Chapter 2

Ben Brandon

Jurisdiction and Complementarity

1 Introduction

For many of us familiar with domestic criminal justice systems in common law countries, the term 'jurisdiction' has a limited meaning. It is a term rarely used in day-to-day practice. Unless you work or practice in a country organised along federal lines, or have experience of international criminal law, the meaning of jurisdiction is usually confined to a discussion of the authority of a court or tribunal to adjudicate over a particular offender or offence. In international criminal law, however, the term often has multiple and inter-linked meanings, which this chapter sets out to disentangle and explain.

Under international law, jurisdiction has been described as having three constituent elements or powers: the power to prescribe, the power to adjudicate and the power to enforce.[1]

1 *Prescriptive jurisdiction* is the power of States to make law and to determine the reach of that law.
2 *Adjudicatory jurisdiction* is a term used to describe the ability to subject a person (or thing) to proceedings in a court of law, which adjudicates upon issues brought before it by parties who have the standing to do so.
3 *Enforcement jurisdiction* reflects the power of a State to compel compliance with its laws and to redress non-compliance, whether through the courts or the executive, within the jurisdictional reach afforded to either institution by the prescriptive power of the State's law-making institutions.[2]

These powers are reserved to States and are used to preserve peace within the territory of a State and provide a degree of protection and security for its nationals and their private property from both internal and external threats.

Having described what the constituent elements of jurisdiction are, it is then necessary to understand where, and over whom, jurisdiction can be exercised. We are primarily concerned with the exercise of criminal jurisdiction over individuals (since criminal liability, both at a domestic and international level, usually attaches to an individual rather

1 Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* 89 (2001). Also, see *Restatement (Third) Foreign Relations Law of the United States* (1987), pp 232, 235-238; Georges Abi-Saab, 'The Proper Role of Universal Jurisdiction', 1 *Journal of International Criminal Justice* 596-602 (2003); Louse Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?', 1 *Journal of International Criminal Justice*, 585-588 (2003); and Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* 589-595 (2003).

2 Kenneth Randall, 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* 785 (1988).

than a group).[3] An additional factor to take into account is the nature of the alleged crime and, in particular, whether it is an international crime.

Where a State, through its law officers or courts, exercises jurisdiction over a crime committed entirely in its own territory by one of its nationals, there is rarely any need to resort to international law and consider applicable principles of jurisdiction. However, the growth of mass transit and global commerce, together with the spread of international crime, has meant that States increasingly seek to exercise jurisdiction beyond their own borders. In doing so, they must have regard to what is permitted in international law, which has developed principles of jurisdiction to ensure that the exercise of domestic penal authority does not conflict with the general desire for harmony and order in the relations between States. Throughout this discussion of different and differing theories of jurisdiction, it is important to bear in mind that a balance must be struck between a State's interest in the offence, and the interests of other States in the offence.

States bring persons accused of having committed crimes before domestic courts under one of the four generally recognised principles of jurisdiction in international law: (1) territoriality, (2) active nationality, (3) passive nationality and (4) universal jurisdiction. Many States rely on more than one principle of jurisdiction in their administration of justice, depending on the nature of the crime alleged to have been committed.

2 Principles of Jurisdiction

2.1 The territorial principle

Until relatively recently, the majority of States only asserted jurisdiction over criminal acts when such acts were said to have been committed on their own territory. Crimes committed abroad were a matter for the forum State (i.e. the State where they occurred). This was particularly true of States that inherited the English common law approach, as articulated by Viscount Simonds in *Cox v. Army Council*:

> "… apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England."[4]

In the vast majority of criminal cases, the UK and many other Commonwealth States continue to exercise jurisdiction on the basis of the territorial principle. Territorial jurisdiction is certainly consistent with two important rules or 'peremptory norms' of

3 See Article 25 of the Rome Statute. Also see discussion of personal as opposed to corporate liability in Kenneth Gallant, 'Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts', 48 *Villanova Law Review* 763 (2003) at 799.

4 Cox v. Army Council (1962), 46 *Cr.App.R.* 258 (1963).

international law (*jus cogens*),[5] enshrined in the Charter of the United Nations: (1) the equality of sovereign States and (2) the principle of non-intervention.[6]

The relationship of these two rules to the question of criminal jurisdiction was considered by the Permanent Court of International Justice at The Hague in the *Lotus Case* (1927).[7] The Court held that:

> "The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

Having stated this general proposition, however, the Court then went on to find that international law did not prohibit States from extending the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, and indeed allowed a wide measure of discretion to do so. As a consequence, it found that:

> "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 the systems of law extend their action to offences committed outside the territory of a State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore is not an absolute principle of international law, and by no means coincides with territorial sovereignty."

The *obiter dicta*[8] of the *Lotus Case* cleared the path for more contemporary assertions of jurisdiction by States, which are explored in greater detail below. But the attraction of criminal justice systems based on the territorial principle of jurisdiction remains.

