



Criminal Jurisdiction of States under International Law

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A. Introduction

1 The term 'jurisdiction' refers to the power of States to subject persons or property to their laws, judicial institutions, or enforcement capacity. This corresponds to the three types of jurisdiction, that is, legislative, judicial, and enforcement jurisdiction (→ *Jurisdiction of States*). Criminal jurisdiction should be distinguished from other forms of jurisdiction arising out of torts or contract, even if the foundation for such actions is an international crime such as torture, as is the basis for the → *United States Alien Tort Statute*. The exercise of criminal jurisdiction is not necessarily a unilateral entitlement of States (→ *Unilateral Acts of States in International Law*), unless the crime in question takes place solely on the territory of the prosecuting State by and against any one of its nationals. Even then, however, if the crime is one of grave international concern, other States may possess a valid interest in prosecuting the offender. To further complicate matters, no hierarchy of criminal jurisdiction is found in any → *international criminal law* treaty, given that these merely list all permissible claims to jurisdiction without granting priority to any. It is, therefore, possible that in respect of a particular crime more than one State may assert a valid jurisdictional claim, in which case several factors are relevant, but none of which alone can be considered definitive and conclusive. A claim for jurisdiction is reinforced where there is a nexus between the claiming State and the location of the crime, the offender, or the victims. In practice, even if said nexus is weak, the apprehending State, or the State to which the offender was surrendered or extradited possesses a much stronger jurisdictional argument, by the mere fact of physical presence therein (→ *Extradition*).

2 Conflicts of inter-State criminal jurisdiction arise where criminal conduct has an extraterritorial element, that is, it implicates in some way more than one State (→ *Extraterritoriality*). In such cases, States usually resolve the conflict through a process of bilateral or multilateral negotiations that culminate in the triggering of their respective bilateral or multilateral extradition treaties (→ *Mutual Legal Assistance in Criminal Matters*). The criminal courts themselves will entertain jurisdiction only where the State in question has adopted explicit domestic legislation providing for an extraterritorial exercise of jurisdiction. Thus, the mere ratification of an international criminal law convention without, however, the subsequent adoption of implementing legislation will not generally be accepted by the national courts of that State as a sufficient enough basis for the assumption of criminal jurisdiction, unless the State adheres to a monist system (→ *International Law and Domestic [Municipal] Law*).

3 The extraterritorial jurisdiction of domestic courts is justified by reference to their domestic laws, relevant bilateral and multilateral treaties, and, exceptionally, by → *customary international law*. The fact that States are endowed with a territory, persons on whom they confer nationality, and national security and global interests necessarily means that it is reasonable for them to assert criminal jurisdiction when a crime is committed on their territory. This entitlement is equally reasonable when a crime is committed by or against one of their nationals, or when, although committed wholly abroad, it is deemed to harm their national security and global interests. It is obvious, therefore, that, given the lack of territory, nationals or special interests akin to those of States by international criminal tribunals, particularly the international criminal tribunals cannot lay claim to these types of criminal jurisdictions (see also → *International Criminal Court [ICC]*; → *International Criminal Tribunal for Rwanda [ICTR]*; → *International Criminal Tribunal for the former Yugoslavia [ICTY]*; → *Mixed Criminal Tribunals [Sierra Leone, East Timor, Kosovo, Cambodia]*). Their jurisdiction is generally known as international criminal

jurisdiction and is delineated solely by the legal instruments that established them, whether UN Security Council resolutions or treaties.

B. Territorial Criminal Jurisdiction

1. Subjective and Objective Territoriality

4 This is the simplest and least contentious form of criminal jurisdiction, even in respect of enforcement. It is generally established by the legislative and judicial practice of States in two alternative, but sometimes overlapping, ways. So-called subjective territorial jurisdiction is asserted by those States in which criminal conduct commences on their territory, although the crime is ultimately consummated, or produces effects, in the territory of a third State.

