CHAPTER 3

BASIC CONCEPTS AND PRINCIPLES

I. INTRODUCTION

In addition to an appreciation of previous international efforts to hold people accountable for the most serious violations of international law, an understanding of the contemporary field of international criminal law requires a grasp of the fundamental principles on which the system rests today. Those principles include jurisdictional concepts as well as substantive norms governing the actual exercise of authority to prosecute international crimes.

II. CONCEPTS OF JURISDICTION

The new international courts and tribunals are the most visible and important feature of the contemporary international criminal law system. Their jurisdiction is specified in the instruments that established them (i.e., UN Security Council resolutions, treaties, or other agreements). But the vast majority of cases involving international or transnational crimes are still prosecuted in domestic courts under national law. The reason is simple: since most crimes take place within one or more States and are committed by or against nationals of those States, those States have the greatest interest in prosecuting the perpetrators.

Moreover, it is simply not possible to prosecute all alleged violations of international law before international tribunals, given the limitations of time and resources. The development of international criminal law must therefore continue to rest primarily on domestic courts and legislation. In this chapter, we explore what international law has to say about when a State can prosecute or punish criminal conduct taking place outside its borders.

§ 3–1 TYPES OF JURISDICTION

International lawyers typically use the term "jurisdiction" to describe the overall authority of each State to determine when and how its national law applies with respect to people, property and conduct outside its territorial borders. For students in American law schools, this understanding of jurisdiction differs from the concepts normally encountered in courses on domestic law, such as those distinguishing between personal and subject-matter jurisdiction or describing the relationship between federal and state courts. The reason is that international jurisdictional principles reflect the structure and principles of the international system, which lacks a global government and still consists mostly of independent States.

It can sometimes be useful to think about three different ways in which national jurisdiction can be applied: prescriptive, adjudicative and enforcement. Generally, see RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 401.

1. *Prescriptive Jurisdiction*

First, the term can be used to refer to the ability of one State's national legislature to determine when and how its laws will apply to people and conduct outside its borders—in other words, to prescribe the extraterritorial application of its domestic law. This is known as legislative

or prescriptive jurisdiction. For our purposes, the question concerns the scope of a State's authority, under international law, to adopt substantive criminal laws and regulations laws that regulate conduct occurring outside its national boundaries.

2. ***Adjudicative Jurisdiction***

Second, "jurisdiction" can describe the authority of national courts (or other adjudicative bodies such as administrative agencies) to apply their law in determining the outcome of particular cases brought before them. This is referred to as judicial or adjudicative jurisdiction. In the criminal context, this would normally involve prosecution of an individual for activities undertaken outside the national boundaries of the country concerned. The fact of prosecution is an exercise of adjudicative jurisdiction, conceptually distinct from the extraterritorial reach of laws which is an exercise of prescriptive jurisdiction. The two are related in practice but theoretically distinct.

3. *Enforcement Jurisdiction*

Third, the term can also be used to describe the ability of governmental authorities (courts, administrative agencies, ministries, police, etc.) to compel compliance with the provisions of national law. We refer to this as enforcement jurisdiction. Examples might include the imposition of criminal penalties, fines for contempt or trade sanctions resulting from violations of the relevant domestic law.

By themselves, these terms do not tell much us about the legitimacy of any particular exercise of jurisdiction. In the first instance, that question has to be answered by reference to the relevant national law. The laws of every State are likely to differ on the extent to which such extraterritorial assertions of jurisdiction are permissible.

From the international criminal law perspective, the important question is what restrictions or conditions international law places on the ability of States to apply their law to persons, property and conduct beyond their territorial boundaries of the State in question. To continue with the example of the United States, even if the Congress has authority under the Constitution to enact a criminal law with extraterritorial effect, and to authorize U.S. courts to adjudicate violations of that law, does international law limit the exercise of such authority? Could another State, or an individual defendant, challenge such a law on the basis that it contravenes principles of international law? As a matter of international law, can States do anything which is not forbidden, or can they only exercise jurisdiction when it is expressly permitted? What limits, if any, does international law impose on "extraterritorial jurisdiction?"

§ 3–2 PERMISSIVE GROUNDS OF EXTRATERRITORIAL JURISDICTION

Customary international law currently recognizes a number of bases or doctrines that justify the exercise of a State's domestic jurisdiction (prescriptive, adjudicative or enforcement) over people, property and activities inside and outside its territory. They are generally grouped under five headings: territoriality, nationality, passive personality, protective and universal. This section also discusses two other types of jurisdiction: the so-called "extradite or prosecute" obligation under various international criminal law treaties and the specialized "international" jurisdiction of international courts and tribunals.

1. *The Lotus Principle*

Before turning to the details of these principles, it is important to note that they are permissive (not mandatory) grounds. In other words, no State is under an obligation to apply its law extraterritorially or to use any or all of these principles to the maximum extent. As a matter of international law, however, it has been less clear whether these principles operate as authorizations or limitations, that is, whether a State can exercise extraterritorial jurisdiction *only if* affirmatively permitted by one of these principles. This question was addressed nearly a century ago in the famous decision of the Permanent Court of International Justice (PCIJ) in *The S.S. "Lotus"* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 13 (Sept. 7).

The case arose as a result of a collision on the high seas between a French vessel (the S.S. *Lotus*) and a Turkish vessel (the *Boz-Kourt*). The Turkish vessel sank and eight Turkish sailors died. After the S.S. *Lotus* arrived in Constantinople, Turkish authorities arrested its first officer, Lt. Demons, who had been on watch on the French vessel when the collision occurred. Even though he was not a Turkish citizen and the collision took place on the high seas, Lt. Demons was detained by Turkish authorities, prosecuted, convicted of manslaughter, and sentenced to a fine and eighty days' imprisonment.

The French government protested, arguing that under international law, jurisdiction in such cases rests exclusively with the State under whose flag the vessel sails. Since Lt. Demons had been aboard the French vessel, they argued, his culpability was a matter for French authorities. France challenged Turkey before the PCIJ, arguing that Turkey could point to no rule of international law affirmatively permitting it to exercise criminal jurisdiction in such situations. In response, Turkey argued that no rule of international law prohibited it from doing so and that in any event jurisdiction was justified under Turkish law by the fact that the collision had produced effects on the *Boz-Kourt*, which was properly treated as if it were Turkish territory.

The PCIJ agreed with Turkey. It acknowledged that under international law, jurisdiction is primarily territorial but said that a State may also exercise jurisdiction over acts taking place outside its borders which have an effect within its territory. All States have jurisdiction over acts taking place within their territories, the Court said, and restrictions on the independence of States (and their jurisdictional reach) cannot be presumed. Thus, States need not rely on a permissive rule and have the right to exercise extraterritorial jurisdiction unless explicitly prohibited by a treaty provision or rule of customary international law.

The so-called *Lotus* "freedom principle" has never been explicitly reversed. (In fact, some read the ICJ's 2010 advisory opinion concerning Kosovo's unilateral declaration of independence as implicitly endorsing the principle.) As a matter of international practice, however, few States today argue in favor of unrestricted freedom to exercise extraterritorial jurisdiction. To the contrary, most situations are judged or justified by reference to one of the established jurisdictional principles described below. In effect, States today have adopted the French approach, and in practice they ground jurisdictional assertions on one of the recognized principles. Indeed, several judges of the International Court of Justice have referred to the *S.S. Lotus* as "the high water mark of laissez-faire in international relations." *See Arrest Warrant of April 11, 2000* (Democratic Republic of Congo v. Belgium), Judgment, ICJ Reports 2002, joint separate opinion of Judges Higgins, Buergenthal and Kooijmans at para. 51, 41 I.L.M. 536, 585 (2002).