- First and foremost, exercising jurisdiction by taking action in the territory of another State (for example, by arresting a suspect without the knowledge of the host State) not only potentially falls foul of international law but may present a threat to the stability of the international legal order.

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5 The definition of peremptory norms that appears at Article 53 of the Vienna Convention on the Law of Treaties 1969 is the most succinct:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Jus cogens means 'compelling law' that may not be violated by any State.

6 Article 2.1: The Organisation is based on the principle of sovereign equality of all of its members.

Article 2.4: All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.

Article 2.7: Nothing contained within the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State….

7 *The Case of the "SS Lotus",* Series A - No. 10 PCIJ 1927.

8 Judicial opinions that have only incidental bearing on the case in question and are therefore not binding.

- Secondly, there are sound practical reasons for investigating and prosecuting crimes in the territory of the State where the offence was committed, including the availability of witnesses, a common language and a shared culture of justice. There is a degree of predictability and consistency in the administration of justice, as well as a reduced danger of exposing the same person to multiple proceedings in different jurisdictions.[9]

However, there are also disadvantages to the territorial model. It is best suited to simple crimes committed in one jurisdiction. The greatest threats posed to international peace and security by criminals and the organisations to which they belong are terrorism, drug trafficking, human trafficking, financial crime and money laundering. These crimes are often committed in multiple jurisdictions, with different elements of the criminal act occurring in different countries and time zones. The law-making institutions of many States have responded to these threats by developing new and innovative approaches to the problem of jurisdiction that do not rely to the same extent on a link between the territory of the State and the crime committed.

UK lawmakers, for example, have responded to the threat of international crime by creating new offences that are justiciable in English courts, even though part or all of the criminal act complained of takes place outside UK territory. For instance, Part 1 of the Criminal Justice Act 1993 allows offences of dishonesty to be tried in the UK provided that any of the relevant events (being acts or omissions necessary to prove the commission of a criminal offence) occurred in England or Wales.[10]

2.2 The principle of active nationality

Some States have always asserted jurisdiction over their nationals if they commit crimes, regardless of where the crime is committed. This principle is usually subject to the double criminality rule, in that the act must be proscribed in both the territory of the State that asserts jurisdiction over its national and the territory of the State where the crime is said to have been committed.

States that rely on the active nationality principle in asserting jurisdiction over crimes committed by their nationals also tend to exhibit a reluctance to extradite their nationals when called upon to do so by the State in whose territory the crime was committed. Indeed, in some instances there may be constitutional prohibitions that prevent the extradition of nationals. The corollary of such a prohibition is that provision must be made in the laws of the enforcing State to prosecute its citizens, even when the crime was committed abroad.

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9 See Cherif Bassiouni, note 1 above.

10 The courts too have developed their own response to the threats posed by international crime. The Privy Council observed in *Liangsiriprasert v. The United States Government* (1991), 92 *Cr.App.R.* 77 at 90, that:

> "Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England."

Certain States assert nationality-based jurisdiction for more serious crimes. For example, in the United Kingdom, there has been a statutory exception to the territorial principle in the case of murder and manslaughter committed by UK nationals abroad since the middle of the nineteenth century.[11] Box 2.1 offers an American example.

Box 2.1: The United States Military Extraterritorial Jurisdiction Act

In view of the increasing deployment of United States service personnel and their civilian auxiliaries in foreign States in the 'war against terror', it is interesting to note the extraterritorial impact of the United States Military Extraterritorial Jurisdiction Act 2000. This Act establishes federal jurisdiction over felony offences allegedly committed outside of the USA by persons employed by or accompanying the armed forces "if such acts would constitute an offence punishable by imprisonment of over one year if they had been committed within the special maritime and territorial jurisdiction of the United States" (18 USC §§ 3261-3267). US servicemen have been subject to the extraterritorial jurisdiction of military courts for many years. The assertion of nationality-based jurisdiction over non-combatant military personnel was introduced by the Clinton administration to close this long-established *lacuna*, but also in an effort to assist in negotiations with foreign States that either already had US bases on their territory or were about to.

2.3 The principle of passive nationality

In the last decade or so, States have increasingly asserted jurisdiction on the basis of passive nationality, where the enforcing State claims jurisdiction over crimes committed outside its territory when the harm that results from such acts is inflicted upon its citizens. This form of jurisdiction has historically proved controversial and has met with resistance, particularly from the United States.[12] In the *Cuttings* case, the US Secretary of State responded to Mexico's assertion of jurisdiction over a native of Texas for libel by denying "that a citizen of the United Sates can be held under the rules of international law to

11 See section 9, Offences Against the Person Act 1861:

"Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter...may be dealt with, inquired of, tried, determined and punished...in England or Ireland.... Provided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act."