5 Equally, however, the State in the territory of which the effect was consummated has a legitimate interest in prosecuting the offenders. This interest will be exercised on the basis of so-called objective territorial jurisdiction. Case law suggests that this type of jurisdiction will be entertained where the criminal conduct has caused significant economic or other consequences within the territory of the affected State (*United States v Aluminium Co of America* [1945]; *Mannington Mills Inc v Congoleum Corp* [1979]). This corresponds to the effects doctrine, postulated by US courts, which was initially employed in anti-trust cases targeting cartels that threatened to harm rival US corporations. Following European protests over the far-reaching extraterritorial effects of the doctrine, it was held that jurisdiction under the doctrine had to be reasonable in that it should consider the economic interests of other States and the relationship between the US and the defendant (*Timberlane Lumber Co v Bank of America* [1976]). Objective territorial jurisdiction may also be justified on the basis of the continuing act doctrine, according to which a criminal act is not deemed to have ceased where it still produces results in the territory of a State. Transnational criminal conspiracies (→ *Transnational Organized Crime*) concerned with the trafficking of illicit substances or women and children (→ *Narcotic Drugs and Psychotropic Substances*; → *Human Trafficking*) are by their very nature continuing crimes, and objective territorial jurisdiction is available to affected States (*Director of Public Prosecutions v Doot* UKHL [1973] 1 All ER 940).

2. The Ambit and Notion of Territory for the Purposes of Criminal Jurisdiction

6 When applying both subjective and objective territorial jurisdiction, the concept and ambit of territory is not confined solely to a State's → *land boundaries*. States enjoy absolute criminal jurisdiction for crimes committed anywhere in their → *internal waters*, even if the offence took place on board a foreign → *merchant ship* (Art. 27 (2) UN Convention on the Law of the Sea; → *Maritime Jurisdiction*). Criminal jurisdiction, however, in respect of offences committed in the coastal State's territorial waters (→ *Port State Jurisdiction*; → *Territorial Sea*) on board a foreign merchant vessel is not unlimited. Its exercise is permissible only where it is demonstrated that a crime has disturbed or affected the coastal State's land territory, or that the measures taken were aimed for the suppression of illicit drug trafficking, or that in any event the consent of the flag State (→ *Flag of Ships*) was secured in accordance with Art 27 (1) UN Convention on the Law of the Sea. The jurisdiction of the coastal State in its → *contiguous zone* is limited only to the enforcement of criminal legislation pertaining to fiscal, sanitary, immigration, or customs violations, or continuing offences that commenced on land territory or the territorial sea in

accordance with Art 33 UN Convention on the Law of the Sea. Jurisdiction of this nature in the aforementioned maritime belts does not apply to → *State ships* or → *warships*.

7 On the → *high seas*, the general rule is that only the flag State has jurisdiction over crimes occurring on vessels flying its flag (Art 97 (1) UN Convention on the Law of the Sea). Thus, the relevant part of the judgment in the case of *The Lotus* (→ *Lotus, The*) has now been discredited. The case concerned a high seas collision between a French and Turkish vessel. The → *Permanent Court of International Justice* (PCIJ) justified the exercise of judicial jurisdiction by the Turkish courts by assimilating the Turkish vessel with Turkish territory. The correct rule, as also enshrined in Art 27 UN Convention on the Law of the Sea, is that flag State jurisdiction pertains to high seas collisions (→ *Collisions at Sea*).

8 The flag State jurisdiction principle is also applicable in respect of crimes committed in → *outer space* by → *astronauts*, in accordance with Art 8 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies of 1967 (→ *Moon and Celestial Bodies*).

9 There are three exceptions to flag State jurisdiction for offences committed on the high seas. The first concerns piracy *iure gentium* (→ *Piracy*), which is subject to universal jurisdiction under both → *customary international law* and Art 105 UN Convention on the Law of the Sea. The second relates to stateless vessels found on the high seas, in which case one strand of scholarship believes that the absence of nationality renders that vessel devoid of any national protection (*Molván v Attorney-General for Palestine* United Kingdom Privy Council [20 April 1948] [1948] The Law Reports [Appeal Cases] 351; *United States v Marino-Garcia* US Court of Appeal [11th Cir 9 July 1982] 679 F 2d 1373). Another strand of scholarship, however, refutes this position, although this has not been backed by case law or sustained practice. Finally, a State may waive its exclusive judicial or enforcement jurisdiction under the flag State principle, whether by virtue of bilateral (eg Agreement to Stop Clandestine Migration of Residents of Haiti to the United States [1981] 20 ILM 1198) or multilateral agreements (Art. 8 (2) Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organized Crime [2000], which, however, requires flag State consent at all stages of enforcement). These agreements are evidently confined to particular offences and do not provide a general right of criminal jurisdiction for the intercepting, boarding, or arresting State.

