

**International Jurisdiction and Crime:**  
**A Substantive and Contextual Examination of Jurisdiction in International Law**

**being a Thesis submitted for the Degree of PhD**

**in the University of Hull**

**by**

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## Table of Cases

### International:

1. Case of the SS Lotus, (France v. Turkey), (1927) PCIJ Rep, Series A, No. 10.
2. Island of Palmas Case (Netherlands v. US) (1928) 2 RIAA 829.
3. International Military Tribunal (Nuremberg), Judgement and Sentences, (1947) 41 AJIL 172.
4. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), [1951] ICJ Rep 15.
5. The Nottebohm Case, (Liechtenstein v. Guatemala), (Second Phase), (1955) 22 ILR 349.
6. North Sea Continental Shelf Cases, (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands), [1969] ICJ Rep 3.
7. Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgement, [1985] ICJ Rep. 13.
8. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.), Merits, [1986] ICJ Reports 14.
9. Prosecutor v. Tadic, Case No. IT-94-1-AR72, (1996) 35 ILM 32.
10. Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, 7 May 1997, excerpts in (1997) 36 ILM 908.
11. Case Concerning Question of Interpretation and Application of the 1971 Montreal Convention from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 27 Feb. 1998.

### Australia:

1. Polyukhovich v. Commonwealth of Australia, (1991) 172 CommLR 501.

### Austria:

1. Italian South Tyrol Terrorism Case, (1968) 71 ILR 235.
2. Public Prosecutor v. Janos V, (1972) 71 ILR 229.
3. Credit Card Fraud Case, (1987) 86 ILR 562.

### Belgium:

1. Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin, (1986) 77 ILR 537.

### Canada:

1. In the Matter of a Reference as to whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts, [1943] SCR 483.
2. Bolduc v Attorney-General of Quebec et al, (1982) 137 DLR (3rd) 674.
3. Libman v. The Queen, (1985) 21 DLR (4th) 174.
4. R v. Finta, (1994) 112 DLR (4th) 513.
5. United States of America v. Lépine, (1994) 111 DLR (4th) 31.
6. Romania (State) v. Cheng, (1997) 114 CCC 3d 289.

### England:

1. R v. Azzopardi, (1843) 1 CoxCC 28.
2. R v. Bernard, (1858) 8 State Tr 887.
3. R v. Holmes, [1883] 12 QB 23.
4. Macleod v. A-G of New South Wales, [1891] AC 455.
5. R v. Jameson, [1896] 2 QB 431.
6. R v. Earl Russell, [1901] AC 446.
7. R v. Lynch, [1903] 1 KB 444.



8. *R v. Casement*, [1917] 1 KB 98.
9. *County Council of Fermanagh v. Farrendon*, (1923-24) 2 Ann Dig 109.
10. *In re Piracy Jure Gentium*, [1934] AC 586.
11. *Compania Naviera Vascongado v. Steamship Cristina*, [1938] AC 485.
12. *Chung Chi Cheung v. R*, [1939] AC 160.
13. *Joyce v. DPP*, [1946] AC 347.
14. *R v. Page*, [1953] 2 All ER 1355.
15. *Board of Trade v. Owen*, [1957] AC 602.
16. *Treacy v. DPP*, [1971] AC 537.
17. *DPP v. Doot*, [1973] AC 807.
18. *Oppenheimer v Cattermole*, [1973] Ch 264.
19. *R v. Vickers*, [1975] 2 QB 664.
20. *DPP v. Stonehouse*, [1977] 2 All ER 909.
21. *Attorney General's Reference (No 1 of 1982)*, [1983] 1 QB 751.
22. *R v. Murtaq Ali*, [1990] CLR 648.
23. *Liangsiriprasert v. United States Government and Another*, [1990] 2 All ER 866.
24. *R v. Sansom, Smith, Williams and Wilkins*, [1991] 2 WLR 366.

France:

1. *Schwartz Case*, Decision of Feb. 25, 1911, 1915 S.Jur I 171 (Cass. Crim).
2. *Re Bayot*, (1923-24) 2 Ann Dig 109.
3. *Re Feld and Newman*, (1967) 48 ILR 88.

Germany:

1. *Extradition of German Nationals Case*, [1954] ILR 232.
2. *Espionage Prosecution Case* (1991) 94 ILR 69.

Israel:

1. *Amsterdam et al v. Minister of Finance*, (1952) 19 ILR 229.
2. *Weiss v. Inspector General of the Police*, (1958) 26 ILR 210.
3. *Attorney-General of the Government of Israel v. Adolf Eichmann*, (1962) 36 ILR 5.

Jamaica:

1. *Smith (James) v. R*, (1992) 41 WIR 272.

Luxembourg:

1. *Ministère Public v. Brabant*, (1972) 73 ILR 369.

Malaysia:

1. *Public Prosecutor v. Loh Ah Hoo*, [1974] MLJ 216.

The Netherlands:

1. *In re Gerbsch*, (1949) 16 Ann Dig 399.
2. *In re Rohrig, Brunner and Heinze*, (1950) 17 ILR 393.
3. *Public Prosecutor v. L.*, (1951) 18 ILR 206.

New Zealand:

1. *Tipple v. Pain*, [1983] NZLR 257.
2. *R v. Saunders*, [1984] 1 NZLR 633.

Scotland:

1. *HMA v. Witherington*, (1880-81) 8 SC (JC) 41.

South Africa:

1. R v. Holm and Pienaar, (1948) 13 CILC 462.
2. R v. Newman, (1949) 3 SALR 1238.

Sweden:

1. Public Prosecutor v. Antoni, (1960) 32 ILR 140.

Switzerland:

1. Stanley Adams v Staatsanwaltschaft Des Kantons Basel-Stadt, [1978] 3 CMLR 480.

United States:

1. The Schooner Exchange v. M'Faddon et al, (1812) 3 L Ed 287.
2. US v. Wiltberger, (1820) 5 L. Ed 37.
3. The Antelope, (1825) 6 L Ed 268.
4. Simpson v. The State, (1893) 92 Ga 41.
5. Stassheim v. Daily, (1910) 221 US 280.
6. US v. Bowman, (1922) 67 L Ed 149.
7. US v. Ford, (1925) 71 L Ed 793.
8. Yenkichiro Ito v. US, (1933) 64 F 2d 73.
9. In Re List, (1948) 15 Ann Dig 632
10. In Re Eisentrager, (1949) 1 LRTWC 8.
11. Kawakita v. US, (1952) 96 L. Ed 1249.
12. Rocha et al v. US, (1966) 288 F 2d 545.
13. Rivard v. US, (1967) 375 F 2d 882.
14. US v. Pizzarusso, (1968) 388 F 2d 8.
15. Stegman v. US, (1970) 425 F 2d 984.
16. US v. Birch, (1972) 470 F 2d 808.
17. US v. Cotten, (1973) 471 F 2d 744.
18. Timberlane Lumber Co. v. Bank of America (1976) F. 2d 597.
19. US v. King, (1976) 552 F 2d 833.
20. US v. Mitchell, (1977) 553 F 2d 966.
21. Mannington Mills Inc. v. Congoleum Corp. (1979) 595 F. 2d 1287.
22. US v. Columba- Colella, (1979) 604 F Supp 356.
23. Escobedo v US, (1980) 623 F 2d 1099.
24. US v. Egan, (1980) 501 F Supp 1252.
25. US v. Schmucker- Bula (1980) 609 F 2d 399.
26. US v. Khalje, (1981) F 2d 90.
27. US v. Layton, (1981) 509 F Supp 212.
28. US v. Marino Garcia, (1982) 679 F 2d 1373.
29. US v. Smith, (1982) 680 F 2d 255.
30. Chua Han Mow v. US, (1984) 730 F 2d 1308.
31. US v. Benitez, (1984) 741 F 2d 1312.
32. Demjanjuk v. Petrovsky, (1985) 776 F 2d 571.
33. US v. Zehe, (1985) 601 F Supp 196.
34. US v. Endicott, (1986) 803 F 2d 506.
35. US v. Peterson, (1987) 812 F 2d 486.
36. Ahmad v. Wigan, (1989) 726 F Supp 389.
37. US v. Davis, (1990) 905 F 2d 245.
38. US v. Noriega, (1990) 746 F Supp 1526.
39. US v. Thomas, (1990) 893 F 2d 1066.
40. US v. Felix- Gutierrez, (1991) 940 F 2d 1200.