12 See Judge Moore's dissenting opinion in the *Lotus Case* (note 7 above, p 92), which argued that the passive personality principle is:

"at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in the case of a denial of justice, must look to that law for his protection"

answer in Mexico for an offence committed in the United States simply because the object of that offence happens to be a citizen of Mexico."[13] As recently as 1979, United States Federal Courts rejected the passive personality principle as a jurisdictional basis in ruling that Congress was incompetent to impose criminal sanctions for the murder of a US citizen in a foreign State.[14]

The United States has performed something of an about-turn in the past decade or so. It increasingly asserts jurisdiction over crimes committed by foreigners against its citizens abroad in both criminal and civil cases where acts of terrorism have resulted in the loss of American lives. In 1986 Congress passed the Omnibus Diplomatic Security and Antiterrorism Act, which imposes the death penalty on any individual who, with the requisite terrorist intent "kills a national of the United States, while such national is outside the United States if the killing is murder". There are two possible reasons why lawmakers in the United States have changed their minds as to the utility of passive personality jurisdiction. First, there is the obvious need to protect their nationals living abroad. Second, there is a distrust of criminal justice systems in foreign territorial States, particularly where a State is considered to be a sponsor of terrorism.

Given the *dicta* in the *Lotus Case*, it has been argued that the principle of passive nationality is not recognised as a basis of jurisdiction prescribed under international law,[15] although the United States courts appear to have studiously avoided such debates in recent cases.[16]

2.4 Universal jurisdiction and international crimes

Simply put, universal jurisdiction is the exercise of jurisdiction by a State over a person who is said to have committed a limited category of international crimes, regardless of where the offence took place and irrespective of the nationality of the offender or victim. What distinguishes universal jurisdiction from the other forms of jurisdiction described here is that, for it to be a true expression of the principle, there need be no connection or link between the offender or the offence and the prosecuting or forum State.

2.4.1 The development of universal jurisdiction

Many jurists and writers have claimed that universal jurisdiction has a solid foundation in legal history, dating from seventeenth century laws prohibiting piracy on the high seas. It has also been said that, after 1945, the international community recognised that certain crimes were so abhorrent that they constituted crimes against the law of nations. As such, the perpetrators were enemies of humankind and could be prosecuted by any member of

13 John Bassett Moore, *A Digest of International Law,* para. 01 at 28-42 (1906), excerpted in Daniel G Partan, *The International Law Process* (1992), pp 292-297.

14 *United States v. Columbia – Colella,* 604 F. 2nd 356 (5th Circuit 1979).

15 See the chapter by Rudiger Wolfrum, 'The Decentralised Prosecution of International Offences Through National Courts' in Y Dinstein and M Tabory (eds), *War Crimes in International Law* (1996).

16 See Robinson, 'US Practice Penalising Terrorists Needlessly Undercuts Opposition to the Passive Personality Principle', *Boston University International Law Journal* 487 (Fall 1998).

the international community under the universal jurisdiction principle. Notwithstanding the confidence with which such claims are expressed, the existence of the principle of universal jurisdiction in international law is hotly disputed.

In order to establish whether or not an independent principle of universal jurisdiction exists in relation to certain categories of international crimes, it is necessary to consider the various sources of international law.[17] The legislation and case law of individual States are of particular value in attempting to resolve this dilemma. In this Guide, the emphasis will be on those States that are members of the Commonwealth, although there is valuable material to be found in the domestic criminal justice systems of Belgium, Germany, Spain and the United States that is also included. Also of importance are a number of international conventions, including the Geneva Conventions of 1949 and Protocols, the Genocide and Torture Conventions of 1948 and 1984 and the anti-terrorist conventions of the 1970s and 1980s. To return to the *dicta* in the *Lotus Case,* it is also necessary to ask of these various sources whether there is a rule in international law that prohibits national courts from exercising jurisdiction under the universal model or, alternatively, whether there exists an international law obligation on States to prosecute *jus cogens* crimes as and when they occur, irrespective of any link with the forum State.

Piracy is widely acknowledged as being the first international crime to attract universal jurisdiction. At a time when international law was in its infancy, States exercised jurisdiction over piratical acts committed on the high seas[18] even when there was no connection between the victims or perpetrators of the crime and the prosecuting State. Pirates were considered '*hostes humani generis*', or 'enemies of mankind', as their acts "disrupt commerce and navigation on the high seas" and "[s]uch lawlessness was particularly harmful when intercourse among States occurred primarily by way of the high seas, thus making piracy the concern of all States".[19]

A departure from jurisdictional principles premised on a link between the offence and the prosecuting State was therefore justified on the basis that prosecuting the 'enemies of mankind' using the universal jurisdiction principle was the joint concern of all States.[20]

Apart from the gradual emergence of the universal prohibition of slave trading in the late nineteenth century, universal jurisdiction as a principle in international law does not surface again until after World War II and, in particular, the Geneva Conventions of 1949. These invoked the universal principle as a basis for exercising jurisdiction with a view to safeguarding universal values.

