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Contemporary Principles and Perspectives

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in certain limited circumstances, as will be seen in the following section. The variety of such limitations demonstrates that even if in principle, as Brownlie argues, there is 'no great difference between the problems presented by the assertion of civil and criminal jurisdiction over aliens'[30] or anyone else for that matter, in practice the consequences are very different and the circumstances in which criminal jurisdiction may be exercised are severely limited in comparison to civil jurisdiction.

6.3 BASES OF JURISDICTION

The sovereign equality of states presumes a more or less plenary power within the confines of state borders. As such, jurisdiction has traditionally been founded on territory. However, several issues have arisen in international law rendering the exercise of jurisdiction across borders increasingly complex. This can in part be explained by the increase in international exchange and organization, the growing instance of transnational crime (notably terrorism, people and drug trafficking, as well as war) and the development of responsibility relating to certain international crimes (such as crimes against humanity and genocide), necessitating cross-border regulation and truly international enforcement mechanisms.

The development of international human rights, international criminal law and, to an ever growing extent, international environmental law has led to some states taking a bolder view of the extension of jurisdiction across state boundaries. In this way, states have been increasingly willing to exercise jurisdiction on the grounds of nationality, national protection, passive personality and, in some cases, universal jurisdiction.[31] Some of these developments are highly controversial, giving rise to reactions and counter-reactions in international law that make traditional conceptions of jurisdiction more tenuous. The progressive Separate Opinions of Judges Higgins, Buergenthal and Kooijmans in the *Arrest Warrant* case before the International Court of Justice capture this sentiment of a developing law of jurisdiction:

> The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. 'Effects' or 'impact' jurisdiction

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[30] Brownlie, above note 1, 302; see also F.A. Mann, *Doctrine of Jurisdiction in International Law* (Leiden: A.W. Sijthoff, 1964), 49–51; Bartin, *Principes de droit international privé* (Paris: Editions Domat-Montchrestien, 1930), Vol. I, 113.

[31] *Arrest Warrant* case, above note 4.

> is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries (the United States; France), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.[32]

There are generally considered to be five bases for the exercise of state jurisdiction in international law: territorial principle, nationality principle, protective principle, passive personality principle and the universality principle. These jurisdictional principles were considered in the impressive work of the Harvard Research into jurisdiction with respect to crime in 1935,[33] and are still considered to be influential despite obvious developments in the content and expression of them in state practice since.[34]

6.3.1 Territorial Principle

The principle that the domestic courts of the state in which a crime is committed have jurisdiction over that crime is universally accepted, even where the accused may be a foreign national.[35] This reflects the exclusivity of sovereignty within the state's territorial limits (land, sea and air), and its responsibility for maintaining order. As such, there is a clear presumption in favour of the jurisdiction of the territorial state,[36] which also reflects the fact that in the great majority of cases the territorial state is the most convenient forum, given that the accused, witnesses, evidence and victims will almost always be located there.[37]

There are two possible applications of territorial jurisdiction, referred to as 'subjective' and 'objective'. The 'subjective' application of territorial

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[32] Ibid. (Judges Higgins, Buergenthal and Kooijmans) [47].

[33] See Edwin D. Dickinson, 'Introductory Comment to the Harvard Convention Research Draft Convention on Jurisdiction with respect to Crime' (1935) 29 *American Journal of International Law Sup.* 443.

[34] See, e.g., Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Antwerp: Intersentia, 2005); D.J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004, 6th edn), 265ff.

[35] *Holmes v Bangladesh Binani Corporation* [1989] 1 AC 1112, 1137; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 188.

[36] *R v West Yorkshire Coroner, ex parte Smith* [1983] QB 335, 358. See also *Bankovic v Belgium et al.* 41 ILM 517, [59] – a reductive human rights ruling in which the European Court of Human Rights characterizes state jurisdiction as 'primarily territorial'.

[37] *Arrest Warrant* case, above note 4, Guillaume J, [4].

jurisdiction grants jurisdiction, where a crime is commenced within the territorial state but completed in another, to the state in which the conduct was initiated. For example, crimes like drug trafficking frequently occur across national frontiers, and many preparatory acts (such as conspiracy) may be carried out in one state before the principal offence (sale or supply) is committed in another state. Under this principle, the first state has jurisdiction notwithstanding the fact that the offence is completed or consummated abroad. Of course, the second state would also be able to validly prosecute, and which state ultimately does so will (usually) depend on the location of the defendant. While there is no obligation in such a scenario for the first state to exercise its jurisdiction (at least in customary international law), where the exercise of such jurisdiction by it is necessary to combat transnational or international crime, a number of treaties (and possibly customary international law) might give rise to an obligation on its part to either prosecute, or to extradite the accused to another state to do so.[38]

The 'objective' application of territorial sovereignty refers to the exercise of jurisdiction by a state where the effects of a crime are felt, even though the crime (or at least its initiation or substantial elements of it) is committed outside its territory. For example, a fraudulent letter posted by the defendant in England, to the victim in Germany, may be tried in Germany.[39] This application of territorial sovereignty was considered by the Permanent Court of International Justice in the landmark *Lotus* case.[40] In that case, a French steamer (the *SS Lotus*) collided with a Turkish collier (the *Boz-Kourt*), sinking and killing eight people. When the *Lotus* reached port, in Turkey, the French officer of the watch was arrested and charged with manslaughter. France protested that Turkey had no jurisdiction to try its national in this way. The majority judgment considered that it was axiomatic to an international system of independent states that 'failing the existence of some permissive rule to the contrary [a state]

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[38] See, e.g., Convention for the Suppression of Counterfeited Currency and Protocol (adopted 20 April 1929, entered into force 22 February 1931) 112 LNTS 371; Convention for Suppression of the Illicit Traffic in Dangerous Drugs (adopted 26 June 1936, entered into force 10 October 1947) 198 LNTS 301. A range of multilateral anti-terrorism treaties also contain such obligations as between states parties, e.g., International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) A/RES/52/164; International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, not yet entered into force) A/RES/59/766.

[39] *Board of Trade v Owen* [1957] 602, 634 (CA); *R v Cox* [1968] 1 ER 410, 414; *DPP v Doot* [1973] AC 807.