In practice, the assertion of extraterritorial jurisdiction in any given situation may well be justified on the basis of several principles. For example, the kind of extraterritorial jurisdiction asserted by the Turkish government in *S.S. Lotus* might readily be justified today under the "passive personality" principle discussed below (since the victims were Turkish nationals) or as a

kind of "objective territorial" or "effects" jurisdiction (*see* discussion in § 3–2 (1)(B–C)). In any event, it would clearly be a matter of "concurrent jurisdiction," since France could also legitimately prosecute Lt. Demons on the basis of his French citizenship nationality or because his negligence, if any, occurred on board a French-flagged vessel (*see* discussion in § 3–2 (2) below).

This is an important point: no rule of customary international law gives preference to one type of jurisdictional assertion or the other. Overlapping or competing claims are entirely possible. There is today no hierarchy of jurisdictional norms. Some limiting principles (such as the "reasonableness" criterion) have emerged (*see* § 3–7 below). In the event of conflicting assertions of jurisdiction, the States themselves must agree on the resolution.

Today jurisdictional competence is often a matter of treaty law. That is the case, for example, with many of the multilateral law treaties discussed below in Chapter 7 on transnational criminal law. In the case of the *S.S. Lotus*, the matter would actually be governed by article 97(1) of the 1982 U.N. Convention on the Law of the Sea, 1833 U.N.T.S. 396 (entered into force Nov. 16, 1994), 21 I.L.M. 261 (1982), and its predecessor article 11(1) of the 1958 Convention on the High Seas, 13 U.S.T. 2312. The rule in those treaties effectively reversed the PCIJ's decision and explicitly provides that in the event of a high-seas collision, no proceedings can be instituted against individuals who might be responsible except before the judicial or administrative authorities of either the vessel's flag State or the State of which that individual is a national.

§ 3–3 THE FIVE TRADITIONAL BASES

1. *The Territoriality Principle*

A basic consequence of sovereignty is that a State has jurisdiction over all crimes occurring within its territory. International lawyers actually distinguish two types of jurisdiction based on territoriality. When the criminal conduct itself occurs within the State's territory, that State is said to be exercising "subjective territorial" jurisdiction. By contrast, when jurisdiction is based on the fact that conduct committed outside the territory has a substantial impact within the territory, the State is said to be exercising "objective territorial" jurisdiction.

An easy way to see the difference is to consider a hypothetical in which an individual on one side of an international border fires a weapon across that border which injures or kills someone on the other side. Which State can exercise jurisdiction over the crime? Most lawyers would say both, of course. The State from which the person fired the weapon would be asserting jurisdiction based on *subjective territoriality*, and the State into which the person fired would be asserting jurisdiction based on *objective territoriality*.

A. Subjective Territoriality

As a matter of traditional international law, every State has plenary jurisdiction to prescribe, adjudicate and enforce criminal law regarding conduct that takes place within its own territory. In general, it can do so without regard to the nationality of the perpetrator or the victim or the interests of other States.

That principle flows from the concept of sovereignty, perhaps more precisely from principles of political independence, territorial integrity and sovereign equality of States. At one time, this authority was considered exclusive, meaning that an attempt by one State to prosecute actions occurring within another State's territory would be deemed an impermissible interference.

Cf. Chief Justice Marshall's opinion in *The Antelope* 23 U.S. 66 (1825)(the "perfect equality of nations" means that "no one [State] can rightfully impose a rule on another," "[e]ach legislates only for itself," and "[t]he Courts of no country execute the penal laws of another.") However, this absolutist view is no longer followed in practice. *See Pasquantino v. United States*, 544 U.S. 349 (2005).

In some cases, states practice what might be called "peripheral territoriality" by basing jurisdictional assertions on relatively minor contacts or conduct. For example, the U.S. Foreign Corrupt Practices Act 1977 allows such factors as the existence of a U.S. bank account or a foreign transaction using dollars and financial transactions routed through the U.S. banking system to trigger U.S. jurisdiction.

B. Objective Territoriality

This type of jurisdictional assertion is sometimes described as resting on the harmful "effects" of an extraterritorial act on the territory of the State in question. In U.S. law, for example, it underlies the exercise of certain kinds of regulatory as well as criminal jurisdiction, such as in antitrust law. *Cf. Hartford Fire Ins. Co, v. California*, 509 U.S. 764 (1993). It has also been relied upon by U.S. courts in upholding prosecutions for smuggling drugs and other contraband, on the ground that acts in foreign countries had consequential effects on the United States. *See, e.g., United States v. MacAllister*, 160 F.3d 1304 (11th Cir. 1998). The effects doctrine has been much debated in the recent years, as several states, including the U.S. have used it to in order to claim jurisdiction based on comparatively remote "effects."

C. Intended Effects

As noted in the RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(b) and Comment (b), on occasion the United States does exercise jurisdiction to prescribe law with respect to extraterritorial conduct that has or is intended to have a substantial effect within its territory. In a narrow set of circumstances, U.S. courts upheld criminal jurisdiction based on the "intended effects" of extraterritorial conduct. For example, in *United States v. Noriega*, 746 F. Supp. 1506, 1513 (S.D. Fla. 1990), aff'd 117 F.3d 1206 (11th Cir. 1997), where the prosecution was based on a conspiracy to import narcotics, the court said that: "The fact that no act was committed and no repercussions were felt within the United States did not preclude jurisdiction over the conduct that was clearly directed at the United States."

Another illustration is provided by the extension of U.S. criminal jurisdiction under the Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70503(a)(1), 70506(b), over stateless or foreign-flagged vessels carrying narcotics intended for distribution and sale within the United States that are intercepted in international waters, far from U.S. territorial waters. See, e.g., United States v. Castillo, 899 F.3d 1208 (11th Cir. 2018).

D. Assimilation

In addition to objective and subjective territoriality, a third type of territoriality may be described as *assimilation*. It has long been customary for States to treat certain locations as if they were part of its territory. Under the law of the sea, for example, vessels flying the flag of a State are generally treated, for purposes of criminal law, as if they were part of the territory of that State, so that crimes committed on board those vessels can be prosecuted under that State's law even

when committed on the high seas or in another country's jurisdiction. The same is true of aircraft registered in that State.

In U.S. law, the assimilation concept finds its clearest expression in the notion of *special maritime and territorial jurisdiction* codified at 18 U.S.C. § 7. This statute makes specified acts violations of federal criminal law when committed within the "special maritime and territorial jurisdiction" even if those acts are not in fact committed on United States territory strictly speaking. Special maritime and territorial jurisdiction extends to, *inter alia*, marine waters within U.S. jurisdiction, marine, aeronautical and space vessels owned by or in possession of the U.S. government, citizens or corporations, and U.S. diplomatic and consular buildings in foreign countries. In *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000), cert. denied, 534 U.S. 887 (2001), the Court of Appeals upheld criminal jurisdiction over charges of sexual abuse relating to acts committed on a U.S. Air Force base in Japan and in an apartment in the Philippines rented by the U.S. Embassy for use by U.S. Embassy employees.

Along the same lines, the United States recognizes the concept of *special aircraft jurisdiction* covering *inter alia* foreign aircraft whose next scheduled destination is in the United States, as well as aircraft which land on U.S. territory and have on board persons accused of terrorist offenses against that aircraft. *See* 49 U.S.C. § 46501. For instance, in *United States v. Georgescu*, 723 F. Supp. 912 (E.D.N.Y. 1989), the court allowed the prosecution of an alien for physically abusing a foreign national on board a foreign-registered aircraft over the Atlantic Ocean while on its way to a U.S. destination, because it fell within the "special aircraft jurisdiction."