In relation to war crimes, the Geneva Conventions and Protocols are the first in a long line of international conventions that came into force after 1945 and that are cited as evidence of a clear reliance on the principle of universality by States. However, it is equally clear that "no territorial or nationality linkage is envisaged [in the Geneva Conventions]

17 See Article 38(1) of the Statute of the International Court of Justice.

18 That is, not in the territorial waters of the forum State.

19 Dubner, *The Law of International Sea Piracy* (1980), pp 157-159, quoted in Randall, note 2 above.

20 Cassese, *International Criminal Law* (2003), p 284.

suggesting a true universality principle".[21] Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III and Article 146 of Geneva Convention IV all provide:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or have ordered to have committed,…grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

In the original commentaries to the Conventions, it was suggested that the obligation to search for offenders under this provision was limited to an obligation to search only on the territory of the forum State, hinting both at continuity with the orthodox territorial model and the balance that must be achieved between the exercise of national jurisdiction and the interests and territorial integrity of other States. The issue has never been resolved satisfactorily in a court of law as "there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions".[22] It has been argued that customary international law "does not warrant the conclusion that universal jurisdiction has been applied in national prosecutions" for grave breaches of the Geneva Conventions, or war crimes in general.[23] Nonetheless, it is generally accepted that there is nothing in international law that prohibits national criminal jurisdictions from invoking the principle of universality when prosecuting war crimes.

The crime of genocide was also a creature of convention. Article VI of the Genocide Convention of 1948 provides:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried 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."

The operative jurisdictional principle in the Genocide Convention was clearly the territorial principle. It was in the minds of the original parties to the treaty that an international penal tribunal would be established shortly to deal with such crimes. Of course, no such tribunal came into existence until the International Criminal Court (ICC) in 1998, and this does not, as we shall see, exercise true universal jurisdiction over the crime of genocide.

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21 See Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal in the International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* ICJ, 14 February 2002, para. 31. Contrast the observation of the dissenting Judges in the *Arrest Warrant Case (DRC v. Belgium)* with that of the Appeals Chamber in *Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* 2 October 1995 (case No. IT-94-1-AR72), reprinted in 105 *ILR* 419 (see http://www.un.org/icty/tadic/appeal/decision-e/51002.htm). The Appeals Chamber held that the grave breaches provisions of the 1949 Geneva Conventions established a "system of universal mandatory jurisdiction" (see para. 80 *et seq*).

22 Ibid, para. 32.

23 See Bassiouni, note 1 above, p 117.

Notwithstanding the apparent jurisdictional limits imposed by Article VI of the Genocide Convention, there is evidence from international tribunals and the recent practice of States that the crime of genocide is seen as attracting universal jurisdiction. The International Criminal Tribunal for Rwanda (ICTR) in the case of *Ntuyahaga* held that view.[24] The preponderance of opinion amongst the majority of jurists is that genocide gives rise to universal jurisdiction under customary international law.[25] Certainly, the obligation on State Parties under Article VI of the Genocide Convention to prosecute under the territoriality principle does not bar States from exercising universal jurisdiction over the same acts under customary international law.

There is no equivalent international convention for crimes against humanity, although many writers assert that the universality principle attaches.

There are a number of other international conventions relied upon by those who argue that an independent universal principle of jurisdiction exits in international law. Of particular relevance are those conventions that deal with international terrorist and drug trafficking offences. The majority of these conventions oblige State Parties to exercise jurisdiction extra-territorially, but the relevant provisions of such treaties usually fall short of compelling States to exercise universal jurisdiction over treaty crimes. Usually there is a link of some description between the forum State and the nationality of the offender, the ship or aircraft concerned or the victim. For example, the relevant sections of the Convention for the Unlawful Seizure of Aircraft 1970 provide that State Parties are obliged to take measures against individuals who commit hijacking offences when the offence takes place on board an aircraft registered in the State, the aircraft lands in the State with the offender still on board or the offender is present in the State by some other means (Article 4). Those measures must include prosecuting the accused, wherever the offence was committed, if the decision is taken not to extradite the offender (Article 7).

In a similar vein, the Single Convention on Narcotics and Drugs 1961 provides that drugs offences under the convention shall be prosecuted either by the State on whose territory the offences were committed, regardless of the nationality of the offender, or by the State in whose territory the offender is found "if extradition is not acceptable". It is claimed that these conventions, and many like them, provide further evidence of the existence of the universal jurisdiction principle.[26]

An examination of the status of torture as a crime in international law, and of the conventional instrument that defined it, is particularly helpful in understanding both (1) the relationship between international treaties and national case law and (2) the continuing debate over universal jurisdiction. The Torture Convention 1984 has been the focus of considerable attention, not least in the *Pinochet* case in the House of Lords.[27] The

24 *Prosecutor v Ntuyahaga,* ICTR Decision on the Prosecutor's Motion to Withdraw the Indictment of 18 March 1999 (case no. 90-40-T).

