terms of inapplicability to NIACs, while Italy has envisioned to address

[68] If one has to maintain the Western scholarship distinction between monism and dualism, then China is definitely closer to monism; see, e.g., D.L. Sloss, 'Domestic Application of Treaties', in D.B. Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed.), New York 2020, pp. 358–362. However, Chinese scholars reject both approaches as inaccurately depicting the relationship between PRC law and PIL. See further Z. Keyuan, 'International Law in the Chinese Domestic Context', *Valparaiso University Law Review*, vol. 44, no. 3, 2010, pp. 937–938; F. Leah, 'Summary', in B. Ahl (ed.), *Die Anwendung völkerrechtlicher Verträge in China*, Berlin 2009, p. 356.

[69] On the legal relevance of Italy being a dualist system for the purpose of assessing its international obligations to criminalise certain conducts, refer extensively to B.I. Bonafè, 'Constitutional Judicial Review and International Obligations of Criminalization', *International Criminal Law Review*, vol. 21, no. 4, 2021, pp. 661–670.

the conducts relevant for the two types of conflicts interchangeably (e.g., in *Progetto Cariplo*). At any rate, neither jurisdiction considers *in absentia* UJ trials acceptable – even though *in absentia* extraterritorial trials are deemed acceptable.

Lastly, both countries are concerned with the politicisation of jurisdictional claims' "rankings" and maintain a record of poor implementation of international judgements and awards (just to exemplify, one may refer for China to the South China Sea arbitral award, and for Italy to the non-compliance rate with the judgements of the Council of Europe's European Court of Human Rights, only slightly less severe than Russia's or Turkey's).

Ultimately, although today's geopolitical projections of China and Italy could not have been more uneven (Western and Atlanticist the latter, Global-South-oriented the former), their HR value-based discourses self-evidently diverge, and the immediate reasons why they resist UJ in theory and practice differ, too, this very concise study has confirmed that on a deeper foundational level, these two jurisdictions' approaches to international justice in fact converge around a number of core "historical" preoccupations. The latter surround an obsolete UN system, worsened by overzealous politics of international justice built on domestic adjudicators in competition with each other to advance jurisdictional claims (especially neo-imperialistic ones focused on prosecuting African and Middle Eastern leaders and militias[70]), while simultaneously disclosing a certain degree of mistrust in their own technical preparedness.

This work has briefly discussed the currently accepted four international crimes (genocide, war crimes, crimes against humanity, and crime of aggression), but several understudied threads could have been developed further. *Inter alia*, whether the potentially "fifth international crime", also known as "ecocide", will further discourage these two countries from establishing their domestic UJ practice or, to the contrary, will renew their interest for and ambition about this controversial legal device, remains to be ascertained, and

[70] On this same "regionalized" aspect of prosecutorial politics, but with reference to the ICC, refer to O. Dovgalyuk, R. Vecellio Segate, 'From Russia and beyond: The ICC Global Standing, while Countries' Resignation is Getting Serious', *FiloDiritto*, 2017, pp. 5–6, https://www.filodiritto.com/sites/default/files/articles/documents/0000002222.pdf.

warrants future research.[71] The role of public opinion across the "East" and the "West" would deserve closer inspection, too: studies have been published on, e.g., the ICC's legitimacy before the public in specific jurisdictions,[72] but no socio-political implications for the future of UJ as a legal device have been drawn therefrom.

To conclude, borrowing from a rather celebre description of the objective of ICL more generally, UJ's purpose seems that of socialising "a system of symbols […] that gives reason to believe that the 'international community' […] can be submitted to a similar kind of rational governance as that of a national [S]tate."[73] The overarching takeaway point from this essay shall be that fishing into a somewhat shared history of thought and civilisational backdrop, Chinese and Italian jurists and legislators appear to read the risks and potentialities inherent in mentioned symbology through dissimilar-*yet-not-too-much-so* legal and geopolitical prisms.

[71] On international environmental crimes and universal jurisdiction, check generally A. Greene, 'The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?', *Fordham Environmental Law Review*, vol. 30, no. 3, 2019, p. 19 (note 85); R. Killean, 'The Benefits, Challenges, and Limitations of Criminalizing Ecocide', New York 2022, https://theglobalobservatory.org/2022/03/the-benefits-challenges-and-limitations-of-criminalizing-ecocide.

[72] Check, e.g., N.T. Carrington, C. Sigsworth, 'Home-State Interest, Nationalism, and the Legitimacy of the International Criminal Court', *Law & Social Inquiry*, vol. 47, no. 2, 2022, pp. 449–477.

[73] I. Tallgren, 'The Sensibility and Sense of International Criminal Law', *The European Journal of International Law*, vol. 13, no. 3, 2002, p. 594.

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The analysis of national systems shows that states do not follow a single legislative model to govern criminal responsibility for international crimes at the national level, and often face doubts as to how far they are only expected to copy international constructions, and how far they should modify treaty or customary international law solutions to adapt them to their specific needs or legal culture. In the presented texts, the reader will find a range of commentaries on the definition of crimes, the rules of jurisdiction, the rules of responsibility, as well as difficulties in the framing of specific crimes within a judgement. The texts refer to the practice of national courts as well as international and internationalized courts. The authors of this publication hope that showing various national perspectives, political and – at times – cultural impacts on certain legal solutions will both facilitate understanding of the doubts as to the current form of international law norms and the system of international justice now in operation, and enable learning lessons for the future directions of amendments to national legislations, so that errors or difficulties once encountered in some countries could be turned into more robust legal constructions in others.

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