The special maritime and territorial jurisdiction concept has been applied to cover felony offenses committed outside the United States by anyone (l) employed by or accompanying the Armed Forces outside the United States or (2) while a member of the Armed Forces subject to the Uniform Code of Military Justice. *See* the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 8 U.S.C. § 3261. The statute actually criminalizes conduct outside the United States which would have been an offense if it had been engaged in within the special maritime and territorial jurisdiction. The term "employed by the Armed Forces outside the United States" includes not only Department of Defense contractors but also employees of contractors of "any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas." 18 U.S.C. § 3267.

2. Nationality

Many States assert criminal jurisdiction based on nationality. This form of jurisdiction is based on the allegiance owed to one's country and the responsibility a State may have, in certain circumstances, for acts of its citizens. International lawyers distinguish two types of nationality jurisdiction: active personality and passive personality. The former depends on the nationality of the *perpetrator*, which the latter rests on the nationality of the *victim*.

Active personality jurisdiction is generally dependent on the citizenship or nationality of the individual committing the offense, but in some instances it may be based on that individual's formal domicile or even residence. A number of States, for example, assert jurisdiction over the activities of their permanent residents even when they are abroad.

Different States invoke the active personality principle to different extents. Civil law countries frequently make more vigorous use of active personality jurisdiction by criminalizing a wide range of activities by their nationals outside their territory. France, for example, asserts extraterritorial jurisdiction over French nationals in all felony cases. *See* Code de Procedure

Penale, art. 689. In consequence, many such States refuse to extradite their nationals and instead prosecute them domestically for offenses committed abroad.

By distinction, common law countries have generally relied on territorial concepts and been less willing to assert active personality jurisdiction. But that has begun to change. Today, for instance, the United Kingdom applies nationality-based jurisdiction for a limited number of offenses such as murder, manslaughter, bigamy, offenses on board foreign merchant vessels, sexual offenses against children, etc.

As indicated in RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(c), the United States exercises prescriptive jurisdiction over the conduct, interests status and relations of its nationals and residents outside its territory. In fact, however, it makes relatively limited use of active personality jurisdiction in the criminal context, though a few examples are available. For example, in *Blackmer v. United States*, 284 U.S. 421 (1932), the Court upheld a criminal contempt conviction against a U.S. citizen living in Paris for ignoring subpoenas to testify in a proceeding in the District of Columbia. In *Skiriotes v. United States*, 313 U.S. 69 (1941), the Court affirmed the conviction of a U.S. national who violated a law against sponge-diving even though he was outside U.S. territorial waters at the time. In the case of *United States v. Clark*, 315 F. Supp. 2d 1127 (W.D. Wash. 2004), aff'd 435 F.3d 1100 (9th Cir. 2006), cert. denied 127 S. Ct. 2029 (2007), Clark was indicted and convicted under 18 U.S.C. § 2423(c), which criminalizes the illicit sexual conduct of American citizens or admitted aliens who travel in foreign commerce.

3. Passive Personality

Passive personality jurisdiction is the other aspect of nationality jurisdiction. It justifies the assertion of domestic criminal jurisdiction over acts in violation of the State's laws committed outside the State *against* its nationals. The concept reflects the interest of every State in protecting the safety of its citizens.

Passive personality jurisdiction has traditionally been controversial. One of the most famous examples is the venerable *Cutting* case. It involved a U.S. citizen arrested in Mexico, in 1886, on charges of having criminally libeled a Mexican national. The allegedly libelous statement had been published while its author was in the United States, but his arrest took place much later in Mexico. The relevant Mexican statute asserted jurisdiction over offenses committed in a foreign country by a foreigner against Mexican citizens. The U.S. Government vigorously opposed Mexico's exercise of jurisdiction (and contended that penal laws could not be applied extraterritorially). The case was eventually discontinued..

While initially resisted by many States, the passive personality principle has found increasing acceptance in the face of international terrorism. In 1986, for example, the U.S. Congress enacted the Omnibus Diplomatic Security and Anti-Terrorism Act, which among things grants U.S. courts jurisdiction over persons charged with the extraterritorial murder of U.S. nationals, where the intention of the perpetrator was to intimidate, coerce, or retaliate against the U.S. government. *See* 18 U.S.C. §§ 2331, 2332. Similarly, the Hostage Taking Statute, codified at 18 U.S.C. § 1203, asserts jurisdiction on the basis of the victim's U.S. nationality.

Passive personality jurisdiction is expressly permitted under several international treaties and conventions, including the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1035 U.N.T.S. 167, 13 I.L.M. 42 (1974); the 1984 UN Torture Convention, 1465 U.N.T.S. 85; the 1988 UN Convention

for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 U.N.T.S. 221; and the 1979 International Convention against the Taking of Hostages, 1316 U.N.T.S. 205.

4. Protective Jurisdiction

The protective principle permits the exercise of jurisdiction over a narrow range of conduct that threatens the most vital interests of the State in question. State sovereignty is the basis for this jurisdictional assertion. The underlying idea is that all States are entitled to exercise jurisdiction over acts which threaten their security, integrity or core governmental interests. The historical development of the law against piracy was originally an act of protective jurisdiction, many scholars believe.

The RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(e) notes that the United States exercises prescriptive jurisdiction with respect to "certain conduct outside its territory by persons not its nationals or residents that is directed against the security of the United States or against a limited class of other U.S. interests." Commonly-cited examples include espionage, counterfeiting the State's currency or official seal, falsification of official documents, perjury before consular officials, and conspiracy to violate the immigration or customs laws. *See*, *e.g.*, *United States v. Zehe*, 601 F. Supp. 196 (D. Mass. 1985), and 18 U.S.C. §§ 792–799 (involving acts of espionage, including providing sensitive information to hostile forces, with no reference to the *locus* of the crime or nationality of the perpetrator).

The exercise of protective jurisdiction need not be justified by actual or intended effects within the State's territory but must involve a genuine threat to vital State interests. These interests are not implicated by mere violation of criminal laws. *See*, *e.g.*, *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), cert. denied 88 S.Ct. 2306 (1968), which only involved visa fraud (lying under oath to a consular officer in the course of a visa application to enter the United States).

Perhaps the most famous and controversial instance of the exercise of protective jurisdiction was the trial of Adolf Eichmann in Israel, in 1961. Eichmann was prosecuted and convicted in an Israeli court for crimes relating to the Holocaust during the Second World War. The alleged crimes were neither committed on Israeli territory, nor targeted at Israeli citizens, nor even directed at Israel, given that the State of Israel came into existence after the Second World War. Nonetheless, the Israeli courts exercised jurisdiction by invoking the protective principle and referring to the interests of the Jewish 'people' which were correlated to the Jewish State. See *Attorney-Gen. of Israel v. Eichmann*, 361 I.L.R. 277 (Dist. Ct. 1968).

5. Universal Jurisdiction

The "universality principle" permits any State to prosecute the perpetrators of a small class of the most serious violations of international law (*delicta juris gentium*) regardless of the nationality of the perpetrator or the victim, the place of commission, or any other connection to that particular State.

Unlike the other principles discussed above, "universal jurisdiction" is not justified by the interests of particular States in prosecuting certain crimes. (However it is argued that the Universality principle was born as a broader version of the protective principle.) It is instead based on the idea that certain international crimes are so heinous that they affect the international legal order as a whole, that the perpetrators are therefore enemies of all mankind *(hostes humani generis)*, and that accordingly, all members of the international community have the right (perhaps

even the obligation) to bring those individuals to justice.

This rationale begs the question of which specific crimes fall into this select category. Universal jurisdiction is, in theory, a matter of customary international law; no existing convention or treaty defines its scope. The earliest examples of crimes attracting universal jurisdiction were piracy and slave trading. Today, most lawyers and advocates might agree that the list also ought to include genocide, crimes against humanity, and torture.