[40] The *Lotus* case, above note 15.

may not exercise its power in any form in the territory of another state'.[41] The court considered, however, that it did not follow that 'international law prevents a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law'.[42]

Having once stated this principle, however, the majority went on to determine that the offence took place on board a Turkish ship which, for the purposes of determining jurisdiction, was to be considered Turkish territory.[43] Turkey did have jurisdiction to try the French officer of the watch once he was in Turkey, on the basis of the objective territoriality principle. The crime originated in France, or rather on board the French vessel, but because a 'constituent element [of the crime], and more especially its effects' occurred on the Turkish collier, which amounted to Turkish territory, the crime was 'nevertheless to be regarded as having been committed in the national territory' of the forum state.[44] This statement of the law has been criticized as permitting too broad an exercise of jurisdiction. Some states 'stretch' this doctrine by means of the legal fiction of the continuing offence, to permit prosecution – for example, for theft when a thief, having stolen goods in one state, crosses a border while still in possession of the stolen goods, a constituent element of the crime supposedly continuing while the goods are in his or her possession.[45] Other states prosecute where effects only are felt in that state. Akehurst argues that as state practice is so inconsistent in the application of the constituent element rule, the effects doctrine must be preferred, but is in itself too broad. He proposes limiting it to only effects felt 'directly' or most 'substantially' by the state seeking to exercise jurisdiction.[46] This, he suggests, is the only rule compatible with decided cases, and prevents excessive claims of jurisdiction.

Since the *Lotus* case, the subjective and objective territoriality principles have permitted states to exercise jurisdiction over people, property and events, where a constituent element of the cause of action occurs within their territory or the direct or substantial effects of the events are felt there. Where there may be competing claims by states over jurisdiction, regard will be had to the degree of connection a state has in relation to

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41 Ibid., 18.
42 Ibid., 19.
43 Ibid., 23.
44 Ibid.
45 *R v von Elling* [1945] AD 234; for stowaways see *Robey v Vladinier* (1936) 154 LT 87; for procuring see *R v Mackenzie and Higginson* (1911) 6 Cr. App. Rep. 64.
46 *Akehurst*, above note 7, 154.

the matter,[47] although it seems obvious that the exercise of enforcement jurisdiction will depend largely on having custody of the accused.[48]

With the exception of the territorial principle, all other bases of jurisdiction are extraterritorial in that they permit states to legislate with respect to persons, property and events occurring outside of their territory. This is true even where they must wait for the presence of the defendant within their territory to exercise enforcement jurisdiction. While the nationality principle in this context is relatively uncontroversial, contention can arise in determining nationality, especially with regard to corporations and subsidiary companies. The United States has exercised enforcement jurisdiction over banks based in the US and their subsidiaries abroad, requiring them to freeze all Iranian assets in dollar-denominated accounts.[49] Similar instances of extraterritorial enforcement are justified on the basis of the 'effects doctrine'.

6.3.1.1 The effects doctrine

US courts consider that when foreign activity causes effects that are felt in the US and are in breach of US law, they are competent to make orders including those for the disposition of property, restructuring of industry and production of documents, subject to another state's exclusive sovereign jurisdiction. Judgments of this nature may be executed against property held by the foreign entity in the US.[50] The UK has objected to the exercise of this jurisdiction on the ground that the only positive principle of jurisdiction recognized in international law is the territorial principle, with all other jurisdictional bases being exceptions to it, and as there is no rule permitting the exercise of enforcement jurisdiction in this way, it is illegal. However, the European Community exercises extraterritorial jurisdiction in a similar fashion with regard to anti-competitive practices. Article 101 of the Consolidated Version of the Treaty on the Functioning of the European Union[51] permits the European Court of Justice to exercise jurisdiction over overseas corporations for cartel behaviour, even where these corporations have never traded within the European Community,

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47 Ibid.

48 See Harris, above note 34, 266.

49 44 Fed Reg 65, 956, 1979.

50 *US v Aluminum Co. of America*, 148 F 2d 416 (1945); *US v Watchmakers of Switzerland Information Centre Inc.*, 133 F. Supp. 40 (1955); 134 F. Supp. 710 (1955).

51 European Union, Consolidated Version of the Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009) 2008/C 115/01.

so long as the effect of the cartel activity was intended to be felt and was actually felt within the European Community.[52]

The US has tempered its expansive approach, partly in response to the wave of diplomatic protest and 'blocking legislation' generated in response to the *Westinghouse* case,[53] in which a US court ordered discovery of documents located in a number of overseas jurisdictions. The subsidence of the UK objections in the face of the European position appears to indicate that the effects doctrine has gained acceptance at least in these jurisdictions. As such, states may be considered to have the extraterritorial jurisdiction necessary to enforce their valid legislative jurisdiction, which seems to depend on a substantial or effective connection, keeping the effects doctrine alive in substance, if not in name.[54]

6.3.2 Nationality Principle

The nationality principle allows states to exercise jurisdiction over their nationals for acts done within or outside the state's territory. This principle stems from the recognition that sovereign states may legitimately impose obligations on their subjects.

Nationality is, in international law, the legal link between a state and its people. The rights and obligations of nationals vis-à-vis their states include such things as the right to a passport and the obligation to perform military service and pay taxes. The authority to provide and oblige these things to and of nationals is an exercise of state jurisdiction based solely on the person's nationality. This authority extends to the civil and criminal jurisdiction of the state's courts.

It is for states to make their own laws regarding nationality.[55] However, the recognition of those laws in international law depends on whether they are 'consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality'.[56] The International Court of Justice has held that nationality is 'a legal bond

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[52] *Ahlström Oy and Others v Commission of the European Communities* (*Wood Pulp*) [1988] ECR 5193.

[53] *Re Uranium Antitrust Litigation*, 480 F Supp 1138, 1148 (9th Cir, 1979); *Re Uranium Antitrust Litigation*, [1980] USCA7 143; 617 F 2d 1248, 1255 (7th Cir, 1980).

[54] Brownlie, above note 1, 311.

[55] *Nationality Decrees in Tunis and Morocco* (1923) PCIJ (Ser. B) No. 4; 2 AD 349.

[56] Hague Convention on the Conflict of Nationality Laws (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89, Art. 1.

having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[57] Without such a genuine connection, international law will not recognize the grant of nationality.

Corporations have the nationality of the state of registration or incorporation, or that of their main place of business. Daughter companies do not automatically have any connection via nationality with their parents. Ships and aircraft carry the nationality of the state of registration, but here too there must be a genuine connection with the state of registration. Variation exists in the law ascribing nationality to children born on board ships and aircraft depending on their location and state of registration, as for nationality laws generally.

