

**Choosing the Right Forum:
Competing Jurisdictional Competences in the Sphere of
International, Transnational and National Crimes**

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Abstract

Legislative jurisdiction is held concurrently by States. There will be occasions when more than one State has established a lawful justification for criminalising the same set of conduct. If the States cannot agree which of them should proceed, there will be a dispute between them which the rules of jurisdiction themselves cannot resolve. Usually, by the time a dispute has arisen, it will concern the facts of a particular prosecution, with one State claiming that it is the more appropriate legal system to try the crime which has been lawfully established in each system. 'Appropriateness' will usually be asserted by reference to a range of factors, including the territorial locus of the conduct, the presence of key actors and the interests involved. The thesis argues that international law has established no standards of sufficient certainty to provide a practical resolution to many of the conflicts which will arise. There is little customary international law can do to resolve conflicts of jurisdiction and many solutions may serve only to mitigate the consequences between States of a dispute about criminal jurisdiction. However, analogies between other areas of law and this one can be drawn, and institutions exist which may, given the right circumstances, be resorted to, to help serve to ease differences which arise about the exercise of criminal jurisdiction. Comity, rather than as yet unrealised rules, may encourage sufficient respect and cooperation between legal systems.

*To my beautiful family and whanau, both near and far
'Because without them we are nothing'*

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Thesis Introduction

1. Competing Jurisdictions

The function of the criminal law is to identify the conduct (omissions as well as acts) to which the State attaches penalties. In order for a State to impose sanctions on an individual for his or her criminal conduct, a State will first of all need to have established legislative (also known as ‘prescriptive’) jurisdiction over the conduct in question. This means it must have adequate national criminal laws in place. Next, the State will need to be empowered to exercise enforcement (also known as ‘executive’) jurisdiction. To do this, it will need to have resources and personnel available to investigate and arrest the suspect. Finally, the State will need to have a functioning judicial system in order to bring the case before an appropriate national court of law. Without these three features, crime may not be prosecuted.

Criminal conduct is predominately carried out within a defined territory, so jurisdiction is usually defined territorially as well.¹ However, features of the criminal conduct may challenge the strict territorial notion of crime, such as the identity of the perpetrator or the victim and the interests affected by the conduct, either narrow State interests or interests of a wider group of States. Furthermore, the crime itself may be complex meaning that elements of the criminal conduct took place in the territory of more than one State. Criminal conduct may consequently be of concern to more than one State. In order for ‘concern’ to translate into action, a State needs to be have in place legislative and judicial jurisdiction, and have the means at its disposal to exercise enforcement jurisdiction. The potential for problems arises where more than one State considers itself to be sufficiently concerned and wishes to assert

¹ See Chapter 1.

its legislative jurisdiction. Provided each State has extended the ambit of their national legislative jurisdiction to cover conduct of both an extraterritorial and territorial nature, and provided jurisdiction over the conduct in question is established using one of the recognised bases of extraterritorial jurisdiction, each claim will be as valid as the next.²

Legislative jurisdiction is held concurrently by States. All claims to legislative jurisdiction are formally equal and no State has the power to claim absolute priority for its national laws. The concurrent nature of legislative jurisdiction has been viewed as a lamentable aspect of the customary based jurisdictional regime. In 1964 Mann wrote 'it is no doubt evidence of the rudimentary state of international law and a matter for regret that international jurisdiction is almost always concurrent'.³ Perhaps, ideally, territorial jurisdiction (supplemented by nationality based jurisdiction) would be enough, backed up by comprehensive extradition laws. But States have not viewed these bases alone to be sufficient to pursue their criminal law objectives and hence a practice of establishing extraterritorial legislative jurisdiction to fill a perceived 'gap' has evolved. Nonetheless, some good policy arguments in favour of the flexibility that a concurrent approach allows can be made, with Zeller arguing that 'concurrent criminal jurisdiction is not only an inevitable phenomenon – it is also a desirable one'.⁴ In terms of the criminal law, in casting the legislative net wide, the view is that no offender should be able to escape prosecution for his or her crimes.⁵ This way, complicated transnational criminal activity or even ordinary 'national' crimes which, by dint of circumstances, take on a 'transboundary' aspect should always be able to be prosecuted. International crimes, considered to be of concern to all States by virtue of their particularly

² See Chapter 1.

³ FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 1–162, 10.

⁴ SZ Zeller, 'Concurrent Criminal Jurisdiction in the International Sphere' (1981) 16 *Israel Law Review* 40–74, 44. Also discussing jurisdiction in the public international law sphere, see Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187–239, especially 194–200.

⁵ See Chapter 2.

serious character, may also benefit from such an approach.⁶ A related idea, whose effectiveness may vary depending on the nature of the crime involved, lies in the potential deterrent effect – or ‘no safe havens’ notion – that encouraging concurrently held legislative jurisdiction can foster. Knowing that all, or at the least a majority, of States criminalise certain conduct could help reduce its prevalence. For these reasons, exclusivity of legislative jurisdiction has not been pursued.⁷

In contrast to legislative jurisdiction which may extend extraterritorially, enforcement jurisdiction is strictly territorial. National authorities only have the power to investigate criminal conduct, detain and question suspects, gather and retain evidence, take witness testimony within their own territorially defined jurisdiction or sphere of competence. Any investigative measures that require executive actions to be executed abroad require the consent, or assistance, of the authorities in that State. Assistance may or may not be forthcoming, and this in itself can have a considerable impact on whether or not a State may exercise judicial jurisdiction in the end.⁸ Following the lawful execution of enforcement jurisdiction, the national prosecuting authorities may decide there are sufficient grounds to bring a prosecution, ie to assert judicial jurisdiction. Except for very rare occasions where a court sits abroad, perhaps due to security concerns in the home State or to satisfy conditions imposed by a State that also holds legislative jurisdiction and/or assisted the State in some way, judicial jurisdiction is likewise territorially defined.

The fact that legislative jurisdiction is held concurrently can lead to conflicts of jurisdiction between concerned States. The type of conflicts that may arise will usually do so on one of two levels. First, at the level of prescription itself, a State may oppose another State’s original act of prescribing certain conduct, ie because either they do not consider the conduct over

⁶ On the different categories of crimes considered in this thesis, see Part II, below.

⁷ For early treatment of themes general to the topic of concurrency of jurisdictions in the criminal sphere, see Zeller (n 4).

⁸ See Chapter 3.

which legislative jurisdiction is asserted to be of a criminal character or because jurisdiction has been established on a controversial/novel base of jurisdiction. Second, States may well be in agreement as to the wrongfulness of the conduct and the need to prescribe that conduct in national laws, but not about the application of legislative jurisdiction in a particular case. In other words, potential problems arise where more than one State is minded to apply its established legislative jurisdiction and exercise judicial jurisdiction and one (or even each) State feels it has a stronger claim and considers itself to be the more appropriate judicial jurisdiction. It is this latter type of conflict that is the primary concern of this thesis.

In shifting from considerations regarding the lawful establishment of jurisdiction in the first place to resolving conflicts between what are now established jurisdictions at the judicial jurisdiction stage, the nature of the inquiry alters from one of principle to one of fact. If the States concerned cannot agree as to which one should proceed with exercising judicial jurisdiction, there will be a dispute between them which rules cannot resolve because there is no hierarchy between the bases of jurisdiction on which legislative jurisdiction is founded.⁹ Relevant facts that may be put forward to support a claim of a superior jurisdictional link could include, *inter alia*, the territorial locus of the conduct, the location of the defendant, the presence or availability of witnesses, the likely timeliness of any trial, the costs involved, the penalty to be imposed and where sentence may be served.

Another consideration of quite a different kind may also need to be taken into account. The suspect or defendant in the criminal process has hitherto been rather sidelined when attempts are made to resolve differences between States about criminal jurisdiction. In actual fact, he or she may have the greatest interest of all in where the trial takes place. Increasingly, defendants are trying to enlist human rights law as a ground for being put on trial in one State rather than another or, conversely, not being tried in one State rather than another. Not only

⁹ See Chapter 1.

does this add another layer of complexity to the question of how to resolve conflicts of jurisdiction, but individuals are raising these issues in national courts and in international human rights tribunals with a degree of success. The very fact that these questions are being asked by defendants is an indication that there is a perceived injustice in the manner by which conflicts of judicial jurisdiction are being resolved at present.¹⁰

International law has not established any standards of sufficient certainty to provide a practical resolution to many of the conflicts which will arise. As Berman rightly observes, ‘One of the greatest paradoxes of current international practice is that, in its drive to deal effectively (or at least comprehensively) with stigmatized abuses, it has deliberately encouraged the greatest multiplicity of national jurisdictions having parallel competence, without creating any rules for regulating priorities between them’.¹¹ Currently, which State ends up exercising judicial jurisdiction may have as much to do with a particular combination of (un)fortuitous circumstances as anything more principled. ‘Chance factors’ such as which State happens to have custody of the accused at a particular point in time may have a greater influence than any objective determination of which judicial jurisdiction represents an appropriate forum. The fact that judicial chaos does not ensue at present is less a reflection of the efficacy of the processes currently engaged,¹² and more to do with the overall lack of investigations and prosecutions instigated in national jurisdictions, in spite of adequate legislative jurisdiction being in place in many States. This will not, however, always be the case. To mention simply two factors, the increasing concern with international crimes and the rising prevalence of transnational crimes, especially terrorism, have meant that there are more conflicts of jurisdiction and that these disputes are about more serious matters than was once the case. Furthermore, the pursuit of non-impunity in respect of international crimes is a

¹⁰ See Chapter 4.

¹¹ Frank Berman, ‘Jurisdiction: The State’ in Patrick Capps, Malcolm Evans, Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003) 3–15, 13.

¹² See Chapter 4.

factor which militates in favour of effective prosecutions, sometimes on extended extraterritorial bases of jurisdiction. The seriousness of both international and transnational criminal conduct may raise the stakes for States, with conflict increasingly likely where fundamental interests or sovereignty are deemed to be in the balance.

2. The Categories of Crimes Investigated

This thesis is concerned with jurisdiction and jurisdiction over criminal conduct in particular. This area of inquiry is distinct from jurisdiction in other areas of international law because it concerns (at least) three principle actors, two (or more) States and one (or more) persons suspected of committing the crime over which States seek to assert their legislative, enforcement and judicial jurisdiction. The individual(s) concerned bear rights by virtue of national, regional and international human rights law and may seek to challenge the potential or actual exercise of judicial jurisdiction. Increasingly, they may be considered as subjects rather than mere objects of the proceedings.¹³

Three principle categories of crime are explored in this thesis: national (or ordinary) crimes, transnational crimes and international crimes. Boister has suggested the following tripartite distinction to distinguish first international crimes, then transnational crimes and, last, national crimes:

[V]ery shocking or state-implicated harmful conduct which threatens general human interests has to be suppressed by humanity acting as a whole. Going down the scale, harmful conduct that crosses borders or threatens cross-border morality may only require affected states to act together. Finally, harmful conduct that only affects interests within states can be dealt with adequately by states acting alone.¹⁴

¹³ See Chapters 3, 4 and 5. See also Albin Eser, Otto Lagodny, Christopher L Blakesley (eds), *The Individual as Subject of International Cooperation in Criminal Matters: A Comparative Study* (Nomos Verlagsgesellschaft 2002) v.

¹⁴ Neil Boister, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law* 953–976.

Despite the fact that this typology appears to place the three categories of crime in some sort of hierarchy of seriousness, which would be artificial to say the least, the distinction is useful in itself and provides a helpful framework to begin thinking about the different implications and challenges involved in suppressing each type of criminal activity.

‘Ordinary’ crimes are only considered to be crimes under national law and are normally territorially defined. They are seldom of concern to other States unless their nationals are implicated either as victims or perpetrators. Conflicts of jurisdiction between States of type envisaged in this thesis are possible, but unlikely. Ordinary crimes are not however expressly excluded from the inquiry as transborder aspects may mean considerations not normally attaching to this type of criminal conduct become relevant. In respect of the other two categories of criminal conduct, there are important differences between so-called ‘international’ and ‘transnational’ crimes, differences which have some bearing on the approaches taken by States in respect of establishing legislative jurisdiction and the way the criminal conduct is perceived.¹⁵ Starting first with the points of overlap, for the reasons outlined in Part I, the criminal conduct may be of concern to more than one State and entail the potential for conflicts of jurisdiction. This is because, unlike ordinary crimes, jurisdiction may be established over both international and transnational crimes on a range of extraterritorial bases by virtue of treaty or customary international law.¹⁶

Key differences emerge in respect of the character of the criminal conduct, although differences in respect of the jurisdictional aspect and any ensuing conflicts of judicial jurisdiction are less pronounced. International crimes are of concern to all States, whereas transnational crimes are only of concern to those States that have ratified the relevant

¹⁵ Setting out the core differences, see Boister (n 14) 961–974; Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) 13–23.

¹⁶ See Chapter 2.

criminalisation treaty.¹⁷ Broadly speaking, international crimes consist of conduct that is prohibited under international law (usually customary international law, but also treaty in some instances) irrespective of whether or not the conduct has also been criminalised under the national laws of any State. The prohibited character of the conduct constituting an international crime applies the world over and all individuals are deemed to have notice of this fact for the purposes of prosecution. Individual criminal responsibility is engaged directly under international law, although to be able to prosecute most States require some form of transposition of international law into national law. In contrast, transnational criminal conduct is only classified as constituting a crime once a State puts in place the necessary domestic legislation to implement obligations arising under international law by way of a multilateral treaty (no transnational crime has yet attained recognition under customary international law although the crime of torture may reach this stage at some point in the not too distant future). Boister writes, transnational criminal law 'is an indirect system of interstate obligations generating national penal laws'.¹⁸ Transnational criminal law does not set out to establish a single, harmonised regime. Each crime recognised under a multilateral treaty has its own discrete regime and a distinct set of obligations for States parties. Transnational criminal law adopts national law procedures so discrepancies may arise, even if the treaty obligations are fully complied with. These types of crimes are an exercise in cooperation between national legal orders. Criminal responsibility flows from treaty obligations transposed into national laws, subject to the jurisdictional and temporal limits set out in the latter.

The clear distinction between international and transnational crimes is relatively new. The advent of the International Criminal Court (ICC) has been credited with providing the

¹⁷ 'Concern' is used here in a legal sense: is the conduct of sufficient concern to a State so as to trigger an assertion of legislative jurisdiction? States may be morally concerned about criminal conduct, but legally obliged to do anything about it.

¹⁸ Boister (n 14) 962.

catalyst for this. Prior to that time distinguishing between the two was not considered especially significant.¹⁹ The judicial forums for dealing with both up until this point were one and the same: national courts and the laws to be applied and the procedures to be used were those of the domestic legal orders of States. (An exception can be noted in respect of the establishment of international criminal tribunals of limited jurisdiction in the 1940s and 1990s, designed to prosecute a small category of crimes on a geographically and temporally restricted basis). Cryer et al. identify that, ‘until the establishment of the international courts and tribunals in the 1990s, the concept of international criminal law tended to be used to refer to those parts of a State’s domestic criminal law which deal with transnational crimes, that is, crimes with actual or potential transborder effects. This body of law is now more appropriately termed “transnational criminal law”.’²⁰ Once the ICC was established the broadly accepted, albeit somewhat ill-defined, notion of ‘international crime’ became firmly divided into those crimes coming under the jurisdiction of the ICC (namely, genocide, war crimes, crimes against humanity and aggression) and the rest, eg torture, certain acts of terrorism, cybercrime, drug and human trafficking. The term ‘international crime’ is now understood to encompass only those crimes coming under the jurisdiction of the ICC and the definitions now in general currency are those provided for in the Court’s Statute.²¹ This has as much to do with pragmatics as anything else: categorising the narrow group of crimes coming under the jurisdiction of the ICC as international crimes was done simply because no other crimes are currently within the jurisdiction of any international courts or tribunals.²² It was deemed to be useful to have a specific name to distinguish these crimes from all those having an *inter*-national dimension but which cannot be prosecuted before the ICC.

¹⁹ Boister (n 14) 961.

²⁰ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010) 5–6.

²¹ Although piracy is the archetypal ‘international crime’ and is accepted by all States as attracting universal jurisdiction. It is not, however, under the jurisdiction of the ICC.

²² Cryer et al. (n 20) 5.

The distinction between international and transnational crimes has implications in respect of whether or not States are obliged or merely permitted to establish legislative jurisdiction over the particular criminal conduct in question and also the extent to which extraterritorial jurisdiction is recognised.²³ However, for the purposes of this thesis the majority of the issues related to identifying, managing and resolving conflicts of jurisdiction are the same irrespective of whether the criminal conduct is more appropriately classified as constituting a ‘transnational’ or an ‘international’ crime.

3. The Forum Question

Conduct may derive its criminal character from treaty or customary international law (or, in the case of ordinary crimes, national legal norms and customs). No matter the source, having in place adequate national criminal laws that establish legislative jurisdiction over the conduct in question is essential if a State wishes to be in a position to exercise judicial jurisdiction.²⁴ This basic requirement is rooted in the principle of legality, the underlying notion being one of ‘fair notice’. The imposition of criminal liability must follow from laws which indicate what is forbidden and that are presented in such a way that individuals may go about their lives knowing the limits imposed by the criminal law. Having a body of criminal law that is clear and accessible is considered essential in most States and the principle is formally enshrined in several national constitutional texts.

National criminal laws mean national prosecutions. The machinery used to apply legislative jurisdiction is located in States themselves. Enforcement jurisdiction is carried out by national prosecutors and law enforcement agencies. Judicial jurisdiction is invoked through national courts by members of the State’s judiciary. While the conduct being investigated or

²³ See Chapter 2.

²⁴ See Chapter 3.

prosecuted may constitute an international or transnational crime, the procedures and resources are national in character. There is no set of criminal procedures established under international law that States may apply when the conduct in question gains its criminal characteristics from international law. International law is silent on the practical aspects of exercising criminal jurisdiction.

In addition to national criminal jurisdiction, international crimes may also be prosecuted by the permanent ICC or an ad hoc international criminal tribunal established to meet a temporary need for international criminal jurisdiction when national criminal jurisdictions are unavailable or ineffective. The relationship between national and international criminal jurisdictions is not a primary concern of this thesis, although the effect the existence of ICC has on encouraging States to extend legislative jurisdiction and exercise judicial jurisdiction is considered indirectly. In contrast, until such a time as any of individual crimes classified as transnational crimes are brought within the jurisdiction of the ICC and/or given their own permanent court or tribunal with a limited jurisdictional mandate, the only forum available to prosecute this category of crime is national courts. Not just any national court will be able to do this. Generally, the States seeking to exercise judicial jurisdiction will be States parties to the relevant criminalisation treaty, although there is probably no prohibition on a non-State party who has established relevant legislative jurisdiction from doing so.

The concern of this thesis is the national prosecution of international and transnational crimes, along with those ordinary crimes that have taken on a transboundary element for whatever reason. Recognising the duality of criminal jurisdictions for international crimes, and the fact that conflicts of jurisdiction may well arise at a 'vertical' level between the national criminal jurisdictions of States and the international criminal jurisdiction of an international court or tribunal, the thesis focuses on the exercise of judicial jurisdiction at the

national level and the corresponding ‘horizontal’ conflicts of jurisdiction that may come about as a result of the plurality of available national criminal jurisdictions.

National investigations and prosecutions carry many benefits. For example, trials may take place in the locality where the majority of the criminal conduct occurred or in the place where the defendant normally resides so he or she is not separated from family members or removed from a familiar social context. The victim(s) of the criminal act or omission may be close by and thus able to witness the unfolding justice process and its resolution. Where vital State interests are affected by the criminal conduct in question, the exercise of judicial jurisdiction in that State may seem particularly appropriate. These considerations apply equally to national, transnational and international crimes, although the political stakes and national emotion may be higher in respect of some criminal conduct rather than others. But as Part I of this introduction highlighted, deciding whose interests should prevail, which concerned State should be entitled in the end to exercise its judicial jurisdiction will require a balancing act of a whole host of considerations in order to determine which State’s courts can be considered *an* (if not *the most*) appropriate forum. It is the process of arriving at this decision which lies at the heart of this thesis.

4. Thesis Roadmap

This thesis proceeds in five Chapters. Chapter One sets out the basic parameters for the inquiry, exploring the scope and reach of national jurisdiction permitted under international law, working through the bases of jurisdiction recognised under customary international law on which States are permitted to lawfully establish legislative jurisdiction. It discusses the *Lotus* case and territorial and extraterritorial bases of jurisdiction, focusing in particular on the aspects which may serve to stimulate conflicts of jurisdiction between States. Chapter Two builds on the previous Chapter, teasing out the nature and extent of the obligations or

powers to establish legislative jurisdiction and exercise judicial jurisdiction that are brought to bear on States under customary international law or treaties for international and transnational crimes. It looks in particular at the differences between jurisdiction established as of right and jurisdiction established as of duty, along with the scope and status of the maxim *aut dedere aut judicare*. Chapter Three turns to the practicalities involved with asserting legislative jurisdiction over criminal conduct, and especially when it may be of concern to more than one State. Three main ‘considerations’ are worked through. First, it looks at the parameters and requirements of national legislative jurisdiction and the limitations which are brought to the fore by any insufficiencies in this domain. Second, the requirements of, and need for, judicial assistance in order for a State to successfully invoke judicial jurisdiction are explored. This ‘help’ comes in the form of mutual legal assistance and extradition and is dependent on the existence of a bilateral relationship and certain criteria being satisfied in both the requesting and the requested States. Third, potential restrictions on the exercise of judicial jurisdiction emanating from the fields of international human rights and immunities are identified. At the extreme, these may serve to prevent a prosecution from happening at all, or at the least from it taking place in a particular State at a particular time. The focus shifts in Chapter Four to how the issue of conflicts of jurisdiction have been approached in the national, regional and international arenas. The inquiry explores national and international jurisprudence that deals with the topic of ‘appropriate forum’ broadly construed as well as formal measures established at the bilateral and multilateral levels, designed to address squarely the issue of jurisdictional conflicts. It also looks briefly at the exceptional approach adopted to resolve the conflict of legislative jurisdiction that plagued the *Lockerbie* affair and explores how private international law deals with the question of ‘(in)appropriate forum’, both at the level of comity and legal regulation. The final Chapter, Chapter Five, partners with the previous one. Focusing on approaches grounded in

comity and rules, it sets out a modest set of proposals as to how the current systems and approaches could be improved and extended, and where new avenues for development might exist. It looks particularly at general approaches but also identifies methods of dealing with conflicts of jurisdiction in respect of particular transnational crime treaty regimes and international crimes as a discrete category in itself, showing how both sets of crimes could potentially enlist the assistance of existing institutional structures. The thesis concludes that while the scope for innovation at a truly international level is limited, smaller scale initiatives may work particularly well. States themselves are powerful actors in this domain, with a marked interest in ensuring conflicts of jurisdiction are resolved swiftly and in a satisfactory manner. Consequently, harnessing the core tenets of comity and especially the private international law doctrine of *forum (non) conveniens*, could provide a boost in the right direction in anticipation of the future development of rules of international law.

Chapter 1

The Basis of National Criminal Jurisdiction

The power to define crimes and proscribe certain conduct under national law is a right belonging to States, executed by their agents, the legislators, who set out in national laws and codes the conditions which must be met in order for the conduct to be considered ‘criminal’. In common law jurisdictions, this power was also once attributed to the judiciary as well, but it is now an exclusively legislative exercise. Alongside substantive considerations and *mens rea* requirements, the legislator may also choose to specify whose criminal conduct (act or omission) is addressed, along with where it must have taken place, and against whom it must be directed. The power to do all this is a sovereign right of States; however, in practice no State exercises this power to the full extent that it could, especially when this would involve the prescription of acts or omissions committed extraterritorially. This is because each State is entitled to benefit from the presumption that other States will not interfere with its sovereign rights: in this case, its right to exercise exclusive jurisdiction over its own territory.

Exclusive territorial jurisdiction does have its limits, however. There will be times when an extraterritorial assertion of legislative jurisdiction may become desirable or necessary. In order to facilitate the extension of legislative jurisdiction extraterritorially, specific ‘principles’ or ‘bases’ of jurisdiction that go beyond territoriality have evolved under customary international law.¹ States may use these principles to extend their legislative jurisdiction in an extraterritorial direction. Having in place a set of recognised principles of

¹ The terms ‘principles of jurisdiction’ and ‘bases of jurisdiction’ are used interchangeably in this thesis, depending on the context where one term may be more appropriate grammatically than the other.

jurisdiction that States can use should reduce the opportunity for disputes on the basis that a State's legislative jurisdiction is unlawful.

Despite significant projects such as the Harvard Research's Draft Convention on Jurisdiction with Respect to Crime,² no general codification of the principles on which States may found their legislative jurisdiction has taken place. Nor is there any formal hierarchy recognised between the principles of jurisdiction. It remains the fact that all jurisdictional claims that rely on any one of the internationally recognised bases of jurisdiction are equally valid formally speaking; legislative jurisdiction is held concurrently by all States.³ Where there is a lawful jurisdictional base, States may put in place the necessary national frameworks to criminalise the particular conduct in their own legal orders.

This Chapter is concerned with the scope and reach of national criminal jurisdiction under international law generally and the bases or principles of jurisdiction that may be invoked by States to justify their assertion of criminal jurisdiction, either territorially or extraterritorially. It proceeds in two parts. Part I addresses the principle of sovereign equality, along with the role of rules of international law, and discusses any fundamental restrictions that such rules may place on the establishment of legislative jurisdiction and the exercise of judicial jurisdiction. Part II highlights the necessity of ensuring there is adequate 'linkage' between the State wishing to assert its legislative jurisdiction and the criminal conduct in question. It also runs through the bases of jurisdiction, exploring their rationales and the points of contact, overlap and potential for collision between these principles.

² Harvard Research, 'Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law – Supplement* 435–652.

³ SZ Zeller, 'Concurrent Criminal Jurisdiction in the International Sphere' (1981) 16 *Israel Law Review* 40–74.

1. The Reach of Jurisdiction

Sovereignty and jurisdiction are inextricably entwined. The nature of criminal activity means, however, that the two may not always converge exactly. The establishment of legislative jurisdiction and any ensuing assertions of judicial jurisdiction are consequently of prime concern to States where extraterritorial aspects are involved. This section explores the limits, if any, imposed by international law on jurisdiction.

1.1. Jurisdiction & the Sovereign Equality of States

In the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States it was set out that ‘All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature’.⁴ One of the fundamental aspects of the sovereign equality of States is the right of each State to exercise exclusive jurisdictional competence over its territory and the peoples residing within it, combined with the duty of non-intervention in the corresponding area of exclusive authority of other States.⁵ According to the *Island of Las Palmas* case, ‘sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State’.⁶ This idea of ‘exclusiveness’ was also taken up in the 1970 UN Declaration where the principle was laid down that ‘No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State’. The flipside of this duty is found in the ‘inalienable right [of each State] to choose its political, economic social and cultural systems, without interference in any form by another State’.

⁴ UNGA Res 2625 (XXV) (24 October 1970).

⁵ Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 289.

⁶ *Island of Las Palmas Case (Netherlands, USA)* Award of 4 April 1928 Reports of International Arbitral Awards Vol II 829–871 at 838.

Making the link between the Declaration's treatment of the duty not to intervene and jurisdiction, Bowett writes 'the principle of non-intervention is breached by an assertion of jurisdiction which interferes with another State's political, economic, social or cultural system'.⁷ The freedom to assert its lawfully established legislative jurisdiction is thus limited by a State's responsibility towards other States.

There can be no doubt that sovereignty is defined territorially. Jurisdiction understood broadly

is primarily concerned with spheres of competence (ie legislative, enforcement and judicial jurisdiction) within a geographically constrained area (ie, territorial jurisdiction). However, jurisdiction as a concept may also become concerned with events that occur extraterritorially when proscribed conduct or the results of that conduct have a 'transboundary' reach. So far as the principle of sovereign equality and its corollary duty of non-intervention thus set the general limits to State authority along territorial lines, the concept of 'jurisdiction' is the tool that delimits the reach of that authority or power exercised through the various legislative, judicial and executive (enforcement) competences that collectively make up the functions of a State. Sovereignty and jurisdiction are certainly closely related concepts, and exercising jurisdiction is often considered to be 'one of the most obvious forms of the exercise of sovereign power'.⁸ They are not, however, one and the same.⁹

Jurisdiction competences, at a most basic level, operate within the limits of sovereignty and thus also takes as its starting point the principle of territoriality. In general, the right to exercise jurisdiction may reach as far as, but not beyond, the limits of sovereignty.¹⁰ This is

⁷ DW Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 *British Yearbook of International Law* 1–26, 16.

⁸ PCIJ, *Legal Status of Eastern Greenland* Judgment of 5 April 1933 PCIJ Report Series A/B No 53, 48.

⁹ FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 1–162, 16; FA Mann, 'The Doctrine of International Jurisdiction Revisited after 20 Years' (1984) 86 *Recueil des Cours de l'Académie de Droit International* 9–116, 20.

¹⁰ Mann (1964) (n 9) 16.

because ‘if a state assum[es] jurisdiction outside the limits of its sovereignty, it... come[s] into conflict with other states which need not suffer any encroachment upon their own sovereignty’.¹¹ The limits of jurisdiction and the limits of sovereignty coincide in the majority of instances, but not always. The increase in transnational criminal activity which impacts on more than one State and the heightened desire to prosecute international crimes, often on bases of jurisdiction other than territoriality mean this tendency is becoming ever more pronounced. As recognised in the *Lotus* case, ‘The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty’.¹² Nonetheless, the presumption remains that extraterritorial assertions of a State’s jurisdictional competences will interfere with the rights of other territorial States, who are entitled not to have their sphere of jurisdiction encroached upon. Any establishment or assertion of extraterritorial jurisdiction (legislative, enforcement or judicial) must therefore be considered carefully and jurisdiction only exercised if the State doing so is an ‘appropriate’ forum.¹³

International law recognises ‘exceptions’ to the strict territoriality of the criminal law and also instances where jurisdiction may extend beyond national boundaries. This may be the result of specific international principles granting (or, perhaps, if defined negatively, prohibiting) extended jurisdiction. As the second part of this Chapter shows, and particularly in the context of the example of universal jurisdiction, while the territorial limits of State sovereignty hold as strongly today as ever, the strict territorial scope of jurisdiction has evolved considerably. The tension between the sovereignty of States and the increasingly internationalised and trans-boundary nature of conduct which States seek to regulate presents

¹¹ Mann (1964) (n 9) 30.

¹² PCIJ, *The Case of the SS Lotus (France v Turkey) Judgment* of 7 September 1927 PCIJ Report Series A No 10, 20.

¹³ See further, section 2.1 below on linkage and Chapter 5 generally.

a significant challenge to the existing doctrine of jurisdiction, both in its practical application and management.

1.2. Jurisdiction & the Limits imposed by International Law

Opening their discussion on whether a State must be able to point to an explicit title to jurisdiction recognised under international law before it may act (a permissive approach, and that espoused by France) or whether it is sufficient that jurisdiction can be exercised provided it does not come into conflict with a restriction imposed by international law (a prohibitive approach, and the view of Turkey),¹⁴ the judges in the *Lotus* case stated:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.¹⁵

Few judgments of the Permanent Court of International Justice (PCIJ) or its successor, the International Court of Justice (ICJ), have been as widely debated as the *Lotus* case. Even in 1928, a year after the judgment was issued, Brierly condemned ‘the highly contentious metaphysical proposition of the extreme positivist school that the law emanates from the free will of sovereign independent states, and from this premise ... that restrictions on the independence of states cannot be presumed’.¹⁶ However, in essentials the PCIJ did not fundamentally contradict the current understanding of the basic limitations imposed on States’ jurisdiction. The Court’s approach certainly suggests a very high degree of individual State freedom and champions the independence of States, but it did not suggest there were absolutely no restrictions on States:

¹⁴ *Lotus* (n 12) 20.

¹⁵ *Lotus* (n 12) 18.

¹⁶ James Brierly, *The Basis of Obligation in International Law* (Sir H Lauterpacht, CHM Waldock (eds) Clarendon Press 1958) 143–4.

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt principles which it regards as best and most suitable.¹⁷

Nonetheless, the position adopted by the PCIJ has been the subject of criticism. Mann suggests that this phrase from the judgment seems ‘to propagate the idea of the delimitation of [legislative] jurisdiction by the State itself rather than international law’ and a ‘retrograde step’.¹⁸ Implying that international principles of penal jurisdiction are formed by the imposition of certain limitations on an originally unlimited competence¹⁹ or, in the words of dissenting Judge Loder that ‘every door is open unless it is closed by treaty or by established custom’²⁰ is, according to Brierly, ‘surely historically unsound’ failing to accord, as it does, with the organic way in which jurisdiction has gradually extended over time from the strictly personal (ie territorial) to the, at times, universal.²¹

It was precisely this absolute freedom of States to determine the reach of their legislative jurisdiction that the USA objected to in the case of *Cutting*.²² Mexico had sought to use its extended legislative jurisdiction to assert judicial jurisdiction in its courts for libellous acts allegedly committed by Mr AK Cutting, a US citizen. The acts in question took place wholly within the US, albeit against a Mexican national. The US Secretary of State objected to the argument made by Mexico that it was for a State alone to decide the reach of its laws on the grounds that ‘if a Government could set up its own municipal laws as the final test of its

¹⁷ *Lotus* (n 12) 19.

¹⁸ Mann (1964) (n 9) 35.

¹⁹ Brierly (n 16) 144.

²⁰ *Lotus* (n 12) Judge Loder, Dissenting Opinion 34. Brierly writes, ‘In a case where the highest opinion was so divided, and in view of the fact that the decisions of the Permanent Court do not constitute irrevocably binding precedents, it is permissible to suggest that the criticisms of the minority on this point was justified’. Brierly (n 16) 143.

²¹ Brierly (n 16) 144. For more recent treatment, see Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187–239, 190–194.

²² United States Department of State / The Executive Documents of the House of Representatives for the first session of the fiftieth Congress (1887–1888). The *Cutting* case, No 491, 751–840, 753 available at: <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS188788> (accessed 31 January 2015).

international rights and obligations, then the rules of international law would be but a shadow of a name and would afford no protection either to States or to individuals'.²³ Writing in a different context, Jennings put the question thus:

Are we to conclude ... that extraterritorial jurisdiction is a matter left within the discretion of each sovereign State, that it is not governed by international law? The practice of States leans against such a conclusion. For the fact is that States do not give themselves unlimited discretion in the matter.²⁴

Nor has the PCIJ's *Lotus* decision escaped the purview of its successor, the ICJ, although the comments have been general in nature, have not formed part of a majority opinion and have generally tended to downplay the decision's importance. In the *Arrest Warrant* case several of the judges referred to the *Lotus* case in their separate or dissenting opinions. Ad hoc Judge van den Wyngaert stated 'It has often been argued, not without reason, that the "*Lotus*" test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today'.²⁵ And, Judges Higgins, Kooijmans and Buergenthal observed 'the dictum represents a high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies'.²⁶

Even if the full extent of the freedom of States postulated by the PCIJ was ever true as a matter of principle, in reality common law States have not extended the reach of their laws extraterritorially without very good reason; civil law States being only marginally more

²³ *Cutting* (n 22) 753. Discussing the *Cutting* case further, see Patrick Capps, Malcolm Evans, Stratos Konstadinidis, 'Introduction' in Patrick Capps, Malcolm Evans, Stratos Konstadinidis, *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003) xxii–xxiii.

²⁴ RY Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *British Yearbook of International Law* 146–175, 150.

²⁵ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment of 14 February 2002, Dissenting Opinion, ad hoc Judge van den Wyngaert, para 51.

²⁶ *Arrest Warrant* (n 25) Joint Separate Opinion, Judges Higgins, Kooijmans, Buergenthal, para 51. What these 'other tendencies' might be were not explicitly set out by the judges; however, human rights and a different conception of what it means to be a State in an emerging 'international community' of States may represent what they had in mind. Certainly, the development of treaty rules which specifically set out the limits of jurisdiction is one tendency that has limited the 'wide' approach adopted by the PCIJ; an emerging duty to exercise jurisdiction another. See further, Chapter 2.

inclined to do so due to the historic tendency of civilian jurisdictions to rely heavily on the nationality principle. In other words, although an absolute freedom to extend legislative jurisdiction may exist in theory, the right to do so is not usually exercised for various reasons of comity, law and policy. Indeed, as the PCIJ had already identified in its 1921 advisory opinion in *Nationality Decrees in Tunis and Morocco*, the right of a State to exercise its legislative jurisdiction over a matter would, in certain situations, be ‘restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law’.²⁷ Even after opening its discussion of the position of States in the highly individualist terms identified above, the PCIJ in the *Lotus* Case concluded its discussion on jurisdiction by saying that a State ‘should not overstep the limits which international law places upon its jurisdiction’.²⁸ The judges of the PCIJ did not, however, expand any further on which rules of international law they had in mind, which would have been helpful.

In his separate opinion in the 1970 *Barcelona Traction* case, Sir Gerald Fitzmaurice noted:

[U]nder present conditions international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction ... [i]t does, however (a) postulate the existence of limits ... and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by the courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercised by, another State.²⁹

It would seem to be incumbent on those who assert that a State’s legislative jurisdiction should be limited to show this to be the case rather than relying on a presumption that international obligations curtail the rights of States to legislate freely without further question. In the absence of clear rules of international law to the contrary, each State is left to

²⁷ PCIJ, *Nationality Decrees in Tunis and Morocco* Advisory Opinion of 7 February 1923 PCIJ Report Series B No 4, 24.

²⁸ *Lotus* (n 12) 19. Discussing the apparent contradiction between this statement and the previous one cited at note 16, see Mann (1964) (n 9) 35–6.

²⁹ ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Second Phase, Judgment of 5 February 1970, Separate Opinion, Judge Sir Gerald Fitzmaurice, 105.

determine the reach of its legislative jurisdiction under its national laws. The mere existence of extraterritorial legislative jurisdiction is seldom challenged; rather, it is usually when it comes to an actual assertion of that legislative jurisdiction through the exercise of judicial or enforcement jurisdiction in a particular case that other States start to raise objections.

2. The Bases of Jurisdiction

National legislative jurisdiction is based on one or more of the five principle of jurisdiction recognised under international law: namely, territoriality, the nationality of the offender(s) or victim(s), protective and universal. The status of these bases of jurisdiction is important as ‘the sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law’.³⁰ But before national legislative jurisdiction may be invoked and judicial jurisdiction asserted on one of bases of jurisdiction, a connection – or sufficient ‘linkage’ – between the State invoking its jurisdiction and the conduct in question ought to be established. The topic of linkage is central to this thesis. The concept is introduced here, and is taken up again in Chapters 4 and 5 when its practical application is explored in detail.

2.1. Establishing Linkage

One commentator has observed that ‘The acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests’.³¹ In light of recent applications to the ICJ, the presence or absence of hard legal protest could also be added.³² There is no formal

³⁰ Joseph Beale, ‘The Jurisdiction of a Sovereign State’ (1923) 36 *Harvard Law Review* 241–262, 243.

³¹ Michael Akehurst, ‘Jurisdiction in International Law’ (1972–3) 46 *British Yearbook of International Law* 145–257, 176.

³² *Arrest Warrant* (n 25). While decided on the grounds of immunity rather than Belgium’s right to exercise universal jurisdiction, the matter of jurisdiction was discussed in the Democratic Republic of Congo’s application and formed the first grounds of the application, 3. It was also addressed in the DRC’s memorial of and Belgium’s counter-memorial. Judges Higgins, Kooijmans and Buergenthal dealt with the question of

international mechanism in place to scrutinise national legislation with an extraterritorial reach and determine its legitimacy; legislative revisions – where necessary – come about as a result of protests made by other States or a shift in national policy. As discussed above, the simple fact is that States do not legislate extraterritorially without good reason or give themselves unlimited discretion when it comes to asserting jurisdiction outside of their own territories. This is, at least in part, due to the idea that a ‘nexus’,³³ ‘linking point’,³⁴ ‘sufficient connection’,³⁵ or ‘justifying principle’³⁶ between the State seeking to exercise judicial jurisdiction and the conduct in question should exist. Otherwise, political (or social or economic) interests rather than ‘contact’³⁷ could end up being more determinative of a State’s assertion of jurisdiction.

Sometimes the existence of this link goes without saying and jurisdiction founded on the principle of territoriality is the main example. Sometimes the link will be harder for the State to immediately prove – the extreme example being that of universal jurisdiction – where it is the serious nature of the conduct itself that provides the justification to link the State asserting jurisdiction to the criminal conduct rather than a more concrete factor. In the *Eichmann* trial, the District Court of Jerusalem referred to the question of linkage this way: ‘what is the special connection between the State of Israel and the offences attributed to the accused, and [is] this connection [...] sufficiently close to form a foundation for Israel’s right of punishment regarding the accused?’³⁸ If such a linking point exists, ‘one may presume that

jurisdiction, stating, ‘In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction’. Joint Separate Opinion, paras 3–4.

³³ Bernard H Oxman, ‘Jurisdiction of States’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2008) para 10.

³⁴ It seems that the origins of the concept of the ‘linking point’ can be traced back to 1874: ‘Tout le monde est d’accord sur ce point qu’il fut un lien de droit entre celui qui punit et celui qui subit le châtement.’ Quoted in *Attorney-General of the Government of Israel v Adolf Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem) 18–276, 51.

³⁵ Menno T Kamminga, ‘Extraterritoriality’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP) para 10, available at: <http://opil.ouplaw.com/home/EPIL> (accessed: 31 January 2015).

³⁶ Jennings (n 24) 150.

³⁷ Mann (1984) (n 9) 30–31.

³⁸ *Eichmann* (n 34) 52. Discussing the linking point generally, 50–54.

the State is entitled to legislate; if there does not, the State must show why it is entitled to legislate for anyone other than persons in its territory and for its nationals abroad'.³⁹ On the occasions that States do seek to assert their judicial jurisdiction extraterritorially, the State should be able to provide a justification for its decision to act. The expectation is that the burden rests on the State asserting jurisdiction to give good reasons for its action, if challenged, rather than on other States to prove the existence of a 'prohibitive rule to the contrary'.⁴⁰

The question of linkage remains under-theorised, but is crucial. Most commentators seem to posit its existence, or indeed its necessity, but go no further in defining what linkage means in terms of the different jurisdictional bases available to States. For example, Brownlie states 'there should be a substantial and bona fide connection between the subject-matter and the source of the jurisdiction',⁴¹ leaving the discussion at that. Mann's treatment of the subject of jurisdiction is extensive and exceptionally clear, with linkage based on his 'closeness of connection' theory.⁴² Writing in terms of criminal jurisdiction, he states 'the real problem of international law is to define the circumstances in which, according to the practice of States, the connection is sufficiently close'.⁴³

2.2. The Basis of National Jurisdiction

The five principles of jurisdiction on which a link may be grounded are basically settled in terms of their broad parameters.⁴⁴ Nonetheless, the principles have been the subject of interpretation by States seeking to pursue their individual (or, on occasions, shared) interests.

³⁹ Vaughan Lowe, 'Jurisdiction' in Malcolm D Evans (ed) *International Law* (2nd edn OUP 2006) 335–360, 342.

⁴⁰ Capps et al. (n 23) xvii–xxiii.

⁴¹ Brownlie (note 5) 311.

⁴² Mann (1964) (n 9) 49–50.

⁴³ Mann (1964) (n 9) 83; Mann (1984) (n 9) 28. 'Connection' or 'linkage' in light of the bases of jurisdiction is discussed in Paul Arnell, 'Criminal Jurisdiction in International Law' (2000) *Juridical Review* 179–189.

⁴⁴ This 5-way categorisation is accepted by most commentators and was adopted by the Harvard Research (n 2) 445.

On the occasions that this does occur, it may exacerbate relations with other States and especially those who hold a jurisdictional interest as well (ie, could also assert their legislative jurisdiction).

The principles of jurisdiction currently in place developed largely out of necessity and in reaction to particular circumstances, rather than in a systematised way. Furthermore, the fundamental systemic differences between the civil and common law legal traditions have lead to different emphasis being placed on the principles.⁴⁵ When reliance on the territorial principle alone proved insufficient to deal with the changing nature of crime and the increased mobility of criminals, more far-reaching bases on which States could act were recognised, or re-emphasised (particularly in respect of nationality-based jurisdiction in continental Europe). In civil law countries, ‘nationality’ as a basis for jurisdiction is considered to be as fundamental as territorial jurisdiction. The judges in the *Lotus* case noted in 1927, ‘Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State’.⁴⁶ In their joint separate opinion in the 2003 *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal also observed the striking trend in international relations at the beginning of the 21st century towards recognising bases of jurisdiction other than only territoriality.⁴⁷ Territoriality continues to be the most firmly established and most common ground for the exercise of jurisdiction although there is no formal hierarchy between the five bases, as outlined above. In this sense, ‘sovereignty’ may be useful in explaining both the lack of hierarchy and the need for it: if

⁴⁵ Comparing the systemic differences between continental Europe and United Kingdom and United States, see Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 43, 55–59, 83. On the UK in particular, see Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (OUP 2003) 28–35, 55–59.

⁴⁶ *Lotus* (n 12) 20.

⁴⁷ *Arrest Warrant* (n 25) Judges Higgins, Kooijmans, Buergenthal, Joint Separate Opinion, para 47.

exercising jurisdiction remains a right of sovereign and equal States, any form of limitation in the form of prioritising one basis over another may be perceived as coming into conflict with this right. On the other hand, in order to protect this very sovereignty, territoriality needs to be the preferred basis for jurisdiction. Given its predominance, this principle will be discussed first, before turning to the personality-based and interest-based principles.

2.2.1. Territorial-based Jurisdiction

In the *Las Palmas* case it was recognised that the ‘principle of the exclusive competence of the State in regard to its own territory [...] make[s] it the point of departure in settling most questions that concern international relations’.⁴⁸ Criminal jurisdiction is no exception to this, territoriality long having enjoyed the respect of States, along with the obvious practical advantages it has over most other bases of jurisdiction, such as easier access to evidence and witnesses and, most of all, the likelihood of the presence of the accused with the power of the legislating State. Indeed, the prevalence of territoriality has been recognised since the rise of the modern, fully sovereign nation State in the 17th century following the peace of Westphalia in 1648.⁴⁹ In the *Lotus* case the PCIJ declared ‘in all systems of law the principle of the territorial character of criminal law is fundamental’.⁵⁰ Few would doubt the many advantages attached to investigation and prosecution in the State where a crime is committed, a belief that has only latterly become displaced to some extent due to the potential for abuse by recalcitrant (territorial) States seeking to shield human rights abusers from meaningful prosecutions leading other States to ‘step in’ and invoke universal jurisdiction. States enjoy plenary legislative and enforcement jurisdiction within their sovereign boundaries, meaning they can proscribe whatever conduct they wish and enforce penalties howsoever they choose

⁴⁸ *Las Palmas* case (n 6) 838.

⁴⁹ On the historical development of the territorial principle across Europe and in England and the USA, see Rynjaert (n 45) 43–74.

⁵⁰ *Lotus* (n 12) 20.

so long as the conduct constituting the crime was wholly committed there subject to any specific rules of international law limiting plenary competence, such as diplomatic immunities. Yet, even if the motives for enacting legislation and the means by which States exercise jurisdiction over their territories may be questioned, the soundness of the principle that allows them to do so is not subject to debate: ‘this rule requires no authority to support it... the territorial principle commands universal assent.’⁵¹

The first challenge to a principle, even as securely rooted as that of territoriality, arises in the case of transboundary criminal offences. Thus, it has been accepted by the doctrine and evidenced in State practice that the territorial State (or States) not only have jurisdiction when the whole of the criminal conduct was committed on their territory, but also when only part of the conduct which constitutes the offence was committed there, too.⁵² This approach was adopted in the *Lotus* case:

[I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, *if one of the constituent elements* of the offence, and more especially its effects, have taken place there.⁵³

This set up introduces the possibility of jurisdictional concurrence (and possible conflicts) between States which are able to put forward seemingly equally strong claims to legislative jurisdiction, all based on the territorial principle. After all, there would be a (territorial) ‘link’ in each case, which is what is needed to found a claim to jurisdiction. At this stage, the question becomes one of localising the conduct in order that only the appropriately effected territorial State acts, and not any State which can merely claim to feel some effects on its territory as a result of the conduct; the latter being very close to the controversial ‘doctrine of

⁵¹ Jennings (n 24) 148. The Harvard Research supports this position: ‘[the territorial principle] is everywhere regarded as of primary importance and of fundamental character. Harvard Research (n 2) 445.

⁵² Harvard Research (n 2) 480.

⁵³ Emphasis added. *Lotus* (n 12) 23. It is commonly accepted that the *Lotus* case was decided on the basis of the ‘objective’ territorial principle.

effects', which will be discussed further below. Even within this distinction, it has been shown that more than one State may be able to show that it has been effected so as to validate a legitimate claim to territorial jurisdiction, and create the potential for conflicts. Before discussing the relative criteria that may distinguish those with the *prima facie* strongest claim from those with merely a residual or subsidiary interest, the two theories of territorial jurisdiction that have grown up over the years in order to localise conduct and address the dual understanding that can be attached to the phrase 'conduct committed on its territory' are surveyed. These are 'objective' and 'subjective' territoriality.

Prior to the start of the 20th century, debate abounded as to whether jurisdiction belonged to the State where the criminal conduct was initiated (which we now call 'subjective' territoriality) or where it was completed ('objective' territoriality). In the end, 'the arguments were so evenly matched that it was eventually realised that there was no logical reason for preferring the claims of one State over the claims of the other; and the only alternative to granting jurisdiction to neither State [...] was to grant jurisdiction to both States'.⁵⁴ Indeed, the Harvard Research on the topic provides a catalogue of examples supporting both approaches.⁵⁵ From a practical perspective, the increasingly transboundary nature of crime has meant that the constituent elements of an offence may often span two or more jurisdictions if the planning, preparation and execution were carried out in different States. This gave rise to a division along so-called 'subjective'/'objective' lines: the distinction hinging on the precise *loci* of the constituent elements of the offence.⁵⁶ As it would be virtually impossible to break a crime down into its constituent elements for the purpose of prosecution, a choice needs to be made; either the State on whose territory the conduct was

⁵⁴ Akehurst (n 31) 152. cf. Jennings: 'Now it is no doubt true that when a crime is committed in two different territories it is logically committed in neither territory; and to the extent that the law permits it to be regarded as committed in either one territory it imports an element of fiction.' Jennings (n 24) 158.

⁵⁵ Harvard Research (n 2) 484–494.

⁵⁶ For a thorough discussion of the objective principle, see Jennings (n 24) 156–161. In England, a similar distinction is made between referring to 'conduct' and 'result' crimes. See also Hirst (n 45) 118–129.

begun or the State on whose territory the conduct was consummated will prosecute the offence in its entirety. Whether the other State can instigate proceedings at a later date depends on the particulars of the case and how far (if at all) the principle of *ne bis in idem* principle applies nationally. States, quite understandably, do not wish to be restricted to prosecuting conduct under either one of the branches of territoriality only, which means another set of criteria needs to be used if we are to decide which State is most 'affected' in the sense of holding the stronger claim to exercise its jurisdiction in such transboundary cases. In the commentary to the Draft Convention it is observed that 'National experience has demonstrated that neither the subjective nor the objective application, taken alone, can be made sufficiently comprehensive to serve as a rationalization of contemporary practice.'⁵⁷

The difficulty lies in distinguishing the State which has the stronger claim, subjectively or objectively, and thus should exercise jurisdiction in the case, from those having merely a residual interest, ie who have felt some effects of the conduct. Commentators have come up with several suggestions as to how this might be done. Two are discussed here. Mann bases his assessment on an analysis of the 'factual requirements of the crime as laid down in the rule with a view to ascertaining whether at least one of them has occurred within the legislating State's territory'.⁵⁸ If a fact does not constitute one of the requirements it is 'neutral and irrelevant' and cannot be considered to be sufficiently close or connected to the State in question in order to justify an assumption of legislative jurisdiction.⁵⁹ Akehurst, on the other hand, considers that only the State where the 'primary effect' is felt can claim jurisdiction, and formulates his criteria as two questions: '(1) Are the effects felt in one State more *direct* than the effects felt in another State? (2) Are the effects felt in one State more

⁵⁷ Harvard Research (n 2) 494.

⁵⁸ Mann (1964) (n 9) 85–86.

⁵⁹ Mann (1964) (n 9) 85–86.

substantial than the effects felt in other States?’⁶⁰ The difference lies in the point of emphasis: Mann identifies it as being the essential facts of the case; Akehurst focuses on the essential effects as being determinative. Of the two approaches, the former is the more neutral. It avoids reference to the loaded term ‘effects’ which has been given a very different meaning to the term ‘being effected’ in the sense of one or more of the constituent elements of the crime being linked to the territory, and which may help to determine which jurisdictional claim should take priority. Mann’s test would also seem less likely to be abused by States seeking to claim jurisdiction on the basis of the controversial ‘effects doctrine’.

The doctrine of effects as a separate basis of jurisdiction is considered by some to be a derivative of the objective territorial principle.⁶¹ However, the essential difference is that objective territoriality requires the criminalisation of some intraterritorial conduct, whereas the effects doctrine relies on certain repercussions within the territory which are not part of the offence.⁶² Or, put another way, the effects doctrine is concerned with the overall effects of the offence, instead of whether or not the last component part of the offence took place within the territory, which is the primary concern of the objective territorial approach.⁶³ It is too simplistic to say that American doctrine and practice tends to support and use the effects doctrine as a basis for establishing jurisdiction and the UK and European countries oppose such practices. For the purpose of this discussion it suffices to say that the doctrine has been controversial and the subject of much dispute in a transatlantic sense, albeit almost wholly limited to the economic sphere. The dangers associated with this doctrine are certainly real; the further we move away from territorial jurisdiction based on strictly subjective or objective

⁶⁰ Akehurst (n 31) 154.

⁶¹ Oxman (n 33) para 23. See also Ryngaert (n 45) 220.

⁶² Lowe (n 39) 345. The doctrine has been applied most readily in the field of economic law, hence the focus on economic effects. However, there would seem to be nothing in the doctrine itself which limits its application to economics – social or other public policy concerns could equally be the grounds – although here the borderline with universal jurisdiction becomes blurred.

⁶³ Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth Publishing 1994) 54.

grounds (with a focus on the localisation of constituent elements), the nearer we get to subsuming this branch of territoriality under the much wider basis of universal jurisdiction, which is conceptually wrong if practically unlikely. This concern was shared by Jennings, whom it is worth quoting in full:

Relevant “effects” must be so limited, for the sufficient reason that any extension of an objective territoriality test to cover the case where the whole of the offence is in fact committed outside the territory amounts to a contradiction of the very territorial principle itself upon which the claim to jurisdiction purports to be based. What is wholly extraterritorial cannot be in any sense territorial; or if it can, “territoriality” has ceased to have any meaning and has become a mere talisman or incantation.⁶⁴

At the very least, allowing extraterritorially grounded ‘effects’ to be invoked by States in this way increases the risk of conflicts of jurisdiction between the variously more- and less-connected States involved, which blurs the lines in what should be relatively straightforward cases. Once again, the need for a clear assessment based on the factual implications of the conduct would seem the most neutral way to evade the application of the effects doctrine. And, in the criminal sphere, it would seem that the safest place for this doctrine is, if anywhere, firmly within in the subsidiary jurisdictional base of universal jurisdiction, with all the incumbent difficulties and limitations which that basis of jurisdiction brings with it

2.2.2. Personality-based Jurisdiction

2.2.2.1. Nationality

The roots of the nationality principle in mainland Europe can be traced back to pre-Peace of Westphalia times. Its decline as the dominant basis for jurisdiction there was brought about by the rise of national sovereignty and the nation-State and the ensuing shift in focus to territoriality as the main source of jurisdiction. It is however important to note, and in contrast to continental Europe, that under the English common law tradition territorial

⁶⁴ RY Jennings, ‘The Limits of State Jurisdiction’ (1962) 32 *Nordisk Tidsskrift Int’l Ret* 209–229, 215–216. Interestingly, in his discussion Jennings does not even include the effects doctrine under the heading ‘the territorial principle of jurisdiction’ but rather as a facet of his discussion of extraterritorial jurisdiction.

jurisdiction based on the doctrine of ‘venue’ and the localised requirements of the jury trial (and, also it has sometimes been suggested, due to its geographic peculiarities as an island) meant that jurisdiction based on nationality has never enjoyed the same status that it did (or continues to do so) on the continent.⁶⁵

The idea that a State should be able to exercise its jurisdiction over its nationals if they commit crimes abroad flows from the special relationship between citizen and State. Brownlie has called nationality a ‘mark of allegiance and an aspect of sovereignty’.⁶⁶ According to the Encyclopedia of Public International Law, ‘Nationality as a legal term denotes the existence of a legal tie between an individual and a State, by which the individual is under the personal jurisdiction of that State’.⁶⁷ How far this relationship does, or should, extend is subject to debate. However, the rationale for the continuation of the relationship beyond a State’s borders can be explained on various policy grounds: the ambassadorial nature of citizenship; the civil law concept of nationality as ‘allegiance’; the avoidance of impunity if the territorial State refuses or is unable to prosecute; the suggestion that certain crimes are heinous wherever committed, and that an individual should not be able to travel abroad in order to perpetrate them. From a strictly legal perspective, due to some States’ adherence to the rule of not extraditing nationals, nationality-based jurisdiction may even be required if the crime is not to go unpunished – a localised form of the *aut dedere aut judicare* doctrine that will be discussed in Chapter 2.

According to the Harvard Research, ‘the competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded’.⁶⁸ The principle is thus firmly entrenched, even if States – at least in the common law tradition – rarely invoke

⁶⁵ Hirst (n 44) 29–35.

⁶⁶ Brownlie (note 5) 303.

⁶⁷ Albrecht Randelzhofer, ‘Nationality’ (1997) 3 *Encyclopedia of Public International Law* 501–510, 502.

⁶⁸ Harvard Research (n 2) 519. Also supporting this position, Akehurst (n 31) 156; Lowe (n 39) 345.

their legislative jurisdiction over nationals for extraterritorial conduct in practice.⁶⁹ States following the European tradition have traditionally been more open to nationality-based jurisdiction. Perhaps the clearest reason for this is the rule on the non-extradition of nationals, which civil law countries have traditionally adhered to and which common law countries have never enforced as a formal doctrine – extradition has often been refused, but on other grounds.⁷⁰ Furthermore, systemic differences and the respective understandings of the ambit of the criminal law between the two traditions also undoubtedly play a significant role in the differing approaches to this head of jurisdiction, although it is beyond the scope of this Chapter to discuss these rationales.⁷¹

When the national over whom the State seeks to exercise judicial jurisdiction is within its territory, the distinction between legislative jurisdiction asserted on territorial grounds or nationality grounds is largely academic, although in the case of an alien the State of nationality may raise an objection to his or her prosecution abroad especially if the crime was not committed in that territory as well. Potential difficulties and opportunities for jurisdictional conflict in terms of nationality-based jurisdiction claims arise when the national is found outside the territorial ('home') State. How a 'national' is defined is for this reason important.⁷² Taking one pertinent example, what happens in the case of those who cease to be citizens of a particular country after committing a crime abroad? The Harvard Research argued in favour of allowing the original State of citizenship to retain its right to exercise

⁶⁹ On the domination of the territorial principle in common law countries to the expense of nationality-based claims, see Geoffrey W Watson 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 *Yale Journal of International Law* 41–84; Paul Arnell, 'The Case for Nationality Based Jurisdiction' (2001) 50 *International & Comparative Law Quarterly* 955–962.

⁷⁰ Discussing the principle further, see Geoff Gilbert, *Aspects of Extradition Law* (Martinus Nijhoff Publishers 1991) 95–99.

⁷¹ For a short synthesis of the approaches of the two traditions, see Ryngaert (n 45) 85–88. In common law States the approach can be characterised as 'retributive' with offences being done against the territorial sovereign whereas in European States a 'preventive' approach focuses on the individual's need for remedial treatment, no matter where the criminal conduct took place.

⁷² The ICJ affirmed in its *Nottebohm* judgment that it is for each State to decide what criteria are required for a grant of nationality. ICJ, *Nottebohm (Liechtenstein v Guatemala)* Judgment of 6 April 1955.

nationality-based jurisdiction as, ‘were the rule otherwise, a criminal might escape prosecution by changing his nationality after committing the crime’.⁷³ This might occur if a person is subsequently naturalised in a State that does not extradite its nationals, although practically speaking it would seem that there is little the former State of nationality could do at this stage except protest diplomatically. However, and unless the naturalising State is particularly recalcitrant, it is equally helpful if the doctrine of nationality is flexible enough to allow the new State of citizenship to exercise jurisdiction on the basis of nationality over the citizen who has previously committed a crime abroad. International law does not prohibit both States from asserting their legislative jurisdiction in such a case; the idea being that concurrency is better than a jurisdictional void. A further challenge in terms of overlapping competencies arises in the context of dual nationals. Here, two (or possibly even more) States might have a ‘connection’ to the individual based on his or her nationality, but whether this is strong enough, or a ‘genuine’ enough connection for the purposes of establishing jurisdiction is harder to establish. As Deen-Racsomány observes, ‘Although commentators have recognized some of the problems related to dual nationality and criminal jurisdiction, these problems have not been studied in detail’.⁷⁴ One source of help could flow from the ‘doctrine of the master nationality’, whose first principle states that the nationality linked to the territory where the dual national is located takes precedence.⁷⁵ Suffice to say, the instances when this may prove to be an issue are often limited by the category of offences to which the principle applies (some States limit nationality based jurisdiction claims to certain serious crimes only) or the application of a double criminality requirement.

⁷³ Harvard Research (n 2) 532.

⁷⁴ Z Deen-Racsomány, ‘The Nationality of the Offender and the Jurisdiction of the International Criminal Court’ (2001) 95 *American Journal of International Law* 606–623, 609.

⁷⁵ Gerald Fitzmaurice, ‘The General Principles of International Law considered from the Standpoint of the Rule of Law’ (1957) 92 *Recueil des Cours de l’Académie de Droit International* 1–227, 193.

2.2.2.2. *Passive Personality*

Whereas the nationality principle is based on the right of States to control the behaviour of their nationals, the passive personality principle is grounded in an assumed duty of protection towards one's own nationals for harms they have suffered abroad. It thus provides an avenue through which a State which is unconnected to the criminal conduct but for the fact that its nationals have been deliberately targeted or simply caught up in the criminal activity. The State must of course have legislated for this possibility; reliance on criminalisation of the conduct by the territorial (or nationality) State is not sufficient. On its face, jurisdictional conflict is highly probable due to the sheer number of States who could become involved; a terrorist attack on a busy holiday destination popular with foreign tourists is a clear example. The objectives of the passive personality principle are laudable, although it necessarily lacks the stronger linking factors of territoriality and nationality. Justifying its reasons for not including passive personality as a separate article in its Draft Convention, the authors of the Harvard Research stated:

Since the essential safeguards and limitations are precisely those by which the principle of universality is circumscribed in the present article, and since universality thus circumscribed serves every legitimate purpose for which passive personality might be invoked in such circumstances, it seems clear that the recognition of the latter principle in the present Convention would only invite controversy without serving any useful objective.⁷⁶

Passive personality could perhaps also even be considered a facet of the protective principle in some circumstances and Cameron notes 'while the objects of protection in such cases are individuals, the basic protection of one's nationals abroad is an interest which could properly be said to belong to the state'.⁷⁷ Taking again the example of a terrorist attack on a tourist destination, would protective jurisdiction result in a 'stronger' (or more acceptable) claim if it could be shown that a certain State's nationals had been especially targeted abroad?

⁷⁶ Harvard Research (n 2) 579. The interpretation of 'universality' given by the Harvard Research is far narrower than is currently accepted under international law.

⁷⁷ Cameron (n 63) 77.

However, the relative objectivity of, for example, including a provision in counter-terrorism treaties based on the ‘nationality of the victims’ rather than a ‘threat to the security of the State’ could lessen the likelihood of this happening, at least in an area as highly politicised as terrorism. It was the fierce divergence of opinion that characterises the debate over this principle which led the authors of the Harvard Research to conclude that no other type of competence was as strongly contested as that of the principle of passive personality, when exercised without significant qualifications.⁷⁸

A compelling argument against use of the passive personality principle is that it may infringe upon another State’s sovereignty. National legislation should not be directed to the regulation of aliens’ conduct in foreign lands. At its extreme, an application of ‘unlimited’ passive personality could mean that an individual would find his or herself held criminally liable either in the home State or while abroad for conduct directed against a third State’s nationals. While this argument holds true in the formal sense and may be true for many ‘ordinary’ crimes, whether it can be asserted so convincingly in terms of international crimes remains to be seen.⁷⁹ Other policy and legal arguments can be advanced against legislative jurisdiction assertions based on passive personality.⁸⁰ The simplest solution is probably to subject any application of the principle to the double criminality requirement, although this may merely mask rather than resolve underlying issues.