However, the "community of nations" has not yet specified which offenses meet that criterion. In point of fact, there are only two clear examples of treaties specifically recognizing universal jurisdiction—piracy (under art. 105 of the 1982 UN Convention on the Law of the Sea) and certain war crimes (under the grave breaches provisions of the 1949 Geneva Conventions).

Some contend that any crime of a peremptory nature (for example, any violation of a *jus cogens* norm) necessarily justifies the exercise of universal jurisdiction and can be prosecuted by any member of the international community. *See, e.g., R. v. Bow St. Metro. Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.) (Eng.).

In the case of *Jones v. Saudi Arabia*, however, Lord Bingham took the contrary view, that no principle exists whereby States recognize an international obligation to exercise universal jurisdiction over crimes arising from breaches of peremptory norms, nor is there any judicial opinion at they should. *See Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, per Lord Bingham, para. 27.

The RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(f) takes a broad approach, noting that the United States exercises prescriptive jurisdiction over "certain offenses of universal concern, such as piracy, slavery, forced labor, trafficking in persons, recruitment of child soldiers, torture, extrajudicial killing, genocide, and certain acts of terrorism, even if no specific connections exists between the United States and the persons or conduct being regulated."

§ 3–4 QUESTIONS ABOUT UNIVERSAL JURISDICTION

Universal jurisdiction poses a number of theoretical and practical questions. Is universal jurisdiction incompatible with sovereignty given that it permits States with no connections to the crime, the offender, or the victim, to prosecute without regard to interests of other States with clearer interest? Or is it an important, even essential method for ensuring that those who commit the most grievous offenses under international law do not go unpunished because of the inability of the territorial State, or the State of nationality, to bring the offenders to justice?

Do States have an obligation to prosecute violations of peremptory norms? Must they have custody of the alleged offender or may they prosecute *in absentia*? Can multiple States pursue prosecutions of the same crimes simultaneously or sequentially? Are other (non-prosecuting) States obliged to cooperate, for example by providing evidence or enforcing judgments? Does the possibility of unilateral assertions of universal jurisdiction favor powerful States with the means, methods and political will to pursue particular individuals for committing particular crimes which those States find objectionable?

The International Court of Justice had occasion to consider the issues of universal jurisdiction in the so-called "Arrest Warrant Case" (Case Concerning the Arrest Warrant of 11 Apr. 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, 2002 I.C.J. Rep. 3, 41 I.L.M. 536, 560 (2002)).

The views of the members of the Court differed. In a joint separate opinion, Judges Higgins,

Kooijmans, and Buergenthal noted that while no established practice of exercising universal jurisdiction exists today (since virtually all national legislation envisages some sort of link to the prosecuting State), that does not mean such an exercise would be unlawful, and in fact, they saw a trend in favor of universality. Moreover, in their view, a State could choose to exercise universal criminal jurisdiction *in absentia* as long as sufficient safeguards were in place to prevent abuse and "to ensure that the rejection of impunity does not jeopardize stable relations between States."

Judge *ad hoc* Van den Wyngaert (in a dissenting opinion) agreed that no prohibition existed under international law to enacting legislation to allow a State to investigate and prosecute war crimes and crimes against humanity abroad, no matter who had committed them. No rule of conventional or customary international law, Judge Van den Wyngaert said, prohibits universal jurisdiction *in absentia*. In her view, jurisdictional limitations lie at "the core of the problem of impunity" in the sense that where the relevant national authorities are not willing or able to investigate or prosecute, the crime goes unpunished.

The President of the Court, Judge Guillaume, took a different approach. In his view, only one true case of universal jurisdiction exists: piracy. In classic international law, States normally have jurisdiction in respect of extraterritorial offenses only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. While some international courts have been created to prosecute particularly heinous crimes, the international community has never "envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found."

Doing so would, in Judge Guillaume's view, "risk creating total judicial chaos." It would also "encourage the arbitrary for the benefit of the powerful, purportedly acting as agents for an ill-defined 'international community.'" Such a development, he said, "would represent not an advance in the law but a step backward." Para. 15.

In this connection, it is interesting to note a very unique U.S. statute that reflects universal jurisdiction in civil (as opposed to criminal) matters. This legislation, known colloquially as the Alien Tort Statute and codified at 28 U.S.C. § 1350, dates back to the Founding of the Republic. It grants original jurisdiction to federal courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." By its terms, it requires no connection to the United States, and thus can be taken as an example of "universal jurisdiction." In several recent decisions, however, the U.S. Supreme Court has narrowed its reach, requiring cases to have some jurisdictional connection with the United States. See *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386 (2018), and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

§ 3–5 EXTRADITE OR PROSECUTE

In the "Arrest Warrant Case" discussed above, Judge Guillaume made a useful distinction between (i) true universal jurisdiction (in the sense described above) and (ii) a contingent form of jurisdiction based on the "extradite or prosecute" provisions found in many modern international criminal law treaties. He called this "subsidiary universal jurisdiction."

This distinction was recently reinforced by the International Court of Justice in a case between Senegal and Belgium,[1] where the latter brought a charge against the former for failing to comply with its obligation under the UN Torture Convention to *extradite* or *prosecute* the

[1] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of July 20, 2012, 2012 I.C.J. Rep. 422.

President of Chad, who had allegedly committed atrocities and crimes against humanity during his presidency. The ICJ held that Senegal had violated its international obligation and directed it to take immediate and necessary measures to extradite or prosecute President Habré.

Many contemporary international criminal law conventions contain such a clause, obligating an apprehending country either to extradite individuals suspected of having committed the proscribed offenses or (if they do not extradite) to prosecute them domestically. Technically, these are known as *aut dedere aut judicare* clauses. For instance, art. 4(1) of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft requires States Parties to take such measures as may be necessary to establish jurisdiction over these offenses where the offender is present in its territory and it does not extradite him or her. To the same effect, art. 5 of the 1984 UN Torture Convention obligates each State Party to take such measures as may be necessary to establish its domestic jurisdiction "over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him."

The purpose is to ensure that an individual accused of a crime covered by the treaty in question does not find "safe haven" in any State Party. It does so by imposing a duty on every State Party that finds an accused in its territory to extradite that individual to another State Party with a particular jurisdiction connection to the crime (e.g., nationality, territorial, etc.) or, if it is unable to do, to proceed to prosecute the individual under its own law.

The difference between pure universal jurisdiction and "extradite or prosecute" jurisdiction is that the former is said to apply to all States as a matter of customary international law and to impose an obligation to prosecute (under domestic law) alleged perpetrators of an as-yet-undefined category of international crimes regardless of their contacts with the State in question. By contrast, the latter applies only to the crime specified in the treaty in question, and to the States Parties to that treaty, and it is conditional on their having apprehended the individual in question and, for some reason, declined to extradite him to another State with a traditional jurisdictional claim.

§ 3–6 THE JURISDICTION OF INTERNATIONAL COURTS

A distinction must also be made between (i) the extraterritorial domestic jurisdiction exercised by the national law of particular States under any of the theories described above and (ii) the "international" jurisdiction exercised by international courts or tribunals. In the latter instance, the international community has conferred a specific jurisdictional grant on an international court by some affirmative act (for example, through a treaty or UN Security Council decision). That court or tribunal therefore exercises a very different form of jurisdictional authority, as to which it would make no sense to require the link of territoriality or nationality or another sovereign interest.