10 Jurisdiction for crimes committed in → *airspace* is regulated by the various specialized anti-terrorist conventions (→ *Terrorism*) relevant to civil aviation (→ *Aerial Incident Cases before International Courts and Tribunals*; → *Civil Aviation, Offences against Safety*). These uniformly provide jurisdiction to the territorial State, the State in which the aircraft was registered, the landing State, and the apprehending State; without excluding other jurisdictional claims (see eg Art 5 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation [1971]). The general rule in such cases is that judicial criminal jurisdiction lies with the subjacent State (*Smith v Socialist People's Libyan Arab Jamahiriya* US Court of Appeals [2nd Cir 10 February 1997] (1997) 113 ILR 534, 541). This subjacent State jurisdiction principle was enforced in respect of the *Lockerbie* incident that involved the destruction of an aircraft in flight above the Scottish town of Lockerbie, despite the fact that the particular terrorist operation implicated numerous jurisdictions (→ *Lockerbie Trial*).

11 The → *premises of diplomatic missions*, including all objects found therein, are not susceptible to the territorial jurisdiction of the host State, in accordance with Art 22 → *Vienna Convention on Diplomatic Relations (1961)* ([‘VCDR’] 500 UNTS 95). This is true not only in respect of judicial and legislative jurisdiction, but also enforcement jurisdiction, unless the government of the sending State has waived its right to inviolability of diplomatic

premises. In cases where the diplomatic premises are seized by criminal elements that threaten the immediate security of the host State and the head of the diplomatic mission does not consent to police action, it is reasonable to assume, even if the VCDR is generally silent on the matter, that the host State is entitled to, at the very least, a basic enforcement jurisdiction. Given the absence of a general rule, the host State's argument would certainly be reinforced if the police action was found to be proportionate to the threat and no object was subsequently removed as evidence or otherwise from the diplomatic premises. Equally, no person endowed with diplomatic immunity under the terms of the VCDR could thereafter be prosecuted in the courts of the host State in relation to said criminal acts perpetrated in the diplomatic premises. The only possible avenue as an alternative to the exercise of judicial jurisdiction is to expel a person enjoying diplomatic immunity as → *persona non grata*.

12 Crimes committed by members of → *military forces abroad* stationed or in transit in the territory of another (host) State are not generally subject to the criminal jurisdiction of the host State because matters of criminal jurisdiction in such circumstances will be covered by → *status of armed forces on foreign territory agreements (SOFA)*. These agreements generally confer primary jurisdiction to the sending State and this is also true in respect of multinational forces stationed abroad (→ *Peacekeeping Forces*), as a matter of customary international law (UN Secretary-General 'Observance by UN Forces of International Humanitarian Law' [6 August 1999] ST/SG-B/199913).

C. Extraterritorial Criminal Jurisdiction

1. Nationality or Active Personality Principle of Jurisdiction

13 The → *nationality* principle confers on States the power to subject their own nationals to judicial and legislative criminal jurisdiction for crimes they have committed abroad. The mere fact of nationality does not give rise to this type of jurisdiction in respect of all crimes committed abroad; rather, it has to be preceded either by particular or general criminal legislation, otherwise it may be deemed to offend the principle against the application of retroactive legislation (→ *Nulla poena nullum crimen sine lege*). The historic origins of nationality jurisdiction can be traced to the prosecution of the crime of treason, which is quintessentially predicated on national allegiance and which is broken when the vow of allegiance is violated. Some courts have held that treason persists even where the assumption of nationality was made possible through fraudulent means (*Joyce v Director of Public Prosecutions* UKHL [1946] AC 347, 359-60).

14 The granting of nationality itself is a matter that befalls the → *sovereignty* of each State, albeit the effects (and possible conflicts arising) from the conferral of nationality in international relations are regulated by international law (→ *Nationality Cases before International Courts and Tribunals*; → *Nottebohm Case* [Liechtenstein v Guatemala] [Second Phase] [1955] ICJ Rep 4, 20). Thus, it is very likely that a person with dual or → *multiple nationality* may be indicted for an extraterritorial offence in one of his countries of nationality but not in another. There exists no general rule for resolving such conflicts and moreover one should not expect the non-prosecuting State (of which the accused is a national) to extradite the accused to the requested State because this would violate the *nulla poena* principle.