41. US v. Yunis (1991) 924 F 2d 1086; US v. Yunis, (1988) 681 F Supp 896.
42. US v. Harvey, (1993) 2 F 3d 1318.
43. US v. Caicedo, (1995) 47 F 3d 370.

**Zambia:**

1. The People v. Roxburgh, (1972) 74 ILR 157.

**Zimbabwe:**

1. S v. Mharapara, [1986] 1 SALR 556.

## Table of Legislation

### Australia

1. War Crimes Act 1945.
2. Crimes (Internationally Protected Persons) Act 1976.
3. War Crimes Amendment Act 1988.
4. Crimes (Ships and Fixed Platforms) Act 1992.

### Austria:

1. Penal Law: ss 32; 62- 65; 67; 74; 242; 244; 246; 252- 260; 288; 289.

### Belarus:

1. Criminal Code: art 5.

### Brazil:

1. Penal Code 1927.

### Bulgaria:

1. Penal Code.

### Canada:

1. Criminal Code: ss 3(7); 6(2); 7(2.1); 7(3.71); 7(3.76); 46; 74; 78; 269; 279; 290.
2. Official Secrets Act, c. O-3.
3. Foreign Enlistment Act, c. F-29.

### Chile:

1. Criminal Code: ss 5; 6.

### China

1. Criminal Code: arts. 4- 6.

### Denmark:

1. Penal Code: s 7.

### France:

1. Code of Criminal Procedure: arts. 689; 691; 692; 694.

### Germany:

1. Penal Code: ss 3(1); 7; 9; 99; 220a.
2. Penal Code 1927.
3. Basic Law: art. 3.

### Italy:

1. Penal Code: arts. 6- 10.

### Israel:

1. Law for the Prevention and Punishment of Genocide.
2. Nazis and Nazi Collaborators (Punishment) Law.
3. Penal Law 5737- 1977.

### Jamaica:

1. Criminal Justice (Administration) Act.

Japan:

1. Penal Code: ss 1(1); 2; 3; 4; 77- 79; 81; 82; 88; 89; 108; 176; 199; 214; 246-250.

Malaysia:

1. Customs Act 1967.

The Netherlands:

1. Criminal Code: arts. 2- 4.

New Zealand:

1. Crimes Act 1961.

Norway:

1. Penal Code: art. 12.

Portugal:

1. Criminal Code: art. 5.

Spain:

1. Law of the Judicial Power 1870: art. 355.
2. Penal Code: art. 10; 137.
3. Judicial Jurisdiction Act 1985.

Sweden:

1. Penal Code 1864.
2. Penal Code: s 3.

Thailand:

1. Penal Code: ss 5; 8; 10.

Turkey:

1. Penal Code: art. 6.

Uganda:

1. Penal Code: s 5(1).

United Kingdom:

1. Treason Act 1351.
2. 2 and 3 Edw. VI, c. 24, (1548).
3. Unlawful Oaths Acts 1797- 1812.
4. Slave Trade Act 1824.
5. 9 Geo. 4, c. 31, (1828).
6. Offences Against the Person Act 1861.
7. Foreign Enlistment Act 1870.
8. Slave Trade Act 1873.
9. Explosive Substances Act 1883.
10. Bering Sea Award Act 1894.
11. Theft Act 1968.
12. Genocide Convention Act 1969.
13. Immigration Act 1971.
14. Misuse of Drugs Act 1971.

15. Internationally Protected Persons Act 1978.
16. Theft Act 1978.
17. British Nationality Act 1981.
18. Forgery and Counterfeiting Act 1981.
19. Nuclear Materials Act 1983.
20. Representation of the People Act 1983.
21. Representation of the People Act 1985.
22. Official Secrets Act 1989.
23. Suppression of Terrorism Act 1989.
24. Taking of Hostages Act 1992.
25. Criminal Justice Act 1993.
26. Sexual Offences (Conspiracy and Incitement) Act 1996.
27. Sex Offences Act 1997.

United States:

1. California Penal Code of 1872: s 778a.
2. New York, Cons. Laws, 1923, c. 41, s 1047.
3. United States Code, Title 18, Crimes and Criminal Procedure: ss 7; 32; 112; 152; 175; 351; 470; 499; 641; 793- 796; 798; 831; 878; 953; 1082; 1091; 1112; 1114; 1116; 1117; 1119; 1571; 1201; 1203; 1546; 1751; 1952; 1962; 2232; 2251- 57.
4. United States Code, Title 46, Maritime Drug Law Enforcement Act, s 1903.
5. United States Code, Title 21, Comprehensive Drug Abuse Prevention and Control Act, ss 846; 955; 959; 963.
6. United States Code, Title 49, Transportation, s 46502.
7. United States Code, Title 16, Marine Mammal Protection Act, s 1361 et seq.
8. Antiterrorism and Effective Death Penalty Act 1996.
9. Helms- Burton Act.