States with civil law traditions are more likely than common law states to exercise jurisdiction based on nationality, although states across all legal traditions practise this form of jurisdiction.[58] Jurisdiction with respect to civil and especially family law matters often depends solely on the nationality of the parties. In common law states, this jurisdiction is generally only exercised with regard to very serious criminal offences, or where the territorial principle is not appropriate.[59] In some cases this has led to the creation of obscure offences, such as leaving the state with intent to commit a crime, in order to prevent nationals travelling to another jurisdiction to commit proscribed conduct (such as duelling) where it is not prohibited.[60]

6.3.3 Protective Principle

States frequently prosecute foreign nationals under the protective principle for acts done abroad, the effects of which are prejudicial to the forum state. While this often encompasses political acts, it also extends to acts compromising the state's economic, immigration, currency and national security interests.

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[57] *Nottebohm* case (*Lichtenstein v Guatemala*) [1955] ICJ Rep 4, 23.

[58] See Dickinson, above note 33, 519.

[59] See, e.g., Australian Criminal Code (Cth), Division 272, Subdivision B, which prohibits certain sexual offences committed by Australian citizens or residents in other states; similarly, Antarctica Act 1994 (UK), s. 21 (offences by British nationals in Antarctica), and offences under the Official Secrets Act 1989 (UK), s. 15.

[60] Donnedieu de Vabres, *Les principes modernes du droit penal international* (Paris: Sirey, 1928) 391; Akehurst, above note 7, 157.

In *Liangsiriprasert v Government of the United States of America*,[61] the House of Lords considered an appeal against an extradition order against a Thai national from Hong Kong to the US. Liangsiriprasert was found to have conspired to import heroin into the US from Thailand, but as the US had no extradition agreement covering drug trafficking, US and Thai authorities tricked Liangsiriprasert into going to Hong Kong, where he thought he would collect payment for the shipment, but was instead arrested. On appeal the question was whether a court in Hong Kong had jurisdiction to try a conspiracy entered into in Thailand to import drugs into Hong Kong, whether or not any overt acts had been done in Hong Kong. This was necessary for the extradition order, under the principle of double criminality.[62] The court held that an inchoate crime, such as conspiracy, which is intended to have an effect in Hong Kong, would be triable in Hong Kong even if no overt element of the plan was carried out in Hong Kong.[63] This decision reflects the protective principle in allowing states to exercise jurisdiction over acts done outside their territory having, or even intending to have, a prejudicial impact within that state.

In *Nusselein v Belgium*[64] a Dutch soldier was convicted of aiding the enemy on the basis of acts done both inside and outside Belgium. The Belgian Court of Cassation held that it had jurisdiction over the soldier irrespective of where the events occurred, as they constituted 'crimes against the external safety of the state'.[65] Similarly in *Joyce v DPP*,[66] a foreign national who left England fraudulently using an English passport and subsequently broadcasted propaganda for the enemy in wartime, was found guilty by the House of Lords of treason. It was held that as he travelled on a British passport he owed allegiance to the Crown. Hence, even though Joyce committed the acts in another state and was not in fact a British national, the prejudice to British interests was sufficient to ground jurisdiction under this principle.[67]

6.3.4 Passive Personality Principle

The controversial passive personality principle has been accepted by different states at different times. The principle allows states to exercise their

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61 [1991] 1 AC 225.
62 See the discussion on extradition at section 6.4 below.
63 *Liangsiriprasert* case, above note 61, 251.
64 (1950) 17 ILR 136.
65 Ibid.
66 [1946] AC 347.
67 Ibid.

jurisdiction over foreign nationals for actions done outside their territory, but which affect the forum state's nationals. The case of *Cutting* is often cited to illustrate the principle. The case concerned an American who published material defaming a Mexican in Texas. Cutting was later arrested while in Mexico and charged on the basis that defamation was criminal in Mexico at the time, the prosecution seeking to exercise jurisdiction based on the passive personality principle.[68] The controversial nature of the principle is evident in the fact that Cutting did an act which was not criminal in the jurisdiction in which the act was done. Nevertheless, he was subject to the criminal jurisdiction of another state by reason only of the nationality of the victim. The principle was also one of several jurisdictional bases evoked to justify prosecution of a terrorist by a US court.[69]

The passive personality principle was, as far back as 1935, considered so controversial, and its practice so incomplete, that it was left out of the Harvard Draft Convention.[70] Nonetheless, it is and has been applied and is broadly accepted as a form of jurisdiction in international law, having been applied in a recent case before the International Court of Justice.[71]

6.3.5 Universal Jurisdiction

Universal jurisdiction is a broad concept that is often used without specificity as to what precisely is meant. The term has been employed to describe the right of – and often obligation upon – states to prosecute or extradite in respect of certain categories of crime (*aut dedere aut judicare*).[72] This form of universal jurisdiction, if that is what it is, is referred to by President Guillaume in the *Arrest Warrant* case as a 'subsidiary' form.[73] It tends to arise out of treaty obligation, rather than recognition that there is a rule of customary international law obliging the exercise of jurisdiction by states. 'Voluntary' universal jurisdiction refers to the true form, whereby a state with no territorial, nationality or other connection with a crime may

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[68] J.B. Moore, *Digest of International Law* (Washington, DC: GPO, 1906), Vol. II, 228.

[69] *Yunis*, 924 F 2d 1086, 1090–3 (CADC, 1991).

[70] See Dickinson, above note 33, 579. The Harvard Draft Convention was an important early work undertaken by scholars to explain and rationalize the forms of jurisdiction relating to crimes in international law.

[71] See *Arrest Warrant* case, above note 4, [47] (Judges Higgins, Kooijmans and Buergenthal), [44] and [16] (President Guillaume).

[72] See above, section 6.3.

[73] *Arrest Warrant* case, above note 4, [7] (President Guillaume).

nonetheless assert jurisdiction over that crime and those responsible.[74] The question over whether a state in such circumstances is obliged to do so is far less clear. Although such jurisdiction is said to arise out of the nature of the criminality as offending the 'laws of humanity', state practice certainly does not support the view that international law obliges states to exercise such jurisdiction.

Crimes attracting universal jurisdiction are those considered to be offensive to the international community as a whole, and are generally described as offending humanity itself or the laws of nations. The crimes generally referred to as giving rise to universal jurisdiction include piracy, genocide, crimes against humanity and war crimes, torture and slavery. Neither customary nor conventional international law providing for universal jurisdiction permits interference in another state's sovereignty in apprehending an accused. This fact demonstrates the limits of universal jurisdiction; while jurisdiction may be prescribed, enforcement may be very much another matter. The different forms of universal jurisdiction will now be examined, as will some practical implications of its application (the illegal apprehension of suspects and its consequences and the United States under the Alien Tort Claims Act of 1789).[75]

6.3.5.1 Crimes at customary international law

It is often said that customary international law empowers states to try individuals accused of certain crimes that are considered particularly opprobrious by the international community. The crime of piracy on the high seas was the first of such crimes, and is seen as the classical example.[76] Piracy itself includes illegal acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or private aircraft and directed against another ship or aircraft (or persons or property therein) on the high seas of *terra nullius*.[77]

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[74] Ibid., [51] (Judges Higgins, Kooijmans and Buergenthal). See distinction between subsidiary and voluntary universal jurisdiction in Harris, above note 34, 303.