15 In practice, civil law States have been most proactive in exercising nationality-based jurisdiction, principally because traditionally they have been the most ardent opponents against extraditing their own nationals. As a result, they were compelled to prosecute every such crime committed abroad. This attitude has now changed to some degree, at least among European States, as a result of the → *European Arrest Warrant* (Council Framework Decision 2002/584/JHA [2002] OJ L190/1), which obliges Member States to extradite their

own nationals in respect of a mandatory list of offences. This led some States to amend their constitutions in order to accommodate the European Arrest Warrant (*General Attorney of the Republic of Cyprus v Konstantinou* [Supreme Court of Cyprus] [7 November 2005] [2007] 44 CMLR 1515), or interpret their constitutions as being compatible with the extradition of nationals (*Avis du Conseil d'État No 368-282* [French Council of State] [26 September 2002]).

16 Increasingly, the contemporary trend in justifying the exercise of nationality jurisdiction by developed States is the avoidance of impunity in respect of certain countries where particular behaviour is either not qualified as criminal, or even if it is the authorities generally fail to prosecute the offenders. This is certainly true with regard to drugs and sexual offences, particularly against children, such as the 2003 United Kingdom's Sexual Offences Act (at section 72).

2. Passive Personality Principle of Jurisdiction

17 This principle focuses on the nationality of the victims and entails the exercise of jurisdiction by the victim's country of nationality. It is generally considered the weakest of all jurisdictional links with the prosecuting State, particularly in those cases where the territorial State is willing to prosecute the accused. In practice it was rarely utilized prior to the advent of contemporary terrorism and the case that is usually cited in respect of its condemnation is the *Cutting* incident (Moore vol 2, 228–42) in which a US citizen was arrested and prosecuted in Mexico in respect of a libel charge against a Mexican national, committed in the form of a book. The book, for which offence was taken, had been authored wholly in the US and the case was resolved through diplomatic means with the US vehemently opposing this form of criminal jurisdiction.

18 Ever since the eruption of terrorist activities directly related to the Palestinian struggle (→ *Palestine*) and later to militant Islam, even the most fervent opponents of passive personality jurisdiction, particularly the US, began to apply it extensively. Given that sophisticated security in the territory of developed nations initially precluded the launching of terrorist attacks thereon, terrorist groups thereafter targeted US and other Western nationals abroad. The victimization of its nationals as a matter of terrorist policy led US lawmakers in the aftermath of the → *Achille Lauro Affair (1985)* (→ *Palestine Liberation Organization [PLO]*) to adopt the Omnibus Diplomatic Security and Antiterrorism Act of 1986, and later others, by which it firmly set out passive personality jurisdiction, not only in terms of law and prosecution, but more importantly as a matter of extraterritorial enforcement (*United States v Yunis* [1988] 903).

19 This principle of jurisdiction is now a consistent and permanent feature of the vast majority of general international criminal law treaties, besides anti-terrorist treaties, such as Art. 5 (1) (c) of 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('1984 UN Torture Convention'; → *Torture, Prohibition Of*). Moreover, it was the principal legal basis for the Spanish extradition request to the United Kingdom in respect of ex-President Pinochet of Chile (→ *Pinochet Cases*; eg *Pinochet Ugarte* [Appeal from the Divisional Court of the Queen's Bench Division] [1998] 3 WLR 1456, 1463). Given its prevalence in contemporary international relations it should not be considered merely as a subsidiary form of jurisdiction. This result has been achieved because the inability of States generally to respond to terrorist crimes taking place on their territory against aliens, coupled with the rapid movement of the culprits across international frontiers before the local authorities have had a chance to react and investigate, renders territorial jurisdiction no more useful than passive personality

jurisdiction. Under such circumstances, the territorial sovereignty of the *locus delicti commissi* (the country where the offence took place) cannot claim to have been violated.