⁷⁸ Harvard Research (n 2) 579. There may be a duty on the local State to make certain conduct criminal and to take steps to ensure effective enforcement of their laws vis-à-vis alien victims. (The reverse of the State of the victim’s nationality’s right to assert jurisdiction over the local States nationals who perpetrated the crime.) This duty is encompassed in the phrase ‘denial of justice’ which was included in Article 9 of the Harvard Research’s Draft Convention on Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners. Harvard Research, ‘Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners’ (1929) 23 *Special Number: American Journal of International Law Special Supplement* 133–239, 173–186. See also Brownlie (note 5) 529–531.

⁷⁹ Once again, the blurred border between passive personality and universal jurisdiction is brought to the fore. See ss 2.2.3.2 below for further discussion of the universality principle.

⁸⁰ Ryngaert (n 45) 92–96; Geoffrey R Watson ‘The Passive Personality Principle’ (1993) 28 *Texas International Law Journal* 1–46, 14–30.

Recognition of passive personality as a basis for jurisdiction may be on the rise in terms of some crimes, at least those proscribed by treaty where this basis is included in the treaty's jurisdictional clause. Terrorism is frequently cited as an example.⁸¹ It must have been these types of crimes that Judges Higgins, Kooijmans and Buergenthal had in mind when they wrote 'Passive personality jurisdiction, for so long regarded as controversial, is now reflected ... in the legislation of various countries [...], and today meets with relatively little opposition, at least in so far as a particular category of offences is concerned'.⁸² However, for the majority of crimes the potential for jurisdictional conflicts brought about by reliance on passive personality is extremely high.

2.2.3. Interest-based Jurisdiction

2.2.3.1. Protective Jurisdiction

The passive personality principle deals with crimes committed against the nationals of a State. In contrast, the protective principle addresses itself to criminal activity directed towards the State itself as a sovereign political entity. Hence, the two are similar in that they both involve actions initiated and completed outside of the State seeking to assert judicial jurisdiction. Whether or not a mere threat is enough raises an interesting question of attaching liability which the literature does not wholly address in a satisfactory manner.⁸³ Ryngaert asserts that no actual harm need have occurred in the prescribing State as a result of these acts,⁸⁴ which would, however, seem to open the door to preventive as well as putative

⁸¹ Oxman (n 33) para 36; Kamminga (n 35) para 12; Ryngaert (n 45) 94; John G McCarthy, 'The Passive Personality Principle and its Use in Combating International Terrorism' (1989/1990) 12 *Fordham International Law Journal* 298–327. Transnational/treaty-based crimes are discussed in Chapter 2, section 1.2.

⁸² *Arrest Warrant* (n 25) Judges Higgins, Kooijmans, Buergenthal, Joint Separate Opinion, para 47.

⁸³ Cameron's text on the protective principle does not discuss the issue of a mere 'threat' to nationality security versus completed acts, and at what stage a State may be legally entitled to invoke the protective principle. The discussion of self-defence focuses more on enforcement jurisdiction than legislative jurisdiction. Cameron (n 63) 46–47. Of course, the political motivations behind this base of jurisdiction would seem to suggest that stretching the principle as far as possible so as to cover unconsummated 'threats' would seem desirable – at least to the State wishing to assert its legislative jurisdiction in a particular case.

⁸⁴ Ryngaert (n 45) 96.

assertions of legislative jurisdiction and increase the scope of the principle considerably. If it is true that no harm needs to have resulted to justify an assertion of enforcement or judicial jurisdiction, then the protective principle can be distinguished on these grounds from the passive personality and the effects doctrine as both of those bases of jurisdiction require actual harm of some sort to have occurred. It is the serious nature of the conduct involved that is used to justify the extraterritorial application of a State's legislation on the basis of the protective principle, whereas the effects doctrine may only be deployed in cases when the conduct involved does not itself warrant the extraterritorial extension to legislation, but nonetheless the State feels itself to be sufficiently injured in some way so as to assert jurisdiction.⁸⁵

For the protective principle, it is 'the nature of the interest injured rather than the place of the act or the nationality of the offender' that serves as the basis for jurisdiction.⁸⁶ While the latter two grounds can usually be determined objectively, 'interests' are, by definition, highly subjective and not easily categorised. The potential for abuse through over-expansive use is clear. Indeed, Mann rejected the use of 'interests' as the determinative factor in ascribing jurisdiction generally: 'A merely political, economic, commercial or social interest does not in itself constitute a sufficient connection.'⁸⁷ There is something inherent to the 'interests' involved in an assertion of the protective principle that renders them serious enough to necessitate the extraterritorial application of a State's legislative jurisdiction. It would seem that the key ingredient is that the attack must be directed towards a fundamental aspect of what it is to be a State – anything less will probably be challenged on the basis that it constitutes an exorbitant assertion of legislative jurisdiction.

⁸⁵ Lowe (n 39) 348.

⁸⁶ Harvard Research (n 2) 543.

⁸⁷ Mann (1964) (n 9) 49. Also Mann (1984) (n 9) 31.

Certain crimes have been universally recognised as cutting to the heart of what it means to be a State – the main criteria being that the conduct constituting the crime should, in some way, target elements of the State’s basic national security.⁸⁸ However, the category of crimes allowed under this head of jurisdiction is by no means closed and, according to Cameron, the ‘principle is uniquely flexible, (i.e. its scope appears to be capable of almost infinite expansion)’.⁸⁹ As far as placing limitations on the expansion of the number of crimes to which the principle is applicable, adopting the criteria proposed by Mann and others who assert that restricting the band of interests permitted to those constituting only the most vital interests of the State is probably the best way forward – that ‘the *primary* effect of the accused’s action [must have been] to threaten the State’.⁹⁰

A certain amount of pragmatism characterises any application of the protective principle. It does involve an extraterritorial application of a State’s laws which may come into conflict with another State’s right to non-interference, potentially jeopardising the latter’s political independence. Nonetheless, States seem generally disinclined to place significant limitations on the principle. Cameron identifies the *raison d’être* for the principle as being that States often feel that they cannot really rely on other States to protect their vital interests, or to protect them to the extent deemed necessary or desirable.⁹¹ A lack of trust of this nature does, however, mean that the potential for conflicts of judicial jurisdiction arising out of an assertion of jurisdiction on this basis is likely to be higher due to the political capital that is in play. Cameron argues that a State may be less inclined to back down over its claim to jurisdiction due to the potential impact on international relations because of the seriousness

⁸⁸ The range of crimes that can be categorised in this way are diverse, and need not only be directed at destroying or overthrowing the State per se; crimes such as counterfeiting of currencies, seals, stamps, passports or public documents may also be included, along with certain immigration offences (Art 8). Harvard Research (n 2) 561.

⁸⁹ Cameron (n 63) 33. See further, Kamminga (n 35) para 13.

⁹⁰ Akehurst (n 31) 159. Also, Mann (1964) (n 9) 3, 93–94; Lowe (n 39) 348; Gilbert (n 70) 43; Kamminga (n 35) para 13; Cameron (n 63) 2.

⁹¹ Cameron (n 63) 31.

with which it views the offence against its internal security.⁹² Similarly, and particularly if the criminal conduct in question constitutes a so-called ‘political offence’, the custodial State may also have equally strong views as to which jurisdictional claim should take precedence, if indeed it agrees that the individual should be prosecuted at all.⁹³

2.2.3.2. *Universal Jurisdiction*

While the protective principle is directed towards protecting one State’s vital internal interests, the universality principle is designed to be exercised in pursuit of protecting interests that are deemed to be of importance to all States. The term an ‘international community of States’ is sometimes used to denote the international solidarity this jurisdictional principle is supposed to engender, although the reality is that its application is mostly highly divisive. Reydams has defined the exercise of universal jurisdiction as those occasions when a State ‘without seeking to protect its security or credit, seeks to punish conduct irrespective of the place where it occurs, the nationality of the perpetrator, and the nationality of the victim’.⁹⁴ A justification for establishing legislative universal jurisdiction commonly put forward is that there are some crimes so heinous that all States have an interest in securing a prosecution of those individuals involved in their commission. This rationale is grounded in a communitarian understanding whereby some serious criminal conduct not only impacts on the one or more States most closely tied by virtue of the nationality or territoriality principles, but on all States due to the character of the criminal conduct. The conduct may be deemed to threaten international peace and security under Chapter VII of the UN Charter, but this is not a prerequisite for invoking universal jurisdiction. It is also important to note that the only crimes for which universal jurisdiction currently receives a modicum of support among States, in addition of course to piracy where it is well established,

⁹² Cameron (n 63) 33.

⁹³ See further Gilbert (n 70) 113–128 and below, Chapter 3, section 2.2 and 136–137, specifically.

⁹⁴ Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2005) 5.

are international crimes (ie genocide, war crimes, crimes against humanity but probably not aggression).⁹⁵ If it were a requirement for the legitimate reliance on the principle of universal jurisdiction that the conduct addressed amounted to an established international crime, this objective element could in itself take away some of the concern that the universality principle is capable of undermining the whole jurisdictional scheme.

In order for a State to be able to exercise judicial jurisdiction on a lawfully established legislative basis, it must be able to establish a link between itself and the conduct that it seeks to punish. In the case of universal jurisdiction none of the traditional linking points need be present. Another source of 'linkage' must therefore be found. The solution to this problem has been to substitute an objectively defined linking point (be it territory, personality, etc.) for that of the crime itself. Put another way, it is the nature of the conduct constituting the crime rather than where or by whom or against whom (be it individual or State) it was committed that is determinative in respect of whether or not a claim to universal jurisdiction is prima facie justified. In order to avoid too frequent a recourse to this basis of jurisdiction, Colangelo has suggested a way to limit unnecessary usage would be to focus on the way in which a State defines the crime in its national legislation, namely, that the definition adopted should accord with the international definition of the criminal conduct. This approach would, he submits, help avoid the risk of exorbitant claims to jurisdiction arising based on State's adopting their own definitions.⁹⁶ Where the crime has been codified in a treaty, this is relatively straight forward. However, for those international crimes that have only traditionally been recognised under customary international law, a settled definition is harder

⁹⁵ It is interesting to contrast the 'modern' approach to universal jurisdiction and its limitations to that espoused in the Harvard Research Draft Convention. Harvard Research (n 2) 573–592. The latter is much more circumspect in scope, and would seem to resemble more closely the principle of *aut dedere aut judicare*, which can, however, now be distinguished from universal jurisdiction in some important respects. The Harvard Research (conducted in the early 1930s) would also seem to coincide with the period identified by Reydamas as 'the co-operative limited universality' phase. Reydamas (n 94) 28–42, specifically 35–38.

⁹⁶ Antony J Colangelo, 'The Legal Limits of International Jurisdiction' (2006) 47 *Virginia Journal of International Law* 149–198, 155–156, 180–182.

to find. In this regard, the codification of international crimes in Articles 6–8 of the Statute of the International Criminal Court (ICC Statute) has turned out to be very helpful and many States have adopted verbatim the definitions contained therein. Few States have extended their jurisdiction over these crimes on the basis of universal jurisdiction. Most limit the scope of their national legislative jurisdiction to territoriality and nationality with some, like the UK, also recognising ‘residence’ based jurisdiction, which could be classified as either a limited form of universal jurisdiction or an extended version of the nationality principle.⁹⁷ Germany is notable exception insofar as its international crimes legislation provides for universal jurisdiction, limited by certain procedural checks.⁹⁸

Over time, the category of crimes over which universal jurisdiction may be invoked has increased. Originally only piracy was recognised as qualifying due to the fact that the criminal conduct often took place on the high seas where no State exercises exclusive jurisdictional competence. Today, it is generally accepted that genocide, crimes against humanity and war crimes are crimes that are capable of being prosecuted on the basis of universality. Although universal jurisdiction is not necessarily restricted to these crimes,⁹⁹ those currently qualifying are certainly very limited in number.¹⁰⁰ By way of determining criteria, Higgins states, that to meet the required threshold they must be ‘acts which are commonly treated as criminal in the local jurisdiction of most States, and which they perceive also as an attack upon *international order*’.¹⁰¹ Suffice to say, to be subject to universal jurisdiction the conduct should be very widely accepted by States as constituting a crime (and should probably constitute customary international law) before it can be prosecuted by a State

⁹⁷ The UK’s international crimes legislation is discussed in detail in Chapter 3, section 1.2.

⁹⁸ Germany’s international crimes legislation is discussed in detail in Chapter 4, section 2.1.2, 199–205.

⁹⁹ For further discussion of which crimes may be candidates for universal jurisdiction, see Chapter 2, section 1.

¹⁰⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 58.

¹⁰¹ Higgins (n 100) 58.

claiming to act in the name of the (so-called) ‘international community as a whole’.¹⁰² The greater challenge may, however, lay not in the identification of certain crimes as being subject to universal jurisdiction, but rather in their (uniform, or at least consistent) definition by States.

A form of extraterritorial and ‘non-linked’ jurisdiction that overlaps with universal jurisdiction but should be distinguished on policy grounds if not on practical grounds is jurisdiction based on representation.¹⁰³ Practically speaking, the end result in both cases may be the same: a State without a traditional ‘link’ to the crime prosecutes. However, the rationale for the transfer of jurisdictional competency is entirely different. States that prescribe conduct and invoke this basis of jurisdiction do so to cover the situation when, for various reasons, prosecution in the territorial State will not be possible, for example, problems with the extradition of the individual concerned.¹⁰⁴ Instead of a State acting

¹⁰² Discussing the concept of international interests, see Chapter 5, 249–250.

¹⁰³ Also called ‘vicarious jurisdiction’. This basis is popular in certain European States. Discussing the principle, see Jürgen Meyer, ‘The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction’ (1990) 31 *Harvard International Law Journal* 108–116, 115–116; Colangelo (n 96) fn 27.

¹⁰⁴ Problems with extradition may be a reason for invoking representative jurisdiction. The French Criminal Code provides in Art 113–8–1 (Inserted by Act No 2004–204 of 9 March 2004, Article 19 Official Journal of 10 March 2004): ‘Sans préjudice de l’application des articles 113-6 a 113-8, la loi pénale française est également applicable à tout crime ou à tout délit puni d’au moins cinq ans d’emprisonnement commis hors du territoire de la République par un étranger dont l’extradition a été refusée à l’Etat requérant par les autorités françaises aux motifs, soit que le fait à raison duquel l’extradition avait été demandée est puni d’une peine ou d’une mesure de sûreté contraire à l’ordre public français, soit que la personne réclamée aurait été jugée dans ledit Etat par un tribunal n’assurant pas les garanties fondamentales de procédure et de protection des droits de la défense, soit que le fait considéré revêt le caractère d’infraction politique’. [Official translation: ‘Without prejudice to the application of articles 113-6 to 113-8, French Criminal law is also applicable to any felony or misdemeanour subject to a penalty of at least five years’ imprisonment committed outside the territory of the French Republic by an alien whose extradition to the requesting State has been refused by the French authorities either because the offence for which the extradition has been requested is subject to a penalty or to a safety measure that is contrary to French public policy, or because the person in question has been tried in the aforesaid State by a court which does not respect the basic procedural guarantees and the rights of the defence, or because the matter in question shows the characteristics of a political offence.’]

The German Criminal Code provides: § 7 ‘Geltung für Auslandsstaaten in anderen Fällen ... (2) Für andere Taten, die im Ausland begangen werden, gilt das deutsche Strafrecht, wenn die Tat am Tatort mit Strafe bedroht ist oder der Tatort keiner Strafgewalt unterliegt und wenn der Täter ... 2. zur Zeit der Tat Ausländer war, im Inland betroffen und, obwohl das Auslieferungsgesetz seine Auslieferung nach der Art der Tat zuließe, nicht ausgeliefert wird, weil ein Auslieferungssuchen innerhalb angemessener Frist nicht gestellt oder abgelehnt wird oder die Auslieferung nicht ausführbar ist’. [Official translation: Offences committed abroad—other cases ... (2) German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender: ... or 2. was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act

unilaterally – as is the case with universal jurisdiction – where representative jurisdiction is invoked ‘the decision to prosecute is not taken in isolation by the state claiming jurisdiction, but requires a certain understanding, if not agreement, by the other state which is more directly concerned’.¹⁰⁵ In other words, the third State furnishes itself with the necessary legislative provisions so that it can ‘step into the shoes’ of the territorial State (albeit applying its own laws), rather than furnishing itself with the competence to prosecute without regard to, and in the place of, the territorial State. Two further aspects of representative jurisdiction distinguish it from universal jurisdiction. The first is that it can, in theory, apply to any crime – seriousness or widespread acceptability are not prerequisites, although in reality a gravity threshold will normally apply.¹⁰⁶ The second is that the State which asserts judicial jurisdiction on this basis does so to protect the interests of the territorial State rather than acting on behalf of the interests of the international community. Indeed, the representation principle in truth shares a great deal in common with the international principle *aut dedere aut judicare* due to its bilateral, cooperative and extradition-related basis, a topic that will be dealt with in Chapter 2.

The potential for conflicts of judicial jurisdiction arising increase considerably once universal jurisdiction is recognised as a valid base of jurisdiction and States establish legislative jurisdiction. As the rationale for allowing universal legislative jurisdiction is sound, albeit limited to certain crimes, the answer lies in applying procedural safeguards rigorously at the outset and certainly by the stage where a State is in a position to assert judicial jurisdiction. The most obvious requirement that would limit wholly exorbitant claims is requiring the presence of the accused at all stages of the process. Another would be a requirement to defer

would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.]

¹⁰⁵ Council of Europe: European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (Publication and Documents Division 1990) 14.

¹⁰⁶ eg Code Pénal, Art 113–8–1. French law is applicable ‘à tout crime ou à tout délit puni d’au moins cinq ans d’emprisonnement.’

if a more closely linked State is able and willing to make use of its own legislative jurisdiction and exercise judicial jurisdiction.

Conclusions

The right to regulate conduct through the exercise of lawfully established legislative jurisdiction is an inherent quality of Statehood. This right is extensive, but it is not unlimited as each State is entitled to enjoy the presumption against extraterritorial assertions of judicial jurisdiction. The State seeking to exercise judicial jurisdiction must be able to point to a legal basis (ie legislative jurisdiction established on one of the recognised principles of jurisdiction) to demonstrate that it is entitled to proceed. The twin principles of the sovereign equality of States and non-intervention, along with the potential limiting character of certain rules of international law, guide this conclusion. As jurisdiction usually coincides with the limits of State sovereignty, territoriality remains the primary basis on which legislative jurisdiction is established and judicial jurisdiction exercised. However, the increasingly transboundary nature of the type of conduct States seek to regulate, criminal conduct being one key example, has created lacunae which territoriality alone cannot address.

Exclusive reliance on the territorial principle has proven to be impossible for any State and, as a matter of practical necessity, extraterritorial bases of jurisdiction have developed under customary international law. No general formal codification of the bases of jurisdiction has taken place, although many individual treaties do make reference to them. Yet, rather than furnishing States with unlimited powers to assert judicial jurisdiction over extraterritorial conduct, the right to exercise this jurisdiction is circumscribed. Certain principles and rules of international law limit the '*Lotus* presumption' of absolute State freedom; also, adequate 'linkage' based on one of the four major principles of extraterritorial jurisdiction –

nationality, passive personality, protective or universal – must be established in order for prescription to (usually) be acceptable to other States.

The lack of hierarchy in respect of the five principles of jurisdiction means that no single basis enjoys primacy over the others. Some bases of jurisdiction may be relied on more readily by States, and the application of others has provoked controversy at times. While all States make use of territoriality and many also invoke nationality based jurisdiction, including other principles of jurisdiction in national legislation is an option, albeit one that is rarely used to the extent permitted under treaty or customary international law. This Chapter has identified the major limitations and potential areas for dispute surrounding each of the principles of jurisdiction. Placing the principles in a hierarchy is appealing on one level, but could mean that judicial jurisdiction is not exercised in the end because the State which is ‘supposed’ to prosecute is not able to do so. Insufficient or non-existent legislative jurisdiction, a lack of will or the practical capacity to act are the main sources of inactivity. The best way to ensure this situation does not arise is to promote concurrency of legislative jurisdictions where jurisdiction is established on a range of bases of jurisdiction so that the possibility that another State can assume judicial jurisdiction instead is increased. The next Chapter turns its attention to the rights and duties incumbent on States to establish this legislative jurisdiction over international and transnational crimes.

Chapter 2

The Expansion of Extraterritorial Jurisdiction

In terms of purely national or so-called ‘ordinary’ crimes, jurisdiction is usually territorially limited, although sometimes a State will have established nationality-based jurisdiction, especially so if it adheres to the principle of non-extradition of nationals. In respect of international and transnational crimes, the story is somewhat different. States are either obliged, or are given the power, by treaty or custom to establish national legislative jurisdiction over conduct constituting an international or transnational crime. Multilateral treaties set out in special jurisdictional provisions the requirement for States parties to establish legislative jurisdiction over the conduct criminalised under the treaty in its substantive part and set out the range of bases on which they must or may establish that jurisdiction. At the very least, these treaties oblige the territorial State to establish legislative jurisdiction and, often, also to establish jurisdiction on the basis of the nationality principle. Establishing jurisdiction on any of the other bases of jurisdiction is recognised as a matter of duty or right to varying degrees depending on the individual text. For conduct that is recognised as constituting a crime under customary international law, States have the power to establish extraterritorial legislative jurisdiction on any of the bases of jurisdiction recognised under international law, and perhaps a duty to do so on certain jurisdictional bases as well. Given that international law, and especially when we refer to international criminal jurisdiction, regulates relations between States and individuals, Mills observes that ‘the idea of jurisdiction in international law as a matter of state discretion should no longer be the

starting point of thinking on the subject, but should be replaced by an idea of state jurisdiction as a mixture of discretionary, mandatory and prohibitive elements'.¹

Several factors, both legal and political, may influence a State's decision to establish legislative jurisdiction with regard to international and transnational crimes, and to do so on an extended extraterritorial basis as well.² Treaty obligations are the most obvious source but equally a growing sense that international and transnational criminal conduct ought to be prosecuted has encouraged States to extend legislative jurisdiction beyond their territorial borders. Extending jurisdiction in this way is intended to ensure prosecutions can take place somewhere. Furthermore, in terms of international crimes (genocide, crimes against humanity and war crimes), the entry into force of the Statute of the International Criminal Court 1998 (henceforth ICC Statute) has provided a powerful impetus for States parties to establish or revise their national legislation to ensure that they can avail themselves of the complementary jurisdiction of the Court and exercise judicial jurisdiction themselves, if they are able and willing to do so. This entails at the very least establishing extraterritorial jurisdiction on the basis of nationality, alongside territoriality. The existence of this *sui generis* treaty regime establishing an international criminal court has consequently had a far reaching impact on national criminal jurisdictions as well as setting up the first ever permanent international criminal court of its kind.

Since the drafting of the Convention for the Suppression of Unlawful Seizure of Aircraft 1970 all treaties addressing criminal conduct refer to the principle *aut dedere aut judicare* (or a variation on it). The inclusion of a 'duty to extradite or prosecute' provision in a treaty has the potential to significantly expand the scope of national legislative jurisdiction on an

¹ Mills A, 'Rethinking Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187–239, 212–213.

² Looking specifically at the topic of how the UK has applied its laws extraterritorially, see See Paul Arnell, *Law Across Borders: The Extraterritorial Application of United Kingdom Law* (2012 Kindle DX Version, Retrieved from Amazon.co.uk) Chapter 3.

extraterritorial basis. This is because if extradition to another State does not take place, the exercise of judicial jurisdiction may become obligatory based on the presence of the alleged offender in a States party's territory. The *aut dedere aut judicare* principle may consequently require States to legislate on an extraterritorial basis either to facilitate the prosecution of an extraterritorial offence where extradition is not possible or to satisfy any double criminality requirements needed for extradition to take place.

This Chapter seeks to tease out the precise nature, and the extent, of States' obligations or powers to establish and exercise jurisdiction for international and transnational crimes under international law. In Part I it explores the sources of the rights and duties to establish adequate legislative jurisdiction on a territorial as well as an extraterritorial basis. Against this backdrop, Part II discusses the obligations placed on States to extend their legislative jurisdiction extraterritorially through a discussion of the complementary *aut dedere aut judicare* principle.

1. Establishing Legislative Jurisdiction

The freedom of States to elect whether or not to criminalise certain conduct and establish jurisdiction is limited to a greater extent than ever before as a result of international law. International and transnational crime treaties contain provisions detailing the nature of the proscribed activity (ie they establish substantive criminality) and an obligation for States parties to criminalise that conduct under national law.³ The advantage of treaty obligations is that the crimes are clearly set out in the relevant text and States parties may incorporate definitions verbatim. Incorporation of the treaty's provisions is, however, generally required. Few, if any, States rely directly on treaty obligations – most require enabling national

³ On the duality of substantive international criminal law (ie its international and national roots), see Paul Arnell, 'International Criminal Law and Universal Jurisdiction' (1999) 11 *International Legal Perspectives* 53–63.

legislation.⁴ Conduct that constitutes an international or transnational crime may also be recognised under customary international law. A perennial difficulty with crimes that have developed at the customary law level is that their character and scope are not defined precisely and may consequently be interpreted differently by States (which may in turn create problems for the principle of legality and double criminality).⁵ Furthermore, States are generally unwilling to rely directly on customary international law as a basis for imposing individual criminal liability, as evidenced in the discussion of the customary status of torture in *Pinochet (No 3)*.⁶ Relying on national legislation is once again the norm.⁷

Turning to the jurisdictional aspect, which is the main concern of this Chapter, the starting point is that States are only obliged to establish jurisdiction over conduct that constitutes transnational criminal activity on the basis of the jurisdictional parameters set out in international treaties which they have ratified. For international crimes matters are slightly more complex: when the criminal conduct is the subject of a multilateral treaty, this text will contain a jurisdiction clause which stipulates on what bases States parties must or may establish legislative jurisdiction. However, as international crimes are also crimes under customary international law, every State has the power to establish jurisdiction on any of the recognised bases of jurisdiction discussed in Chapter 1, namely, territoriality and nationality, along with passive personality, protective or universal jurisdiction. The two categories of crimes will be discussed in turn, although the discussion is simply illustrative of a few key examples designed to highlight the range of jurisdictional provisions currently in place and whether States may or must establish jurisdiction rather than providing an exhaustive run-

⁴ Ward N Ferdinandusse, *Direction Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 17–88.

⁵ Piracy, once the archetypal customary international law crime does, however, now have a treaty basis: United Nations Convention on the Law of the Sea 1982, 1833 UNTS 33, Art 101.

⁶ *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [2000] 1 AC 147 (HL). Also known as ‘*Pinochet (No 3)*’.

⁷ Ferdinandusse (n 4) 17–88.

down of the jurisdictional requirements in respect of all international and transnational crimes.⁸

1.1. International Crimes

The Genocide Convention 1948 foresees in Article VII jurisdiction being exercised ‘by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’.⁹ Jurisdiction based on the universality principle was discussed during the drafting of the convention, but was rejected by the majority of States in the Sixth Committee debates.¹⁰ And while a jurisdictional provision that would require States to establish legislative jurisdiction on the basis of nationality did not find its way into the final text of the Convention, a clarifying statement was proposed by the chairman of the drafting committee in recognition of the widespread acceptance that the principle enjoyed generally. This statement provides that ‘the first part of Article VI contemplates the obligation of the State on whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State’.¹¹ The decision not to include nationality – a ‘universally recognised principle of jurisdiction’ – in the text of Article VI is not as significant as it first seems. The statement in the Sixth Committee Report did not rule out nationality jurisdiction, but carefully refers to a State’s ‘right’ rather than to its ‘duty’ to exercise such jurisdiction. A right to establish jurisdiction does not need to be enshrined in a treaty, although for the sake of clarity most recently drafted crime treaties list

⁸ For thorough treatment of transnational crime, their characteristics and methods of criminalisation, see Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012) Chapters 3–11. For similar treatment in respect of international crimes, see Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010) Chapters 10–12.

⁹ Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.

¹⁰ UNGA Sixth Committee (11 November 1948) UN Doc A/C.6/SR.100, 406.

¹¹ UNGA Sixth Committee (3 December 1948) UN Doc A/C.6/SR.134, 717.

the bases on which legislative jurisdiction must be established as well as those that a State may choose to incorporate as well. Establishing territorial jurisdiction under the Genocide Convention is, in contrast, an unequivocal obligation on States parties.¹² This fact was confirmed in the 2007 judgment of the ICJ in *Application of the Genocide Convention*:

Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.¹³

The Genocide Convention is limited in respect of the jurisdictional bases it expressly includes, and beyond tacit recognition of nationality-based jurisdiction it seems unlikely that including any other bases of national jurisdiction was seriously contemplated by a majority of States at the time of drafting.¹⁴ However, customary developments and changes in attitudes vis-à-vis the prosecution of international crimes since 1948 have widened the scope of acceptable national legislative jurisdiction for the crime of genocide. In its 1996 *Preliminary Objections* ruling in *Application of the Genocide Convention*, the Court noted that ‘the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention’.¹⁵

The nationality of the accused is a legitimate ground on which States may establish legislative jurisdiction for the crime of genocide, despite the paucity of national prosecutions on this basis. The trial in The Netherlands of Frans van Anraat for complicity in genocide in

¹² When implementing the Genocide Convention 1948, some States provided expressly for jurisdiction over nationals (eg USA, Genocide Convention Implementation Act 1987 (now repealed by Genocide Accountability Act 2007) although others did not (eg UK, Genocide Act 1969 (now repealed by International Criminal Court Act 2001).

¹³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment of 26 February 2007 para 442.

¹⁴ Passive personality was discussed – and rejected – by the Sixth Committee. See William Schabas, *Genocide in International Law: the Crime of Crimes* (2nd edn CUP 2009) 359.

¹⁵ Emphasis added. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Preliminary Objections, Judgment of 11 July 1996 para 31.

Iraq is possibly the only such example.¹⁶ Nonetheless it has been argued that the right to establish jurisdiction over nationals who are suspected of having committed the crime of genocide abroad has now attained the level of a customary law.¹⁷ This right, if it exists, would flow not only from the customary status of the prohibition of genocide itself, but also from recognition of the central position afforded to nationality-based jurisdiction by many States.¹⁸

Establishing jurisdiction on the universality principle, which was strongly opposed during the drafting of the Genocide Convention, also now appears to be recognised as of right under customary international law. The existence of such a right is widely supported in the literature.¹⁹ In terms of national case law, Israel's *Eichmann* decision remains the most audacious statement of universal jurisdiction's customary law status for the crime of genocide.²⁰ Asserting its existence may have been premature at the time, but today this position is widely accepted. International declarations, judgments of the two ad hoc international criminal tribunals (ICTs), revised national legislation and the ever-increasing body of national judicial authorities invoking the principle mean that no 'credible challenge

¹⁶ Schabas (n 14) 425. In contrast, prosecutions on the basis of territoriality have been more forthcoming, see Schabas (n 14) 416–425.

¹⁷ Roger S Clark, 'State Obligations under the Genocide Convention in light of the ICJ's Decision in the Case of Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (2008) 61 *Rutgers Law Review* 75–109, 80.

¹⁸ The ICJ's *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion of 28 May 1951 is commonly read as recognising the customary status of genocide, 23.

¹⁹ Charting the development of this customary right for universal jurisdiction over genocide, see Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) 148–156; Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 87. Also, the lengthy list of references provided in Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* September 2001 (AI Index: IOR 53/009/2001) Chapter VII, 4, fn 10. Arguing that there is no State practice to support this contention, see M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001–2) 42 *Virginia Journal of International Law* 81–162.

Any such right may have become embedded in the past 10 years or so. A comparison between the cautious approach demonstrated in the 2000 edition and the resounding support in the 2009 edition demonstrates how significant the changes of the past decade have been. See William Schabas, *Genocide in International Law* (CUP 2000) 367–378; Schabas (n 14) 435.

²⁰ *Attorney-General of the Government of Israel v Adolf Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem) 18–276.

to the principle of universal jurisdiction where genocide is concerned' can really be sustained anymore.²¹ There remains, however little support for a customary obligation to exercise universal jurisdiction.²²

The category of crimes collectively known as war crimes covered by the four Geneva Conventions 1949 and their two Additional Protocols, along with the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and its Second Protocol and the Convention on the Safety of United Nations and Associated Personnel 1994 and the various treaties dealing with the use or possession of certain weapons all contain provisions detailing on what bases States parties may or must establish legislative jurisdiction.²³ Due to space considerations, discussion will be limited to the jurisdictional provisions contained in the four Geneva Conventions and their Additional Protocols.

War crimes collectively enjoy the most far-reaching codification of any of the international crimes.²⁴ The treaty regime for war crimes committed in international armed conflict is principally governed by the Geneva Conventions and Additional Protocol I.²⁵ The Conventions' common article on national jurisdiction places an explicit obligation on

²¹ Schabas (n 14) 435. More cautiously, Cryer asserts that 'State practice... offers just about sufficient support to ground a right to do so in custom.' Cryer (n 19) 87.

²² Inazumi (n 19) 142–143, 156; MA Summers, 'The International Court of Justice's Decision in *Congo v. Belgium*: How has it affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?' (2003) 21 *Boston University International Law Journal* 63–100, 82–87; Michael Scharf, 'Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?' (1996) 31 *Texas International Law Journal* (1996) 1–43, 34–39; Claus Krefß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 *Israel Yearbook of Human Rights* 103–177, 170. Arguing that there is an obligation and not merely a right, see Orna Ben-Naftali, Miri Sharon, 'What the ICJ did not say about the Duty to Punish Genocide' (2007) 5 *Journal of International Criminal Justice* 859–874, 865–870.

²³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1992 1974 UNTS 45; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997 2056 UNTS 211; Convention on the Use of Certain Chemical Weapons 1980 1342 UNTS 137 and its Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices 1996 2048 UNTS 93.

²⁴ Charting the historical evolution, see Timothy LH McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy LH McCormack, Gerry Simpson, *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997) 31–63.

²⁵ The Protocol additional to the Geneva Conventions 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I) 1125 UNTS 3 incorporates the common jurisdictional article by

Each High Contracting Party ... to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.²⁶

The ICRC commentary to the articles confirms that States are under an obligation to enact national legislation that extends to both nationals and non-nationals.²⁷ This provision has never been interpreted as doing anything other than obliging States parties to establish (as well as actually exercise) jurisdiction over individuals who commit grave breaches of the Conventions, although the State may also ‘hand over’ (extradite) the individual to another High Contracting Party for trial if it has presented a *prima facie* case. The formulation in the common article may be an early forerunner to the *aut dedere aut judicare* provisions contained in later texts: although the emphasis (and obligation) is on prosecution, the right to extradite is also provided for.²⁸ According to Lauterpacht, ‘no more emphatic affirmation of the principle of universality of jurisdiction with regard to the punishment of war crimes could be desired’.²⁹ The conventional obligation on States parties to establish jurisdiction on a nationality and universal basis, as well as territoriality, is thus mandatory rather than discretionary.

Establishing legislative jurisdiction on the basis of universal jurisdiction has also gained acceptance under customary international law in respect of grave breaches of the Conventions.³⁰ Indeed, in the opinion of Kreß ‘the only duty to exercise universal

reference in Article 85(1): ‘The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.’

²⁶ Common Article: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 75 UNTS 31, Art 49; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 75 UNTS 85, Art 50; Geneva Convention (III) Relative to the Treatment of Prisoners of War 1949 75 UNTS 135, Art 129; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, Art 146.

²⁷ Commentaries are available through the International Committee of the Red Cross website available at: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (accessed: 31 January 2015).

²⁸ See Part II, below, on the duty to extradite or prosecute.

²⁹ H Lauterpacht, ‘The Problem of the Revision of the Law of War’ (1952) 29 *British Yearbook of International Law* 360–382, 362.

³⁰ See further, Gabriel Bottini, ‘Universal Jurisdiction After the Creation of the International Criminal Court’ (2003-4) 36 *New York University Journal of International Law & Politics* 503–562, 533.

jurisdiction, which is firmly established in customary international law, relates to the grave breaches of the Geneva Conventions and to Protocol I'.³¹ However, if the provision is read in keeping with the original Pictet commentary, it appears that universal jurisdiction is only obligatory when the alleged criminal is present on the State's territory:³² in other words, there may be a right to establish *in absentia* universal jurisdiction, but no obligation to exercise it under the Conventions or customary international law. This view is shared by Reydams who, while not doubting the universal jurisdiction character of the provision or the imperative nature of the Geneva Conventions jurisdictional regime, submits that it is premised on actual custody of the offender which would come about either through the voluntary presence of the individual in the State's territory or potentially following extradition from another High Contracting Party (paragraph 2, common article).³³ Reydams concludes that 'the competence of the *judex loci deprehensionis* over grave breaches is primary *and* mandatory for all states parties, not just for those whose internal legislation recognizes as a general rule the principle of prosecution of extra-territorial offences'.³⁴ In contrast, in the *Arrest Warrant* case Judges Higgins, Kooijmans and Buergenthal query (or, at least leave the question open) whether the regime can be truly classed as constituting (obligatory) universal jurisdiction if the duty to 'search for' is territorially limited.³⁵

They prefer the construction 'obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere'.³⁶ However, as the trend in State practice seems to be away from asserting *in absentia* universal jurisdiction and (back) towards 'linked' or custody-based

³¹ Kreß (n 22) 170.

³² ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment of 14 February 2002, Joint Separate Opinion, Judges Higgins, Kooijmans, Buergenthal para 31, quoting Pictet Commentary (see (n 86) below).

³³ Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2005) 55.

³⁴ Reydams (n 33) 56. See also Menno T Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2001) 23 *Human Rights Quarterly* 940–974, 946.

³⁵ *Arrest Warrant* (n 32), Joint Separate Opinion, Judges Higgins, Kooijmans, Buergenthal, para 31. 'Searching for' is classified as enforcement jurisdiction, so this obligation is territorially limited to this extent.

³⁶ *Arrest Warrant* (n 32), Joint Separate Opinion, Judges Higgins, Kooijmans, Buergenthal, para 41. See further, Inazumi (n 19) 103–104; Cryer (n 19) 85.

jurisdiction ('residence' is sometimes a requirement),³⁷ it would seem that reading a presence-based nexus into the provision is not necessarily out of step with current developments.

War crimes committed in non-international armed conflict falling under common Article 3 are not subject to the mandatory universal jurisdiction regime. Kreß warns against analogising or adopting a teleological interpretation of the Convention that could conflate the two situations,³⁸ and the Appeals Chamber in *Tadić* refused to extend the mandatory regime, stating that 'State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts – at least not the mandatory universal jurisdiction involved in the grave breaches system'.³⁹ While a corresponding customary duty to establish universal jurisdiction over this category of crimes is certainly lacking and remains unsupported in the literature⁴⁰ a right to do so has been recognised⁴¹ and is confirmed by some incidences of State practice.⁴² Non-international armed conflict not covered by common Article 3 of the Geneva Conventions is subject to an even more restrictive jurisdictional regime. Article 6 of Additional Protocol II does not mention any grounds on which States parties must (or may) establish jurisdiction.

For crimes against humanity, no single treaty exists, although this type of criminal conduct has been variously defined in the Draft Codes of Crimes against the Peace and Security of

³⁷ See Chapter 4, section 2.1.2, discussing the German and Spanish laws and Chapter 3, 102, discussing the UK's 'residency' requirements.

³⁸ Kreß (n 22) 110.

³⁹ *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72, 2 October 1995 (Appeals Chamber) para 80.

⁴⁰ See eg Bottini (n 30) 534–535; Kreß (n 22) 170.

⁴¹ *Tadić* (n 39); Kreß (n 22) 168; Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554–577, 576; Diane Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2004) 92 *Georgetown Law Journal* 1057–1134, 1110–1111.

⁴² Examples of State practice are cited in Orentlicher (n 41) 1110–1111; Bruce Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law' (2001) 35 *New England Law Review* 399–420, 404–405.

Mankind, the Statutes of the Military Tribunals for Nuremberg and Far East, the two ad hoc International Criminal Tribunals and the International Criminal Court.⁴³ The precise list varies in each and the Statutes are directed toward prosecutions that will take place at the international rather than the national level, but the jurisprudence of the tribunals has done much to shape the definition and the circumstances needed for the conduct to reach the necessary gravity threshold to be considered as constituting a crime against humanity under international law. Put simply, a crime against humanity is now defined as entailing ‘the commission of a listed inhumane act, in a certain context: a widespread or systematic attack directed against a civilian population’.⁴⁴

Aside from codification developments in respect of crimes against humanity that are destined to be prosecuted by an international tribunal, the prohibition of such acts has occurred solely under customary international law. As discussed above, conduct that is only recognised as criminal on a customary international law basis can be problematic. And even if the conduct is prohibited on a customary basis, it does not necessarily follow that the exercise of jurisdiction by States is also sufficiently established so as to constitute a customary obligation binding on all States. Difficulties are apparent when it comes to determining what rights or obligations States have in respect of establishing national legislative jurisdiction over crimes against humanity. It is, nonetheless, probably safe to say that, at a minimum, the territorial State has a duty to prescribe jurisdiction for crimes against humanity under customary international law. This is in spite of the widespread practice of granting amnesties for conduct

⁴³ Draft Code of Crimes against the Peace and Security of Mankind 1996 [with Commentaries] *Yearbook of the International Law Commission* (1996) Vol II, Part Two, 7–56, Art 18; Charter of the International Military Tribunal 1945 82 UNTS 280 (Nuremberg Tribunal), Art 6(c); Charter of the International Military Tribunal for the Far East 1946 (Tokyo Tribunal), Art 5(c); Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to Security Council resolution 827, UN Doc S/RES/827 (1993), Art 5; Statute of the International Criminal Tribunal for Rwanda, annexed to Security Council resolution 955, UN Doc S/RES/955 (1994), Art 3; Rome Statute of the International Criminal Court 198 2187 UNTS 90, Art 7.

⁴⁴ Cryer et al. (n 8) 91.

constituting these crimes.⁴⁵ The most contested jurisdictional basis is of course universal jurisdiction, although States do now appear to have the right to exercise universal jurisdiction over customary crimes against humanity if they legislate accordingly.⁴⁶

Conduct that is now classified as a crime against humanity if committed under certain circumstances and meets the necessary criteria may also be the subject of a multilateral treaty.⁴⁷ The Convention against Torture 1984 sets out a detailed jurisdictional framework which States parties must adopt. Nationality and territorial jurisdiction is obligatory (extending to any territory under its jurisdiction), with passive personality jurisdiction left to the State party's discretion (Article 5(1)). The right to go beyond these bases is enshrined in Article 5(3), which provides that the 'convention does not exclude any criminal jurisdiction exercised in accordance with internal law'. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 (the Torture Convention) also includes the obligation to prosecute when extradition is not possible in Articles 5(2) and 7, which is considered an independent basis of jurisdiction and not dependent on jurisdiction first being established by the State under Article 5(1). Article 5(2) therefore allows for universal jurisdiction to be established by States parties to cover those situations when the suspect is present on the State's territory or territory which it controls. No prior extradition request is necessary to invoke this duty: simply put, if the State does not extradite for whatever reason, it must

⁴⁵ Jackson discusses these amnesty practices and offers an interesting solution based on the derogations provisions of international human rights treaties to the problem of the 'duty to prosecute vs. amnesties'. Miles M Jackson 'The Customary International Duty to Prosecute Crimes against Humanity: A New Framework' (2007) 16 *Tulane Journal of International and Comparative Law* 117–156.

⁴⁶ This is supported in the majority of the literature on the topic. See for example: Cryer (n 19) 87; Steven Ratner, Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd edn OUP 2001) 143; M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd rev edn Kluwer Law International 1999) 240; Amnesty International (n 19) Chapter 5, 9–14. (Arguing that in addition to a right, there may also be an obligation to exercise universal jurisdiction.)

⁴⁷ Torture may also constitute a war crime, a 'grave breach' of the Geneva Conventions (Convention I, Art 50; Convention II, Art 51; Convention III, Art 130; Convention IV, Art 147) entailing mandatory universal jurisdiction. In terms of non-international armed conflicts, torture is also prohibited (common Article 3) but only entails permissive universal jurisdiction.

prosecute.⁴⁸ The Committee against Torture established in *Senegal (re. Hissène Habré)* that a failure to establish universal jurisdiction is a violation of Article 5(2) for which States parties are obliged to legislate.⁴⁹ And the case of *Zardad*, where a successful prosecution was brought for torture under Article 5(2), represented for the Special Rapporteur on Torture a ‘best practice example of a State willing to overcome the jurisdictional challenges involved in a universal jurisdiction prosecution’.⁵⁰

It has nonetheless taken a while for torture as a separate international crime to be fully accepted as having reached the status of customary international law. In *Pinochet (No.3)* the argument that torture was a crime recognised under customary international law prior to the entry into force of the Convention was rejected.⁵¹ Torture is now recognised as having attained this status, however, and carries with it the right of all States to establish legislative jurisdiction over conduct constituting the crime of torture on any of the five recognised bases of jurisdiction.⁵²

1.2. Transnational Crimes

Efforts to draft a general treaty on terrorism have not succeeded and the ‘terrorism’ as a crime remains undefined.⁵³ Terrorism is therefore, at present, only criminalised at the inter-State

⁴⁸ J Herman Burgers, Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers 1988) 132; Manfred Nowak et al., *The United Nations Convention against Torture: A Commentary* (OUP 2008) 255.

⁴⁹ *Senegal* [2006] UNCAT 1; CAT/C/36/D/181/2001, decision of 16 May 2006, Communication No 181/2001 paras 9–10. Human Rights Council, *Report of the UN Special Rapporteur on Torture to the Human Rights Council (Manfred Nowak)* A/HRC/4/33 (15 January 2007), paras 41–47, especially paras 43–45. Discussing the early stages of the case against Habré and surrounding issues in some detail, including the nature of Article 5(2), see Stephen P Marks, ‘The Hissène Habré Case: The Law and Politics of Universal Jurisdiction’ in Stephen Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2004) 131–167, 155–159, 163.

⁵⁰ *R v Faryadi Sarwar Zardad* [2007] EWCA Crim 279. Special Rapporteur Comments, cited in Nowak et al. (n 48) 307 (emphasis in original).

⁵¹ *Pinochet (No 3)* (n 6). Cf Lord Millett, who accepted the argument 101–102.

⁵² *Prosecutor v Anto Furundžija*, Case No IT-95-17/1-T 10 December 1998 (Trial Chamber) para 147, 156; Antonio Cassese, *International Criminal Law* (OUP 2003) 119.

⁵³ Cassese argues to the contrary, stating that there is a definition and it also amounts to a customary international law crime. Cassese (n 52) 120. In 2000, a draft treaty was presented entitled *Draft Comprehensive*

level through individual treaties dealing with specific terrorist activities. These treaties were often drafted in response to heightened threats or in response to specific attacks and cover acts such as aircraft hijacking and other offences against civil aviation;⁵⁴ hostage taking and attacks on internationally protected persons;⁵⁵ attacks against ships and fixed maritime installations;⁵⁶ terrorist bombings and the potential abuse of nuclear materials.⁵⁷ Recently, the financing of terrorism has also been criminalised.⁵⁸ ‘Cyber terrorism’ is also emerging as a serious threat to States and to world trade, although no multilateral treaty has yet been drafted covering it specifically or cybercrime more generally.⁵⁹ The piece-meal approach to the criminalisation of terrorist action could be viewed as a problem, or necessary in light of the profound difficulties with generalising in this field of law. Certain acts coming under the umbrella heading of terrorism may rise to the level of a war crime or crime against humanity if the necessary gravity criteria are met.⁶⁰ Criminal responsibility for acts constituting terrorism is not, however, established directly under customary international law. Instead, terrorism is recognised as a transnational crime and is only criminalised under the international treaties dealing with specific terrorist acts.

Convention on International Terrorism UN Doc A/C.6/55/1 (28 August 2000). Work is ongoing in this area, see further: http://www.un.org/en/ga/sixth/69/int_terrorism.shtml (accessed 31 January 2015).

⁵⁴ Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 704 UNTS 219 [Tokyo Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft 1970 860 UNTS 105 [Hague Convention]; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 974 UNTS 178 [Montreal Convention] and its Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988 27 ILM 627.

⁵⁵ Convention against the Taking of Hostages 1983 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973 1035 UNTS 167.

⁵⁶ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 1678 UNTS 221; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988 1678 UNTS 304.

⁵⁷ Convention for the Suppression of Terrorist Bombing 1997 2149 UNTS 256; Convention on the Physical Protection of Nuclear Material 1980 1456 UNTS 101.

⁵⁸ Convention for the Suppression of the Financing of Terrorism 1999 2178 UNTS 197.

⁵⁹ The Council of Europe Cybercrime Convention 2001 ETS No 185.

⁶⁰ Geneva Convention IV, Art 33(1); Additional Protocol I Art 51(2); Protocol additional to the Geneva Conventions 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 (Protocol II) 1125 UNTS 609, Art 4(2)(d), Art 13(2). Supporting terrorism as a potential crime against humanity, see Cryer et al. (n 8) 294; Cassese (n 52) 128.

The precise wording of the obligations to establish legislative jurisdiction and on what bases of jurisdiction this must be done varies between the different treaties although all of them (except the Tokyo Convention) contain a provision on the duty to prosecute in the absence of extradition.⁶¹ They also all include an obligation for States parties to establish jurisdiction on territorial/‘flag’ State (ie registration) grounds and, in most instances, on the basis of the nationality of the offender – although the possibility that the State of nationality may have little interest in prosecuting or capacity to do so (especially in regard to State-sponsored acts) is one possible explanation for its occasional omission from the list of obligatory grounds. The Hague and Montreal Conventions do not explicitly foresee nationality-based jurisdiction; however, the inclusion of a duty to extradite or prosecute (Article 7 in both treaties) coupled with the provision on non-exclusion of ‘any criminal jurisdiction exercised in accordance with national law’⁶² makes up for this deficiency and does not therefore exclude jurisdiction from being established and exercised on the basis of nationality. The Hague and Montreal Conventions also require States parties to establish legislative jurisdiction over the situations when an aircraft lands in its territory or when the lessee of the plane has his principle place of residence or business in that State.

Differences appear in terms of those jurisdictional bases that are provided for in the treaties on the basis of right rather than obligation. Some of the terrorism conventions provide for jurisdiction on the basis of passive personality or the protective principle, and also when the offender is a Stateless individual, when the act was aimed at compelling the State to do/not do something, or when the attack is directed against government facilities abroad (including diplomatic and consular missions) or government operated aircraft. The inclusion of these additional bases may have been in recognition that the territorial/flag State or State of nationality might be unable or unwilling to exercise judicial jurisdiction in the end, even if it

⁶¹ See Part II.

⁶² Hague Convention 1970 Art 4(3), Montreal Convention 1971 Art 5(3).

has established adequate legislative jurisdiction. The fundamental nature of the State interests that could be effected by an act of terrorism, coupled with the fact that the nationals of certain States may be particularly targeted, may suggest that having the option under the treaty to establish extended legislative jurisdiction was appealing to States involved in the drafting processes. However, all the texts do also provide that the convention in question should not exclude any other basis of jurisdiction established in accordance with national law, a fact that leaves considerable room to States to expand the jurisdictional scope of their legislative jurisdiction beyond the ambit of the treaty itself should they so choose.

The transnational treaties covering organised crime and corruption contain a set of detailed legislative obligations for States parties.⁶³ Established under the auspices of the United Nations, the Convention against Transnational Organised Crime 2000 (TOC Convention) aims to create a comprehensive framework whereby States parties establish legislative jurisdiction on a range of bases so that legislative jurisdiction is held concurrently.⁶⁴ The TOC Convention is the first multilateral treaty to foresee the possibility of consultation between States parties with a view to coordination of their actions to avoid conflicts of judicial jurisdiction (Article 15(5)).⁶⁵

⁶³ Convention against Transnational Organized Crime 2000 2225 UNTS 209. In recognition that the crime of corruption was too far-reaching to be dealt with adequately in the Treaty on Organized Crime Convention, the General Assembly recognised in Resolution 55/61 of 4 December 2000 that a separate convention was desirable. As the jurisdictional provisions are virtually identical to the TOC Convention, the Convention against Corruption 2003 2349 UNTS 41 will not be discussed separately here.

⁶⁴ Charting the progeny of the 2000 Convention, see Dimitri Vlassis, 'United Nations Convention against Organized Crime and its Protocols' in M Cherif Bassiouni, *International Criminal Law Vol I: Sources, Subjects and Contents* (3rd edn Martinus Nijhoff Publishers 2008) 907–937, 907–925.

The TOC Convention has three protocols: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime 2000 2237 UNTS 319; Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime 2000 2241 UNTS 507; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition supplementing the United Nations Convention against Transnational Organized Crime 2001 2326 UNTS 208.

⁶⁵ Other multilateral treaties include: Convention against Corruption 2003 Art 42(5); Convention for the Suppression of the Financing of Terrorism 1999 Art 7(5); Council of Europe Cybercrime Convention Art 22(5). See further, Chapter 4, section 1.2.1.

Other than the obligation to establish jurisdiction on territorial/flag State grounds, the rest of the bases of jurisdiction included in the TOC Convention are permissive in character. Beyond the right to exercise passive and active personality jurisdiction, Article 15 also includes a form of ‘effects’ or protective jurisdiction insofar as, for certain crimes or their preparation, jurisdiction may be established by a State when the act ‘is committed outside its territory with a view to the commission of a serious crime within its territory’.⁶⁶ In contrast to the mandatory *aut dedere aut judicare* provisions of the terrorism treaties, the corresponding provision in Article 15 of the TOC Convention is permissive (paragraph 3), unless the alleged offender is a national, in which case jurisdiction must be exercised in lieu of extradition (paragraph 4), even though establishing nationality-based jurisdiction is done at the discretion of States parties, rather than constituting an obligation. The emphasis therefore seems to lay heavily on jurisdiction being established by the territorial State with all other bases permitted but subsidiary in character.

The final group of transnational crimes touched on here cover the treaties aimed at controlling the illicit production through to the distribution of narcotic and psychotropic drugs, and the crime of drug trafficking. The control of drugs is a truly transnational venture as the main sites of production and consumption diverge in almost all instances and suppression requires concerted cooperation efforts between States. Often inextricably linked with other transnational organised criminal activity, the criminalisation of drug production, possession, use and trafficking stretches back many years. A regime for addressing this area of criminal conduct was consolidated in the Single Convention on Narcotic Drugs 1961 (as amended by the 1972 Amending Protocol) and was supplemented by the Convention on Psychotropic Substances 1971.⁶⁷ The jurisdictional provisions in the two conventions are

⁶⁶ TOC Convention 2000 Art 15(2)(c)(i)–(ii).

⁶⁷ Single Convention on Narcotic Drugs 1961 520 UNTS 151; Convention on Psychotropic Substances 1971 1019 UNTS 175.

virtually identical, requiring States parties to establish and exercise jurisdiction over both nationals and foreigners in the territory where the offence was committed, albeit ‘subject to the constitutional limitations of a Party, its legal system and domestic law’. A version of the *aut dedere aut judicare* principle, also subject to these potential limitations, obliges State parties ‘in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made’ to prosecute.⁶⁸

In recognition that the 1961 and 1971 Conventions did not go far enough in tackling the transportation of drugs between States, the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances was drafted in 1988.⁶⁹ Many of the issues addressed in this convention and the incorporation of provisions on cooperation and mutual legal assistance were a precursor to the TOC Convention; indeed, the 1988 Convention provided the framework for the latter convention’s *aut dedere aut judicare* provision as well as its general jurisdictional provisions. Virtually identical language to the TOC Convention can be found in Article 4 of the 1988 trafficking convention with the exception of the right to exercise enforcement jurisdiction over a vessel when authorisation has been granted to search it in accordance with Article 17 of the treaty. (This provision was included in recognition of the fact that much trafficking of drugs is carried out by sea.) The possibility of requesting another State to exercise enforcement jurisdiction is included as of right in the Convention although no mention is explicitly made as to whether the enforcing State must hand over any arrested individuals engaged in drugs trafficking to the flag State or may prosecute itself. The arresting State (ie the State exercising enforcement jurisdiction) should, however, ‘promptly inform the flag State concerned of the results of that action’.⁷⁰

⁶⁸ Single Convention 1961 Art 36(2)(iv); Psychotropic Convention 1971 Art 22(2)(iv). Paragraphs 4 and 5 of the respective articles further reiterate that the definition, prosecution and punishment of the offences as well as any questions of jurisdiction are subject to the domestic law of the State party.

⁶⁹ Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 1582 UNTS 95.

⁷⁰ Illicit Traffic Convention 1988 (n 65) Art 17(8).

The right or duty to establish legislative jurisdiction on one or more of the recognised bases of jurisdiction set out in a specific criminalisation treaty varies considerably between texts and the different types of criminal conduct. The date when the conduct was criminalised under treaty and the prevailing circumstances and attitudes apparent at the time of drafting are the main reasons for this disparity. As a general rule, the jurisdictional regimes established for the various transnational crimes are more detailed than the majority of texts dealing with international crimes. This can, in part, be explained by their more recent appearance and the shift that has taken place from an era where conduct was criminalised for the first time under international law (similar to what is sometimes called ‘standard setting’ in the human rights field) to a time when it was recognised that criminalisation of conduct needed to be supplemented by obligations on States to put in place the necessary legislative frameworks to ensure prosecutions could actually take place (an era of ‘enforcement’). Clear provisions detailing the range of jurisdictional bases available and the incumbent expectations on States to establish legislative jurisdiction are required so that States can ensure that they have the relevant national laws in place so that judicial jurisdiction may be exercised, if appropriate. Under customary international law rights, but probably not yet duties, to establish legislative jurisdiction exist. This power extends to the establishment of jurisdiction on any of the recognised principles of jurisdiction, although few States have legislated to the extent permitted under international law. Treaties and custom impose certain requirements on States (parties) to establish legislative jurisdiction over criminal conduct. These specific requirements are almost always supplemented by a ‘duty to extradite or prosecute’, at least under treaties, and will be discussed next.

2. Exercising Legislative Jurisdiction: *Aut Dedere Aut Judicare*

The obligation to prosecute or extradite, based on the Grotian maxim *aut dedere aut punire*,⁷¹ has the removal of ‘safe havens for criminals’ as its central objective. Its inclusion has now become standard in all multilateral treaties of a criminal character.⁷² The principle requires a State having custody of a criminal suspect to extradite to another State willing to prosecute, or prosecute itself, those individuals accused of having committed crimes who are present in its territory or otherwise under its jurisdiction. In its strongest form, a State must not refuse to honour an extradition request once it discovers that a suspected criminal is within its territory or decline to initiate an investigation (with the view to prosecution). In other words, they must do one or the other even if this would entail exercising jurisdiction absent any strong jurisdictional ‘link’, ie on the basis of custody-based universal jurisdiction. The duty to extradite or to prosecute – in the words of ad hoc Judge van den Wyngaert, the ‘prosecution clause’ (as opposed to the ‘jurisdiction clause’)⁷³ – by its very nature encourages the exercise of judicial jurisdiction extraterritorially. In other words, in addition to the provisions in a treaty which set out the bases of jurisdiction on which a State may or must establish legislative jurisdiction, the presence of an *aut dedere aut judicare* provision encourages (or obliges) States parties to actually exercise their judicial jurisdiction in a particular case (if they do not extradite).

The inclusion of the *aut dedere aut judicare* principle heightens considerably States’ parties obligations to take positive and proactive action, not wholly dissimilar from the active obligation to ‘search for’ found in the Geneva Conventions. Although certain restrictions may

⁷¹ H. Grotius, *De Iure Belli ac Pacis* Book II, Chapter XXI, para III–1, 2, IV–1, 3. FW Kelsy (ed, trans) *The Classics of International Law* (1925) 526–529.

⁷² An early version of the principle can be found in Article 9(2) of the Convention for the Suppression of Counterfeiting Currency 1929 112 LNTS 371, although the obligation is premised on the request – and refusal – of extradition.

⁷³ *Arrest Warrant* (n 32), Dissenting Opinion, Judge van den Wyngaert, para 62.

still prevent prosecution of the individual from going ahead, the obligation itself has the potential to require States parties to the treaty in which the principle is found to extend their extraterritorial jurisdictional capacity significantly in respect of the crimes to which it applies. Discrepancy over its precise ambit and reach does, however, remain and the topic was recently considered by the International Law Commission.⁷⁴

The discussion of *aut dedere aut judicare* in this Chapter focuses only on those aspects which directly serve to expand and strengthen the exercise of extraterritorial jurisdiction: namely, the sources of the obligation, its current status and the way in which the two aspects interact with each other (the ‘internal’ relationship) and more broadly in respect of the standard jurisdictional clauses present in the treaties which encompass the maxim (the ‘external’ relationship).⁷⁵

2.1. The Duty or Power under Treaty & Custom

Since the drafting of The Hague Convention 1970 all treaties addressing conduct of a criminal character include a variation on the duty to extradite or prosecute.⁷⁶ Several procedural treaties also make provision for prosecution in lieu of extradition and are

⁷⁴ The precise status and scope of the principle under treaty and customary international law is not entirely clear and the topic was reviewed recently by the International Law Commission. Resolution of the General Assembly endorsing the decision of the International Law Commission to include the topic ‘The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)’ in its programme of work, 23 November 2005. UNGA A/RES/60/22 para 5. The International Law Commission adopted its Final Report on ‘The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)’ 7 August, 2014, *Yearbook of the International Law Commission* (2014) Vol II.

⁷⁵ The grounds on which extradition may be refused or conditioned and the safeguards and possible limitations on the exercise of jurisdiction are dealt with in Chapter 3, section 2.2 and will not be discussed further here. The important related matters of competing extradition/jurisdiction claims and the issue of priorities are dealt with in Chapter 4, section 1.1.

⁷⁶ An exception is the Convention on the Suppression and Punishment of the Crime of Apartheid 1015 UNTS 243. Bassiouni and Wise also catalogue some of the earlier formulations of the maxim *aut dedere aut judicare*. MC Bassiouni, EM Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995) 12–14 and generally Part II. However, these early formulations bear only little resemblance the duty as it is currently understood; The Hague Convention 1970 formulation is taken as the starting point in this thesis. The Study of the Secretariat, *Survey of Multilateral Conventions which may be of relevance for the Commission’s Work on the Topic ‘The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)’* (2010) also contains a run through of a large range of treaties. ILC A/CN.4/630.

sometimes held up as examples of *aut dedere aut judicare*.⁷⁷ These latter texts are, however, designed primarily to facilitate extradition and only provide for mandatory (or permissive) prosecution in the case of non-extradition of nationals – which is also conditioned on an agreement being reached between the requesting and requested State vis-à-vis prosecution. Moreover, they are dependent on the existence of criminal conduct that is recognised under treaty or custom in order to become operational – the obligation does not stand alone. The duty is consequently qualitatively different from the obligation encompassed in the substantive treaties.⁷⁸

Of the multilateral criminalisation treaties that include a variation of the obligation to extradite or prosecute, two main approaches can be identified. The first is the mandatory regime; the second is the mandatory/permissive regime. The mandatory regime allows no exceptions whatsoever: jurisdiction must be exercised in the event of non-extradition. The main example of this approach, and the one which most other treaty provisions have been modelled on, is contained in Article 7 of The Hague Convention 1970:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, *to submit the case to its competent authorities for the purpose of prosecution*.⁷⁹

In contrast, the dual regime provides for mandatory prosecution following non-extradition when the custodial State is, at the very least, the nationality State (and usually when it is territorial State as well); however, States are permitted to exercise discretion as to whether they prosecute in cases where they do not extradite and to do so would involve exercising

⁷⁷ Bassiouni, Wise (n 76) 11–12. European Convention on Extradition 1957 ETS No 24 Art 6(2); UN Model Extradition Treaty 1990, Art 4(a) A/RES/45/116.

⁷⁸ Extradition treaties and the obligations flowing from them specifically are discussed in Chapter 3.

⁷⁹ Emphasis added. It is important to note that the scheme envisages the enlisting of national legal orders rather than providing for a new international regime.

extraterritorial jurisdiction on any of the other recognised bases.⁸⁰ An example of this type of formulation is Article 15 of the Transnational Organised Crime (TOC) Treaty:

3. ... each State Party *shall* adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party *may* also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.⁸¹

The Geneva Conventions 1949 are sometimes considered to constitute a *sui generis* regime in respect of the obligation to extradite or prosecute (although such an obligation only pertains to grave breaches of the Conventions. For non-grave breaches there is no explicit ‘duty to prosecute or extradite’ but it is generally recognised that all States have the right to prosecute).⁸²

Taking the wording of the provision, some commentators have concluded that prosecution is mandatory and extradition is subsidiary, exercised only at the discretion of the custodial State (‘may...hand such persons over for trial’). This formulation apparently reverses the Grotian maxim: for grave breaches it should be considered to be *aut judicare aut dedere*⁸³ or *primo prosequi, secundo dedere*.⁸⁴ Henzelin writes, ‘l’exercice de la compétence ... n’est pas subsidiaire a une extradition mais absolu’.⁸⁵ However, the roots of the provision are also to be

⁸⁰ TOC Convention 2000 Art 15(3)–(4); Illicit Traffic Convention 1988 Art 4(2). Interestingly, nationality based jurisdiction is not mandatory under either of the treaties’ jurisdictional provisions (Art 15(2)(b), Art 4(1)(b)(i)) – the right is only elevated to an obligation when States do not extradite their nationals as a matter of policy.