[75] See generally the 'Princeton Principles on Universal Jurisdiction', Program in Law and Public Affairs, Princeton University (2001), available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

[76] *In re Piracy Iure Gentium* [1934] AC 586; see President Guillaume's reference in the *Arrest Warrant* case, above note 4, [4]; see also M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 1.

[77] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (hereinafter UNCLOS), Art. 101.

Interestingly, the Genocide Convention of 1948 (the substantive content of which has been applied in the statutes of all the relevant international criminal tribunals and many states' domestic legislation) did not prescribe universal jurisdiction for this crime.[78] Although the UN Secretary-General's preliminary draft Article VII provided for a primary obligatory universal jurisdiction, states' suspicion of the courts of other jurisdictions led to its omission.[79] The prohibition against genocide is now widely considered a *jus cogens* norm. Judge Elihu Lauterpacht has stated that 'genocide has long been regarded as one of the few undoubted examples of *jus cogens*'.[80] Such norms sit at the top of the hierarchy of international law sources and cannot therefore be derogated from by states, either by international agreement or national legislative action.[81] All crimes prohibited under *jus cogens* norms have been said to entail universal jurisdiction; courts and international law scholars have overwhelmingly accepted this position both as a general proposition, and particularly in respect of genocide.[82] The prohibition of genocide also constitutes an obligation *erga omnes* binding on all states in their dealings with the international community, whether with other states or with individuals.[83]

It is less clear whether crimes against humanity qualify for similar treatment. On one hand, there is considerable scholarly argument – and some jurisprudence of the post-Second World War tribunals, domestic courts, and the ad hoc Tribunals – supporting the view that crimes against human-

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

[79] For a discussion of this process, see Inazumi, above note 34, 59–60.

[80] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia*) [1993] ICJ Rep 325, 440 (Separate Opinion of Judge ad hoc Elihu Lauterpacht).

[81] See Michael Akehurst, 'The Hierarchy of the Sources of International Law' (1974–75) 47 *British Yearbook of International Law* 273; Shaw, above note 2, 123–8.

[82] See, e.g., M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law and Contemporary Problems* 63. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina v Yugoslavia*) (Preliminary Objections) [1996] ICJ Rep 565, [31] (hereafter '*Bosnia v Yugoslavia* Preliminary Objections Judgment').

[83] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) ('*Reservations* Opinion') [1951] ICJ Rep 15, 23. See also *Bosnia v Yugoslavia* Preliminary Objections Judgment, above note 82, [31]; *Barcelona Traction, Light and Power Co. Ltd* (*Belgium v Spain*) [1970] ICJ Rep 3, [33]–[34].

ity violate *jus cogens* norms and give rise to universal jurisdiction.[84] On the other hand, the International Court of Justice in the *Arrest Warrant* case suggested (rather unconvincingly) that, while crimes against humanity are no doubt prohibited under customary international law, the notion that they violate *jus cogens* norms and give rise to universal jurisdiction may at this stage be more aspirational.[85] The preponderance of scholarly and preferable juridical writings suggests that crimes against humanity may give rise to universal jurisdiction; indeed, if the justification for application of this jurisdictional principle is that certain crimes contravene some notion of the laws of humanity it is difficult to see how crimes against humanity fail to reach this threshold.

One category of war crimes (grave breaches of the Geneva Convention) certainly gives rise to universal jurisdiction, at least the expression of this form of jurisdiction in terms of the so-called *aut dedere aut judicare* obligation.[86] Despite reductive arguments about the jurisdictional scope of the Geneva Conventions,[87] the preferable view is that the Conventions create an obligation on each state (and these Conventions are now universally ratified) to search for and try suspects in their own courts for alleged breaches of the grave breaches regime.[88]

Torture is another crime giving rise to such an expression of universal jurisdiction. In *Ex parte Pinochet (No. 3)*, torture was referred to by several judges as a crime giving rise to universal jurisdiction, general state

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[84] See, e.g., Larry May, *Crimes against Humanity: A Normative Account* (Cambridge; New York: Cambridge University Press, 2005), 24–39; M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1998, 2nd edn), 210–17, 227–42; Tristan Gilbertson, 'War Crimes' (1995) 25 *Victoria University Wellington Law Review* 315, 327–8.

[85] See *Arrest Warrant* case, above note 4, [71] and [42]–[51] Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal (carefully considered analysis of whether universal jurisdiction attaches to crimes against humanity). See also Robert Jennings and Arthur Watts, *Oppenheim's International Law* (London: Longman, 1996, 9th edn), 998 (noting that 'there are clear indications pointing to the gradual evolution' of the principle that crimes against humanity give rise to universal jurisdiction). According to the ICJ, at least, this point has not yet been reached.

[86] Grave breaches of the Geneva Conventions include a range of serious crimes committed in an international armed conflict. For a detailed discussion, see Gideon Boas, James L. Bischoff and Natalie L. Reid, *Elements of Crimes in International Criminal Law* (Cambridge: Cambridge University Press, 2008), Chapter 4.

[87] See, e.g., D.W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' (1982) 53 *British Yearbook of International Law* 12.

[88] See Inazumi, above note 34, 57–8.

practice and support for the UN Convention against Torture reinforcing this view.[89]

6.3.5.2 Treaties providing for 'universal jurisdiction': *aut dedere aut judicare*

Some multilateral treaties confer a form of jurisdiction upon states that is often described as 'universal'. These treaties generally require States Parties to create in their domestic law provisions proscribing the relevant conduct and allowing prosecution in certain circumstances, and to prosecute or extradite accused persons – the *aut dedere aut judicare* principle. The Hague Convention for the Suppression of the Unlawful Seizure of Aircraft, for example, requires States Parties to provide for prosecutions for certain crimes committed on board any aircraft which lands in that state's territory with the offender still on board, and where the offender is present in the jurisdiction and is not extradited.[90]

This is an exercise of what might be termed 'quasi', or 'subsidiary', universal jurisdiction and is distinguishable from true (or 'voluntary') universal jurisdiction. The accused must have a territorial link with the forum state – here, physical presence within the state. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[91] contains such provisions and provides that States Parties shall include torture in extradition agreements with other States Parties.[92] The Convention was considered in *Ex parte Pinochet (No. 3)*.[93] A majority of the House of Lords found that English courts had no jurisdiction to try acts of torture committed outside the UK before the implementation of the Convention into English municipal law by way of section 134 of the Criminal Justice Act 1988.[94] After that date they were obliged to exercise 'quasi-universal jurisdiction' to prosecute accused persons in their territory, or to extradite them. This meant only a small proportion of the charges brought could be considered in the extradition request.