3. Protective Principle of Jurisdiction

20 The protective principle of jurisdiction confers on a State power to prosecute offenders and enforce its laws in respect of extraterritorial acts that threaten or harm its national security interests (→ *International Criminal Jurisdiction, Protective Principle*). This type of jurisdiction allows for a broad unilateral construction of national interests. This varies from destruction of critical infrastructure, including military and diplomatic missions located abroad (destruction of the *USS Cole* by terrorists in Yemen) and it may also involve extraterritorial acts of espionage against the prosecuting country's national interests (*In Re Urios* Cour de Cassation [French Court of Cassation] [15 January 1920] [1919-1922] 1 AnnDig 107; → *Spies*), or those of one of its allies (*Re Van den Plas* Cour de cassation [French Court of Cassation] [28 April 1955] (1955) 22 ILR 205, 207). There is no general consensus as to the location where the harmful effects must be targeted, felt, or perpetrated (in the case of continuing crimes or crimes in motion) before the State concerned can exercise enforcement or other jurisdiction. Some courts have held that the threat can take place on both home soil and abroad (*Nusselein v Belgium* Cour de Cassation [Belgian Court of Cassation] [27 February 1950] [1950] 17 ILR 136). It is reasonable for countries with extensive coastlines and in fear of waves of illegal immigration, smuggling, and trafficking to enforce their relevant laws beyond the outer edge of their contiguous zone, or against their embassies abroad (*United States v Pizzarusso* [1968]; *United States v Bin Laden* [2000] 197; → *Taliban*). The State of → *Israel* even invoked the protective principle, among others, in order to justify its abduction (→ *Abduction, Transboundary*) and prosecution of Eichmann, at a time when it did not possess any statehood (→ *States, Fundamental Rights and Duties; Attorney-General of the Government of Israel v Eichmann* [1961] para 30; → *Eichmann Case*).

21 Although the legislative and judicial jurisdictional elements of the protective principle are not in conflict with general international law, enforcement jurisdiction is evidently problematic. The bombing of US embassies in Kenya and Tanzania in the late 1990s provoked military action by the US against alleged Al Qaeda targets in different parts of the world. The regulation of military action under such circumstances is governed by the → *United Nations Charter's* provisions relating to the use of force (→ *Use of Force, Prohibition Of*) and should not be dictated by the unilateral designation and application of the protective principle. Certainly, the best avenue for exercising the protective principle without recourse to armed force is through mutual legal assistance channels.

4. Universal Jurisdiction

22 The principle of universal jurisdiction is said to apply to two categories of offences: (a) certain crimes that are universally considered heinous and repugnant; and (b) crimes committed in locations that are beyond the exclusive authority of any State. Proponents of the principle claim that any and all countries in the world should possess legislative, judicial, and enforcement jurisdiction over (a) and (b) above, irrespective of any link between themselves and the crime, the accused, or the victim. It is crucial, therefore, and evident that the establishment of universal jurisdiction can only encompass a very limited number of international crimes. The next logical question is how one may identify the range of crimes subject to universal jurisdiction. Two schools have generally made claims over this sensitive matter. The conservative school has relied on treaty-based universal jurisdiction and has thereafter sought either concrete evidence of → *State practice* that justifies expansion by means of customary international law, or has relied on the Lotus case principle, according to which the lack of prohibition in relevant treaties regarding the exercise of a particular jurisdiction entails its acceptance. The expansionist school,

reflected best in the so-called 'Princeton Principles of Universal Jurisdiction', espouses the view that universal jurisdiction has been conferred upon the majority of international crimes by virtue of rapid developments in State practice since the early 1990s.

23 Two crimes are clearly subject to treaty-based universal jurisdiction. The first concerns grave breaches of the provisions of the → *Geneva Conventions I-IV (1949)* (→ *War Crimes*). While grave breaches are clearly susceptible to the exercise of universal jurisdiction by any State, war crimes that do not qualify also as grave breaches do not attract universal jurisdiction, at least under the Geneva Conventions. The other treaty-based international offence that is expressly subject to universal jurisdiction is piracy *iure gentium*, on the basis of Art 105 UN Convention on the Law of the Sea. Both of these offences have been subjected to universal jurisdiction at least since the 19th century under customary international law, each on a different theoretical basis. Flag State jurisdiction and the existence of stateless pirate vessels on the high seas that posed an immediate menace to the merchant vessels of all nations clearly rendered the relevant jurisdictional avenues redundant. Hence, the subjection of piracy *iure gentium* to universal jurisdiction was justified by virtue of the location wherein it is perpetrated, the high seas, which is not subject to the criminal jurisdiction of any State. On the other hand, grave breaches are not perpetrated on locations beyond the jurisdictional reach of States; however, their heinous and repugnant nature sufficed in order for the international community to consent to clad them with universal jurisdiction.

24 Besides grave breaches it is true that there are also other crimes that are equally, if not more, heinous and repugnant, but which are not expressly subject to treaty-based universal jurisdiction. For some this is because no relevant global convention exists, as is the case with → *crimes against humanity*, whereas for others, such as torture, the adoption of the 1984 UN Torture Convention in the midst of the → *Cold War (1947-91)* rendered a possible consensus on universal jurisdiction on such a sensitive issue impossible to reach. Nonetheless, there are two ways of justifying the exercise of universal jurisdiction over these international crimes, absent an express provision to this effect in the treaties in which they are contained.