## Table of Conventions, Resolutions and Declarations

1. Treaty on International Penal Law 1889, (1935) 29 AJIL (Supp) 638.
2. Hague Convention Respecting the Laws and Customs of War on Land 1907, (1908) 2 AJIL 90.
3. International Convention for the Suppression of White Slave Traffic 1910, (1910) 211 CTS 45.
4. International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade 1926, (1927) 21 AJIL 171.
5. Montevideo Convention on Rights and Duties of States 1933, (1934) 28 AJIL (Supp) 75.
6. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis 1945, (1945) 8 UNTS 279.
7. Convention on the Prevention and Punishment of the Crime of Genocide 1948, (1951) 45 AJIL (Supp) 7.
8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31.
9. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field 1949, 75 UNTS 85.
10. Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135.
11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.
12. Protocol Amending the International Agreement of the Suppression of White Slave Traffic 1949, (1949) 98 UNTS 101.
13. European Convention on Extradition 1957, (1990) SI 1990 No. 1507.
14. Geneva Convention on the High Seas 1958, (1958) 52 AJIL 842.
15. Agreement of 4 April 1960 Between the Government of the United Kingdom of Great Britain and Northern Ireland and Government of the State of Israel, (1960) SI 1960 No. 1660.
16. Vienna Convention on Diplomatic Relations 1961, (1961) 55 AJIL 1064.
17. Single Convention on Narcotic Drugs 1961, (1964) 520 UNTS 204.
18. International Convention on Civil and Political Rights 1966, (1967) 61 AJIL 870.
19. International Convention on the Elimination of All Forms of Racial Discrimination, 1966, 660 UNTS 195.
20. Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, (1969) UKTS 126, Cmd 4230.
21. Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, (1971) 10 ILM 133.
22. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, (1971) 10 ILM 1151.
23. Protocol Amending Single Convention on Narcotic Drugs 1972, (1972) 976 UNTS 3.
24. Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on their Destruction 1972, (1976) 11 UKTS, Cmd 6397.
25. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973, (1974) 12 ILM 42.
26. Convention Against the Taking of Hostages 1979, (1979) 18 ILM 1456.
27. The International Convention on the Physical Protection of Nuclear Material 1980, (1980) 19 ILM 1419.
28. Convention on the Law of the Sea 1982, (1982) 21 ILM 1261.
29. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, (1985) 24 ILM 535.
30. European Convention on Offences Relating to Cultural Property 1985, (1986) 25 ILM 44.

31. Convention Against Illicit Traffic in Narcotic and Psychotropic Substances 1988, (1989) 28 ILM 497.
32. Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, (1988) 27 ILM 668.
33. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located upon the Continental Shelf 1988, (1988) 27 ILM 685.
34. Convention Between the Member States of the European Communities on Double Jeopardy 1987, (1987) Cmnd. 438.
35. Protocol to the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1971 of 1988, (1988) Misc. 6, Cmnd 378.
36. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, (1990) 29 ILM 89.
37. Convention Applying the Schengen Agreement 1985 of 1990, (1991) 30 ILM 84.
38. Prohibition of the Development, Prohibition, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, (1993) 32 ILM 800.
39. Convention on the Safety of United Nations and Associated Personnel 1994, (1995) 34 ILM 484.

#### Resolutions and Declaration:

1. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, United Nations General Assembly Resolution 2625 (XXV), Series I, Vol. XIII, 1970- 71.
2. Security Council Resolution 827, Establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1993), 32 ILM 1203.
3. Security Council Resolution 955, Establishing the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violation committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, (1994), 33 ILM 1600.



## Table of Miscellaneous Primary Sources

1. Report of the Royal Commission on Extradition, Parliamentary Papers, 1878, Vol. 24, Reports, p 903 at p 908, micro fiche No. 84.176.
2. Moore, J.B., Report on Extraterritorial Crime and the Cutting Case, (1887) Foreign Relations of the United States 751.
3. Brierly, J.L, and De Visscher, C, Report of Sub- Committee of the Committee of Experts for the Progressive Codification of International Law, Criminal Competence of States in Respect of Offences Committed Outside Their Territory 1926, (1926) 20 AJIL 252.
4. Harvard Draft Convention on Jurisdiction With Respect to Crime, (1935) 29 AJIL (Supp) 439.
5. International Law Commission, Report of the Ad Hoc Committee on Genocide, 3 UN ESCOR Supp. 6, UN Doc E/794 (1948).
6. International Law Commission, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, (1950), 5 UN GOAR Supp. (No 12) 11 UN Doc A/1316 (1950), (1950) 41 AJIL 126.
7. American Law Institute, *Restatement of the Law (Second), The Foreign Relations Law of the United States*, American Law Institute Publishers, St Paul Minn., 1965.
8. International Law Commission, Draft Articles on State Responsibility, [1980] Year Book of the International Law Commission, Vol. 2, Part 2; (1998) 37 ILM 440.
9. *Encyclopaedia of Public International Law*, Vol. 10, Elsevier Science Publishers B.V., Amsterdam, 1985.
10. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987.
11. Law Commission Report No. 180, *Jurisdiction Over Offences of Fraud and Dishonesty with a Foreign Element*, 1989.
12. *Halsbury's Laws of England*, Fourth Edition, Reed Elsevier (UK) Ltd., London, 1997.
13. Law Reform Commission of Canada, *Extraterritorial Jurisdiction*, Working Paper 37, Ministry of Supply and Services Canada, Ottawa, 1984.
14. Deschênes, J., Canada Commission on War Criminals Report, 1986.
15. American Law Institute, *Restatement of the Law: The Foreign Relations of the United States*, (Third), American Law Institute Publishers, St. Paul, Minn., 1987.
16. European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe, Strasbourg, 1990.
17. *Questionnaires and Replies*, European Committee on Crime Problems, 4 October 1990, PC-R-EJ/INF Bil.
18. Blanplain, R., (Ed), *International Encyclopaedia of Laws: Criminal Law*, Kluwer Law Publishers, Deventer, 1993.
19. Secretary- General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, (1993) 32 ILM 1159.
20. Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (1993) 32 ILM 1192.
21. United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court, 16 July 1993, (1994) 33 ILM 253.
22. Statute for the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violation committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, (1994) 33 ILM 1602.

## Table of Abbreviations

All ER	All England Law Reports
AJIL	American Journal of International Law
Ann Dig	Annual Digest of Cases in Public International Law
AC	Appeal Cases
BYIL	British Yearbook of International Law
CLJ	Cambridge Law Journal
CCC	Canadian Criminal Cases
CYIL	Canadian Yearbook of International Law
Ch	Chancery Reports
ColJTL	Columbia Journal of Transnational Law
Col LR	Columbia Law Review
CMLR	Common Market Law Reports
CILC	Commonwealth International Law Cases
CLB	Commonwealth Law Bulletin
CommLR	Commonwealth Law Reports
ConnLR	Connecticut Law Review
CILJ	Cornell International Law Journal
Cox CC	Cox's Criminal Cases
CLF	Criminal Law Forum
CLR	Criminal Law Review
CLP	Current Legal Problems
DLR	Dominion Law Reports
DJCIL	Duke Journal of Comparative and International Law
EJIL	European Journal of International Law
F	Federal Reports
F Supp	Federal Supplement
GJICL	Georgia Journal of International and Comparative Law
Ga	Georgia Reports
HasLJ	Hastings Law Journal
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HRLJ	Human Rights Law Journal
ICLQ	International and Comparative Law Quarterly
ICJ Rep	International Court of Justice Reports
IJECL	International Journal of Estuarine and Coastal Law
ILR	International Law Reports
ILM	International Legal Materials
IntR	International Relations
IR	Irish Reports
IsLR	Israel Law Review
IYBHR	Israel Yearbook of Human Rights
JAL	Journal of African Law
JCL	Journal of Criminal Law
KB	King's Bench Division Reports
LQR	Law Quarterly Review
LRTWC	Law Reports of Trials of War Criminals
L Ed	Lawyers Edition
LaLR	Louisiana Law Review
MalLJ	Malay Law Journal
Mich LR	Michigan Law Review