⁸¹ Emphasis added. The other main example of a mixed obligation/power, albeit cast in slightly different terms, is Article 4(2) of the Illicit Traffic Convention.

⁸² Bassiouni and Wise consider the Geneva Conventions separately to The Hague Convention formula, but do not provide any rationale for this. Bassiouni, Wise (n 76) 14–15. See also Edward M Wise ‘The Obligation to Extradite or Prosecute’ (1993) 27 *Israel Law Review* 268–287, 275. Van Elst and Henzelin also argues that the Geneva Conventions are fundamentally different from other mandatory versions of the obligation. Richard Van Elst, ‘Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions’ (2000) 13 *Leiden Journal of International Law* 815–854, 818–819; Marc Henzelin, *Le Principe de l’Universalité en Droit Pénal International* (Helbing & Lichtenhahn 2000) 353.

⁸³ Van Elst (n 82) 819.

⁸⁴ According to the Belgium delegate, cited in Henzelin (n 82) 353.

⁸⁵ Author’s translation: ‘the exercising of the competence [to prosecute] is not subsidiary to extradition, it is absolute.’ Henzelin (n 82) 353.

found in Grotius's alternative maxim,⁸⁶ and the obligation is not so very different from the mandatory regime outlined above despite its reversed formulation in the text of the treaty. This is because under the regime exemplified by The Hague Convention 1970 text there is nothing to suggest that extradition enjoys primacy over prosecution despite the word order adopted; rather, extradition is an alternative to prosecution. States must prosecute if they do not extradite, which they may choose not to do or not be able to do so for legal reasons. Extradition is at all times (formally) optional. Similarly, under the common article of the Geneva Conventions, extradition (or, 'handing over' which must, for all practical purposes, be considered to indicate extradition through legal channels and not tantamount to rendition or other extra-judicial means for securing the presence of the individual) may be resorted to, if the State does not want to prosecute, despite the primary obligation to do so. While the phrasing of the two texts differs, the end result is the same. In both instances the final decision between prosecution or extradition will rest on the particularities of the case in question. States may extradite; when they do not they are obliged to prosecute. At bottom, those who argue that the Geneva Conventions approach differs from The Hague Convention approach appear to believe that there is a hierarchy between the prosecution and extradition obligations, with extradition enjoying primacy.⁸⁷ As will be shown below no such hierarchy exists and, in terms of practical effect, the Geneva Conventions obligation is no different from the mandatory Hague Convention formulation.⁸⁸ The only distinction between the two texts is that the Geneva Conventions do in one article what later texts do in two: namely, 'subsequent Conventions have refined this way of drafting and have laid down distinctive

⁸⁶ This is supported in the official commentary to the Conventions. See JS Pictet (ed), *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC 1958) 585.

⁸⁷ Van Elst (n 82) 819.

⁸⁸ See section 2.2, below.

provisions on *jurisdiction* on the one hand and on prosecution (*aut dedere aut judicare*) on the other'.⁸⁹

As a general principle of treaty law, the obligation to prosecute or extradite contained in the various multilateral conventions only binds States who are parties to the substantive treaty in question. This does not affect their freedom to extradite the individual to a non-State party with which the contracting State has an extradition agreement (should any such request be forthcoming and not prohibited or inadvisable on other grounds) although any such arrangement will consequently not be governed by the provisions of the substantive treaty. Nor does it imply, as is sometimes still argued, that the treaty may not be invoked against the nationals of States that are not party to the treaty. In other words, a State party to a treaty may assert judicial jurisdiction over a foreign national provided it has established jurisdiction on the appropriate legislative bases. The fact that the national comes from a State which has not ratified the treaty from which the right to establish jurisdiction is drawn is irrelevant.⁹⁰

If a standalone customary duty to extradite or prosecute exists, or is crystallising, this would extend the obligation to exercise extraterritorial jurisdiction to all States (except for persistent objectors) in respect of the crime in question if an individual suspected of the crime was found in its territory and it did not extradite. States often argue strongly against the idea that there is a general customary duty to extradite or prosecute individuals accused of transnational or international crimes recognised under custom and/or treaty and the United States made this view very clear in its general comments to the ILC: 'The United States does not believe that there is a general obligation under customary international law to extradite or

⁸⁹ Emphasis in original. *Arrest Warrant* (n 32), Dissenting Opinion, Judge van den Wynygaert para 60.

⁹⁰ Rejecting this argument, see Michael P Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States' (2000-1) 35 *New England Law Review* 363-382. Also, two US terrorism cases support this position, *United States v Yunis* 687 F 2d 617 (District of Columbia Circuit, 30 January 1989) and *United States v Rezaq* 134 F 3d 1121 (District of Columbia Circuit, 6 February 1998) and demonstrate that the Hostages Convention and The Hague Hijacking Convention are, respectively, opposable against the nationals of non-States parties.

prosecute individuals for offences not covered by international agreements containing such an obligation.⁹¹ Nor, for the majority of commentators, is such an all-encompassing customary norm considered to exist.⁹² Requiring prosecution or extradition in all cases would impinge significantly on State sovereignty. In its written submissions to the ILC, Russia observed that the appropriate test in order to determine whether or not there is a customary rule *aut dedere aut judicare* is that States must be seen to act under the principle absent a treaty obligation and demonstrate that they have chosen to extradite or prosecute because they consider themselves bound by a rule of law. This is sensible otherwise the duty to extradite or prosecute is not discernibly different from a general duty to prosecute. The Russian submission continues, ‘The latter element here is particularly important, given that in practice it is difficult to determine when a State that extradites or prosecutes a particular person is acting on the basis of the *aut dedere aut judicare* principle’.⁹³ Indeed, this is a general problem with discerning positive State practice in respect of the obligation; States either prosecute or they extradite, often without stating why they have chosen a particular course of action.⁹⁴ Consequently, while States may recognise that they should do one or the other, a general customary *aut dedere aut judicare* obligation has never, apparently been put forward explicitly as the reason (or even a reason) for the decision to prefer one approach over the other in a particular case. Where *aut dedere aut judicare* as a customary obligation is mentioned, it is referred to in the context of specific crimes.

The possibility that there is a customary law duty developing, or that it could do so in the future, in the context of a particular class of crimes (namely, international crimes) is

⁹¹ Comments and Information Received from Governments A/CN.4/579/Add.2 para 2. Other States either reject outright the proposition of a customary basis, or concede that it may apply to specific crimes.

⁹² Wise (n 82) 282; Michael Plachta, ‘*Aut Dedere Aut Judicare: An Overview of Modes of Implementation and Approaches*’ (1999) 6 *Maastricht Journal of European and Comparative Law* 331–365, 333; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 105; Cryer (n 19) 110; Luis Benavides ‘The Universal Jurisdiction Principle: Nature and Scope’ (2001) *Anuario Mexicano de Derecho Internacional* 20–96, 32–36.

⁹³ Comments and Information Received from Governments A/CN.4/599 paras 52–53.

⁹⁴ The *Cavallo* Case, discussed below (n 112) is a rare exception. *Juez Sexto de Distrito de Procesos Penales Federales en el Distrito Federal, Extradición de Miguel Angel Cavallo/Expediente de extradición 5/2000*.

sometimes argued. Belgium has stated that it supports a customary duty to extradite or prosecute for international crimes.⁹⁵ In terms of this category, the view that genocide, crimes against humanity and war crimes may be subject to an overriding customary duty to extradite or prosecute was supported by members of the ILC charged with investigating the status of the *aut dedere aut judicare* obligation.⁹⁶ In Article 9 of the Draft Code of Crimes against the Peace and Security of Mankind, the duty was applied to the crimes detailed in Articles 17–20. As the Code purports to be a codification of international law as it stands rather than a progressive piece of work, and only the Geneva Conventions already contain an express *aut dedere aut judicare* provision, for crimes against humanity and genocide the source of any such duty must consequently be customary in nature. Amongst commentators, Bassiouni remains the most vocal supporter of a customary ‘extradite or prosecute’ duty for international crimes.⁹⁷

Attractive as a customary duty to extradite or prosecute for international crimes would seem, State practice seems not yet to support the existence of such a duty. Some indicators that the necessary *opinio juris* may be crystallising can nonetheless be found. National legislation providing for the prosecution or extradition of individuals accused of ‘core crimes’ is appearing.⁹⁸ Moreover, China asserted in a meeting of the Sixth Committee discussing the work of the ILC that the obligation ‘might also become an obligation under customary international law if the crime to which it was applied was a crime under the customary law universally acknowledged by the international community’ (a position that was contested by Russia).⁹⁹ If true, this position would help considerably the case in favour of a duty to

⁹⁵ Comments and Information Received from Governments, Belgium comments, A/CN.4/612 paras 33–34.

⁹⁶ Special Rapporteur, Second Report on the Obligation to Extradite or Prosecute (11 June 2007) A/CN.4/585 para 354.

⁹⁷ Bassiouni, Wise (n 76) 24–25, Cf Wise (n 82) 281.

⁹⁸ The Swiss Criminal Code was amended in March 2009 to reflect this. Translation available at: <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (accessed 31 January 2015).

⁹⁹ Sixth Committee, Summary Report of the 22nd Meeting A/C.6/62/SR.22 para 62. Comments and Information Received from Governments, Russian comments, A/CN.4/599 para 51.

prosecute or extradite in respect of international crimes. However, reasoning from the prohibited nature of certain conduct to a positive jurisdictional obligation on States is often problematic.¹⁰⁰ The increase in the number of national prosecutions for international crimes may also be a sign that States feel growing compulsion to prosecute international crimes, although it has not been argued that the sense of obligation on the basis of *aut dedere aut judicare* expressly and cannot therefore be taken as a sign that the obligation itself is customary in character. The Guatemalan Constitutional Court, in its decision denying extradition to Spain of two of its nationals, recalled on three separate occasions that it was under a duty to extradite or prosecute for, inter alia, the crime of genocide, referring to the ‘rule’ or ‘obligation’ to do so but not tying this to any specific treaty obligation.¹⁰¹

The answer in respect of a general customary obligation to extradite or prosecute for all transnational crimes is unequivocal: no general customary law duty exists for this category of crimes. Not only has the criminal status of the conduct making up this category not yet been accepted by all States with many arguing that these are only *inter partes* treaty crimes, but there is too much divergence in the scope of the *aut dedere aut judicare* obligations encompassed in the individual conventions to be able to reason that a general duty exists. It is highly premature to draw any conclusions as to the existence of a customary law duty to prosecute or extradite individuals accused of having committed transnational crimes, despite the contention that ‘signing lots of treaties’ including the obligation articulates the belief that it is a generally accepted norm and that this provides sufficient evidence of *opinio*

¹⁰⁰ PCIJ, *The Case of the SS Lotus (France v Turkey) Judgment* of 7 September 1927 PCIJ Report Series A No 10.

¹⁰¹ ILC Special Rapporteur, Third Report on the Obligation to Extradite or Prosecute (10 June 2008) A/CN.4/603, para 88.

juris/evidences ‘practice’ to give rise to a general customary *aut dedere aut judicare* obligation.¹⁰²

Three categories of crimes do warrant closer attention in terms of a possible crime-specific customary duty to extradite or prosecute: terrorism, torture and war crimes. In 2007, the representative of the Nordic countries stated at the Sixth Committee meeting that the obligation to extradite or prosecute for terrorism and torture (alongside genocide, crimes against humanity and war crimes) had, or was acquiring, customary status.¹⁰³ The argument for a customary duty in terms of terrorism and torture has also found favour among the judges at the ICJ. In his 1992 dissenting opinion to the *Request for Provisional Measures (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie)* order, Judge Weeramantry recognised a customary duty *aut dedere aut judicare*, which Libya had apparently relied upon. It is unclear though whether Judge Weeramantry was implying the existence of this duty only in terms of the Montreal Convention, terrorist treaties generally, or even in a wider sense.¹⁰⁴ More recently, in the ICJ’s *Request for the indication of provisional measures (Questions relating to the Obligation to Prosecute or Extradite)* in 2009 Judges Koroma and Yusuf declared ‘The present case between Belgium and Senegal concerns Senegal’s obligation, under conventional and customary international law, to extradite or prosecute (*aut dedere aut judicare*) the former President of Chad, Mr. Hissène Habré [for, *inter alia*, the crime of torture].’¹⁰⁵ Belgium, at the least, seems to believe that there is a standalone customary duty

¹⁰² Colleen Enache-Brown, Ari Fried, ‘Universal Crime, Jurisdiction and duty: The Obligation of *Aut Dedere Aut Judicare* in International Law’ (1997–8) 43 *McGill Law Journal* 613–633, 629.

¹⁰³ Sixth Committee, Comments by the Nordic countries, A/C.6/62/SR.22 para 33.

¹⁰⁴ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America/United Kingdom)* Request for the Indication of Provisional Measures, Order of 14 April 1992, Dissenting Opinion, Judge Weeramantry 51.

¹⁰⁵ ICJ, *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal)* Request for the Indication of Provisional Measures, Order of 28 May 2009, Joint Declaration, Judges Koroma and Yusuf, para 2.

to extradite or prosecute for the crime of torture and crimes against humanity.¹⁰⁶ The ICTY Appeals Chamber has also noted the presence of a customary duty in respect of war crimes. In one of its early decisions in the *Blaškić* case it was held that ‘National courts of the States of the former Yugoslavia, like the courts of any State, are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law’.¹⁰⁷

Commentators, conversely, have sometimes been more circumspect in recognising a customary *aut dedere aut judicare* obligation. In terms of war crimes, Meron states ‘the fact that, in most cases, states fail either to prosecute or extradite perpetrators of grave breaches of the *Geneva Conventions* weakens the claim of the obligations to prosecute or to extradite perpetrators of grave breaches to customary law status’.¹⁰⁸ And in respect of terrorism (considered as a class of crimes), Wise has submitted that ‘It is doubtful, as a matter of actual practice, how far the obligation to extradite or prosecute imposed by anti-terrorism treaties can be regarded as customary rule binding apart from the special arrangements prescribed in those treaties. It is even more doubtful whether the obligation applies to forms of terrorism not covered thereby’.¹⁰⁹ Indeed, Cassese has called the obligation to prosecute nationally (that includes the notion of ‘extradite or prosecute’) contained in the Geneva Conventions ‘a dead letter’.¹¹⁰ Examples of national judicial practice maintain that any obligation to extradite or prosecute in respect of terrorist offences is firmly conventional in nature: in *United States v Yousef* it was held that ‘The Montreal Convention is [...] a jurisdictional agreement among contracting States to extradite or prosecute offenders who commit the acts proscribed by that

¹⁰⁶ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Application instituting proceedings, filed 19 February 2009 paras 9, 12.

¹⁰⁷ *Prosecutor v Tihomir Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No IT-95-14, 29 October 1997 (Appeals Chamber) para 29.

¹⁰⁸ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 61.

¹⁰⁹ Wise (n 82) 282–283.

¹¹⁰ Antonio Cassese, ‘On the Current Trend towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 *European Journal of International Law* 2–17, 5.

treaty'.¹¹¹ In the Mexican *Cavallo* decision, the District Court judge stated that Mexico, along with Argentina and Spain, were under duties to either extradite or prosecute persons accused of, inter alia, torture and terrorism – but only by virtue of their international treaty obligations.¹¹² Finally, in *Pinochet (No 1)* and *(No 3)*, the duty to extradite or prosecute torturers was tied to the Torture Convention and was not held to have a customary basis.¹¹³

Opinion may be shifting in favour of a customary duty to extradite or prosecute for certain transnational crimes (torture, terrorism) and classes of crimes ('core crimes'), but actual practice does not demonstrate that States uniformly (or even mostly) consider themselves to be bound at the level of custom; rather, the source of any duty remains predominately treaty-based. The vast majority of States that have implemented national legislation in order to satisfy *aut dedere aut judicare* have done so on the basis of their specific conventional obligations (or to satisfy the requirements of the ICC Statute) and only view the exercise of extraterritorial jurisdiction in lieu of extradition as a binding obligation when expressly required to do so by a treaty.

2.2.The Relationship between Extradition/Prosecution and Establishing/ Exercising Jurisdiction

The nature of the relationship between extradition and prosecution and the duty to extradite or prosecute's connection to a State's jurisdictional obligations more generally may have the effect of transforming a mere right to establish jurisdiction under treaty or custom into a duty to do so, or strengthen existing duties in this area. This section focuses on the scope of these relationships. As the previous section established, there is no general customary obligation

¹¹¹ *United States v Yousef* 327 F 3d 56 (Court of Appeals, Second Circuit, 4 April 2003) 96.

¹¹² *Cavallo* (n 94). See also, José Antonio Guevara, 'La Extradición de *Cavallo* Continúa' (2004) 21 ISONOMIA 85–114, 99–100. Benavides argues that the Supreme Court implicitly accepted the reasoning of the lower court on the broader jurisdictional issues. Luis Benavides, 'Introductory Note to the Supreme Court of Mexico: Decision on the Extradition of Ricardo Miguel Cavallo' (2003) 42 ILM 884–887, 886.

¹¹³ *Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, R v* [2000] 1 AC 61 (HL). Also known as '*Pinochet (No 1)*'; *Pinochet (No 3)* (n 6) 200, 212.

aut dedere aut judicare. Nor is there a customary duty to establish jurisdiction on all of the bases jurisdiction for international crimes.¹¹⁴ Consequently, the following discussion of the balance between the two aspects of the maxim applies primarily to the treaty regimes where *aut dedere aut judicare* is currently enshrined alongside the general provisions on the rights and duties to establish jurisdiction.

In order to ensure that accountability is given the greatest chance of success, one course of action must not be prioritised or ‘trump’ the other: the obligation *aut dedere aut judicare* needs to be cast in the alternative and interpreted neutrally. Favouring either extradition or prosecution as a matter of principle could lead to the situation where, if the preferred course of action is unavailable or proves impossible to execute, or to execute without undue delay, then the result may be stalemate and, potentially, impunity. In its commentary to Article 9 of the 1996 Draft Code, the ILC stressed that the custodial State has a choice and that the article ‘does not give priority to either alternative course of action’.¹¹⁵ Casting the obligation as an alternative must, however, in no way weaken the absolute character of the obligation itself and the duty of the custodial State to ensure that one or other course of action is followed. While the duty to prosecute is in no way conditional on extradition first having being requested (and denied), prosecution only becomes mandatory following non-extradition. States therefore have a choice, but not one that is entirely free as the option is between two alternatives designed to secure accountability rather than between doing ‘something’ or ‘nothing’. In its Final Report on the topic, the ILC concluded that ‘whether the mandatory nature of “extradition” or that of “prosecution” has priority over the other depends on the context and applicable legal regime in particular situations’.¹¹⁶

¹¹⁴ See section 1.1, above.

¹¹⁵ Draft Code 1996 Commentary (n 43) para 6. Plachta also supports the neutral character of the obligation. Plachta (n 92) 335.

¹¹⁶ ILC Final Report (n 74) para 3.

The nature of the relationship between *dedere* and *judicare* has received specific attention in respect of the Montreal Convention and the Torture Convention. In 1992, Libya sought provisional measures from the ICJ to prevent the UK and the USA from taking action against Libya designed to coerce it into surrendering the two nationals accused of the PanAm flight 103 bombings.¹¹⁷ Libya also sought a declaration from the ICJ that the Montreal Convention was the correct legal framework to apply and that it governed the dispute.¹¹⁸ Despite issuing an order denying provisional measures on the basis that Security Council resolution 748 took precedence over any treaty obligations, several of the judges took the opportunity to issue pronouncements in their Opinions and Declarations on the character of the obligation contained in Article 7 of the Convention. The opinion that was shared by the majority was that the custodial State (Libya) had the right to choose between the two courses of action so long as it either prosecuted or extradited: for example, Judge Ranjeva writes ‘On the basis of general international law, confirmed by the Montreal Convention, the Applicant enjoys the right to choose expressed in the traditional adage: *aut dedere aut judicare*’.¹¹⁹

The choice of the custodial State between extradition or prosecution was also confirmed by the Committee against Torture in its decision on the communication submitted by Suleymane Guengueng et al.¹²⁰ The Committee stated that the ‘alternative’ only exists when an extradition request has been made, putting ‘the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial

¹¹⁷ *Questions of Interpretation/Montreal Convention*, Provisional Measures Request (n 104).

¹¹⁸ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America/United Kingdom)*, Application instituting proceedings, filed 3 March 1992, 5.

¹¹⁹ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America/United Kingdom)*, Judgment of 27 February 1998, Dissenting Opinion, Judge Ranjeva, para 2. Also, Judge Ajibola, Dissenting Opinion, para 3; Judges Evensen, Tarassov, Guillaume, Aquilar Mawdsley, Joint Declaration, para 3; Judge Bedjaoui, Dissenting Opinion, para 12.

¹²⁰ *Senegal* (n 49).

authorities for the institution of criminal proceedings'.¹²¹ Otherwise, prosecution was mandatory. While in *Lockerbie* the element of 'choice' was effectively removed following recourse to the Security Council by the other powerful parties to the dispute (The UK and USA, joined by France), reducing the 'alternative' to no alternative: 'extradite or extradite',¹²² the fact that in general the custodial State has a choice under the Montreal Convention remains unaffected.¹²³ Even in the *Request for the indication of provisional measures* in the *Habré* case, it was not Belgium's contention that Senegal did not have the right to choose; rather, Belgium's concerns centred on Senegal's apparent failure to discharge its duty to either prosecute or extradite expeditiously.¹²⁴ In the 2012 ICJ judgment in *Questions Relating to the Obligation to Extradite or Prosecute* the ICJ took the view that a State party to the Torture Convention is obliged under Article 7(1) to 'submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect'.¹²⁵ However, 'if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request'.¹²⁶ The ICJ concluded its discussion of the relationship between the two aspects of the *aut dedere aut judicare* principle by observing:

[T]he choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.¹²⁷

¹²¹ *Senegal* (n 49) para 9.7.

¹²² *Plachta* (n 92) 337.

¹²³ Discussing *Lockerbie* further, see Chapter 4, Part III.

¹²⁴ *Questions/Extradite or Prosecute*, Provisional Measures Request (n 105) para 3.

¹²⁵ ICJ, *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal)*, Judgment of 20 July 2012, para 94.

¹²⁶ *Questions/Extradite or Prosecute*, Judgment (n 125) para 95.

¹²⁷ *Questions/Extradite or Prosecute*, Judgment (n 125) para 95.

The ICJ also found that there is an implicit obligation in the text of the Torture Convention that Article 7(1) will be ‘implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention’.¹²⁸ In delaying for so long, Senegal had breached since 2000, and remained in breach at the time of the judgment in 2012, its obligations under Article 7(1).¹²⁹

Casting the obligation in terms of a genuine choice protects the sovereignty of the custodial State as it is not bound to extradite; an especially important safeguard for States that do not traditionally extradite their nationals. Equally, however, it introduces the very real possibility that jurisdiction will need to be exercised on an extraterritorial basis either by the custodial State, or by the State that secures extradition (if it is not the territorial State that requested extradition), which means that all States parties really need to establish legislative jurisdiction on a full range of bases of jurisdiction if they wish to avail themselves of the right to prosecute in lieu of extradition. Otherwise, if they fail to extradite or prosecute they will be in breach of their obligations under the relevant treaty.

The *aut dedere aut judicare* obligation must be read and implemented by States in their national legislation in conjunction with the general jurisdiction clauses found in the treaty which delineate on what grounds States may or must establish legislative jurisdiction. Some treaties make express reference to the connection between the two,¹³⁰ but even where this is not explicitly set out the link is clear. The obligation to prosecute or extradite is designed to strengthen these provisions by requiring that jurisdiction is not only established, but exercised as well. Often, the jurisdiction clause is drafted solely in obligatory terms, setting out the bases on which a State must establish prescriptive jurisdiction, and the separate *aut dedere*

¹²⁸ *Questions/Extradite or Prosecute*, Judgment (n 125) para 114.

¹²⁹ *Questions/Extradite or Prosecute*, Judgment (n 125) para 117.

¹³⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 1465 UNTS 85; Convention on the Physical Protection of Nuclear Material 1980; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988; Convention for the Suppression of Terrorist Bombing 1997; Convention for the Suppression of the Financing of Terrorism 1999.

aut judicare clause simply requires the State to start the process of investigating as it will (or should) already have established the jurisdictional basis to do so.¹³¹ If and when an extradition request is received, the choice to continue with the investigation or to extradite instead comes into play. More interesting in terms of potentially expanding the scope of a State's extraterritorial jurisdiction, however, are the treaties which require States to establish jurisdiction on some grounds but only state that they 'may' do so on other bases if they choose to do so.¹³² The *aut dedere aut judicare* provisions that follow such a formulation are always cast in obligatory terms.¹³³ This means that if a State does not want to find itself obliged to extradite an individual found on its territory, it will have to make sure that it has established jurisdiction on all the bases that are provided for by the treaty, even if those that are only set down as of right. In other words, mere 'powers' to exercise jurisdiction may, for practical purposes, become 'duties' if a State wishes to safeguard against the possibility of (mandatory) extradition. And even if the State is prepared to extradite, the existence of an extraterritorial basis in the laws of some States will be necessary to establish double criminality where the requesting State will prosecute on an extraterritorial basis.¹³⁴

States either need to remove all bars to extradition or ensure comprehensive extraterritorial jurisdiction provisions are in place. However, as human rights considerations may mean that one or other course of action cannot be pursued in a particular case, flexibility must be

¹³¹ Torture Convention 1984; Convention for the Protection of all Persons from Enforced Disappearance 2006 2716 UNTS 3; Convention against Recruitment Use, Financing and Training of Mercenaries 1989 2163 UNTS 75; Convention against the Taking of Hostages 1983; Convention on the Physical Protection of Nuclear Material 1980; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973; The Hague Convention 1970; Montreal Convention 1971. Nb the Geneva Conventions 1949 have a *sui generis* jurisdiction regime.

¹³² Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973; Convention for the Suppression of Acts of Nuclear Terrorism 2005 2445 UNTS 89; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988; International Convention for the Suppression of Terrorist Bombing 1997; Convention for the Suppression of the Financing of Terrorism 1999.

¹³³ Save for the exceptions of the TOC Convention 2000 and Illicit Traffic Convention 1988 which use a permissive formulation in their duty to extradite or prosecute provisions.

¹³⁴ eg, Spain's request for the extradition of Pinochet. The time line of proceedings against Pinochet are detailed in Diana Woodhouse, 'Introduction: The Extradition of Pinochet: A Calendar of Events' in Diane Woodhouse (ed), *The Pinochet Case: A Legal and Constitutional Analysis* (Hart Publishing 2000) 1–14, 2–11. See further, Chapter 4, 170–171.

retained.¹³⁵ Taking into account the sheer number of different formulations of the *aut dedere aut judicare* obligation, the ILC concluded that when drafting treaties States should:

[D]ecide for themselves which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance. Owing to the great diversity in the formulation, content and scope of the obligation to extradite or prosecute in conventional practice, it would be futile for the Commission to engage in harmonizing the various treaty clause on the obligation to extradite or prosecute.¹³⁶

A preference was, however, declared by the ILC in favour of the Hague Convention formulation of the *aut dedere aut judicare* principle, the implication being that in closing any gaps in the existing regimes, this approach should be adopted.¹³⁷

Conclusions

A growing acceptance that international and transnational criminals should be prosecuted for their crimes if at all possible and recognition that the effects of some crimes on global security, international relations and trade are too great for States to tackle alone have served to encourage States to revise national legislation and participate in more extensive treaty regimes, many of which require them to extend the scope of their legislative jurisdiction extraterritorially. Nonetheless, the extent to which States have responded to the obligation or opportunity to establish extraterritorial prescriptive jurisdiction continues to vary considerably among States and according to the criminal conduct in question.¹³⁸

¹³⁵ See further, Chapter 3, sections 2.2.2 and 3.1.

¹³⁶ ILC Final Report (n 74) para 12.

¹³⁷ ILC Final Report (n 74) para 33.

¹³⁸ Reviewing the record of national implementation and content of national legislation for all the crimes discussed here is of course beyond the scope of this thesis. Moreover, no systematic review of national implementing legislation for all international and transnational crimes has been carried out. The Amnesty International study (n 19) contains chapters on 'State Practice at the National Level' for each of the core crimes (crimes against humanity, genocide and war crimes), and reviews the national provisions on universal jurisdiction. See also Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World* (2011) (AI Index: IOR 53/004/2011). The nearest comprehensive review of these texts (including also non-ICC crimes) is Bassiouni's 1997 study, but at most he cites the number of States parties to a treaty rather than looking at States' implementation of their treaty duties and of course the text is now very out

Each multilateral criminalisation treaty sets out the duties or powers given to States parties to extend legislative jurisdiction to cover crimes committed outside of their territory. Under customary international law, States are also authorised, and sometimes required, to establish legislative jurisdiction over criminal conduct committed extraterritorially. Whether a State must establish jurisdiction on particular bases or may choose to do so varies greatly between the different kinds of criminal conduct in question: the regimes covering international crimes and transnational crimes are distinct and depend on the scope of the jurisdictional provisions in the treaty and/or the extent to which the obligation to establish jurisdiction under customary international law has developed.

Establishing legislative jurisdiction on various jurisdictional bases is a first, important stage. With a view to encouraging the actual exercise of States' judicial jurisdiction, all of the criminalisation treaties drafted since 1970 include the principle of *aut dedere aut judicare*. If the 'duty to prosecute or extradite' is to work properly in practice and States are to truly retain the choice between prosecution or extradition, they will need to have established legislative jurisdiction on all of the recognised grounds, even if not explicitly required to do so (ie including universality) in order to prosecute themselves or to satisfy any double criminality requirements as well as having in place comprehensive extradition arrangements – an extremely tall order and one which few – if any – States have managed to do comprehensively.

The web of jurisdictional rights and obligations discussed in this Chapter operate on the basis of concurrency of jurisdictions rather than exclusivity. No treaty places the bases of jurisdiction in a hierarchy. The main objective of international law in this field is to get as many States as possible to enact legislation for international and transnational crimes on a

of date. See M Cherif Bassiouni, *International Criminal Law Conventions and their Penal Provisions* (Transnational Publishers Inc. 1997).

territorial and extraterritorial basis so that States can exercise judicial jurisdiction over international and transnational crimes and national crimes having a foreign element. However, as the following Chapter will show, limitations of a legislative nature along with the need for suitable judicial assistance regimes to be in place represent practical challenges for the application of judicial jurisdiction. And that is before restrictions imposed by international human rights law and the question of immunities are addressed.

Chapter 3

Considerations that May Limit the Exercise of Judicial Jurisdiction by States

A State that is willing to prosecute criminal conduct of a national, transnational or international character may encounter difficulties in pursuing its objectives from the outset if its legislative jurisdiction is any way deficient in terms of existence, substance or scope. Even if the State is able to point to a legal basis to justify invoking its legislative jurisdiction in a particular case, obstacles may be encountered when the interested State seeks to carry on an investigation. If the criminal conduct spans borders and involves foreign elements, ie if evidence, witnesses or even the suspected individual(s) are found abroad, assistance from overseas authorities in the form of judicial cooperation will be required. In contrast to legislative jurisdiction, which may lawfully extend extraterritorially, enforcement jurisdiction is always strictly territorial and any assistance rendered will usually be dependent on the existence of a treaty or memorandum of understanding between the parties involved. And all this precedes the question of whether or not there are any 'bars' to the exercise of the judicial jurisdiction by virtue of the international human rights protections in place and/or the application of immunities. In other words, a State that is interested in exercising judicial jurisdiction over an individual for conduct recognised as constituting a crime under international law may find itself unable to start or continue with its investigation or prosecute in the end due to one or more of these factors.

Legislative deficiency, lack of cooperation from the authorities abroad, human rights and immunities are four areas that represent significant potential impediments for a State wishing

to exercise its judicial jurisdiction. The situation may be further exacerbated by the fact that when the help of another State (or States) is required in order to realise the investigation and prosecution objectives of the ‘requesting’ State, the ‘requested’ State(s) must also consider seriously whether assistance should or may be given in the current circumstances. The authorities of the latter State will need to ask if the conditions for extradition/mutual legal assistance met under its domestic law (such as the double criminality rule). The requested State will also need to check if adequate arrangements are in place with the requesting State, or if they can be hastily drafted. Finally, it will need to consider if extradition or assistance ought to be declined due to human rights concerns, or if the rules of international immunity prevent the State from assisting.

A State wishing to assert its legislative jurisdiction may be confronted with numerous practical difficulties when the criminal conduct in question involves transborder aspects. This Chapter seeks to highlight the most problematic aspects from the perspective of States.¹ The Chapter contains three main Parts. It identifies the national and inter-State legislative and cooperation (MLA/extradition) frameworks that need to be in place if an investigation is to be successfully executed and a prosecution launched and explores the shortcomings connected with the implementation of international law into national law through a review of the scope and ambit of national legislation.² (‘Systemic’ considerations, Parts I and II.) The Chapter then proceeds to discuss the bars to the exercise of judicial jurisdiction that flow from the

¹ The individual concerned is also the bearer of rights, and may be able to challenge the actual or intended exercise of judicial jurisdiction, although the detailed consideration of his role as a ‘subject’, ie not a mere ‘object’, of proceedings is beyond the scope of this Chapter. See further, Albin Eser, Otto Lagodny, Christopher L Blakesley (eds), *The Individual as Subject of International Cooperation in Criminal Matters: A Comparative Study* (Nomos Verlagsgesellschaft 2002) v. However, 5 years earlier in 1998, the view was still very much that an individual was a mere ‘object’ and was restrained from raising human rights objections in both the requested and requesting States. See John Dugard, Christine Van den Wyngaert, ‘Reconciling Extradition with Human Rights’ (1998) 92 *American Journal of International Law* 187–212, 189.

² A review of all the national legislation and the cooperation arrangements States have in place is beyond the scope of this thesis. Several large scale empirical studies chart the national treatment of customary and treaty based international law relating to international and transnational crimes and the extent to which national legislation complies with, or reflects, international law. For some examples, see Chapter 2, fn 138.

rights and privileges of the accused, ie human rights requirements and the rules of international immunities. ('Individual' considerations, Part III.) These four aspects – legislative frameworks, inter-State assistance, human rights and immunities – are considered in this Chapter only to the extent that they may impede an interested State from actually exercising its judicial jurisdiction in the end. The aim is not to provide an exhaustive inquiry into each topic and only the most relevant aspects will be discussed.

1. Considerations Attaching to National Legislative Jurisdiction Frameworks

The first and most fundamental stumbling block to the prosecution of international and transnational crimes comes from the inability, unwillingness or sheer omission of States to implement (or implement fully) into national law their international treaty or customary law obligations so that an adequate legal basis is available to facilitate an assertion of jurisdiction over the criminal conduct in question.³ Even if adequate legislative jurisdiction does exist, definitional issues and the temporal scope of the national laws may impede their application to particular criminal conduct. Together, these aspects form the basis for national prosecutions; without adequate legislative jurisdiction, judicial jurisdiction cannot be exercised.

1.1.A Legal Basis under National Law

Most States have taken some steps to criminalise under their national law conduct that constitutes international and transnational crimes and a few States have done so on a very extensive basis. The implementation of international law that criminalises certain conduct directly (the process for international crimes) or requires States to create crimes under their

³ See further, Chapter 2, Part I.

national law (the process for transnational crimes) is nonetheless patchy for many States. A primary problem is low ratification levels of the relevant criminalisation treaties. The lack of participation in a relevant treaty means that the likelihood of a State having adequate national legislation in place to prosecute international or transnational criminal activity is slim. Even where ratification of a treaty has taken place, national implementing legislation does not always follow. For example, despite the fact that over half of African Union member States are States party to the Torture Convention, a majority have not enacted legislation to incorporate it into national law.⁴ International crimes recognised under customary international law have often suffered similar deficiencies in terms of their transposition into national law. For example, crimes against humanity are not widely criminalised as crimes against humanity under States' national criminal law. This is, in part, due to a lack of a universally recognised definition for this category of crimes and relying directly on customary international law to prosecute these crimes against humanity may run into problems with respect to the principle of legality. In this respect, the codification of definitions for this category of crimes under the ICC Statute has gone some way to ameliorating these issues.

There are three main approaches that may be adopted by States to implement international law that addresses transnational or international criminal conduct. The particular constitutional makeup of the State and its understanding of the legality principle will inform which method of implementation is adopted. The main approaches are: (a) using national law; (b) transformation of international law into national law or (c) incorporation of international law by making reference to it. Each are discussed in turn.

⁴ Burundi, the Democratic Republic of the Congo and Cameroon are exceptions. Senegal only belatedly enacted implementing legislation in order to be able to put Hissène Habré on trial after the first attempt to prosecute failed due to a lack of jurisdiction for the crime of torture. *Ministère Public et François Diouf c Hissène Habré*, No 135, 4 juillet 2000 (Cour d'Appel de Dakar, Chambre d'Accusation). Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction* 8672/1/09, Rev.1, 16 April 2009.

Some States have opted to rely simply on their pre-existing national criminal law rather than implementing additional legal provisions drawn from international law directly. Under the ‘ordinary crimes’ approach, the conduct will be prosecuted as its national equivalent: murder instead of genocide, bodily harm instead of torture, etc. The acceptability of treating international and transnational crimes as analogous to ordinary crimes under domestic law is an important consideration in itself.⁵ Furthermore, the approach may also have implications for the jurisdictional ambit of the national law. Ordinary crimes do not generally involve an extension of jurisdiction extraterritorially (except sometimes on a nationality basis for civil law countries). In contrast, international and transnational crimes carry the possibility, if not the obligation, under treaty or customary international law for a State to extend jurisdiction extraterritorially on one or more of the bases of extraterritorial jurisdiction. If the ordinary national criminal law is the only legislative framework used by a States to deal with international or transnational criminal conduct, assertions of legislative jurisdiction on grounds other than territoriality and nationality may be met with protest from abroad. The only way to circumvent this limitation would be if reference were also made (in a Code of Criminal Procedure or Criminal Code, for example) to the possibility of applying extraterritorial legislative jurisdiction to prosecute ‘national’ crimes when the conduct also constitutes an international or transnational crime. But this, in essence, would have the effect

⁵ The issue of national prosecution of international crimes classified as ‘ordinary’ crimes rather than ‘international’ crimes came up during the ICC Statute negotiations in the context of Article 20(3) on *ne bis in idem* and provoked debate about the States’ freedom to implement laws as they choose. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* UN Doc A/50/22 (1995) 9 §43; *Report of the Preparatory Committee on the Establishment of an International Criminal Court* UN Doc A/51/22 (1996) Vol I §171. The issues is also considered by Jan Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003) 1 *Journal of International Criminal Justice* 86, 98–100; Albin Eser, Ulrich Sieber, Helmut Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen – National Prosecution of International Crimes, Vol 7: Völkerstrafrecht im Ländervergleich* (Max Planck Institut Verlag 2006) 31–32. Project details available at: https://www.mpicc.de/en/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.html (accessed: 31 January 2015).

of extending a State's judicial jurisdiction beyond its borders, which is not generally considered acceptable for ordinary crimes and would not really be satisfactory from a definitional point of view.

Under the UK's War Crimes Act 1991, designed to facilitate the prosecution of suspected Nazi war criminals who had since become resident in the UK, the crimes of murder, manslaughter and culpable homicide were given an extraterritorial application provided the criminal conduct was (a) committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and (b) constituted a violation of the laws and customs of war.⁶ The Act represented a simple extension of the ordinary criminal law extraterritorially rather than creating a separate basis for prosecution of the conduct as international (war) crimes. The conventional basis for war crimes had only been introduced by the Geneva Conventions 1949 and the UK had only established jurisdiction over war crimes nearly a decade later under the Geneva Conventions Act 1957. Nonetheless, the customary international law status of war crimes had already been recognised by the International Military Tribunal at Nuremberg. The reticence of the UK legislature to rely directly on customary international law to found jurisdiction meant, however, that the only real other option was to rely on crimes that were undoubtedly considered criminal at the time, ie the ordinary crimes of murder, manslaughter and culpable homicide.⁷

Similar problems confronted Canada in 1987 when it sought to establish jurisdiction over its own resident suspected Nazi war criminals under the Canadian Criminal Code. The first and only attempt at prosecution under the amendment plainly shows the difficulties with using national criminal law designed primarily for other purposes and limited in ambit to prosecute

⁶ War Crimes Act 1991 s 1(1).

⁷ See further AT Richardson, 'War Crimes Act 1991' (1992) 55 *Modern Law Review* 73–87, especially 76–78.

extraterritorial international crimes. In *R v Finta* the correct interpretation of section 7(3.71) of the Criminal Code was at stake.⁸ The provision allowed jurisdiction to be, – exceptionally – extended extraterritorially where crimes against humanity or war crimes (defined in section 7(3.76)) were concerned. The question for the Supreme Court turned on whether the provision was, however, jurisdictional in nature insofar as it extended the ambit of Canadian law extraterritorially for specific ordinary crimes that could also be classified as war crimes or crimes against humanity, or whether it created these two new (extraterritorial) offences under Canadian law. In the end, the conclusion that two new substantive offences were created was reached by the majority in the Supreme Court, rather than that the sub-section was simply a jurisdiction-enabling provision. Arguing that the Supreme Court reached the wrong conclusion, Cotler sets out the distinction clearly: extraterritorial provisions can be offence-creating provisions, but section 7(3.71) does not follow the model normally used to do so.⁹ Moreover, its position in the ‘General Part’ of the Criminal Code makes it even less likely that this was an offence-creating rather than jurisdiction-enabling provision.¹⁰ The Court therefore attributed an interpretation to the provision that Parliament, acting on the recommendations of the Deschênes Commission, had not intended.¹¹

The problem seems essentially to lie in Justice Cory’s assessment that, as jurisdiction over ordinary criminal offences in Canada was territorial at the time (section 6(2) Criminal Code), *Finta* would need to have been charged with international offences – namely, war crimes and crimes against humanity which were recognised under international law as carrying the right to exercise extraterritorial jurisdiction – in order to be tried in Canada. The only way to reconcile the fact that *Finta* committed his alleged crimes abroad with the very ‘ordinary’

⁸ *R v Finta* [1994] 1 SCR 701 (Supreme Court of Canada). Summarising the conclusions of each court, see Irwin Cotler, ‘War Crimes Law and the *Finta* Case’ [1995] 6(2d) *Supreme Court Law Review* 577–646, 604–608.

⁹ Cotler (n 8) 610. Exemplified by Canadian Criminal Code s 465(3) and discussed in *Bolduc v Attorney General of Quebec* [1982] 1 SCR 573 (Supreme Court of Canada) 573, 577, 581.

¹⁰ Cotler (n 8) 609.

¹¹ Cotler (n 8) 615.

charges of unlawful confinement, robbery, kidnapping and manslaughter that were laid and the territorial nature of Canadian criminal jurisdiction was to imbue section 7(3.71) with substantive as well as jurisdictional characteristics. However, none of this can detract from the fact that Finta was charged with – and acquitted of – ‘ordinary’ crimes contrary to the Criminal Code. By virtue of the special circumstances of the case these were, however, considered to constitute war crimes and crimes against humanity under section 7(3.76) and could thus be prosecuted in Canada despite their extraterritorial occurrence. The confusion this case created and the impossibility of reconciling substance with the jurisdictional ambit applied demonstrates why reliance on the ordinary criminal law to prosecute international and transnational crimes is so problematic and ought to be avoided. Indeed, Canada did not seek to invoke these provisions again, and reformed its laws on international crimes and their ambit in 2000 so that reliance on the existing national criminal law was no longer needed.¹²

States that have not enacted separate enabling legislation or made provision in their Criminal Codes for the prosecution of international and transnational crimes as distinct crimes would need to rely on their domestic criminal law to conduct a trial, which may expose them to similar problems to those confronted by the Canadian courts in the *Finta* case.¹³ Direct reliance on national crimes and their definitions instead of international or transnational criminal definitions is usually problematic and should generally be avoided. The alternative (and generally better) approaches to implementing international law are transformation or incorporation by reference.¹⁴

¹² War Crimes and Crimes Against Humanity Act 2000.

¹³ For example, discussing this very problem in the context of Botswana, see Bonolo Ramadi Dinokopila, ‘The Prosecution and Punishment of International crimes in Botswana’ (2009) 7 *Journal of International Criminal Justice* 1077–1085.

¹⁴ Ward Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 7, 36.

Transforming international law either involves adding special criminal law provisions to the general Criminal Code or creating a separate Act or Code.¹⁵ Both of these approaches are equally acceptable. The former has the advantage of keeping all the State's criminal laws in one place and easily accessible to all, but may prevent a State from extending the ambit of its jurisdiction if the General Part stipulates that jurisdiction is only to be exercised on certain bases; the latter has the advantage that the text can be tailored to meet the particular demands of prosecuting international and transnational crimes which may not affect ordinary crimes such as special general part requirements and the extraterritorial jurisdictional ambit. The other way that States may implement international law is by passing legislation or amending the Criminal Code so that it makes reference to international law, which has the effect of incorporating it directly into the national legal framework. This can be as general as a broad constitutional statement that all international law is part of the law of the land or as precise as reference to specific treaty provisions.¹⁶ Various points on the spectrum are also available such as recognition that customary international law is generally considered part of domestic law (although treaties require an enabling legislative basis)¹⁷ or that it provides the basis for the creation of jurisdiction over specific crimes.¹⁸

In recognition of the vastly differing approaches to implementation – and the problems created by non-implementation – various publications, both official and NGO-sourced, set out guidelines on how States should tackle the task of implementing international law into

¹⁵ This is the typology used in the Max Planck Institute for Foreign and International Criminal Law project. MPI (n 5) diagram, 34.

¹⁶ Ferdinandusse identifies a spectrum of what he terms 'direct application' and illustrates it with examples from State practices (n 14) 29–84.

¹⁷ Under the common law, customary international law is considered part of the UK's legal order. Discussing the general position of custom in respect of UK law, see Roger O'Keefe, 'The Doctrine of Incorporation Revisited' (2008) 79 *British Yearbook of International Law* 7-85.

¹⁸ Canada, Crimes against Humanity and War Crimes Act 2000. The MPI Project calls this approach the 'dynamic reference to customary international criminal law option' MPI (n 5) 28. See also Roger O'Keefe, 'Customary International Crimes in English Courts' (2001) 72 *British Yearbook of International Law* 293–335.

their national legal systems.¹⁹ One reason for non- or inadequate implementation is that some States simply lack capacity: encouragement and practical assistance might be enough in these situations to augment implementation nationally.²⁰ Some treaties also provide in themselves a strong incentive for States parties to adopt comprehensive implementing legislation: the ICC Statute is the most notable humanitarian example. If States wish to ensure that they will be in a position to avail themselves of the complementarity privilege, they need (at the very least) to establish jurisdiction over all the crimes mentioned in Articles 6–8 from the date the Statute entered into force on the basis of territoriality and nationality.

When it comes to how they implement international law, States enjoy considerable freedom, although, as noted, the deficiencies associated with reliance on the existing criminal law and national crimes to prosecute international and transnational crimes mean that it should be avoided if at all possible. While international law stipulates the need to criminalise certain conduct, the means by which this is done are essentially left up to the individual State to determine in accordance with any national requirements for the implementation of international law: International law does not prescribe how it should be applied or enforced at the national level.²¹ The protection of State sovereignty is a primary reason for this; dictating how international obligations are to be given effect would constitute an intrusion into the prerogative of the State to shape the scope of its own laws. Moreover, there is no overarching international body charged with ensuring that States' implement international law 'correctly'. Nonetheless freedom to choose the method of adhering to international

¹⁹ United Nations Office on Drugs & Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto* (United Nations Publishing 2004); The International Centre for Criminal Law Reform and Criminal Justice Policy, *International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute* (3rd edn 2008).

²⁰ The Coalition for an International Criminal Court runs an 'implementation drive', targeting different States in turn in order to encourage them to ratify and implement the Rome Statute, available at: <http://www.iccnw.org/?mod=romeimplementation> (accessed: 31 January 2015).

²¹ Eileen Denza, 'The Relationship between International and National Law' in Malcolm D Evans (ed), *International Law* (3rd edn OUP 2010) 411–440, 423. MPI (n 5) 15, 23–24.

obligations should not be confused with a requirement to criminalise conduct and establish jurisdiction over it in the first place, which is often required by treaty or custom.²²

1.2. The Content & Temporal Scope of National Laws

Criminalisation under domestic law involves not only formally recognising the criminal character of the conduct but also ensuring that all of the ancillary aspects setting out the general requirements for criminal liability and any exclusions of that liability are adequately provided for under national criminal law.²³ Furthermore, the temporal scope of a State's legislative jurisdiction must coincide with or post-date the point at which the conduct was recognised as criminal under international law in order not to contravene the principle of legality. Omissions, gaps or restrictions in these areas will place limitations on the legislative jurisdiction and reduce the possibility that jurisdiction may be successfully invoked by an interested State.

The crime as it stands under national law should, as far as possible, reflect the crime as it is understood under international law.²⁴ The adoption of definitions that are narrower may restrict a State's ability to prosecute because the national crime does not match the conduct prohibited by international law. Equally, if they are broader, a challenge under the legality principle may be raised.²⁵ Definitional problems at the national level are less pronounced for conduct that is criminalised under a treaty or that constitutes both a treaty and customary crime (eg genocide) as there will be a readily available definition for the State to use and the elements of the crime will be clear. In order to avail themselves of the complementary

²² Ferdinandusse seems to conflate the idea of the freedom to implement international obligations by whatever means a State sees fit with the duty to criminalise certain conduct in the first place (n 14) 132–136, 153–171. See further Chapter 2.

²³ For a thorough treatment of all the aspects involved with implementing national legislation to cover international crimes and a detailed review of 12 States' implementation efforts, see 'National Prosecution of International Crimes' Volumes 1-7 (n 5).

²⁴ Article 7(1) ECHR, Article 15(1) ICCPR.

²⁵ *Jorgic v Germany* – 74613/01 [2007] ECHR 9 (12 July 2007) paras 89–116, especially 103–114.

jurisdiction of the ICC, many States have, for example, adopted verbatim the definitions of the core crimes set out in Articles 6–8 of the Statute and in the Elements of Crimes in their national implementing legislation. This approach is also reflected in earlier legislation such as the UK's Genocide Act 1969 (now repealed) which adopted the definition of genocide provided in Article II of the Genocide Convention 1948. The more troublesome issue arises where the conduct is (or was previously) only criminal under customary international law. The challenge for States is to determine what aspects constitute the elements of the customary law crime. Even if the crime was later codified under international law (several crimes against humanity were codified in the ICC Statute for the first time), when the prosecution involves criminal acts that occurred prior to the date of codification a national court will need to determine whether or not the conduct constituted a crime under customary international law at the time of its commission. The dynamic and developing nature of customary international law makes pinpointing the particular point in time when this occurred quite difficult.

Conduct recognised as constituting a crime under customary international law does not usually form the basis for prosecution without first being incorporated into domestic law through a statute or code. In many countries, such as Germany and Spain, it is a constitutional requirement that the criminal law must be written down.²⁶ Germany's Code of Crimes against International Law 2002 takes the approach of including the established rules of customary international law in its definitions of the crimes so that they too are set down in the Code. In contrast, Canada has adopted a method which seems to pass this determination directly onto the courts. The Canadian Crimes against Humanity and War Crimes Act 2000 takes an innovative approach to customary crimes insofar as it does not seek to define them expressly. Rather, the Act attempts to keep the legislation current by making dynamic reference to both

²⁶ Basic Law for the Federal Republic of Germany, Article 103; Spanish Constitution 1978, Article 124.

treaty and custom. The act or omission will constitute, for example, the crime of genocide if it was recognised at the time and in the place of commission ‘according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations’. Similar wording is used for other international crimes, too. This appears to indicate that conduct recognised as constituting a crime under customary international law is capable of creating offences directly punishable under domestic Canadian criminal law by direct reference under the Act. No further definition in national criminal legislation is required to establish liability.

Usually, custom is recognised by common law courts, but in order for conduct constituting a crime under customary international law to qualify as a basis for prosecution it must have been ‘translated’ into domestic law through the legislative process.²⁷ Turns notes that it is the:

[F]lexibility [of the Canadian approach] which represents a conspicuous departure from common law practice in respect of international law in the domestic legal system, [...] [and makes the Act] especially innovative and admirable. It makes prosecutions of the core crimes comparatively easy, because of the broad and adaptable nature of the definitions of crimes, whilst at the same time preserving the right of the accused not to be faced with a retroactive application of the criminal law.²⁸

Whether the Canadian courts will agree that searching for the elements of a crime under custom is actually commensurate with the strict requirements of legality principle has not yet been tested in the courts. In the UK, the possibility that ‘Crimes recognised in customary international law are (without the need for any domestic statute or judicial decision) recognised and enforced by the domestic law of England and Wales’ was rejected.²⁹

²⁷ Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010) 62.

²⁸ David Turns, ‘Aspects of Implementation of the Rome Statute: The United Kingdom and Selected Other States’ in Dominic McGoldrick, Peter Rowe, Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing 2004) 337–388, 359.

²⁹ *R v Jones* [2006] UKHL 16 (29 March 2006) paras 20–23 (Lord Bingham).

Customary crimes must be clearly defined by Parliament in national legislation before they may be tried in the courts.³⁰

In addition to defining the criminal conduct under national law, States also need to ensure that the General Part of their criminal law is suited to the prosecution of international crimes. Updating this aspect is sometimes overlooked, or States simply believe that their existing national law is adequate. The deficiencies of the ICC Act England and Wales' International Criminal Court Act 2001 (ICC Act) in this respect may create problems for the prosecution of certain offences.³¹ The better approach is probably that taken by those States which, in response to their ratification of the ICC Statute, have sought to create a whole separate General Part specifically geared at the particularities of international crimes – Canada and Germany being two such examples. This approach does not leave gaps to be filled by the existing criminal law.

Settling on an appropriate date from which national criminal jurisdiction should run is not always straightforward. A State will need to decide if it should take the date at which the conduct was first recognised as an international crime under customary international law or simply start its legislative jurisdiction on the date the legislation enters into force. For transnational and international crimes that are the subject of a treaty, a State will need to decide if it should take the date the treaty was established (when it was drafted and signed), the date the treaty entered into force (received the requisite number of ratifications), the date the State itself ratified the treaty or the date when its national implementing legislation enters into force. A State will also need to decide on which bases of jurisdiction it will establish legislative jurisdiction and from what date jurisdiction will run. The date a State picks to define the temporal scope of its laws will have a profound impact on the conduct over which

³⁰ Sir Franklin Berman, 'Introduction' in M Evans, S Konstantinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003) 1–15, 11.

³¹ Robert Cryer, 'Implementation of the International Criminal Court Statute in England and Wales' (2002) 51 *International and Comparative Law Quarterly* 733–743, 740.

it will eventually be able to exercise judicial jurisdiction. The legality principle dictates that conduct must be considered criminal under national law at the time of commission in order for a prosecution to take place.

When it comes to actually asserting legislative jurisdiction, the conduct over which jurisdiction is sought must constitute a crime under the national criminal law. For example, in the UK, until the recent reform under the Coroners' and Justice Act 2009 the courts only had jurisdiction over the conduct prescribed in the ICC Act from 1st September 2001. This date roughly coincided with the UK's ratification of the ICC Statute but actually pre-dated the Statute's entry into force by 10 months.³² The jurisdictional ambit of the Act is territorial, but also recognises the principles of nationality and universality, albeit restricted by a residency requirement.³³ (Restricted) universality is included in recognition of the lawfulness of this principle of jurisdiction for international crimes, but as universal jurisdiction is not provided for in the ICC Statute the ICC Act goes beyond that which is required by the treaty.

States are free to choose when they 'start' their prescriptive jurisdiction over international and transnational crimes, subject to national rules on the non-retroactivity of the criminal law.³⁴ They may, in essence, pick any of the dates mentioned above. The most common approach is the last one; implementation legislation is drafted and enters into effect with prospective temporal reach only. States may choose to adopt one of the other (earlier) dates, but in order to ensure that their legislative jurisdiction is as comprehensive as possible and does not create loopholes whereby an individual may escape prosecution simply because the conduct had not been made criminal under the national law at the time the crime was committed, legislative jurisdiction should ideally be given the earliest possible start date.

³² The UK ratified the ICC Statute on 1 October 2001. The ICC Statute did not, however, enter into force until the following July 2002, once it had received the requisite 60 ratifications.

³³ ICC Act 2001 s 68(2)(a); Coroners and Justice Act 2009 s67A.

³⁴ See further, below 107–109.

The effect of not extending jurisdiction back in time to the point at which the conduct was recognised as constituting a crime under international law was exposed in the UK in 2009. At the time, the UK only had legislative jurisdiction for the crime of genocide over nationals and residents from 2001 onwards under the ICC Act. (The Genocide Act, which established jurisdiction from 1969 onwards nonetheless had only ever had a territorial reach, and was repealed by the ICC Act anyway.) This meant that the prosecution of alleged Rwandan génocidaires who were residing in the UK at the time and were accused of having committed acts of genocide in 1994 would not be possible.³⁵ Had the UK previously extended the jurisdictional ambit of the Genocide Act 1969 to reflect the developments in customary international law that allowed for universal jurisdiction over the crime of genocide, or had it adopted an earlier date than 2001 to start jurisdiction for the criminal conduct detailed in sections 51 and 58 of the ICC Act, the problem that now faced the UK courts would not have arisen.³⁶ Indeed, in terms of the implementation of the obligations arising under the ICC Statute, States are generally ill-advised not to backdate its jurisdiction at least to the date the Rome Statute entered into force if they wish to fully avail themselves of the complementary jurisdiction of the Court, which has jurisdiction over crimes committed after 2001.³⁷ That the majority of States are taking 2001 as their general start date (Canada was a notable exception) is unfortunate. Establishing prescriptive jurisdiction from 2001 onwards over international

³⁵ *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* [2009] EWHC 770 Admin. Discussing the case in detail, see below. This was of course an extradition case, not an attempt to prosecute the four Rwandan men in the UK. However, it raised these issues and exposed the shortcomings of the UK legislation.

³⁶ A general earlier start date for the ICC Act would not have been possible, given the primary purpose of the Act which is to afford cooperation with the Court, which only became operational itself in 2002. However, much of the conduct defined in sections 51 and 58 was considered to constitute criminal conduct from a much earlier point in time and this could have been reflected in the ICC Act, given that the Act represents the only international crimes legislation the UK has in place, alongside the Geneva Conventions Act 1957 and the Criminal Justice Act 1987 s 134.

³⁷ That States are not backdating their jurisdiction is nonetheless apparent. In March 2010 Switzerland's Council of States (Parliament's highest chamber) passed a federal law incorporating the crimes under the jurisdiction of the ICC into national law. Switzerland is not a party to the Rome Statute so the complementarity imperative is not strong, but the legislature still did not take the advice of Council's Legal Affairs Committee which was to backdate the scope of the law to 31 December 1990 but instead set the start date for when the law enters into force.

crimes is of course better than having no legislative jurisdictional competence at all, but the danger is that it leaves open an obvious loophole. Reference to what is permitted by international law in terms of the criminal conduct and not simply the terms of ICC Statute would have helped avoid this as the majority of the crimes coming under the jurisdiction of the ICC were recognised as crimes under international law much earlier than 2001.

States are permitted to back-date their legislative jurisdiction over international crimes to give it retrospective effect. The only legal restriction on the start date selected is that this must not pre-date the point at which the conduct was first recognised as constituting a crime under international law, which would render the law retroactive in its effects. The prohibition on retroactivity is a facet of the legality principle and enshrined inter alia in Article 15 of the International Covenant on Civil and Political Rights:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed [...] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.³⁸

The Article makes no distinction between the sources of international law that may be relied upon. So long as the conduct was criminal under custom or treaty, legislative jurisdiction may be extended retrospectively. Indeed, there have been occasions where legislation is explicitly drafted with limited retrospective effect to address a particular problem, such as occurred in the late 1980s when the presence of alleged Nazi war criminals in some States was uncovered.³⁹ Nonetheless, legislative jurisdiction will usually have a forward looking and precautionary quality to it: the State might one day want, or need, to use it to prosecute

³⁸ Almost identical wording is found in Article 7 ECHR: '(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. [...]; (2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.'

³⁹ eg War Crimes Act 1991.

crimes that took place or will take place in the future and over which the State can demonstrate a legal interest.

From the perspective of substantive criminality and retrospection, the challenge stems from determining if the conduct constituted a crime under international law at the time of commission or omission and whether it was reasonably foreseeable for the accused that his conduct was criminal at that point. The retrospective criminalisation of acts constituting violations of international humanitarian law and the resulting national prosecutions have been the subject of two Grand Chamber decisions of the European Court of Human Rights. In *Korbely v Hungary* and *Kononov v Latvia* the defendants' convictions were challenged on the basis that there had been a violation of Article 7, European Convention on Human Rights (ECHR) that prohibits retroactivity.⁴⁰ In both instances determining whether the specific conduct constituted a crime under international law in 1956 and 1944 respectively was key. In *Korbely* the conviction for crimes against humanity violated Article 7 because the provision under which he was found guilty (which referred to common Article 3 of the Geneva Conventions 1949) could not reasonably have formed a basis for a conviction for crimes against humanity under the circumstances of the case in respect of the relevant international-law standards at the time.⁴¹ In contrast, in *Kononov* no violation of Article 7 was found because there had been a sufficiently clear and contemporary legal basis for the specific war crimes for which the applicant had been convicted, namely, the protection of civilians and combatants *hors combat*, and the accused could reasonably have been expected to be aware of the prohibited nature of the conduct.⁴² In both instances marrying the particular set of facts with the state of international law at the time the criminal acts took place proved critical.

⁴⁰ *Korbely v Hungary* – 9174/02 [2008] 848 (19 September 2008); *Kononov v Latvia* – 36376/04 [2010] ECHR 667 (17 May 2010).

⁴¹ *Korbely* (n 40) 73–94.

⁴² *Kononov* (n 40) paras 214 – 244.

The application of the law retrospectively is complicated from an evidential point of view, and all the more so when the legislation has not been drafted so that it reflects international law at the time. The precision needed for drafting legislation that will not fall foul of Article 15 International Covenant on Civil and Political Rights (ICCPR) and Article 7 ECHR can be demonstrated by the example of the UK's recent revision of its international crimes legislation. On 7 July 2009, the Justice Minister announced plans to extend the extraterritorial scope and retrospective application of the law relating to international crimes.⁴³ The amendments, introduced under the Coroners and Justice Act 2009, modify the ICC Act in terms of the dates from which certain conduct will henceforth be considered criminal in the UK and the penalties that apply to these pre-2001 offences. These provisions entered into force on 6 April 2010.⁴⁴ However, the ICC Statute itself criminalises some conduct for the first time,⁴⁵ so making such conduct criminal in the UK before that date would breach the most elementary understanding of the legality principle. Some of the definitions in the Statute are wider than previously recognised and some are narrower than those under treaty or customary international law. As the ICC Act adopted verbatim in Schedule 8 the definitions of crimes set out in Articles 6–8 of the ICC Statute, blanket retrospection of the crimes would not be possible because of the differing dates on which they became crimes under international law.

The problem over the differing dates was addressed by adopting 1 January 1991, the date from which the International Criminal Tribunal for the former Yugoslavia (ICTY) has jurisdiction, as the general cut off point for retrospection.⁴⁶ This is in itself a conservative date for genocide and grave breaches of the Geneva Conventions. Jurisdiction could, at the

⁴³ *Hansard* HC vol 495 col 41WS (2009). The amendments were introduced during consideration at the Report stage before the House of Lords, Coroners and Justice Bill 2009, *Hansard* HL vol 713 col 1089–1094 (2009).

⁴⁴ The Coroners and Justice Act 2009 (Commencement No 4, Transitional and Saving Provisions) Order 2010 (SI 2010/816).

⁴⁵ eg sexual crimes and conscription of child soldiers (Art 7(g), Art 8(2)(b)(xxiii), (xxvi), 8(2)(e)(vi), (vii)).