25 See Theodor Meron, 'International Criminalization of Internal Atrocities, 89 *American Journal of International Law (AJIL)* 569; and Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War', 39 *British Yearbook of International Law (BYIL)* 402.

26 Note, however, the dissenting opinion of Judges Higgins *et al* in *DRC v. Belgium* (note 21 above) who attribute this conclusion to "loose language" and argue that the relevant conventions really exhibit "obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere" (para. 41).

27 See note 16 above.

jurisdiction provisions in the Torture Convention are similar to those in earlier conventions we have looked at. Article 5 of the Convention provides that each State Party is obliged to take measures (which include either prosecuting the offender or extraditing him) when the treaty offences are committed in the territory of the forum State, or where the alleged offender or victim is a national of the forum State. It would appear that the Torture Convention stipulates a combination of territorial, active and passive nationality principles as the preferred basis for the exercise of jurisdiction by State Parties, but there is still some disagreement as to whether this amounts to universal jurisdiction (see Box 2.2, for example).[28]

Box 2.2: A UK Decision on Universal Jurisdiction Concerning Torture

The *Pinochet* case is just one example of where national courts have considered whether they have jurisdiction to try international crimes, said to attract universal jurisdiction. The decision of the House of Lords in that case tends to support the conclusion that no State has exercised universal jurisdiction without reference to national legislation – even where treaties allow for it.[29] In *Pinochet*, the House of Lords decided that, although it had been suggested that torture had been an international crime from the early 1970s when the first of General Pinochet Ugarte's victims claimed that they had been tortured, it was not until the 1984 Convention passed into domestic law by virtue of the Criminal Justice Act 1988 that torture committed extra-territorially could be considered as an extradition crime in the UK.

How have States, particularly those from the Commonwealth, chosen to interpret the international legal obligations placed upon them by the various treaties discussed in this section? An interesting example is the English Geneva Conventions Act of 1957. In certain respects, it could be argued that this Act represents the jurisdictional high water mark of international criminal justice legislation in the UK. Section 1 provides:

> "Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say … shall be guilty of a felony …."

This certainly looks like universal jurisdiction – or at least something close to it. There does not appear to be any requirement that there be a link between the prosecuting State and the offence, victim or offender. The Act is silent as to whether the offender needs to be present in the UK but, given the virtual impossibility of trying defendants in their absence in the UK, the presence of the offender can be read into the relevant provisions.

28 See Bassiouni, note 1 above, p 124.

29 Ibid, pp 106 and 148.

2.4.2 Recent developments regarding universal jurisdiction

Relevant Commonwealth legislation implementing the Rome Statute of the ICC is dealt with extensively in Part II of this Guide. A review of the implementing legislation in Australia, Canada, New Zealand, South Africa and the UK confirms that all these States have provided for the trial and punishment of the three core crimes of genocide, crimes against humanity and war crimes that have been committed extra-territorially. However, in the majority of cases, some nexus or connection is required with the forum State – usually the presence of the offender in the territory of the prosecuting State – thus arguably falling short of a classical assertion of universal jurisdiction.

This 'conditional' universal jurisdiction (as it has been called)[30] is to be distinguished from the national law in certain European States that asserts universal jurisdiction over certain crimes regardless of whether the offender is in the territory or not. For example, Article 23 of the Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside Spanish territory in circumstances where Spain is obliged to prosecute such crimes under relevant international treaty obligations.[31] In Germany, in a Bill that is still before Parliament (the *Entwurf eines Gesetzes zur Einführung des Völkersrtafgesetzbuches),* a similar unconditional universal jurisdiction model for German courts is proposed:

> "This code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany]."

The most controversial exercise of universal jurisdiction unrestrained by any nexus requirement is in recent international criminal prosecutions in Belgium under their Statute of 16 June 1993 (see Box 2.3).[32] This law was broader in scope than any other domestic implementing legislation in terms of the crimes it covered. No link between Belgium and the accused, victims or events was required. In the *Sharon* case heard before the Cour de Cassation in February 2003, the appeal court held that the 1993 law did not even require the accused to be present in Belgium.