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[89] *Ex parte Pinochet (No. 3),* above note 35. See discussion of the *Pinochet* case in 6.3.5.2. See also analysis of the Trial Chamber in the ICTY case, *Prosecutor v Furundžija* (Judgment) ('*Furundžija* Trial Judgment') IT-95-17/1-T (10 December 1998), [147]ff.

[90] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971), 1973 UNTS 105.

[91] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[92] Ibid., Art. 4.

[93] *Ex parte Pinochet Ugarte (No. 3)* above note 35, 275.

[94] Ibid., 195–7.

Lord Millet, dissenting, considered torture to be a crime at customary international law attracting universal jurisdiction and hence held that, as custom is incorporated into English common law, English courts had jurisdiction at the necessary time before the implementation of the Torture Convention.[95] Extradition to Spain was ultimately refused by the Home Secretary on medical grounds.

A proliferation of counter-terrorist and other treaties also reflect the *aut dedere aut judicare* principle.[96] Indeed, following the 11 September 2001 terrorist attacks in the US, the Security Council issued a Resolution requiring all states to:

> Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'.[97]

6.3.5.3 True universal jurisdiction

The crimes to which universal jurisdiction is said to attach include piracy, genocide, crimes against humanity, war crimes, torture and slavery. Other offences, including hijacking, apartheid and even drug trafficking, have also been considered to give rise to universal jurisdiction,[98] although evidence does not appear to support the extension under customary international law of the universality principle to these broader categories of crime.

A case of potentially great importance in the area of universal jurisdiction was the *Arrest Warrant* case before the International Court of Justice in 2002.[99] In 1993, Belgian courts were given jurisdiction by national legislation to exercise universal jurisdiction in trying charges of war crimes, crimes against humanity and genocide. Pursuant to this legislation, in 2000, a warrant was issued by Belgian authorities for the arrest of Abdoulaye Yerodia Ndombasi, the then Minister of Foreign Affairs of the Democratic People's Republic of the Congo (DRC). The Court was initially asked by the DRC to consider (1) whether Belgium acted unlawfully by legislating and issuing an arrest warrant for another state's incumbent Foreign Minister, for crimes committed by him within his country

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95 Ibid., 276; 119 ILR 135.
96 See, e.g., the multilateral treaties referred to above at note 38.
97 S/Res/1373 (2001), [2(e)].
98 See *DPP v Doot and Others*, above note 39 (per Lord Wilberforce).
99 *Arrest Warrant* case, above note 4.

and with no connection whatever with Belgium's territory, its nationals (as perpetrator or victim), and (2) whether Foreign Minister Yerodia was protected by the doctrine of sovereign immunity. Unfortunately, the parties and the Court agreed to resolve the matter on the question of immunity alone, rejecting the opportunity to clarify the position of universal jurisdiction in international law. As rightly noted in a joint Separate Opinion, the resolution of the question of immunity cannot properly be resolved without also addressing jurisdiction – it is after all immunity *from* jurisdiction.[100]

The story of Belgium's endeavours to extend application of the universality principle in its jurisdiction is perhaps indicative of the current state of the principle, and its complex interrelationship with international power politics.[101] Having boldly amended its laws to enable the prosecution of war crimes, crimes against humanity and genocide exercising universal jurisdiction, and having a system that allowed victims to initiate criminal complaints before an investigating judge, Belgium tried and convicted four Rwandans for the genocide in Rwanda and accepted complaints against an extraordinary range of potential defendants, including Israeli Prime Minister Ariel Sharon, Cuban President Fidel Castro and Iraqi President Saddam Hussein, among others. The diplomatic response from affected states to this increased litigation was far from favourable, and included Israel withdrawing its ambassador in protest.

As challenging as this was, the wheels only really fell off the Belgian universal jurisdiction machine when Iraqi victims sought to bring an action against US President George H.W. Bush, Vice-President Dick Cheney and others for committing war crimes in the 1991 Gulf war. Overt threats by US Secretaries of State Colin Powell and later Donald Rumsfeld, including the refusal to fund a new NATO headquarters in Belgium, led to a series of amendments brought by the Belgian Prime Minister that significantly emasculated the Belgian law, including the removal of the *partie civile* component and recognizing a wide range of immunities under international law.[102]

It is fair to say that Belgium's domestic experience, as well as the ruling of the International Court of Justice in the *Arrest Warrant* case, has delivered something of a blow to the trajectory of a true universal jurisdiction.

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[100] Ibid., 64, [3] (Judges Higgins, Kooijmans and Buergenthal).

[101] For a detailed account of these events, see Steven Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 *American Journal of International Law* 888.

[102] Ibid.

6.3.5.4 Illegal apprehension of accused

Any exercise by a state outside of its own territory raises difficult questions about potentially competing sovereign rights. The apprehension of a pirate on the high seas is a less controversial application of the principle. A more difficult ramification of the exercise of universal jurisdiction can occur where states seek to exercise their jurisdiction in violation of another state's sovereignty. For example, can states exercise jurisdiction over an accused when they have been abducted from another country? The Israeli District and Supreme Courts considered this issue in the Eichmann trial and (not surprisingly) held that the fact of the accused's abduction in violation of international law did not prevent it from trying Eichmann for war crimes.[103] While the Security Council considered the abduction to be a potential threat to international peace and security and ordered reparations be paid,[104] it stopped short of suggesting or requiring Eichmann's release from Israeli custody.

Courts in the United Kingdom, Australia, France, South Africa, Israel and the United States have historically held that the manner in which a person is brought before the court does not affect its jurisdiction (*male captus bene detentus*).[105] This is still the position of the United States Supreme Court, where the so-called *Ker-Frisbie* doctrine operates,[106] with the exception that, where an extradition treaty is in force between the abducting state and the former host state, and the abduction was contrary to the treaty, jurisdiction may not be exercised.[107] Another recognized exception to this rule is where US officials have been involved in inflicting torture on an apprehended person in the course of that person's abduction and transfer to US territory.[108]

Other common law states – including New Zealand, Australia, South Africa, Canada and the United Kingdom – have, in recent times, distanced themselves from the robust position operating in the US.[109]

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[103] *Eichmann* case, above note 16, 5, 277.