⁴⁶ Coroners and Justice Act 2009 s 70(3), inserting ICC Act s 65A(1). The ICTY was established by SC Res 827 (25 May 1993) and the UK voted in favour of establishing the Tribunal.

very least, have been backdated to 1957 for those war crimes coming under the jurisdiction of the Geneva Conventions Act 1957 and to 1969 for Genocide, the date the Genocide Act 1969 entered into force. However, in recognition that the ICC Statute established new crimes or codified some crimes that had emerged since 1991 and that the ICTY Statute does not represent a definitive ‘codifying’ catalogue of all international crimes, section 65A(2) of the Criminal Justice Act 2009 states that the relevant provisions of the ICC Act ‘do not apply retrospectively to a crime against humanity, or a war crime within Article 8.2(b) or (e), committed by a person before 1 September 2001 unless, at the time the act constituting that crime was committed, *the act amounted in the circumstances to a criminal offence under international law*’.⁴⁷ Here, ‘international law’ must be read to mean customary international law as prior to the codification undertaken in the Rome Statute these crimes only existed on a customary international law basis.⁴⁸ In practice, the difficulty is likely to lie with the phrase emphasised: if a prosecution is brought in the UK for any of these crimes committed prior to 2001, proving at what point the conduct was recognised as criminal under customary law with enough precision to meet the requirement of the legality principle could be problematic, as may also be the case with the Canadian Crimes against Humanity and War Crimes Act, discussed above.

Avoiding retroactivity of the substantive law is the primary and most apparent concern of Article 7 ECHR and Article 15 ICCPR. There is, however, a jurisdictional ambit aspect, too (which could be termed ‘procedural retroactivity’).⁴⁹ Where a State opts to extend its legislative jurisdiction back to an earlier date it must also ensure that the jurisdictional bases which it includes were recognised for the crime at the time from which it establishes

⁴⁷ Emphasis added.

⁴⁸ Traditionally, British courts have been unwilling to rely directly on customary law to ground a prosecution absent a statutory basis. *R v Jones* (n 29) paras 22–23.

⁴⁹ The Hetherington-Chalmers report recognised this distinction, Heatherington-Chalmers Inquiry, *War Crimes: Report of the War Crimes Inquiry*, 1989 HMSO Cm 744, §§ 6.35–6.44. See also Richardson (n 7) 76.

substantive criminality. The Article 7/15 standard would not be met if a State made a claim of international criminality beyond the jurisdictional circumstances attending the international crime: any claim of universal jurisdiction for a crime recognised under the ICC Statute would have to be supported by a demonstration that the conduct amounted to a crime by customary international law and that it attracted universal jurisdiction at the time of commission. For example, at what point genocide was recognised as a crime that could be prosecuted by any State on the basis of universal jurisdiction and not simply by the territorial State (as provided under the Genocide Convention 1948) would be important for this determination. The Israeli District Court in *Eichmann* asserted that it had universal jurisdiction over the crime of genocide, which suggests that at least by the 1960s the extension of jurisdiction on this basis for this crime had been recognised under customary international law.⁵⁰

The universal ratification of the Geneva Conventions 1949, which provides for universal jurisdiction over grave breaches, has removed the need for serious consideration of the question of when universal jurisdiction became recognised under customary international law as opposed to simply its *inter partes* treaty basis (few prosecutions for pre-1949 conduct are still taking place), but the underlying question remains an important one. In contrast, it is foreseeable that a challenge could be raised regarding an assertion by a State of universal jurisdiction over certain crimes against humanity. For most transnational crimes the entry into force of the treaty with its catalogue of jurisdictional provisions remains the best guide for retrospective establishment of the jurisdictional ambit of a State's laws.⁵¹ Article 15 ICCPR and Article 7 ECHR would not seem to permit a State to establish universal jurisdiction over torture prior to the Convention against Torture 1984.⁵¹ The inclusion of provisions dealing

⁵⁰ *Attorney-General of the Government of Israel v Adolf Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem) para 12.

⁵¹ Whilst dealing essentially with the question of extradition rather than prosecution, the lengthy and intricate discussion in *Pinochet (No 3)* over when torture became a crime under UK law carrying extraterritorial jurisdiction (important in that case for the purposes of satisfying the double criminality requirement)

with jurisdictional ambit in all newly drafted treaties is thus helpful for retrospective application of the law as well as from the implementation of international law perspective.

Making the necessary legislative changes in order to create an adequate legislative framework is central to the effective prosecution by States of international and transnational crimes. Nevertheless, the somewhat abstract character of the process of establishing legislative jurisdiction has very fundamental, practical consequences for the pursuit of justice through an exercise of judicial jurisdiction. When States implement international law subject to some or all of the restrictions or limitations identified in this section, their capacity to exercise judicial jurisdiction in the future is correspondingly curtailed.

2. Considerations Attaching to the Inter-State Cooperation Arrangements

Establishing legislative jurisdiction marks the first and founding stage in creating a viable national framework for the prosecution of international and transnational crimes. This must be complemented by the necessary cooperation arrangements if any assertion of that lawfully established jurisdiction is not to encounter problems in its application where foreign elements are involved, ie at the point where enforcement jurisdiction must be exercised. Indeed, trends in transnational criminal activity (criminal conduct often spans borders), and the recognition that some international crimes are of concern to all States and may be prosecuted by any one of them, means that a wholly 'local' approach will seldom provide an adequate solution. Cooperation between States will usually be required to bring to fruition any national prosecution. Public and scholarly attention usually focuses on the topic of extradition and its

demonstrates the importance temporal jurisdiction carries for the purposes of establishing jurisdiction in a particular case. The Law Lords took the conservative approach: the point at which the UK established universal jurisdiction by virtue of section 134 of the Criminal Justice Act 1987 rather than the entry into force of the Torture Convention in 1984 was held to be the appropriate date. *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [2000] 1 AC 147 (HL) (*Pinochet (No 3)*).

profound implications for individual liberty certainly warrant its detailed consideration. Yet of equal importance to the process (although this aspect makes the headlines less often) is the practical legal assistance rendered by States to each other in order to realise the prosecution objectives of an interested State. Without arrangements in place to support both aspects of international cooperation, judicial jurisdiction is unlikely to be able to be asserted in the end.

2.1. Interactions between States: Securing Legal Assistance

2.1.1. Receiving Help from Abroad

Mutual legal assistance (MLA) covers ‘such unglamorous but highly practical matters’ as the provision of evidence, documentary or *viva voce*, for use abroad; the search and seizure of evidence for use in foreign proceedings; finding persons and other information; the transfer of witnesses for interview; and the serving of documents originating in another jurisdiction.⁵²

In essence MLA is any form of assistance given by one State to another that will help at the investigation stage or later in proceedings up to, and including, at the trial. In practice States will provide more far-reaching assistance to some States than others depending on their relationship but also increasingly due to concerns about the fairness of any trial that will take place in the requesting State in the end.⁵³ Also, a State that may be willing to offer assistance generally might not want to offer assistance in a specific case: Rwanda is an example here. Following the refusal to extradite Brown (Bajinja) and others back to Rwanda,⁵⁴ the CPS requested MLA from Rwanda in order to facilitate its investigation. But these requests were

⁵² W Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters* (CUP 1995) xii.

⁵³ For example, the UK can only grant assistance in respect of interception of telecommunications to States that are parties to the Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union 2000 and not other States, despite the fact that it appears in the UK’s general Crime (International Cooperation) Act 2003. Home Office, Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom (11th edn, Judicial Cooperation Unit, issued January 2014), 20, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269208/MLA_Guidelines_2014.pdf (accessed: 31 January 2015) 12.

⁵⁴ See below, 142–143, 149.

refused, – almost certainly because the Rwandan government wanted to put the men on trial in Rwanda. In an interview with the BBC, the Rwandan High Commissioner, stated: ‘Why would the UK or anyone who is interested in the delivery of justice be interested in trying genocide suspects in the UK? The people that desire to see justice being done are not in the UK, they are in Rwanda ... Our view is all genocide suspects, wherever they are, should be tried in Rwanda’.⁵⁵ This example indicates that there are many factors at play in whether or not MLA requests are honoured or not.

MLA arrangements can be found in a range of formal sources, from provisions in substantive criminalisation treaties⁵⁶ through to purpose-designed regional⁵⁷ and bilateral⁵⁸ treaties.

⁵⁵ BBC, ‘Rwanda “Refused UK Request” over genocide suspects’ 12 December 2013, available at: <http://www.bbc.com/news/uk-25004725> (accessed: 31 January 2015).

⁵⁶ Torture Convention 1984 Art 9; Additional Protocol I to the Geneva Conventions 1949 Art 88; The Hague and Montreal terrorism conventions, Arts 10 and 11; Transnational Organized Crime Convention 2000 Art 3 (but see also Article 18(1)–(2)); Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 Art 7; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime 1990 Arts 8–10; Council of Europe Convention on Cybercrime 2001 Art 8; Inter-American Convention against Corruption 1996 Art XIV; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 Art 9.

Only one criminalisation treaty, the Treaty on Transnational Organized Crime 2000, goes further and provides a detailed and self-contained MLA regime within the framework of the agreement itself. See Article 18 which details, in 30 sub-sections, what MLA entails between States parties. Apart from Article 18 of the TOC treaty, which States parties may use to base their MLA requests to each other, in order for the general treaty provisions on MLA to have any practical effect, suitable parallel multi- or bi-lateral procedural agreements also need to be in place that set out what kind of assistance will be provided and how this will be done. Article 18(6): ‘The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance; (7) Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.’ See UNODC, *Legislative Guide* (n 19) paras 461, 478–480, 489.

See also General Assembly Resolution 3074 (XXVIII) 1973 which lays down a set of ‘principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity’. The resolution sets out the need for States to cooperate in the collection of information and evidence that would help bring a person to trial for these crimes; achieving the ends set out is however dependent on the existence of suitable additional arrangements between States.

⁵⁷ At the regional level, the most far-reaching and significant developments have taken place in the European context within the EU (under the Schengen Convention 1990 and the Convention on Mutual Assistance in Criminal Matters 2000 and its Protocol) and the Council of Europe (under the European Convention on Mutual Assistance in Criminal Matters 1959 and its Additional Protocols). At the other end of the scale the voluntary ‘Harare Scheme’ for Commonwealth countries set up in 1986 may facilitate cooperation between these States provided they have implemented its provisions as it is not a treaty. Commonwealth Secretariat, London, *Scheme Relating to Mutual Assistance in Criminal Matters* (1986) LMN (86) 13, amended 1999. Other regional schemes operate in the OAS (Inter-American Convention on Mutual Assistance in Criminal Matters 1992 OAS TS No 75) and between Arab countries through the Arab League Agreement on Extradition and Judicial Cooperation 1983.

(Although the former must still be supplemented by a web of bilateral, individually negotiated treaties or, at the least, national legislation that provides for the applicability of the treaty with all other State parties.) In contrast, there are no multilateral treaty initiatives, which is testament to the character of MLA; arrangements are best entered into at the bilateral, or sometimes regional, level where they can be tailored to meet the needs of the parties involved.⁵⁹ Unlike extradition, MLA also remains an area often governed by comity and ad hoc or informal arrangements.⁶⁰ For example, the UK has issued detailed Guidelines for overseas authorities to refer to in respect of requests for MLA from the UK as requests must be transmitted to the appropriate authority by way of a 'Letter of Request'.⁶¹ In addition to the arrangements for handling requests between States, a suitable legislative framework setting out what is permitted in terms of giving and receiving assistance under national law and the procedures that must be followed is also required. In the UK, this is the Crime (International Cooperation) Act 2003. This type of legislation has a dual function: it implements general duties to cooperate arising under international customary or treaty law (and, if relevant, the more specific requirements spelt out under European law, for example)

⁵⁸ The preference for the UN and most States is for an extensive network of well worked out bilateral arrangements based on a common model. To these ends, the UN has drafted a model (bilateral) MLA treaty that States can adopt and adapt. UN Model Treaty on Mutual Legal Assistance in Criminal Matters 1990 A/Res/45/117.

⁵⁹ Schomburg et al. identify six levels of norms where one finds applicable rules on assistance in criminal matters: 'the national law at the lowest level (1st level), then eventual bilateral agreements (2nd level), the Schengen Convention (3rd level), European Union Law (4th Level), Council of Europe Law (which occasionally also applies to non-member states, 5th level), and finally, at the global level, multilateral treaties (6th level) which, as a rule, are concluded under the aegis of the United Nations'. Typology outlined in Kai Ambos, 'Publication Review: International Cooperation in Criminal Matters' (2008) 19 *Criminal Law Forum* 299-302.

⁶⁰ For example, the UK, along with other States in following the common law tradition (notably the USA), has long engaged with this approach. Even States such as Germany which traditionally place emphasis on legalisation and the written text do not always require a treaty to which both States are party in order to give or receive MLA. MLA Guidelines (n 53). A series of standing 'memorandums of understanding' may serve to facilitate MLA. An example of a MoU between the UK and Russian Federation is available at: http://www.cps.gov.uk/publications/agencies/opgrf_cps.html (accessed: 31 January 2015).

⁶¹ MLA Guidelines (n 53).

and provides the substantive and procedural frameworks that govern relations with the States with which enters into bilateral MLA treaties.⁶²

If States do not have the necessary assistance arrangements in place and channels through which to communicate requests and responses swiftly and efficiently, then it will be very much harder, or even impossible, for them to realise their prosecution objectives. Therefore, whether inter-State relations are based on treaty agreements or informal arrangements, investigators and prosecutors need to be able to communicate their requests and responses efficiently to the correct authority. The ability to do this effectively will be dependent on States having established on a bilateral basis the modalities, contacts and other requirements alongside their agreements/arrangements as to what can actually be done in terms of assistance. Even where MLA relations exist, it is not always clear to whom or in what form requests need to be addressed and significant delays to the provision of MLA can result. In recognition of the practical problems associated with securing assistance, at the European level (through the EU's European Judicial Network and the actions of the Council of Europe's Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC)) steps have been taken to establish networks of national contact points to facilitate judicial co-operation in criminal matters.⁶³

⁶² The UN Drug Control Programme has, in order to support States in the realisation of their obligations under Article 7 (on MLA) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, drafted a model legislative bill (with commentaries) that can be adopted by States. Revised United Nations Model Treaty on Mutual Legal Assistance in Criminal Matters. Available at: http://www.unodc.org/pdf/lap_mutual-assistance_2000.pdf Commentary on the United Nations Model Treaty available at: http://www.unodc.org/pdf/lap_mutual-assistance_commentary.pdf (accessed: 31 January 2015). The UNDCP guidelines on implementation state: 'The optimum legislation is a general instrument that can be used to implement all bilateral mutual assistance treaties and multilateral conventions relating to mutual assistance or which contain obligations with respect to mutual assistance [...] it should be broadly framed to ensure that bilateral and multilateral instruments could be implemented under the legislation without the need for legislative amendment.' *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, para 16, available at: http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf (accessed: 31 January 2015).

⁶³ See <http://www.ejn-crimjust.europa.eu/ejn/> (European Union) and http://www.coe.int/t/DGHL/STANDARDSETTING/PC-OC/default_en.asp (Council of Europe) (both accessed: 31 January 2015).

Securing legal assistance from other States at the investigation stage is an essential component in the majority of cases concerning alleged international and transnational crimes or ordinary crimes that have a transborder element. Even later on in the criminal process, once the necessary evidence has been collected and the foreign processes executed and decision to proceed with a prosecution has been taken, further assistance may still be needed up to, and even during, the trial. The danger with evidence secured by virtue of MLA is, however, that the receiving State's courts may declare it to be inadmissible if it has not been collected or presented in a form compatible with domestic criminal procedures. This may not constitute an insurmountable problem (the sending State may be only too happy to present the evidence in another form or provide supplementary information that will render it admissible), but it can lead to delays. If there are serious delays and/or irregularities the requesting State may be unable to proceed with the investigation.

Despite the obvious desirability of having legal assistance treaties or arrangements in place for all States interested in exercising their judicial jurisdiction over international and transnational crimes, a facet of State sovereignty is that no State is obliged to assist another in the enforcement of its criminal law which includes, *inter alia*, the rendering of legal assistance. The presence of optional bars to assistance in the multi- and bi-lateral treaties that may be invoked by the requested State weakens any claim that MLA treaties create binding assistance obligations between States parties; rather the only obligation on States parties is to ensure that the request is examined and the process of rendering assistance put in motion. There is no guarantee that the outcome will be favourable to the requesting State.⁶⁴

The question of enforceability of MLA treaty obligations was addressed by the ICJ in *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v*

⁶⁴ ICJ, *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgment of 4 June 2008 paras 116–124.

France).⁶⁵ The Court held that while the existence of a bilateral MLA treaty, the Convention on Mutual Assistance in Criminal Matters between France and Djibouti 1986, places an obligation on the requested State to ensure that procedures to provide MLA to the requesting State are put in place, ‘the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory’.⁶⁶ MLA treaties are designed to provide a framework that may facilitate assistance, with each request for MLA assessed on its own terms by each party. Otherwise, the exceptions listed could be rendered without effect.⁶⁷ The Court did however place emphasis on the requirement of good faith codified in Article 26 of the Vienna Convention on the Law of Treaties 1969 (VCLT). This must be made out through proof that the decision was taken by the relevant authority and fell within the scope of the particular ‘grounds for refusal’ article (in the case before it, Article 2(c) of the bilateral treaty).⁶⁸ Furthermore, the decision would need to be transmitted by a letter including ‘some brief further explanation [of the grounds for refusal]. This is not only a matter of courtesy. It also allows the requested State to substantiate its good faith in refusing the request’.⁶⁹ Despite the fact that France’s reasons for reliance on Article 2(c) could be justified under that provision,⁷⁰ it had not communicated these reasons adequately to Djibouti in accordance with Article 17 of the treaty which provides that ‘reasons shall be given for any refusal of mutual assistance’.⁷¹ The decision of the ICJ underscores the considerable discretion a State has to decline to give assistance, even in the presence of a MLA treaty. A general obligation ‘to

⁶⁵ *Mutual Assistance* (n 64).

⁶⁶ *Mutual Assistance* (n 64) para 123.

⁶⁷ This was put forward by Djibouti. *Mutual Assistance* (n 64) paras 116–118. Decision of Court on this matter, para 119.

⁶⁸ *Mutual Assistance* (n 64) para 145.

⁶⁹ *Mutual Assistance* (n 64) para 145, 152.

⁷⁰ Although it has been noted that: ‘a more sophisticated discussion of “good faith” and a more transparent application of that principle in assessing the French judiciary’s actions would fend off accusations that the Court chose to interpret good faith as a toothless concept in order to fully defer to the French judge’s decision’. J Craig Barker, Robert Cryer, Ioannis Kalpouzos, ‘International Court of Justice, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) Judgment of 4 June 2008’ (2010) 59 *International and Comparative Law Quarterly* 193–205, 201.

⁷¹ *Mutual Assistance* (n 64) para 153.

afford each other the widest measure of judicial assistance in criminal matters' can, it seems, be trumped relatively easily where other interests are involved. Except for lodging a diplomatic protest the requesting State can do very little to enforce its request.

In contrast to the parallel cooperation area of extradition which is highly legalised – no State should extradite in the absence of a treaty – similar *forma* requirements are lacking in the field of MLA. This is an area that still depends largely on comity. Strong elements of a 'prosecutorial led approach' (as opposed to a legalised approach) remain pervasive in MLA: the maintenance of good bilateral relations and contacts between national authorities will be invaluable to securing the necessary help from other States as and when it is needed.⁷² In short, States recognise the need for legal assistance but equally wish to retain firm control over their relations with other States. Receiving assistance is viewed by all parties concerned as a privilege rather than a right.⁷³ The fewer formal agreements or longstanding understandings a State has in place, the harder it will be to secure MLA in a timely and appropriate fashion which may in turn limit the ability of a State to exercise its judicial jurisdiction. And this is before we consider the built-in restrictions and limitations to MLA.

2.1.2. Restrictions & Limits on Mutual Legal Assistance

Almost every MLA agreement contains a set of limitations on, or bars to, the assistance that can be given by a State. Even if States are willing to cooperate in principle and have the necessary bilateral treaties/Memorandums of Understanding (MoU) and implementing

⁷² The CPS makes reference to the use and maintenance of 'good relations'. Also, distinguishing the key elements of a 'prosecutorial' vs. 'international law' approach to cooperation, see Philip B Heymann, 'Two Models of National Attitudes Toward International Cooperation in Law Enforcement' (1990) 31 *Harvard International Law Journal* 99-117; Alastair Brown, 'Towards a Prosecutorial Model for Mutual Assistance in Criminal Matters' in P Cullen, W Gilmore (eds), *Crimes sans Frontières: International and European Legal Approaches* (Edinburgh University Press 1998) 50–57.

⁷³ Within Europe, the introduction of the European Evidence Warrant may streamline the processes further and make assistance obligatory. Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

legislation in place, assistance may nonetheless be prevented for one or more of these reasons. Article 4 of the United Nations' Model Treaty on Mutual Legal Assistance 1990 contains a list (for illustrative purposes) of the most common grounds on which assistance may be refused, and States are also free to include additional criteria or tailor their domestic legislation and/or bilateral arrangements accordingly.⁷⁴

The discretionary nature of a decision to grant MLA is typified most clearly by the 'sovereignty clause' contained in the majority of bi- and multilateral treaties. This allows States parties to decline to assist on the basis that to do so would infringe their sovereignty, security, public order (*ordre public*) or other national interests.⁷⁵ This is the broadest restriction and the one most likely to cause friction when invoked; indeed, it formed the basis for the application by Djibouti to the ICJ in *Mutual Assistance* case. The decision of the parties to include a provision in the treaty allowing refusal on the basis of national sovereignty, security, *ordre public* or interest meant, however, that the requested State is, in the words of the ICJ, afforded a 'very considerable discretion'.⁷⁶ Unlike a refusal based on clear cut legal grounds (such as a requirement of double criminality or the fact that to assist in an investigation or preparing a trial would potentially place the defendant in double jeopardy) which can be tested relatively easily and objectively, this basis is inherently subjective. Unless the requesting State has clear proof of bad faith, the ICJ decision demonstrates that deferral to the requested State, which 'understands best its interests and concerns' will be the

⁷⁴ UN Model Treaty on Mutual Legal Assistance in Criminal Matters 1990 A/Res/45/117. The Guidance notes to Article 4 state: 'Some countries may wish to delete or modify some of the provisions or include other grounds for refusal, such as those related to the nature of the offence (e.g. fiscal), the nature of the applicable penalty (e.g. capital punishment), requirements of shared concepts (e.g. double jurisdiction, no lapse of time) or specific kinds of assistance (e.g. interception of telecommunications, performing deoxyribonucleic-acid (DNA) tests). Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality). Countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.'

⁷⁵ The Council of Europe Mutual Legal Assistance Convention 1959 Art 2(b) and the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (Harare Scheme) 1999 (amended), Art 8(2)(a) contain such provision, as does, for example the 1986 Convention between France and Djibouti that was a bone of contention in the ICJ decision (Art 2(c)). One notable exception is the European Mutual Legal Assistance Convention 2000 which does not contain this basis for refusal.

⁷⁶ *Mutual Assistance* (n 64) para 145.

norm. In terms of the material decision taken by the municipal court under Article 2(c) the ICJ noted ‘it is not for this Court to do other than accept the findings of the Paris Court of Appeals in this point,’⁷⁷ although Judge Keith highlighted in his declaration that the substantive assessment by the State of its interests (and in which the Court should not intervene) is distinct from the issue of whether or not the action was justified within the scope of the purpose of the Convention.⁷⁸ At bottom, the sovereignty clause shows just how difficult it may be for the requesting State to seek to enforce its requests when fundamental interests or national security are deemed to be at stake. As France pointed out, penal matters, more than others, affect the national sovereignty of States.⁷⁹ But it has also been wryly noted by one commentator that ‘States have a tendency to think that anything connected with criminal law, even quite minor procedural matters, affects national sovereignty’.⁸⁰

Where serious international and transnational crimes are concerned it would seem to go against the core objectives of international criminal justice to refuse assistance that would help to bring a prosecution against a person who has allegedly committed a crime of international concern or that has serious transnational implications. However, nowhere are these crimes formally exempt from the sovereignty ground of refusal (at least in the inter-State context).⁸¹ Given the highly politicised context of most international – and some transnational – crimes, along with national security considerations attached to military and

⁷⁷ *Mutual Assistance* (n 64) para 146.

⁷⁸ *Mutual Assistance* (n 64) Declaration, Judge Keith, para 10.

⁷⁹ *Mutual Assistance* (n 64) para 136.

⁸⁰ R Dussaix, ‘Some Problems Arising from the Practical Application, from the Judicial Point of View, of the European Convention on Mutual Assistance in Legal Matters’, in European Committee on Crime Problems, *Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters*, cited in Gilmore (n 52) xiii.

⁸¹ In contrast, for international crimes, States may not invoke national sovereignty or interest to refuse cooperation with the International Criminal Tribunals: ‘to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of the trials would be tantamount to undermining the very essence of the International Tribunal’s functions.’

Prosecutor v Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No IT-95-14, 29 October 1997 (Appeals Chamber) para 64.

See also ICTY Statute Art 29 and ICTY RPE Rule 7*bis*. Under the ICC Statute, a failure to comply with a request to cooperate by the Court may be referred to the Assembly of States (or to Security Council if the matter was referred to the Court by the SC) Art 87(7).

intelligence operations, the potential for refusal on this basis is a real possibility. Moreover, the problems this basis can create for a State seeking to exercise its judicial jurisdiction are not limited to those seeking to assert extraterritorial jurisdiction. The territorial State seeking assistance from its neighbours or the State of nationality, for example, may be equally at risk from the application of such a clause as those States wishing to exercise a more controversial extended form extraterritorial jurisdiction. Here, given the highly subjective nature of what constitutes an infringement of sovereignty, the refusal to cooperate on this basis may be caught up with a more general protest at the intended exercise of (extra)territorial judicial jurisdiction by a State.

Where the refusal is based on genuine, good-faith, security or public order concerns, there might be ways around the problem this creates for the requesting State. Sensitive information could be protected or removed so that assistance can still be given – although this course of action does then run the risk of the receiving State’s courts declaring the evidence or testimony inadmissible.⁸² The best course of action may be reformulation of the request so that it can be honoured, but as the *Mutual Assistance* case demonstrates, this may not always be possible where the sensitive information is considered to permeate the whole file.⁸³ Sometimes the stumbling block arises when the requested State considers that the provision of MLA would prejudice a domestic investigation or prosecution.⁸⁴ Whilst it would be reasonable for a State to refuse assistance if the request relates directly to conduct it is dealing with itself (it is also an ‘interested State’ and has instituted an investigation or started a prosecution), where the request pertains to different conduct but shares important evidence, the State may decline (or, better, delay) on the basis of its own prosecution interests. Here,

⁸² This was a solution proposed by Djibouti, but rejected by France and the ICJ. The Court did, however, entertain the possibility that such a course could have been taken, *Mutual Assistance* (n 64) para 152.

⁸³ *Mutual Assistance* (n 64) para 148.

⁸⁴ The ECOWAS Convention on Mutual Assistance in Criminal Matters 1992 recognises the right of States to ‘postpone the execution of the request if its immediate execution would interfere with an ongoing investigation or prosecution in the territory of a requested Member State’ Art 4(3). Also, UN Model Treaty on Mutual Legal Assistance 1990 Art 4(3).

the stage of the investigation/proceedings may be most determinative of whether a solution can be reached – a postponement to the delivery may be acceptable. This basis need not be entirely inimical to cooperation, but it has the potential to prevent a State from receiving the kind of assistance it needs to successfully build a prosecution.

A refusal on the grounds of sovereignty, public order national interests or security might be hard to second-guess or challenge. The other potential bars, in contrast, are much easier for the requesting State to quantify and, perhaps, do something about. A change to its internal laws, a reformulation of the request or the giving of assurances may enable a State to receive assistance from abroad that has previously been refused, or where the requested State has indicated that it will have to decline.⁸⁵ For example, some States will not assist a State if the crime under investigation or being prosecuted there incurs the death penalty or the ‘death row phenomenon,’ or if firm assurances that the death penalty will not be passed (or not imposed, if passed) are not given. This bar surfaces most prominently in the context of extradition,⁸⁶ but also applies to MLA as the debate of the House of Commons European Committee on the Agreement with Japan on Mutual Legal Assistance demonstrates.⁸⁷ Where adequate assurances can be given that certain penalties will not be imposed if a conviction is reached or that the information provided will not be used for other purposes than that set out in the original request (the ‘specialty’ requirement) a State should be able to assist.

In addition, national law requirements regarding double criminality or *ne bis in idem* may prevent an assistance request from being met.⁸⁸ From an international criminal justice

⁸⁵ UN Model Treaty on Mutual Legal Assistance 1990 Art 4(4).

⁸⁶ See s 2.2, below.

⁸⁷ Debate available at:

<http://www.publications.parliament.uk/pa/cm200910/cmgeneral/euro/100202/100202s01.htm> Col 5 (accessed: 31 January 2015).

⁸⁸ UN Model Treaty on Mutual Legal Assistance 1990 Art 4(1)(d): ‘The request relates to an offence the prosecution of which in the requesting State would be incompatible with the requested State’s law on double jeopardy (*ne bis in idem*).’ The Guidance states: ‘Countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality).’

perspective the latter bar does not present such a problem (provided it was a fair trial and not designed to shield the accused) because it means the conduct to which the MLA request pertains has already been prosecuted and the relevant individual convicted or acquitted. The problem arises where this basis is invoked following a trial that did not meet international standards as the conviction or acquittal could be flawed. However, there is equally no international obligation to recognise a previous conviction or acquittal, and States have different approaches to the application of the principle in practice.⁸⁹ A double criminality requirement in a general bi- or multilateral MLA treaty may mean assistance cannot be given if strict correspondence is required. For international and transnational crimes this is not as problematic as it once was. An increasing number of States have implemented legislation covering the relevant criminal conduct, often with similar definitions when they have relied on the ICC Statute or the terms of the relevant treaty. Moreover, as most of these crimes have a corresponding 'national' crime this should be sufficient to satisfy double criminality for the purposes of MLA. But where a State chooses to interpret this limitation restrictively and has not ratified and implemented the relevant treaties this can limit their ability to cooperate.

A growing concern for the human rights dimension of rendering legal assistance is another reason why giving assistance should, at times, be declined. Equally, a State may be prevented from using evidence or the outcomes of other procedures obtained from another State if the methods used were in violation of certain human rights guarantees. Respect for the human rights of the defendant and any other individuals involved in the investigation or prosecution of a crime should underpin States' criminal procedures. The logical extension to this is that assistance given in pursuance of another State's prosecution objectives should be guided by these same concerns.

Countries may also consider restricting the requirement of dual criminality to certain types of assistance, such as search and seizure.' Guidance Notes (n 74) fn 6.

⁸⁹ Cryer et al (n 27) 77.

A general ‘human rights’ bar does not currently exist, but in time aspects of international human rights law may influence or restrict the assistance that can be offered under MLA agreements.⁹⁰ Gane has observed that ‘Mutual assistance in criminal matters [...] [is] capable of provoking human rights questions, but the relevance of human rights to these areas has received little attention’.⁹¹ The relationship between human rights and extradition is well recognised, exemplified by the landmark *Soering* judgment of the European Court of Human Rights.⁹² There has, however, been no corresponding challenge to MLA at the European level, although the view that ‘there could be a *Soering*-type case where an adjudicative body will be asked to pronounce of whether the provisions of MLA for an investigation in some State will violate the requested State’s human rights obligations’ has been voiced.⁹³ An awareness of the potential impact of human rights law on MLA was recognised by the UN when it added Annex II to its 1990 Model Treaty on the subject.⁹⁴ The International Law Association has also proposed that a special ‘human rights’ provision be inserted into MLA agreements.⁹⁵ The human rights implications of MLA remains an under-developed area, but States would do well to regularise their MLA procedures where possible so as to avoid challenges on this basis.

In the context of extradition the individual can usually invoke the possible violation of his human rights to try to halt extradition, but he does not enjoy the same rights where the

⁹⁰ A helpful and extensive discussion of this topic is provided by Robert J Currie, ‘Human Rights and International Mutual Legal Assistance: Resolving the Tension’ (2000) 11 *Criminal Law Forum* 143-181.

⁹¹ Christopher Gane, ‘Human Rights and International Cooperation in Criminal Matters’ in P Cullen, W Gilmore (eds), *Crimes sans Frontières: International and European Legal Approaches* (Edinburgh University Press 1995) 155-178, 160.

⁹² A key article on the topic remains Christine van den Wyngaert, Applying the European Convention on Human Rights to Extradition: Opening Pandora’s Box? (1990) 39 *International and Comparative Law Quarterly* 757-779; Dugard, van den Wyngaert (n 1).

⁹³ Currie (n 90) 149-153.

⁹⁴ Annex II to Model Treaty on Mutual Assistance in Criminal Matters 1990, amended by GA Res 53/112 para 4.

⁹⁵ ‘Assistance shall be refused if it appears to the requested State that there are substantial grounds for believing that the rendering of such assistance would result in a serious violation of the human rights of any person under any treaty for the protection of human rights to which the requested State is a party, under customary international law, or under domestic law of the requested State.’ International Law Association, Report of the 68th Conference held at Taipei, Taiwan, May 1998, 14.

provision of assistance is concerned. The only possibility of challenging matters related to MLA comes much later at the trial stage when fair trial challenges may be raised, for instance, that there has not been equality of arms between the defence and the prosecution with respect to legal assistance or that evidence has been obtained under MLA arrangements which could not have been obtained in that way in the other State.⁹⁶ In the field of MLA, the onus is instead on the States involved to decide whether assisting or receiving assistance would violate fundamental principles of human rights guaranteed under international or domestic laws and to do all they can to protect individual rights accordingly.⁹⁷

In contrast to the explicit and mandatory human rights guarantees found in most bi- and multilateral extradition agreements, the influence of human rights on MLA generally only infiltrates through other sources of obligation. A State in receipt of a request for MLA would need to ask whether or not providing assistance would violate other international human rights treaty obligations (ECHR, ICCPR) to which the requested State is a party, infringe constitutionally protected rights or involve using a procedure prohibited under national law because of its effect on civil liberties. If any of these questions are answered affirmatively, the requested State may (and probably should) refuse to assist. However, it would also seem likely that only clear evidence of the occurrence or likelihood of the most serious human rights violations would lead to assistance being declined.⁹⁸ MLA is primarily concerned with coordinating national criminal procedures so that evidence found in one territory or testimony taken elsewhere can be used by the State that ultimately wishes to prosecute, if a case can be made out. While a strict rule of non-inquiry may have been diluted by parallel strong human

⁹⁶ eg *R v Birmingham and Others* (1992) Crim LR 117.

⁹⁷ Cf Elements recommended for inclusion in model legislation on mutual assistance in criminal matters, ANNEX II (n 94) para 4; also, ILA Report (n 95) 14. The problem with including any such clause is that it would clearly entail an enquiry into and assessment of the workings of another State's justice system. Not only are States often reticent to do this, but it would also slow down the delivery of MLA and probably require judicial evaluation of the circumstances, much like in the context of extradition.

⁹⁸ Currie (n 90) 153–158.

rights obligations, the tendency remains to not look too closely at what will happen when assistance is provided.

Even though the grounds for refusal have always been cast in facultative rather than mandatory terms, there is presently a trend away from including grounds which could be interpreted too restrictively.⁹⁹ Human rights could make a difference to MLA and inform the decision whether to assist or not, although clear cases of refusals of assistance on this basis are still lacking, unlike in extradition.¹⁰⁰ Nonetheless, the references to security, sovereignty, interest and public order continues to have a place in even the most collaborative of MLA regimes, and can serve as a catch-all basis for declining assistance,¹⁰¹ as the *Mutual Assistance* case shows. States may be willing to remove some legal impediments to assistance, but they insist on retaining ultimate discretion over whom they assist.

This can create a problem for States that require the help of foreign authorities to build or prosecute a case. Currently, the majority of MLA agreements are between States that have a high degree of trust in their respective legal systems, even if their criminal procedures are qualitatively different in many ways. However, if States are serious about prosecuting international and transnational crime and wish to be in a position to prosecute ordinary crimes that have a transborder element to them, they may have to cooperate on a wider basis than previously envisaged. So far, extending far-reaching cooperation frameworks beyond recognised circles, such as within the EU, has not proven to be terribly popular.

⁹⁹ Cryer et al. (n 27) 87.

¹⁰⁰ See below, section 3.1.

¹⁰¹ TOC Convention 2000, Art 21(b).

2.2. Interactions between States: Securing Extradition

2.2.1. Presence by Legal Means

A significant portion of the criminal investigation may be conducted without the relevant individual being physically present in the investigating State, but for most States the likelihood of being able to secure the presence of the accused will play a role in the decision whether or not the State will seek to exercise judicial jurisdiction. It is an elementary requirement that the accused be physically present to stand trial; although *in absentia* trials (ie extraterritorial assertions of judicial jurisdiction) are not entirely without precedent, there are serious limitations involved in these types of prosecutions.

The importance attached to securing an individual's presence before the court that wishes to try him is illustrated by the long history of extradition practice between States.¹⁰² Without an effective extradition system the exercise of judicial jurisdiction could easily be frustrated by mobile criminals. Cooperation in this area is thus highly desirable and extradition is widely supported as a means of ensuring individuals do not escape prosecution for their crimes by fleeing abroad or orchestrating their criminal activities from the 'safety' of another jurisdiction.¹⁰³ In contrast to the comity-based approach permitted (and often adopted) in the field of MLA, extradition is far more legalised and requires the existence of a treaty (although sometimes other arrangements will suffice)¹⁰⁴ and the consent of the requested State's courts before extradition may be granted.

¹⁰² See Geoff Gilbert, *Responding to International Crime* (Martinus Nijhoff 2006) 17–23; M Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th edn OUP 2014) 1–7.

¹⁰³ For the distinction between crimes of conduct and of result, see Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (OUP 2003) 117–129.

¹⁰⁴ A rule of municipal law which empowers a State to enter into a temporary arrangement in the absence of a formal treaty relationship with the requesting state maybe sometimes be sufficient. Ivan Shearer, *Extradition in International Law* (Manchester University Press 1971) 22, 28.

In *Lodhi* the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1953 provided the basis for extradition between the UK and UAE. In the UK, under the Extradition Act 2003 (Parties to International Conventions) Order 2005, SI 2005/46, any States not already designated as Category 1 or 2 (ie with which the UK already has standing extradition agreements) listed in the Schedule may be considered a

Bilateral treaties are the most popular and appropriate means of establishing extradition relations between States as these can be tailored to take into account the special circumstances of the States involved.¹⁰⁵ A small number of multilateral treaties also exist, although they are regional rather than universal in reach, and tend to be drafted in recognition that States in the same geographical and/or political area will often share a common interest in suppressing crime and that criminal activity, or its affects, may extend throughout a region, such as drug trafficking in the Americas and Caribbean.¹⁰⁶ Several substantive criminalisation treaties dealing with transnational crimes also contain provisions referring to extradition.¹⁰⁷ This type of provision is in addition to any *aut dedere aut judicare* obligation included in the text and differs in its core objectives as it relates to enforcement jurisdiction rather than legislative jurisdiction.¹⁰⁸ In order for these provisions to apply, States will normally need to have accepted either individually or generally that the treaty can be relied upon in the absence of standard extradition treaty and the obligations contained therein will only apply *inter partes*.

Given the importance attached to presence in the forum State an inability to secure this through the legal channels – either due to a lack of extradition relations or because of the operation of one or more of the ‘bars’ to extradition – will usually mean a prosecution cannot take place at the present time. In light of the profound effect this can have on the realisation of its prosecution objectives, States have sometimes resorted to extrajudicial methods such as

temporary extradition partner for the conduct described in the criminalisation convention. When this happens, the general procedures applying to Category 2 States under the Extradition Act apply (section 193). *Re Lodhi* [2001] EWHC Admin 178. These provisions have also been relied up to facilitate the extradition process relating to Bajinja and others currently.

¹⁰⁵ The UN also produced a Model Treaty on Extradition in 1990 to aid States in drafting suitable bilateral agreements. A/RES/45/116.

¹⁰⁶ Within the European Union far-reaching steps have been taken through the introduction of the European Arrest Warrant which has replaced the existing extradition procedures between member States for crimes of certain gravity. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. See generally, Rob Blekxtoon, Wouter van Ballegooij, *Handbook on the European Arrest Warrant* (TMC Asser Press 2005). Among Council of Europe members the *European Convention on Extradition* 1957 continues to provide a basis for extradition between its States parties.

¹⁰⁷ eg Torture Convention 1984 Art 8.

¹⁰⁸ See Chapter 2, Part II.

abduction to secure the presence of the individual to stand trial.¹⁰⁹ The receiving State's courts may not consider the means by which an individual came to be in the country to be particularly important: Eichmann was abducted from Argentina in order to stand trial in Israel and this presented no problem for the Israeli courts.¹¹⁰ Higgins has argued that there may be some crimes for which the ends achieved (prosecution of very serious crimes) may outweigh any abuse of process engendered by the irregular methods of securing presence of the accused.¹¹¹ It is possible that a human rights-based argument could succeed if the person had not been brought to the country through the appropriate legal channels; this does, however, remain a difficult argument to make out and the Article 5, ECHR, argument did not succeed in *Öcalan v Turkey* (although the European Court of Human Rights did recognise the possibility of a violation under Article 5(1) if the consent of the custodial State to the abduction had not been granted).¹¹² In some jurisdictions, the 'abuse of process' doctrine may succeed where a person has been forcibly brought into the jurisdiction of the court in disregard of extradition procedures, although the conditions that would render extradition an abuse of process have been very narrowly prescribed.¹¹³ Expulsion or deportation of an individual from one State under immigration controls may also enable an interested State to exercise its judicial jurisdiction in the end if the State intercepts/receives the individual or is able to secure his or her extradition from a third State later on.

Despite these alternative – often successful – extrajudicial means of obtaining custody of the accused, they remain irregular and uncertain methods. Extradition through the correct legal

¹⁰⁹ Shearer (n 104) 72–76; See further Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (OUP 1994) 69–73.

¹¹⁰ *Eichmann* (n 50).

¹¹¹ Higgins (n 109) 72; also, *R v Mullen* [1999] 2 Cr App R 143, where the Court of Appeal stressed that there may be cases in which the seriousness of the crime is so great, relative to the nature of a particular abuse of process, that it would be a proper exercise of judicial discretion to allow the prosecution to succeed.

¹¹² *Öcalan v Turkey* – 46221/99 [2003] ECHR 125 (12 March 2003) para 85.

¹¹³ *Bennett v Horseferry Road Magistrates Court and Another* [1993] 3 All ER 138 (HL) 151. Discussing abuse of process as an impediment to the exercise of jurisdiction, see Yasmin Q Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (TMC Asser Press 2009) 329–366.

channels is the preferred approach, and ensuring that the necessary mechanisms and agreements are in place and that procedures are correctly adhered to provides the best chance for an interested State to obtain custody of the accused and successfully prosecute. There do, however, remain several legitimate 'bars' to extradition which may be invoked to prevent extradition from going ahead in a particular case.

2.2.2. Restrictions & Limits on Extradition

Returning an accused person to where he allegedly committed his or her crimes when the individual has fled to another State in order to avoid arrest and possible prosecution is the archetypal pattern presented for extradition. But as demonstrated in Chapter 1, States may feel their sovereignty to be threatened by extraterritorial assertions of legislative jurisdiction and any incumbent extradition requests that may follow if that State does not already have custody of the accused. Whereas sovereignty was usually only affected in the past to the extent that extradition necessitated a State cooperating to return someone 'home', it is now even more likely that a State with a *prima facie* 'strong' interest in prosecuting may itself be the subject of an extradition request or see its request trumped by an earlier request from another State. This is because of the nature of international and transnational crimes which may well have repercussions in several States. Nonetheless, 'sovereignty' is not expressly recognised as one of the grounds for refusal of extradition. Unlike in the field of MLA where there are fewer formal bars to assistance and reliance on the sovereignty clause is a means for a State to decline to cooperate, extradition law has instead developed a range of legal bases on which removal can be denied by the requested State. The individual is also an active participant in the extradition process, unlike at the stage of proceedings when the majority of MLA requests take place when he or she may not be aware of any investigation. Equally, while MLA requests are transmitted and, for the most, part dealt with by police and

prosecution authorities directly under the heading of ‘enforcement’ jurisdiction, extradition requests must be processed through the courts. The judicialisation of the extradition process explains, to a large extent, the need for the standard legal bars to extradition.

Having the courts deal primarily with extradition requests is desirable because of the serious implications for individual liberty extradition usually entails. Although political actors can and still do intervene to prevent or secure removal (sometimes even after the courts have decided to grant extradition¹¹⁴), the preference is for clear, transparent and speedy (judicial) decision making. Refusal to extradite, when this happens, can usually therefore be presented as protection of the individual and justified on one of the legal grounds for denial and/or due to a procedural irregularity rather than because it interferes with the sovereign interests of the State. But many States are reluctant to remove the political discretion aspect entirely. For example, under the Extradition Act 2003, steps have been taken in the UK to reduce, but not remove, the role of political actors and the Review of Extradition Law 2011 proposes further amendment in this area.¹¹⁵

No matter which basis of jurisdiction the requesting State invokes, all are equally subject to the legal restrictions on extradition in place under the domestic law in the requested State and/or set out in the treaty governing extradition between the two States. For example, the territorial or nationality State does not have an automatic, or privileged, right to receive the individual. This has a remarkable leveling effect between claims and also means that the custodial State has considerable power to influence which interested State will exercise its

¹¹⁴ The British Home Secretary prevented the extradition of Gary McKinnon to the USA from going ahead on health grounds in 2012. BBC, ‘Gary McKinnon extradition to US blocked by Theresa May’ available at: <http://www.bbc.com/news/uk-19957138> (accessed: 31 January 2015).

¹¹⁵ Under the Extradition Act 1989, extradition was an executive act. The Secretary of State had the power to decide whether to allow extradition proceedings to commence and whether to order extradition at the end of judicial proceedings. These powers were reduced/removed in the Extradition Act 2003. The powers of the Secretary of State to intervene have been removed for Category 1 extraditions. For extradition involving Category 2 States, the Secretary of State retained limited pre-proceeding powers (ss 70, 126) and after the hearing (ss 87(3), 93). ‘A Review of the United Kingdom’s Extradition Arrangements, September 30, 2011’ available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf (accessed 31 January 2015).

judicial jurisdiction if there are competing requests, a topic returned to in Chapter 4. But despite the formal equality of the bases of jurisdiction in respect of granting extradition requests, the basis of jurisdiction asserted by the requesting State may have a bearing on whether the custodial State can entertain an extradition request from it at all. This is because some States require that both the requested and the requesting State have established the same legislative bases of jurisdiction for the conduct in question. While this will not be problematic for territorially based claims, if one of the extraterritorial bases for jurisdiction is asserted by the requesting State but the requested State has not legislated accordingly, the extradition request may fail.

The ‘identity of jurisdiction’ issue was a material consideration in the *Pinochet* litigation. The decision required that where the conduct of which the defendant stood accused involved extraterritorial elements from the point of view of the requesting State, that conduct must constitute an offence in UK law with similar extraterritorial reach.¹¹⁶ As torture was not recognised as a crime for which the UK had extraterritorial jurisdiction at the time of commission,¹¹⁷ Pinochet could not be extradited. This conclusion was unnecessarily stringent given the later assumption of extraterritorial jurisdiction by the UK and the fact that the conduct constituting the crime was criminal in the UK at the time: although not expressly labeled ‘torture’ other conduct of an equivalent nature was recognised under UK law.

Starting in 2001, steps were taken in the UK to simplify the extradition process for international crimes – perhaps, also with a view to reversing the effect of the *Pinochet* rule introduced by Lord Browne-Wilkinson for torture. (Although it can be noted that the conduct in *Pinochet* was torture and a ‘transnational’ rather than ‘international’ crime in the strictest

¹¹⁶ *Pinochet (No 3)* (n 51) 196–197 (Lord Browne-Wilkinson). Colin Warbrick, ‘Extradition Law Aspects of *Pinochet 3*’ (1999) 48 *International and Comparative Law Quarterly* 958–965; M Birnbaum, ‘Pinochet and Double Criminality’ [2000] *Criminal Law Review* 127–139.

¹¹⁷ This was an additional hurdle added by Lord Browne-Wilkinson; not only was jurisdictional parity required, but the requested State also needed to have the same basis at the time the crime was committed. *Pinochet (No3)* (n 51) 194–196 (Lord Browne-Wilkinson).

sense; the parameters of the Convention against Torture were material rather than torture as a customary law crime against humanity). The first of these steps removed the need for parity of location jurisdiction required under the Extradition Act 1989 for crimes defined in the ICC Act 2001.¹¹⁸ The comments made by Baroness Scotland at the time are instructive of the UK's attitude towards extraterritorial jurisdiction and extradition and are worth quoting in full:

Under UK extradition law, it is the normal rule that we are unable to send people to another country to stand trial or to serve a period of imprisonment unless we could try that person under similar circumstances in the United Kingdom. This is the so-called "dual criminality rule". But under this Bill we are going to disapply that rule in the case of ICC crimes. This means that even though a State that requests the extradition of an individual suspect takes a wider jurisdiction than we do ourselves, we shall now be able to extradite that person to stand trial in the usual way. So even in cases where suspects were not liable to prosecution in this country or before the ICC they would be liable to extradition. This will ensure that non-UK nationals who have committed crimes overseas will not be able to come to the United Kingdom thinking that they will be immune from the reach of the law. They will be vulnerable to prosecution before the ICC, and they will be vulnerable to extradition.¹¹⁹

Then, in 2003 extradition law in the UK as a whole underwent a significant reform.¹²⁰

Amongst the changes was the complete removal of double criminality/identity of jurisdiction parity for crimes under the jurisdiction of the ICC. Section 196(3) reads:

It is not an objection to extradition under this Act that the person could not have been punished for the offence under the law in force at the time when and in the place where he is alleged to have committed the act of which he is accused or of which he has been convicted.

This provision removes, inter alia, the barriers to extradition for international crimes in cases where the UK does not have extraterritorial legislative jurisdiction (for example, it may extradite to a State that wishes to exercise extended extraterritorial or universal jurisdiction

¹¹⁸ ICC Act 2001 s 72, repealed by the Extradition Act 2003.

¹¹⁹ *Hansard* HL Vol 620 col 929 (2001).

¹²⁰ The day Pinochet returned to Chile, the Home Secretary announced that there would be wide-ranging reform of UK extradition law. *Hansard* HC Vol 345 cols 572–575 (2000). The Extradition Act 2003 repealed the Extradition Act 1989 in full. Following the 2011 Extradition Review (n 115) further reform is proposed and is currently underway. See further Chapter 4 for discussion of some of these proposals.

whereas the UK only has territorial/nationality and ‘resident’ jurisdiction).¹²¹ It does not, however, apply to non-ICC Statute crimes or transnational crimes, for which the *Pinochet* precedent holds. This is unfortunate as there are several near universally recognised treaty crimes over which the UK has not established wide-reaching extraterritorial jurisdiction despite the permission to do so granted by the treaty. Its jurisdiction over torture under the Crime and Justice Act 1988 is an exception.

Requiring jurisdictional correspondence before extradition can take place is an exceptionally onerous ‘bar’ to extradition and may impede extradition to a State seeking to assert what appears to be a legitimate claim to extraterritorial jurisdiction. While a cautious approach to double criminality is helpful to guard against extradition for conduct the State perceives to be wholly lawful, it loses its imperative for conduct everyone anywhere in the world should have known to be criminal at the time: genocide, war crimes and some crimes against humanity such as torture being straightforward examples. Provided the request does not relate to conduct that took place before the time the crime were recognised under customary international law as constituting an international crime, the bases of jurisdiction in the requested State should not influence the outcome of an extradition request. For transnational crimes that have a basis in treaty the effect of such a rule would be less severe if all States parties have implemented jurisdiction on each available basis; however, most treaties contain a mixture of obligatory and facultative bases and few States have extended their prescriptive jurisdiction to include all the available heads of jurisdiction. Again, provided the request relates to conduct that constitutes a crime under the law of the requested State, it should not matter for the purposes of extradition whether or not there is jurisdictional correspondence. Nonetheless, the possibility of declining extradition when the requested State has not

¹²¹ The Extradition Act 2003 introduced section 64(6) for category one States and section 137(5) for category two States in respect of crimes under the ICC Act. If the conduct occurred outside the requesting State’s territory and provided that no part occurred in the UK and it carries at least a 12 month period of detention, the conduct constitutes an extradition offence. This provision must be read in conjunction with section 196.

established jurisdiction on the same basis as the requesting State remains a recognised ground for refusal. It is contained as an optional ground in the 1990 United Nations Model Extradition Treaty as well as various multilateral agreements. It is also retained in the 2002 Framework Decision on the European Arrest Warrant where non-execution of the EAW is permitted when the conduct constituting the crime took place ‘outside the territory of the issuing [requesting] Member State and the law of the executing [requested] Member State does not allow prosecution for the same offences when committed outside its territory’.¹²² While on its face this optional ground for refusal should not prevent extradition for international and transnational crimes as most fall under the category of 32 offences for which double criminality has been removed (Article 2(2)), the vagueness of some of these listed terms and the fact that Member States may have divergent or imperfect implementing laws for these offences could lead to this ground being applied in practice in some situations.

In terms of the conduct itself, the acts of the individual must constitute an extraditable offence. This involves two aspects: sufficient gravity and criminalisation of the conduct in both States. The first should be relatively unproblematic for international and transnational crimes (at least in theory) because an increasing number of States now adopt an approach to classification based on the seriousness of the offence (the ‘eliminative approach’) in their national extradition laws rather than relying on a list of offence descriptors (the ‘enumerative approach’).¹²³ By their nature, international and transnational crimes will generally meet the minimum punishment requirements.

Potentially more problematic is the second dimension. The double criminality rule stipulates ‘an act shall not be extraditable unless it constitutes a crime according to the laws of both the

¹²² Article 4(7)(b). See Blekxtoon, van Ballegooij (n 106) 237–239.

¹²³ Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff Publishers 1998) 84–85. Extradition Act 2003 ss 64–66, 137–138.

requesting and the requested States'.¹²⁴ A strict reading of the double criminality requirement means that unless the conduct is classified as the same offence in the requested State, no extradition can take place. As discussed previously in this Chapter and in Chapter 2, all States should have established legislative jurisdiction over genocide, war crimes and certain crimes against humanity and States parties to the various treaty crimes are equally supposed to have implemented the necessary national enabling legislation to make prosecution possible. The reality is nonetheless somewhat different, with many States failing to implement, or implementing incorrectly or insufficiently, their treaty or customary law obligations. This situation not only affects the State's own ability to prosecute, it can also impede a State's capacity to extradite. Fortunately, many international and transnational crimes will constitute a crime under national law already if not in name; a State may not have introduced legislation for the crime of genocide, but murder will already be a crime under the criminal law of (all) States. When the underlying conduct constitutes a crime under existing national criminal law, 'substantial similarity' will often suffice for the purposes of extradition.¹²⁵ Where problems arise is in the cases that have no corresponding national offence: a State that has not criminalised rape or whose definition varies greatly from the requesting State's, for example, might find it difficult to extradite for the crimes against humanity of sexual slavery or rape. As an increasing number of States pass or update international crimes legislation, sometimes with extended extraterritorial jurisdiction, and implement transnational crime treaties into their national laws, the issues associated with double criminality may lessen with time; however, unless this is accompanied by more extensive extradition agreements and a shift in policy in some States regarding extradition of their nationals, a State with a prima facie interest may still find it hard to exercise its judicial jurisdiction.

¹²⁴ Shearer (n 104) 137.

¹²⁵ *R v Governor of Pentonville Prison, ex parte Budlong* [1980] 1 WLR 1110.

The significance of reciprocity-related issues notwithstanding, the practice of non-extradition of nationals may provide the most significant stumbling block for extradition to an interested State. Often constitutionally protected, this bar is the one most obviously linked to sovereignty and remains jealously guarded by the States that invoke it. It is included in a great many bi- and multi-lateral treaties, including the 1990 UN Model Extradition Treaty, as either an optional or mandatory grounds for refusal. In essence, it prevents a State from sending its national to the country where he committed a crime or against whose interests his actions had an effect (ie which triggered an assertion of jurisdiction based on the protective principle), or indeed to any third State. While requesting States (particularly from the common law tradition¹²⁶) may protest against a refusal to extradite on this ground, over years of usage it has attained legitimacy and is virtually sacrosanct among the States who oppose extradition of their nationals. As Plachta observes, ‘in sharp contrast to the considerable evolution over the last few decades of almost all other forms of international cooperation in criminal matters, including extradition itself, the gap between the two approaches to the problem of surrendering nationals has not been closed. [...] Overall, the traditional stance against the extradition of nationals has prevailed.’¹²⁷

The major problem with refusal on this basis is its finality: it does not adequately take into account the question of where exactly might be the best place for trial. The nationality State may indeed be the best equipped, but equally the territorial State or a third State which has the means to prosecute successfully may be better placed. While there are often compelling human rights based reasons for denying extradition of a national in a particular case,¹²⁸ this is a separate issue from whether it is justifiable to either bar absolutely or occasionally the

¹²⁶ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America/United Kingdom)* Judgment of 27 February 1998.

¹²⁷ Michael Plachta, ‘Non-Extradition of Nationals: A Neverending Story?’ (1999) 13 *Emory International Law Review* 77–159, 77.

¹²⁸ See section 3.1, below.

extradition of a national for no other reason than the mere fact that he is a national. When a State wishing to exercise its judicial jurisdiction needs to secure an extradition from a State which may not extradite its nationals, the state of relations between the two States and assurances such as return of the individual to serve any sentence, etc. that can be given may well be instrumental in securing his extradition to stand trial.¹²⁹ However, given the constitutional status of the prohibition in some States, attaining a waiver may be highly problematic or impossible.

There are various other factors which operate in the field of extradition law generally and that may serve to impede extradition for international or transnational crimes. These range from the political offence exception, statutory limitations, national security factors, *ne bis in idem* (although not as a rule of international law), specialty, amnesties through to immunities and human rights concerns. The last two of these play a particularly important role as they can serve to bar extradition absolutely. They are discussed in Part III in respect of the State granting extradition and from the perspective of the State wishing to exercise judicial jurisdiction. Of the other potential bars to extradition, some would be legitimate to invoke under international law, others would not. For example, while statutory limitations are generally acceptable under national law, they should not be imposed for international crimes.¹³⁰ And, some international and transnational crimes are exempted from the political offence exception to extradition by international treaty.¹³¹ The special circumstances of this category of crimes highlight a fundamental problem: as criminal offences they are qualitatively different from those for which extradition was originally envisaged, but the framework used is still the same. Unless certain bars are disapplied in respect of these crimes,

¹²⁹ Plachta offers some possible ways of breaking the stalemate. Plachta (n 127) 115–117.

¹³⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968 754 UNTS 73; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes 1974.

¹³¹ eg Genocide Convention 1948; Protocol additional to the Geneva Conventions 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 (Protocol I); most ‘terrorism’ treaties.

extradition may be unnecessarily prevented. Drumbl evidently shares this concern as he asks rhetorically: ‘Is it self-evident that the same standards ought to apply in cases of extradition of a suspected ordinary criminal, on the one hand, and in cases of the extradition of a suspected extraordinary international criminal, on the other?’¹³² To take an example, while provisions such as section 196 of the UK Extradition Act 2003 recognise expressly the special character of international crimes for the purposes of the double criminality rule, such recognition is not widespread.

The assessment engaged in by the courts during an extradition hearing has much to do with an evaluation of whether to deny removal would be proportionate given the ‘good’ of extradition and that upholding the system is in the interests of all States. In *Ullah*, Lord Bingham set great store by the desirability of honouring extradition treaties with other States.¹³³ Hence, the legitimate aims of extradition, to strengthen international cooperation to ensure the speedy administration of justice and to prevent safe havens from developing, are considered to be of fundamental importance and steps should be taken by all States to ensure their national legislation and extradition laws are as comprehensive as possible. Few states have, however, managed this and the restrictions discussed in this section may all too often continue to bar extradition.

¹³² Mark A Drumbl, ‘Prosecution of Genocide v. the Fair Trial Principle: Comments on *Brown and Others v. The Government of Rwanda and the UK Secretary of State for the Home Department*’ (2010) 8 *Journal of International Criminal Justice* 289–309, 308.

¹³³ *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 (HL) para 24 (Lord Bingham).

3. Considerations Attaching to the Individual

In addition to the practical matters of securing assistance and custody of the accused, a State wishing to invoke its legislative jurisdiction and exercise judicial jurisdiction must also focus on the individual in question and consider whether or not it can secure and protect his or her human rights, along with answering any questions relating to the applicability of immunities. When the State seeking to assert jurisdiction does not already have custody of the individual in question and has requested his or her extradition from another State, the custodial State must take steps to assess the level of rights protection offered by the requesting State and determine if the person should be immune from prosecution under rules of international law. Extradition is essentially a contractual relationship between governments, but each State party to a multi- or bi-lateral extradition agreement is also bound by its international obligations in respect of human rights and immunities. This marks an important departure from an absolute ‘rule of non-inquiry’ where there would be no need to look to the receiving State’s judicial system or human rights record before granting extradition.¹³⁴

3.1. Human Rights Guarantees

States parties to the various human rights conventions are under a duty ‘to secure’¹³⁵ or ‘to respect and to ensure’¹³⁶ the rights encompassed therein to everyone within their jurisdiction. In terms of criminal prosecutions, some rights are particularly relevant. On the one hand, the procedural propriety of the proceedings is crucial, encompassed in the ‘right to a fair trial’ found in all human rights treaties and often constitutionally protected. On the other hand, the physical integrity and psychological well-being of the accused should be guaranteed. If the

¹³⁴ Discussing the current state of this rule and how it is applied by some States, see MS Topiel, ‘The doctrine of Non-Inquiry and the Preservation of Human Rights: Is there Room for Reconciliation’ (2001) 9 *Cardozo Journal of International and Comparative Law* 389–420.

¹³⁵ ECHR Art 1.

¹³⁶ ICCPR Art 2(1), AHRC, Art 1(1).

State feels it cannot adequately protect the individual or provide him or her with a fair trial, it may wish to consider deferring jurisdiction to another interested State that is willing and able to take up the case, if such an option exists.¹³⁷

When the State wishing to exercise its judicial jurisdiction and the custodial State diverge and an extradition request has been issued the latter State needs to consider if extradition would be barred for any of the standard ‘State based’ reasons detailed in the previous section or on grounds pertaining to the treatment or trial of the individual. These can include the likelihood of specific human rights violations encompassed in a human rights treaty occurring and/or on the basis of the traditional ‘non-discrimination’ clause found in many extradition treaties.

Extradition should be refused on this basis:

If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic, origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons.¹³⁸

The overlap between human rights standards and some of the other long-standing extradition-specific guarantees is clear. Gilbert cites, *inter alia*, the link between right to life and non-extradition to a State that enforces the death penalty, alongside the cross over between the political offence exception and certain fair trial guarantees.¹³⁹ However, there is also a shift towards treating human rights as a discrete ground for refusal, which Van den Wyngaert terms a ‘third dimension’ to the extradition relationship.¹⁴⁰ Under the UK Extradition Act 2003, the appropriate judge must not order extradition if to do so would be incompatible with rights protected under the ECHR, which is a separate determination from whether extradition

¹³⁷ See further Chapters 4 and 5. Other options include simply not prosecuting at that time (which is usually not acceptable) or setting up a special tribunal to try the individual or a group of individuals.

¹³⁸ UN Model Treaty on Extradition 1990 Art 3(b).

¹³⁹ Gilbert (n 123) 141. Cf Dugard, Van den Wyngaert (n 1) 188.

¹⁴⁰ Van den Wyngaert, cited in Eser, Lagodny, Blakesley (n 1) 489.

is barred on one of the grounds included in the ‘extraneous circumstances’ provisions of the Act.¹⁴¹

The inclusion of express human rights protections in national extradition law is the most clear and direct indication of the role human rights should play in this process, although reference to the requirement to consider rights protected internationally can equally be found in the multi- or bi-lateral extradition treaties themselves and some criminalisation treaties.¹⁴² One thing is clear: no matter where the source of a requirement to consider the human rights implications of an extradition request comes from, the duty to do so exists. In *Soering v United Kingdom* it was established that the responsibility of a requested State may be engaged if it knowingly extradites an individual to a State where there are substantial grounds for believing that there is a real risk he would be subject to a human rights violation, in this instance, inhuman or degrading treatment.¹⁴³ Which rights are liable to be included and the degree and severity of the violation needed remain, however, difficult to classify with certainty. Indeed, the ECtHRs was careful to qualify that the general obligation of States parties to secure Convention rights to those within its jurisdiction ‘cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention’.¹⁴⁴ Whether or not extradition could be barred on the basis of ECHR articles

¹⁴¹ Human rights: s 21 (Category 1 States), s 87 (Category 2 States); Extraneous circumstances: s 13 (Category 1 States) & s 81 (Category 2 States).