Box 2.3: Criminal Prosecutions Under the Belgian Statute of 16 June 1993

Belgium intended that the 1993 law would give effect to various international obligations under the treaties discussed in this chapter, including the Geneva Conventions and the Genocide and Torture Conventions. Several high profile figures were investigated by Belgian investigating magistrates for their alleged involvement in international crimes, including former Iraqi President Saddam Hussein, Cuban President Fidel Castro and former Palestinian Liberation Organization leader Yasser Arafat. The current Israeli Prime Minister Ariel Sharon

30 Cassese, *International Criminal Law* (2003), p 288.

31 Ibid.

32 *Loi du Juin 1993 relative à la répression des infraction graves aux Conventions internationales de Genève du 23 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*

was investigated for his alleged role in the Shabra and Shatila refugee camp massacres in Lebanon in 1982, at the time when he was defence minister. The proceedings were initiated by 23 survivors of the massacres.

In 2001 four Rwandans, including two nuns, were prosecuted for their part in the genocide in that State. All of them were convicted and sentenced to substantial terms of imprisonment – although it should be noted that all defendants were in Belgium at the time of the investigations and prosecutions. The prosecution of the Congolese former foreign minister Abuldaye Yerodia under the 1993 law resulted in the *DRC v. Belgium* case before the International Court of Justice, referred to extensively in this Guide.

However, in the face of mounting international criticism, particularly from Israel and the United States, Belgian legislators took steps to tone down the law. In April 2003 Parliament amended the statute so as to ensure that only federal prosecutors, as opposed to victims' groups, could initiate prosecutions if the crime was alleged to have been committed outside Belgian territory or if the offender was not in Belgium, was not a Belgian national or had lived in Belgium for less than three years. The federal prosecutor was also granted an additional discretion in that he or she could refuse to proceed if:

> "in the interests of the administration of justice and in respect of Belgium's international obligations, this matter should be brought either before international tribunals, or before a tribunal in the place where the acts were committed, or before the tribunals of a State in which the offender is a national or where he may be found, and as long as this tribunal is competent, independent, impartial and fair." [33]

These concessions were apparently insufficient to assuage Belgium's critics, and by August 2003 an entirely new law had come into existence, marking the end of the country's decade-long flirtation with unconditional universal jurisdiction.[34] Now the Belgian courts can only try persons accused of genocide, crimes against humanity and war crimes if the accused or victim is a Belgian national.

The failure of the Belgian experiment does not mean that international law prohibits the exercise of unconditional universal jurisidiction by States. Instead, what it reveals is that other obligations that bind States in international law, as well as the necessity of preserving good relations with other sovereign States, inevitably impose constraints on its exercise.

One obvious limitation is the conventional and customary international law norms that grant immunity to serving Heads of State, senior state officials and diplomats from criminal proceedings in domestic courts, even where the crime is alleged to be an

33 See 42 *International Legal Materials* 749 (2003).

34 See Steven R Ratner, 'Belgium's War Crimes Statute: A Post Mortem', 97 *AJIL,* 890 (2003).

international crime.[35] For instance, the Belgian Cour de Cassation quashed proceedings against Ariel Sharon on the grounds that he was a serving Head of State, and as such enjoyed personal immunity in respect of all acts whether or not committed in an official capacity.

The position with Heads of State and senior government officials after they have left office in relation to acts they performed in an official capacity[36] is less certain, as the immunity they enjoy is different and less absolute. This class of immunity has been considered in a number of recent cases, including *Pinochet* and *DRC v. Belgium*. It is apparent from these various authorities that immunity, whether enjoyed personally or functionally, is a real impediment to those States that would seek to exercise true universal jurisdiction over international crimes.

There are other impediments. To prosecute persons using the unconditional universal jurisdiction model in a State that does not permit trials *in absentia* may inevitably involve arrests executed on the territory of other States. Not only may such actions prove unlawful, but also they create tremendous tensions in the relations between States, as recent United States incursions to arrest suspects in Mexican territory have proved. Less formal constraints also operate. It has been suggested that an informal complementarity exists in relation to the investigation and prosecution of many international crimes in domestic courts, where the crime is already being investigated by another State.

Ultimately, the debate about universal jurisdiction becomes one about broader principles of international law – the equality of States, sovereign immunity and territorial integrity. Our concern is to understand where States stand in international law should they seek to exercise universal jurisdiction over certain recognised international crimes. The answer appears to be that there is no rule in international law that prohibits States from doing so, but that there are very real practical and legal obstacles. These difficulties are particularly acute when there is no requirement for a link or connection between the offender, the offence or the place that the offence was committed and the prosecuting State. The majority of States that purport to exercise universal jurisdiction do so conditionally, in that they demand some form of nexus between the crime and the State for this reason.

3. National Courts and International Crimes

Criminal justice policy is increasingly influenced by global trends in crime control. As such, many recent anti-terrorist initiatives, as well as strategies to combat money laundering and drug trafficking, have their origin in international conventions negotiated and agreed at gatherings of like-minded States.