[104] UNSC Res. 138 (1960).

[105] See generally Susan Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia' (1999) 70 *British Yearbook of International Law* 165, 230–31.

[106] Based on two US Supreme Court cases (*Ker v Illinois*, 119 US 436, 444 (1886), and *Frisbie v Collins*, 342 US 519 (1952)).

[107] *Sosa v Alvarez-Machain*, 542 US 692 (2004).

[108] See *United States v Toscanino*, 500 F 2d 267, 275 (2d Cir.1974).

[109] See Paul Michell, 'English-speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain' (1996) 29 *Cornell International Law Journal* 383. See also *R v Horseferry Road Magistrate's Court, ex parte Bennett* [1994] 1 AC 42, 62 (HL); *R v Bow Street Magistrates, ex parte*

6.3.6 The Alien Tort Claims Statute

An unusual application of extraterritorial jurisdiction is found in the United States. The Alien Tort Claims Act of 1789 provides for the original jurisdiction of the District Court of the United States to hear and determine claims brought by aliens in 'tort only, committed in violation of the law of nations or a treaty of the United States'.[110] This was interpreted in as late as 1980 as permitting a tort action by a Paraguayan national, against a Paraguayan police officer for acts of torture committed in Paraguay, to be heard in the United States.[111] Since then, *Tel-Oren v Libyan Arab Republic*[112] and *Sanchez-Espinoza v Reagan*[113] have made it clear respectively that a cause of action in international law was necessary, that political crimes will not be considered by the court, and that state immunities prevent judgment against people acting in an official capacity.[114]

6.4 EXTRADITION

Extradition refers to the practice of surrendering an accused person to the authorities of another state for prosecution. It is commonly organized by way of bilateral treaties, which are reflected in the domestic legislation of each state. There is no obligation to extradite at customary international law, nor is there any customary law obligation to prosecute if extradition is refused. However, as discussed above, many multilateral treaty regimes add particular offences, such as hijacking and terrorist bombing, to the offences for which extradition is required unless the forum state is prepared and able to prosecute.

The two key principles reflected in many extradition treaties are the requirements for double criminality and speciality of the prosecution. The double criminality principle requires the offence in question to be criminal in both the sending and receiving states. In *Ex parte Pinochet (No. 3)* the operation of this principle prevented extradition for offences committed before 1988, when the Convention Against Torture was implemented in the UK. Prior to that date the offences were not part of UK law and

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Mackeson (1981) 75 Crim. App. R. 24; *State v Ebrahim* [1991] 2 SALR 553(q), 31 ILM 442 (South Africa Supreme Court, Appellate Division).

110 Title 28, United States Code, §1350.

111 *Filartiga v Peña-Irala*, 630 F. 2d 876 (2d Cir. 1980); 77 ILR 169.

112 726 F. 2d 774 (DC Cir. 1984).

113 770 F. 2d 202 (DC Cir 1985).

114 See *Alvarez-Machain v United States*, 41 ILM 2002, 130.

could not form the basis of an extradition order.[115] The speciality principle requires that the accused be tried and punished in the receiving state only for the crime for which he or she is surrendered. An interesting example of a contest relating to this latter principle can be seen in the extradition proceedings brought by Sweden against Julian Assange, who is residing in the United Kingdom. One of the defence arguments in this case is that Sweden, upon receipt of custody of Assange, will send him to the US upon a request from the US relating to violation of its state secrets (an entirely different crime from that for which he is sought by Sweden).[116]

Political offences are generally excluded from the list of extraditable crimes, with the exception of terrorist offences. In particular, the European Convention for the Suppression of Terrorism 1977[117] lists in Article 1 a number of offences not to be considered political. Many states also do not allow the extradition of their own nationals, especially where they have the capability of prosecuting domestically for crimes committed by nationals abroad,[118] although this approach is by no means universal.[119] Finally, some multilateral extradition arrangements prohibit extradition on the principle of *non refoulement* or where the subject will be put in danger,[120] or is likely to suffer human rights violations,[121] which includes the risk that the accused will not receive a fair trial in the requesting state.[122]

Other forms of extradition not undertaken on the basis of formal arrangements (bilateral treaty and domestic implementing legislation) have recently become notorious in the so-called 'war on terror' era. The use of informal and extraordinary rendition techniques, particularly by

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[115] *Ex parte Pinochet (No. 3)*, above note 35.

[116] *The Judicial Authority in Sweden v Julian Paul Assange* [2011] EW Misc 5 (MC).

[117] European Convention on the Suppression of Terrorism (adopted 27 January 1977, entered into force 4 August 1978) ETS 90.

[118] See, e.g., French Extradition Law of 1927, Art. 3(1); Basic Law of the Federal Republic of Germany, Art. 16.

[119] For example, in Australia extradition of Australian nationals may be ordered in response to requests by other states: *Vasiljkovic v Cth* (2006) 227 CLR 614.

[120] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150.

[121] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) CETS 194 ('ECHR'), Arts 2, 3, 5, 6; Extradition Act 1988 (Cth), s. 7(b); Extradition Act 2003 (UK) c.41, s. 21.

[122] ECHR, Art. 6; Extradition Act 1988 (Cth), s. 7(b); Extradition Act 2003 (UK) c.41, s. 21.

the United States with the aid of a number of allies, has raised serious human rights – as well as international law – questions.[123]

6.5 IMMUNITY FROM JURISDICTION

The remainder of this chapter will consider limitations upon a state's exercise of its otherwise lawful jurisdiction. The preceding discussion has examined the areas in which international law recognizes the valid exercise of state authority. The complexities arising in this area are largely because of the interface between equal sovereign powers, and the need to allocate competence for the exercise of authority. This final section will examine the extent to which international law provides protection to the person, agents or property of a sovereign state while it is present within the territory or otherwise subject to the jurisdiction of another state. An important preliminary point is worth raising. As Judges Higgins, Kooijmans and Buergenthal explained in their joint Separate Opinion in the *Arrest Warrant* case: "Immunity" is the common shorthand phrase for "immunity from jurisdiction". If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise'.[124] It is therefore important to understand the concept of immunity within international law in relation to the existence of jurisdictional authority open to a state.