¹⁴² Discussing these four main methods of ensuring that human rights are considered in extradition proceedings, see Gane in Cullen, Gilmore (n 91) 162–165.

¹⁴³ *Soering v United Kingdom* – 14038/88 [1989] ECHR 14 (7 July 1989) para 88. This was in the context of Article 3. There is myriad debate, however, regarding what other rights a State may be expected to consider. It is also now established in the Strasbourg jurisprudence that the sending State (the State where the suspect is residing) can be held responsible for a foreseeable human rights violation of the suspect’s rights in the receiving State (that is, the state which requested extradition of the person). *Mamatkulov and Askarov v Turkey* – 46827/99 and 46951/99 [2005] ECHR 64 (4 February 2005). Cf the less onerous obligations on States to enquire into the set up in other states in *Drozd and Janousek v France and Spain* – 12747/87 [1992] ECHR 52 (26 June 1992) para 110.

¹⁴⁴ *Soering* (n 143) para 86.

other than Article 3 was discussed by the House of Lords in *Ullah*. It was held that they could – provided a ‘very strong case’ was presented.¹⁴⁵ Nonetheless, some rights appear to be routinely excluded. The right to family life found in Article 8(1) ECHR is repeatedly held not to present a significant enough reason to prevent extradition because of qualification in Article 8(2).¹⁴⁶

3.1.1. Fair Trial

Turning first to the criminal proceedings themselves, the ability and willingness to provide a fair trial of the accused is crucial if the prosecution is to carry legitimacy at home and abroad. This includes ensuring that the full range of standard protections set out in Article 14 ICCPR or a regional treaty such as Article 6 ECHR will be available to a defendant. Ensuring a fair trial where transnational or international crimes are involved will also often require additional measures that may necessitate the involvement and cooperation of other States. Protecting defence witnesses in third States and/or arranging for their travel to the prosecuting State to testify (witnesses who may themselves be in custody or in prison) are some examples. A failure to secure such assistance in a timely fashion may undermine the quality of justice that will be delivered.

Securing a trial that is in accordance with international standards may not be easy for a State and can be expensive, time consuming and complicated. A State needs to have a sufficient level of judicial, investigative and financial capacity to be able to conduct trials of these types of crime. A fair trial cannot therefore just be guaranteed at a theoretical level in the national laws of the State exercising jurisdiction, it must be provided in practice as well. Moreover, a State may be generally able to provide fair trials, but unable to do so in a particular case: for

¹⁴⁵ *Ullah* (n 133) para 24 (Lord Bingham of Cornhill).

¹⁴⁶ *Lauder v United Kingdom* – 27279/95 [1997] ECHR 106 (8 December 1997); *Birmingham & Ors v Director of Serious Fraud Office & Anor* [2006] EWHC 200 (Admin) para 118 (Laws LJ).

example, the trial of a former political or military leader for crimes against humanity could be difficult whereas the trial of an ‘ordinary’ criminal would not be problematic.

The potential for fair trial concerns to prevent extradition was first recognised in *Soering*.¹⁴⁷

The ECtHRs stated: ‘[A]n issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’.¹⁴⁸ This has been confirmed in later judgments, most recently in the 2012 Abu Qatada judgment of the ECtHRs.¹⁴⁹ If such a risk is found to exist, the requested State should deny extradition or at the very least seek to attach certain conditions to the surrender that would alleviate the most problematic fair trial concerns: perhaps international observers could be present, or the trial held before a panel of judges rather than single judge, for example, although the requested State is not be able to demand any such measures. Yet while Article 6 ECHR is commonly invoked alongside other rights, it took until 2009 for it to succeed as an independent bar to extradition in the UK.

In the High Court decision of 2009 in *Brown (aka Vincent Bajinja) & Ors v Government of Rwanda & Ors* it was decided that on the basis of the Convention’s fair trial provision if returned to Rwanda to stand trial for genocide there was a real risk that the four men residing in Britain would suffer a ‘flagrant denial of justice’.¹⁵⁰ This would be because of the difficulties, inter alia, with securing testimony from defence witnesses and the lack of judicial independence caused by interference from the executive.¹⁵¹ The court was specifically asked to decide if, even though there was a possibility that international human rights standards

¹⁴⁷ *Soering* (n 143).

¹⁴⁸ *Soering* (n 143) para 113.

¹⁴⁹ *Othman (Abu Qatada) v United Kingdom* – 8139/09 [2012] ECHR 56 (17 January 2012) paras 258–262. Also, *Mamatkulov and Askarov* (n 143) paras 90–91; *Al-Saadoon and Mufdhi v United Kingdom* – 61498/08 [2010] ECHR 285 (2 March 2010) para 149.

¹⁵⁰ *Brown (aka Vincent Bajinja) & Ors v Government of Rwanda & Ors* [2009] EWHC 770 (Admin) para 121.

¹⁵¹ *Brown (Bajinja)* (n 150) 66–67.

were not fully respected, extradition would be able to go ahead.¹⁵² To do this, the English judges needed not only to scrutinise procedures in place for witness protection – a relatively objective task – but also undertake the much more invasive job of assessing the level of influence exerted by the executive over the judiciary. As they observed, ‘the question whether a court is independent and impartial cannot be answered without considering the qualities of the political frame in which it is located’.¹⁵³ This may help explain why Article 6 has not succeeded before in barring extradition independently: the need for such extensive examination of the internal workings of another State’s judiciary is a difficult and intrusive task to undertake. It involves a level of scrutiny that is at odds with the principle of non-inquiry whose influence, while significantly diminished, retains some vestige of worth when it comes to upholding the reciprocal ‘good’ of the inter-State extradition system.¹⁵⁴

In an extradition case with similarities, in December 2008 the Regional High Court in Karlsruhe, Germany, refused the extradition to Rwanda of Ignace Murwanashyaka and Straton Musoni on the basis of fair trial concerns. The two men were subsequently tried and found guilty of numerous crimes against humanity and war crimes in a trial in Germany under that country’s expansive international crimes legislation, the *Völkerstrafgesetzbuch* (*VStGB*) or Code of Crimes against International Law 2002 (CCAIL).¹⁵⁵ And, in 2009 Australia also found itself in the position of being unable to extradite a former Croatian Serb paramilitary leader to Croatia on the basis that there were ‘substantial grounds’ for believing that he would ‘prejudiced at his trial... by reason of his or her race, religion, nationality or political opinions’ under s.7(c) of the Extradition Act 1988.¹⁵⁶ However, unlike the 2009 High Court ruling in the UK in the case of *Brown (Bajinja) and others*, the ruling of the

¹⁵² Discussing fair trial aspects of *Brown (Bajinja)*, see Drumbl (n 132) 294–299.

¹⁵³ *Brown (Bajinja)* (n 150) para 68.

¹⁵⁴ Topiel (n 134) 418–419.

¹⁵⁵ Human Rights Watch, Germany: Q&A on Trial of Two Rwandan Rebel Leaders, 2 May 2011 available at: <http://www.hrw.org/de/news/2011/05/02/germany-qa-trial-two-rwandan-rebel-leaders> (accessed: 31 January 2015). For further discussion of CCAIL, see Chapter 4, 199–205.

¹⁵⁶ *Snedden v Republic of Croatia* [2009] FCAFC 111 (2 September 2009) para 55.

Federal Court was overturned in March 2010 by the Australian High Court which ruled the ineligibility of Vasiljkovic (aka Snedden) for mitigation under Croatian law did not constitute an unfair punishment that would render his extradition contrary to s.7(c).¹⁵⁷

While the differences between the Rwandan and Croatian cases, based on the one hand on probable political interference by the executive and on the other on the (mere) unavailability of a defence to reduce any sentence passed are clear, with the latter appearing to the Australian High Court to be of insufficient seriousness to bar extradition, both cases highlight the potential problems for a custodial State. Bound by its human rights obligations but equally desirous of honouring extradition requests where possible, the requested State is placed in a difficult position. When the only alternative to extradition (probably to the territorial State) is a trial in the custodial State on the basis of universal jurisdiction with the incumbent practical and cost implications, it is not hard to see why extradition remains the preferred course of action. Even when after first inspection it appears that the requesting State cannot provide a fair trial, with certain modifications to legislation or procedures or the introduction of special measures a trial may be able to be held there. This is what has happened in relation to the *Brown (Bajinja) and others* legal saga. Rwanda has taken steps to improve its justice system and reissued its extradition request to the UK for the men in April 2013.¹⁵⁸ Other States have now extradited individuals to Rwanda and the ICTR has transferred cases, which it previously refused to do based on the deficiencies of Rwandan legal system.¹⁵⁹ Extradition has, however, been challenged and it remains undecided at the time of writing whether or not the men will be extradited to Rwanda from the UK or if it will be denied a second time on the basis of Article 6 ECHR.¹⁶⁰

¹⁵⁷ *Republic of Croatia v Snedden* [2010] HCA 14 (19 May 2010) 73–81.

¹⁵⁸ Detailing the extradition process thus far, see *VB & Ors v Westminster Magistrates* [2014] UKSC 59 (5 November 2014) paras 1–12 (Lord Mance).

¹⁵⁹ See further, Chapter 4, section 2.2 generally, n 183 specifically.

¹⁶⁰ *VB & Ors* (n 158).

Despite the inherent difficulties with assessing the ability of different legal systems' to provide a fair trial, notwithstanding the basic fundamental differences between the inquisitorial and adversarial approaches, the custodial State must consider the human rights implications of extraditing an individual. But so that this does not render the entire extradition system unworkable and subject to enormous delays (which in itself raises human rights concerns), a very high threshold to what is considered unacceptable is set. Both the Strasbourg Court and the UK House of Lords have variously suggested that the breach would need to be so fundamental as to completely deny or nullify the rights guaranteed by the Article.¹⁶¹ This seems fair, and is perhaps the only real way to strike a balance between holding a trial in the State best able or best suited to do so and the human rights of potential defendants.

To a lesser extent, fair trial concerns may arise in respect of evidence and testimony requested through MLA channels. If a requested state feels that the type of assistance requested would not be conducive to securing a fair trial in the other state, it should refuse to assist or ask for a modification to the request. There is, however, far more leeway in terms of MLA than extradition and a solution can normally be reached between the two states involved.

3.1.2. Bodily Integrity: the Death Penalty & the Right to Life

States parties to the various human rights conventions are obliged to protect individuals from violations of unqualified and non-derogable 'negative' human rights. In the context of the ECHR, these are classified as 'so-called absolute rights, i.e. the rights that [...], allow no departure whatsoever, not even in time of war or other public emergency'.¹⁶² In practical

¹⁶¹ *Mamatkulov and Askarov* (n 143); *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 (22 October 2008) (HL).

¹⁶² *van den Wyngaert* (n 92) 764.

terms, this may mean a State that wishes to exercise judicial jurisdiction asking itself honestly whether it truly has the capacity to provide the necessary security to protect the life and bodily integrity of the individual that it wishes to put on trial. If it cannot, prosecution in another State, or before a specially constituted tribunal, might be more appropriate.

Evaluating the ability of a State to secure a fair trial in a particular case against objective standards is a potentially difficult exercise for a State that has received an extradition request. In contrast, the violation – or strong possibility of a violation human rights such as the right to life or the right to be free from torture or other forms of inhuman or degrading treatment is much clearer cut. When it comes to extradition, the inability to protect an individual from interference with these rights should prevent transfer. In *Filartiga v Pena-Irala* the now widely held view was expressed that ‘an act of torture committed by a state official against one held in detention violates established norms of international human rights law’.¹⁶³ The Torture Convention expressly prohibits States parties from extraditing individuals to a State where they ‘would be in danger of being subject to torture’.¹⁶⁴ Torture is also outlawed in all of the major human rights conventions. And it was *Soering* that established the requirement of States parties to the ECHR to consider, and refuse if necessary, extradition to a requesting State where the individual would be subjected to or likely be subjected to torture or to inhuman or degrading treatment.¹⁶⁵ However, where the treatment falls short of torture, it must reach a certain level of severity to constitute a violation.¹⁶⁶ In *Soering* the test was put thus:

[T]he assessment of this minimum is, in the nature of things relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its

¹⁶³ *Filartiga v Pena-Irala* 630 F 2d 876 (Court of Appeals, Second Circuit 30 June 1980) 880.

¹⁶⁴ Art 3(1). It is also a mandatory ground for refusal under the UN Model Extradition Treaty 1990 Art 3(f).

¹⁶⁵ *Soering* (n 143) para 88.

¹⁶⁶ *Tyler v United Kingdom* – 5856/72 [1978] ECHR 2 (25 April 1978) paras 29, 80.

physical or mental effects and, in some instances, the sex, age and state of health of the victim.¹⁶⁷

Nonetheless, the requested State may find it difficult to quantify what constitutes unacceptable treatment (potentially amounting to torture). In *Mamatkulov and Askarov v Turkey* it was held that in cases where the individual is exposed to the risk of ill-treatment ‘the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition’.¹⁶⁸ A requested State can only do its best to inform itself of the situation in the requesting State given the limitations on conducting too invasive an investigation into the practices and procedures there.

Another potential stumbling block to extradition comes from the likely imposition of the death penalty. This can have implications for extradition to a State that has not outlawed this form of punishment for convicted defendants, although it should be noted that the death penalty is not classified as constituting a violation of the right to life or to the right not be subject to inhuman treatment under international human rights law.¹⁶⁹ For example, Article 2(1) ECHR even appears to expressly allow derogation from the right to life if it occurs ‘in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’ and Article 6(2) ICCPR allows its usage for ‘the most serious crimes’. The continued use of the death penalty in many States is divisive (prohibition does not constitute a rule of customary international law) and can be problematic for extradition when the requested State has outlawed it because this may create a situation of competing human rights/extradition obligations.¹⁷⁰ Pressure from outside has led some States to abolish the death penalty in order to put themselves in a position to receive extraditees, such as

¹⁶⁷ *Soering* (n 143) para 100.

¹⁶⁸ *Mamatkulov and Askarov* (n 143) para 69.

¹⁶⁹ *Soering* (n 143) para 101.

¹⁷⁰ *The Netherlands v Short* 29 ILM 1375 (1991).

Rwanda; equally, though, several powerful States (the USA, China) show little inclination to abolish the death penalty. Nonetheless, Optional Protocols to the ICCPR, ECHR and ACHR do prohibit its usage and for those States that have ratified any of these additional protocols extradition to a State that still carries out the death penalty is prohibited.¹⁷¹ In light of this obligation, many extradition treaties and domestic laws recognise that the imposition, or the possibility of the death penalty being applied, will constitute a mandatory ground for refusal.¹⁷² In view of the serious disabling effect this could have on extradition relations, some texts qualify this ground and allow extradition provided an assurance that the death penalty will not be imposed or carried out is given and the requested state is confident that this promise will be honoured.¹⁷³ This assurance has been given by the USA on occasions to allow for the extradition of individuals suspected of having committed terrorism related crimes.

More often than not, the most serious problems that could present in respect of human rights and extradition will in fact be mitigated by the lack of an extradition agreement in the first place. During the passage of the UK Extradition Bill in 2003, the presumption against the fairness of certain States' justice systems and their human rights record more generally was made plainly apparent when Baroness Scotland stated 'the countries with which we do not have general extradition arrangements are often the kind of countries where we might be unable to extradite for human rights reasons'.¹⁷⁴ A degree of self-selection as to which other States a requested State wishes to contemplate extraditing individuals to is therefore already

¹⁷¹ Second Optional Protocol to the ICCPR, aiming at the Abolition of the Death Penalty 1989 1642 UNTS 414; Protocol 6 to the ECHR Concerning the Abolition of the Death Penalty 1983 (amended by Protocol 11) ETS 114; Additional Protocol to the ACHR to Abolish the Death Penalty 1990 A-53.

¹⁷² This features in the UN Model Treaty on Extradition 1990 Art 4(d) (albeit as an optional ground); the European Convention on Extradition 1957 Art 11; the UK-US Extradition Treaty 1972 Treaty No 108-23, Art IV and UK-US Extradition Treaty 2003 Treaty No 07-426, Art 7; the UK Extradition Act 2003 s 94.

¹⁷³ Extradition Act 2003 s 94; Clive Nicholls et al., *The Law of Extradition and Mutual Assistance* (3rd edn OUP 2013) 136.

¹⁷⁴ Statement made by Baroness Scotland, cited in *Government of the Republic of Rwanda v Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja*, Decision of the City of Westminster Magistrates' Court (6 June 2008) [unreported] para 20.

built into the system. Unless an ad hoc extradition agreement on the basis of a MoU can be reached, the request may be a non-starter. Consequently, any State that considers itself likely to be a potential candidate to prosecute international or transnational crimes can probably not do much better than endeavour to improve its human rights record and/or criminal justice system as much as it can so that it is in a better position to establish standing bilateral extradition agreements. While the first round of hearings in the extradition of *Brown (Bajinja) and others* demonstrates that such efforts may still not be enough to satisfy the exacting standards imposed by the judiciary in requested States, at a political level such reforms are looked on favourably and can lead to the possibility of creation of extradition relations where none existed previously. The outcome of the second round of extradition hearings in *Brown (Bajinja) and others* is pending. The further improvement of the requesting State's judicial system (ie Rwanda) may mean that extradition is now possible.

3.2. Immunities from Prosecution

Immunities serve an important function in ensuring the smooth running of international relations. The existence of numerous multilateral treaties on the topic¹⁷⁵ and the development of customary international law norms in this area¹⁷⁶ demonstrate the considerable importance attached by States to the immunity of heads of State and ministers/heads of government, along with diplomats and other State functionaries, although the focus of this section will be on the former category of officials. All States have an interest in maintaining a working system of immunities for their officials; however, the often absolute protections afforded by

¹⁷⁵ Vienna Convention on Diplomatic Relations 1961 500 UNTS 7310; Vienna Convention on Consular Relations 1963 596 UNTS 8638; Convention on Special Missions 1969 1400 UNTS 231; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 1035 UNTS 167; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975 Doc A/CONF.67/16 [not yet in force]; UN Convention on Jurisdictional Immunities of States and Their Property 2004 GA Res 59/38, annex, [not yet in force].

¹⁷⁶ eg in the field of Head of State immunity, ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment of 14 February 2002, para 52.

the international rules of personal and functional immunity (*rationae personae* and *rationae materiae*) may conflict with other key imperatives: namely, non-impunity for international and transnational treaty crimes and the application of the principle of individual criminal responsibility. Balancing the dual ‘goods’ of immunity and accountability therefore represent a considerable challenge for national courts. For an interested State seeking to assert its judicial jurisdiction over any high ranking current or former State official, the question of immunities will undoubtedly be raised and may prevent the continuation of the case.¹⁷⁷

For most States, the international rules of immunity apply. The State of nationality is, however, in the unique position of being able to dis-apply any personal and functional immunities available under its domestic law and extend legislative jurisdiction to cover the acts for which the individual stands accused (subject to the requirements of non-retroactivity). For example, the process started by Chile against General Pinochet upon his return from London demonstrates the powers available to the nationality State. This State is also entirely free to waive immunity in accordance with its national immunity laws so that another State may exercise its jurisdiction unencumbered by the restrictions of personal or functional immunity.¹⁷⁸ This would enable that State to extradite the individual unencumbered by the question of immunities. For example, Chad expressly waived the immunity of Hissène Habré in 2002; the effect was that Senegal would no longer be prevented from exercising its jurisdiction by virtue of his immunity.¹⁷⁹

¹⁷⁷ Any question of immunity must be decided at the outset of proceedings although it may also be raised subsequently if the question of immunity only becomes apparent at a later stage. ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, para 63. Also, *Re Mofaz* 128 ILR 709 (12 February 2004). *Mofaz* is discussed in Colin Warbrick, ‘Immunity and International Crimes in English Law’ (2004) 53 *International and Comparative Law Quarterly* 769–774, 772.

¹⁷⁸ Waiver may be express or implied, although the latter is more problematic as the Lords’ discussion of implied waiver under Torture Convention in *Pinochet* shows. On implied waiver, see ILC, ‘Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat’ 31 March 2008 A/CN.4/596, paras 256–264.

¹⁷⁹ *Letter from the Minister of Justice of the Republic of Chad to the Juge d’Instruction de l’arrondissement de Bruxelles*, 7 October 2002, cited in Memorandum (n 178) para 253.

In his Hague Lectures on the topic of immunity, Watts states unequivocally that ‘where an immunity exists, it may be waived and consent given to the exercise of jurisdiction’.¹⁸⁰ More commonly, though, it will be the nationality State which will object to another State’s assertion of jurisdiction and seek to challenge it on the basis of the official’s personal or functional immunity.¹⁸¹ Even where there is no open challenge, the courts of the interested State or a State in receipt of an extradition request must satisfy themselves that the individual is not immune. The latter represents the situation confronting the British courts in the Pinochet case. Where the territorial and nationality States diverge, the territorial or any other ‘third’ State (the victims’ State of nationality or a State wishing to exercise universal or protective jurisdiction, for example) may be presented with a dichotomy: the need to uphold the immunity of the individual (if no waiver has been granted) on the one hand and the desire to prosecute conduct prohibited by international law, for which it has established legislative jurisdiction, on the other. Whether there is immunity or not follows a determination that the interested State has established the necessary legislative jurisdiction in terms of substance, ambit and temporal reach. As Judges Higgins, Kooijmans and Buerenthal noted in their Joint Separate Opinion in the *Arrest Warrant* case, ‘the notion of “immunity” depends, conceptually, upon a pre-existing jurisdiction. ... the one – immunity – can arise only if the other – jurisdiction – exists’.¹⁸²

Immunity from the exercise of criminal jurisdiction is a procedural bar to prosecution. A finding by a court that an individual is immune (either *rationae personae* or *rationae*

¹⁸⁰ A Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers* (1994) 247 *Recueil des Cours de l’Académie de Droit International* 9–130, 67.

¹⁸¹ *Certain Criminal Proceedings in France (Republic of the Congo v France)*, Application instituting proceedings and request for the indication of provisional measures, filed 11 April 2003.

¹⁸² *Arrest Warrant* (n 176), Joint Separate Opinions Judges Higgins, Kooijmans, Buerenthal, paras 4-5. Judgment, para 46.

materiae) signifies that prosecution will not be possible.¹⁸³ But while the individual is rendered immune from process he is not exempted from substantive criminality. In other words, but for his immunity, he could be prosecuted for the conduct and, potentially, be found to be criminally responsible. The ILC Special Rapporteur described the situation thus: ‘[there is] immunity only from the executive and judicial jurisdiction and not from legislative (prescriptive) jurisdiction of the State’.¹⁸⁴ The distinction was also recognised by the ICJ in the *Arrest Warrant* case:

The *immunity* from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed [...]. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.¹⁸⁵

Immunity does not therefore remove the possibility of criminal responsibility, but for practical purposes the individual may escape prosecution (at least, at the present time). As will be shown below, immunity *rationae materiae*, which attaches to the conduct and extends beyond the period of office (unlike immunity *rationae personae*), presents a particular challenge to the non-impunity argument as it may serve to prevent rather than simply delay prosecution.

Whether or not an individual should be able to invoke his current or former status to avoid prosecution for international and transnational crimes has been subject to challenge in national courts, with the most notable example still being the House of Lords decision in *Pinochet*, to be discussed below. The ICJ has also been called on to pronounce on the status

¹⁸³ For analytical purposes, a distinction between the two types of immunity is helpful. However, in practice, the courts seldom speak these terms. In the *Arrest Warrant* (n 176), the question was cast as whether or not he had left office and whether or not the acts had been performed in an official or private capacity, paras 54, 55, 61.

¹⁸⁴ Report of the Special Rapporteur, *Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction* A/CN.4/601 (2008) para 64.

¹⁸⁵ *Arrest Warrant* (n 176) para 60.

of immunities under international law.¹⁸⁶ And a case has been made in the literature for lifting immunities for some serious international crimes, or on an even broader basis so as to include some transnational crimes (namely, torture), too.¹⁸⁷ Yet the strong policy reasons for denying immunity based on accountability for these serious crimes are not reflected widely in State practice. While a shift in practice away from conferring absolute immunity appears to be emerging for some of the most serious international crimes and also a few treaty crimes, where inroads into the field of immunities have taken place, the exceptions remain narrowly prescribed.

3.2.1. *Personal Immunities*

Immunity *rationae personae* provides an absolute (albeit time-limited) bar to prosecution. Personal immunities attach to the individual during his time in office and cover official and private acts performed both before and while occupying the post. In *Pinochet No 3* Lord Browne-Wilkinson stated ‘immunity enjoyed by a head of state in power [...] is a complete immunity attaching to the person of the head of state [...] rendering him immune from all actions or prosecutions whether or not they relate to matters done for the benefit of the state.’¹⁸⁸ The lack of distinction between public and private acts for the purposes of personal immunities was also confirmed in the *Arrest Warrant* case.¹⁸⁹ These immunities do, however, dissolve once the individual ceases to hold the position, leaving only the question of whether there is any immunity *rationae materiae* for the criminal acts. For a State considering if personal immunities apply, the crucial question turns on whether or not the individual hold a

¹⁸⁶ eg *Arrest Warrant* (n 176); *Certain Criminal Proceedings in France* (n 181).

¹⁸⁷ Andrea Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 10 *European Journal of International Law* 237–277, 260–261; Steffen Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case (2002) 13 *European Journal of International Law* 877–893; Rosanne van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 222–295. See also *Arrest Warrant* (n 176), Dissenting Opinion, Judge Al-Khasawneh, para 7 and Dissenting Opinion, ad hoc Judge Van den Wyngaert, para 27.

¹⁸⁸ *Pinochet No 3* (n 51) 201–202.

¹⁸⁹ *Arrest Warrant* (n 176) para 55.

position to which this form of immunity attaches. Three categories of State officials have been identified as qualifying for this protection: Heads of State and Heads of Government, Ministers for foreign affairs and certain other high-ranking officials.

A Head of State's personal immunity is well-established under international law and enjoys universal respect, having been confirmed in several international decisions as representing customary international law.¹⁹⁰ This has been echoed at the national level: for example, the French *Cour de Cassation* reasoned in the case against the Libyan head of State, Colonel Ghaddafi, on terrorism charges that, as a sitting head of State, he enjoyed personal immunity: 'la coutume internationale s'oppose à ce que les chefs d'Etat en exercice puissent, en l'absence de dispositions internationales contraires s'imposant aux parties concernées, faire l'objet de poursuites pénales d'un Etat étranger'¹⁹¹ and in the UK case of *Tatchell v Mugabe* the absolute immunity of President Mugabe by virtue of customary international law as embodied in the common law along with the provisions of the State Immunity Act 1978 was made crystal clear.¹⁹²

The issue of personal immunities for the middle category of State officials received its first significant treatment in the ICJ's 2003 *Arrest Warrant* case. The case concerned the issuing by Belgium of an arrest warrant for the incumbent Congolese Minister for Foreign Affairs for offences constituting grave breaches of the Geneva Conventions 1949 and their protocols and also for crimes against humanity pursuant to the Belgium Act Concerning the Punishment of Grave Breaches of International Humanitarian Law.¹⁹³ The Court was unequivocal in

¹⁹⁰ *Mutual Assistance* (n 64) para 170; *Arrest Warrant* (n 176) para 51.

¹⁹¹ Cour de Cassation, *Affaire Kadhafi* – No 1414 (2001) 125 ILR 508, 510 (Judgment of 13 March 2001).

Author's translation: 'International custom allows for Heads of State to be the subject of criminal proceedings abroad, in the absence of other international obligations bearing on the parties concerned.'

¹⁹² *Tatchell v Mugabe* (2004) 36 ILR 572. See Warbrick (n 177) 770. For academic support of this position, see Salvatore Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation' (2001) 12 *European Journal of International Law* 595–612, 600.

¹⁹³ 16 June 1993, amended 10 February 1999 [since repealed]. Article 5(2) provided: 'the immunity attributed to the official capacity of a person does not prevent the application of the present Act.'

upholding Yerodia's immunity and made clear that foreign ministers enjoy the same personal immunities as heads of State: 'In international law it is firmly established that, [...] Head[s] of Government and Minister[s] for Foreign Affairs, enjoy immunities from jurisdiction in other States'.¹⁹⁴ Nonetheless, the absolute character of this immunity was examined by several of the Judges. In their joint separate opinion Judges Higgins, Kooijmans and Buergenthal voiced the view that this immunity should probably only extend to 'official visits in the exercise of his function [...] whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear'.¹⁹⁵ In their dissenting opinions Judge Al-Khasawneh and ad hoc Judge van den Wyngaert raised serious doubts about the customary international law status of these officials' immunity.¹⁹⁶

Finally, which (if any) State officials do or should qualify for the third category is far from settled, although it is accepted that personal immunity may extend beyond the three figures already discussed. Cassese states cautiously that in addition to a minister for foreign affairs 'other senior members of cabinet' may also be included¹⁹⁷ and Wickremasinghe reasons from the dictum of the *Arrest Warrant* case that an extension to other individuals may be possible 'based on the involvement of such persons in international relations. [...] Nevertheless it is not yet clear where the lines should properly be drawn'.¹⁹⁸ The *Arrest Warrant* case did indeed appear to leave open the door to the possibility of extending personal immunities to other officials, suggesting that it is the nature of the functions performed that are likely to be decisive. Relying on the reasoning of this judgment, the British courts have upheld the personal immunity of Israel's acting Defence Minister and China's Minister for Commerce

¹⁹⁴ *Arrest Warrant* (n 176) para 52.

¹⁹⁵ *Arrest Warrant* (n 176), Joint Separate Opinion, Judges Higgins, Kooijmans, Buergenthal, paras 81, 84.

¹⁹⁶ *Arrest Warrant* (n 176) Dissenting Opinion, Judge Al-Khasawneh, para 1 and Dissenting Opinion, ad hoc Judge van den Wyngaert, paras 10–11, 13.

¹⁹⁷ Antonio Cassese, 'When May Senior State Officials be tried for international crimes? Some comments on the Congo v. Belgium case' (2002) 13 *European Journal of International Law* 853–875, 864.

¹⁹⁸ Chanaka Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations' in Malcolm Evans (ed), *International Law* (3rd edn, OUP 2010) 380–410, 395.

and International Trade.¹⁹⁹ Both positions were likened by the respective courts to that of a foreign affairs minister insofar as they are required to travel in order to discharge their functions.²⁰⁰

Outside of the International Criminal Court and UN tribunals systems which have removed immunities (subject to some limitations),²⁰¹ there has been no move at the national level to eliminate immunity *rationae personae* for serving officials either generally or for specific categories of crimes. The argument was advanced by Belgium in the *Arrest Warrant* case that immunities should not be invoked for office holders in the case of war crimes and crimes against humanity. If accepted this would have provided a narrow exception to what are otherwise absolute personal immunities under international law. However, the Court rejected the argument, stating ‘it has been unable to deduce [...] that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity’.²⁰² On the basis of this judgment, third States will find it hard to justify lifting (or attempting to lift) the immunity of these incumbent senior State officials. Following the ICJ ruling, Belgium amended its law on immunities accordingly.²⁰³

The imperative of prosecuting international and transnational crimes does not (yet) provide a strong enough reason to deviate from the rule. The only way to get around personal immunities at the national level is thus by one of the routes suggested *obiter* in the *Arrest Warrant* case: namely, where it is the individual’s own State of nationality that wishes to prosecute (this is then purely a matter of domestic criminal law and national immunities) or

¹⁹⁹ Mofaz (n 177); *Re Bo Xila* (2005) 128 ILR 713 (8 November 2005).

²⁰⁰ Commenting on the *Mofaz* decision, see Warbrick (n 177) 773–774.

²⁰¹ eg Articles 27 and 98 of the ICC Statute should be read in conjunction.

²⁰² *Arrest Warrant* (n 176) para 58.

²⁰³ The 2003 amendment reads: ‘in accordance with international law, there shall be no prosecution with regard to... Heads of State, heads of government and ministers for foreign affairs, during their terms of office.’

where immunity has been expressly waived by the nationality State with the view to prosecution in a third State. Otherwise, the only possibility is waiting until the individual's term of office ends or trial by an internationally constituted court or tribunal.²⁰⁴ Either way, once personal immunities no longer apply or have been waived, the challenge shifts to proving that immunity *rationae materiae* does not apply.

3.2.2. *Functional Immunities*

Whereas the position held by the official is very important in determining if personal immunities apply, *rationae materiae* immunity may be enjoyed by all State officials, regardless of rank.²⁰⁵ This is because it is the act itself that is relevant, not the status of its author. Several Law Lords in *Pinochet No 3* recognised the wide reach of functional immunity in terms of its potential beneficiaries.²⁰⁶ There is also no distinction between incumbent and former officials; all enjoy immunity for the acts covered.²⁰⁷ Immunity *rationae materiae* has the potential to bar prosecution indefinitely for any acts done in the course of the individual's official functions, although acts done in their private capacity are outside the scope of these protections.

Functional immunity may present a serious challenge for any interested State (other than the State of nationality which is free to waive immunity on the basis of its national laws) wishing to exercise its judicial jurisdiction over international and transnational criminal conduct. This is because the acts that qualify as these kinds of crime are seldom committed in a private capacity, although this is not entirely impossible to envisage. Most often by their very nature they require the input of considerable resources and the use of State apparatus to carry them

²⁰⁴ *Arrest Warrant* (n 176) para 61.

²⁰⁵ Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407–433, 412.

²⁰⁶ *Pinochet No 3* (n 51) 205 (Lord Browne-Wilkinson); 220 (Lord Goff); 269 (Lord Millet); 285 (Lord Phillips).

²⁰⁷ Cassese (n 197) 863; Special Rapporteur Report (n 184) para 80.

out. Where they are committed as part of a State policy this would, on its face, appear to qualify them as ‘acts of the State’.²⁰⁸ Under the traditional interpretation of the purpose of functional immunity, the acts would thus be immune by virtue of their connection to the State: the official discharges functions that are coterminous with the ‘State’ and the doctrine sovereign equality precludes other States from passing judgment or, more precisely for our purposes, arresting and charging its State officials.

This understanding has been challenged on the basis that serious violations of international law cannot be considered as ‘official acts’ or that the very character of certain crimes excludes those who carried them out from benefiting from the protections normally offered by immunity *rationae materiae*.²⁰⁹ Applying either rationale would strip officials of their functional immunity and have a far reaching impact on the criminal accountability of high ranking State officials for crimes committed while in office. In terms of national court decisions, the Israeli Supreme Court in its *Eichmann* decision rejected functional immunity for ‘crimes against humanity’ holding that individuals could not ‘shelter behind’ the official character of their acts.²¹⁰ Nearly four decades later, whether the functional immunity of a (former) head of State for crimes committed during his period of office could be lifted was the question that confronted the House of Lords in the 1999 *Pinochet* litigation. Aspects of both rationales are apparent in the Lords’ separate opinions.

²⁰⁸ Jan Wouters, ‘The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks’ (2003) 16 *Leiden Journal of International Law* 253–267, 262. See also, *Arrest Warrant* (n 176) Dissenting Opinion, ad hoc Judge van den Wyngaert, para 36.

²⁰⁹ The first rationale came out strongly in several of the Lordships opinions in *Pinochet No 1 (R v Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet)* [2000] 1 AC 61 (*Pinochet (No 1)*) and appears to have been shared by the Court of Appeal of Amsterdam in *Bouterse. (Re Bouterse – NJ 2000/266, Amsterdam Court of Appeals, Judgment of 3 March 2000.)* The latter decision appears to inform the approach taken by the Institute of International Law in Article 13(2) of its Resolution on *Immunities from Jurisdiction and Execution of Heads of State and of Governments in International Law* adopted at the ‘Session of Vancouver 2001’, available at: http://www.idi-iil.org/idiE/resolutionsE/2001_van_02_en.PDF (accessed: 31 January 2015).

²¹⁰ *Attorney-General of the Government of Israel v Adolf Eichmann* (1968) 36 ILR 277 (Supreme Court) 310.

In *Pinochet (No 3)* six of the seven Law Lords held that the extradition of General Pinochet to Spain for acts of torture was not barred on the basis of Pinochet's immunity *rationae materiae*.²¹¹ While the reasoning of the Law Lords diverges considerably and the decision does not contain a common *ratio decidendi*, the fact that the UK, Chile and Spain were all parties to the Torture Convention was considered relevant and features in each of the seven opinions.²¹² It was argued by the majority, broadly and with slightly different emphasis, that functional immunity would be incompatible with the terms of the Torture Convention and the wider obligations it imposes on States parties to extradite or prosecute.²¹³ Akande writes 'immunity *rationae materiae* cannot logically coexist with such a grant of jurisdiction [under the Torture Convention]. Indeed, to apply in such cases, the prior rule according immunity would serve to deprive the subsequent jurisdictional rule of practically all meaning'.²¹⁴

To prohibit torture by way of a multilateral treaty and require States parties to establish universal jurisdiction over the conduct constituting the crime on the one hand, but to allow State officials to avoid prosecution (when the act of Torture Convention explicitly requires it to be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity', Article 1(1)) by virtue of the international law rule of functional immunity on the other hand seems manifestly contradictory. While there is some merit in Lord Goff's rejection of an 'implied waiver' argument for States parties to CAT, the problem essentially lies in the parallel but uneven development of two different, but related, branches of international law. An overly strict reading of the rules of (functional) immunity does not, however, need to be adopted simply

²¹¹ *Pinochet (No 3)* (n 51) 218 (Lord Goff). Dissenting from the majority he argued that nothing in the Torture Convention provided for the lifting of functional immunity of State officials.

²¹² For detailed discussion of the seven different opinions, see van Alebeek (n 187) 226–237; Bianchi (n 187) 243–248; Hazel Fox, 'Case Comment: The Pinochet Case No. 3' (1999) 48 *International Criminal Law Quarterly* 687–702.

²¹³ *Pinochet (No 3)* (n 51) 237 (Lord Saville); 205 (Lord Browne-Wilkinson); 290 (Lord Phillips); 262 (Lord Hutton); 278 (Lord Millett); 247–248 (Lord Hope). In contrast, Lord Goff rejected the argument that immunity was incompatible with the terms or obligations flowing from the Torture Convention, 221–222.

²¹⁴ Akande (n 205) 415.

because States have expressly stated that functional immunities may be waived. The rules of functional immunity need to be interpreted in the light of developments in the field of individual criminal responsibility for international and transnational crimes, which is the approach it appears the majority of the Law Lords broadly took.

Setting the discussion squarely within the parameters of the Torture Convention undoubtedly limits the scope of the decision and *Pinochet (No 3)* does not in itself provide evidence of the emergence of a common rule lifting functional immunity for international crimes more generally.²¹⁵ Pushing the boundaries of immunity for one crime was challenge enough in 1999. Yet despite the limitations of the House of Lords decision, the case was instrumental in (re-)sparking interest in the lifting of functional immunity for serious international crimes,²¹⁶ and perhaps also some transnational/treaty crimes as well.²¹⁷ In its 2001 resolution, the Institute of International Law affirmed that immunity *rationae materiae* was not available at the national level to former heads of State (or government) ‘when the acts alleged constitute a crime under international law’.²¹⁸ And, in their Joint Separate Opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal noted the trend away from recognising functional immunities, but avoided offering a conclusive opinion on whether serious international crimes should not be regarded as ‘official acts’ because they are neither normal

²¹⁵ van Alebeek discusses the limited scope of the decision (n 187) 237–238.

²¹⁶ In the literature, Bianchi (n 187) argues for the removal of functional immunity for international crimes. See also, Paola Gaeta, ‘Rationae Materiae Immunities of Former Heads of State and International Crimes: the Hissene Habre Case’ (2003) 1 *Journal of International Criminal Justice* 186–196, 194–195; Cassese (n 197) 864–866.

²¹⁷ This topic remains under-developed. While torture as a treaty crime is clearly exempt from functional immunity following the Pinochet decision, the position in respect of other treaty crimes is less certain. See Memorandum (n 178) paras 208–212.

²¹⁸ IIL Resolution (n 209) Art 13(2). This position is given tacit support by Fox on the basis of Pinochet, although she notes its continued uncertainty. Hazel Fox, ‘The Resolution of the Institute of International Law on the Immunities of Heads of State and Government’ (2002) 51 *International and Comparative Law Quarterly* 119–125, 125.

State functions nor functions that a State alone (without the input of individuals) could perform.²¹⁹

Opinions expressed at the international criminal justice level have also been interpreted as indicating that *rationae materiae* immunity for certain international crimes is incompatible with the imperatives of individual criminal accountability and that there is now no functional immunity at the national level. The Appeals Chamber of the ICTY in its *Blaskić* subpoena decision held ‘These exceptions [to the customary rule granting immunity *rationae materiae* to State officials] arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from *national or international jurisdiction* even if they perpetrated such crimes while acting in their official capacity’.²²⁰ This appears to be a statement that there is now a rule of customary international law that removes functional immunity for these three categories of crimes. Cassese supports the crystallisation of just such a customary rule.²²¹ Confirmation of the emergence of such a general rule seems premature, however, given the limited amount of State practice on the matter.

Nonetheless, a strong case for the removal of functional immunity for former State officials can certainly be made for all international crimes and probably many transnational treaty crimes, too. The *Pinochet* decision provides evidence that States are receptive to the removal of functional immunity. A State wishing to exercise its judicial jurisdiction over an international or treaty crime may well wish to test the boundaries for the conduct in question. In this sense, it is unfortunate that *Certain Criminal Proceedings in France (Republic of the*

²¹⁹ *Arrest Warrant* (n 176), Joint Separate Opinions Judges Higgins, Kooijmans, Burgenthal, para 85.

²²⁰ Emphasis added. *Prosecutor v Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case No IT-95-14, 29 October 1997 (Appeals Chamber) para 41.

²²¹ Cassese (n 197) 864–865.

Congo v France) was removed from the ICJ's list as this case may have provided some further clarity on the relationship between functional immunity and international crimes.²²²

As the international rules on immunities, both personal and functional, may bar prosecution either temporarily or permanently, they represent a potential major obstacle to the exercise of judicial jurisdiction by an interested State. However, inroads into this once absolute bar to proceedings against the individual mean that States are not necessarily barred from seeking to exercise their judicial jurisdiction over former State officials. While personal immunities should certainly be maintained at the national level, there is scope for national courts to interpret the boundaries of functional immunity in a more liberal way. Existing State practice appears to support this trend. Moreover, interested States can actively seek a waiver of immunity from the State of nationality, which may well be forthcoming for former State officials and especially so if that State is unable to exercise judicial jurisdiction itself but would like to prosecution take place.

Conclusions

States desiring to exercise judicial jurisdiction, and particularly when to do so would involve an extraterritorial assertion of legislative jurisdiction and involve transnational or international criminal conduct, face myriad potential challenges from a substantive and procedural perspective. Not only must they ensure their own legislative 'house' is in order, but suitable arrangements with other states to facilitate judicial cooperation through the provision of mutual legal assistance and/or extradition also need to be in place. The current landscape is, however, characterised by incomplete and inconsistent arrangements in both these respects, the limitations of which may impact negatively on an interested State's ability to prosecute. A State wishing to exercise judicial jurisdiction in respect of international or

²²² ICJ, *Certain Criminal Proceedings in France (Republic of the Congo v France)* Order of 16 November 2010.

transnational crimes (or national crimes with a transborder dimension) is, more often than not, dependent on receiving some kind of assistance from other States. These States must also have in place the necessary legislative frameworks in order to satisfy national requirements before any assistance can be given. These sit alongside the need for the official cooperation agreements to facilitate extradition and/or MLA.

Human rights concerns may further impede a State's ability to exercise judicial jurisdiction as not only must the State be confident that it can secure basic human rights and a fair trial for the individual concerned, but any State providing assistance in the form of MLA or extradition must also be satisfied that these basic requirements will be met. Questions of immunity represent the final major hurdle to overcome. Even when there is nothing to impede the exercise of jurisdiction from other quarters, if immunities apply no prosecution will be able to take place (or, at least at this time).

The piecemeal development of legislative jurisdiction and the patchy establishment of cooperation arrangements between States means that the prosecution of international and transnational crimes remains an exception rather than the rule, for practical if not ideological reasons. Despite the powers and duties incumbent on States to establish legislative jurisdiction for international and transnational treaty crimes discussed in Chapter 2, the reality is that chance factors, such as unexpected custody, or the efforts of a 'crusading' prosecutor/investigative judge, may have more to do with bringing individuals accused of committing international and transnational crimes to account than high principle. The status quo is, however, slowly changing as States begin the process of amending legislative provisions and revising the terms of their MLA and extradition agreements.

The four main areas of limitation discussed in this Chapter and the paucity of actual prosecutions may provide a de facto method of averting conflicts of judicial jurisdiction

between States. This does not mean, however, that regulation or having in place the means to resolve possible conflicts is unwarranted. Chapter 4 turns to some of the methods currently employed and systems that have been put in place to address the issue of conflicts of judicial arising out of the concurrency of legislative jurisdictions.

Chapter 4

Current Approaches to Identifying, Managing & Avoiding Conflicts of Judicial Jurisdiction

Conflicts of judicial jurisdiction resulting from the fact that legislative jurisdiction may be held concurrently by more than one State can prevent the criminal justice process from running its course in a timely manner or even, in extreme cases, prevent it from functioning at all in respect of a specific case. Thus, approaches have been developed to try to ensure that where more than one State holds an interest in prosecuting and is willing and able to assert judicial jurisdiction on a lawfully established jurisdictional basis under its national laws, identification of competing claims and resolution of any resulting conflicts of jurisdiction can be achieved swiftly.¹ Formal measures designed to be applied by national authorities and intended to make the process of identifying and ‘allocating’ jurisdiction between interested States simpler and more transparent are one method. Rules concerning the prioritisation of extradition requests where more than one State has sought the extradition of an individual for the same, or qualitatively similar, criminal conduct are another. The application of a ‘principle of subsidiarity’ by the courts to determine if a State seeking to exercise judicial jurisdiction on the basis of universality should defer (or not) to another State which may exercise judicial jurisdiction on another jurisdictional basis is a further method that has been developed to try to ensure the most appropriate (in the circumstances) jurisdiction prosecutes.

¹ The International Bar Association has highlighted four broad approaches to dealing with overlapping jurisdictions. These are: legal hierarchies and balancing tests; discretionary doctrines; cooperation and mutual recognition; harmonisation of laws. The report does, not however, proffer solutions, it just identifies these four approaches as possibilities. International Bar Association, Report of the Task Force on Extraterritorial Jurisdiction (February 2009) available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=597D4FCC-2589-499F-9D9B-0E392D045CD1> (accessed: 31 January 2015) 21–31, 161–179.

These processes and procedures designed to resolve or avert conflicts of judicial jurisdiction may not, however, result in an outcome satisfactory to a defendant. As hardly needs stating, what is the appropriate forum to a prosecutor might not be to a defendant. Arguments concerning the suitability of a particular judicial forum are increasingly being raised in national courts once a decision to prosecute in (or, more usually, extradite to) a particular jurisdiction is taken by the relevant authorities. This body of jurisprudence provides an important discussion as to what constitutes an appropriate judicial forum. In parallel, the matter of allocation of judicial jurisdiction between national courts has also concerned the International Criminal Tribunal for the former Yugoslavia (ICTY) in recent times as it works towards the goals of its Completion Strategy. Discussion of this particular body of ICTY jurisprudence is pertinent to this thesis because it provides an example of a set of criteria that has been adopted (albeit applied by external judicial organ) to determine the appropriateness of national judicial forums to hear a case where the courts of more than one State would be in a position to do so.

Taking the two key areas of formal measures/judicial criteria and the jurisprudence of national/international courts as its starting point, this Chapter seeks to show how the topic of conflicts of judicial jurisdiction is currently addressed at the national, inter-State and international levels (Parts I and II). The Chapter also discusses, in Part III, the *Lockerbie* incident and the role played by the Security Council (SC) – not because this can be classified as a general ‘approach’ to managing or dealing with conflicts of judicial jurisdiction, but because it demonstrates how a conflict of jurisdiction which has resulted in stalemate between interested States can, exceptionally, be dealt with if the political will (or power) exists. As the ICJ has no power to actually compel States to resolve a jurisdictional conflict in one direction or another, the intervention of a political organ such as the SC represents the only means of authoritatively determining a dispute as to which of two competing States

which have proper claims to jurisdiction should actually proceed to hear the case.² Finally, Part IV provides an overview of how conflicts of jurisdiction are handled in the field of private international law as a point of comparison, and possible source of inspiration, to the wider topic of identifying, managing and avoiding conflicts of criminal judicial jurisdiction, the central concern of this thesis. To these ends, the particular focus is on how the common law doctrine of *forum (non)conveniens* functions in respect of determining what constitutes an appropriate judicial forum, although the Brussels I Regulation is also discussed to illustrate what a rule-based approach looks like in this sphere.

In sum, Chapter 4, which introduces the current approaches to dealing with conflicts of jurisdiction, including their limitations and positive aspects, serves as the foundation for Chapter 5 which contains proposals as to how the current systems and approaches could be improved and extended, and where new avenues for development might exist.

1. Provisions, Agreements and Measures Designed to Balance or Control the Exercise of Judicial Jurisdiction

At the inter-State level, rules surrounding extradition and the development of frameworks to support communication between national prosecution agencies and other interested bodies are both ways which may help reduce or avoid the practical or adverse effects of the concurrency of judicial jurisdictions. Essentially, extradition works reactively to resolve a conflicts of jurisdiction situation where prosecution is imminent; procedures and processes work proactively to identify and resolve potential conflict issues before any prosecutions start. Each approach is considered in turn.

² Individual regimes may provide some form of dispute resolution facility. So far, only the European system has developed an ‘arbitration arm’ under the auspices of Eurojust, which will be discussed below, 182–197. The need for this type of facility is discussed further in Chapter 5.

1.1. The Extradition Law Framework

The criteria set out in treaty (multi- or bi-lateral) or under national legislation on how to handle competing extradition requests may play an important role in ‘resolving’ jurisdictional conflicts in one direction or another for the simple reason that custody of an individual is generally considered essential before a State can prosecute. *In absentia* trials are technically possible, but represent the exception rather than the rule. The majority of the regional multilateral extradition treaties contain provisions on competing requests. They range from the more open-ended 1957 Council of Europe European Convention on Extradition model which leaves the determination up to a range of case-specific factors and States that ‘the requested Party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State’³ to the unequivocal territorial bias of the Organisation of American States’ Inter-American Convention on Extradition 1981 which provides that ‘When the extradition is requested by more than one State for the same offense, the requested State shall give preference to the request of the State in which the offense was committed,’⁴ although this approach is exceptional and says nothing of the situation where the territorial State is not one of the requesting States. Under the European Arrest Warrant scheme that now governs extradition between Member States of the EU, the topic of multiple requests is considered

³ Art 17 – Conflicting Requests. Also adopting this approach, the Arab League Extradition Convention 152 states in Article 18 that ‘If requests for extradition are made concurrently by several States, in respect of the same person, the requested State shall have the discretion to decide thereon taking into consideration all the circumstances of the case and, in particular, the priority of the request, the gravity of the offence and the Penalty to be imposed therefore’. The London Scheme for Extradition within the Commonwealth incorporating the amendments agreed at Kingstown in November 2002 provides in Article 19 – Priority where two or more requests are made that: (1) extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests; (2) In making a determination under paragraph (1), the authority will consider all the circumstances of the case and in particular – (a) the relative seriousness of the offences, (b) the relative dates on which the requests were made, and (c) the citizenship or other national status and ordinary residence of the person sought.

⁴ Art 15 – Requests by more than one State.

both as an inter-Member State matter and when a third State is involved.⁵ While in each case the matter of priority is primarily to be decided by the requested State's judicial or 'competent' authorities, taking into consideration such matters as the relative seriousness and place of the offences, the respective dates of the warrants/requests and whether they were issued for the purposes of prosecution or execution of a custodial sentence, if the requests come from two or more member States the Framework Decision provides for the option that the custodial State may seek the advice of Eurojust.⁶ The great advantage of this provision is that Eurojust possesses a great deal of 'know how' about the respective Member States that a State in receipt of competing warrants can draw on, should it so wish.⁷

Provisions on the handling and prioritising of competing extradition requests are also found in many bilateral treaties. The United Nations' Model Extradition Treaty 1994 provides simply, and without further delineation of the criteria to be applied, that 'If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.'⁸

More explicit is the 2003 Agreement on Extradition between the United States of America and the European Union, designed to supplement existing, and new, bilateral arrangements between Member States and the USA. It lists, in addition to any factors detailed in an applicable extradition treaty, a number of specific considerations that the requested State should consider when deciding which request should take priority.⁹ And, by way of example

⁵ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, 2002/584/JHA. Arts 16(1), (3) – Decision in the event of Multiple Requests.

⁶ Art 16(2).

⁷ Jose Luis Lopes de Mota, Roelof Jan Manschot, 'Eurojust and the European Arrest Warrant' in Rob Blextoon, Wouter van Ballegooij (eds), *Handbook on the European Arrest Warrant* (TMC Asser Press 2005) 63–71, 68. The role of Eurojust is discussed in more detail below 184–186.

⁸ Art 16 – Concurrent Requests.

⁹ Art 10(3) – Requests for extradition or surrender made by several States. These include: whether the request was made pursuant to a treaty; the places where each of the offences was committed; the respective interests of the requesting States; the seriousness of the offences; the nationality of the victim; the possibility of any subsequent extradition between the requesting States; and the chronological order in which the requests were received from the requesting States.

of a parallel bilateral treaty between the US and an EU Member State, the UK-US Extradition Treaty 2003 provides an almost identical list of considerations (omitting the victim's nationality criterion) as the EU-US Agreement in respect of determining which extradition request should prevail.¹⁰ In terms of national legislation, the UK's Extradition Act 2003 provides for slightly different procedures for handling concurrent requests coming from States categorised as either Part 1, ie European Arrest Warrant States (made subject to judicial determination) or Part 2, ie all the rest (made subject to political determination), albeit using the same set of determinative criteria.¹¹

The criteria for determining which request should take precedence are set out in each of these texts and they share many similarities. The Inter-American Extradition Convention aside, they clearly avoid prioritising any of the bases of jurisdiction. This deliberate omission, combined with the requirement that the order in which requests were received must be taken into account, demonstrates that extradition should be on the merits of the individual case; a requesting State cannot assume it is in a stronger position because of the jurisdictional basis it asserts. Furthermore, the procedure to be followed in the case of competing requests is broadly the same in each State insofar as, depending on the stage reached, extradition proceedings may either be deferred or extradition stayed if another request (or warrant) is received for the same individual until one or other of the requests has been disposed of.¹²

¹⁰ Art 15 – Requests for Extradition Made by Several States. The provision reads: If the Requested State receives requests from two or more States for the extradition of the same person, either for the same offense or for different offenses, the executive authority of the Requested State shall determine to which State, if any, it will surrender the person. In making its decision, the Requested State shall consider all relevant factors, including but not limited to: (a) whether the requests were made pursuant to a treaty; (b) the place where each offense was committed; (c) the gravity of the offenses; (d) the possibility of any subsequent extradition between the respective Requesting States; and (e) the chronological order in which the requests were received from the respective Requesting States.

¹¹ s 44 (Competing Part 1 warrants) and s 126 (Competing extradition requests). The criteria in ss 44(7) and 126(3) are: (a) the relative seriousness of the offences concerned; (b) the place where each offence was committed (or was alleged to have been committed); (c) the date when each request was received; (d) whether, in the case of each offence, the person is accused of its commission (but not alleged to have been convicted) or is alleged to be unlawfully at large after conviction.

¹² Under the UK's Extradition Act 2003, the procedures is set out in s 44(4): The judge may—(a) order further proceedings on the warrant under consideration to be deferred until the other warrant has been disposed of, if the

Once again, this highlights that the merits of each individual request will need to be considered before a decision on where to send a person is reached.

Despite the fact that provision is made in several instruments for the handling of competing requests, situations where States have been called upon to decide between two or more requests have arisen on only a few occasions. The *Soering* case represents one such example: the criminal conduct for which extradition was sought concerned the ‘ordinary’ crime of murder.¹³ Both the USA (as the territorial State) and Germany (as the State of nationality) had requested Soering’s extradition. The UK decided to honour the USA’s request – which happened to be the first in time – but the reasons given for doing so were based on the fact that Germany had not presented a prima facie case (a requirement under the Extradition Act 1870 which governed extradition from the UK at the time) whereas the USA had satisfied the necessary procedural requirements for extradition according to UK law.¹⁴ Whether this decision could have been subject to review had extradition to the USA not gone ahead or whether Germany should have submitted a new extradition request is a moot point. (The UK could not have prosecuted itself as it did not have extraterritorial jurisdiction over Soering’s alleged crimes.)

Another key example of the filing of consecutive extradition requests, this time in respect of the transnational treaty crime of torture, is that of Augusto Pinochet. In October 1998 Spain issued the first request for General Pinochet’s extradition from the UK.¹⁵ On the 11th and 13th

warrant under consideration has not been disposed of; (b) order the person’s extradition in pursuance of the warrant under consideration to be deferred until the other warrant has been disposed of, if an order for his extradition in pursuance of the warrant under consideration has been made. In s 126(2) The Secretary of State may—(a) order proceedings (or further proceedings) on one of the requests to be deferred until the other one has been disposed of, if neither of the requests has been disposed of; (b) order the person’s extradition in pursuance of the request under consideration to be deferred until the other request has been disposed of, if an order for his extradition in pursuance of the request under consideration has been made.

¹³ *Soering v United Kingdom* – 14038/88 [1989] ECHR 14 (7 July 1989).

¹⁴ *Soering* (n 13) paras 16, 19.

¹⁵ The first international arrest warrant was received from Spain on 16 October 1998. A second followed on 22 October 1998. A formal request for extradition was transmitted on 3 November 1998. The time line of proceedings against Pinochet are detailed in Diana Woodhouse, ‘Introduction: The Extradition of Pinochet: A

November and 15th December the Home Secretary received requests from Switzerland, France and Belgium respectively.¹⁶ He decided on 9th December not to issue an authority to proceed in respect of the Swiss and French requests and on 27th January issued a similar order in respect of the Belgian request.¹⁷ The final notification of the decision not to proceed with the extradition requests on the basis of Pinochet's ill health was issued to all four requesting States on 2nd March 2000.¹⁸ Unlike the 2003 Act, the Extradition Act 1989, which was in force at the time and therefore governed Pinochet's requested extradition, did not contain a provision on the handling of competing requests. While the conduct identified in the requests from Switzerland, France and Belgium were found not to constitute extradition crimes under section 2 of the Act (it should not be forgotten that Spain's first request did not, either; it was later revised to fall within the scope of section 2), it does however appear that the fact that Spain's request was the 'first in time' was crucial to the determination that the authority to proceed should be given to this request. Although its terms were not fully incorporated into UK law under the Extradition Act 1989, the European Extradition Convention 1957 (which covered extradition between all of the five States at the time) contains a provision on conflicting requests. Under Article 17, the respective dates of the requests was a factor to be considered. While Pinochet was, in the end, not extradited at all, the process shows that the timing of the request will have a significant bearing on the direction of the proceedings.¹⁹

Calendar of Events' in Diane Woodhouse (ed), *The Pinochet Case: A Legal and Constitutional Analysis* (Hart Publishing 2000) 1–14, 2–11.

¹⁶ Further requests were received from France on 4 February 1999 and Belgium on 12 October 1999.

¹⁷ On 22 February 1999 and 19 November 1999 respectively, he decided not to issue an authority to proceed in respect of the second French and second Belgian requests.

¹⁸ *Hansard* HC vol 345, cols 571–88 (2000). Letters from the Home Office to the Spanish, Belgium, Swiss and French Ambassadors announcing the termination of extradition proceedings, 2 March 2000, reproduced in Reed Brody, Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International 2000) 465–480. Also available in *Hansard* HC vol 345, cols 357–371WS (2000).

¹⁹ More recently, in early 2010 the UK received competing extradition requests from Serbia and Bosnia for Ejup Ganic, the ex-Bosnian leader, wanted on charges of war crimes although in the end the Serbian request was found to be politically motivated and extradition did not go ahead to either State. (It appears, however, that the extradition request was submitted by Bosnia in an attempt to prevent Ganic's extradition to Serbia rather than with a view to prosecuting him at home.) *The Government of the Republic of Serbia v Ejup Ganić* [2010] EW Misc 11 (MC).

The competing request provisions in the treaties identified above address the situation where the requested State is merely the custodian of an individual wanted by more than one State, but has no intention of asserting its own judicial jurisdiction. A situation can, however, also be envisaged where the custodial State either is already prosecuting, is still at the investigative stage, or is considering opening an investigation, but is also in receipt of one or more extradition requests for an individual concerning the same conduct. It is the prerogative of the custodial State to prioritise its own claim to judicial jurisdiction over an extradition request. This possibility is foreseen in most extradition agreements, where provision is made for refusal of the request, or at least its delay, while proceedings are underway in the custodial State.²⁰ However, Article 5(3) of the UK-US Extradition Treaty 2003 makes special mention of the fact that ‘Extradition shall not be precluded by the fact that the competent authorities of the Requested State: (c) are still investigating the person sought for the same acts for which extradition is sought’, meaning that an extradition request, if granted, could potentially terminate an existing investigation.

The increase in internet-based crime where the conduct constituting the crime actually occurs in more than one State means that the question of what constitutes the most appropriate judicial ‘forum’ to prosecute will become an increasingly important, and difficult to determine, issue (although it should be remembered that all transnational and international criminal activity raises the same questions). In 2013, amidst public pressure following several high profile cases, a forum bar provision was brought into force in the UK Extradition Act 2003.²¹ The original impetus for the inclusion of this provision followed the extradition of the

²⁰ European Convention on Extradition 1957 Art 8; EAW Decision Art 4(2); UN Model Extradition Treaty 1994 Art 4(c). At the national level, the UK’s Extradition Act 2003 ss 22, 88 – Person charged with offence in United Kingdom.

²¹ The Crime and Courts Act 2013 Schedule 20 inserts ss 19B–F (Category 1 States) and 83A–E (Category 2 States).

so-called ‘Nat West Three’ in the *Birmingham* case to the USA from the UK in 2006.²² A forum bar was drafted that year, but was never brought into force.²³ Introduction of the forum bar came about despite the fact that such a provision was strongly opposed in the 2011 Review of the United Kingdom’s Extradition Arrangements.²⁴ Such a bar was considered unnecessary by district judges,²⁵ and the authors of the review considered that it would constitute a ‘backward step’ and that ‘prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the court’.²⁶ They were also concerned that involving the courts in this process would create further delays to the extradition process, increase costs and risk generating satellite litigation.²⁷ Concerns pertaining to ‘forum’ could be adequately dealt with under existing extradition provisions, combined with clearer prosecutorial guidelines and human rights protections.²⁸

The provision as it now stands requires judges to bar extradition on the basis of forum if it would not be ‘in the interests of justice’ to extradite. A list of exhaustive criteria for the judge to consider are provided.²⁹ However, a decision to invoke the forum bar provision may be

²² *Birmingham & Ors v Director of Serious Fraud Office & Anor* [2006] EWHC 2000 (Admin). See below 193–195.

²³ A simpler forum bar than the one introduced in 2013 was inserted by the Police and Justice Act 2006 Schedule 13 but its provisions were never brought into force.

²⁴ ‘A Review of the United Kingdom’s Extradition Arrangements, September 30, 2011’ available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf (accessed 31 January 2015).

²⁵ Extradition Review (n 24) Part 6: Forum, para 6.57.

²⁶ Extradition Review (n 24) Part 6: Forum, para 6.79.

²⁷ Extradition Review (n 24) Part 6: Forum, para 6.79.

²⁸ Extradition Review (n 24) Part 6: Forum, paras 6.70–6.80.

²⁹ Extradition Act 2003 ss 19B(2) – (3) and 83A(2) – (3) read: (2) For the purposes of this section, the extradition would not be in the interests of justice if the judge— (a) decides that a substantial measure of D’s relevant activity was performed in the United Kingdom; and (b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place. (3) These are the specified matters relating to the interests of justice—(a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur; (b) the interests of any victims of the extradition offence; (c) any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence; (d) were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom; (e) any delay that might result from proceeding in one jurisdiction rather than another; (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to— (i) the jurisdictions in which witnesses, co-defendants and

overturned by the prosecutor and certification can only be discharged following a judicial review at the High Court.³⁰ Introduction of the forum bar may provide an added level of judicial scrutiny in extradition cases, and should represent a positive step. The criteria to be taken into account are sound, and share similarities to those introduced in July 2013 for prosecutors under the Director's Guidance on the Handling of Cases where the Jurisdiction to Prosecute is shared with Prosecuting Authorities Overseas.³¹ Rather than the decision on forum being solely one for the prosecutor, it is now shared with the judiciary. The prosecutor may indeed still override the decision of the judge, but the process itself, combined with existing human rights protections, may do enough to convince extraditees and their advocates that due consideration has been given to what constitutes an appropriate forum. The fact that appropriateness of judicial forum now features as a stage in extradition matters is a positive step. Even if extradition is still granted, increased transparency in this area is commendable.