For example, the Rome Statute gives the International Criminal Court jurisdiction over a limited set of crimes committed after a specific date, on the territory of (or by a national of) a State Party to the Statute. This jurisdictional grant is further circumscribed by several "admissibility" criteria. *See* Chapter 5 *infra*. A unique aspect of ICC jurisdiction is also reflected in the "complementarity principle," which authorizes the ICC to exercise its jurisdiction *only* if the concerned State Party is unable or unwilling to investigate or prosecute the perpetrators of crimes itself. In this sense, the jurisdictional competence of the various international criminal tribunals is limited - substantively, temporally and procedurally. To date, none of the international courts and tribunals has been vested with anything like true "universal" competence.

§ 3–7 ARE THERE ANY LIMITATIONS?

As noted above, the various bases of jurisdiction recognized by customary international law are permissive and in practice can lead to competing claims of competence, yet no rule of customary international law currently exists for resolving those competing claims or giving priority to one over the other. Various domestic systems address the issues differently.

In U.S. law, no explicit constitutional prohibition prevents the extraterritorial application of U.S. criminal law. Of course, Congress must have constitutional authority to adopt the provision in question. Typically, that means the authority to regulate interstate or foreign commerce or to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations" in article I, § 8. *See generally* Charles Doyle, Extraterritorial Application of American Criminal Law, Cong. Research Serv. Report RS22497 (Oct. 31, 2016). However, several important doctrines are frequently applied by U.S. courts in respect of extraterritorial criminal jurisdiction.

1. *Charming Betsy Canon*

In U.S. law, a longstanding canon of statutory interpretation states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." As phrased in the RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 406: "Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. If a federal statute cannot be so construed, the federal statute is controlling as a matter of federal law." The rule is based on a presumption that Congress knows, and does not intend to violate, applicable principles of international law. *Cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). *United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994).

2. Presumption Against Extraterritoriality

Another long-standing presumption in U.S. law is that, unless specifically stated, the Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States. To overcome this presumption, there must be "affirmative evidence of intended extraterritorial application." See RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404; *Sale v. Haitian Ctrs. Council, Inc*., 509 U.S. 155, 176 (1993).

However, this presumption does not apply to those particular criminal statutes "which are, as a class, not logically dependent on their locality for the Government's jurisdiction." *United States v. Bowman*, 260 U.S. 94, 98 (1922). In those circumstances, the Supreme Court said that Congress can be presumed to intend the extraterritorial application of criminal statutes which are "as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents." In such instances, "to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home." *Id.*

Some courts have applied the *Bowman* analysis even when the alleged perpetrator of the

crime was a foreign national abroad. *See, e.g.*, *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir. 1968); *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988).

3. Prescriptive Comity

Under § 402(2) of the RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, "[i]n exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity." As pointed out in Comment (a) to that section, the United States "does not necessarily exercise prescriptive jurisdiction to the full extent permitted by international law." In this sense, comity means taking into account the legitimate interests of other States in given situations.

4. Reasonableness

Some U.S. courts have also identified a "reasonableness" criterion to the exercise of extraterritorial jurisdiction. See, for example, *United States v. Clark*, 315 F. Supp. 2d 1127 (W.D. Wash. 2004) (even if principles of international law serve as bases for extraterritorial application of a law, international law also requires that such application of the law must be reasonable).

To the same effect, the RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 405 (titled "Reasonableness in Interpretation") states that "As a matter of prescriptive comity, courts in the United States may interpret federal statutory authority provisions to include other limitations on their applicability." Comment (a) to this section observes that courts seek "to avoid unreasonable interference with the sovereign authority of other states" through the exercise of statutory interpretation, citing *F. Hoffmann-La Roche Ltd. v. Empagram S.A.*, 542 U.S. 155, 165 (2004).

5. Due Process

The Due Process provisions of the Fifth Amendment to the U.S. Constitution may also impose limitations on the exercise of extraterritorial criminal jurisdiction, for example by requiring in given situations that the defendant's acts have some real locus or impact on or within the United States even if the exercise of jurisdiction is justified under international law. See, e.g., *United States v. Noel*, 893 F.3d 1294 (11th Cir. 2018). In practice, however, the application of federal criminal statutes to the extraterritorial acts of foreign nationals is likely so long as it is neither arbitrary nor unfair.

§ 3–8 INTERNATIONAL IMMUNITIES

In specific cases, domestic prosecutions of foreign governmental officials may be precluded by the application of internationally-recognized doctrines of immunity. For example, as a matter of long-standing customary international law, current (sitting) Heads of State or Government are afforded absolute immunity from the civil and criminal jurisdiction of foreign courts. Some senior officials representing a foreign State, such as foreign ministers, may also benefit from this rule. *See* the ICJ's decision in the *Belgian Arrest Warrant Case*, Judgment of 14 February 2002, at paras. 47–55.

By distinction, former Heads of State and Government have traditionally been entitled to

a more limited form of immunity for actions taken within the scope of their official duties, but some controversy over this rule has arisen in respect of certain international crimes. See, for example, *Regina v. Bartle and the Comm'n of Police for the Metropolis and Others, ex parte Pinochet*, [2000] 1 A.C. 119 (H.L.); *al-Adsani v. United Kingdom*, App. No. 3576/97, 34 Eur. H.R. Rep. 11 (2002) (paras. 55–66).

As a matter of treaty law, ambassadors and other diplomatic representatives who have been duly accredited to the forum State are entitled to broad immunities under the Vienna Convention on Diplomatic Relations (art. 39(2)). Consular officers may be entitled to protection under the Vienna Convention on Consular Relations. In specific circumstances, immunities may also extend to foreign officials on "special missions" and to senior officials of international organizations (such as the United Nations, the OAS, the World Bank, etc.) as well as to representatives from Member States of those organizations.

When it comes to international criminal tribunals, however, the rules are different. Generally speaking, no immunity is accorded to either sitting or former Heads of State or government or other governmental officials by virtue of their official positions. *See*, for example, art. 7 of the London Charter, and arts. 7(2) and 6(2) of the Statutes of the ICTY and ICTR respectively. Article 27(2) of the Rome Statute provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

III. BASIC PRINCIPLES

The following provides a preliminary overview of the most important substantive principles on which international criminal law is founded.

§ 3–9 INDIVIDUAL CRIMINAL RESPONSIBILITY

The most fundamental principle is *individual criminal responsibility*—the idea that an individual who commits a crime under international law is personally responsible for that act and is liable to trial and punishment directly under international law, including by an international court or tribunal.

The Judgment of the Nuremberg Tribunal stated that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Office of Chief of Counsel for Prosecution of Axis Crimes, Nazi Conspiracy and Aggression: Final Opinion and Judgment of the International Military Tribunal, at 53 (1947).

This principle was articulated in the 1945 London Charter, applied in the Nuremberg and Tokyo war crimes tribunals, and adopted by the International Law Commission as Principle I: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." *See* ILC's *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 1950 Y.B. Int'l Law Comm., vol. II, para. 97.

Individual criminal responsibility extends not just to the commission of proscribed acts, but also various inchoate crimes including their planning, instigation, ordering, aiding and abetting and preparation. Due to recent international lawmaking like the Hague Law, the two Additional Protocols to the Fourth Geneva Convention and ICC statute, greater stress has been laid on the

importance of Individual Criminal Responsibility. These are discussed *infra* in Chapter 6, part II.

§ 3–10 CRIMINAL LIABILITY OF ORGANIZATIONS

The direct responsibility of individuals for international crimes is well-established. Much more controversial, and much less clear, is the proposition that organizations and other "legal persons" (such as political parties and corporations) can commit international crimes, or that membership in such organizations can be declared criminal.