6.5.1 Origins: The Doctrine of Absolute Sovereign Immunity

State sovereignty, until relatively recently, was seen as vesting in the person of the head of state. As an individual from whom all the power and authority of the state emanated, the head of state could not be subject to the authority of his or her own courts, nor – on the principle of sovereign equality – the courts of a foreign state. Over time, the personality of the sovereign was replaced by the abstraction of the state, yet the principle of

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[123] See Leila Nadya Sadat and Henry H. Oberschelp, 'Extraordinary Rendition, Torture and Other Nightmares from the War on Terror' (2007) 75 *George Washington Law Review* 1200; David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition and the Torture Convention' (2006) 46:4 *Virginia Journal of International Law* 585; Jane Mayer, 'Outsourcing Torture', *The New Yorker* (New York) 14 February 2005, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

[124] *Arrest Warrant* case, above note 4, Separate Opinion of Judges Higgins, Kooijmans, Buergenthal, [3].

sovereign equality remained and the immunity afforded was preserved. Chief Justice Marshall in *The Schooner Exchange v McFadden*, considered that the principle of sovereign immunity means that 'every sovereign is understood to waive the exercise of part of [their] complete exclusive territorial jurisdiction'.[125] This principle was confirmed more recently by Lord Browne-Wilkinson in *Ex parte Pinochet (No. 3)*, when he explained that 'the foreign state is entitled to a procedural immunity from the processes of the forum state', which embraces both criminal and civil process.[126] Sovereign immunity has its foundation in customary international law and the fundamental principle of sovereign equality,[127] and has ancient roots in international law.[128]

Sovereign immunity is based on the status of an individual. Once it is determined that the person is entitled to immunity, he or she cannot be subjected to the legal system of the host state except in a few limited exceptions. The traditional doctrine of sovereign immunity meant that an agent of a foreign state could never be brought before the courts of another state. The principle was explained in *The Parlement Belge*,[129] in which Brett LJ considered that states had a 'duty to respect the independence and dignity of every other sovereign state', and therefore each

> declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use . . . though such sovereign, ambassador or property be within its jurisdiction.[130]

In applying this statement of principle, it was necessary to determine which entities were to be considered sovereign states and what interests in property would fall within the protective scope of the immunity.

Two factors are relevant in determining the status of entities claiming immunity. The first is that state organs need not conform to a particular mode of organization to qualify as such. The way in which state agencies are incorporated or otherwise organized is a matter for the state and courts need not examine these in determining claims of immunity.[131]

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125 11 US (7 Cranch) 116 (1812).

126 *Ex parte Pinochet (No. 3)*, above note 35, 201.

127 Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588; 119 ILR 367.

128 See discussion in Chapter 1, section 1.3.1.

129 (1880) 5 PD 197.

130 Ibid., 214–15 (Brett LJ).

131 *Krajina v Tass Agency* [1949] 2 All ER 274, 281 (Cohen LJ); 16 AD 129; and *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438; 23 ILR 160.

Secondly, the issue of a certificate by the executive, showing recognition of the statehood of the claimant is sufficient to allow a court to determine its status as such. English courts will not look beyond such a certificate.[132]

As states began to engage in commerce, nationalize industry and employ people, on a large scale in public agencies and in private capacities, outside their territory, the reasons for immunity based solely on status began to be questioned. It no longer made sense for foreign states to be protected from liability when engaging in the same conduct as private entities, which carried the full responsibility for their delicts.

6.5.2 The Restrictive or Qualified Sovereign Immunity Doctrine

These developments, which have occurred particularly and increasingly since the end of the Second World War, led in many jurisdictions to the development of the restrictive (or qualified) doctrine of immunity to replace the absolute approach to sovereign immunity. The restrictive doctrine differentiates between acts done in the capacity of a state for which immunity attaches (*jure imperii*), and those acts done in a private capacity (*jure gestionis*).

This conception of state immunity is based around the nature of the transaction rather than the status of the person transacting. The status of the person is still important in determining who may claim immunity, but it will be extended to cover only *acta jure imperii*, acts in the nature of public authority. This distinction has formed the basis of immunities legislation enacted in the 1970s and 1980s in many common law jurisdictions.[133] In the United States, the principle was applied in *Victory Transport Inc. v Comisaria Generalde Abasteciementosy Transportes*, a case concerning the charter of a ship by an arm of the Spanish Ministry of Commerce, to transport grain. The court in this case held that transporting grain was neither particularly political nor public, and hence did not give rise to a claim of immunity.[134] In the UK, the absolute principle set out in *The Parlement Belge*[135] was definitively overturned by the Privy Council in the *Philippine Admiral*[136] case, in which a foreign state was con-

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[132] *Duff Development Company v Kelantan* [1924] AC 797; 2 AD 124; and State Immunity Act 1978 (UK), s. 21.

[133] See, e.g., Foreign Sovereign Immunity Act 1976 (USA); State Immunity Act 1978 (UK); State Immunity Act 1981 (Canada); Foreign State Immunities Act 1981 (South Africa); Australian Foreign States Immunities Act 1985.

[134] 35 ILR 1, 110.

[135] *The Parlement Belge*, above note 129.

[136] [1977] AC 373.

sidered not to be immune from the jurisdiction of local courts in admiralty actions *in rem* with respect to state-owned commercial vessels or cargoes. *Trendtex Trading Corporation Ltd v Central Bank of Nigeria*,[137] in which the Court of Appeal unanimously accepted the restrictive approach as reflecting international practice, is now the settled position in UK law and is often cited in international and national courts as reflecting the contemporary doctrine of sovereign immunity.[138] The restrictive approach is now enshrined in the national legislation of numerous common and civil law countries, and is also reflected in certain multilateral treaties.[139]

6.5.3 The Nature Test

The restrictive approach requires courts to determine whether the sovereign was acting in its public or private capacity in the relevant transaction, in order to ascertain whether jurisdiction is to be affirmed or not. Initially, a number of methods were employed to make this determination. Courts in different jurisdictions considered the nature of the relationship encompassed by the transaction (a private contract for example), whether private entities are capable of engaging in the conduct, and the purpose of the conduct in their determinations on this point.

It seems now to be generally accepted that the purpose of the transaction is not relevant as to its characterization as an act *jure imperii* or an act *jure gestionis*. The purposive approach presents difficulties as it inevitably involves a political judgment as to what is a public purpose and what is not[140] and, as Mitchell and Beard point out, 'almost any act of a sovereign can be said to have a public purpose of some sort'.[141] This is reflected in Lord Denning's ruling in the *Trendtex Trading* case, in which he stated that the purpose of a contract is irrelevant to the question of immunity.[142] That case concerned the supply of concrete from a Swiss company to the

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137 [1977] QB 529; [1977] 2 WLR 356; 64 ILR 122.

138 *Reid v Republic of Nauru* [1993] 1 VR 251, 252; *Reef Shipping Co. v The Fua Kavenga* [1987] 1 NZLR 550, 571; *Prosecutor v Blaškić* (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) (Judgment) IT-95-14 (29 October 1997).