The extradition law framework provides a helpful, yet incomplete solution to the problem of conflicts of judicial jurisdiction. Save in the UK where a forum bar now exists, this is because the extradition framework will only be able to help 'resolve' a conflict in those situations where two or more States have requested the extradition of an individual from a State that does not intend to prosecute itself. Nor does it signify that any of the requesting States are necessarily appropriate judicial forums to conduct a prosecution, simply that they consider themselves able (and willing) to exercise judicial jurisdiction. Declining extradition is a possibility, but there is a presumption among States that extradition requests will be honoured if possible and a failure to extradite leaves the custodial State with the task of prosecuting

other suspects are located, and (ii) the practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom; (g) D's connections with the United Kingdom. Liberty has criticised these criteria on the basis that they are not objective; rather, they are skewed in favour of extradition. Liberty's briefing on the Extradition amendments to the Crime and Courts Bill for Ping Pong in the House of Lords (March 2013) 9 available at: <https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-briefing-crime-courts-bill-extradition-hol-ping-pong-march-2013-.pdf> (accessed 31 January 2015).

³⁰ Extradition Act 2003 ss 19D, 83C and 19E, 83D.

³¹ http://www.cps.gov.uk/publications/directors_guidance/director_s_guidance_on_concurrent_jurisdiction.html (accessed 31 January 2015).

itself instead. The requesting States' courts may not be ideal judicial forums, but faced with the alternatives (prosecution or letting the person go) a requested State may choose to extradite.

An extradition law based solution is essentially reactionary; it does nothing to avoid or mitigate a conflict of judicial jurisdiction in the first place, it simply provides a solution to the problem by sending the requested individual to one requesting State instead of the other, effectively 'closing' the matter, as occurred in *Soering*. The custodial State thus holds a unique arbitrating position, but one which may be susceptible to external (and internal) political influences and prove onerous if the conduct involved concerns serious international or transnational criminal activity. Not all States may feel able to weigh up competing extradition requests in such instances. And, overly strict adherence to the 'first in time rule' or indeed prioritisation of any of the other criteria set out in the various extradition treaties do not necessarily ensure that the most appropriate forum will be the one that actually prosecutes. In contrast, the next section discusses some of the approaches to identifying and resolving conflicts of jurisdiction early on in the process.

1.2.Substantive Provisions & Prosecutorial Arrangements

1.2.1. The Treaty on Organized Crime Model

There are currently only two substantive crimes treaties that contain written provision on the handling of instances of concurrent jurisdiction: The United Nations Convention against Organized Crime 2000 (henceforth, TOC 2000) and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Organisation for Economic Cooperation and Development 1997.³² The general article on jurisdiction in the TOC 2000

³² Only the Treaty on Organized Crime (TOC) will be discussed here for space considerations as well as relevance issues. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Organisation for Economic Cooperation and Development 1997 provides in Art 4(3): When more

first sets out the jurisdictional requirements for States parties and the duty or option to prosecute if a State does not extradite.³³ It then provides in Article 15(5), ‘If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.’ No special implementation measures are envisaged for putting this provision into practice; States parties are expected to utilise existing networks or means of inter-authority communication to facilitate consultation and coordination where necessary.³⁴ The Implementation Guide does, however, provide further guidance as to what the result of coordination efforts might be: deferral of the investigation or prosecution to another State party; the sharing of information to advance the respective interests of both States; an agreement to pursue different actors or offences.³⁵ Article 15 is innovative because it recognises the particular character of transnational crime and that it may span, and have effects in, several States, rendering each of them an ‘interested’ State for the purposes of prosecution. It also represents the fusion in a single treaty of standard jurisdictional clauses with recognition of the need for practical measures to manage the possibility of judicial jurisdictions being asserted concurrently.

Given the nature of transnational crime covered by the TOC 2000 and its protocols, the value of having points of contact and means of communication in place in order to deal with

than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

³³ See Chapter 2, 71–72.

³⁴ United Nations, Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (2004) para 231.

³⁵ Legislative Guide (n 34) para 231.

potential instances of overlapping jurisdictional claims is clearly beneficial.³⁶ Yet the need for such measures stretches beyond dealing with the conduct falling within the parameters of this treaty; as this thesis argues, the majority of international and transnational crimes, as well as many national crimes with a transborder dimension, could be tried in more than one jurisdiction and raise similar problems of duplication of work and even instances of judicial jurisdictional conflict. The TOC model could therefore perhaps be extended effectively in future criminalisation treaties, too. Arrangements of the variety referenced in the TOC designed to preempt and resolve concurrency issues that may lead to conflicts of judicial jurisdiction have been implemented at both the bi- and multi-lateral levels. These are identified next.

1.2.2. Formal Arrangements

1.2.2.1. Bilateral Arrangements

Where transnational criminal activity is prevalent between a pair of States or within a small regional grouping, localised liaison arrangements (which may in turn feed into or draw from larger initiatives) can be helpful. An example of just such an arrangement is the 2007 Memorandum of Understanding (MoU) entitled *Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America* ('the Guidance'), drafted by the UK and US Attorneys General.³⁷ Again, this was an initiative

³⁶ Concurrency of jurisdictions and the potential for conflicts of judicial jurisdiction was recognised at the preliminary drafting session meeting held in Warsaw February, 2-6, 1998, but was not necessarily viewed as a negative thing as it would: 'indicate the interest of numerous States to deal with specific problems. In addition, conflicts of jurisdiction were rather rare and were invariably resolved at the practical level by an eventual determination of which jurisdiction would be ultimately exercised on the basis of the chances for successful prosecution and adjudication of the particular case.' Report of the Meeting of the Inter-Sessional Open-Ended Intergovernmental Group of Experts on the Elaboration of a Possible Comprehensive International Convention against Organized Transnational Crime UN Doc E/CN.15/1998/5 18 February 1998 para 29.

³⁷ *Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America*, 25 January 2007 available at: <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf> (accessed 31 January 2015). See also Kate Brookson-Morris, 'Conflicts of Criminal Jurisdiction' (2007) 56 *International and Comparative Law Quarterly* 659-666, 660-662.

undertaken in the wake of the *Birmingham* case.³⁸ The Guidance ‘provides guidance for addressing the most serious, sensitive or complex criminal cases where it is apparent to prosecutors that there are issues to be decided that arise from concurrent jurisdiction’. It goes on to state that, ‘In deciding whether contact should be made with the other country regarding such a case, the prosecutors should apply the following test: does it appear that there is a real possibility that a prosecutor in the other country may have an interest in prosecuting the case? Such a case would usually have significant links with the other country.’³⁹ This latter phrase suggests that there may be something more required than the simple existence of legislative jurisdiction in both States; there must be an indication that the case has strong enough links to each State to show that a conflict of judicial jurisdiction could arise, ie that each State is likely to want to exercise its jurisdiction. Both States must be conducting concurrent investigations in order for the procedures in the Guidance to be invoked, a requirement that was confirmed in *Ahsan*.⁴⁰

The Guidance establishes a consultation procedure between prosecutors with a view to reaching agreement on the strategy for handling a particular case and of disposing of any issues that arise within it.⁴¹ While the offices of the respective Attorneys General (or Lord Advocate in Scotland) should take the lead in resolving any issues outstanding at the end of the process,⁴² the parallel ‘Domestic Guidance’ produced by the UK’s Attorney General’s Office for use by the Crown Prosecution Service makes clear that, as far as is possible, ‘decisions on concurrent jurisdiction as between the UK and US are properly to be made by prosecutors’ and that ‘this guidance does not seek to address or influence the manner in

³⁸ *Birmingham* (n 22). See further below 193–195.

³⁹ Guidance (n 37) paras 3, 2.

⁴⁰ *Ahsan v Government of the United States of America and Secretary of State for the Home Department* [2008] EWHC 666 (Admin) paras 34–5.

⁴¹ Guidance (n 37) paras 12–14.

⁴² Guidance (n 37) para 4.

which independent prosecutors may exercise their discretion in any individual case'.⁴³ A central element of the main Guidance is the sharing of information between investigators and national prosecutors and between US and UK prosecutors, who must inform the relevant offices in the other jurisdiction, although information should not be shared without first securing the permission of the State.⁴⁴ The aim of the consultation procedure is to enable prosecutors to decide 'where and how prosecutions may be most effectively pursued; where and how the prosecution should unfold; whether or how aspects of the case should be pursued in different jurisdictions'.⁴⁵ Nonetheless, the process is not binding and each prosecuting authority must decide if the case should properly be prosecuted in their jurisdiction and if doing so would be commensurate with national laws and the public interest.⁴⁶ The process is thus highly flexible, to the degree that, other than involving the respective Attorneys General, no mechanism for actually resolving any disputes that arise is included. This could prove to be an unfortunate omission as agreement may not always be forthcoming.

Under the Guidance, there is no obligation at any stage to consult with the defence, inform it of the consultation's outcome – or even that a consultation took place. The Guidance makes very clear that it 'does not create any rights on the part of a third party to object to or otherwise seek review of a decision by the UK or US authorities regarding the investigation or prosecution of a case or issues related thereto'.⁴⁷ The Domestic Guidance, in contrast, does at least foresee that the defence may draw a case with possible conflict issues to the Attorney-General's attention and provides that a case report will be made available – presumably to the

⁴³ Attorney General's Domestic Guidance for Handling Criminal Cases Affecting both England, Wales or Northern Ireland and the United States of America. 18 January 2007 available at: <http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf> (accessed 31 January 2015) para 2. See also Brookson-Morris (n 37) 662.

⁴⁴ Guidance (n 37) paras 5–11.

⁴⁵ Guidance (n 37) para 14.

⁴⁶ Guidance (n 37) para 14.

⁴⁷ Guidance (n 37) para 13.

defence as well as the relevant authorities although this is not explicit.⁴⁸ The expectation is nonetheless that prosecutors will resolve matters: these two texts are ‘prosecutors’ deals’ through and through. Such bilateral memoranda of understanding-type agreements should help avoid or resolve conflicts of judicial jurisdiction, but care must be taken that any agreement struck on forum does also consider the impact that this decision will have on the accused. Certain guarantees attached to extradition (such as non-execution of the death penalty) or an agreement to transfer the individual back to the other State to serve any sentence passed might be sufficient in this respect. The rights of the defendant may suffer further erosion as a result of such an agreement, despite assurances that human rights will be considered, and especially when combined with the general move towards the streamlining and speeding up of the extradition process that has seen several of the traditional bars to extradition relaxed considerably.

Paragraph 13 of the Guidance which unequivocally sidelined the defence was almost certainly included to head off future challenges of the sort that were given short shrift in *Bermingham* in respect of choice of the judicial forum, although Laws LJ did concede that there may be occasions where review of a prosecutorial decision is warranted.⁴⁹ Even when States (or their prosecutors) are in agreement over matters of judicial forum and a process to reach a decision undergone, defendants may still have other ideas. The balancing ‘forum’ provision recently inserted into the Extradition Act 2003 by the Crimes and Courts Act 2013⁵⁰ may go some way to addressing this problem: the option of judicial review of a forum decision by the High Court is now expressly included.⁵¹

Following the 2011 review of the UK’s extradition arrangements the Director of Public Prosecutions was asked to publish general guidance, which would apply to all cases and all

⁴⁸ Domestic Guidance (n 43) para 8.

⁴⁹ *Bermingham* (n 22) para 64. See further below, 193–195.

⁵⁰ Crimes and Courts Act 2013 Schedule 13 ss 19B, 83B.

⁵¹ Extradition Act 2003 ss 19E, 83D.

jurisdictions where concurrency of judicial jurisdictions is involved, not just to UK-US cases.⁵² The Director's Guidance on the Handling of Cases where the Jurisdiction to Prosecute is shared with Prosecuting Authorities Overseas were published in July 2013.⁵³ This Guidance is designed to be used in any instance where the UK and another State are both in a position exercise judicial jurisdiction. The Director's Guidance is broadly similar to the UK-US Guidance and the domestic guidance in terms of procedures to be followed, the type of information to be shared and the aims of consultation. The Director's Guidance does, however, set out a detailed set of principles to be applied. The jurisdiction where most of the criminality or most of the harm or loss occurred is to be preferred if possible; however, the following conditions should also be taken into account: (i) the location of the witnesses, their ability to give evidence in another jurisdiction and where appropriate, their right to be protected; (ii) the location of the accused and his or her connections with the United Kingdom; (iii) the location of any co-defendants and/or other suspects; and (iv) the availability or otherwise of extradition or transfer proceedings and the prospect of such proceedings succeeding.⁵⁴ Where all factors are finely balanced, the relative costs and resources dedicated to an investigation in one jurisdiction rather than the other may be considered.⁵⁵ And, in response to forum arguments raised in cases such as *Birmingham*,⁵⁶ unless the criminal conduct is already the subject of an investigation in the UK, receipt of an extradition request 'do[es] not, without more, require CPS prosecutors in England and Wales to consider or reconsider whether a prosecution for the conduct in question should be brought in this jurisdiction'.⁵⁷ In other words, individuals accused of extraditable crimes may not

⁵² Extradition Review (n 24) paras 6.71–6.74. The Interim Guidelines were published in October 2012 and a consultation period opened at the same time. See Interim Guidelines on the Handling of Cases where the Jurisdiction to Prosecute is shared with Prosecuting Authorities Overseas available at: http://www.cps.gov.uk/consultations/concurrent_jurisdiction_consultation.pdf (accessed 31 January 2015).

⁵³ Director's Guidance (n 31).

⁵⁴ Director's Guidance (no 31) para 8(1), (4).

⁵⁵ Director's Guidance (no 31) para 8(5).

⁵⁶ See below, 193–195 for discussion.

⁵⁷ Director's Guidance (no 31) para 8(10).

themselves challenge the decision by seeking to invoke a forum bar; any decision in this respect is a power of the judiciary.

Greater collaboration between national prosecutors at the bilateral level is a positive step, and not just at the level of practical legal assistance (MLA) and cooperation to secure the presence of an individual in a particular jurisdiction to stand trial (extradition). Early consultations may ensure that the most appropriate jurisdiction prosecutes in the end. The UK-US Guidance represents an agreement between two common law jurisdictions whose criminal procedures are broadly similar and which have a tradition of close cooperation in criminal matters, so the fact that such an agreement exists is not unusual. The development of domestic guidelines is also a helpful step.

1.2.2.2. *Multilateral Arrangements & the European System*

Turning now to the regional level, Article 82(1)(b) of the Treaty on European Union sets out the obligation for the European Parliament and the Council to adopt measures to ‘prevent and settle conflicts of jurisdiction between Member States’. To these ends, in January 2006 the Commission of the European Union published a Green Paper entitled *On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*.⁵⁸ The Green Paper identified the growing problem of positive conflicts of jurisdiction and the serious implications multiple prosecutions may have on the rights and interests of all the individuals involved. An ‘adequate response’ it stated ‘would be to create a mechanism for allocating cases to an appropriate jurisdiction’.⁵⁹ The central aim of the Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings⁶⁰

⁵⁸ Green Paper, Brussels 23.12.2005 COM (2005) 696 final. The Paper is accompanied by a detailed Commission Staff Working Document SEC (2005) 1767. Discussing the scope of the Green Paper, see Brookson-Morris (n 37) 663–666 and M Fletcher ‘The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response’ (2007) 26 *Yearbook of European Law* 33–56.

⁵⁹ Green Paper (n 58) 3.

⁶⁰ Council Framework Decision 2009/948/JHA, 30 November 2009. OJ L 328/42.

(henceforth, the ‘FD’) that resulted from the initial preparatory work of the Commission is to ‘prevent situations where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States’ and to enable Member States to ‘reach consensus on any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings’.⁶¹ In order to do this, the FD sets out to establish a procedure for the making of contact between the competent authorities (to confirm the existence of parallel criminal proceedings) and to share ‘information’ (FD, Chapter 2), as well as facilitating the consultations that will help to reach a consensus on an effective solution and will avoid the adverse consequences of such parallel proceedings (FD, Chapter 3).

Where there are ‘reasonable grounds to believe that parallel proceedings are being conducted in another Member State’ the FD obliges Member States to share relevant information with each other.⁶² While it is envisaged that the authorities will most commonly raise the possibility of parallel proceedings, the fact may also be brought to the attention of the authorities by a suspected or accused person himself.⁶³ Once that process has confirmed that parallel proceedings do exist, Member States (through their competent authorities) are obliged to enter into direct consultations.⁶⁴ While these procedures are expressed in terms of obligation rather than as being optional, where the provision of specific information could harm national security interests or jeopardise the safety of individuals, the Member State is not required to give it.⁶⁵ How this might impact on the consultation process depends on the level of secrecy deemed necessary; ie whether the non-disclosed information permeates the whole file or not. Until a consensus on the concentration of criminal proceedings has been

⁶¹ Framework Decision (n 60) Art 1.

⁶² Framework Decision (n 60) Arts 5–6.

⁶³ Framework Decision (n 60) preamble, para 5.

⁶⁴ Framework Decision (n 60) Art 10.

⁶⁵ Framework Decision (n 60) Art 10(3).

reached, neither Member State is required to waive or exercise its judicial jurisdiction unless it wishes to do so and is entitled to continue with any criminal proceedings for any criminal offence falling within its national jurisdiction.⁶⁶ While this may lead to a doubling up or the conducting of unnecessary investigative work if proceedings are eventually concentrated in the other jurisdiction, it seems inevitable that some duplication will occur as the national procedures should not be delayed by consultations; it may after all take a considerable time to reach consensus. In contrast to the UK-US Guidance, which does not provide any dispute resolution mechanisms, under the FD an inability to reach a consensus means that the matter should, ‘where appropriate,’ be referred to Eurojust by the competent Member States’ authorities.⁶⁷ Eurojust is deemed to be uniquely positioned to help in these situations.⁶⁸ Article 7(2) of the Eurojust Decision provides:

Where two or more national members cannot agree on how to resolve a case of conflict of jurisdiction as regards the undertaking of investigations or prosecution [...], the College shall be asked to issue a written non-binding opinion on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned. The opinion of the College shall be promptly forwarded to the Member States concerned.⁶⁹

Eurojust prefers to limit recourse to its formal powers, acting as a facilitator for inter-State negotiations rather than an arbiter. The usual course of action involves the establishing of Joint Investigative Teams (JITs) between interested States. Since 2002, Eurojust has only used its formal powers three times.⁷⁰ The 2005 *Prestige* case represents a rare example of

⁶⁶ Framework Decision (n 60) preamble, para 11.

⁶⁷ Framework Decision (n 60) Art 12(2).

⁶⁸ The amended and consolidated Eurojust Decision was made available in July 2009. Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, 15 July 2009, 5347/3/09REV.3 available at: <http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejdecision/Consolidated%20version%20of%20the%20Eurojust%20Council%20Decision/Eurojust-Council-Decision-2009Consolidated-EN.pdf> (accessed 31 January 2015).

⁶⁹ This paragraph is without prejudice to paragraph 1(a)(ii), which provides that ‘when Eurojust acts as a College it (a) may in relation to the types of crime and the offences referred to in Art 4(1) ask the competent authorities of the Member States concerned, giving its reasons: [...] (ii) to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts’.

⁷⁰ Eurojust Annual Report (2011) 21 available at:

<http://www.eurojust.europa.eu/doclibrary/corporate/Pages/annual-reports.aspx> (accessed 31 January 2015).

a time when Eurojust exercised its powers under Article 7 to resolve a jurisdictional dispute between France and Spain in favour of Spain.⁷¹ Since the modification of the *Eurojust Decision* in 2009,⁷² A Member State's national Eurojust member must also be informed of any case where conflicts of jurisdiction have arisen or are likely to arise.⁷³ From the wording of the provision, this would appear to be necessary even if there is no dispute between the Member States as to where proceedings should be concentrated.

The FD, along with the amended Eurojust Decision, provides the outline of the procedure for avoiding or resolving conflicts of jurisdiction.⁷⁴ In terms of the criteria to be used to arrive at a consensus, the preamble to the FD refers to the place where the major part of the criminality occurred, where most of the loss was sustained, the location of the suspect/accused and the likelihood of extradition, his nationality or residence, any 'significant interests' of the suspect/accused and/or the witnesses and victims, the admissibility of evidence and the possibility of delays in a particular jurisdiction⁷⁵ along with Eurojust's own Guidelines for deciding which Jurisdiction should Prosecute.⁷⁶ Whether 'significant interests' could relate to the human rights implications of trial in a particular jurisdiction or from an ensuing custodial sentence, is not made explicit but it is hard to see what other interests of the accused could be deemed relevant. In the Eurojust Guidelines reference is only made to the interests of the

The Annual Reports provide helpful case examples of instances of conflicts of jurisdiction and discussion of the topic of conflicts of jurisdiction. See especially, Eurojust Annual Report (2011) 20–21; Eurojust Annual Report (2012) 19;

⁷¹ Eurojust's decision on the 'Prestige Case' (Case Nr 27/FR/2003) was discussed in the Eurojust Annual Report (2005) 32–33, 98.

⁷² Amended Eurojust Decision (n 68).

⁷³ Amended Eurojust Decision (n 68) Art 13(7)(a).

⁷⁴ A major research project to be coordinated by the University of Luxembourg was launched in June 2014. The project is due to report in May 2017. Its aim is to "elaborate[e] a new legal framework for the prevention and resolution of conflicts of jurisdiction in criminal matters in the Area of Freedom, Security and Justice (AFSJ)." This project could significantly overhaul the current system within the EU for identifying, managing and resolving conflicts of criminal jurisdiction. Project details available at: http://www.europeanlawinstitute.eu/projects/current-projects-contd/article/prevention-and-settlement-of-conflicts-of-exercise-of-jurisdiction-in-criminal-law-1/?tx_ttnews%5BbackPid%5D=137874&cHash=09ddf0ca04527b4de4b817ab2b38c7db (accessed 31 January 2015).

⁷⁵ Framework Decision (n 60) preamble, para 9.

⁷⁶ The Guidelines are found in Eurojust Annual Report (2003) 60–66.

victims to the extent they could be prejudiced were prosecution to take place in one jurisdiction rather than another.⁷⁷ The Guidelines further state that there should be a ‘presumption’ of territoriality and that the protection of witnesses is paramount. Moreover, they identify several negative considerations that should not be taken into account or should at least not become primary factors in the decision where to prosecute. These include sentencing powers and length of sentence, where recovery of the proceeds of crime will be easiest and the cost of prosecuting a case, which ‘should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than another when all other factors are equally balanced.’⁷⁸

Despite the initial positive outlook for the involvement of the defence at the Green Paper stage,⁷⁹ in the FD the defence is given little opportunity to participate in the decision on forum. The only concession in this direction is that the FD ‘does not affect any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction, if such rights exist under national law’.⁸⁰ Judicial review in a national court would seem to be the most obvious way in which the accused could challenge the allocation of jurisdiction, although this would only come after a consensus had been reached by the national prosecuting authorities. But it has been shown already that, in the UK at least, the likelihood of the defence successfully challenging a forum decision has thus far met with little success.⁸¹ In any event, the preamble’s provision on defence participation is significantly less than what was proposed in the Green Paper which recognised the appeal of a more active role for this party when to do so would not jeopardise a prosecution or affect the rights and interests of

⁷⁷ Guidelines (n 76) 64.

⁷⁸ Guidelines (n 76) 66.

⁷⁹ Brookson-Morris (n 37) 663.

⁸⁰ Framework Decision (n 60) preamble, para 17.

⁸¹ *Bermingham* (n 22) and the other cases following that decision.

victims and witnesses.⁸² It is also less than was provided for in the Council of Europe Convention on the Transfer of Proceedings in Criminal Matters 1972, where Article 17 expressly states ‘If the competence of the requested State is exclusively grounded on Article 2 that State shall inform the suspected person of the request for proceedings with a view to allowing him to present his views on the matter before that State has taken a decision on the request’.⁸³

The criteria for deciding where to prosecute set out in the preamble to the FD and the Eurojust Guidelines are not designed to be overly prescriptive and each case will require a different balancing of the considerations.⁸⁴ As with the UK-US Guidance, the emphasis remains on establishing the frameworks for communication and achieving a consensus between the relevant designated (usually prosecuting) authorities. Moreover, although Eurojust may advise, there is no scope within the existing EU system for the issuing of a binding decision on which Member State should prosecute.⁸⁵

Another mechanism that has been established at the European level under the auspices of Eurojust and that may be able to help to avoid or resolve conflicts of jurisdiction is the Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes (‘the Network’).⁸⁶ The Network was established in recognition that ‘the successful outcome of effective investigation and prosecution of such crimes at national

⁸² Green Paper (n 58) 6.

⁸³ Art 2(1) provides: ‘For the purposes of applying this Convention, any Contracting State shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable.’

⁸⁴ This approach does however sit in contrast the conflicts of jurisdiction provision in the Council Framework Decision of 13 June 2002 on combating terrorism 2002/475/JHA which addresses the topic of competing jurisdictional claims and aims to concentrate proceedings in one State according to a hierarchy of the bases of jurisdiction (territoriality, nationality/residency, location of victims and, finally, where the individual is found), Art 9(2). OJ L 164 22.6.2002.

⁸⁵ Staff Working Document SEC (n 58) 26–9.

⁸⁶ Council Decision 2002/494/JHA of 13 June 2002, setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. OJ L 167 26.06.2002. This is complemented by Council Decision 2003/335/JHA on the investigation and prosecution of genocide, crimes against humanity and war crimes, OJ L 118/12 14.05.2003.

level depends to a high degree on close cooperation between various authorities involved in combating them'.⁸⁷ The Network is composed of 'contact points' (for example, prosecutors, investigators, immigration and Ministry of Justice officials) drawn from each Member State (Article 1). It also has a permanent Secretariat based at the headquarters of Eurojust.⁸⁸ The primary function of the Network is to facilitate the exchange of information and enhance cooperation among national authorities involved in the investigation and prosecution of international crimes specifically (Article 2). Since the Network was established in 2002 it has met 17 times and meetings have included not only the Member States' contact points but also, at different points, representatives from the European political organs, the African Union, the International Criminal Tribunals (ICTs), the International Criminal Court (ICC), the NGO community and non-Member States such as Canada, Norway and the USA.⁸⁹

In a similar way to the information sharing procedures established by the FD on conflicts of jurisdiction, the Network Decision also anticipates that contact points shall, on request, provide 'any available information that may be relevant in the context of investigations into genocide, crimes against humanity and war crimes, [...] or to facilitate cooperation with the competent national authorities'.⁹⁰ While the idea of keeping a database of ongoing investigations into international crimes put forward at the fifth meeting was rejected at the sixth due to concerns over data protection and its overall usefulness,⁹¹ during the twice yearly

⁸⁷ Network (n 86) preamble, para 8.

⁸⁸ Amended Eurojust Decision (n 68) Art 25(a)(2).

⁸⁹ The AU–EU Expert Report on the Principle of Universal Jurisdiction recommends: 'The EU network of contact points on genocide, crimes against humanity and war crimes should consider discussing and developing ways forward in relation to the concerns expressed by AU Member States over the exercise of universal jurisdiction over African nationals by some EU Member States. The EU network and the AU Commission should consider establishing co-operation with each other in this regard.' 16 April 2009, Doc 8672/1/09, Rev.1, at para R15. In November 2014 Eurojust published the *Strategy of the EU Genocide Network to combat impunity for the crime of genocide, crimes against humanity and war crimes within the European Union and its Member States* available at: <http://www.eurojust.europa.eu/doclibrary/genocide-network/Pages/genocide-network.aspx> (accessed 31 January 2015).

⁹⁰ Network (n 86) Art 2(1).

⁹¹ See Redress/FIDH, Newsletter: EU Update on International Crimes, Issues 5/September 2009 and 6/February 2010 available at: http://www.fidh.org/IMG/pdf/EU_Crimes_Newsletter_Sept_09.pdf at 2 and http://www.fidh.org/IMG/pdf/EU_Newsletter_February_2010.pdf at 2 (both accessed 31 January 2015).

meetings the contact points will be able to provide information about any investigations taking place within their jurisdiction.⁹² This could serve as an ‘early warning system’ in case of conflicts of jurisdiction that may arise between States, and not just amongst EU Member States. Such information sharing about international crimes investigations is useful. The issue of vertical conflicts are regulated by the respective Statutes of the ICTs and ICC by virtue of their primacy and complementary jurisdiction regimes, but no such mechanisms exists at the horizontal level. The more information States are able to provide and share through initiatives such as the Network, the more likely it will be that prosecutions happen and that they take place in the most appropriate forum available.

In May 2014 the International Association of Prosecutors published its Guidelines for Cases of Concurrent Jurisdiction: Making the Decision – “Which Jurisdiction Should Prosecute?”⁹³ These guidelines represent the first multilateral, albeit non-binding, attempt to assist prosecutors in the handling of (potential) conflicts of judicial jurisdiction. The Guidelines recognise that:

[T]he increasing number of extraterritorial laws may serve to confuse and create more conflicts in the ever expanding jurisdictional grid [and that] [w]hile these may help to prevent impunity for cross-border crime, there must also be a corresponding multilateral cooperation to ensure efficient, effective and fair prosecutions. ... [T]hese Guidelines while by no means conclusive or exhaustive, aim to provide prosecutors with practical guidance when deciding who should prosecute cases when more than one state claims jurisdiction.⁹⁴

Rather than establishing hard and fast rules or laying down a process for prosecutors to follow, the Guidelines instead set out a whole range of criteria for prosecutors to consider in no particular order. This perhaps lessens their usefulness as practical guidance for actually

⁹² Conclusions of the Meetings of the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes available at: <http://eurojust.europa.eu/Practitioners/Genocide-Network/Network-Activities/Pages/meetings.aspx#seventeenth> (accessed 31 January 2015).

⁹³ http://www.iap-association.org/IAP/media/IAP-Folder/IAP_Guidelines_Cases_of_Concurrent_Jurisdiction_FINAL.pdf (accessed 31 January 2015).

⁹⁴ IAP Guidelines (n 93) 6.

dealing with conflicts of judicial jurisdiction that may arise; they should, however, provide a good starting point for prosecutors confronted with issues of jurisdictional concurrency, especially when this is not a common occurrence in their jurisdiction. The Guidelines identify issues relating to: which territory?; which jurisdiction has the strongest case?; number of accused and coordinating prosecutions; the accused; delay; victims; witnesses; sentencing powers; state interests as being the primary criteria for determining jurisdiction.⁹⁵ Of secondary importance to consider are: proceeds of crime; sentencing powers; costs of prosecuting; political considerations.⁹⁶ Under each heading prompt questions and matters to consider are identified. These Guidelines nonetheless mark a useful step towards developing a truly multilateral text setting out procedures for the identification, management and avoidance of conflicts of judicial jurisdiction.⁹⁷

At a more ad hoc, multilateral level, albeit limited to a few western States, in November 2009 the Attorneys General of Australia, Canada, England, Wales and Northern Ireland, the USA and New Zealand met for the first time ‘to discuss how they could better tackle the challenges of cross-jurisdictional crime and other areas of mutual concern more productively, together’.⁹⁸ The five are due to meet annually and have agreed to work jointly on establishing a coordinated response to transnational and international crime, but so far no formal procedures have been established for handling any cases where there is concurrent jurisdiction between these State that may come to light as a result of these liaisons. And, in

⁹⁵ IAP Guidelines (n 93) paras 17–57.

⁹⁶ IAP Guidelines (n 93) paras 58–62.

⁹⁷ The IAP has also established three specialist online networks where prosecutors can meet and discuss issues concerning concurrency of jurisdictions. They are: the Global E-Crime Network (covering cybercrime); the Forum for International Criminal Justice (covering war crimes, crimes against humanity and genocide); the Trafficking in Persons Platform (covering human trafficking). Links are available from the IAP main website. See <http://www.iap-association.org/> (accessed 31 January 2015).

⁹⁸ <https://innertemplelibrary.wordpress.com/2009/11/16/attorneys-general-of-five-nations-outline-plans-for-enhanced-cooperation-attorney-generals-office/> (accessed 31 January 2015).

2010, at a Commonwealth Secretariat meeting, the text ‘Criminal Jurisdiction: Criteria to be considered by States in Relation to Competing Criminal Jurisdictions’ was adopted.⁹⁹

The development of regional and international networks of prosecutors and systems of ‘points of contact’ and criteria for prosecutors to consider represent steps in the right direction with respect to conflicts of judicial jurisdiction. Conflicts of jurisdiction are best averted rather than dealt with once they arise, and these measures are designed to do just that, where possible. Even though participation by the defence is still extremely limited (or non-existent), there are likely to be benefits to the defendant from having such arrangements in place even if they are sidelined from the main determining process: if proceedings can be concentrated in one jurisdiction early on delays are less likely to arise at a later stage of proceedings and their time in pre-extradition or pre-trial custody may be limited. Nonetheless, the EU Framework Decision currently represents the only binding multilateral (albeit regional) mechanism of its kind at present and most other arrangements are limited in their scope and reach.

2. Jurisprudence on Determining an Appropriate Forum

The question of what constitutes an appropriate judicial forum in cases where more than one State could potentially prosecute has been raised before the UK courts with increasing regularity.¹⁰⁰ In another vein, in accordance with the mandate set out in its Completion Strategy, the ICTY has had to decide if a particular State’s courts are a suitable forum to prosecute cases from its remaining indictments, or whether another State’s courts are likely to

⁹⁹ Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions, Marlborough House, London, October 2010. Cited in IAP Guidelines (n 93) n 27.

¹⁰⁰ This is also happening in other jurisdictions, as well, although space and scope considerations militate against detailed consideration of the jurisprudence of a range of other States.

provide a better forum.¹⁰¹ The main difference is that in this situation an external body (the ICTY) is making the determination regarding appropriateness between two or more national forums whereas a national court tasked with the question is essentially deciding whether or not to deny extradition based on the argument that they constitute a more appropriate judicial forum than the courts of the State seeking extradition. The ends to be achieved are, however, similar. Some States have also enshrined a principle of ‘subsidiarity’ into their national criminal laws and procedures, designed to indicate which judicial jurisdiction should take priority when an assertion of universal jurisdiction is involved. The following discussion does not purport to be an exhaustive inquiry into the matter; rather, some key case law examples from the national and international levels are discussed.

2.1.National Jurisprudence

2.1.1. Substantial Connection

Once a State has decided that it wishes to exercise its judicial jurisdiction, unless it already has custody of the accused, it will need to seek extradition of the individual in order to be able to proceed to the trial stage (the possibility of *in absentia* prosecutions notwithstanding). Naturally, the accused may well raise arguments during the extradition process to resist his removal. Many of the conventional and human rights grounds for resisting extradition were discussed in Chapter 3.¹⁰² However, some individuals have also sought to prevent their extradition from going ahead on the basis that the case properly ‘belongs’ to a jurisdiction (usually the custodial State) rather than the one to which extradition is sought. This is done by invoking a range of factors that apparently ‘connect’ the circumstances of the case to a particular State and which indicate that the individual in question should be tried for their

¹⁰¹ Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, June 2002, UN Doc No S/2002/678 para 4.

¹⁰² See Chapter 3, section 2.2.2.

alleged crimes in that jurisdiction. It is not hard to see that this argument could well be raised by an individual who is sought by a State wishing to exercise universal jurisdiction, but it could equally be invoked against a claim on any of the jurisdictional bases. In fact, an assertion of some form of extended territorial jurisdiction characterises all the examples identified here. So far, arguments raised by individuals based on the assertion that one particular judicial forum is more appropriate than another have not succeeded in barring extradition and kick starting a prosecution in the custodial jurisdiction, as the following cases from the UK show. Nonetheless, the character of the arguments employed are worthwhile discussing for the interesting points raised on what linkage aspects are deemed important by defendants if not prosecutors.¹⁰³

Bermingham was the first case in England where the proper forum argument was raised in the context of extradition proceedings.¹⁰⁴ In July 2004 the defendants' solicitors wrote to the Director of the Serious Fraud Office inviting him 'to conduct an investigation as to whether or not a prosecution should be brought in the UK against these three clients.'¹⁰⁵ A central plank of the arguments raised against extradition was that the crimes were really 'English' crimes and should be investigated and prosecuted in England, not the United States. The defendants were UK citizens who worked in the UK and were accused of defrauding their UK employers, with much of the relevant evidence to be found in London.¹⁰⁶ Consequently, the UK was the most appropriate forum for the trial. However, in the High Court, Laws LJ concluded that the Extradition Act 2003 left no room for a public authority (court or minister)

¹⁰³ Some Canadian cases have also explored the 'real and substantial connection test'. See eg, *R v Hape* [2007] 2 SCR 292, para 62: 'Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question...Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event...[W]hat constitutes a "real and substantial link" justifying jurisdiction may be "coterminous with the requirements of international comity".'

¹⁰⁴ *Bermingham* (n 22). See Colin Warbrick, 'Recent Developments in UK Extradition Law' (2007) 56 *International and Comparative Law Quarterly* 199–208, especially 201–203.

¹⁰⁵ *Bermingham* (n 22) para 45.

¹⁰⁶ *Bermingham* (n 22) para 48.

‘to decide, where a criminal case is triable in either of two jurisdictions, which is the appropriate *forum conveniens*’ (a term used as shorthand here to denote the more appropriate venue).¹⁰⁷ In other words, there was no statutory basis on which the Secretary of State or the courts could rely in order to exercise discretion as to the appropriateness of the judicial forum and the courts were not able to act without it.¹⁰⁸ Laws LJ did concede nonetheless that ‘To the extent that a decision to try a defendant in one jurisdiction rather than another may lead to a violation of his Convention rights, some public decision-maker must be in a position to conclude the matter so as to avoid such an outcome, or the process will fall foul of s.6(1) of the 1998 [Human Rights] Act by whoever sends the defendant to the offending jurisdiction [...]’.¹⁰⁹

The subject of the judicial review was the decision of the Director of the SFO not to open an investigation under s.1(3) of the Criminal Justice Act 1987 into the alleged crimes. Laws LJ conceded that there might be extraordinary circumstances where the decision to launch a prosecution or not could be subject to a judicial review, but where the matter hinged on the decision to investigate (as was the case here) the discretion of the prosecutor was even more open-ended – ‘it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the Director to investigate or not.’¹¹⁰ This particular case did not satisfy this standard. Laws LJ was, however, prepared to entertain the related question, albeit reformulated on a narrower basis than counsel originally submitted, that consisted of whether or not the Director was required by s.1(3) of the Criminal Justice Act 1987 to reach a conclusion on the place of trial as a way to protect the defendant’s

¹⁰⁷ *Birmingham* (n 22) para 57.

¹⁰⁸ A forum bar was inserted in the Crime and Justice Act 2006, by the Coroners and Justice Act 2009 but it never entered into force. A revised forum bar was inserted in the Crime and Courts Act 2013. (This provision is now in force.) This means that a judicial determination of the matter that arose in this case would now be possible.

¹⁰⁹ *Birmingham* (n 22) para 59.

¹¹⁰ *Birmingham* (n 22) para 64.

Convention rights under s.6(1).¹¹¹ He was not. It would, rather, constitute an ‘entirely fanciful construction’ of the sub-section to say that it imposed a positive obligation on the director ‘to embark upon an investigation so that he might pre-empt the potential trial venue in favour of this jurisdiction [...] if it appear[ed] that the Convention rights of a suspected person might be violated by trial elsewhere.’¹¹² If an individual’s rights were to be violated by the prospect of a trial in another jurisdiction, it would be up to the District Judge acting under s.21 and s.87 of the Extradition Act 2003 to discharge the extradition request and not for a prosecutor to determine where was the best place for trial by virtue of the substantive legislation.

Forum considerations and whether or not to investigate and prosecute were the preserve of the relevant authorities. Involving the individuals wanted for trial would be tantamount to placing a ‘duty to consult’ on the Director of the SFO in respect of whether and what he should investigate.¹¹³ There were thus no arguments that a suspect could raise successfully in order to secure trial in a particular jurisdiction or to influence the prosecutor’s decision; only if extradition could be barred on one of the grounds recognised under the Extradition Act 2003 might it then be appropriate to consider whether or not an investigation and prosecution should take place in the custodial State in lieu of the requesting State.¹¹⁴

Despite the unfavourable outcome for the defendants in *Bermingham*, the most appropriate forum for trial question has been raised in a series of subsequent cases involving extradition from the UK, none meeting with success, either.¹¹⁵ In the case of *Norris*,¹¹⁶ the topic of appropriate forum for prosecution was once again put forward and rejected, although Lord

¹¹¹ *Bermingham* (n 22) para 69.

¹¹² *Bermingham* (n 22) para 70.

¹¹³ *Bermingham* (n 22) para 72. This very possibility was ruled out later in the UK–US Guidance (n 37).

¹¹⁴ This is what happened in the case of Gary McKinnon. See below (n 122), below.

¹¹⁵ *Wright v Scottish Ministers* (No 2) (2004) SLT 823; *R v Abu Hamza* [2006] EWCA Crim 2918; *Ahsan* (n 39); *Bary & Anor, R (on the application of) v Secretary of State for the Home Department* [2009] EWHC 2068 (Admin) see especially paras 70–77; *McKinnon, R (on the application of) v Secretary of State for Home Affairs* [2009] EWHC 2021 (Admin).

¹¹⁶ *Norris v Government of the United States of America* [2010] 2 AC 487 (HL).

Phillips did not rule out the possibility that forum could influence the outcome of an extradition hearing in exceptional circumstances, which may represent a slight shift position.

He stated:

Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country.¹¹⁷

And, in the extradition case of Babar Ahmad to the USA on terrorism charges, although refusing the appeal against extradition on the grounds that none of the statutory bars to extradition applied to the case, Senior District Judge Workman observed ‘This is a difficult and troubling case. The [first applicant] is a British subject who is alleged to have committed offences which, if the evidence were available [had it not all been sent to the USA], could have been prosecuted in this country.’¹¹⁸ The topic of forum was not, however, discussed further and the ECtHRs declined to comment on this matter in its April 2012 judgment.¹¹⁹

In all these cases, the central question was: were these actually British crimes, which ought to be prosecuted in the United Kingdom rather than the USA? In the cases of McKinnon and Ahmad, the individuals concerned were British nationals who committed the alleged criminal conduct from the UK, never once setting foot in the USA.¹²⁰ In Ahmad’s case, the UK could have prosecuted, were it so inclined. But the authorities determined that, in this case, the USA was willing to prosecute and was a more appropriate forum, having handed over all evidence to the USA early on in the proceedings. After an incredibly protracted legal process,

¹¹⁷ *Norris* (n 116) para 67.

¹¹⁸ BBC, ‘Terror Suspect Facing Extradition’, May 17, 2005 available at: http://news.bbc.co.uk/2/hi/uk_news/4554829.stm (accessed 31 January 2015). Decision of the District Judge cited in *Babar Ahmad and Others v The United Kingdom* – 24027/07 [2012] ECHR 609 (10 April 2012) para 24.

¹¹⁹ *Babar Ahmad* (n 118) para 166.

¹²⁰ David Bermingham, ‘Babar Ahmad Case: We Must Not Outsource Our Criminal Justice System’ 11 September 2012 available at: <http://www.theguardian.com/commentisfree/2012/sep/11/babar-ahmad-outsource-criminal-justice> (accessed 31 January 2015).

Babar Ahmad was extradited to the USA in October 2012, 10 years after the initial extradition request was received.¹²¹ In the end it was determined that McKinnon could not be extradited to the USA on health grounds. However, this was on the proviso that the possibility – since rejected – of prosecuting him in the UK should be explored instead.¹²²

The UK courts have been extremely reluctant to accept arguments raised by the accused that certain criminal conduct may ‘belong’ to or be so closely associated with a particular jurisdiction that extradition to another State should be prevented. Prosecutorial discretion is protected; decisions as to where a case ought to be prosecuted should not be open to influence by the individual(s) whom the decision concerns. But it has been acknowledged by these courts that prosecutors face considerable challenges in coordinating investigations and prosecutions with other States so that the duplication of efforts is avoided and proceedings are concentrated in one jurisdiction where possible.¹²³ Where the custodial State is willing to defer to a prosecution in another State despite the fact that it also has jurisdiction over the conduct in question and could prosecute itself (as was the case in *Birmingham*), it seems the only course of action available to the accused individual is to invoke human rights based arguments at the appropriate stage as they will not be able to challenge the actual decision where to prosecute. Individuals whose extradition is sought by another State firmly remain objects of proceedings.

2.1.2. Subsidiarity

Under the subsidiarity principle broadly understood in the criminal law context, a State that would otherwise be able to exercise universal jurisdiction in a particular case defers to the

¹²¹ *Ahmad & Anor v United States of America* [2006] EWHC 2927 (Admin); *Babar Ahmad* (n 118).

¹²² Joint CPS/MPS Statement on the Case of Gary McKinnon, 14 December 2012 available at: <http://blog.cps.gov.uk/2012/12/gary-mckinnon.html> (accessed 31 January 2015).

¹²³ *Birmingham* (n 22) para 73.

territorial State or the State of nationality if either is ‘able and willing’ to prosecute.¹²⁴ However, there is no uniformly accepted definition of subsidiarity between States as to what the principle constitutes. The idea that it is ‘good judicial policy’ for jurisdictional claims based on universality to give way to a more closely connected State that wants to exercise its judicial jurisdiction is sound in principle.¹²⁵ The AU-EU Expert Report on the Principle of Universal Jurisdiction recognises that there is no hierarchy of jurisdictional bases,¹²⁶ but equally recommends that ‘In prosecuting serious crimes of international concern, States should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction’.¹²⁷ The idea of subsidiary jurisdiction has also been taken up by the Institute of International Law who included the principle in their 2005 Resolution on Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes.¹²⁸ Article 3(c) provides:

Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.¹²⁹

¹²⁴ Cedric Ryngaert, ‘Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle’ (2008) 19 *Criminal Law Forum* 153–80.

¹²⁵ Claus Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit International’ (2006) 4 *Journal of International Criminal Justice* 561–585, 579.

¹²⁶ AU–EU Universal Jurisdiction Report (n 89) para 14.

¹²⁷ AU–EU Universal Jurisdiction Report (n 89) para R9.

¹²⁸ 2005 Krakow Session: Seventeenth Commission – Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes (26 August 2006) available at: http://www.idi-ii.org/idiE/resolutionsE/2005_kra_03_en.pdf (accessed 31 January 2015).

¹²⁹ 2005 Krakow Session (n 128). In contrast, the 2009 AIDP Resolution on Universal Jurisdiction, adopted at the Eighteenth Session of the Congress of the International Association of Penal Law in September 2009 makes no reference to subsidiarity. See Maja Munivrana Vajda, ‘The 2009 AIDP’s Resolution on Universal Jurisdiction – an epitaph or a revival call?!’ (2010) 10 *International Criminal Law Review* 325–344.

Applying a subsidiarity principle has been said to provide ‘a fair balance between sovereignty interests and international justice interests.’¹³⁰ In essence, the aim of the subsidiarity principle is to ensure that an assertion of judicial jurisdiction on the basis of universality – that would otherwise be a legitimate exercise of that jurisdiction – is put on hold if it is deemed that there is a more closely connected State able and willing to prosecute instead. The test as it stands is generally limited to whether or not the territorial or nationality States could prosecute instead, although there is no real reason why a subsidiarity test could not be applied against any of the bases of jurisdiction. In applying a national subsidiarity test the task of determining whether or not another sovereign State is in a better position to prosecute falls to the courts. In order to operate truly effectively, the responsible court will, by necessity, need to undertake an assessment of matters usually considered to be internal to another State, ie the operation of its criminal justice system, which may be problematic and especially so where the cooperation of that State cannot be assured.¹³¹

An international principle of subsidiarity does not currently exist under international law.¹³² Were subsidiarity in the context of universal jurisdiction to crystallise into a rule of international law it would, however, effectively place universal jurisdiction at the bottom of a non-official hierarchy of jurisdictional bases – or at least on the same level as the passive personality and protective bases but certainly ‘below’ territoriality and nationality. But the principle is not widely subscribed to by States at present. For example, Belgium repealed its

¹³⁰ Julia Genuess ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction (2009) 7 *Journal of International Criminal Justice* 945–962, 958.

¹³¹ Susanne Walther has suggested that screening of any State seeking to exercise universal jurisdiction could be carried out under an international system of accreditation. Susanne Walther, ‘Terra Incognita. Wird staatliche internationale Strafgewalt den Menschen gerecht?’ in J. Arnold et al. (eds), *Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag* (CH Beck 2005) 925–954, 953.

¹³² Only Kreß (n 125) believes that subsidiarity has now become a rule of customary international law, at 580. cf, Ryngaert (n 124) 173–177; Genuess (n 130) 957.

laws explicitly making reference to the principle in 2003,¹³³ Spain has undertaken a difficult amendment process to curtail the original, expansive judicially constituted principle and Germany has legislated for the principle, albeit on a highly restrictive basis. The latter two approaches are discussed in turn.

The subsidiarity principle is enshrined in §153(f) of the German Code of Criminal Procedure. This provision was introduced alongside the *Völkerstrafgesetzbuch (VStGB)* or Code of Crimes against International Law (CCAIL) in 2002, which was introduced following Germany's ratification of the ICC Statute.¹³⁴ The preparatory documents accompanying the Code state that 'in view of the complementarity of the prosecutorial jurisdiction of the International Criminal Court [a core objective of the Code is] to make it absolutely clear that Germany is always in a position to prosecute for itself those crimes falling under the jurisdiction of the ICC Statute'.¹³⁵ However, the application of the universal jurisdiction provision is tempered by the procedural conditions set out in §153(f) of the German Code on Criminal Procedure (GCCP).¹³⁶ These conditions limit considerably the occasions when

¹³³ Pressure from abroad led to Belgium's Act Concerning Punishment for Grave Breaches of International Humanitarian Law 1993 being repealed in August 2003 and the elements concerning international crimes were incorporated into the Belgium Criminal Code. In conjunction with the Code of Criminal Procedure, Belgium courts have territorial, as well as nationality and passive personality, jurisdiction over war crimes, crimes against humanity and genocide. Furthermore, where Belgium has jurisdiction over any offense committed outside of Belgium where there is a treaty obligation to do so (Art 12*bis*). The Prosecutor also has a wide discretion to decide not to investigate/prosecute or to reject a complaint if the facts indicate that the matter should be addressed by the courts of the territorial State or an international court or tribunal. (Code of Criminal Procedure, Arts 10(5) and 12*bis*.) See the judgment of the Belgium Constitutional Court (formerly, the Court of Arbitration), Cour d'Arbitrage (Court of Arbitration), Law on Grave Breaches of International Humanitarian Law, No 2/2005 Judgment of 23 March 2005. See further, Human Rights Watch, *Universal Jurisdiction: The State of the Art* (2006) vol 18 No 5(D) 37–45.

¹³⁴ Entered into force, 30 June 2002 available at: <http://www.gesetze-im-internet.de/vstgb/BJNR225410002.html> (accessed 31 January 2015). Unofficial English translation available at:

<http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (accessed 31 January 2015). On the features of CCAIL, See Human Rights Watch, 'The Legal Framework for Universal Jurisdiction in Germany' (September 2014) available at: http://www.hrw.org/sites/default/files/related_material/IJ0914German.pdf (accessed 31 January 2015); Stephen Wirth, 'Germany's New International Crimes Code: Bringing a Case to Court' (2003) 1 *Journal of International Criminal Justice* 151–68; Gerhard Werle, Florian Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes against International Law' (2002) 13 *Criminal Law Forum* 191–223.

¹³⁵ Bundestags-Drucksache 14/8524, 11.

¹³⁶ CCAIL s 1: This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.

CCAIL may be applied and confer a large degree of discretion on the Federal Prosecutor in respect of the decision to proceed with a prosecution. Essentially, the Prosecutor has the power to dispense with prosecuting a crime in cases where the offense was not committed on German soil, neither the accused nor the victim was German, or the accused is not present, nor can be expected to be present, on German soil.¹³⁷ The mandatory prosecution requirement to all other crimes under the German Criminal Code is instead replaced by the option to decline to prosecute in relation to international crimes under the jurisdiction of the ICC if any of these criteria are met – except where a German national is accused of their commission and he is not ‘... being prosecuted before an international court or by the State on whose territory the offence was committed or whose nationals were harmed by the offence.’¹³⁸ The subsidiarity principle itself is encompassed in §153(f)(2)(iv) which provides that the Prosecutor may furthermore decline to proceed when ‘the offense is being prosecuted before an international court or by a State on whose territory the offense was committed, whose national is suspected of its commission or whose national was harmed by the offense’. In the

GCCP §153(f): [Dispensing with Prosecution of Criminal Offences under the Code of Crimes against International Law]:

(1) The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, if the accused is not resident in Germany and is not expected to so reside. If, in the cases referred to in Section 153c subsection (1), number 1, the accused is a German, however, this shall only apply if the offence is being prosecuted before an international court of justice or by a State on whose territory the offence was committed or a citizen of which was injured by the offence.

(2) The public prosecution office may dispense with prosecuting an offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, in particular if

1. no German is suspected of having committed the crime;
2. the offence was not committed against a German;
3. no suspect is, or is expected to be, resident in Germany;
4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence.

The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting State is admissible and intended.

(3) If, in the cases referred to in subsections (1) or (2) public charges have already been preferred, the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings.

[Official translation.]

¹³⁷ GCCP §153(f)(2)(i)–(iii).

¹³⁸ GCCP §153(f)(1).

explanatory notes accompanying the Code it was stated that ‘the jurisdiction of third party States [...] must be understood as a subsidiary jurisdiction which should prevent non-punishment, but not otherwise improperly interfere with the primarily responsible jurisdiction’.¹³⁹ The German subsidiarity test thus goes further than the principle often acknowledges insofar as it includes the possibility for deferral to the nationality State and victims’ State of nationality if they are in a position to exercise their judicial jurisdiction.

The Prosecutor was presented with his first chance to interpret and apply the subsidiarity test in 2003 when a complaint was filed under CCAIL against Donald Rumsfeld and other high ranking individuals over alleged acts of torture and maltreatment at the Abu Ghraib prison between September 2003 and January 2004.¹⁴⁰ The basic argument for engaging the German criminal justice system put forward by the complainants centred on the lack of prosecution in either of the two States with primary jurisdiction: the USA on the basis of the nationality of the alleged perpetrators and Iraq on the territorial basis. Neither jurisdiction, it was submitted, was carrying out probing investigations of higher ranking individuals that might result in a prosecution. Against this backdrop, the complainants argued that impunity for crimes committed in Iraq would prevail unless the German Prosecutor took up the case. The filing of these complaints put Germany in a very difficult position politically.¹⁴¹ From this perspective, the Federal Prosecutor needed to find grounds to dismiss the complaint and not open an investigation himself – which he did.¹⁴²

In his letter setting out the reasons for the dismissal, the Chief Federal Prosecutor stated that ‘the jurisdiction of uninvolved third countries is, [...] to be understood as an initial

¹³⁹ Explanations on the *Draft of an Act to Introduce the Code of Crimes against International Law* available at: <http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf>, 82 (accessed: 31 January 2015).

¹⁴⁰ Complaint against Donald Rumsfeld et al., 29 November 2004, with addenda 29 January 2005.

¹⁴¹ See ‘Lawsuit against Rumsfeld Threatens US-German Relations,’ Deutsche Welle, 14 December 2004 available at: <http://www.dw-world.de/dw/article/0,,1427743,00.html> (accessed 31 January 2015).

¹⁴² The complaint was dismissed on 10 February 2005. Letter to Wolfgang Kalek from the General Prosecuting Attorney of the Federal Court, notarised English translation available at: <http://www.brusseltribunal.org/pdf/RumsfeldGermany.pdf> (accessed 31 January 2015).

intercepting jurisdiction, which should avoid impunity, yet not inappropriately push aside the primarily competent jurisdictions'.¹⁴³ This encapsulation of the subsidiarity principle in action is sound. However, in determining what criteria should be used by the Prosecutor to decide whether or not the primary competent jurisdiction was prosecuting, he indicated that the interpretation and application of §153(f) was to be guided by the ICC Statute.¹⁴⁴ Consequently, 'the concept of prosecution of the deed ought to be construed on the basis of the whole complex and not in relation to an individual alleged criminal and his special part in the deed'.¹⁴⁵ This approach echoes the procedure adopted by the ICC which is obliged to consider first the situation as a whole before turning to individual, specific cases that arise out of the broader situation. The Security Council or a State Party may only 'trigger' the jurisdiction of the ICC by referring a 'situation' to the Prosecutor, not a specific case.¹⁴⁶ But the ICC regime and national criminal procedures are not the same. Despite the desire of the Prosecutor to draw parallels between subsidiarity and complementarity, perhaps to provide legitimacy and coherence to what was otherwise a new and un-defined test, the German Prosecutor is not mandated to investigate general situations. Rather, the Prosecutor is limited to determining whether a particular offense by an individual has been committed. Nor can a complainant refer a situation to the Prosecutor. To do otherwise would, according to Jessberger, introduce 'a concept of "offense," as yet unknown in German criminal procedure'.¹⁴⁷ In short, a national principle of subsidiarity cannot correctly be applied to a whole complex of events as the situation stage before the ICC is *sui generis*. Indeed, the Prosecutor's recourse to the term 'situation' was in fact later criticised in the 2007

¹⁴³ Letter (n 142) 4.

¹⁴⁴ Letter (n 142).

¹⁴⁵ Letter (n 142) 5.

¹⁴⁶ ICC Statute Arts 13, 14.

¹⁴⁷ Florian Jessberger, 'Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany' in Wolfgang Kalek et al. (eds), *International Prosecution of Human Rights Crimes* (Springer 2007) 213–222, 217.

Parliamentary hearing.¹⁴⁸ To draw a more correct parallel between the ICC and national procedures, the latter ‘start’ at the investigatory stage envisaged in Articles 15 and 53 of the Statute and which are cast in terms of a case rather than a situation – not at the Article 13-14 stage.¹⁴⁹ In the national context subsidiarity can only mean ‘has the State with primary jurisdiction demonstrated that it is prosecuting the same crime and the same individual that is the subject of the complaint?’ According to Fischer-Lescano §153(f)(2)(iv) should be read narrowly, ‘the possibility of dropping the case according to [this provision of the] Code of Criminal Procedure is only if the act, here the accusations of responsibility of superiors, is in fact being criminally prosecuted. This is only the case if the accused themselves are confronted with proceedings before the legal remedies, eg, courts.’¹⁵⁰

Undoubtedly, the idea of looking at the USA’s treatment of crimes committed in Iraq as a whole took the pressure off a foreign national prosecutor who had only to determine that some action was being taken to prosecute rather than that specific charges had been brought against particular individuals. The Federal Prosecutor could therefore conclude that ‘In this instance there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint’.¹⁵¹ However, it appears that in reaching his decision, the Federal Prosecutor did not engage in the same test under Article 17 that the ICC Prosecutor would be required to use. Parts of the ICC regime were therefore referred to, and other aspects ignored. When it comes to determining whether or not the ICC should defer to a national investigation or prosecution, under Article 17(1)(a) ‘the Court shall determine that a case is inadmissible

¹⁴⁸ Andreas Schüller, ‘The Role of National Investigations in the System of International Criminal Justice – Developments in Germany’ (2013) 31(4) *Sicherheit und Frieden* 226–231, 228.

¹⁴⁹ Kai Ambos, ‘International Core Crimes, Universal Jurisdiction and §153F of the German Criminal Procedure Code: A Commentary on the Decision of the Federal Prosecutor General and the Stuttgart higher Regional Court in the Abu Ghraib/Rumsfeld Case’ (2007) 18 *Criminal Law Forum* 43–58, 52–53.

¹⁵⁰ Andreas Fischer-Lescano, ‘Torture in Abu Ghraib. The Complaint against Donald Rumsfeld under the German Code against Crimes under International Law’ (2005) 6 *German Law Journal* 689–702, 701.

¹⁵¹ Letter (n 142) 5.

where ... the *case* is being investigated or prosecuted by a State which has jurisdiction over it'. This is far more specific than a requirement that the State is investigating or prosecuting crimes or individuals connected to the wider 'situation'. Deferral is based on a State party's ability or willingness to prosecute a particular case; not simply on the basis that the USA has conducted investigations and prosecutions of some crimes committed at Abu Ghraib.

Despite claiming that the ICC Statute would be his guide, the German Federal Prosecutor did not consistently apply the same procedures used by the ICC Prosecutor. A somewhat confused reading of the German subsidiarity test thus emerges: it draws in part on ICC procedures, but not fully. The decision also provides little by way of precise guidance in respect of the concrete criteria that should be used to determine whether or not the offense is actually being prosecuted by the territorial or active/passive personality States. Maybe the intention was simply to use similar criteria to those engaged by the ICC Prosecutor; however, it would seem to be more helpful to develop specific national guidelines regarding what practical aspects need to be considered by a German prosecutor if the subsidiarity test is to be a transparent one that can be easily applied in other cases. Having a clear and robust set of publicly available criteria would help in regard to what subsidiarity in the context of the application of the principle of universal jurisdiction could mean for the international community more broadly.¹⁵² But opaqueness in this area is probably in the interests of the German prosecution services: prosecutions on the basis of universal jurisdiction may carry a high diplomatic cost and retaining as many discretionary powers as possible is in the political interest if not the interests of justice. Indeed, Germany has been heavily criticised for putting in place robust international crimes legislation which has not been made use of, despite

¹⁵² The intention was always that CCAIL would serve as a role model to other States. On publication, it was translated into eight languages by the Max Planck Institute for Foreign and International Criminal Law available at: <https://www.mpicc.de/de/forschung/publikationen/onlinepub.html> (accessed 31 January 2015).

numerous opportunities.¹⁵³ Things might however be starting to change: in May 2011 the first trial conducted on the basis of universal jurisdiction under CCAIL opened in Stuttgart, culminating in the prosecution of two Rwandans for numerous charges of crimes against humanity and war crimes.¹⁵⁴ Neither the Democratic Republic of Congo or Rwanda were deemed to be in a position to prosecute, hence an assessment on the basis of Germany's subsidiarity provisions (§153(f)(2)(iv), Code of Criminal Procedure) concluded that Germany ought to proceed with a prosecution, a decision supported by the territorial and nationality States.¹⁵⁵

In Spain, jurisdiction over specified international and transnational crimes is provided for under the *Ley Orgánica del Poder Judicial* 1985 (LOPJ).¹⁵⁶ Prior to 2009, jurisdiction could be exercised if the conduct constituted a crime under Article 23.4(a)-(g) LOPJ on the basis of universal jurisdiction. Jurisdiction could also be exercised according to Spain's treaty obligations.¹⁵⁷ This made Spain's legislation on international and transnational crimes one of the broadest in the world with near unfettered recourse to the principle of universal jurisdiction. Following a series of high profile incidents involving the application of these laws, in November 2009 a first amendment was passed that, inter alia, amended Article 23 LOPJ so that universal jurisdiction could only be invoked if the accused was present in Spain,

¹⁵³ See further, Schüller (n 148) 227–228.

¹⁵⁴ Human Rights Watch, 'Germany: Groundbreaking Trial for Congo War Crimes', 2 May 2011 available at: <http://www.hrw.org/news/2011/05/02/germany-groundbreaking-trial-congo-war-crimes> (accessed 31 January 2015).

¹⁵⁵ BBC, 'Rwanda: Ignace Murwanashyaka and Straton Musoni tried May 4, 2011' available at: <http://www.bbc.com/news/world-africa-13275795> (accessed 31 January 2015); Human Rights Watch, 'Germany: Q&A on Trial of Two Rwandan Rebel Leaders', 2 May 2011 available at: http://www.hrw.org/de/news/2011/05/02/germany-qa-trial-two-rwandan-rebel-leaders#_Toc291850182 (accessed 31 January 2015); Schüller (n 148) 229.

¹⁵⁶ Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, as amended by Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.

¹⁵⁷ Since 2009, the list of crimes in Art 23.4 consists of: a) Genocide, crimes against humanity and crimes of war; b) Terrorism; c) Piracy and illicit seizure of aircraft; d) crimes related to prostitution and corruption of minors or the handicapped; e) illegal trafficking of psychotropic, toxic and narcotic drugs; f) Human Trafficking and clandestine immigration of persons, whether or not workers; g) Those related to female genital mutilation, if the responsible are in Spain; h) any other crimes that, under international treaties or agreements, must be prosecuted in Spain.

there were Spanish victims or a ‘relevant connection’ to Spain. Then, in March 2014 a second amendment restricted universal jurisdiction to all but the narrowest cases: namely, when Spain has denied extradition of a foreigner, which arguably is not universal jurisdiction at all, but rather an application of the *aut dedere aut judicare* principle.¹⁵⁸ Instead, in addition to territorial jurisdiction, Spanish courts will only be able to exercise judicial jurisdiction over the crimes of genocide, crimes against humanity, war crimes and torture if the accused is a Spanish national or a foreigner who is resident in Spain (or extradition of a foreigner has been requested but denied by Spain).¹⁵⁹ These amendments change Spain’s international and transnational crimes legislation from being one of the most far-reaching set of provisions in the world to one of the more restrictive.