Article 9 of the 1945 London Charter permitted the trial of any individual member of any group or organization that the tribunal might declare a "criminal organization." Some organizations were in fact named as criminal by the IMT, including the SS and the Leadership Corps of the Nazi Party. Similarly, Allied Control Council Law No. 10 provided that organizations (and membership in such organizations) could be declared criminal. However, in neither case was membership alone sufficient to hold individuals responsible for the acts of the organization. Individuals having no knowledge of the criminal purposes or acts of the organization could not be convicted without some measure of proof that they were personally implicated in the criminal acts themselves. In point of fact, no international criminal tribunal after the International Military Tribunal has exercised jurisdiction over legal persons, nor is the notion of corporate criminal liability universally recognized. It is often argued, however, that business or corporate involvement in human rights violations can be addressed effectively through international criminal liability. The main issues to address when considering corporate criminal liability are those concerning penalization of legal persons if found liable and the pre-requisite of mens rea in certain crimes.

§ 3–11 STATE RESPONSIBILITY

It is commonly accepted that States cannot subjected to criminal liability. The "State" (like the "Government") is a legal fiction that does not act apart from the individuals who constitute it. It cannot be imprisoned, and while it can be punished in some ways (for example, through monetary fines or other sanctions), doing so is often seen as simply shifting the consequences of illegal conduct from the responsible individuals to the organizational entity.

Saying that States cannot commit crimes is certainly not the same thing as saying that States have no obligations to prevent and refrain from acts which constitute international crimes or to make reparations in particular cases. Clearly, all States have a responsibility not to engage in international criminal acts. States may incur responsibility for breaching international law norms, and this responsibility may result in liability to pay damages, reparations or other compensation. For instance, in the Genocide Convention case, the ICJ considered the Srebrenica massacre and found that although Serbia was neither responsible nor liable for the particular circumstances of that case, States could indeed be responsible for not preventing genocide. *See* Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Judgment (Feb. 26, 2007).

States can of course be held responsible for non-compliance with their treaty obligations, for example in the recent case involving Belgium and Senegal, where the ICJ held Senegal responsible for non-prosecution and refusal to extradite the President of Chad who had been implicated in several acts of torture and atrocities punishable by the Torture convention.

The responsibility of States may also extend to acts of individuals or groups acting under their instructions or control, or whose actions are attributable to them. *See, e.g.*, the International

Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, arts. 4–11 (completed in 2001; Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 Eur. J. Int'l L. 425 (1999).

§ 3–12 LEGALITY

Under the principle of "legality," individuals may not be prosecuted for conduct that was not unlawful at the time it was committed. Nor should they be held liable for an act which they did not know, or could not reasonably have been expected to know, was in fact prohibited. The principle is premised on the ideas of non-retroactivity and fair notice.

Put differently, a criminal prosecution must be based on the alleged violation of a legal norm that existed at the time of the offense, was accessible to the accused, and was clear enough to make the possibility of prosecution and punishment foreseeable. Some scholars consider that the principle of legality also requires a sufficient indication of the applicable penalties.

The general principle of legality was recognized long ago by the Permanent Court of International Justice in its *Advisory Opinion on Consistency of Certain Danzig Legislative Decrees with Constitution of Free City*, 1935 P.C.I.J. (ser. A/B) No. 65 (Dec. 4). Today, the principle is reflected in most international human rights instruments, including the International Covenant on Civil and Political Rights (art. 15), the European Convention of Human Rights (art. 7), the Charter of Fundamental Rights of the European Union (art. 49), and the African Convention on Human and Peoples' Rights (art. 9).

The proscription against non-retroactivity in criminal matters is frequently referred to by two separate Latin maxims: *nullem crimen sine lege* (no crime outside the law) and *nulla poena sine lege* (no punishment outside the law). The first is incorporated in article 22(1) of the Rome Statute, which states: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." The second is reflected in article 23: "A person convicted by the Court may be punished only in accordance with this Statute."

Nulla poena sine lege is properly understood to preclude punishment "outside the law" as well as the retroactive application of more severe penalties than would have been applicable at the time when the criminal offense was committed. Thus, if the law is changed *after* the offense has been committed to provide a lighter penalty, the offender is entitled to benefit from that change. This principle is expressed in article 24(2) of the Rome Statute: "In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply."

In application, it is similar to the "*rule of lenity*" found in some common law systems (including the United States). That rule provides that when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant. See, e.g., *United States v. Flemming*, 677 F.3d 252 (3d Cir. 2010). The rule covers criminal prohibitions as well as penalties.

An exception to the principle of legality is generally recognized with regard to the most serious international crimes, such as genocide, crimes against humanity, and grave breaches of international humanitarian law. Since these crimes have been universally condemned by the international community as violations of customary international law, it is implausible to allow an accused to escape responsibility by arguing that at the time of the acts were committed they had not been specifically forbidden by an applicable statute, treaty or convention. *See, e.g., United*

States v. Altstötter et al. (Justice Case), 3–4 December 1947, III Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1946–1949 at 975.

As Canadian Supreme Court Justice Cory stated in the *Finta* case, "war crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes are vague or uncertain. . . . These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations." *See R. v. Finta*, [1994] 1 S.C.R. 701 (Can.).

The International Covenant on Civil and Political Rights recognizes, in article 15(1), the general rule against *ex post facto* criminal law: "no one shall be held guilty of any criminal offence on account of any act or omissions which did not constitute a criminal offence, under national or international law, at the time when it was committed." It also states, in article 15(2), that "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

The International Criminal Tribunal for the Former Yugoslavia devised an innovative approach to retroactivity and the legality principle under the famous *Tadic*[2] case, declaring customary international law to be applicable during the war crimes committed in the former Yugoslavia.

These provisions, and similar language in the European Convention on Human Rights and Fundamental Freedoms, were relied on by the French Cour de Cassation in the *Barbie* case in finding that crimes against humanity are exempted from the principle of legality as formulated in French law. *See* Court de Cassation [Cass.] [Supreme Court for judicial matters] crim., Jan. 26, 1984, Bull. Crim., No. 34 (Fr.) (Barbie No. 2), *see* English text at 78 I.L.R. 132–136).

The invocation of the heinous nature of crimes under international law to justify prosecution and punishment notwithstanding the absence of explicit statutory prohibition at the time of commission is manifest in many principles of international criminal law. It forms part of the justification for the denial of the 'superior orders' defense as discussed above. It formed part of the justification for the denial of Head of State immunity to General Augusto Pinochet by the U.K. House of Lords, on the grounds that the commission of crimes against humanity and torture could not reasonably form a part of the functions of a Head of State. *See R. v. Bow St. Metro. Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.) (Eng.) (In Re: Pinochet, Opinion of the Lords of Appeal for Judgment in the Cause).

§ 3–13 NON BIS IN IDEM

International criminal law recognizes the principle that no one should be tried or punished more than once for the same offense. This principle (comparable to the principle of double jeopardy) is often expressed as *non bis in idem*. It is rooted in the concepts of fundamental fairness and finality, and finds expression in the major human rights treaties.

It would be misleading, however, to think of *non bis in idem* as constituting a sweeping doctrine prohibiting double jeopardy. As a matter of international law, it applies only to prosecutions within the same legal system. For example, article 14(7) of the ICCPR provides that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or *acquitted in accordance with the law and penal procedure of each country*" (emphasis added). *See also* art. 4 of Protocol 7 to the European Convention on Human Rights and

[2] IT-94-1-A

Fundamental Freedoms. It would not be a violation of this doctrine for one State to bring a prosecution against an individual who had been acquitted of the same crime in another State.