MLLWR	Military Law and the Law of War Review
MLR	Modern Law Review
NJIL	Netherlands Journal of International Law
NZLR	New Zealand Law Reports
NTIR	Nordisk Tidsskrift for International Ret
PCIJ	Permanent Court of International Justice
QB	Queen's Bench Division Reports
RdC	Recueil des Cours
RIAA	Reports of International Arbitration Awards
SLT	Scots Law Times
SC (JC)	Session Cases (High Court of Justiciary)
SCR	Supreme Court Reports
TennLR	Tennessee Law Review
TILJ	Texas International Law Journal
TLR	Texas Law Review
TLCP	Transnational Law and Contemporary Problems
TGS	Transactions of the Grotius Society
SALR	South African Law Reports
STr	State Trials
SI	Statutory Instrument
UKTS	United Kingdom Treaty Series
UNTS	United Nations Treaty Series
UPLR	University of Pittsburgh Law Review
USC	United States Congress
US	United States Reports
ULR	Utah Law Review
VJTL	Vanderbilt Journal of Transnational Law
WUJUCL	Washington University Journal of Urban and Contemporary Law
WCR	War Crimes Reports
WLR	Weekly Law Reports
WIR	West Indian Reports
YBILC	Yearbook of the International Law Commission

## International Jurisdiction and Crime- Introduction

International criminal law and jurisdiction are fields of ever greater significance. Developments within them are frequent and important. Resultant is the need for conceptual understanding, in isolation as well as in context. This is the aim of this thesis; it is argued that it is only through a contextual and substantive approach that full and proper understanding is possible. The criminal law, and its lawful application through reference to a right of jurisdiction, fundamentally concerns two parties; States and private legal persons. It is of the utmost importance for both. For States the criminal law at its most basic level serves to protect its very existence. Here it is a critical defensive mechanism; the State through the means of its criminal justice system ensuring its continuance. Further, through the imposition of a general coercive regime the society upon which the State is based is protected from anarchy as well as the continuance of a system of governance based upon the rule of law and the framework for a system founded upon democratic and liberal tenets are ensured. For individuals the criminal law is of no less importance. The individual is, of course, the subject of the application of criminal prescriptions. It is the individual who is made to suffer in person or goods the sanctions attached to such prescriptions. Indeed as the application of criminal law can and does protect the societal human rights through for example deterrence and the prevention of recidivism so too must it protect the human rights of the accused. Clearly, that the criminal law potentially affects the individual's right to liberty, the collective rights of society, and the existence and nature of States themselves, its significance is manifest.

The importance of criminal law and jurisdiction on the international plane is greater today than it has ever been legally, jurisdictionally and criminally. Legally there are an ever increasing number of proscriptive international conventions relating to aspects of criminal law. From those now firmly established proscriptive conventions concerning for example hijacking<sup>1</sup> to relatively recent conventions concerning the safety of United Nations personnel<sup>2</sup> and the employment of mercenaries<sup>3</sup> there today exists a large corpus of criminally tangential conventional international law. The establishment of *ad hoc* tribunals relating to the crimes committed in the territory of former Yugoslavia and Rwanda as well as the developments concerning the permanent international criminal court also highlight the topical significance of the area. In regard to the permanent international criminal court, whilst it is far too early to draw any conclusions upon the affect of the court upon international criminal law and jurisdiction generally, the opportunity exists for it to usefully augment the system of law and State jurisdiction proffered in this thesis. Jurisdictionally, the recent decisions of the International Court of Justice accepting competence to adjudicate upon the dispute between the United Kingdom and the United States and Libya is very important.<sup>4</sup> Criminally, there are today an ever greater number of internationally relevant crimes being committed. The possibilities for international criminality expands along side the actual commission of offences. From "simple" crimes of theft and murder across borders, to the large scale traffic in proscribed substances, war crimes and genocide. Technological advances in transport and communications have led to numerous and varied international criminal opportunities. The

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<sup>1</sup> For example the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, (1971) 10 ILM 1151. There are of course a myriad of non- proscriptive conventions, dealing with for example mutual assistance in criminal matters and extradition.

<sup>2</sup> Convention on the Safety of United Nations Personnel 1994, (1995) 34 ILM 484.

<sup>3</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989, (1990) 29 ILM 89.

<sup>4</sup> The former being the Case Concerning Question of Interpretation and Application of the 1971 Montreal Convention from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 27 Feb. 1998.

scale and importance of this actual and potential international criminality is in turn reflected in the international and municipal legal reaction.

A result of the developments within and significance of international criminal law and jurisdiction is the critical need for understanding and conceptual clarity. Areas of law lying at the intersection of criminal law, human rights, and State sovereignty demand nothing less. The starting point must be exposition of the meanings of international criminal jurisdiction and substantive international criminal law themselves. In this task this thesis primarily examines the practice of States. The importance of stating the law as it is cannot be over-emphasised. It is mandated by the requirements of critical defence. Indeed, given the topicality of the subject, and what is stated as the predilection of international lawyers "to suffer from a professional disease against which other members of the legal profession are remarkably immune...[being] highly susceptible to current fashions in the realm of political ideology"<sup>5</sup> the reliance upon *lex lata* is critical. What therefore comprises the majority of authority adduced is State practice, unilateral in the form of legislation and judicial decision, and collective in the form of convention and international judicial decision. What is novel in this thesis is not the advocacy of a regime *de la ferenda* but rather the contextual and substantive approach taken in the exposition of existing authority.

International criminal law and jurisdiction are fields as large as they are significant. It is impossible to analyse them in their entirety here. The focus of this thesis is the context in which substantive international criminal law and the rules concerning its application exist. International criminal law, as municipal criminal law, is comprised of substantive rules, evidential rules and procedural rules. The latter two are here subject to examination only to the extent necessary to fully comprehend the former. Jurisdiction is inextricably part of the substantive component. As will be seen, in one guise it facilitates the lawful application of that body of law and in another it provides evidence in support of it. This thesis, then, substantiates that the correct methodology to take in an exposition of substantive international criminal law and jurisdiction is a contextual and substantive one. It examines the nature and content of international criminal law; what it is and what it is comprised of, as well as the rules relating to its lawful application. The former is in large measure a substantive examination, the latter a contextual one, my thesis being that only through such a contextual and substantive examination can jurisdiction and international criminal law be fully and properly understood. In the substantiation of this thesis it will be established that substantive international criminal law comprises all those prescriptions that have other than purely municipal interest or concern, and that they are identified and characterised with reference to the categories of jurisdiction. Further, it will be demonstrated that "jurisdiction" in fact comprises the right of jurisdiction and the categories of jurisdiction, the former being a single facilitative monad, applicable in the light of a requisite connective between the State and the object of the assumption of jurisdiction, the latter being evidential depositories, reference to one or more of which supporting the existence of the right.

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<sup>5</sup> Schwarzenberger, G., The Problem of an International Criminal Law, (1950) 3 CLP 263, at 263.