139 See states and instruments referred to in Triggs, above note 3, [8.57].

140 G. Fitzmaurice, 'State Immunity from Proceedings in Foreign Courts', 14 *British Yearbook of International Law* (1933), 101 at 121.

141 Andrew Mitchell and Jennifer Beard, *International Law: In Principle* (Pyrmont, NSW: Thomson Lawbook Co., 2009), 127.

142 *Trendtex Trading Corporation v Central Bank of Nigeria*, above note 137. The statutory position was subsequently altered by the State Immunity Act 1978 (UK).

Nigerian government for the purpose of constructing an army barracks. The dispute arose when the Nigerian government refused to pay and claimed that the transaction was subject to sovereign immunity. The Court held that, while the purpose of the contract was related to a public purpose (the building of army barracks), the transaction was clearly in the nature of a commercial transaction, to which immunity did not attach. So, too, the German Constitutional Court, in the *Empire of Iran* case, stated that 'one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity'.[143]

The sources of international law governing this area are generally limited to domestic judgments, with the exception of the European Convention on State Immunity 1972[144] and the UN Convention on Jurisdictional Immunities of States and their Property 2004.[145] The latter incorporates the restrictive doctrine, denying immunity in relation to commercial transactions.[146] While not yet in force, the Convention reflects a general trend in the acceptance of the restrictive doctrine in international law.[147]

6.5.4 Functional Immunity

Functional immunity prevents a state from exercising jurisdiction over foreign officials for acts carried out in the conduct of their official duties. Such acts are attributable to the state rather than the individual. Lord McNair, considering the *McLeod* incident, stated the following principle:

> [A]n individual doing a hostile act authorized and ratified by the government of which he is a member cannot be held individually answerable as a private trespasser or malefactor, but that the Act becomes one for which the State to which he belongs is in such a case alone responsible.[148]

More recently, the International Criminal Tribunal for the former Yugoslavia explained functional immunity in terms of the authority of states to determine their internal structure and, in particular, to designate

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[143] *Claims against the Empire of Iran* (1963) BVerfGE 16; 45 ILR 57.

[144] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) ETS 74.

[145] UN Convention on Jurisdictional Immunities of States and their Property 2004 (adopted 2 December 2004, not yet in force) GA Res. 59/38, Annex, Supplement No. 49 (A/59/49).

[146] Ibid., Arts 2 and 10.

[147] See Triggs, above note 3, 471–4.

[148] Lord McNair, *International Law Opinions: Selected and Annotated* (Cambridge: Cambridge University Press, 1956), ii, 230.

the individuals acting as state agents or organs, as well as a state's right to issue instructions to those organs, whether operating internally or abroad, and to provide sanctions for non-compliance. The necessary implication of this authority is that 'each state is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the state, so that the individual organ may not be held accountable for those acts or transactions'.[149] This protection shares the same rational foundation as the foreign state immunity doctrine discussed above. Indeed, it is a corollary of the equality of sovereign states that individuals do not incur responsibility for actions carried out in performance of their function as state agents. Accordingly, the immunity is held by the state, not the individual. It merely extends to embrace their conduct. As such, waiver of the immunity may be done by the state, not the individual, and nothing prevents individual agents being tried if the sending state waives its immunity, irrespective of the wishes of the individual representative.[150]

Exactly who is likely to be protected by this immunity and the extent of it are considered below.

6.5.4.1 The scope of functional immunity

Functional immunity prevents the exercise of jurisdiction over agents and organs of foreign states with regard to conduct in the execution of their official duties. Conduct outside the scope of those acts attributable to the state is not, however, subject to immunity and may form the subject of a legal claim.[151]

A further limitation on immunity applies where the official act is in breach of the sending state's international legal obligations and includes the commission of a serious crime under the law of the host state. In such circumstances, the individual may be prosecuted or subject to punitive measures in addition to international legal responsibility attaching to the sending state. This exception is illustrated by the *Rainbow Warrior* incident and subsequent arbitral award.[152] This incident concerned the blowing up of a Greenpeace ship (the *Rainbow Warrior*) by French intelligence agents during a period of protest against French nuclear testing in the South

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[149] *Prosecutor v Blaškić, Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum* (Judgment) IT-95-14-PT (18 July 1997), [41]–[42]

[150] Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005, 2nd edn) 113.

[151] See Chapter 7, section 7.3.

[152] *'Rainbow Warrior'* case (*New Zealand v France*) (1990) 20 RIAA 217; see UN Secretary-General's Ruling of 1986, Rainbow Warrior, 74 ILR 241, 212–14.

Pacific. The ship was at the time docked in Auckland Harbour and a Greenpeace photographer was killed in the attack, leading to the finding by a New Zealand court that France had interfered with New Zealand's sovereignty and its agents were guilty of, among other offences, manslaughter.[153] The sinking of the ship was an interference with New Zealand sovereignty in breach of international law, occurring on the territory of the forum state, which involved a very serious criminal offence. While the actions of the French agents were performed in the course of their duty as agents of France, because the acts were a breach of France's international legal obligations the agents were not protected by functional immunity.

A second exception involves international crimes. In the *Blaškić* case before the ICTY, the Appeals Chamber considered that immunity does not extend to conduct disclosing international crimes, such as genocide, war crimes and crimes against humanity.[154] The norms prohibiting such crimes preclude the availability of immunity. As in the *Rainbow Warrior* case, international responsibility for international crimes will attach to the state as well as criminal liability attaching to the individual responsible for the commission of, or contribution to, these crimes.[155] Just as extraterritorial (including universal) jurisdiction may attach to crimes that violate the 'laws of humanity', so too are such crimes exempt from claims of immunity. This sentiment can be traced at least back to the diplomatic protest by the French, British and Russian governments condemning the massive and widespread deportation and extermination of over one million Christian Armenians by the Ottoman government in 1915:

> In view of these new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly to the *Sublime Porte* that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.[156]

As we shall see, however, the personal or status immunities, particularly in relation to heads of state and sitting foreign ministers, in some circum-

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153 Two of the agents, Major Mafart and Captain Prieur, were subsequently arrested in New Zealand and, having pleaded guilty to charges of manslaughter and criminal damage, were sentenced by a New Zealand court to ten years' imprisonment: *R v Mafart and Prieur*, 74 ILR 241, 243.

154 *Prosecutor v Blaškić*, above note 149.

155 Similar issues concerning state immunity will be considered by the ICJ in *Jurisdictional Immunities of the State* (*Germany v Italy*), pending.

156 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Developments of the Laws of War* (London: HMSO, 1948), 35.