Many of these conventions create obligations for those States that ratify them. Typically, a State Party must prohibit in its domestic law the conduct that is the subject of the convention and must undertake to prosecute or extradite those who offend against such a prohibition. On occasion, such conventions even prescribe what principle of jurisdiction should attach to particular offences. In other cases, jurisdiction remains an issue for the

35 The topic of immunity is discussed at length elsewhere in this Guide: see Chapter 5 below.

36 So called functional immunity, or immunity *rationae materiae*.

State in question.[37] Jurisdiction is a jealously guarded attribute of sovereignty, and one that is not sacrificed lightly.

As we have seen, conventional law is not the only source of international criminal law. Many States have introduced domestic legislation prohibiting international crimes without any conventional obligation to do so. The War Crimes Acts[38] that passed through the parliaments of a number of Commonwealth States in the late 1980s were not introduced in compliance with international treaty obligations, but were thought to reflect customary international law norms. Although the crimes described in these Acts were international, the jurisdiction was exercised locally, under variants of the active nationality principle.

With no international penal tribunal with universal jurisdiction to deal with international crimes, and absent a 'global sovereign', jurisdiction over individuals alleged to have committed international crimes has been primarily exercised by national courts. Neither the existence of the *ad hoc* tribunals and special courts nor the establishment of the ICC has affected what has been described as the decentralised enforcement of international law.[39] The bulk of international crimes have been, and will continue to be, prosecuted in domestic courts rather than by international tribunals. That is particularly so in light of the complementarity scheme that is a central feature of the Rome Statute of the ICC (discussed further below).

Until the 1980s the prosecution of international crime in either international or domestic courts was a rarity. The International Military Tribunal (IMT) at Nuremberg in 1946 and the *Eichmann* trial in Jerusalem in 1962 are the notable exceptions.

The Israeli Supreme Court, and many international jurists before and since, have claimed that the IMT asserted jurisdiction under the universal principle. The preferred interpretation is that the Allies were merely exercising sovereign powers in the place of a failed sovereign, Germany. Hence in the Judgement of the IMT the following was stated:

> "The Signatory Powers created this Tribunal, defined the law it was going to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any of them may have done singly: for it is not to be doubted that any nation has the right to set up special courts to administer the law."[40]

Israel asserted a combination of the passive nationality principle and the universal principle in prosecuting Adolf Eichmann for crimes against the Jewish people, crimes against humanity and war crimes.[41]

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37 See, for example, the Genocide Convention Article VI:

> "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried 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".

38 Australian War Crimes Amendment Act 1988, War Crimes Act 1991 (United Kingdom), Canadian Criminal Code 1985.

39 Cherif Bassiouni, 'The Theory of International Criminal Law' in *International Criminal Law (3 volumes)* (1999), pp 1-9.

40 IMT (Nuremberg) Judgements and Sentences, 41 *AJIL* 172 (1947) at 216.

41 *The Attorney General v. Adolf Eichmann*, 36 *International Law Reports (ILR)* 5 (1961).

Recent prosecutions for international crimes such as *Sawoniuk*[42] in the English criminal courts under the War Crimes Act 1991 have been under a limited form of active nationality-based jurisdiction. The crimes contemplated by the relevant sections of the Act[43] had not been committed in UK territory at all. Jurisdiction is not even asserted on the basis of the nationality of the perpetrator at the time that the offence was committed, but rather his nationality at the time that the Act came into force. Further, the criminal acts (war crimes not crimes against humanity or genocide) must have occurred within strictly prescribed temporal and geographical limits.

Ten years later, the UK Parliament passed into law the International Criminal Court Act, which represents a further departure from the territorial principle for the English courts. It is now an offence against the English criminal law for a person to commit genocide, a crime against humanity or a war crime. Reflecting an unusual compromise of the territorial and active nationality principles of jurisdiction, the Act "applies to acts committed in England or Wales, or outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction".[44]

4. The Jurisdiction of International Criminal Tribunals

Towards the end of the last century *ad hoc* tribunals emerged in response to widespread human rights violations committed in Yugoslavia, Rwanda, Sierra Leone and East Timor. These tribunals are limited in jurisdiction and competence. For example, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) provides at Article 8 as follows:

> "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

Hence, the ICTY exercises a territorial-based jurisdiction with certain temporal limitations, albeit that it is an international tribunal that has primacy over the national courts of that territory. The Statute of the ICTR is very similar, save that it adds the active nationality principle into the mix, so that crimes committed by Rwandan citizens outside the recognised territorial boundaries of Rwanda and in the territory of neighbouring States are also subject to the jurisdiction of the Tribunal. Article 7 of the ICTR Statute reads:

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42 *R. v. Anthony Sawoniuk* (2000) Crim. L.R. 506, discussed extensively in Chapter 10 (The United Kingdom).

43 The War Crimes Act 1991 provides that:

" Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –

(a) was 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.

(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands".