## Chapter One- The Framework

### Introduction

International criminal jurisdiction is necessarily concerned with crime. Criminal prescriptions of an international character *ipso facto* explain the international jurisdictional regime. Crime and the resultant prohibitive and prescriptive municipal and international reaction are *sine qua non* of international jurisdiction. Indeed, that the categories of international jurisdiction exist, and exist as they do, as a result of the nature and extent of crime and criminal prescriptions is axiomatic. In light of this reality orthodox examinations of international criminal jurisdiction, concentrating not on the prescriptions that are at the heart of that body of law, are incomplete. Such expositions in large measure tend to concentrate upon such issues as the parameters of the individual categories of jurisdiction, and their expansion or dilution.<sup>1</sup> Further, where the prescriptions that the jurisdictional rules serve to justify or affect are the subject of examination, that discussion tends to be more enumerative than analytical, isolated than contextual. Whilst such approaches are undoubtedly valuable they fail to focus on the heart of international jurisdiction. This failure to focus upon the nature and application of criminal prescriptions operative internationally, the context in which jurisdiction operates, is a fundamental oversight. Logic would appear to mandate precisely what seems to be on the whole absent from most jurisdictional discussions; an examination of the criminal prescriptions acted upon with reference to one or more of the categories of jurisdiction. In examining the separate categories of jurisdiction, then, the approach most useful is a substantive and contextual one. It is the context in which category exists that must be the focus of examination. The context is, of course, a body of criminal prescriptions. It is the nature and characteristics of such criminal prescriptions that expose the essence of the differing categories of international jurisdiction, and indeed the overall nature of international criminal jurisdiction itself.

In addition to a contextual examination leading to the most revealing and insightful discussion of international criminal jurisdiction it also leads to analysis and characterisation of the criminal prescriptions themselves. Cumulatively these comprise the totality of “substantive international criminal law”. This term is deliberately and properly employed. For a crime to be of any concern to the international jurisdictional rules it must involve at least a modicum of internationality. A wholly municipal crime, with no international connection whatsoever, is the concern of international jurisdiction only to the extent that the territorial category of jurisdiction unequivocally supports the assumption of jurisdiction by that State if it so desires, which is in effect not at all.<sup>2</sup> Thus the hitherto amorphous subject of substantive international criminal law, in the widest sense of the term, is also brought into the scope of the discussion. The apodictic relationship between these two branches of international law necessarily leads to this conclusion. Indeed, jurisdiction is wholly reflective of the corpus of substantive international criminal law, that is, the criminal prescriptions that are its concern. In this sense the separate categories of jurisdiction can be understood as convenient conceptual (and evidential) depositories for the differing forms of international criminal prescription. Herein lies the rationale for this thesis; an exposition of international criminal jurisdiction must be facilitated

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<sup>1</sup> An exception to this general statement are examinations of the universal category and to a lesser extent the protective category of jurisdiction which tend to be crime specific. Further, the contextual examination will highlight that “international jurisdiction” itself is comprised of two constituent elements; jurisdiction as a right, and the categories of jurisdiction, leaving orthodox treatments incomplete in this regard as well.

<sup>2</sup> Such a situation only exceptionally arises, there being little doubt in such circumstances of the propriety of the assumption of jurisdiction by the territorial State. The limited exceptions include those arising from international human rights law.

by a examination and categorisation of the criminal prescriptions that are its subject. These, *in toto*, are nothing other than the complete corpus of substantive international criminal law. A product of this contextual and substantive examination will be the conclusion that each category of jurisdiction is generally reflective of a particular class or type of international crime and/or criminal prescription. Types, or classes, of crimes gave rise to the distinct but related categories of jurisdiction, and these categories of jurisdiction in turn evince certain common characteristics of that class of crime. This conclusion is one of the two products of the contextual and substantive approach taken, namely that substantive international criminal law is identified and categorised with reference to the categories of jurisdiction. It is disjunctive in that the totality of substantive criminal law is first identified and then dissected and characterised with reference to the categories of jurisdiction.

The second product emanating from the substantiation of this thesis is an exposition of the underlying nature of jurisdiction in international law. It comprises a general and particular aspect. The former centres around wide questions relating to the jurisdictional regime, such as the important question of whether international law generally permits or prohibits the assumption of extraterritorial jurisdiction. Particularly, jurisdiction is seen to comprise both jurisdiction as right and the jurisdictional categories; the former being a single entity proven by reference to one or more of the latter. Jurisdiction as right is facilitative and active, rendering lawful the application of international criminal prescriptions. State practice in assuming extraterritorial jurisdiction will be seen to fully support the unified conception of jurisdiction as a single right, both in terms of the interests served by reference to the differing categories by States often being similar across the categories, as well as by particular assumptions often explicitly or implicitly referring to more than one category in the light of the same facts. This product is conjunctive in that it will be seen that jurisdiction in international law is a single entity, a right bestowed by international law in the presence of a requisite facilitative connective. The categories are evidential and passive. They prove the existence of the right. They are a product of the nature and particular categorisation of the criminal prescriptions exercised internationally. It is fundamentally important that this distinction, reflecting *lex lata*, between jurisdiction as right and the categories of jurisdiction is made. Only once made and understood is full comprehension possible.

This thesis has at its heart jurisdiction as right, the categories of jurisdiction and substantive international criminal law. These three related concepts exist in an interdependent and contingent framework. One can only be fully and properly understood in relation to the others. This thesis, by taking a substantive and contextual approach to all three of these concepts shed light upon all of them not only together but in isolation. The framework comprised of all three concepts itself exists within international law generally, and is informed and affected by the influences which shape it, predominately concern over sovereignty and territorial integrity. It can be represented in a circular flow- chart with the internationally bestowed right of jurisdiction leading to and substantiating a plethora of distinct and seemingly unrelated criminal prescriptions. These criminal prescriptions are applied internationally with the acceptance of States and lead to the categories of jurisdiction, which mirror them in accordance with their common denominators. The categories in turn lead back to the right of jurisdiction as it is reference to them which substantiates the existence of the right. This conceptual configuration accurately reflects State practice. The conceptual and substantive approach taken by this thesis will support it, and in doing so will lead to full and proper understanding.

### The International Framework

In order to fully comprehend international jurisdiction and international criminal law it is necessary to note the most salient institutional features of the international legal order affecting

these areas. International jurisdiction and international criminal law are both products of the acts of States, either unilateral or conjunctive. These acts explain why the law exists and exists as it does and highlight what interests are putatively served by the acts of States that in turn have given rise to the jurisdictional rules. These interests are understood in both the general and the particular. The first and foremost general consideration of States providing the impetus for the majority of the claims to international<sup>3</sup> jurisdiction is that of sovereignty. Indeed “sovereignty” and jurisdiction as international legal concepts are closely related. Jurisdiction not only serves to protect State sovereignty, it also is a product of it.<sup>4</sup> Only sovereign States or their creations can assume criminal jurisdiction.<sup>5</sup> It is in the relationship between sovereign States at the level of criminal law that international jurisdiction was born. As such, the importance of the concept of sovereignty is central and demands elucidation.

International law traditionally was almost solely concerned with States. They comprised the totality of international legal actors. Each State was entitled, by virtue of being a State, to equality in international law. This constitutional principle, of an international society predicated upon the equality and independence of sovereign States, has been strengthened in modern times. It is unequivocally enunciated in the most widespread and fundamental international instrument, the Charter of the United Nations. Article 2 of the Charter contains a list of principles expressing and expanding upon the basic premise, amongst them are:

“1. The Organisation is based upon the principle of the sovereign equality of all its Members.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

7. Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...”.

These fundamental and underlying principles have been restated and expanded upon, a significant instance of which takes the form of General Assembly Resolution 2625 (XXV)<sup>6</sup>, adopted without a vote on 24 October 1970. The resolution, entitled General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, contains the principle that “States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”. Additionally it refers to “the duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the Charter” and the “principle of the sovereign equality of States”. This latter principle is here said to include or mean that:

“(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States”.