The rule has a specific application when applied to international criminal tribunals, because their jurisdiction overlaps that of domestic courts. Reflecting the primacy of their jurisdiction, for example, the statutes of the ICTY and ICTR provide that no one may be tried for the same conduct after he or she has been prosecuted *at the Tribunal*, but a prior prosecution in a national court does not necessarily prevent the Tribunals from undertaking their own prosecution. *See* art. 10 of the ICTY Statute and art. 9 of the ICTR Statute. Thus, national courts cannot prosecute someone who has already been prosecuted in the *ad hoc* tribunals, but the tribunals are not prevented from bringing a second prosecution of someone previously tried in a domestic court. A comparable rule is in articles 8 and 9 of the Statute for the Special Court of Sierra Leone.

The Rome Statute, in art. 20(1), says that "[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court." In art. 20(2), the Statute provides that "[n]o person shall be tried by another court for a *crime* referred to in article 5 for which that person has already been convicted or acquitted by the Court."

Article 20(3) states that no person who has already been tried by another court for *conduct* falling within the scope of articles 6, 7 or 8 (genocide, crimes against humanity or war crimes) shall be tried by the Court with respect to the same conduct *unless* the proceedings in the other court were (i) "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court" or (ii) "were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

The European Court of Justice recently prescribed certain qualifications justifying a departure from the *non bis in idem* principle. In *Luca Menci*, No. C-524/15 (Mar. 20, 2018), 2018 ECR 197, the ECJ decided that when the case involves possible administrative and criminal penalties, a court may be justified in "duplication of 'criminal proceedings/penalties' and 'administrative proceedings/penalties of a criminal nature' against the same person with respect to the same acts." The Court added that "[i]t is for the national court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed."

§ 3–14 COMMAND OR SUPERIOR RESPONSIBILITY

A basic tenet of the laws of war, now incorporated into international criminal law, allows the imposition of liability upon a commander (superior officer) for the most serious wrongful acts of his or her subordinates, when he or she ordered those acts to be performed or failed to prevent them from occurring. The commander of course has a duty to refrain himself (or herself) from committing those acts, and from ordering others to commit them, but in addition is required to take whatever action is necessary to prevent people under his or her authority from committing them. This rule was articulated most famously during the Tokyo Trials in the case against Japanese Army General Yamashita.

The ICTY and ICTR expanded this principle beyond the narrow confines of a military

organization. Both held that civilians may be recognized as superiors for the purposes of command responsibility. *See, e.g., Prosecutor v. Karemera et al.*, ICTR 98–44–T, Decision on Motions for Judgment of Acquittal, (Mar. 19, 2008).

The rule was effectively codified in article 28(1)(a) of the Rome Statute, which states that "[a] military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Article 28(1)(b) states that, "with respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

In a recent (and highly controversial) decision by its Appeals Chamber, the ICC acquitted Jean-Pierre Bemba Gombo, former President and Commander-in-chief of the *Mouvement de libération du Congo* (Movement for the Liberation of Congo) (MLC), of charges of crimes against humanity and war crimes in the Central African Republican by MLC troops. Although Bemba had acted as a military commander with effective authority and control over the forces that committed the crimes, the Chamber reversed his conviction on the grounds that the prosecution had not proved he "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution." *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment of June 8, 2018, available at *https://www.icc-cpi.int/car/bemba*.

§ 3–15 NO DEFENSE UNDER DOMESTIC LAW

An individual may still liable for committing an act constituting a crime under international law even though that act might be required, permitted, or not prohibited under the applicable domestic law. Thus, it is no defense to a charge of genocide that the acts constituting that crime were not illegal under the internal law of the country where they took place. That national law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

§ 3–16 NO OFFICIAL POSITION IMMUNITY

The fact that an accused acted as "Head of State" or "Head of Government" (such as a

king, president or prime minister) does not shield that person from individual criminal responsibility for the most serious crimes under international law. The same is true for government officials of lesser rank, who sometimes claim they were only acting in a governmental capacity. As stated in article 7 of the London Charter, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

Art. 7(2) of the ICTY Statute and art. 6(2) of the ICTR Statute of the ICTR lay down rules to similar effect. Article 27(1) of the Rome Statute repeats this basic rule by stating that "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence." Article 27(2) provides that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Application of the ICC's rules has been challenged in the case of Sudanese President Al-Bashir, for whom the ICC issued an arrest warrant on charges of crimes against humanity, war crimes and genocide. Notwithstanding their obligations, several countries, both ICC- Party states and non-party states, have declined to enforce the warrant on grounds (inter alia) of immunity. In July 2017, an ICC Pre-Trial Chamber found that South Africa had failed to comply with its obligations under the Rome Statute by not arresting and surrendering Omar Al-Bashir to the Court while he was in South Africa on an official visit in 2015, but declined to refer South Africa's non-compliance to the Assembly of States Parties or the UN Security Council. *See https://www.icc-cpi.int/Pages/item.aspx?name=pr1320*.

§ 3–17 NO SUPERIOR ORDERS DEFENSE

An individual cannot avoid personal responsibility for a crime under international law on the basis that he or she was merely carrying out the orders of a superior or the laws and policies of his or her government.

This principle was recognized and endorsed at the Nuremberg and Tokyo Tribunals and has been reinforced by recent decisions of the *ad hoc* tribunals. It is no defense to the charge of an international crime that the accused acted pursuant to an order of his government or of a superior official, whether or not that order was lawful. However, mitigation of punishment is possible in some cases where the individual did not know, or could not reasonably be expected to know, that the order in question was unlawful, or had no viable alternative to compliance.

Denial of "superior orders" as a defense to individual criminal responsibility explores a gray moral area. Crimes under international law are often committed by individuals acting in their capacity as members of military organizations or militias. In that context, refusal to obey an order can be construed as a breach of military discipline and can result in severe punishment, including execution, for disobeying the orders of a superior. At the same time carrying out the order will implicate the individual in the commission of a heinous crime. Denying the 'superior orders' defense requires individuals in these circumstances to refuse to participate in the commission of heinous crimes at the risk of their own lives and well-being. This may be defended morally, but in some situations it can be difficult to justify it legally.

Recognizing the burden that denial of this defense can create, the statutes of the ICTY (art. 7(4)) and ICTR (art. 6(4)) allow for the fact that the accused was acting pursuant to superior orders

to be taken into account "in mitigation of punishment if . . . justice so requires." As stated in article 33(1) of the Rome Statute, "[t]he fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful."

§ 3–18 FAIR TRIAL AND HUMAN RIGHTS

One of the most important consequences of the emergence of the international criminal tribunals has been the articulation of normative principles and protective processes to govern the actual conduct of prosecutions under international law. To a considerable extent, the protections now set forth in the statutes and rules of procedure and evidence of the various tribunals reflect the direct application of well-established principles of international human rights law.

Whether or not these various rules and procedures constitute customary international law is debated. Some contend that because they have been accepted and implemented by the international community, they do constitute a new body of customary international law applicable to criminal proceedings in all courts and tribunals, both international and domestic. Others respond that the rules, practices, and even decisions of a given tribunal do not qualify as customary international law since they do not reflect state practice. Still others suggest that the most basic rules were general principles of law recognized by civilized nations and are therefore properly applicable in any court or tribunal.

Whatever one's views on this issue are, international human rights law has clearly had a profound effect on expectations of fair trial procedures at the international level. The rules may vary in their details between courts, and they continue to evolve through the decisional law of the tribunals themselves. Still, one can identify a set of essential principles that inform this emergent body of law and practice. For ease of reference, we can look in the first instance to the Rome Statute. Some of the more significant provisions are summarized below. (Some of these provisions are also reflected in art. 21 of the ICTY Statute and art. 20 of the ICTR Statute).