In contrast to the legislative basis afforded to the subsidiarity principle by Germany from the outset, in Spain the principle was discussed and developed first by the courts, although it is now expressly included in the LOPJ.¹⁶⁰ The *Guatemala Genocide* case marked the high watermark for the application of the subsidiarity principle to Spain’s universal jurisdiction laws by the Spanish courts.¹⁶¹ The amendments of 2009 and 2014 mean that such a case is

¹⁵⁸ Announcing the proposed amendments in February, see El País, ‘Popular Party fast-tracks quashing of universal jurisdiction’ 27 February 2014 available at: http://elpais.com/elpais/2014/02/27/inenglish/1393529217_120740.html (accessed 31 January 2015).

¹⁵⁹ Arts 23.4(a) and (c). The ‘popular action’ clause has also been removed: courts will only investigate the crimes referred to in Articles 23 and 24 if the complaint has been filed by a victim or the Prosecutor. See further, Rosa Ana Alija Fernández, ‘The 2014 Reform of Universal Jurisdiction in Spain: From All to Nothing’ (2014) 13 *Zeitschrift für Internationale Strafrechtsdogmatik* 717–727.

¹⁶⁰ Only in 2009 was subsidiarity placed on a legislative footing when the LOPJ was first amended. Spanish courts would only be able to exercise judicial jurisdiction if another competent State or international tribunal had not already initiated an effective investigation and prosecution of the same criminal acts. Furthermore, any criminal process initiated in Spain would be provisionally suspended in favour of the other country or international tribunal that had commenced proceedings for the same facts. (Art 23.4.) The principle of subsidiarity under Spanish criminal law was further clarified in the 2014 revision which now explicitly excludes prosecution in Spain for the offences covered in Article 23 when the case is being investigated or prosecuted by (a) an international court, or (b) by the territorial or nationality States. (Art 23.5.)

¹⁶¹ The decision touched on and discussed many other important aspects of universal jurisdiction, Spanish jurisdiction and international crimes, but only the ‘subsidiarity’ aspects of the decisions are discussed in this section. For a full analysis of the Guatemalan Genocide case from the start and covering all aspects, see Hervé Ascensio, ‘Are Spanish Courts backing down on Universality? The Supreme Tribunal’s Decision in Guatemalan Generals’ (2003) 1 *Journal of International Criminal Justice* 690–702; Hervé Ascensio, ‘The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals: Unconditional Universality is Back’ (2006) 4

now unlikely to ever reach the Spain's courts again. Nonetheless, aspects of the decisions handed down by Spain's *Audiencia Nacional*, *Tribunal Supremo* and *Tribunal Constitucional* are discussed here because some of their dicta on the scope of subsidiarity and problems with its application is useful to the wider topics discussed in this thesis: namely, the prioritisation of judicial jurisdiction claims and the search for an appropriate forum.

At the first stage of proceedings, the investigating judge declared himself to be competent to investigate the case. Spain's exercise of universal jurisdiction would be legitimate because, based on Article 6 of the Genocide Convention 1948 which gave primary jurisdiction to the territorial State or an international criminal tribunal, Spain's jurisdiction would be 'subsidiary' to that of Guatemala – the territorial State having primary jurisdiction. This was the first time the term 'subsidiary' was used by a Spanish judge. As Guatemala had not acted, Spain was entitled to exercise universal jurisdiction in the case based on Article 23.4 LOPJ. Such action was important to uphold the principle that international crimes such as genocide and terrorism were prosecuted in the interests of the international community as a whole.¹⁶² On appeal, however, the *Audiencia Nacional* (AN) reversed the decision that had granted the Spanish courts jurisdiction on the basis that Guatemala had not yet been given enough time to demonstrate that it was minded not to prosecute. Since 1996 it had in place adequate national legislation that would permit prosecutions and could not therefore be considered to be inactive to the extent that Spain should step in. It was simply too early to judge. The AN nonetheless upheld the line of reasoning adopted by the examining magistrate and held that Spain's jurisdiction was indeed subsidiary to that of the territorial State on the basis of Article

Journal of International Criminal Justice 586–594; Naomi Roht-Arriaza, 'Guatemala Genocide Case. Judgment No. STC 237/2005' (2006) 100 *American Journal of International Law* 207–213.

¹⁶² Juzgado Central de Instrucción N° 1 Audiencia Nacional, Diligencias previas 331/99, Auto en la villa de Madrid, 27 de marzo de 2000, Sixth Ground.

VI of the Genocide Convention. Article VI only listed territorial and international jurisdiction. All other jurisdictional bases were therefore subsidiary.¹⁶³

On appeal to the *Tribunal Supremo* (TS), the concept of subsidiary jurisdiction was further discussed.¹⁶⁴ The appellants (who were themselves victims) argued, inter alia, that attributing a subsidiary character to universal jurisdiction under Article VI of the Genocide Convention constituted a misinterpretation of the provision and consequently ‘subsidiarity’ had been given a different meaning to that used by the ICC under Article 17;¹⁶⁵ Guatemala’s legislation did not enable it to prosecute the acts in question, so even if the subsidiarity principle were valid, it could not be applied to the case in hand; and finally, that Article VI of the Genocide Convention, alongside Article 23.4 LOPJ, established universal jurisdiction for genocide directly and was not made subject to a principle of subsidiarity.¹⁶⁶

The TS recognised that while the Genocide Convention did not establish universal jurisdiction, nor did it exclude it. As a result, ‘... some sort of priority criteria will be necessary, directed at resolving the supposed effective and real concurrence of active jurisdiction, in a manner that considers it natural that those courts in the place of commission of the act exclude the jurisdiction of courts of another State.’¹⁶⁷ Yet, if a State were to intervene on a subsidiary basis, due to either the real or apparent inactivity of the territorial State’s courts, this would require it to pass judgment on the judicial capacity of the courts of another sovereign State.¹⁶⁸ (This is undoubtedly a real concern for the idea of subsidiary

¹⁶³ Juzgado Central de Instrucción Nº 1 Audiencia Nacional, Sala de lo Penal, Causa d. previas 331/99. Rollo Apelación, No 115/2000, Auto en la villa de Madrid, 13 de diciembre de 2000, Second Ground: ‘La postura del Pleno fue por tanto la siguiente: Subsidiariedad de actuación de la jurisdicción penal española para el delito de genocidio cuando los hechos son extraterritoriales.’ Author’s translation: ‘The position of the Plenary was therefore as follows: Spain’s judicial jurisdiction for the crime of genocide is of a subsidiary nature when the conduct occurred extraterritorially.’

¹⁶⁴ Tribunal Supremo, *Guatemala Genocide Case* 42 (2003) ILM 686, Judgment of 23 February 2003.

¹⁶⁵ The decision refers to ‘subsidiarity’ in the context of the ICC; complementarity must be what was meant by the court.

¹⁶⁶ *Guatemala Genocide* (n 164) Fifth Ground, paras 1–2.

¹⁶⁷ *Guatemala Genocide* (n 164) Sixth Ground, para 3.

¹⁶⁸ *Guatemala Genocide* (n 164) Sixth Ground, para 5.

jurisdiction, as identified above in relation to the German law, and thus far proponents of subsidiarity have not satisfactorily identified what criteria could best be used by the State needing to make the assessment.) The solution the TS came up with, while laudable in theory would, in practice, render universal jurisdiction for genocide virtually impossible to invoke. The TS reasoned that as the impact on international relations associated with any subsidiarity assessment carried out by Spain itself would be considerable it should be up to the UN to decide what action should be taken. In other words, as Article VIII of the Genocide Convention provides that ‘any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III’ it should fall to the UN to decide whether or not the territorial State is in a position to prosecute. Only if the UN organs determine that the territorial State is unable to do so should the third State then exercise its subsidiary universal jurisdiction. The effect of the TS’s judgment was to reject ‘the ‘horizontal subsidiarity’ test as applied by the AN [...] which in the event resulted in excessive stiffening of the condition.’¹⁶⁹ The solution offered by the TS would have the advantage of taking the subsidiarity determination out of the hands of a State (and thus lessens the direct impact on its international relations) but renders the exercise of universal jurisdiction over the crime of genocide, recognised as legitimate under customary international law, subject to a prior decision of the UN. The TS consequently appears to attribute to the UN (but without indicating which organs would be responsible) a role not wholly unlike that of the Prosecutor of the ICC, who is mandated to determine whether or not a State party is willing or able to exercise judicial jurisdiction itself. In reality, their interpretation of Article VIII of the Convention cannot be correct: assistance

¹⁶⁹ Ascensio, Case Comment (n 161) 694.

in prevention and suppression of the crime of genocide does not extend to determining which State should prosecute *ex post facto*.

The minority of judges at the TS, while agreeing in essentials with the assessment that Spanish universal jurisdiction should be subsidiary (secondary) to that of Guatemala, did however use a different set of criteria for determining when subsidiarity should come into play and reached the conclusion that in this case the examining magistrate had been correct to assume jurisdiction.¹⁷⁰ As jurisdiction over the crime of genocide will always be concurrent because priority of one jurisdictional base over another is not established in the Convention, the application of a ‘principle of necessity of jurisdictional intervention’ becomes necessary.¹⁷¹ Whether intervention in the form of the exercise of subsidiary universal jurisdiction is required should be determined simply by assessing the available evidence. If such an investigation provides a ‘reasonable and serious indication that the serious crimes alleged have not to date been prosecuted in an effective manner by territorial jurisdiction, for whatever reasons that may be’ universal jurisdiction could be exercised. The minority added that this could be done ‘without implying any pejorative judgment on the political, social or economic conditions of the country which have made a *de facto* determination of impunity [by virtue of their lack of prosecution to date].’¹⁷² In the case before it, the minority of judges at the TS stated it was clear that ‘the courts in Guatemala have not been able to effectively exercise jurisdiction with regard to genocide of the Mayan population’ and therefore Spain should not be barred from exercising universal jurisdiction.¹⁷³

The minority dissenting opinion sought to depoliticise the subsidiarity determination by focusing on a factual assessment of the situation whereas the majority appeared to be all too

¹⁷⁰ *Guatemala Genocide* (n 164) Fourth Ground, paras 1, 6.

¹⁷¹ *Guatemala Genocide* (n 164) Fourth Ground, para 1.

¹⁷² *Guatemala Genocide* (n 164) Fourth Ground, para 4.

¹⁷³ The other ground discussed by the Court in its judgment was the need for a clear nexus or link to Spain in order for jurisdiction to be exercised.

aware of the political implications of any such appraisal and used the potential threat to international relations to steer well clear of a subsidiarity test that would be applied directly by the Spanish courts. When the *Tribunal Constitucional* (TC) issued its judgment in 2005, it echoed the TS's dissenting opinion on the matter and adopted the simpler, fact-based view of subsidiarity.¹⁷⁴

The TC found that the only restriction on the exercise of jurisdiction is that the individual concerned must not have previously been convicted, found to be innocent or have been pardoned abroad for the same facts (*res judicata*).¹⁷⁵ Universal jurisdiction for the list of crimes detailed in Article 23 was therefore concurrent with other bases of jurisdiction and 'absolute', ie not subject to any 'presence' requirement.¹⁷⁶ Moreover, nothing in Article VI of the Genocide Convention could be interpreted as limiting jurisdiction to the territorial State or to an international criminal tribunal. Universal jurisdiction was equally permissible.¹⁷⁷ From this starting point, the TC discussed the subsidiarity principle. The TC acknowledged that 'there are undoubtedly both procedural as well as political and criminal grounds for supporting the priority of the locus delicti, which is part of the classic heritage of international criminal law. [...] [And] Since (at least at the level of principles) all States are jointly committed to prosecuting these atrocious crimes that affect the international community, elementary procedural and political-criminal considerations must give priority to the jurisdiction in which the crime was committed.'¹⁷⁸ Thus, instead of a 'subsidiary' universal jurisdiction, the Court preferred to cast its test in terms of 'priority' for the territorial jurisdiction where possible. Nonetheless, it concluded that the TS had given an 'extremely restrictive interpretation to the subsidiarity test [...] requir[ing] the complainants

¹⁷⁴ Tribunal Constitucional, No 237/2005, Judgment of 26 September 2005, available at: <http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2372005.aspx> (accessed 31 January 2015).

¹⁷⁵ Tribunal Constitucional (n 174) Section II, para 3 discussing Art 23.4(2).

¹⁷⁶ Tribunal Constitucional (n 174) Section II, para 3.

¹⁷⁷ Tribunal Constitucional (n 174) Section II, para 4.

¹⁷⁸ Tribunal Constitucional (n 174) Section II, para 4.

to fully prove the legal impossibility or the prolonged inactivity of the courts, to the point of demanding proof that the Guatemalan courts have effectively rejected the complaint'.¹⁷⁹ This placed too onerous a burden on the victims. Instead, according to the CT 'to activate universal extraterritorial jurisdiction it should suffice for the complainant to provide serious and reasonable evidence of the failure to act of the courts, which would reflect either a lack of will or a lack of capacity to effectively repress those crimes.'¹⁸⁰ This would, it held, be more appropriate for the victims to have to prove. Moreover, to read such a strict subsidiarity requirement into the Spanish law would defeat the purpose of universal jurisdiction as set out in Article 23.4 LOPJ and also the intentions of the Genocide Convention.¹⁸¹

Subsidiarity as a test was not, in the end, dismissed entirely by the CT but was cast in different terms from that adopted by the majority of the TS; priority where possible should be given to the territorial State, although not at the expense of international justice and a simple factual review of the evidence of prosecutions by the territorial State would suffice. The value of prosecutions in the place where the criminal conduct was committed was recognised, although the Court was equally keen to make clear that universal jurisdiction in Spain was also absolute. There was consequently no legal impediment present in Spain's legislation that would impede the exercise of universal jurisdiction in the *Guatemalan Genocide* case. If evidence were presented that showed Guatemala to be actively investigating and prosecuting, Spain should defer as a matter of good judicial policy.

Aspects of the Spanish courts' reasoning may be criticised, but the discussion surrounding subsidiarity has much to recommend it. Many of the points raised highlight the profound difficulties States will face as they seek to determine whether or not they should defer the exercise of their judicial jurisdiction to another State that may be 'better able' to prosecute,

¹⁷⁹ Tribunal Constitucional (n 174) Section II, para 4.

¹⁸⁰ Tribunal Constitucional (n 174) Section II, para 4.

¹⁸¹ Tribunal Constitucional (n 174) Section II, para 4.

on the basis of subsidiarity or some other test. The prioritisation of a particular jurisdiction, usually the territorial or nationality States, will often still be the best way to avoid an actual conflict of judicial jurisdiction from manifesting itself; there is, after all, an inbuilt presumption in subsidiarity against prosecution in a State that bases its claim on universal jurisdiction if another judicial forum is available. However, even if a subsidiarity principle is rigorously applied, this does not mean that concurrent investigations in the State seeking to assert universal jurisdiction and other States will not have taken place already, thus entailing a duplication of efforts and the incurring of substantial sunk costs. Moreover, deferral must only take place where it is clear that a more closely connected jurisdiction will prosecute (or, at least investigate to determine whether or not a prosecution should be brought). Such a determination would be extremely difficult for the State applying a subsidiary test to undertake successfully, which probably explains why few States have legislated accordingly.

2.2. Jurisprudence of the ICTY

At the international level, the ICTY has had to consider the topic of the most appropriate national forum based on the criteria set down in Rule 11*bis*, ‘Referral of the Indictment to another Court’ of the Rules of Procedure and Evidence.¹⁸² The Tribunal has been tasked with

¹⁸² The relevant sections of the Rule reads:

Rule 11*bis*: Referral of the Indictment to Another Court (*Adopted 12 Nov 1997, amended 30 Sept 2002*) —

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the ‘Referral Bench’), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or (*Amended 10 June 2004*)

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, (*Amended 10 June 2004*) so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (*Amended 30 Sept 2002, amended 11 Feb 2005*)

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (*Amended 30 Sept 2002, amended 10 June 2004, amended 11 Feb 2005*)

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused. (*Amended 30 Sept 2002, amended 28 July 2004, amended 11 Feb 2005*)

applying this criteria to decide to which national courts remaining indictments should be referred. The jurisprudence of the ICTY, which focuses on a suitable ‘nexus’ between the accused and the State, is particularly rich in this sense and provides a helpful point of comparison to the national cases and possible source of inspiration to States in respect of the criteria employed.¹⁸³

Originally, the 2002 version of Rule 11*bis* only foresaw possible referral to a State ‘(i) in whose territory the crime was committed or; (ii) in which the accused was arrested.’ In June 2004 this was extended to include referral to any State ‘having jurisdiction and being willing and adequately prepared to accept such a case’¹⁸⁴ – in other words, a State wishing to exercise universal jurisdiction could also be considered. Interestingly, nationality is not foreseen as a separate basis for jurisdiction, although naturally the State of nationality may also be one of the three States identified in the paragraph (A). The problems associated with using the nationality of the accused was highlighted in the case of *Prosecutor v Željko Mejačić, Momčilo Gruban, Dušan Fuštar & Duško Knežević* where not only was the precise nationality status of all the accused unclear, but it also became apparent that citizenship was being granted to individuals while they were in the custody of the ICTY.¹⁸⁵ The Referral Bench was also at pains to stress that citizenship does not have ‘... a significant relevance to the determination of the issue to which State [referral should] be ordered.’¹⁸⁶ It was perhaps in recognition of the likely challenges that nationality based jurisdiction could present that

(The rest of Art 11*bis*, paragraphs (D) through (I), are largely procedural and include the powers of the Tribunal to oversee and potentially recall a case, should the need arise.)

¹⁸³ This thesis focuses on the ICTY as it has provided a rich body of case law in this area which is directly relevant to this thesis because of the multiple possible national jurisdictions to which cases might be referred. Space considerations also limit the discussion to this area. The ICTR has only more recently started to consider the question of referrals to States and the focus is on generally on the referral to one State, the territorial State. On Rwandan transfer cases, see further, Jesse Melman, ‘The Possibility of Transfer(?): A Comprehensive Approach to the International Criminal Tribunal for Rwanda’s Rule 11*bis* to Permit Transfer to Rwandan Domestic Courts’ (2011) 79 *Fordham Law Review* 1271–1332.

¹⁸⁴ ICTY RPE Rule 11*bis*(A) as amended 30 September 2002, IT/32/Rev.25.

¹⁸⁵ *Prosecutor v Željko Mejačić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision on Prosecutor’s Motion for Referral of Case pursuant to Rule 11*bis*, Case No IT-02-65-PT, 20 July 2005 (Referral Bench) paras 34–38.

¹⁸⁶ *Mejačić et al.* (n 185) para 38.

lead the judges to exclude it as a separate category under paragraph (A) when they drafted the rule in the first place. Paragraph (A)(iii) – covering universal jurisdiction – has not been made use of to date.¹⁸⁷ While the Prosecutor should state in the transfer request to which State referral is envisaged, the final decision lies with the Referral Bench and has been subject to challenge by the defence on several occasions, as the discussion of the case law below will show.

The accused may not himself initiate the referral of his case to a national court; however, the Referral Bench may act *proprio motu* in deciding to refer as well as following a request from the Prosecutor.¹⁸⁸ The power of the Bench in this respect means that it could foreseeably act on a direct request from the accused to exercise its *proprio motu* powers.¹⁸⁹ But this would seem tantamount to affording the accused more rights than paragraph (B) envisages. These powers have not been used and would, in any event, probably only be used sparingly, ie where there was clear evidence that another forum was more suitable and following the initial request to refer by the Prosecutor rather than as a result of a direct, separate, petition from the accused while in custody. The limited use of the *proprio motu* powers was acknowledged by the Referral Bench for the first time in *Rašević & Todović* where it had been urged by both the Defence and Serbia & Montenegro to use its powers to refer to this State rather than to Bosnia & Herzegovina, as requested by the Prosecutor. It stated ‘While [we] may order referral to a State *proprio motu* pursuant to Rule 11bis(B), it would normally be appropriate to do so only in an obvious case’.¹⁹⁰ It seems that only if there were ‘significant problems’ with sending a case to the State designated by the Prosecutor would the Bench consider using its

¹⁸⁷ ICTY, Status of Transferred Cases available at: <http://www.icty.org/sid/8934> (accessed 31 January 2015).

¹⁸⁸ Paragraph (B).

¹⁸⁹ Sarah Williams, ‘ICTY Referrals to National Jurisdictions: a Fair Trial or a Fair Price?’ (2006) 17 *International Criminal Law Forum* 177–222, 188.

¹⁹⁰ *Prosecutor v Mitar Rašević and Savo Todović*, Decision on Referral of Case under Rule 11bis with Confidential Annexes I & II, Case No IT-97-25/1-PT, 8 July 2005 (Referral Bench) para 31.

own powers,¹⁹¹ although what an ‘obvious case’ or ‘significant problems’ might constitute has been left open. The reticence to use these *proprio motu* powers is apparent in each of the decisions where the State of referral has been contested. Any potential unfairness to the defence caused by referral being a prosecutor-initiated process should, however, be mitigated by the fact that both the prosecutor and the accused are given the right to appeal any decision of the Referral Bench, a right which has been invoked in most of the referral cases.¹⁹²

The Referral Bench of the ICTY delivered its first decision on the transfer of a case to a national jurisdiction in May 2005.¹⁹³ Since then a total of 11 cases involving 17 accused have been heard, with eight of those cases resulting in a referral to a national jurisdiction. Of the 13 accused who have been transferred, 10 were sent to Bosnia & Herzegovina,¹⁹⁴ two to Croatia¹⁹⁵ and one to Serbia.¹⁹⁶ The transfer of four individuals has been denied¹⁹⁷ and five further requests initially filed by the Prosecutor were later withdrawn.¹⁹⁸

¹⁹¹ *Rašević & Todović* (n 190) para 33.

¹⁹² Art 11bis(I): An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision. (*Amended 11 Feb 2005*.)

¹⁹³ *Prosecutor v Radovan Stanković*, Decision on Referral of a Case under Rule 11bis, Case No IT-96-23/2-PT, May 17, 2005 (Referral Bench). See also *Prosecutor v Radovan Stanković*, Decision on Rule 11bis Referral Case No IT-96-23/2-AR11bis. 1, 1 September 2005 (Appeals Chamber).

¹⁹⁴ *Stanković* (n 193) (Referral Bench and Appeals Chamber); *Prosecutor v Gojko Janković*, Decision on Referral of Case under Rule 11bis, Case No IT-96-23/2-PT, 25 July 2005 (Referral Bench) and *Prosecutor v Gojko Janković*, Decision on Rule 11bis, Referral Case No IT-96-23/2-AR11bis.2, 15 November 2005 (Appeals Chamber); *Mejakić et al.* (n 185) and *Prosecutor v Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević*, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis, Case No IT-02-65-AR11bis.1, 7 April 2006 (Appeals Chamber); *Prosecutor v Paško Ljubičić*, Decision to Refer the Case to Bosnia & Herzegovina pursuant to Rule 11bis, Case No IT-00-41-PT, 12 April 2006 (Referral Bench) and *Prosecutor v Paško Ljubičić*, Decision on Appeal against Decision on Referral under Rule 11bis, Case No IT-00-41-AR11bis.1, 4 July 2006 (Appeals Chamber); *Rašević and Todović* (n 190) and *Prosecutor v Mitar Rašević and Savo Todović*, Decision on Savo Todović’s Appeal against Decisions on Referral under Rule 11bis, Case No IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, 4 September 2006 (Appeals Chamber); *Milorad Trbić*, Case No IT-05-88/1, 27 April 2007 (Referral Bench).

¹⁹⁵ *Prosecutor v Rahim Ademi and Mirko Norac*, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11bis, Case No IT-04-78-PT, 14 September 2005 (Referral Bench).

¹⁹⁶ *Prosecutor v Vladimir Kovačević*, Decision on Referral of Case pursuant to Rule 11bis with confidential and partly ex parte annexes, Case No IT-01-42/2-I, 17 November 2006 (Referral Bench).

¹⁹⁷ Status of Transferred Cases (n 187).

¹⁹⁸ Status of Transferred Cases (n 187).

In *Stanković* it was established that the Referral Bench possesses the power to refer a case from the Tribunal to another jurisdiction and that Rule 11*bis* has a legal basis under the ICTY Statute.¹⁹⁹ In that case the choice of State of referral – Bosnia & Herzegovina – was not contested; rather, it was contended by the defence that the case should be tried before a ‘national court’ (ie the District Court of Trebinje in Republika Srpska) rather than before the newly constituted War Crimes Chamber of the State Court in Bosnia & Herzegovina (WCC).²⁰⁰ This argument was rejected by the Referral Bench following the Government of Bosnia & Herzegovina’s submission that the WCC was the only court that was competent to hear referred cases in that State. The Bench maintained that it did not wish, as far as was possible, to interfere with the decisions of State authorities in respect of choice of national judicial forum.²⁰¹ Its concern was simply to ascertain whether or not a case should be transferred to a particular State’s national authorities in the first place. Rule 11*bis* only provides that the case will be referred to the relevant ‘authorities of a State’ having jurisdiction on one of the bases outlined in paragraph (A) – it is essentially the prerogative of those authorities to determine which national court will hear the case.²⁰² Once the competence of the Referral Bench to refer was confirmed as having a legal basis under the Statute, attention turned to the precise parameters of these powers.

The requirements for a State to be considered an appropriate referral forum and the matter of whether there is an implicit hierarchy in the jurisdictional bases detailed in paragraph (A)(i)-(iii) were discussed directly in several of the referral cases. Both the Referral Bench and the Appeals Chamber have been unequivocal in their view that the individual circumstances of each case would guide the decision whether or not to refer. In July 2005 the Referral Bench

¹⁹⁹ *Stanković*, Appeals Chamber Decision (n 193) paras 14–17.

²⁰⁰ *Stanković*, Referral Bench Decision (n 193) para 23.

²⁰¹ *Stanković*, Referral Bench Decision, (n 193) paras 24, 31.

²⁰² In the case of the three individuals transferred to Croatia (two accused) and Serbia (one accused), the question of the appropriate national court was not raised during proceedings, nor was referral contested.

issued its decisions on the transfer of the case files to national jurisdictions in *Janković, Rašević & Todović* and *Mejakić, Gruban, Fuštar & Knežević*. In April 2006 it issued its decision in the case of *Ljubičić*. In each of the first three cases the Prosecutor submitted that they should be referred to Bosnia & Herzegovina; in each case the defence contested this, arguing that Serbia & Montenegro would be more appropriate. In *Ljubičić* the States concerned were, again, Bosnia & Herzegovina for the Prosecutor but this time Croatia for the defence.

In upholding the Prosecutor's request for referral to Bosnia & Herzegovina in each, the Referral Bench focused on the 'nexus' between the accused and that State as opposed to Serbia & Montenegro/Croatia. While it did not explain its reasons for concluding which State had a greater nexus in *Rašević & Todović*, stating simply 'In the view of the Referral Bench, the nexus with Serbia and Montenegro is much weaker with respect to the individual case of each Accused than the nexus with Bosnia and Herzegovina'²⁰³ in its subsequent decisions of *Mejakić et al.*, *Janković* and *Ljubičić* the grounds for the decision were provided. The Referral Bench stated in those three cases that the fact that the crimes were committed in Bosnia & Herzegovina, against persons living in Bosnia & Herzegovina and by accused who, at the time of the alleged crimes and at the time of Bench's decision, were and remain citizens of Bosnia & Herzegovina were all relevant factors.²⁰⁴ In *Mejakić et al.*, it was furthermore considered to be significant that two of the four were originally also transferred to The Hague from Bosnia & Herzegovina.²⁰⁵ The only factor weighing in favour of referral to Serbia & Montenegro in *Janković* was that prior to the charged timeframe, in 1990, his permanent residence was Montenegro and that at the time of the Referral Bench's decision he

²⁰³ *Rašević & Todović*, Referral Bench Decision (n 190) para 32.

²⁰⁴ In *Mejakić et al.*, Referral Bench Decision (n 185) three of the four Accused were citizens of Bosnia & Herzegovina at the time the crimes were committed. Dusan Fuštar was not and has not since obtained citizenship of Bosnia & Herzegovina, either.

²⁰⁵ *Mejakić et al.*, Referral Bench Decision (n 185) para 41; *Janković*, Referral Bench Decision (n 194) para 24.

also met all the criteria in order to obtain citizenship of that State.²⁰⁶ In *Mejakić et al.*, the only nexus to Serbia & Montenegro was that two of the four were originally transferred to The Hague from that State and that ‘some of the accused, perhaps all of them, are currently citizens of Serbia & Montenegro’.²⁰⁷ And, in *Ljubičić*, the subsequent grant of Croatian citizenship, ongoing criminal proceedings in Croatia and his voluntary surrender to the ICTY from that State were not enough to tip the balance in favour of referral to Croatia instead of to Bosnia & Herzegovina.²⁰⁸ But, as discussed previously, nationality is not a separate ground for jurisdiction under the Rule and its relative weight is consequently much reduced.

‘Nexus’ was considered to be the only key determining factor for the Referral Bench in guiding its decision to honour the Prosecutor’s request or not. The argument that Rule 11bis(A) ranked the jurisdictional bases in terms of priority was resoundingly rejected by it, a position upheld by the Appeals Chamber. In her Request under Rule 11bis to the Trial Chamber in *Ademi & Norac* the Prosecutor had clearly expressed her preference for putting the bases of jurisdiction under paragraph (A) in a descending hierarchy.²⁰⁹ She reasoned that:

Should more than one State have an interest in the prosecution of a case, the Prosecutor would interpret these provisions as ranking the possible States in descending order of priority. In accordance with the principle that justice in criminal matters should be rendered as closely as possible to the victims and to the place where the crimes were committed, the Prosecutor considers that, where possible, a case should be referred to the authorities of the State where the crimes alleged took place.²¹⁰

In the end, the Referral Bench issued its decision in *Mejakić et al.* prior to that of *Ademi & Norac* and set out its reasons for rejecting the ‘preferential ordering’ put forward by the Prosecutor there. It stated:

²⁰⁶ *Janković*, Referral Bench Decision (n 194) para 24.

²⁰⁷ *Mejakić et al.*, Referral Bench Decision (n 185) para 41. The uncertainties surrounding the nationalities of the Accused is discussed in paras 34–38 of the decision.

²⁰⁸ *Ljubičić*, Referral Bench Decision (n 194) para 29.

²⁰⁹ Request of 2 September 2004. The argument in favour of ‘preferential ordering’ was also put forward in *Rašević & Todović*, Referral Bench Decision (n 190) para 26; *Mejakić et al.*, Referral Bench Decision (n 185) para 33; *Janković*, Referral Bench Decision (n 194) para 21; *Ljubičić*, Referral Bench Decision (n 194) para 25.

²¹⁰ Request (n 209) para 6.

It is contended that this is the proper construction of the Rule, and is also consistent with established principles of international and domestic law. As a matter of construction, the Rule appears, relevantly, to be concerned only to identify the alternatives and gives no indication of a hierarchy of, or priority between, States. Further, it has not been shown that there is an established priority in international law in favour of the State in whose territory a crime was committed. International extradition treaties, whether multilateral or bilateral, offer some analogy, but these do not typically provide for primacy of any one ground of jurisdiction. In domestic jurisdictions, the question is often regulated by statute and there is no universal provision or practice.²¹¹

This position is consistent with international law.²¹² It is understandable why the Prosecutor would wish to argue that territoriality trumps all other bases of jurisdiction, and territoriality does enjoy a unique position in the legislation of many States. The Referral Bench has nonetheless been careful not to exclude other States automatically, which could be the effect if a hierarchy in paragraph (A) was recognised, and all the more so given that Bosnia & Herzegovina has the specialised WCC in place and appears keen to prosecute crimes committed on its territory where possible. The WCC is but one available judicial forum; it is not the only suitable one.

The Appeals Chamber confirmed in *Janković* (its first decision dealing with the topic of ‘preferential ordering’ and competing claims to jurisdiction) that, under Rule 11bis(A)(i)-(iii), the Referral Bench is free to exercise the discretion vested in it ‘to choose [a referral State] without establishing any hierarchy among these three options and without requiring [it] to be bound by any party’s submission that one of the alternative jurisdictions is allegedly the most appropriate.’²¹³ It also noted that no hierarchy exists for determining criminal jurisdiction or for deciding the most appropriate jurisdiction in cases of jurisdiction concurrency generally.²¹⁴ To indicate otherwise, in accordance with the Prosecutor’s wishes, would contradict the general tenor of international law on the subject. To support its conclusions, the

²¹¹ *Mejakić et al.* (n 185) para 40.

²¹² See Chapter 1.

²¹³ *Janković*, Appeals Chamber (n 194) para 33.

²¹⁴ *Janković*, Appeals Chamber (n 194) para 34.

Appeals Chamber cited the European Convention on the Transfer of Proceedings in Criminal Matters 1972 and the Eurojust Guidelines 2003 that require, in cases of jurisdictional concurrency and conflict, the range of factors in the individual case to be considered in any decision as to which State should exercise its judicial jurisdiction.²¹⁵ Consequently, the Referral Bench had been correct to apply a ‘nexus’ test to determine whether Bosnia & Herzegovina or Serbia & Montenegro should be the State of referral.²¹⁶ In the *Mejakić et al.*, *Todović*²¹⁷ and *Ljubičić* appeals against the decision to transfer their case files to Bosnia & Herzegovina, the Appeals Chamber followed its earlier decision in *Janković*, citing extensively from that decision, and upholding both the State of referral indicated by the Prosecutor in the original request and the ‘nexus’ criteria adopted by the Referral Bench to justify this decision.²¹⁸

All the referral decisions issued by the ICTY have involved States in the region where the conflict took place, with the tension being between the ‘territorial’ and the ‘nationality’ States. No further transfer of indictments are going to be considered by the Referral Bench.²¹⁹ It would, however, have been interesting to see how the Tribunal might respond to the situation where the accused was either originally apprehended in a third State, thus establishing the prima facie jurisdiction of that State under paragraph (A)(ii), or the Prosecutor decided to seek referral to a State that fits the very broad criteria under paragraph (iii). Taking an existing example and putting it into the ‘referral context’, Nikola Jorgić was arrested in Germany and tried there in 1997 for his part in Bosnian genocide under the State’s universal jurisdiction law for the crime of genocide. He was found guilty of 11 counts of

²¹⁵ *Janković*, Appeals Chamber (n 194) paras 35–36.

²¹⁶ *Janković*, Appeals Chamber (n 194) para 37.

²¹⁷ Rašević, the joined party in the original submission, did not appeal the referral of his case to Bosnia & Herzegovina.

²¹⁸ *Mejakić et al.*, Appeals Chamber (n 194) paras 43–44; *Rašević & Todović*, Appeals Chamber (n 194) paras 42–43; *Ljubičić*, Appeals Chamber (n 194) paras 13–14.

²¹⁹ ICTY, Transfer of Cases available at: <http://www.icty.org/sections/TheCases/TransferofCases> (accessed 31 January 2015).

genocide.²²⁰ This case was decided when trials at the ICTY were just getting under way and well before the Completion Strategy and the role of national courts in finishing up the work of the Tribunal was ever formally contemplated. However, Jorgić could have been transferred to the ICTY by Germany and, had the matter of referrals to national jurisdictions been apposite at that point in time, the question for the Prosecutor would have been whether to seek referral to Bosnia & Herzegovina under paragraph (A)(i) or to Germany under either sub-sections (ii) or (iii). Whether or not the Prosecutor would have sought referral to a paragraph (ii) or (iii) State instead of the territorial State and if the Referral Bench would look differently at a case where the other potential referral State was outside the former Yugoslavia, perhaps using its *proprio motu* powers to transfer the case to a State such as Germany is open to speculation. The statement in *Ademi & Norac*²²¹ and the position subsequently advanced by the Prosecutor might well suggest that Bosnia & Herzegovina would have been preferred in the case of Jorgić. While the other jurisdictional grounds in paragraph (A) thus remained an option for the Referral Bench, it appeared most inclined to make use of the territorial basis of jurisdiction.

The cases discussed in this sub-section do not represent the classic conflicts of criminal jurisdiction between two (or more) interested States that will be the norm and with which this thesis is predominately concerned. Nonetheless the approach adopted by the Tribunal in the referral decisions discussed above reflects in general the approach of States and within the European Union context. States are not permitted under the rubric of Rule 11*bis* to petition the Tribunal directly to try to secure referral to their jurisdiction, and the defence is also limited in this respect. Yet in almost all of the cases discussed above the governments of the States involved have entered submissions as to why they are the more appropriate State for

²²⁰ *In der Strafsache gegen Nikola Jorgić*, Oberlandesgericht (Düsseldorf) IV – 26/96, 2 StE 8/96, Judgment of 26 September 1997. Jorgić's appeal was rejected in 1999 by the Bundesgerichtshof. *In der Strafsache gegen Nikola Jorgić*, Bundesgerichtshof, 3 StR 215/98, Judgment of 30 April 1999.

²²¹ Request (n 209) para 6.

referral. The defence has also contributed to proceedings, putting forward why it believes a State other than the one indicated by the Prosecutor is a more appropriate place to refer the case.

3. The Power of the Security Council to Intervene in a Jurisdictional Dispute

Acting under Chapter VII of the UN Charter the SC may determine that the failure of a State to bring an individual to justice for his crimes constitutes a threat to the peace.²²² In the *Lockerbie* case, the SC used its coercive powers in another way: namely, to compel a State (Libya) to refrain from exercising its legitimately established jurisdiction under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 over its own nationals in favour of the claims to jurisdiction asserted by the USA (the State in which the plane was registered and the nationality of most of the victims) and UK (the State where the explosion occurred and where the remnants of the plane were found).²²³ Despite the fact that Libya was exercising its prerogative under the 1971 Convention to investigate and prosecute its own nationals in lieu of extradition this was not considered sufficient by the UK and USA who would have accepted nothing less than extradition to them (or, at the least ultimately, transfer to a third State to stand trial). Instead of ending in stalemate as non-honoured extradition requests so often do, Libya was compelled, by the force of the UN SC

²²² Michael Scarf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law & Contemporary Problems* 41–61, 59. See also Michael Scharf, 'The Lockerbie Model of Transfer of Proceedings' in M Cherif Bassiouni, *International Criminal Law: Multilateral and Bilateral Enforcement* (3rd edn, Brill Marinus Nijhof 2007) 521–527, 522. On the Chapter VII powers of the SC generally and in respect of judicial determinations specifically, see Erika de Wet, *The Chapter VII Powers of the Security Council* (Hart Publishing 2004).

²²³ The SC adopted one resolution under Chapter VI and two under Chapter VII. SC Res 731 (1992); SC Res 748 (1992); SC Res 883 (1993).

resolutions, to hand over the accused for trial in a third State (the Netherlands) conducted under Scottish law.²²⁴

UN Member States are obliged to accept and carry out the decisions of the SC (Article 25, UN Charter). According to Article 103 of the UN Charter, in case of conflict with other obligations under international law, obligations under the Charter prevail or, simply, SC resolutions have overriding effect. Any resolution passed by the SC would therefore ‘trump’ the provisions of the 1971 Convention. This position was confirmed in the ICJ’s 1992 Order concerning Libya’s *Request for the Indication of Provisional Measures* where the binding force of SC resolution 748 (a decision which was specifically taken under Chapter VII and thus binding on States) was substantiated by the Court’s decision to decline an indication of provisional measures.²²⁵ Doing so would, according to the majority, impair the rights the respondents enjoyed *prima facie* by virtue of the resolution.²²⁶

The *Lockerbie* incident confirmed, for the first time, that the exercise of criminal jurisdiction by States is not immune from the purview of the SC, although the ICJ refrained from reviewing the legality of the resolutions and the Council’s intervention in the affair. Moreover, the incident also confirmed that a ‘threat to the peace or breach of the peace’ can be interpreted exceptionally widely in situations when the Council has the will to do so; it is perhaps questionable if the Lockerbie bombing ever constituted a threat to international peace and security as such as envisaged under the Charter, and whether there was a genuine and

²²⁴ For a comprehensive discussion of the processes surrounding the Lockerbie case, see Anthony Aust, ‘Lockerbie: The Other Case’ 49 (2000) *International and Comparative Law Quarterly* 278–296.

²²⁵ ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America/United Kingdom)* Request for the Indication of Provisional Measures, Order of 14 April 1992, para 39: ‘Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention.’

²²⁶ *Questions of Interpretation/Montreal Convention*, Provisional Measures Request (n 225) para 41.

persistent threat in 1992 when resolution 748 was issued.²²⁷ This has important consequences as Chapter VII resolutions are far more intrusive than those adopted under Chapter VI and are designed to be highly coercive in nature, even if both are supposed to be to some extent ‘binding’ on States insofar as States should heed them.²²⁸ It was, however, the second (Chapter VII) resolution that effectively put an end to the dispute.

In situations where the Council decides the failure of a State to bring an individual to stand trial (or do so in a particular jurisdiction) threatens or breaches international peace and security, it appears that there are few limitations on the action the SC can take. However, this is difficult territory to enter and has the potential to undermine the carefully crafted *aut dedere aut judicare* regimes set up under treaties, not to mention riding roughshod over States’ prerogative not to extradite their nationals in accordance with their constitutions and national extradition laws. Plachta’s conclusion that the Council’s involvement in the *Lockerbie* Case constituted ‘an extraordinary remedy... [which introduces the possibility of] recourse to that organ for intervention in exceptional circumstances’ must therefore be correct.²²⁹ Furthermore, a demand by the SC for a transfer may well bypass all the protections an individual would have under national extradition law and human rights law, which especially in the field of terrorism, could have considerable implications for defendants.²³⁰

4. The Private International Law Approach

²²⁷ Susan Lamb, ‘Legal Limits to United Nations Security Council Powers’ in Guy S Goodwin-Gill, Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 361–388, 379.

²²⁸ The relative status of Chapter VI and Chapter VII resolutions and their relationship with Article 25 of the UN Charter was discussed in the ICJ’s Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion of 21 June 1971. Discussing the binding nature of both, see Rosalyn Higgins, ‘The Advisory Opinion on Namibia: Which UN Resolutions are binding under Article 25 of the Charter?’ (1972) 21 *International and Comparative Law Quarterly* 270–286; cf, de Wet (n 222) 39–40.

²²⁹ Michael Plachta, ‘The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*’ (2001) 12 *European Journal of International Law* 125–140, 129.

²³⁰ The SC has also demanded the ‘transfer’ (note, not ‘extradition’) of Osama Bin Laden and also the alleged assassins of Sadat from Afghanistan and Ethiopia, though both demands were without effect. See further, de Wet (n 222).

The national systems designed to address conflicts in the private international sphere are imperfect, just as they are in the criminal sphere. As Mills observes,

[T]he exercise of international jurisdiction by each state aspires to avoid a conflict through openness to the application of foreign rules which have a greater ‘connection’ to the dispute at hand, as determined and shaped by public and private international law rules and principles. None of the conflict avoidance techniques of private international law has been universally accepted, nor does any form a clear part of the international law on jurisdiction. But they show that in the private law context states have engaged with the principles and problems of (potentially overlapping) international jurisdiction in a more sophisticated and nuanced way than is generally seen in the context of public international law.²³¹

In a bid to address some of the problems that can arise, regulation has taken place. At the EU level, for example, these include harmonised jurisdictional, choice of law and recognition of foreign judgments standards. One of the key features of the EU system is of course the availability of an external judicial mechanism (the ECJ) with its powers to issue binding decisions to Member States. In contrast, outside of the European civil and commercial context, State practice, general principles and a ‘reasoned approach to difficulties’ usually based on a variation of the doctrine of *forum conveniens* provide the basic outline of an international system of the conflicts of laws to which, it is implied, national systems ought to conform. After exploring the central concerns of private international law and outlining the conflicts process, this Part then discusses how an appropriate forum is settled upon under the doctrine of *forum conveniens* and the European Brussels I Regulation.²³²

4.1. Applying the Right Law

Disputes between parties involving family matters, torts, contracts, wills, and other issues broadly considered to be of a ‘private’ rather than a ‘public’ character may take on an international dimension if certain foreign elements are involved. These elements can include

²³¹ Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187–239, 209.

²³² Discussing the concept of jurisdiction in the private international law sphere, see Mills (n 231) 200–209.

aspects such as foreign domicile of the parties; the residence or place of business of the parties; events which have taken place in a foreign country or countries; the effects of any agreement. Where such elements are involved, courts must apply any national conflict of laws provisions that are in place. As is customary with legislative matters, States are free to adopt their own conflicts rules. The lack of uniform systems of national private law means that the domain of conflict of laws is necessary. If laws are harmonised, as they sometimes are under treaty, there is little need for conflicts measures to intrude because, given the application of good faith, the end result in a case should be the same in whichever jurisdiction it is heard because the courts will be applying the same substantive law. Where there is no harmonisation of laws but there is jurisdiction, choice of law rules are essential to select the most appropriate law. Nonetheless, States are generally in agreement regarding the ends to be achieved by the rules concerning conflict of laws: to do justice between parties in the action where there is a foreign element involved though in a pluralistic international State system, the notion of 'justice' can itself give rise to significant differences.

The possibility of conflicts of judicial jurisdiction arising in this area is high given that the agreements that are of concern to the discipline of conflict of laws will have a connection – legal or factual – to more than one State. Furthermore, in many instances, a plaintiff or the parties (acting in advance) might select a forum to mediate any disputes (so-called 'party autonomy'). This situation need not necessarily lead to problems because the court exercising judicial jurisdiction must also decide what law or laws to apply to the matter before it. The choice of law rules may direct the court to apply the law of another State, so that the interests of that State (or indeed the parties to the dispute) may be satisfied in a way that would not be were the case a criminal one. In criminal cases the State exercising jurisdiction must apply its own law even if it is judging a wholly extraterritorial crime and the law of the territorial State is very different from its own. But in private international law matters, the choice of law rules

should direct national courts to the most appropriate law wherever that comes from.²³³ The potential for problems thus arises instead where the forum State chooses to apply its own law or the law of a third State, and this is objected to by either one of the parties or another State that believes its law to be the most appropriate.

At heart, the conflict of laws regimes (be they traditional or treaty driven) seek to avoid situations where conflicting judgments would be issued by courts of different jurisdictions for the same or similar questions, which would impede the recognition of judgments between States and cause injustice to the litigants. A central aim of the processes is to prevent, as far as is possible, concurrent proceedings for the same cause of action and between the same parties from arising in the first place. By ensuring that an appropriate forum hears the case, the likelihood of multiple proceedings being launched is lessened as other States' courts will have confidence in the fact in that a suitable forum is hearing the dispute (and applying appropriate law) and it can be hoped that parties to the dispute will be less inclined to seek to launch a parallel action elsewhere. The 'ideal' arrangement would be that, whichever court takes jurisdiction, the choice of law rule will result in the application of the rules of the same legal system, and the outcome of a dispute will be the same in whichever jurisdiction it is heard.

4.2.Determining an Appropriate Forum

Once a case has been identified as having a connection to another State or States, the courts in the forum State will apply their national conflict of laws rules. These rules may help to avoid conflicts of jurisdiction arising between States by indicating which court should assume

²³³ The idea of a 'proper law of crime' was first discussed in 1962 by Sarkar, and later taken up again by Arnell in 2000. Lotika Sarkar, 'The Proper Law of Crime in International Law' (1962) 11 *International and Comparative Law Quarterly* 446–470, 467–470; Paul Arnell, 'The Proper Law of Crime in International Law Revisited' (2000) 9 *Nottingham Law Journal* 39–52; Paul Arnell, *Law Across Borders: The Extraterritorial Application of United Kingdom Law* (2012 Kindle DX Version, Retrieved from Amazon.co.uk) Chapter 5. See also Chapter 5 of this thesis, section 1.3.

jurisdiction and which set of laws should be applied.²³⁴ Application of these rules will, in turn, lead the court either to accept or decline to exercise jurisdiction over the case. Broadly speaking, the court where a claim has been filed will need to engage in a two stage test: first, does the court have jurisdiction ie, is it an appropriate forum? This may be governed either by traditional conflicts rules or a treaty, such as the European Union's revised Brussels I Regulation.²³⁵ If the conclusion is reached that the national court does not have jurisdiction, the claimant must take his claim to a foreign court but the finding of no jurisdiction does not, of itself, indicate which other national jurisdiction would be appropriate. Second, and only if the court has jurisdiction, it will ask: should domestic law or foreign law be applied? (The procedural law applied will always be that of the forum State.) Both stages involve evaluating the connection of the parties/cause of action to the State where the action was commenced. However, while it need only be established that the courts of the State where the action has been brought are an appropriate judicial forum (there could be others that could assume jurisdiction as well), the law that is to be applied should ideally be the most appropriate available, which will be determined by the forum's choice of law rules.²³⁶

Settling on an appropriate judicial forum for a particular cause of action is a core concern of private international law. In essence, the process can be defined as 'a court taking jurisdiction on the ground that the local forum is the appropriate forum (or an appropriate forum) for trial or that the forum abroad is inappropriate.'²³⁷ As relatively tenuous links may be relied upon by parties to a dispute to seize the local courts in an action – such as the temporary presence of an individual or some of his property being located in the country where process is served – rules to assess and regulate the appropriateness of the exercise of judicial jurisdiction by a

²³⁴ CMV Clarkson, J Hill, *The Conflict of Laws* (3rd edn, OUP 2003) 3.

²³⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) OJ L 351 20.12.2012 (effective from January 2015).

²³⁶ Clarkson (n 234) 6.

²³⁷ JJ Fawcett, *Declining Jurisdiction in Private International Law: Reports of the XIVth Congress of the International Academy of Comparative Law, Athens, 1994* (Clarendon Press 1995) 6.

national court have been developed out of necessity. The court will apply either their traditional, national conflict rules (eg, the common law doctrine of *forum conveniens* or the strict procedural rules on jurisdiction that operate in civilian systems) or, in civil and commercial matters involving Member States of the EU, the Brussels I Regulation (unless stipulated that the traditional rules should govern any dispute between the parties). Both sets of rules are, at least in part, designed to determine whether the local courts should proceed with an action or decline jurisdiction. The presence of such rules may help mitigate claims from abroad that a particular exercise of judicial jurisdiction is ‘exorbitant’ because the assumption of jurisdiction is not automatic and is made subject to a judicial process that regulates the exercise of jurisdiction by national courts. Parties to a dispute do enjoy considerable freedoms in terms of where to litigate; however, this is not an absolute right and manifestly inappropriate forums should decline to exercise their judicial jurisdiction. Equally, however, where courts do not decline to do so, a court in another State may decide that the seised court is *forum non conveniens* and seek to halt proceedings there by orders to litigants within its own jurisdiction.

Given the fact that the law to be applied in criminal cases will always be that of the forum State, it is consequently the jurisdictional aspect, or ‘first’ stage of the conflict of laws process that constitutes the most interesting element for the purposes of this thesis. As choosing the applicable law is not an issue, the focus of the next two sub-section will be to explore how a State becomes classified as an appropriate or inappropriate forum.

4.2.1. *Forum (Non)Conveniens*

In common law jurisdictions, courts have the discretion to decline jurisdiction or stay proceedings on the basis of *forum non conveniens*. However, there is no unified doctrine

amongst common law States and variations abound.²³⁸ In most civil law countries judges have no such discretion; rather, strict laws of procedure define the cases over which the courts have jurisdiction and include prescribed factors such as domicile or nationality.²³⁹ Given the breadth of the subject, the following discussion will focus primarily on the common law doctrine of *forum conveniens* as its rationale and operation are particularly interesting for the purposes of this thesis. As a further limiter, where appropriate, the discussion draws on examples of how it has been developed and is applied in England.

The doctrine of *forum non conveniens* stipulates that jurisdiction should generally be declined or proceedings stayed if it can be shown by the respondent that another available forum is better suited than the one where process has been served by the claimant. A respondent should not be automatically disadvantaged just because service was made in a particular jurisdiction – one which may have been selected by the claimant for the sole purpose that, if successful, the outcome will be financially or otherwise more advantageous to him than an action brought elsewhere (a process known as ‘forum shopping’).²⁴⁰ The leading case in England, and which still constitutes the cornerstone of the law governing *forum non conveniens*, is the 1987 House of Lords decision *Spiliada Maritime Corporation v Cansulex Ltd*.²⁴¹ It established that ‘In cases where jurisdiction has been founded as of right, i.e., where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the

²³⁸ For an indicative survey of the different approaches to *forum conveniens*, now somewhat out of date unfortunately but still helpful, see Fawcett (n 237)10–21.

²³⁹ Exploring some of the reasons why most civil law States have not adopted the doctrine, see Fawcett (n 237) 21–24.

²⁴⁰ This broadly includes situations where process has been ‘served out’ – ie where the defendant is not in England, he cannot be served with process in the normal ways. The court must therefore first grant permission for service to be made on him abroad. In England, this process is governed by the Civil Procedure Rules, Parts 6, 11. See further, Adrian Briggs, *The Conflict of Laws* (OUP 2008) 105–111.

²⁴¹ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL).

ground which is usually called *forum non conveniens*.²⁴² Lord Goff, who wrote the leading opinion in *Spiliada*, has more recently described the doctrine as ‘the most civilised of legal principles’²⁴³ – an opinion shared by Briggs who observes ‘it allows a judge in one country to yield to the submission that the courts of another country are better placed to give the parties the adjudication they deserve. It gives effect to that judicial comity which acknowledges that where sovereignties collide, a sensitive solution is preferable to an abrupt one.’²⁴⁴ The doctrine thus aims to be flexible to the wishes of the parties while endeavouring to avoid claims that the decision by a court to exercise judicial jurisdiction is exorbitant. This charge could be made if national courts accepted without question all services of process by claimants in what is clearly an inappropriate, or far less appropriate, forum than the courts of another State. The doctrine thus serves a dual function of maintaining good inter-State judicial relations and protecting the respondent if he seeks it.

If the parties are in agreement about proceedings taking place in a particular jurisdiction, however, their decision should not usually be interfered with by the courts.²⁴⁵ Even if another jurisdiction would appear to be *prima facie* more appropriate, the effect of a choice of jurisdiction agreement should direct the court to honour the wishes of the parties. But the existence of such a provision does not automatically bar the respondent from subsequently applying to the courts to stay proceedings.²⁴⁶ In common law States, the courts have discretion whether or not to assume jurisdiction in spite of a jurisdiction agreement, although

²⁴² *Spiliada* (n 241) Lord Goff at 474 (para (5)). The doctrine was first developed under Scots Law. The classic statement of the law there, and now in England too, according to Lord Goff in *Spiliada*, is ‘the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice’ (at 474). *Sim v Robinow* [1892] 19 R 665 (Court of Session) (Lord Kinnear).

²⁴³ *Airbus Industrie GIE v Patel* [1999] 1 AC 119 (HL) 144.

²⁴⁴ Briggs (n 240) 100.

²⁴⁵ Briggs (n 240) 99. Nb, Where EU Member States are involved, this situation will usually be governed by Article 24 of the Brussels I Regulation, which confers mandatory jurisdiction on the courts on the State indicated in the jurisdictional agreement. (Unless the case falls outside the scope of Article 1, Brussels I Regulation.) See below, section 4.2.2.

²⁴⁶ On these points, see *Spiliada* (n 241) 472, para (3) (Lord Goff).

in practice the courts have tended to hold the parties to their agreement.²⁴⁷ In contrast, in civil law countries the discretion option does not exist; a jurisdictional agreement is considered sacrosanct.²⁴⁸

There are no general rules of international law (and none of the conflicts of laws, either) to determine which court must hear an action and which must not. The process for deciding this matter is left up to individual States (or bodies such as the EU). Under the doctrine of *forum conveniens* the focus is on whether there are sufficient real and substantial connections to link the seised judicial forum to the dispute. The existence (or lack) of such connections will help the court to determine if it should assume or decline jurisdiction. In England, the criteria have developed so that, first and foremost, the particular category of action will have considerable bearing on the type and level of connection that will be required. As Hill observes, ‘A jurisdictional rule which provides a satisfactory solution to a contract case might be wholly inappropriate in a divorce case. Even if, as a general rule, a civil court should be entitled to exercise jurisdiction if it is a forum with which the dispute has a substantial connection, what constitutes a substantial connection in a tort case would not necessarily be a substantial connection in an arbitration case’.²⁴⁹ There are, nonetheless, certain guiding factors which are generally considered by the court exercising judicial jurisdiction, even though the weight attributed to them may vary considerably. These considerations can be divided into two main stages.

²⁴⁷ Despite an English jurisdiction agreement, proceedings were stayed in one reported case. *Bouygues Offshore SA v Caspian Shipping Co (Nos 1, 3, 4 & 5)* [1998] 2 Lloyd’s Rep 461 (CA). See Clarkson (n 220) 113.

²⁴⁸ Fawcett (n 237) 47, see also 47–58.

²⁴⁹ Jonathan Hill, *The Exercise of Jurisdiction in Private International Law* in Patrick Capps, Malcolm Evans, Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing 2003) 39–62, 48–49.

At the first stage, identifying the centre of gravity of the dispute in order to avoid unnecessary inconvenience and expense is paramount.²⁵⁰ According to Lord Goff, this could include the availability of witnesses, and factors such as ‘the law governing the relevant transaction [...] and the places where the parties respectively reside or carry on business’ could also influence a judge at this stage.²⁵¹ Reviewing the body of available case law as it now stand as a whole, commentators have also identified the location of evidence and the language of any documentary evidence; the existence of pending proceedings concerning the same dispute in a foreign court; in cases involves multiple parties, the desirability of resolving all the disputes in a single forum; the *Cambridgeshire* factor (ie the desirability of concentrating disputes that involve the same factual or legal issues, despite different parties being involved in one forum) as all being relevant factors at the initial stage.²⁵² Once, and only if, the judge has decided that the dispute has a closer connection to another State’s courts, will he move on to consider the second stage factors. At this point, the burden shifts to the claimant to demonstrate that ‘if established objectively by cogent evidence, [...] the plaintiff will not obtain justice in the foreign jurisdiction.’²⁵³ Striking the balance between allowing a factor to influence the decision on forum that would merely be advantageous to the claimant and one that, if denied, would lead to a substantial denial of justice for him is the challenge at this stage. If it is manifestly clear that the claimant will not receive a fair trial in the other forum, especially on racial or religious grounds, it ‘will probably be unjust to stay proceedings.’²⁵⁴ The subjective feeling of the claimant that justice will not be done due to his personal circumstances or characteristics is not however enough – the claimant must ‘support his allegations with

²⁵⁰ Lord Diplock cast the major question to be asked in terms of ‘can justice be done in the other forum at “substantially less inconvenience or expense”?’ *MacShannon v Rockwell Glass Ltd* [1978] AC 795 (HL) 812. Cited in Clarkson (n 234) 106.

²⁵¹ *Spiliada* (n 241) Lord Goff at 473 (para (4)).

²⁵² Clarkson (n 234) 106–108.

²⁵³ *Spiliada* (n 241) Lord Goff, 475–476 (para (6)).

²⁵⁴ *Briggs* (n 240) 101.

positive and cogent evidence.²⁵⁵ Other grounds that may be taken into consideration in deciding whether or not to stay proceedings in the seised court at this stage include instances where an action would be time-barred in the more appropriate forum; the cost of litigation or length of proceedings abroad; a significant difference to the damages recoverable; situations where a different choice of law decision would be reached in the other State and, by consequence, the claimant would inevitably fail.²⁵⁶

Rather than hard and fast rules, the criteria used by the English courts are flexible and can be applied as appropriate on a case specific basis. The range of factors that may be taken into account by a court mean that there is no hierarchy of jurisdictional bases; a territorial connection does not necessarily take precedence over the nationality or domicile of the parties. However, Hill is of the view that greater importance should be attached to territorial links and cautions against an over-litigious approach to questions of jurisdiction: ‘Private international lawyers need to be reminded that the fact that it would be convenient for litigation to take place in a particular forum should be, without more, irrelevant. Unless the parties have expressly or impliedly chosen the forum in question, the exercise of jurisdiction is not legitimate if the dispute does not have some territorial connection with that forum.’²⁵⁷ Such a territorial emphasis might be acceptable in principle in common law jurisdictions; perhaps less so in civilian systems. But for the very reason that a range of other connecting factors has been periodically taken into account, a territorial connection cannot be definitive; with the exception perhaps of a case involving a tortious action, territorial jurisdiction does not carry the same weight in the private international law sphere that it does in criminal law matters.

²⁵⁵ *The Abidin Daver* [1984] AC 398 (HL), 411 (Lord Diplock).

²⁵⁶ Clarkson (n 234) 109–111.

²⁵⁷ Hill (n 249) 45.

4.2.2. *The Brussels I Regulation*

In contrast to the considerable discretion afforded to national courts under the traditional common law rules on *forum conveniens*, where the dispute is governed by the Brussels I Regulation the rules concerning jurisdiction are closely prescribed.²⁵⁸ It should be remembered that rather than being designed in the first instance to help courts decide whether they are an appropriate forum or not, the main objective of the Brussels I Regulation is to facilitate the free flow of judgments between Member States. In other words, the primary concern is reducing the number of instances that may lead to incompatible or contradictory judgments being issued for the same, or closely related, questions. To secure these ends, States must apply the rules contained in Brussels I to determine whether or not they should assume or decline jurisdiction. Whereas under the doctrine of *forum conveniens* a range of connecting factors may be considered to decide on the most appropriate jurisdiction, under Brussels I Regulation the domicile of the parties involved will be decisive unless the jurisdictional rules indicate otherwise. The approach thus echoes most closely the civilian method of determining suitability of a forum which places a premium on the official residence of the defendant in deciding matters of jurisdiction.²⁵⁹ (Domicile is in itself a highly complex matter, subject to diverse interpretation in different States. Brussels I itself does not attempt to define it; rather, Article 59(1) provides that States should apply their national law to determine domicile.²⁶⁰)

The Brussels I regime includes a series of jurisdictional rules. Exclusive jurisdiction (Article 24) is provided for in five situations.²⁶¹ Application of this provision supersedes any

²⁵⁸ This section is included to show what a heavily regulated, rule-based system looks like as a point of comparison to a comity based, flexible approach. It is not likely, or possibly even desirable, that the former approach would ever materialise in the criminal sphere. Its inclusion is for comparative purposes, only.

²⁵⁹ Arts 4–9.

²⁶⁰ On domicile generally and in the UK, see Clarkson (n 234) Chapter 2. On domicile and the Brussels I Regulation, see Briggs (n 240) 75–85.

²⁶¹ Related to rights *in rem* (immovable properties); the constitution, dissolution or winding up of companies; the keeping of public registers; the registration or depositing of a trademark or patent; judgment enforcement.

jurisdictional agreement entered into by the parties,²⁶² which in all other cases would be upheld as a matter of respect to the freedom of the parties to stipulate where they wish any dispute to be heard (Article 25(1)). In virtually all other situations falling outside of the scope of Article 24, the domicile of the parties is central. (Article 24 confers jurisdiction on the courts of a Member State regardless of the domicile of the parties involved.²⁶³) Where neither of the parties is domiciled in a Member State (subject to Articles 24) the traditional rules apply instead of the Regulation (Article 4(2)). The situations where Article 4 applies do, however, mark the limit of the application of the *forum conveniens* doctrine to cases that otherwise fall within the ambit of Brussels I.

The Brussels I Regulation seeks to regulate the exercise of judicial jurisdiction by States within the EU and thus avoid as far as possible the likelihood of conflicts of jurisdiction arising (leading to potentially conflicting judgments). It does so by setting out fairly stringent rules on the assumption of jurisdiction by Member States that are based on clearly prescribed parameters. The approach is, however, unique in the field of the international conflict of laws and benefits from the fact that it operates within the integrated EU judicial system and where Member States are bound by the decisions of the ECJ.

Whether a State applies its national rules on *forum conveniens* or the Brussels I Regulation depends on the scope of the action and the States involved. But whatever the cause of action, the national and regional rules in place aim to help avoid conflicts of jurisdiction from arising, ensure that the best placed forum acts and mitigate the adverse effects of parallel proceedings. But while national rules and the initiatives of the EU are relatively well-developed, at a truly international level there is little more than comity between States to ensure that justice is done between the parties to a dispute, in an appropriate forum and

²⁶² Art 26.

²⁶³ Article 24 should be read in conjunction with Article 27: 'Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.'

applying the most suitable law. Private international law thus in general relies on comity as the basis for resolving jurisdictional disputes, which, in turn, requires a measure of good faith by a national court in assessing cases whether or not it might have a good claim to jurisdiction against the parallel claims of courts of other jurisdictions. This might mean not exercising jurisdiction in a particular case but it might also mean insisting on the priority of its own authority and enforcing that by orders to litigants to desist from proceeding elsewhere. However, a court should ideally refrain from declining jurisdiction in cases where there is no or little prospect of fair and timely proceedings in any other legal system.