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<sup>3</sup> International jurisdiction is used in a sense that is synonymous with extraterritorial jurisdiction.

<sup>4</sup> It is noted that “Jurisdiction is a manifestation of State sovereignty.”, in Bowett, D.W., Jurisdiction: Changing Patterns of Authority over Activities and Resources, (1982) 53 BYIL 1.

<sup>5</sup> The latter taking the form of an international judicial tribunal.

<sup>6</sup> United Nations General Assembly Resolution 2625 (XXV), Series I, Vol. XIII, 1970- 71, p 337.



In addition to conventional international law and so- called soft- law<sup>7</sup> supporting and expanding upon these international constitutional principles it has recently been authoritatively stated that they exist, at least in regard to the prohibition contained in Article 2 (4) of the Charter, in custom. In the case of *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v U.S.*), Merits, the ICJ stated “The principle of the non- use of force... may... be regarded as a principle of customary international law”.<sup>8</sup> Indeed it is often averred that these principles, particularly concerning the non- use of force, do not only exist in customary international law but have in fact the character of *jus cogens*. The Nicaragua case cites the International Law Commission, Nicaragua, and the United States as all subscribing to that position.<sup>9</sup> Writers on international law concur. Brownlie for example cites the prohibition of the use of force as among the least controversial examples of *jus cogens*.<sup>10</sup> Beyond the principle prohibiting the use of force, other principles, termed by the ICJ “less grave forms” of the use of force, found in G.A. Res. 2625 (XXV) are also said to exist in customary international law, including the principle of the “non- intervention in matters within the domestic jurisdiction of States”.<sup>11</sup> It is beyond question, then, that amongst the most fundamental tenets of international law are those protecting the sovereignty of States. It is also clear that the nature of sovereignty itself and the means by which States protect it affect the law of international criminal jurisdiction.

Sovereignty is a multi- faceted and elusive concept. It has been said to contain three main aspects: independence, and territorial and personal authority.<sup>12</sup> Relatedly, it has been written that “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the function of a State...”.<sup>13</sup> Reflecting the absolute importance of sovereignty, these three aspects are mirrored in the definition of States themselves. The definition commonly regarded as being authoritative is that found in the Montevideo Convention on Rights and Duties of States 1933.<sup>14</sup> Article 1 of which provides that “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other States”.<sup>15</sup> In these building blocks of States, and of sovereignty, is found not only insight into constitutional arrangement of the international legal order but also an explanation of the contradictions giving rise to jurisdictional conflict. Indeed in light of the above “extraterritorial jurisdiction” is an oxymoron. A system comprised of sovereign States existing upon a defined territorial region and exercising powers over such does not allow for extraterritorial jurisdiction, at least in areas within other States. But, of course, States are not hermetically sealed territorial (and jurisdictional) units. States, and more importantly for our purposes, their populations, engage in international intercourse. Thus whilst it is attractive and tempting to write in terms of “exclusive” jurisdiction it is fallacious. As Brownlie implicitly accepts:

“The principle corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population

<sup>7</sup> General Assembly Resolutions are termed “soft- law” in that they are not *per se* binding upon States.

<sup>8</sup> [1986] ICJ Rep 14, (1986) 76 ILR 1, at para 188. Hereinafter the Nicaragua Case.

<sup>9</sup> Ibid. at para 190.

<sup>10</sup> Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press, Fourth Edition, 1991, at p 513.

<sup>11</sup> The Nicaragua Case, *supra* note 8, at paras 191 and 192.

<sup>12</sup> Jennings, R.Y. and Watts, A.D., *Oppenheim's International Law*, Harlow, Longham, Ninth Edition, 1992, at p 382.

<sup>13</sup> Island of Palmas Case (*Netherlands v. US*) (1928) 2 RIAA 829 at p 838 per Huber J.

<sup>14</sup> (1934) 28 AJIL (Supp) 75.

<sup>15</sup> Ibid.

living there; (2) a duty of non- intervention in the area of exclusive jurisdiction of other states...”<sup>16</sup>

Sovereignty itself therefore, being derived from territory, population, and an independence, contains contradictions fundamentally affecting international jurisdiction.

It is unquestioned that the sovereignty of States and its corollary the equality of States are regarded as basic constitutional doctrines of international law.<sup>17</sup> This paradigm, while in concordance with theory and general practice, fails to indicate the dynamic, volatile, and at times destructive nature of inter- State relations. This dynamism emerges at the lowest level from the same influences that spur the need of States to have recourse to international jurisdiction- basic human nature. Human nature is at its most basic and general level affected by self interest and avarice.<sup>18</sup> These forces on an individual level are generally conditioned and mitigated by the immediate community from which one comes in the interests of its survival. On the international collective level of States these influences coalesce into national interest, and have until relatively recently been devoid of such survival mandated restraints. The advent of the nuclear age and of mutually assured destruction has to a large extent tempered the international manifestations of such national interest, at least on a military level.<sup>19</sup> The spread of international communications and the realisation that the subsumation of certain manifestations of national interest is necessary for global survival have also played a role in spawning and strengthening a relatively new- found spirit of international co-operation. Just as at the level of municipal law there exist limits regarding, and rules controlling, the attainment of one's self interest in order that the national community survive, so too the international community has come to such a realisation. This in turn has led to redefinition and reconceptualisation by many States of the notion of national interest. The use of physical force is no longer a practicable option in the maximisation of national State interest and, as we have seen, has thus been prohibited by international law. This in turn has led to considerably greater conservative and defensive importance placed upon the three building blocks of sovereignty. Recourse to extraterritorial jurisdiction from this perspective amounts to action in defence of perceived national interests which are firstly motivated by coalesced self- interest and avarice, and secondly circumscribed by both international law and military reality.

Paramount amongst the results of the limitation upon State action in pursuit of its national interest has been a pronounced international preoccupation with all aspects of territory. States, coming to accept the idea that territorial aggrandisement *per se* is no longer possible have come together to deem sacrosanct the territory they possess. This is for most States an overwhelmingly conservative force. A second result has been the increase in both the importance and forms of non- hostile competition between States. This may take the form of economic competition. It may manifest itself into diplomatic manoeuvring that in turn may lead to the establishment of blocs of States acting in unison.<sup>20</sup> It is generally however, the former

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<sup>16</sup> Brownlie, *supra* note 10 at p 287.

<sup>17</sup> *Ibid.*

<sup>18</sup> The zoologist Desmond Morris has written “Animals fight amongst themselves for one or two very good reasons: either to establish their dominance in a social hierarchy, or to establish their territorial rights over a particular piece of ground. Some species are purely hierarchical, with no fixed territories. Some are purely territorial, with no hierarchy problems. Some have hierarchies on their territories and have to contend with both forms of aggression. We [the human species] belong to the last group; we have it both ways. As primates, we were already loaded with the hierarchy system. This is the basic way of primate life”, in Morris, D., *The Naked Ape*, Jonathan Cape, London, 1967, at p 146.

<sup>19</sup> The development of weapons of mass destruction is to a degree responsible for the development of such fundamental international norms as that prohibiting aggression.