25 First, none of the relevant conventions expressly prohibit the exercise of universal jurisdiction. In fact, they advocate significantly broad jurisdictional bases for Member States. Art 5 (3) of the 1984 UN Torture Convention stipulates that it 'does not exclude any criminal jurisdiction exercised in accordance with internal law'. This means that if a Member State has adopted domestic legislation subjecting extraterritorial acts of torture to universal jurisdiction, this would be wholly consistent with the other jurisdictional bases contained in the 1984 UN Torture Convention. This observation reinforces the Lotus principle that any jurisdiction is permissible, so long as it is not expressly rejected by treaty or custom and to the extent that it does not clash with a pre-existing rule of international law. In this manner, treaty-based → *universality* may arise not by virtue of express but implied permissibility. The International Court of Justice (ICJ) has noted that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide only obliges States to exercise territorial criminal jurisdiction. Nonetheless, while it does not impose other types of jurisdiction, it does not prohibit them either (→ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case [Bosnia and Herzegovina v Serbia and Montenegro]* [Judgment] [2007] ICJ Rep 43, para. 442; → *Yugoslavia, Cases before the ICJ*).

26 Secondly, an international crime may be subjected to universal jurisdiction by means of customary international law. In practice, our ascertainment of customary universal jurisdiction is derived from judicial determinations. For example, in *Fédération Nationale de Déportés et Internés Résistants et Patriotes and Others v Barbie* (Cour de Cassation [French Court of Cassation] [20 December 1985] 78 ILR 125, 130) the Criminal Chamber of the French Court of Cassation held that crimes against humanity are amenable to universal jurisdiction. In reality, there is very little concrete practice in the sense of national prosecutions under the principle of universal jurisdiction. This fact alone is certainly not determinative of the veracity and evolution of the principle itself because of logistical considerations relating to its applications by national authorities, but it is reason enough to avoid sweeping generalizations (→ *Arrest Warrant Case [Democratic Republic of the Congo v Belgium]* [Judgment] [Dissenting Opinion of Judge Guillaume] [2002] ICJ Rep 3, paras 5–12 which takes a very restrictive view). The customary nature of universal jurisdiction over particular international crimes should best be judged on the basis of *opinio iuris*, rather than *usus*, given that States are able to consent and reject the exercise of this type of jurisdiction by other national judicial authorities. In any event, the prosecution of international crimes by the ICTY, ICTR, and the ICC is not evidence of State practice with regard to offences perceived to fall under customary universal jurisdiction, because these are not national courts.

27 By reason of logistical necessity, at least, there exists no compulsion under international law on States to exercise universal jurisdiction, nor is such jurisdiction granted *ipso facto* in respect of all heinous crimes (*Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya [the Kingdom of Saudi Arabia]* [2006] UKHL 26 per Lord Bingham, para 27).

28 Despite the limited concrete practice, it is worthwhile to attempt to discern those crimes that are subject to universal jurisdiction, other than grave breaches and piracy, by reason of a broad international consensus. This is certainly true of crimes against humanity and → *genocide*, and there seems to be an emerging, albeit not yet crystallized, rule on torture. Some courts have taken the view that the crime of → *aggression* is subject to universal jurisdiction (*R v Jones [Margaret]* UKHL [2007] 1 AC 136), and whatever the merits of that decision there is certainly no consensus that all acts of terrorism produce the same effect. As we have already stated, there is no specific rule that prevents States from assuming universal jurisdiction over these and other international offences, so long as such action does not conflict with the entitlements of other States.

29 From a practical point of view, only a very brave judge would assume universal jurisdiction over an extraterritorial offence, in the absence of any domestic legislation, solely on the basis of customary law. While national courts regularly import customary principles into national proceedings, this is only undertaken in the fields of private and public law, but not criminal law, because the latter requires specificity and legal certainty. Thus, the recognition by a State of the customary nature of universal jurisdiction over crime X, but without any implementing legislation, does not mean that the criminal courts of this country can assume this type of jurisdiction over an accused person.