Conclusions

The formal equality of all the jurisdictional bases means that concurrent legislative jurisdiction is common and conflicts of judicial jurisdiction are now a real possibility. This is all the more so where international and transnational crimes are concerned, the first by virtue of their status as crimes of ‘international concern’ – engaging even universal jurisdiction – and the second due to the often trans-border nature of the criminal activity concerned. In light of this simple fact, developing ways to handle existing conflicts, or even to try to avoid conflicts of jurisdiction arising in the first place, has become important. This Chapter discussed some of the mechanisms employed and arguments invoked to date which, at their heart, have as their main objective the seeking out and prioritisation of one – preferably the most appropriate – jurisdiction for prosecution. Nonetheless, many of these mechanisms are imperfect due either to their limited scope and reach or the fact that they were not designed expressly to deal with conflicts of jurisdiction (ie extradition law frameworks). This said, there have been several important inroads into developing procedures to address cases of concurrent jurisdiction. The principle of subsidiarity applied in a jurisdictional context and the concepts of substantial connection and nexus used by national courts and the ICTY, like

the provisions that are in place on handling of concurrent extradition requests, are certainly very useful supplementary tools for helping to avoid the practical and adverse effects of conflicts of jurisdiction between States. However, while they may provide a 'solution' to an existing or emerging conflict of jurisdiction, they are ill-equipped to prevent the conflict from arising in the first place due to their reactive character.

Ideally, the relevant State officials should be in contact with one another through pre-established networks so that the cases which are likely to be of concern to the authorities in more than one State can be identified early on. That way, hopefully a decision can be reached quickly between the interested parties as to where any judicial proceedings will be concentrated. This would mean, for example, that multiple extradition requests for the same or very similar conduct could be minimised. Moreover, this would also attribute more of a 'back stopping' role to the system for handling concurrent extradition requests: it would instead only need to be utilised in those cases where either communication channels are not in place between the interested States or agreement could not be reached on the concentration of proceedings in one State at an earlier date. Having in place these early warning systems may lessen recourse to the courts by defendants on the basis that a particular judicial forum is inappropriate. If the process engaged in by prosecutors is deemed fair and has sufficiently taken into account defendants' forum and human rights concerns, the likelihood of protracted legal battles may be lessened. Without some participation in the early stages by the defence, judicial challenge at a later stage remains a strong possibility and one which may delay or ultimately prevent a prosecution (or extradition) from going ahead. Judicial challenge by the defence does always remain a possibility, however, and the courts must be adequately equipped with the necessary criteria and tools to determine if a case properly 'belongs' to one or other jurisdiction. The forum bar in the UK's Extradition Act

2003 may provide a good model in this respect, although a judicial determination may be overridden.

‘Hard cases’ may nonetheless still emerge and the extraordinary tactics employed to resolve the *Lockerbie* jurisdiction dispute represent such an example. There, the SC intervened to ensure judicial jurisdiction was exercised by a particular State in a dispute regarding what was, essentially, a disagreement about (non)extradition and proper application of the *aut dedere aut judicare* principle in the Montreal Convention. The framework for resolving the dispute was actually in place, but in the end a political rather than a legal solution was adopted. The possibility of pursuing such a course of action in the future remains if the SC is willing to get involved.

As a point of comparison to these criminal law approaches, the private international law doctrine of *forum (non) conveniens* is interesting for the purposes of this thesis as it engages with a range of ‘linkage’ factors in the process of determining which judicial forum is the most appropriate to litigate. The rationale underscoring *forum (non) conveniens* could prove to be useful in the criminal sphere and is explored further in Chapter 5, along with a range of alternative means of addressing the issue of conflicts of judicial jurisdiction that may arise in respect of international, transnational and national crimes having a foreign dimension, brought about by the fact of concurrency of legislative jurisdictions.

Chapter 5

The Regulation of the Jurisdictional Conflicts which Remain

From the perspective of international law it is always necessary that the prosecution can point to a lawfully established legislative jurisdiction basis before exercising judicial jurisdiction. This applies in all instances, regardless of the particular facts of the case. Certain criteria must be satisfied both as a matter of international and national law before judicial jurisdiction may be asserted. To satisfy the requirements of international judicial jurisdiction, it is usually necessary for a defendant to be in the custody of the State seeking to prosecute (although *in absentia* trials are sometimes possible and may not violate international law). In order not to fall foul of national law requirements, certain evidential and procedural criteria must also be met. These latter considerations only become a concern for international law when a fair trial is not possible according to international human rights law standards.

Potential problems arise where more than one State is satisfied that it could prosecute: the concurrency of legislative jurisdictions may lead to a conflict of judicial jurisdictions. Resolving this matter should be a factual matter (not a political or ideological one, although at times this is hard to escape), with the central question turning on which State's courts, or which judicial forum, is an appropriate to prosecute. As Chapter 4 showed, various approaches have already been developed at the national, inter-State and supra-national levels to manage specifically the problem of conflicts of judicial jurisdiction in the criminal sphere brought about by the concurrency of legislative criminal jurisdictions. These measures include, at one end of the spectrum, articles in treaties and, at the other, bilateral and regional

sets of guidelines. Development has tended to occur on a piecemeal basis and in response to specific needs.

This Chapter partners the previous one by exploring what other approaches or rules could be introduced (or further developed) in this area. To do so, this Chapter looks first of all in Part I at the role of ‘comity’ through an exploration of the related concepts of reasonableness and the international interest. The private international law doctrine of *forum (non)conveniens* is also a creature of comity, and the elements of the doctrine that could be of value in the criminal law sphere are teased out here. Part II looks at what rule-based approaches have to offer, starting with the possibility of establishing a model bilateral treaty that States could tailor to their specific circumstances and adopt, moving on next to consider the possibility of developing a stand-alone multilateral treaty before finishing with a discussion of how we could further develop the scope of the existing transnational and international crime treaties so that they contain guidance and procedures on the handling of conflicts of judicial jurisdiction. A unique role for the ICC in managing horizontal (State-to-State) conflicts of judicial jurisdiction is also explored.

At each stage and under each proposal the position (or role – if any) of the defence is considered. The defendant has typically been considered an object in criminal proceedings, albeit one with considerable protections afforded by domestic and international human rights laws broadly as well as due process/fair trial provisions specifically. However, in criminal proceedings, and all the more so when a decision as to which judicial jurisdiction is going to conduct a trial is at stake, a defendant may have a strong interest in where any trial takes place though it should be noted that, however greatly it would be in the defendants interests it is almost never a matter of human rights that there should be no trial at all. (A medical declaration of unfitness to stand trial is probably the only exception and that is not without implications for the wider pursuit of justice.) Can the interests of any prosecuting authorities

be accommodated with those of the defendant(s)? Can (or should) the defence play an active role in the decision making process, or must it remain an object of proceedings? If participation by the defence is beyond the scope of procedures, ensuring that the concerns of the defence in the wider process are promoted and advocated become paramount.

The issue of concurrency of legislative and judicial jurisdictions and the potential for conflicts of jurisdictions between States is only going to increase in prevalence and, possibly, complexity as time goes on. In this final Chapter a set of modest proposals for future developments is presented.

1. An Approach Grounded in Comity: Harnessing Jurisdictional Restraint

International comity is characterised by ‘neighbourliness, mutual respect, and the friendly waiver of technicalities’.¹ Oppenheim describes comity as covering ‘the rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them’.² In practice, comity will play out through a process of negotiation or deliberation, which has been defined by the European Commission in the context of the EU, as the process of ‘trying, on an *ad hoc* basis, possibly using non-binding guidelines, to reach consensus on which Member States interested should go ahead with proceedings in situations where the jurisdiction of two or more Member States is given’.³ The Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America,⁴ represents an example of just such a non-legally binding but persuasive

¹ Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 28–9.

² Lassa Oppenheim, cited in Brownlie (n 1) 29.

³ Commission of the European Communities, Mutual Recognition of Decisions in Criminal Matters among the EU Member States and Jurisdiction, Discussion Paper with questions for experts (2001) 5. Cited in Tom vander Beken et al., *Finding the Best Place for Prosecution: European Study on Jurisdiction Criteria* (Maklu 2002) 24.

⁴ Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America, 25 January 2007 available at:

text, setting out the aims and objectives of two States for whom judicial jurisdictional conflicts have become increasingly common but without over-formalising the relationship and procedures and, importantly, without creating any hard and fast rules of priority or binding obligations. Writing in a specifically jurisdictional context, Ryngaert observes, ‘comity means that States limit the reach of their laws, and defer to other States that may have a stronger, often territorial, nexus to a situation.’⁵ However, it would seem that it is less a limitation on the reach of laws that is necessary – or indeed desirable – at least for transnational and international crimes – and more a need to engage with the tenets of comity in order to effectively manage assertions of legally established jurisdiction(s) and any conflicts that arise as a result.

Comity is currently the main tool employed by States in dealing with the actual or potential conflicts of judicial jurisdiction that arise out of those situations where concurrent legislative jurisdiction exists. It is a doctrine without hard and fast rules, so it is applied on a strictly case-by-case basis. The presence of secondary legal rules and procedures may help mitigate the negative effects of concurrency of judicial jurisdiction and/or guide states to a sensible conclusion, (the law of extradition and mutual legal assistance and the duty contained in the TOC to consult in case of jurisdictional conflicts are examples).⁶ Yet in the absence of specific treaty-based regulation of conflicts, or customary law rules of priority governing the jurisdictional bases themselves, it is comity that informs States’ dealings with one another and, it is hoped, will provide the necessary restraint to avoid wholly unreasonable assertions of judicial jurisdiction.

An approach grounded in comity has many advantages. Like-minded States can enter into informal arrangements between their prosecutors to ensure that information is shared so that

<http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf> (accessed 31 January 2015). See Chapter 4, sub-section 1.2.2.1 for discussion.

⁵ Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 137.

⁶ Discussing the exceptions that have emerged, see Chapter 4 for discussion of these discrete regimes.

investigative efforts are not duplicated and that the most appropriate State prosecutes, if and when the time comes. Relying on comity to manage conflicts is, however, potentially problematic as it requires a large degree of trust in the capacity and effectiveness of the other judicial system, a close working relationship between national prosecution offices, the ability and willingness to share information and is, consequently, not suited to all inter-State relationships. Indeed, an approach to the regulation of conflicts of judicial jurisdiction that is reliant on comity as its guiding force would seem best suited to bilateral state relationships, or very small groups of States at most. This section explores two of the main ideas that inform an approach grounded in comity: what can be considered a ‘reasonable’ exercise of jurisdiction, and the role of international interests. It then discusses how aspects of the private law doctrine of *forum (non)conveniens* might be of use in the field of jurisdictional conflicts relating to criminal conduct as well.

1.1.The ‘Reasonableness’ Factor

Just as ‘linkage’ was identified as being an important concept in respect of establishing legislative jurisdiction on a particular set of bases of jurisdiction,⁷ the concept of reasonableness may inform a State’s decision to exercise – or refrain from exercising – its judicial jurisdiction. International judicial support for a principle of reasonableness is limited; however, in his Separate Opinion in the *Barcelona Traction Case* Judge Fitzmaurice stated that while ‘under present conditions international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction [...] It does, however [...] *involve for every State an obligation to exercise moderation and restraint* as to the extent of the jurisdiction assumed by the courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercised by, another

⁷ Chapter 1, section 2.1.

State'.⁸ It would seem that, if anywhere, this 'obligation of moderation and restraint' finds its roots in comity, supported by the dual principles of State sovereignty and non-intervention.⁹

The strongest support for an approach to the exercise of judicial jurisdiction that is grounded in reasonableness comes from the doctrine and, in particular, from FA Mann.¹⁰ Mann formulates the issue thus:

The problem, properly defined, involves the search for the State or States whose contact with the facts is such as to make the allocation of legislative competence just and reasonable. [...] [I]t is the legally relevant contact between such legislation and the given set of international facts that decides upon the existence of jurisdiction.¹¹

According to Mann, the central question is '...whether the legally relevant facts are such that they 'belong' to this or that jurisdiction'.¹² In other words, it is the *closeness of connection* (or the genuineness of the link/strength of the interest¹³) between the State wishing to exercise its jurisdiction in a matter and the circumstances of the case that should be determinative. If it can be shown that this connection is strong enough, this would prima facie suggest that the assertion of jurisdiction may be classified as 'reasonable'.¹⁴ Mann concludes that it is 'good faith and reasonableness in international relations that will be the rule of decision'.¹⁵

Reasonableness as a basis on which to assert jurisdiction seems sensible enough. Mann does not, however, flesh out his concept with any concrete criteria. It has instead fallen to others to determine what guiding considerations might be taken into account. Two texts actually use

⁸ Emphasis added. ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* Second Phase, Judgment of 5 February 1970. Separate Opinion of Judge Sir Gerald Fitzmaurice, 105.

⁹ Ryngaert identifies non-intervention; genuine connection; equity; proportionality; abuse of rights; responsibility or duty to protect as principles/concepts which might provide support for a jurisdictional 'rule of reason' under international law. Ryngaert (n 5) 144–153.

¹⁰ FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 1–162; FA Mann, 'The Doctrine of International Jurisdiction Revisited after 20 Years' (1984) 86 *Recueil des Cours de l'Académie de Droit International* 9–116.

¹¹ Mann (1964) (n 10) 44.

¹² Mann (1964) (n 10) 45.

¹³ Emphasis in original. Mann (1964) (n 10) 46.

¹⁴ Mann (1984) (n 10) 29.

¹⁵ Mann (1964) (n 10) 48. Vander Beken et al. also advocate a 'reasonable enforcement of jurisdiction'. Vander Beken (n 3) 25–30.

the term, albeit defined in the negative. The Restatement (Third) of US Foreign Relations Law (1987) identifies eight determinative criteria as to ‘whether exercise of jurisdiction over a person or activity will be unreasonable’¹⁶ and in the ‘Draft Convention on the Prevention and Solution of Jurisdiction Conflicts’ the Institute for International Research on Criminal Policy identifies 12 criteria under the article ‘Unreasonable Enforcement of Jurisdiction’ where ‘the enforcement of jurisdiction [will be considered to be] manifestly unreasonable’.¹⁷ Other attempts to delimit the reach of jurisdiction and provide guidance on concurrent jurisdiction include similar criteria and are designed to alert States to those situations where their assertion of jurisdiction may be considered ‘(un)reasonable’.¹⁸ The criteria all include

¹⁶ §403(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

¹⁷ Article 9: In order to attain a proper administration of justice, Member States shall not enforce jurisdiction when this is unreasonable. The enforcement of jurisdiction by a Member State is manifestly unreasonable if this is not the Member State:

1. where the offence has been committed;
2. where the suspected person is ordinarily resident;
3. of the nationality or the origin of the suspected person;
4. where the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty;
5. where proceedings for the same or other offences are being taken against the suspected person by its prosecuting authorities;
6. where the most important items of evidence are located;
7. where the enforcement of a possible future sentence is likely to improve the prospects for the social rehabilitation of the person sentenced;
8. where the presence of the suspected person at the hearing of proceedings can be guaranteed;
9. where a possible future sentence can be enforced;
10. where the injured person is ordinarily resident;
11. of the nationality or the origin of the injured person or
12. where damage has occurred.

Draft Convention available in: Gert Vermeulen et al., *Finding the Best Place for Prosecution: European Study on Jurisdiction Criteria* EC/2001/GRP/025 (Maklu-Uitgevers 2002).

¹⁸ For example, Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* (Princeton Press 2001) Principle 8: On the Resolution of Competing National Jurisdictions, available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (accessed 31 January 2015).

nationality/habitual residence of the accused or a similarly worded text as one of the factors to consider. However, this is as far as involvement of the defence goes; the accused remains an object of the proceedings rather than a participant.

These clear statements aside, it would seem that reasonableness as a guiding factor in sanctifying a State's assertion of judicial jurisdiction and/or resolving jurisdictional conflicts is still far from being consolidated as a 'jurisdictional rule of reason' and norm of international law.¹⁹ Many States take into account some of the listed criteria, some of the time. Yet this would seem to be less in deference to an emerging principle and more as a result of the specifics of the particular case in hand. We are, moreover, crucially left with the fact that there is still no real way of truly ascertaining which State has the most reasonable claim in instances of jurisdictional concurrency. §403(3) of the Restatement foresees the situation 'where it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity...' and goes on to require both States to conduct an evaluation of the other's claim in the hope that this will lead one to defer 'if the state's interest is clearly greater' – a process not unlike that foreseen in the UK-US Guidance and the European conflicts system. In short, Mann's sense of *belonging* or the idea of closeness of connection should, without doubt, inform all assertions of jurisdiction. However, in the following subsection I will suggest that this needs to be supplemented by consideration of the wider international interests involved as well.

Anke Biehler et al., *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union* (Edition Iuscrim 2003) Section 1: Concurrent Jurisdictions, §1: Determination of Forum, available at: <https://www.mpicc.de/files/pdf1/fa-ne-bis-in-idem.pdf> (accessed 31 January 2015).

¹⁹ Ryngaert also discusses reasonableness. See Ryngaert (n 5) 163–184.

1.2. The 'International Interest' Factor

If individual State interests are used to inform an assertion of jurisdiction, the risk is that jurisdiction may be exercised on unreasonable grounds. As Mann asserts 'it is not the subjective or political interest, but the objective test of the closeness of connection, of a sufficiently weighty point of contact between the facts and their legal assessment that is relevant.'²⁰ Narrow State interests alone are problematic; however, if it can be shown that the interests in prosecuting are shared by several States, or even a loosely understood 'international community' of States,²¹ then this may add weight to a particular State's assertion of jurisdiction, render it reasonable in the eyes of other States and help to secure a prosecution in one, well-placed and well-disposed jurisdiction. Ryngaert writes, 'If the interests of the international community are duly taken into account, a more just solution to the jurisdictional conundrum may be reached'.²² The critical importance of the connecting factors, or sense of belonging, may be offset in a particular case if it can be said to be in the international interest for a particular State to exercise jurisdiction.

A key example is a State seeking to exercise jurisdiction on the basis of universal jurisdiction, although the argument can also be made in respect of most of the bases of jurisdiction. Under a classic analysis of the reasonableness criteria such an assertion of jurisdiction might struggle to meet the threshold required. Yet, if the State can argue successfully that there is an international interest in prosecuting, objection may be less forthcoming. And, this argument cuts the other way as well: a State to whom the criminal conduct is also 'connected' or 'belongs' may be less inclined to raise a barrier to prosecution or object diplomatically if the weight of international opinion is in favour of prosecution in another State. The example of Senegal and Belgium could be cited: Senegal, supposedly struggling to mount an

²⁰ Mann (1984) (n 10) 31.

²¹ On the idea of an 'international community' of States, see Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn Palgrave Macmillan 2012).

²² Ryngaert (n 5) 184.

international trial for financial reasons, even though it had legislative and judicial jurisdiction to do so, could accept Belgium's claim (or, indeed, any third State's claim provided they have legislative jurisdiction) to jurisdiction as a State able and willing to prosecute Hissène Habré, and that crucially has the support of other States in its assertion of jurisdiction. The State ceding jurisdiction would not lose face: the dispute is elevated above the bilateral, State-to-State level, politics and sovereignty concerns may become less pronounced, and responsibility for the decision ultimately lies at the door of the so-called 'international community'. Instead of handing judicial jurisdiction over to a specially constituted court, with all the huge costs involved in their establishment and implementation, existing national infrastructures would be utilised and, crucially, the costs borne directly by those States.

Of course, this requires a fundamental re-positioning of the place of State sovereignty in jurisdictional matters, which unfortunately still features as a main, and often vocally voiced, objection to other States' assertion of judicial jurisdiction. But, arguments based on sovereignty in this sense may well merely be synonymous with the subjective or political interests so derided by Mann.²³ An assertion of extra-territorial jurisdiction, supported for the criminal conduct in question by international custom (or, even, in some instances, international treaty) may not need to be considered a violation of State sovereignty. This said, the instances where jurisdiction may be asserted on the basis that to do so serves an international interest are probably limited to 'core' international crimes and to those treaty crimes where an international interest can be found on an *inter partes* basis. In other words, the criminal conduct concerned will need to be of sufficient seriousness to warrant international attention in the first place. The purely bilateral conflict, involving so-termed 'ordinary crimes' will not qualify as other States are highly unlikely to weigh in with their opinions on the exercise of jurisdiction.

²³ Mann (1964) (n 10) 31.

1.3. *Forum (Non)Conveniens*

One of the central concerns of private international law is deciding if the seised national court has jurisdiction and if it is an appropriate judicial forum to judge the action. (The other main concern is which law to apply.²⁴) This is important because, in a similar way to criminal jurisdiction, there are no common rules on jurisdiction or hierarchy of jurisdictional claims. In order to help mitigate the problems caused by overlapping jurisdictional competences, the common law doctrine of *forum (non)conveniens* has evolved, where the court is required to ask whether or not it is an (in)appropriate judicial forum to hear the claim.²⁵ This doctrine represents the high water mark of judicial good faith and comity in action: the doctrine ‘acknowledges that where sovereignties collide, a sensitive solution is preferable to an abrupt one.’²⁶ There are fundamental differences between the adjudication of private law matters between individuals and the prosecution of individuals for crimes by a State. For example, when a court assumes judicial jurisdiction in the criminal sphere it will apply national laws whereas in a private international law matter a court must apply the most appropriate national law available. Nonetheless, there are similarities in the challenge of deciding where judicial jurisdiction most appropriately lies for both fields.²⁷ This is mainly because the question of locating a convenient – or the most appropriate – forum has in recent times become a more significant issue in the context of the criminal law due to the increasingly transborder nature of criminal activity and States’ greater desire to prosecute individuals for these crimes whereas it has been a characteristic of the civil law for much longer. It is suggested here that the doctrine of *forum (non)conveniens* has some valuable aspects which could be used

²⁴ See Chapter 4, section 4.1.

²⁵ See Chapter 4, section 4.2, for the full discussion of this doctrine. The purpose here is to tease out the elements relevant to the field of conflicts of criminal jurisdiction.

²⁶ Adrian Briggs, *The Conflict of Laws* (OUP 2008) 100.

²⁷ It is worth noting that some of the same problems, often with respect to the same kind of issues, which have arisen in the criminal jurisdiction context are now emerging in civil law cases, such as those under the *Alien Tort Statute* 1789 and the *Torture Victim Protection Act* 1991 in the USA. Space considerations prevent further discussion of this area.

national prosecutors and courts to help decide where exactly is the best placed jurisdiction to exercise judicial jurisdiction.²⁸

The main criteria underscoring the application of the doctrine of *forum (non)conveniens* in the civil sphere is whether or not there are sufficiently strong real and substantial connections to link the seised judicial forum to the dispute rendering it an appropriate forum to hear the dispute. In order to decide this, the court determines where the centre of gravity of the dispute lies and asks if justice will be available to the claimant in the present jurisdiction or if another jurisdiction would be better placed to render justice to the parties involved.²⁹ Aspects of a *forum (non)conveniens* style approach to determining whether or not a particular State should exercise its judicial jurisdiction are starting to appear in the dicta of national and international courts that have had to address conflicts of judicial jurisdiction in the criminal sphere. Terms such as ‘subsidiarity’ and ‘nexus’ that aim to determine if the jurisdiction in question has a sufficiently close connection to the subject matter of the case and if the basis on which jurisdiction is asserted is appropriate are used more frequently by courts.³⁰ Indeed, in *Bermingham*, the term *forum conveniens* itself was cited by Laws LJ in his discussion of the scope of the Extradition Act 2003.³¹

²⁸ Arnell has adopted the idea of a ‘proper law of crime’. Paul Arnell, ‘The Proper Law of Crime in International Law Revisited’ (2000) 9 *Nottingham Law Journal* 39–52; *Law Across Borders: The Extraterritorial Application of United Kingdom Law* (2012 Kindle DX Version, Retrieved from Amazon.co.uk). This approach has two aspects: first, law only applies across borders if certain links or connections between the State and the circumstances or alleged offender exist and, second, the State may need to weigh up the strength of its link or connection relative to another State. (Law Across Borders, location 4888–4905.) Arnell writes, ‘a proper law approach does not entail a widening of the range of offences subject to being applied across borders. Indeed, the proper law approach does not lead to an expansion of circumstances and people to which the law applies, but rather greater focus upon why and how the law applies as it does.’ (Law Across Borders, location 5037.) Sarkar originally defined the ‘proper law’ as ‘the law with which the legal event in question has, in all the circumstances, the most substantial connection,’ Lotika Sarkar, ‘The Proper Law of Crime in International Law’ (1992) 11 *International and Comparative Law Quarterly* 446–470, 467. She also discusses at 467–470, however, whether or not the idea of ‘proper law’ is appropriate in the field of criminal jurisdiction.

²⁹ See Chapter 4, section 4.2.1 for detailed discussion of these two criteria.

³⁰ Substantial connection and subsidiarity are discussed in Chapter 4, sections 2.1.1 and 2.1.2.

³¹ *Bermingham & Ors v Director of Serious Fraud Office & Anor* [2006] EWHC 2000 (Admin) para 57. Laws LJ’s finding was that there was no role for a court or the Secretary of State to decide which was the *forum conveniens* in cases that were triable in two jurisdictions, Chapter 4 (n 107). See also Chapter 4, 193–195 for full discussion of this case.

As representative of comity in action, the central tenets of *forum (non)conveniens* are certainly valuable to the field of conflicts of criminal jurisdiction. However, a fundamental difference is that in the civil sphere it is a court which applies *forum (non)conveniens* whereas in the criminal sphere, at least for common law countries, the preference – at least for the authorities – is still firmly that the determination of appropriateness of the forum is made outside of the courtroom: the emphasis is firmly on promoting prosecutor-lead arrangements. Moreover, judicial review of the decision where to prosecute, a decision that was perhaps reached in consultation with prosecutors in other States, has, so far, not been looked on favourably, at least in the UK.³² As *Bermingham* demonstrated, the opportunity for judicial review of a prosecutor's decision to pursue a prosecution in a particular forum is curtailed. In other words, the vast majority of decisions regarding forum will be determined by national prosecutors long before the matter reaches a national court, with limited avenues for challenge – or involvement – along the way by the defence. If this is the case, the prosecutor should seriously consider whether or not to waive a perfectly feasible jurisdiction over the defendant so that he be transferred to another jurisdiction – taking into account the reasonableness (based on the criteria discussed above) of doing so. In this process, there may also be room for a variation on the private international law doctrine of *lis alibi pendens*. As a corollary of *forum (non) conveniens*, prosecutors could have the power or duty not to proceed to court in their jurisdiction if it is discovered that an action in another jurisdiction is pending.

A solution to conflicts of jurisdiction grounded in *forum non conveniens* will not produce a smooth resolution of all jurisdictional disputes, though it can be hoped that utilising the doctrine would produce a better result than a wholly sovereignty-based process. It is not very likely that the equivalent to Brussels I under the authority of the European Court, discussed in Chapter 4, is attainable on a wide scale in the criminal context, however. Such formality is

³² *Bermingham* (n 31) para 64.

unlikely to meet with widespread acceptance by States, nor is it perhaps even ideally suited to the criminal sphere.

2. An Approach based in Rules: Developing New & Existing Mechanisms

In an ideal world (at least, an ideal common law world), comity and the existence of good international relations would be enough to resolve conflicts of judicial jurisdiction when they arise. Yet, even if a mutually satisfactory resolution is reached in the end, considerable State investment in time and money may be made before the potential conflict comes to light. The earlier a potential conflict of jurisdiction is made apparent, the better for all concerned: in other words, an early warning system would seem to be in the interests of all States and their prosecution authorities. And, as mentioned above, approaches that rely on comity may simply not be suitable for all States and all situations. This section explores the variety of options available to update the piecemeal rule-based approaches in place at present. These range from an entirely new, independent international criminal conflicts regime through to inserting mechanisms or developing existing systems for identifying and dealing with conflicts in the frameworks and treaties we already have in place, ranging from international substantive treaties through to the International Criminal Court regime.

2.1.A Treaty-based Approach

The appeal of an internationalised treaty like the Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings,³³ supported by a regulatory body such as Eurojust, is clear. The European system, discussed extensively in

³³ Council Framework Decision 2009/948/JHA, November 30 2009. OJ L 328/42.

Chapter 4,³⁴ provides detailed guidance on the processes and procedures Member States should go through in cases of concurrent criminal jurisdiction. The existence of a multilateral treaty on conflicts of criminal jurisdiction would, similarly, provide a clear framework for States to refer to and follow in order to resolve their jurisdictional disputes. Such a framework is appealing because it would place all States on an even-footing and establish one, coherent approach to identifying and managing their conflicts of national judicial jurisdiction. A multilateral approach is a theoretical possibility, albeit one that would require significant international commitment and resourcing, especially if a body equivalent to Eurojust were ever to be established and maintained. In the alternative, bilateral initiatives – following the approach taken by the UK and US in their Guidance for Handling Criminal Cases with Concurrent Jurisdiction but placed on a formal, legal footing – are also a theoretical possibility. To these ends, the United Nations could draft a Model Treaty or Protocol on Conflicts of National Criminal Jurisdiction which States could use as the basis for drawing up their own bilateral arrangements. Such an approach would maintain the burden for resolving any disputes among States themselves, unless an institution with the capacity to accept referrals from States is established, or its capacities are attributed to an existing international body (or bodies). However, we should not forget that the ICJ is also able to act as a final decision maker in respect of jurisdictional disputes, if requested to adjudicate on a matter by the States involved.³⁵

The primary purpose of the remainder of this section is to explore some of the key elements of either a bi- or multi-lateral approach. Any treaty would need to contain three main aspects: (1) a procedure for identifying conflicts and details of the consultation process to be

³⁴ Chapter 4, sub-section 1.2.2.2.

³⁵ This has happened on two occasions: PCIJ, *The Case of the SS Lotus (France v Turkey)* Judgment of 7 September 1927 PCIJ Report Series A No 10, 20; ICJ, *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal)* Judgment of 20 July 2012.

followed; (2) a set of substantive criteria that should be considered in deciding which State should prosecute; (3) a means of resolving any disputes that remain.

In terms of the first aspect, the procedural part, the basic format adopted in the *Framework Decision* seems a logical model to follow. Chapter Two of the Decision sets out, in turn, the obligations to establish contact and to reply; the means of communication to be used; the minimum level of information to be provided in the request and the response. Chapter Three details the obligation to enter into direct consultations; the procedure for reaching consensus; cooperation with Eurojust; the provision of information about the outcome of the proceedings. The system will of course only work if the procedures are cast in the language of obligation; that States parties are required to make initial contact and to follow through until a workable consensus has been reached. In a multilateral agreement, it seems unlikely that the defence would be able to play an active role at this stage in influencing the outcome of the decision ‘where to prosecute?’ As the Commission Staff Working Document: Annex to the Green Paper ‘On Conflicts of Jurisdiction and the principle of *ne bis in idem* in Criminal Proceedings’ identified:

[I]t seems difficult to set up a detailed rule on the EU level which would cope with the various types of national proceedings of the Member States’ legal systems. An EU wide consultation mechanism should not force the prosecuting authorities to disclose information to the defence where the national law does not provide for this. Therefore, if an EU rule on the implication of the defence is deemed necessary, it would have to leave sufficient scope for flexibility and discretion to the competent authorities as to how to involve the defence when deciding jurisdictional issues at the pre-trial stage.³⁶

However, provision could be made for the option of defence involvement at this stage if the circumstances of the case and the peculiarities on the legal systems involved permitted; and a bilateral agreement could be drafted so as to accommodate a tri-lateral consultation stage option if the States involved were positively disposed to the idea.

³⁶ Commission Staff Working Document SEC (2005) 1767, Annex 26.

The most likely problems lie less in the procedures to be adopted, which are relatively straightforward to establish, and more in their execution: for example, States that have previously had few if any dealings with each other's judicial systems may, by dint of circumstances such as the presence of a victim or alleged offender in their territory, be thrown into consultations with a State with a very different legal tradition and criminal justice system. Consequently, all State parties would need to ensure they had in place dedicated personnel to deal with incoming or outgoing requests for further information regarding potential conflicts of judicial jurisdiction, and the linguistic and legal capacity to deal with them. The strain is likely to be greater for obligations arising as a result of a multilateral agreement; agreements entered into at the bilateral level will usually be simpler to execute because, like the UK-US example, the States entering into the agreement will have had particularly strong reasons for doing so in the first place (ie a past history of potential or actual conflicts of jurisdiction) and are likely to be primed to receive requests from their counterpart. They may also share certain things in common, such as legal traditions and language.

Turning to the substantive criteria, these should be grounded in 'reasonableness'. As discussed above, what would constitute an unreasonable exercise of jurisdiction has informed the list of criteria adopted in both the Restatement and the Institute for International Research on Criminal Policy's Draft Convention. In deciding what criteria to include, consideration would need to be given to the location of the crime or the majority of the criminal activity, the usual residence of the accused (perhaps also his nationality), evidential matters, interests of the victims, the stage reached in the proceedings in each jurisdiction, the presence of related proceedings, where the human rights of the accused can best be secured and protected, and if the 'interests of international justice' point to trial in a particular jurisdiction or other.

A significant additional consideration would seem to hinge on whether or not there should be any inbuilt presumption to a lead jurisdiction – which may be rebutted by another claim – or simply a list of objective and non-hierarchical criteria for States to consider. The former would create a degree of prima facie certainty (especially as territoriality would usually be selected as the default position); the latter would provide flexibility and the ability for States to fully consider all the possible implications of prosecution in a particular jurisdiction. A combined approach was adopted in the original proposed Framework Decision with a ‘general presumption in favour of conducting criminal proceedings at the jurisdiction of the Member State where most of the criminality has occurred’ but which could be rebutted if there are ‘other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction’,³⁷ however, the problem with this method is that it may encourage States to not fully consider at the outset all the relevant factors that could influence the decision regarding the most appropriate location for prosecution. Furthermore, where there is a presumption of a ‘lead’ jurisdiction, other States may be more inclined to acquiesce without going through the full consultation process, a decision which may not always be in the interests of justice. It would therefore seem a better approach to simply include a broad range of criteria that all the States involved must consider each time a

³⁷ Art 15: Criteria to Determine the Best Placed Jurisdiction. 1. There shall be a general presumption in favour of conducting criminal proceedings at the jurisdiction of the Member State where most of the criminality has occurred which shall be the place where most of the factual conduct performed by the persons involved occurs. 2. Where the general presumption according to paragraph 1 does not apply due to the fact that there are other sufficiently significant factors for conducting the criminal proceedings, which strongly point in favour of a different jurisdiction, the competent authorities of Member States shall consider those additional factors in order to reach an agreement on the best placed jurisdiction. Those additional factors shall include, in particular, the following: – location of the accused person or persons after an arrest and possibilities for securing their surrender or extradition to the other possible jurisdictions, – nationality or residence of the accused persons, – territory of a State where most of the damage was sustained, – significant interests of victims, significant interests of accused persons, – location of important evidence, – protection of vulnerable or intimidated witnesses whose evidence is of importance to the proceedings in question, – the residence of the most important witnesses and their ability to travel to the Member State where most of the criminality has occurred, – stage of proceedings reached for the facts in question, – existence of ongoing related proceedings, – economy of the proceedings.

Proposal for a Council Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings 20 January 2009 5208/09 available at: <http://db.eurocrim.org/db/en/doc/1066.pdf> (accessed 31 January 2015).

conflict arises. Not all will be relevant to each case and not all to the same degree, but a multitude of ‘smaller’ considerations may indicate that an apparently less connected State might, in some instances, be better placed to prosecute. In the Commission Green Paper, it is recognised that ‘If prosecuting authorities are given a considerable scope of discretion, they must be obliged to fully take into account the legitimate interests of all concerned parties’.³⁸ Moreover, the relevant yardstick is identified as what is ‘a reasonable, proper and fair administration of justice, based on a comprehensive consideration of the relevant facts and their balanced weighting’.³⁹

Finally, an over-seeing mechanism similar to Eurojust would be preferable, but the likelihood of this level of regulation at the international level emerging is slim. Such a body could assess whether or not the correct consultation procedures were followed and determine if all the relevant considerations were taken into account. A more likely approach would instead be to ensure that adequate provision is first and foremost included in the treaty for robust consultation procedures, preferably complemented by the possibility of national judicial review of the final decision on where to prosecute, which could lead to a reopening of the negotiations. However, the usual questions of whether a particular State has jurisdiction in a particular case, is, in these situations of jurisdictional concurrency and ‘conflict’, replaced by the basic question: is this State the most appropriate jurisdiction or would X have been more appropriate? Such a question could only be answered on the basis of whether or not to prosecute in that State would accord with the national requirements of a fair trial and due process. Whether or not these can be secured in a particular jurisdiction for the defendant is paramount, and there ought to be an avenue left for challenge by the defence at the end of the consultation process and before any trial gets underway, ie at the pre-trial proceedings stage. The authors of the Green Paper devoted considerable thought to the issue of judicial review

³⁸ Green Paper, Brussels 23.12.2005 COM (2005) 696 final, 43.

³⁹ Green Paper (n 38) 43.

of the decision where to prosecute.⁴⁰ In addition to the fair trial/due process considerations, the defence could be entitled to ask ‘whether it was justified to bring the case before a particular jurisdiction’.⁴¹ In doing so, the court could assess if the principle of reasonableness had been respected with a ‘jurisdiction allocation [...] only be[ing] set aside by the competent tribunal if the latter finds that it is arbitrary, following doctrines inspired from the Member States national laws, such as abuse of process or abuse of discretion’.⁴² The possibility for judicial review was included in the Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in §2, on the basis that ‘this right to judicial review is essential as a counterbalance to the system of self-coordination by the prosecution authorities’.⁴³ Such a clear right to appeal, whilst desirable from the perspective of the defence, would, however, likely meet with considerable resistance from States. If judicial review is not accepted, then at the very least, a clear statement that human rights law and due process/fair trial procedures will be actively considered by prosecuting agencies would seem to be a necessity in any such text.

Putting in place comprehensive bi- and/or multi-lateral mechanisms for identifying and addressing conflicts of jurisdiction and challenging the outcome of the decision ‘where to prosecute’ is one approach. Whilst appealing on many levels, unless there was widespread uptake we would see little improvement in practice. More incremental, or change on a crime-by-crime basis, might prove to be a more immediately effective method, provided existing States parties are willing, and is the subject turned to next.

⁴⁰ The topic of judicial review was discussed at length in the Green Paper (n 38) 26–30.

⁴¹ Green Paper (n 38) 27.

⁴² Green Paper (n 38) 27–8.

⁴³ Freiburg Proposal (n 18) §2: Right to Judicial Review: ‘The accused has the right to apply to the Court of Justice of the European Communities for review of the Member States’ decision.’ However, this is a highly aspirational provision, given that it would require an enlargement of the competencies of the ECJ itself and thus TEU amendment.

2.2. Extending Existing Frameworks

Within some of the regimes we currently have in place, there may be scope for inserting new provisions, probably by way of an additional protocol, or extending existing frameworks in order to better address the problems generated by conflicts of criminal jurisdiction. This possibility is most likely to gain traction in the context of transnational crimes that are already criminalised under an international treaty and international crimes that are considered to be crimes *jus cogens*. There may also be scope within the ICC Statute's existing framework for helping to manage horizontal conflicts of judicial jurisdiction between States involving international crimes falling under the jurisdiction of the Court. In contrast, ordinary crimes, ie conduct which is only criminal due to having been criminalised under national legislation and not as a result of treaty or customary duties, are not suited to such an approach and conflicts involving these types of crimes would need to be dealt with under the bilateral or multilateral conflicts regimes discussed above.

2.2.1. Transnational Crimes

The Treaty on Organized Crime (TOC) and its provisions on handling conflicts of jurisdiction was dealt with in Chapter 4.⁴⁴ This is, at present, one of only two dedicated international crime treaties to include such a provision. Although organised crime tends to be, by its very nature, cross-border crime and therefore particularly prone to engendering conflicts of judicial jurisdiction between States, other transnational crimes criminalised under multilateral treaties are also potential candidates for conflicts given the concurrency of jurisdiction foreseen in their jurisdictional provisions. These treaties (ie the Torture Convention⁴⁵ and the various terrorism-related treaties⁴⁵) could benefit from an extension to

⁴⁴ Chapter 4, section 1.2.1.

⁴⁵ Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963 (Tokyo Convention); Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (The Hague Convention); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (Montreal Convention) and its

their provisions in order to address the handling of any conflicts of jurisdiction that may arise. The Optional Protocol model would seem to provide the best framework for adding procedures relating to the identification, management and resolution of conflicts of jurisdiction as ‘Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty’⁴⁶ and may be used for both procedural and substantive aspects.

As a starting point, such provision would need to cover broadly the same ground as Article 15(5) of the TOC, which provides: ‘If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.’ However, as was also noted in Chapter 4, the TOC model lacks any form of monitoring or enforcement provision; States parties must rely on existing mechanisms for communicating between authorities to facilitate the necessary consultation and coordination, with all the incumbent problems this may bring.⁴⁷ Any such protocol would therefore need to be drafted to include all, or most, of the elements identified above in section 2.1 in respect of a separate, stand-alone conflicts treaty if it were to truly help States’ parties to identify and resolve conflicts. Furthermore, reference to the

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988; International Convention against the Taking of Hostages 1983 (Hostages Convention); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973 (Protected Persons Convention); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA Convention); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (SUA Protocol); International Convention for the Suppression of Terrorist Bombing 1997; Convention on the Physical Protection of Nuclear Material 1980; International Convention for the Suppression of the Financing of Terrorism 2000.

⁴⁶ United Nations, What is an Optional Protocol? Available at:

<http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> (accessed 31 January 2015).

⁴⁷ United Nations, Office on Drugs and Crime, Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2004) para 231.

need to fully consider the broader human rights implications of trial in a particular jurisdiction as well as due process/fair trial considerations are necessary.

The benefits of an overseeing body following the Eurojust model that can help mediate situations involving conflicts of jurisdiction are plentiful, although the challenges for establishing such a general organ on the international level are profound; indeed, the likelihood of such a body ever developing is slim as discussed above. Instead of aiming for this, it appears that, at least in respect of most transnational crime treaties, there could be scope for developing a suitable mechanism within the existing supporting United Nations frameworks. Taking one example, the Committee against Torture (CAT) may be a well-placed institution to offer assistance in the case of conflicts of jurisdiction arising between States parties to the Convention against Torture 1984. This existing body already monitors implementation and observance of the treaty and States parties are obliged to submit regular reports to it on their activities.⁴⁸ It would therefore seem possible that a ‘sub-committee on jurisdictional conflicts under CAT’ could be established. Under this proposal, such a body would provide a forum for mediation between States’ parties and a place to refer their queries and/or dispute concerning jurisdiction. The body would not be able to issue binding decisions, but the existence of an independent panel of advisors could be beneficial in some instances. This model could be applied to most substantive crime treaties, based on need, although for those treaty regimes that do not enjoy the support of an existing body such as the CAT, an alternative external arbitrating body would ideally need to be set up. Recognising that the Torture Convention/Committee set up is unique to a degree and direct emulation would be difficult, this example aims to illustrate what could be achieved exceptionally if the will is present.

⁴⁸ On the working of the Committee against Torture, see <http://www2.ohchr.org/english/bodies/cat/> (accessed 31 January 2015).

2.2.2. *International Crimes*

The mechanisms and approaches discussed above could equally be applied to the category of crimes classified as ‘international crimes’. However, international crimes are also distinct because they are the concern of the International Criminal Court (ICC). In this section a unique approach to resolving State-to-State conflicts of judicial jurisdiction for crimes falling under the jurisdiction of the ICC Statute is explored.

2.2.2.1. *Complementarity and Horizontal Conflicts*

Much attention has been focused on how the complementary relationship and the jurisdictional balance will play out between the ICC and its States parties.⁴⁹ Due to the nature of this relationship, the matter of horizontal concurrency of national criminal jurisdictions (and the potential for conflict) remains despite the advent of the Court; in fact, membership of the ICC regime has actually served as a catalyst for States parties to update and extend their national legislative criminal jurisdiction so as to avail themselves of the complementary nature of the court’s jurisdiction if the time ever comes where they become the subject of an investigation by the ICC prosecutor into a situation involving their nationals or territory. This, in turn, has actually increased the potential for conflicts of judicial jurisdiction between States parties as legislative competences are extended, and this is in addition to the complementary judicial jurisdiction of the court itself. The ICC and States parties are equal players as opposed to the superior position of the International Criminal Tribunals (ICTs) which enjoy so-called ‘primacy of jurisdiction’ relative to all States. This section is therefore concerned with how the State-to-State dynamic plays out within the context of the ICC Statute’s framework when the ICC is technically on the same level as States. It explores the

⁴⁹ The body of literature on this topic is immense. Here are just a few examples from the literature that this author has found useful. Jann K Kleffner, Gerben Kor, *Complementary View on Complementarity* (TMC Asser Press 2006); Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (OUP 2008); Mohammed El Zeidy, *The Principle of Complementarity in International Criminal Law* (Brill 2008).

extent to which organs of the ICC (namely, the Office of the Prosecutor (OTP)) may be able to ‘help’ two or more States to reach an agreement as to which of them may be best placed to exercise judicial jurisdiction in situations of jurisdictional conflict.

The Statute expressly envisages that the Court’s jurisdiction will be complementary to States parties for crimes committed on their territory or by their nationals in situations where referral was made by a State party or where the Prosecutor decides to initiate an investigation *proprio motu*.⁵⁰ Furthermore, non-State parties may accept the jurisdiction of the Court on an ad hoc basis for crimes committed on their territory or by their nationals.⁵¹ It is therefore entirely foreseeable that at least two different States may have legislative jurisdiction over the conduct that constitutes a crime under Article 5. Moreover, in contrast to the precondition that either the territorial or nationality State must be a party to the Statute before the jurisdiction of the Court itself can be triggered (unless the referral was made by the Security Council (SC) under Article 13(b)), the States which may exercise jurisdiction over the crimes defined in Article 5 are not limited to the territorial or nationality States: it remains a simple fact of international law that any State that has established appropriate legislative jurisdiction (ie on the basis of universal jurisdiction or passive personality in addition to territoriality/nationality) may seek to exercise that jurisdiction when an international crime has been committed.

The Preamble to the Statute highlights this plainly, recalling that ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. Moreover, nowhere does the Statute differentiate between, or make reference to, the bases on which States may exercise jurisdiction. Article 17 which sets out the admissibility criteria for a case refers simply to whether investigation or prosecution is being carried out or has been

⁵⁰ ICC Statute Art 12(2)(a)–(b), Art 13(a), (c).

⁵¹ ICC Statute Article 12(3).

carried out by ‘a State which has jurisdiction over [the case]’. Article 18 talks of the Prosecutor’s obligation to notify ‘States parties and those States which ... would normally exercise jurisdiction over the crimes concerned’ of his intention to investigate. And, Article 19 identifies the right of ‘any State which has jurisdiction over a case’ to challenge the decision that led the Court to exercise its jurisdiction. The Statute therefore remains neutral in respect of which State could or should be expected to exercise jurisdiction over a given case; it would seem that the ICC is, in practice, able to be complementary to any State that is prepared to prosecute or is doing so already, not just to its States parties. This is correct: it would be nonsensical for the Statute to curtail or in any way limit the bases on which States are already entitled to exercise jurisdiction under international law or step in unnecessarily where a non-State party or a State party other than the nationality/territorial State is investigating and/or prosecuting; moreover, as a matter of basic treaty law, the Statute has no binding powers over non-State parties, anyway. To do so would be to increase rather than lessen the chances of impunity, and increase the workload of the Court.

Potential difficulties instead arise where at least one of the nationality or territorial States is keen to exercise their judicial jurisdiction either because they wish to avoid the situation where the Court decides that it should assume jurisdiction in accordance with Article 17 or – the classic inter-State conflicts situation – because the State believes itself to be better placed than the other to prosecute. The two reasons may of course be linked; ie not only does a State wish to avoid the situation where its own judicial jurisdictional claim is usurped by the territorial/nationality State, but it also wishes to avoid a declaration of inability or unwillingness and the assumption of jurisdiction under the complementarity principle by the Court. The difference from the classic horizontal conflicts situation which has formed the basis of much of the discussion elsewhere in this thesis is that once the ICC becomes involved (because the criminal conduct comes under its subject matter and temporal

jurisdiction and involves at least one State party⁵²) the question of whether or not the Court should in any way, shape or form help to ‘resolve’ an inter-State conflict presents itself. It would seem that the Court could be ideally placed to assist in brokering a solution, but there is no express provision in the Rome Statute that deals with the situation where a conflict of jurisdiction arises. Evidence of such an ability to do so may however be found within the rubric of Article 18.

2.2.2.2. *Managing and Resolving Horizontal Conflicts under the ICC Statute*

Once a situation has either been referred to or taken up by the ICC Prosecutor,⁵³ the Prosecutor evaluates all the information made available to him and initiates an investigation unless there is no reasonable basis on which to proceed with one under the Statute.⁵⁴ In reaching this decision, the Prosecutor must consider three elements: if there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; if the case is or would be admissible under Article 17; if, after taking into account the gravity of the crime and the interests of the victims, there are substantial reasons to believe that an investigation would not serve the interests of justice.⁵⁵

The determination of admissibility under Article 17 is central to whether the Prosecutor decides to initiate an investigation or, at a later stage, proceed with a prosecution, and for our purposes, the main parameters of the Article need to be fleshed out further. The balance between the jurisdiction of the Court and that of its States parties hinges on this Article. The Prosecutor may only open an investigation if the case is not currently being investigated or

⁵² The Security Council may also refer any situation, regardless of whether or not the States involved are States parties, to the Prosecutor for investigation as per Article 13(b). This process is, however, distinct from the consensual State party/ad hoc acceptance of jurisdiction as the presumption following a SC referral is that the ICC will investigate and prosecute. In contrast, in the other ways that a situation may come to the attention of the Court, no such presumption exists: a national jurisdiction or the ICC could end up prosecuting.

⁵³ ICC Statute Arts 14, 15.

⁵⁴ ICC Statute Art 53(1).

⁵⁵ ICC Statute Art 53(1)(a)–(c).

prosecuted by a State which has jurisdiction over it (unless the State is shown to be unwilling or unable to genuinely carry out the investigation or prosecution) or an investigation has been completed and the State has decided not to prosecute the person concerned, but the decision not to proceed resulted from the unwillingness or inability of the State genuinely to prosecute.⁵⁶ Furthermore, he may not proceed if the individual has already been tried for the conduct constituting the crime under Article 5 and to prosecute would violate the *ne bis in idem* provision in Article 20(3) of the Statute or the case is not of sufficient gravity to justify further action by the Court.⁵⁷ ‘Unwillingness’ and ‘inability’ are defined in Article 17(2)–(3).⁵⁸

If the Prosecutor does decide to initiate an investigation in accordance with Article 53, he must notify directly ‘all states parties and those states which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned’ of his initiation, or intention to initiate, an investigation.⁵⁹ It is clear why there is an obligation to inform all States parties of this decision; the Court is designed to work in a partnership with these States. Moreover, if any State party wishes to avail itself of the complementarity provision it needs to be aware that a case that is potentially of interest to it is under the scrutiny of the Prosecutor. The Paper on Some Policy Issues before the Office of the

⁵⁶ ICC Statute Art 17(1)(a)–(b).

⁵⁷ ICC Statute Art 17(1)(c)–(d).

⁵⁸ ICC Statute Art 17(2) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. (3) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

⁵⁹ ICC Statute Article 18(1).

Prosecutor⁶⁰ provides further guidance as to which other States should be informed and the reasons for this. In those cases where several States have jurisdiction over the crime in question, the Paper provides that ‘the Prosecutor should consult with those States best able to exercise jurisdiction’. The Paper goes on to identify the State where the alleged crime was committed and the State of nationality of the suspects, but also the State which has custody of the accused and the State which has evidence of the alleged crime, as being ‘best able’ States.⁶¹ The slightly ambiguous category of States having ‘evidence of the alleged crime’ could include any number of additional States – such as the victims’ State of nationality, by way of example. Many States may hold an interest in seeing the individual prosecuted. However, ‘best able’ would seem necessarily to mean that the State must have established legislative jurisdiction over the conduct and has a real chance of seeing its investigation result in a prosecution. In other words, which States can we realistically foresee as exercising jurisdiction in the case? These are the ‘other’ States which the prosecutor should inform.

Once the Prosecutor has informed the relevant States of his intention to start an investigation, Article 18(2) provides that ‘within one month of the receipt of that notification, a state may inform the court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 and which relate to the information provided in the notification to states’. A one month window is not very long and suggests that if a State is going to avail itself of its primary right to exercise jurisdiction over Article 5 crimes it will need to be pretty well organised and act decisively to launch an investigation within the specified time limits, if the investigation is not in fact already ongoing.

⁶⁰ ICC-OTP 2003 available at: http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (accessed 31 January 2015).

⁶¹ Policy Issues Paper (n 60) 5.

The presumption is that the Prosecutor will defer to a State which announces that it has or is investigating the crimes. He must apply to the Pre-Trial Chamber for authorisation if he wishes to proceed with his investigation instead of deferring.⁶² Importantly, it seems from the wording of the Statute that any State which has jurisdiction over the crimes may request the deferral. This request would normally come from one of the States previously notified by the Prosecutor under the Article 18(1) procedure, as he should have informed all the States ‘best able’ to exercise jurisdiction in the case in the first place. However, if another State has jurisdiction it is not at this stage foreclosed from informing the Court that it is investigating/has investigated (for example, a non-State party in a position to exercise universal jurisdiction). What is clear is that the State requesting deferral must either currently be investigating or have completed an investigation at the time of notification. Furthermore, there is the need to establish that any investigations that have been launched have been done so in good faith and not simply to prevent the Prosecutor from conducting his own investigation and prosecution. Article 18(3) provides that any decision to defer to an investigation by a State ‘shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.’⁶³ What is not necessary is that an investigating State already has the suspect in its custody. The extradition/custody aspect is separate from the investigation for the purposes of Article 18(2). If no State requests a deferral then the Prosecutor is at this stage free to continue with his investigation. This provides the answer in the case of a so-called ‘negative’ conflict of jurisdiction where more than one State has established legislative jurisdiction but no State

⁶² ICC Statute Article 18(2).

⁶³ Furthermore, Art 18(5) provides: ‘When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.’

opts to exercise it in the given case. This is complementarity in action. It may however be at this stage where a positive conflict of jurisdiction comes to light, or is even stimulated following the indication by the Prosecutor that he intends to proceed with an investigation into the alleged crimes. It is this latter situation that raises the question of whether or not the Court should advise or seek to help 'resolve' the emerging conflict of judicial jurisdiction and is of most interest for the purposes of this thesis. On one level, the prospect of moving from a state of inaction to one where States announce their intention to investigate (or that they already started to do so) would seem to be a positive step. However, several issues of concern present themselves if more than one State declares its intentions in this respect. A serious concern is that multiple concurrent investigations might lead to an undue delay in the justice process or even to the breakdown of the investigation. The OTP may also have to monitor investigations in several States to determine whether they are all being carried out genuinely in accordance with the rubric of Article 17.

On the one hand, such a situation could be viewed as a purely inter-State matter: it is up to the territorial, nationality and any other interested States to sort out between themselves who shall investigate and, eventually, prosecute – or simply settle it on a 'first come, first served' basis, or by virtue of which State has custody of the accused. Either way, the States involved would hopefully be able to make use of the methods discussed in this Chapter to resolve the issue. There is no prohibition on concurrent investigations or prosecutions under international law, as has been made clear throughout this thesis. However, the potential problems with concurrent investigations in terms of, *inter alia*, access to evidence, protection of witnesses and rights of the accused, etc. means that, if at all possible, such situations should be avoided.

On the other hand, and this is the crux of the matter for the purposes of this thesis, the Prosecutor may be in a unique position to help, adopting a 'quasi-diplomatic role'. There is a possible window of opportunity at the 'paragraph 2 stage' of Article 18 – ie when the

Prosecutor receives notice of a State's intention to investigate. He may have extensive information regarding which, if any, of the interested States intend to investigate or are, in fact, already doing so. He would seem to hold a 'big picture' view of what is going on at the national level. This could well be the time to suggest that of the several interested States, they defer to one State, if it is apparent that it holds a superior position in respect of investigating and prosecuting the alleged crimes. Any such discussions would have to be handled carefully in order to avoid accusations that the ICC is interfering in the primary right of States to investigate and prosecute, and in their sovereign affairs.⁶⁴ However, the unique global and impartial perspective the Prosecutor holds could prove invaluable in this respect. In complex cases involving international crimes and possibly several 'interested' States, such a perspective could be just what is needed to secure a workable solution that leads to division of national prosecutions between States, or a deferral to the State deemed by the Prosecutor to be 'best able' to investigate and prosecute. Of course, where no 'national' agreed solution can be reached then the possibility for the ICC to take over the investigation remains a possibility.

The idea of two or more interested States seeking to investigate and prosecute core crimes resulting from the same set of circumstances may not present itself as an actual problem in the short – or even medium – term, but as more States and the ICC pursue their shared agenda of prosecuting international crimes it could be an issue that presents itself with more regularity. Cassese has even suggested that the OTP might wish to consider issuing general guidelines on the possible resolution of positive conflicts of jurisdiction.⁶⁵ To date, it appears that no such project has been undertaken. This section has nonetheless shown that there is scope with the ICC Statute's existing framework for a role for the Prosecutor or other suitable

⁶⁴ First Public Hearing of the Office of the Prosecutor, 17–18 June 2003, Transcript – Comments by Antonio Cassese 2–3.

⁶⁵ Public Hearing, Cassese (n 64) 2.

organ in managing and helping to resolve any horizontal conflicts of jurisdiction that arise concerning crimes identified under Article 5 of the Statute.

Conclusions

Taken all together, prosecutorial restraint informed by reasonableness, considerations of appropriateness of forum, and the wider interests of the international community, along with a combination of concrete approaches to managing conflicts of judicial jurisdiction that either make use of existing mechanisms or develop new ones represent a clear ‘best way forward’ in respect of the issue of conflicts of judicial jurisdictions caused by the concurrency of legislative jurisdictions in the criminal sphere. This final Chapter has sought to showcase a variety of approaches to addressing the problem of conflicts of judicial jurisdiction that could be developed or further enhanced to best meet the challenges currently facing this area; challenges that are only set to increase in prevalence in the future.

Reasonableness and consideration of the international interest in prosecuting in a particular jurisdiction can add credence to a claim to judicial jurisdiction and may provide enough of a basis to determine which State should exercise its judicial jurisdiction in the end. However, while they may help to determine which State should prosecute, they remain fluid concepts and essentially rely on comity and the existence of good international relations, which may or may not be forthcoming. The doctrine of *forum (non)conveniens*, grounded in common law judicial practice, has some definite similarities to the concepts of ‘connection’, ‘nexus’ that have been used in the criminal cases and whilst not all aspects of the appropriate forum doctrine can be imported into the criminal sphere, some of the thought processes involved in determining an (in)appropriate forum are helpful and could be incorporated into prosecutorial guidelines.

Comity will probably continue to play a large – if not the largest – role in how conflicts of judicial jurisdiction are resolved for some time, at least until there are significant developments at a more structured level to resolve conflicts of judicial jurisdiction in the context of specific crimes. Such developments can only be welcomed: however, they take time, financial investment and considerable effort if procedures as well as dispute mediation processes are to be established. With the exception of the potential role to be attributed to the Office of the Prosecutor at the ICC which draws on a pre-existing arrangement, each of the other two approaches discussed (an entirely new international regime and developing existing substantive treaty regimes by the addition of protocols) requires international impetus to draft and adopt the specific texts that are needed.

An incremental approach is probably the best that can be hoped for in this context: development in the context of specific crimes as and when a need is perceived to have arisen, such as occurred in the respect of organised crime under the TOC regime. On this basis, international crimes which are already considered to be of concern to a loosely understood ‘international community as a whole’ might be primary candidates whereas it may be the case that States wish to keep the body of crimes related to terrorist activities within their own exclusive jurisdictional ambit as much as possible, and be less inclined to establish regimes that could potentially determine that another judicial forum (ie another State’s courts) are objectively deemed to represent a more appropriate forum.

A major challenge with all these approaches will be ensuring that the interests of the defendant are adequately considered by the bodies responsible for deciding which judicial forum should prosecute. Disclosure considerations are difficult to overcome, but in drafting any further comity-informed guidelines along the lines of the UK-US bilateral arrangements, provisions on safeguarding the human rights of the defendant protected under international, regional and national law, along with securing due process and a fair trial, must be included.

Equally, any formal legal procedures must also make explicit reference to these human rights in the list of criteria that will be used to determine where might be the most appropriate forum to conduct a trial. Ideally, any decision by a prosecutor where the case in hand suggests that multiple jurisdictions could exercise their judicial jurisdiction should be open to judicial review at the request of the defence (to ensure correct procedures were followed and the criteria applied effectively). However, this is unlikely to gain widespread acceptance as it could afford the defence a greater role in pre-trial proceedings in cases involving concurrency of legislative jurisdictions than in sole jurisdiction matters. The best that can probably be hoped for is that States adopt an option to consult the defence at the pre-trial stage in their procedures, if deemed appropriate. And, at the trial stage, the defence does still have the right to raise objections on the basis that human rights that have been incorporated into national law have not been protected adequately.

Final Conclusions

This thesis has addressed the problem of conflicts of judicial jurisdiction that may arise due to the fact that legislative jurisdiction is held concurrently by States. Rules of priority between the bases of jurisdiction have not emerged that would indicate which jurisdictional claim enjoys precedence, nor would it seem to be entirely advantageous to impose such rigidity. Encouraging the plurality of jurisdictions has been the preferred approach. There are sound policy reasons for continuing to support this. Conflicts of jurisdiction is a topic which is an emerging area of concern, and one that has not hitherto been given extensive treatment in respect of both the national (both UK and foreign jurisdictions) and international levels in the literature on jurisdiction. This thesis approached the problem of jurisdictional conflicts in the criminal sphere by making a distinction between the abstract considerations which apply to the enactment of legislative criminal standards on the one hand, and the pragmatic ones which come into play where a particular application of those standards is being pursued on the other. In instances of conflicts of jurisdiction, what is involved is not a competition between legislative bases of jurisdiction but the actualities of the particular case, which State should exercise judicial jurisdiction – which is the ‘right’ forum in this instance.

Resolving the conflicts of jurisdiction that do emerge, or preventing them from arising in the first place, is going to become an increasingly necessary and important task as claims of extraterritorial judicial jurisdiction expand. The nature of criminal activity and its potential to extend across borders, affecting interests in more than one State, means that innovation in this area is required. This will almost certainly create possibilities of tension, if not outright conflict, between human rights law and the developing law of international criminal cooperation. Such considerations will need to be taken into account in deciding how conflicts

of jurisdiction can best be addressed. Given the varied interests of national prosecutors and defendants, all of whom have legitimate concerns when it comes to staging a prosecution, and where any trial takes place, establishing approaches that balance these interests is necessary. The balancing of these, on occasions, competing interests, is a central concern of this thesis and it mooted ideas and made some recommendations how this could best be approached.

There is little customary international law can offer to resolve the problems identified in this thesis. Many of the available solutions that are on offer may serve only to mitigate the most serious consequences between States of a dispute about the appropriate exercise of judicial jurisdiction rather than getting to the root of the problem. As exclusive territoriality is not possible, and probably not advisable given the complex nature of international and transnational crimes which sometimes call for or would benefit from the application of judicial jurisdiction extraterritorially, a solution that consider all the prevailing factors involved is required. The international system lacks in general the institutional capacity to provide a truly successful means to resolving the kind of disputes which arise as a result of the concurrency of legislative jurisdictions. In discrete areas the possibility of rule based innovation exists, but large scale projects will prove cumbersome and unlikely to meet the specific demands of individual cases. The burden therefore largely falls back on States themselves to find a solution and engage with processes that could help alleviate the more negative consequences of conflicts of jurisdiction in this area. Innovation, even on a smaller scale, is not without its challenges, especially in terms of developing rule-based systems. There are, however, sources of analogy between other areas of international law and the topic of criminal jurisdiction addressed in this thesis (namely, private international law), and institutions which could, given the right circumstances, be called upon, and which could serve to ease the differences of opinion which arise about the exercise of judicial jurisdiction in criminal cases. In particular, the thesis looked to comity and especially the ideas

encapsulated in the doctrine of *forum (non) conveniens* rather than the, as yet, unrealised rules of international law to encourage respect and cooperation between legal systems. The hope, maybe expectation, is that comity will encourage an attitude of mutual respect between prosecuting administrations, rather than the indifference or even hostility to the genuine concerns of other States and that legal systems will find effective ways of protecting the human rights of those caught up in the criminal process, even in the new contexts presented by conflicts of jurisdiction.

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