44 Discussed below in Chapter 10.

> "The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

The competence of the Special Court of Sierra Leone differs from its two *ad hoc* predecessors. Its Statute indicates in the very first Article that the Court is concerned with prosecuting those "who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law". Whether or not the Special Court has the jurisdiction to try those who do not bear the greatest responsibility has not been decided. Nonetheless, it was clearly the intention of the UN and the Sierra Leone Government that those who did not fall into such a category, or who cannot be said to have been 'leaders' responsible for "threatening the establishment of and implementation of the peace process", should be tried by the national courts.

Although the Special Court is described in its Statute as having "concurrent jurisdiction" with national courts in Sierra Leone, this principle is subject to an important caveat. The Statute also confirms that, like its *ad hoc* predecessors, the Court has primacy over the national courts, and "at any stage of the procedure, the Special Court may formally request a national court to defer to its competence".

The Court exercises a territorial jurisdiction, but subject to significant modifications. It is restricted temporally, in that it only has jurisdiction to try crimes committed after 30 November 1996. It has the jurisdiction to try crimes committed by peacekeepers, but only if the State of which the accused is a national (the "sending State") is "unwilling or unable genuinely to carry out an investigation or prosecution" and the UN Security Council, on the proposal of "any State", authorises prosecution. As such, peacekeepers who commit international crimes in Sierra Leonean territory can be tried by the Special Court in a manner that is described as "complementing" the jurisdiction of the national courts of the sending State. As we shall see, this principle of 'complementarity' lies at the very heart of the jurisdictional regime of the ICC. Finally, the Special Court only has the power to try persons who were over 15 years old at the time that the offences were alleged to have been committed.

5. The Jurisdiction of the ICC and the Principle of Complementarity

Under the Rome Statute, national courts take priority over the ICC. The ICC can only exercise its jurisdiction "over persons for the most serious international crimes of international concern" and is an institution that is "complementary to national criminal jurisdictions".[45] Even if universal jurisdiction is afforded under the relevant implementing legislation to national courts, the Rome Statute controls whether the ICC is able to exercise such a jurisdiction. The conditions that have to be met before the Court can exercise its competence are set out in Article 12. The Court's jurisdiction, while arguably

45 See Article 1, ICC Statute.

inspired by the notion of universal jurisdiction, is in fact limited to situations where (1) the State where the alleged crime was committed is a party to the Statute (*territoriality*) or (2) the State of which the accused is a national is a party to the Statute (*nationality*). Accordingly, to the extent that universal jurisdiction remains important within the ICC scheme, it is a principle of jurisdiction that remains relevant to national courts only.

The complementarity model works in this way: the ICC cannot exercise jurisdiction over a crime if the same crime is being investigated or prosecuted by a State that has jurisdiction over it or a decision not to prosecute has been taken properly and independently by the appropriate authorities in that State. In other words, such a case would be inadmissible before the Court.[46] Further, the ICC cannot investigate or prosecute a crime if it is not sufficiently serious, or where the accused has already been acquitted or convicted by a fair trial before an independent tribunal in the State concerned.[47]

Cases are only admissible before the Court, and hence the ICC can only exercise its jurisdiction, where the State that has jurisdiction over the same crime is either unwilling or unable genuinely to carry out the investigation or prosecution, or the person accused of the crime has not been prosecuted due to the State being unwilling or unable to genuinely prosecute.[48]

What is meant by 'unwilling and unable' is also spelt out in the Rome Statute. The ICC may determine that a State is unwilling to investigate or prosecute where:

1 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;
2 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;
3 The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner that, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The Court may determine that a State is unable to investigate those who are alleged to have committed serious international crimes where, owing to a total or partial collapse of the national judicial system in the prosecuting State, "the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

It is only where the Security Council refers a case to the ICC (a power reserved for the Council under the Rome Statute in Article 11(2)) that the jurisdiction of the Court can be said to transcend the jurisdiction of a State Party and hence be described as universal. Otherwise, the jurisdiction of the Court is entirely complementary.

46 See Article 17, ICC Statute.

47 See Article 17.1(c) and 20.3, ICC Statute.

48 See Article 17, ICC Statute.

The ICC's system of complementarity entitles us to expect that national criminal justice systems will play an important role in assisting the Court to provide exemplary punishments that will serve to restore the international legal order. As Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton, has pointed out:

> "One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice – either a nation tries its own or they will be tried in The Hague – it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle."[49]

The ICC will be effective when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian law to investigate and prosecute all those guilty of international crimes, including peacekeepers. In the words of the ICC Prosecutor:

> "As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of regular functioning of national institutions, would be a major success."[50]

49 'Not the Court of First Resort', *The Washington Post*, 21 December 2003.

50 Quoted in McGoldrick et al, *The Permanent International Criminal Court: Legal and Policy Issues*, (2004), p 477.