D. Criminal Jurisdiction: Three Salient Conflicts

30 The primary legitimate bar to the exercise of criminal jurisdiction by national courts is the principle of immunity (→ *Immunities*). This is a procedural impediment to criminal jurisdiction and persists as such as long as the immunity under consideration continues to shield the accused person. As a result, the principle of immunity does not extinguish the crime or the liability of the accused; thus, when the accused no longer enjoys immunity, he or she may legitimately be subjected to the criminal jurisdiction of any interested States. In particular, persons enjoying immunity *ratione personae*, such as → *Heads of State* or

Government and foreign ministers (→ *Heads of Diplomatic Missions*; → *Heads of Governments and Other Senior Officials*) cannot be prosecuted for any international crime before national courts (*Arrest Warrant of 11 April 2000 [Democratic Republic of Congo v Belgium] [Judgment]* [2002] ICJ Rep 3, paras 47–55). The scope of immunity *ratione materiae* has undergone a process of considerable limitation since the mid 1990s, in the sense that criminal activity is no longer considered a public act and thus the perpetrators of such acts can be prosecuted before national courts (*R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet Ugarte (No 3)* UKHL [1999] 2 WLR 827, 880–887, 890–902). As already stated, the UN Security Council through a resolution, or the community of States via multilateral treaty may circumvent the immunity restriction and indict such persons before specially constituted international tribunals.

31 The second bar to the exercise of criminal jurisdiction by national courts relates to possible concurrent jurisdiction enjoyed by international criminal tribunals. The granting of criminal jurisdiction to international tribunals does not extinguish the relevant jurisdiction of national courts. Unlike the lack of hierarchical rules resolving jurisdictional conflicts between national criminal courts, concurrent conflicts of criminal jurisdiction with international tribunals are usually settled by reference to express provisions in the instrument that created them. In the case of the ICTY, it has been conferred primacy over national courts in accordance with Art. 9 (2) of its Statute. The ICC, on the other hand, enjoys concurrent, albeit secondary jurisdiction, vis-à-vis ICC Member States on the basis of the so-called principle of complementarity (→ *International Criminal Courts and Tribunals, Complementarity and Jurisdiction*), as enshrined in Art 17 (1) (a) Rome Statute of the International Criminal Court ('Rome Statute'). This means that in practice national courts enjoy primacy of jurisdiction with respect to crimes falling within the ambit of the ICC. As a result, the ICC may only prosecute where the State enjoying jurisdiction surrenders the accused person (Art 14 (1) Rome Statute), or where that State is genuinely unable or unwilling to prosecute (Art 17 (1) (a) Rome Statute).

32 In every case, the UN Security Council may dispense with complementarity and confer primary jurisdiction to the ICC (Art 13 (b) Rome Statute; UNSC Res 1593 [2005] [31 March 2005], in which the Council referred the Darfur situation to the ICC Prosecutor; → *Sudan*). Although resolutions of the UN Security Council are binding on UN Member States, it is the subject of academic debate whether, in the absence of specific names from the resolution, the relevant State may invoke the principle of complementarity in order to avoid surrendering the accused.

33 Finally, it is queried whether national courts may entertain their criminal jurisdiction in respect of accused persons that have suffered extraterritorial abduction by agents of the forum State. This issue should be approached without sweeping generalizations, nor even definitive claims in respect of the practice of individual States, given its political ramifications. Despite the fact that Israel paid → *compensation* to Argentina for damage (which gave rise to → *State responsibility*) caused as a result of the abduction of Adolf Eichmann from the latter's territory, the Israeli Supreme Court confirmed the legality of the Jerusalem District Court's jurisdiction (*Attorney-General of the Government of Israel v Eichmann* [1962]). The current position of the US is depicted in the judgment of the US Supreme Court in *United States v Alvarez-Machain* (1992; especially 2197), where it was held that unless a bilateral extradition treaty prohibited abductions, there was no rule in customary international law that prevented the prosecution of an accused before a national criminal court once brought to it in this manner (*male captus bene detentus* principle). English law takes a wholly different approach. In *Bennett v Horseferry Road Magistrate's Court* (UKHL [1993] 3 All ER 138, 150), the House of Lords pointed out that if the national enforcement authorities had acted in serious abuse of their powers the courts could stay proceedings, because the maintenance of the → *rule of law* ought to prevail over the public

interest in the prosecution of the crime. It should be noted that this is an evolving concept and the courts are willing to allow for exceptions either way on the basis of the facts of each case.