<sup>20</sup> This in some ways is akin to the “balance of power” phenomenon that existed between European States and which reached its peak in the nineteenth century. At that time it was not the threat of

concern, relating to the protection of all aspects of a State's territory, that lies behind recourse to extraterritorial jurisdiction. In this form such claims are defensive and reactive, and generally the more accepted type of recourse. Through reference to the categories of jurisdiction criminal prescriptions are exercised in the protection of territory, and ultimately sovereignty. This explains the primary position of territory in the law of international jurisdiction. As with territory, the protection of the other building blocks of the modern State, a population and an independence to act internationally, also form the platform from which recourse to extraterritorial jurisdiction is made. Indeed as will become apparent there is a clear linkage between the categories of jurisdiction, the groupings of international criminal law and these building blocks. Two of the categories for example explicitly serve interests directly connected to what can be broadly termed populations, namely the active and passive personality categories. Two further accepted categories, that of the protective and universal, serve interests immediately related to the independence of States.

This Machiavellian approach to understanding international criminal law and international jurisdiction holds true in the large majority of cases.<sup>21</sup> However it only goes so far. A seemingly conspicuous example of a claim to extraterritorial jurisdiction motivated by other than self-serving considerations is found in the reference to the active personality category in circumstances where nationals engage in paedophilia outwith that State's borders. Legislation has been introduced in Sweden, Australia, the United States, Germany, France, Belgium and Norway enabling them to take cognisance over the acts of so-called sex-tourists from their respective States.<sup>22</sup> More recently the UK has enacted the Sex Offenders Act 1997 which provides for the assumption of jurisdiction by England and Wales, Northern Ireland and Scotland with reference to the nationality or residence of the accused for a number of sexual offences relating to minors.<sup>23</sup> Such assumptions of jurisdiction *prime facie* appear to be motivated by altruistic rather than self-serving reasons; the welfare of foreign children appearing to be the *raison d'être* of such legislation. From another perspective however one could argue that such action, taken against a minority of the population who undoubtedly engender the opprobrium of the majority, would be a popular and vote-winning policy to pursue, as well as one which would assuage the "general conscience". Indeed as it would protect a State's own population from the possibility of recidivism whence the offender is within his home State. While such self-serving considerations undoubtedly play a part in the assumption of international jurisdiction it must be conceded that in certain instances such as this claims to international jurisdiction are made for reasons other than what is traditionally considered as being the national interest of States.<sup>24</sup> In part reflecting this is the first of the justifications proffered by the European Committee on Crime Problems for the exercise of extraterritorial jurisdiction, namely "a manifestation of international solidarity in the fight

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mutually assured destruction that prevented total war but rather the possibility that a State engaging in war would find that the costs and risks of such an operation outweigh any benefit accruing.

<sup>21</sup> Machiavelli wrote, germane to this discussion, "... the main foundations of all States, whether new, old, or mixed, are good laws and good arms.", in Machiavelli, N., *The Prince*, 1513, (translated by Thomson, N.H.), Dover Publications, New York, 1992, p 31. In some respects the latter of these "State foundations" has been replaced by the former in the form of international criminal prescriptions.

<sup>22</sup> See *The Sunday Times*, 9 July 1995, Section 5 (Travel), p 3.

<sup>23</sup> Section 7 applies to England and Wales and Northern Ireland and s. 8 to Scotland. For further discussion of these provisions see Chapter Three.

<sup>24</sup> Indeed such action, in an economic respect, is in opposition to a State's national interest as it has to incur the costs of investigation, prosecution and possibly incarceration, all in respect of an activity that did not directly, if at all, affect that State's national interest.

against crime”.<sup>25</sup> This is particularly the case in regard to crimes almost universally regarded as abhorrent. Morality and altruism, it must be conceded, do play a role in the motivation of extraterritorial jurisdiction. There is however no doubt that it is subsidiary. In the event of conflict between explicit national self-interest and considerations of morality or altruism the former would undoubtedly override the latter.

The forces and influences underlying claims to international jurisdiction have been outlined above. Germane were basic yet fundamental concepts, and the relationship between them. Sovereignty, territory, populations, independence, individual and collective human nature, and even morality and altruism all impact upon this area of law. One final influence, alluded to above, must be noted. This is the force of conservatism. States largely use extraterritorial jurisdiction as a tool to maintain the *status quo ante*. It is in reaction to perceived threats to the multitude and multifarious interests deemed important by States that the majority of instances of recourse to extraterritorial jurisdiction occur, and occur without dispute or protest. States also however use the assumption of jurisdiction pro-actively. Whilst it is difficult to absolutely distinguish between pro-active and conservative assumptions of jurisdiction it is clear that it is in regard to the former that the preponderance of jurisdictional disputes arise. This follows international jurisdiction being employed not in reaction to a perceived (past) threat but rather to influence what it perceives as future threats or indeed ongoing or future policies. It is largely conservative assumptions of jurisdiction that will comprise this discussion, because they are the far more frequent type of jurisdiction as well as being generally accepted within the parameters of the categories of jurisdiction. Claims to extraterritorial criminal jurisdiction can then be aptly described as direct manifestations of State national self-interest, on the whole of a conservative nature, occurring in a global community putatively composed of sovereign, independent and equal States.

### International Criminal Jurisdiction

Central to the substantiation of this thesis is a conclusion upon a meaning of “international criminal jurisdiction”. As with “international criminal law” it is a term imbued with imprecision and obfuscation. It is unanimously agreed that it is a phenomenon of importance, yet it suffers greatly under the weight of its own opacity. In coming to an understanding of it it is useful to highlight a number of germane definitions. Firstly however it is useful to underline that most constructions of international jurisdiction define it in terms of a facilitative attribute of States. This in itself is quite unexceptional, indeed it conforms with general notions of the term. However, as we will see, it appears to directly conflict with the opinion of the Permanent Court of International Justice in the well-known and controversial judgement of the Case of the SS Lotus.<sup>26</sup>

At the outset of this summary it is useful to exclude what manifestly does not accord with “jurisdiction” for our purposes. Firstly is jurisdiction in the sense of a particular locality. This sense can be found, for example, when commentators employ the term “international criminal jurisdiction” to denote an international criminal law of universal application so as to give rise to a global juridical locality.<sup>27</sup> Whilst such a use of the term is not uncommon the assimilation of “jurisdiction” with a defined piece of territory is not employed here unless specifically stated. A

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<sup>25</sup> European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe, Strasbourg, 1990, at p 26. As a second justification the Committee proffers “a need for protection of a state’s own interests, or those of its subjects”, *ibid*.

<sup>26</sup> Case of the SS Lotus, (France v. Turkey), (1927) PCIJ Rep, Series A, No. 10. Hereinafter the Lotus Case.