1. *Investigative Stage*

Article 55(a) of the Rome Statute acknowledges that at the investigative stage, a person cannot be compelled to incriminate himself or herself or to confess guilt, or subjected to any form of coercion, duress or threat, torture, or any other form of cruel, inhuman or degrading treatment or punishment. Where necessary, he or she is entitled to the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness. Importantly, he or she shall "not be subjected to arbitrary arrest or detention" or "deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute."

Where there are grounds to believe that a person has committed a crime within the Court's jurisdiction and that person is about to be questioned, he or she is entitled, under article 55(b), to be informed that there are grounds to believe that he or she has committed such a crime, to remain silent (without such silence being a consideration in the determination of guilt or innocence), to have legal assistance of his or her own choosing, and to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

2. At Trial

Under article 63, the presence of the accused is required during the trial. However, if the accused "continues to disrupt the trial," the Trial Chamber can remove him or her and arrange for him or her to observe the trial and instruct counsel from outside the courtroom.

Article 66 states clearly that "[e]veryone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law." It also states that the onus is on the Prosecutor to prove the guilt of the accused and that, "[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

Article 67 guarantees the right to a public hearing, to "a fair hearing conducted impartially," to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks, to adequate time and facilities for the preparation of the defense and to communicate freely with counsel of the accused's choosing in confidence, and to be tried without undue delay.

The accused is also entitled to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. (This is similar to, but not precisely the same, as the "right of confrontation" afforded defendants under the U.S. Constitution.) In addition, the Prosecutor is required to disclose to the defense ("as soon as practicable") any evidence in the Prosecutor's possession or control which he or she believes "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."

None of these courts allows for application of the death penalty. *See* art. 77, Rome Statute; art. 101, ICTY Rules of Procedure and Evidence; art. 101, ICTR Rules of Procedure and Evidence.

IV. NOTE ON COMPARATIVE CRIMINAL PROCEDURE

The student of international criminal law needs to avoid the assumption that foreign judicial systems work like the domestic systems he or she is most familiar with. Different legal systems provide different judicial structures, pathways, and procedures for different types of criminal prosecutions. For example, single trial courts (combining civil and criminal jurisdiction) such as those found in the United States are rare. Instead, criminal courts may be entirely separate from the civil, commercial, or labor courts. Moreover, legal systems are constantly evolving as a result of both internal and external developments. In fact, the existence of the International Criminal Court has had a direct impact on a number of domestic criminal law systems.

Many scholars tend to classify contemporary legal systems into five or six broad categories. A distinction is often made between those following the "common law" tradition (e.g., the United States, the United Kingdom, and most of the former Commonwealth countries), and those in the "civil law" tradition (e.g., most of Western Europe and Central and South America). Common law systems are characterized by doctrines of separation of powers, the independence of the judiciary, the principle of judicial review, and the prominence of judge-made law (including *stare decisis* or judicial precedent). By distinction, civil law systems are frequently described as based on a more unitary (or even bureaucratic) view of legal authority, resting primarily on comprehensive legal codes reflecting the will of the legislators and permitting for relatively circumscribed roles for the courts.

For most of the twentieth century, one could also identify a "socialist law" tradition, for

example in the former Soviet Union and much of Eastern Europe, which combined features of a code-based system, a judiciary with a sharply limited scope, and a system of political supervision ensuring decisional fidelity to the governing principles of Marxism-Leninism. Islamic States and peoples generally follow *Shari'a* law reflecting the divinely-revealed principles and requirements of the Koran (Qur'an). In Africa and elsewhere, the role of custom or indigenous law still exerts profound influence, and local communal values and procedures continue to play an important role in informal systems of justice and accountability. Finally, the legal systems of the People's Republic of China (PRC) and other Asian countries can be said to share certain common elements reflecting the unique historical, cultural, religious, and political traditions of that region.

In terms of criminal procedure, certain broad differences can be identified between the common law "accusatorial" approach and the civil law "inquisitorial" approach. Common law systems usually (but not always) rely on the decision of a jury of "peers" (private citizens) whose job is to decide whether the prosecutor has proved the charges. In contrast, traditional or "classical" civil law systems of criminal justice employ an approach in which the goal is to establish the fact of the defendant's guilt or innocence by means of an official (and, in theory at least, objective or impartial) fact-finding process. The prosecutor is often a professional governmental official and may even have judicial status (both judges and prosecutors are often called "magistrates"). The defendant is expected to cooperate in this quest for the truth and consequently enjoys fewer rights to resist or object to the process.

Once it has been established that a crime has been committed, preliminary investigation is undertaken to determine the facts of the situation, typically under the direction of an investigating magistrate (*juge d'instruction* or *juez instructor*). The trial proceeding itself may be conducted before an entirely different court, and may be relatively brief and informal by common law standards. The duty of the court is to seek the truth; the main examination of the accused (and witnesses, if any) is conducted primarily by the presiding judge. The speed, nature, and formalities of the proceedings also reflect these differences.

These broad distinctions can be misleading. Many legal systems do not fit neatly into the categories described above, nor are the categories themselves entirely accurate descriptors. For instance, codification of both substantive and procedural law is increasingly common in common law countries, and in many civil law systems, decisional law (known in French as *jurisprudence* or in Spanish as *jurisprudencia*) actually plays a significant if not necessarily binding role.

This may be the reason for the established trend in international criminal law to regionalize tribunals, in order to find a balance between transnational prosecutions of crimes under the Rome statute with the support of a regional procedure in order to obviate the necessity for clarifications on methods of criminal justice unique to certain areas.

Even within the "Romano-Germanic" civil law tradition, marked differences have long existed between the French approach (which has heavily influenced the legal systems of Italy, Portugal, and Spain) and the German (followed by the Scandinavians, South Korea, and Greececommon law (e.g., public trials and oral testimony). More importantly, many domestic systems embrace or even combine elements of the different approaches. Few countries today fall neatly into the "accusatorial" or "inquisitorial" camps.

It is as yet too early to know whether one byproduct of the creation of international courts and tribunals will be the harmonization, or perhaps even unification, of criminal law in terms of procedural rights or (eventually) substantive law.

§ 3–19 FURTHER READING

Julie Rose O'Sullivan, The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and A Plea to Congress for Direction, 106 Georgetown L.J. 1021 (2018); Daryll Robinson, A Justification of Command Responsibility, 28 Crim. L. Forum 633 (2017); Sabine Gless, Ne Bis in Idem in An International and Transnational Criminal Justice Perspective – Paving the Way for An Individual Right? In van der Wilt and Paulssen, eds., Legal Responses to Transnational and International Crimes: Towards an Integrative Approach (Elgar 2017); Neha Jain Judicial Lawmaking and General Principles of Law in International Criminal Law, 57 Harvard J. Int'l L. 111 (2016); Michael Farbiarz, Extraterritorial Criminal Jurisdiction, 114 Mich. L. Rev. 507 (2016); Charles Doyle, Extraterritorial Application of American Criminal, Cong.Research Serv.7-5700 (Oct. 31, 2016), available at *https://fas.org/sgp/crs/misc/94-166.pdf*'; Olympia Bekou, Cooperation and the Iternational Criminal Court: Perspectives from Theory and Practice (Brill Nijhoff 2016); Werle, *Principles of International Criminal Law* (Oxford, 3rd ed. 2014); Sluiter, Frinan, Linton, Zappala & Vasiliev, eds., *International Criminal Procedure: Principles and Rules* (Oxford 2013); Dan Stigall, "International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law," 35 Hastings Int'l & Comp. l. Rev. 323 (2012); Watson, "The Passive Personality Principle," 28 Texas Int'l L. J. 1 (1993);*ly* Geoffrey R. Watson, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction," 17 Yale J. Int'l L. 41 (1992).

-