Select Bibliography

- JB Moore (ed) *A Digest of International Law* vol 2 (Government Printing Office Washington 1906).
- H Lauterpacht 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens' (1947) 9 CLJ 330-48.
- FA Mann 'The Doctrine of Jurisdiction in International Law' (1964) 111 RdC 1-162.
- DS Wijewardane 'Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces' (1965-66) 41 BYIL 122-97.
- M Akehurst 'Jurisdiction in International Law' (1972-73) 45 BYIL 145-257.
- D Oehler *Internationales Strafrecht* (2nd edn Heymann Köln 1983).
- KC Randal 'Universal Jurisdiction under International Law' (1988) 66 TexLRev 785-841.
- GR Watson 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 YaleJIntlL 41-84.
- GR Watson 'The Passive Personality Principle' (1993) 28 TexIntlLJ 1-46.
- I Cameron *The Protective Principle of International Criminal Jurisdiction* (Aldershot Dartmouth 1994).
- R Wolfrum 'The Decentralised Prosecution of International Offences through National Courts' (1994) 24 Israel Yearbook on Human Rights 183-199.
- ALT Choo 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' (1995) Crim LR 864-874.
- G Aldrich 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia' (1996) 90 AJIL 64-69.
- LH Brown 'The Extraterritorial Reach of the US Government's Campaign against International Bribery' (1999) 22 HastingsIntl&CompLRev 407-522.
- D Turns 'Pinochet's Fallout: Jurisdiction and Immunity for Criminal Violations of International Law' (2000) 20 Legal Studies 566-591.
- K Ambos and E Malarino (eds) *Persecución penal nacional de crímenes internacionales en América Latina y España* (Konrad-Adenauer-Stiftung St Augustin 2003).
- E Voyiakis 'Access to Court v State Immunity' (2003) 52 ICLQ 297-332.
- G Werle *Völkerstrafrecht* (Mohr Siebeck Tübingen 2003).
- L Reydamas *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP Oxford 2004).
- A Poels 'Universal Jurisdiction in Absentia' (2005) 23 NQHR 65-84.
- K Ambos *Internationales Strafrecht* (2nd edn Beck München 2008).
- C Ryngaert *Jurisdiction in International Law* (OUP Oxford 2008).
- I Bantekas 'The Exercise of Criminal Jurisdiction' in I Bantekas, *International Criminal Law* (Hart Oxford 2010) 329-54.

Select documents

- Alien Tort Statute 28 United States Code § 1350.
- Agreement to Stop Clandestine Migration of Residents of Haiti to the United States (1981) 20 ILM 1198.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3.

Attorney-General of the Government of Israel v Eichmann (Judgment) District Court of Jerusalem (12 December 1961) 36 ILR 5.

Attorney-General of the Government of Israel v Eichmann (Judgment) Supreme Court of the State of Israel (29 May 1962) 36 ILR 277.

Avis du Conseil d'État No 368-282 [French Council of State] (26 September 2002).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 112.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (with Final Act of the International Conference on Air Law Held under the Auspices of the International Organization at Montreal in September 1971) (concluded 23 September 1971, entered into force 26 January 1973) 974 UNTS 177.

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States [2002] L190 OJ 1.

The 'Lotus' [France v Turkey] PCIJ Reports Series A No 10.

Mannington Mills Inc v Congoleum Corp United States Court of Appeals (3rd Cir 3 April 1979) 595 F 2d 1287.

Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub L No 99-399 Statutes at Large 853 (1986).

Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) GAOR 55th Session Supp 49, 65.

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

Sexual Offences Act (20 November 2003) (United Kingdom).

Timberlane Lumber Co v Bank of America United States Court of Appeals (9th Cir 27 December 1976) 549 F 2d 597.

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies (signed 27 January 1967, entered into force 10 October 1967) 610 UNTS 205.

United Nations Convention against Transnational Organized Crime (signed 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209.

United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

United States v Aluminium Co of America United States Court of Appeals (2nd Cir 12 March 1945) 148 F 2d 416.

United States v Alvarez-Machain Supreme Court of the United States (15 June 1992) 112 S Ct 2188.

United States v Bin Laden United States District Court for the Southern District of New York (13 March 2000) 92 F Supp 2d 189.

United States v Pizzarusso United States Court of Appeals (2nd Cir 9 January 1968) 388 F 2d 8.

United States v Yunis United States District Court for the District of Columbia (12 February 1988) 681 F Supp 896.

UNSC 'Statute of the International Criminal Tribunal for the Former Yugoslavia'
UNSC Res 827 (1993) (25 May 1993) SCOR 48th Year 29.
UNSC Res 1593 (2005) (31 March 2005) SCOR (1 August 2004-31 July 2005) 131.