<sup>27</sup> See for example Blishchenko, I. and Shdanov, N., The Problem of International Criminal Jurisdiction, (1976) 14 CYIL 283.

second exclusionary point to be made is that the term jurisdiction in the present study is used in a wholly international sense. It is one that does not impact upon or affect the legitimate authority of constituent elements of federal States within that State or any public municipal institutions therein.<sup>28</sup> These exclusions noted, a sense of the term broadly corresponding with orthodox definitions of “jurisdiction” is that found in the Harvard Draft Convention on Jurisdiction With Respect to Crime.<sup>29</sup> It states in Article 1 (b) that “A State’s ‘jurisdiction’ is its competence under international law to prosecute and punish for crime”.<sup>30</sup> A largely congruous definition provides that jurisdiction is “... the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially”.<sup>31</sup> Mann has stated “When public international lawyers pose the problem of jurisdiction, they have in mind the State’s right under international law to regulate conduct in matters not exclusively of domestic concern”.<sup>32</sup> An expansive conception is “... the jurisdiction of a State may refer to its lawful power to act and hence to its power to decide whether and, if so, how to act”.<sup>33</sup> The latest edition of *Oppenheim’s International Law* holds that State jurisdiction “... concerns essentially the extent of each state’s right to regulate conduct or the consequences of events”.<sup>34</sup> Brownlie offers a slightly different formulation, stating that “Jurisdiction refers to particular aspects of the general legal competence of states often referred to as ‘sovereignty’” and “Jurisdiction is an aspect of sovereignty and refers to judicial, legislative and administrative competence”.<sup>35</sup> The Law Reform Commission of Canada has written that internationally “jurisdiction” is “used in the sense of the sovereign power of one state *vis-à-vis* other states to make, apply and enforce its criminal law”.<sup>36</sup> It is clear that most of these definitions of “jurisdiction” conceive it in a roughly similar sense. In particular as a facilitative “power”, “right” or “sovereign competence”. It is also clear that certain conceptions of jurisdiction treat it as a multi-faceted entity.

An example of a subdivision or dissection of jurisdiction is found in the *Restatement (Third)*.<sup>37</sup> Section 402 of which, entitled Categories of Jurisdiction, states:

“Under International law, a state is subject to limitations on  
(a) jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

<sup>28</sup> This is a valid distinction. It does however highlight a point giving rise to the peculiar nature of jurisdiction in international law. This is that the law of international jurisdiction is the product, to a not inconsiderable degree, of the actions of States at the level of their own municipal law, as opposed to the deeds of States occurring explicitly on the level of international law. As Brownlie states “The customary and general principles of law relating to jurisdiction are emanations of the concept of domestic jurisdiction.”, at Brownlie, *supra* note 10, at p 310- 11.

<sup>29</sup> (1935) 29 AJIL (Supp) 439. Hereinafter Harvard Draft Convention.

<sup>30</sup> *Ibid.*

<sup>31</sup> American Law Institute, *Restatement of the Law: The Foreign Relations of the United States*, (Third), American Law Institute Publishers, St. Paul, Minn., 1987 at p 230, hereinafter the *Restatement (Third)*.

<sup>32</sup> Mann, F.A., *The Doctrine of Jurisdiction in International Law*, (1964- I) RdC 1.

<sup>33</sup> Oxman, B.A., *Jurisdiction of States*, in the *Encyclopaedia of Public International Law*, Vol. 10, Elsevier Science Publishers B.V., Amsterdam, 1985, at p 277.

<sup>34</sup> *Supra* note 12, at p 456.

<sup>35</sup> *Supra* note 10 at p 298.

<sup>36</sup> Law Reform Commission of Canada, *Extraterritorial Jurisdiction*, Working Paper 37, Ministry of Supply and Services Canada, Ottawa, 1984, p 4.

<sup>37</sup> *Supra* note 31.

(b) jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to those proceedings;

(c) jurisdiction to enforce, i.e., to induce or compel compliance or punish non-compliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action".<sup>38</sup>

A somewhat similar position is followed by Akehurst with jurisdiction being conceived as comprising the three component elements of legislative, judicial and executive jurisdiction. He defines them as the "power of a State to apply its laws to cases involving a foreign element", "the power of a State's courts to try cases involving a foreign element" and "the power of one State to perform acts in the territory of another State" respectively.<sup>39</sup> Brownlie, in contrast, proffers only two constituent components, stating that "Distinct from the power to make decisions or rules (the prescriptive or legislative jurisdiction) is the power to take executive action in pursuance of or consequent on the making of decisions or rules (the enforcement or prerogative jurisdiction)."<sup>40</sup> It is submitted that a dualist conception of jurisdiction, for our present purposes at least, is sufficient; namely one that conceives jurisdiction as comprising a prescriptive and an adjudicatory element, excluding executive jurisdiction. This is due in part to the particular meanings given to adjudicatory jurisdiction and enforcement jurisdiction. Adjudicatory jurisdiction here is taken to denote not only judicial or administrative proceedings themselves but also their corollary, the forcible exaction of any penalties that may follow from such proceedings. Indeed, to conceive of a power to adjudicate devoid of a power to insist upon the expiation of any penalties subsequent to such adjudication, or contingent upon another separate right (enforcement jurisdiction) is to engage in an analysis not in concordance with common practice. If it were not it would be possible to subject an accused to criminal proceedings, and find him/ her guilty but then be unable to exact punishment for the crime.<sup>41</sup> A further reason for the exclusion from the discussion of enforcement jurisdiction is that extraterritorial executive (enforcement) criminal jurisdiction, i.e. the exercise of State power in regard to criminal matters in an area within the area of legitimate territorial control of another State without its consent is unanimously regarded as contrary to international law.<sup>42</sup>

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<sup>38</sup> Ibid. at p 232.

<sup>39</sup> Akehurst, M., Jurisdiction in International Law, (1972- 73) 43 BYIL 145, at p 145.

<sup>40</sup> Brownlie, supra note 10, at p 298. This distinction is followed by both Jennings, R.Y., The Limits of State Jurisdiction, (1962) 32 NTIR 209 at p 212, and Mann, supra note 32, at p 13- 14. The *Restatement* (Third), supra note 31, in its Introductory Note states that "... it has become clear that the identification of prescription with legislation and of enforcement with adjudication is too simple.", at p 230. It argues that substantive regulation (prescription) and enforcement are carried out by means additional to legislation and adjudication, such as administrative rules and executive acts in regard to both regulation and enforcement.

<sup>41</sup> Criminal trials *in absentia* appear to be the only circumstances where the trial and conviction of an accused are not necessarily followed with the right and ability to exact punishment. While such trials are not wholly uncommon they form only a small minority of all criminal prosecutions. Being exceptional they do not warrant the detachment of enforcement jurisdiction (in the sense used here) from adjudicatory jurisdiction.

<sup>42</sup> The European Committee on Crime Problems states "... it is widely agreed that in the context of enforcement the sovereign powers of the state may not be exercised within the territory of another state, save with its consent.", in European Committee on Crime Problems, supra note 25, at p 7. Indeed the fundamental norms outlined above regarding non- intervention are the basis of this prohibition. This work can be seen to support the exclusion of enforcement jurisdiction as a separate component of examination in a discussion of international criminal jurisdiction. As while it identified three forms of jurisdiction, legislative or prescriptive, judicial, and "in some legal systems" enforcement, it excludes the latter from its examination.

A further question raised by the disjunction of jurisdiction concerns the methodology to be employed in examining a concept putatively comprised of distinct elements, and relatedly, the precise nature of the relationship of these elements to each other. In regard to the latter question the *Restatement* (Third) states:

“These categories of jurisdiction are often interdependent, and their scope and limitations are shaped by similar considerations. Jurisdiction to prescribe may be more acceptable where jurisdiction to adjudicate or enforce is plainly available; jurisdiction to adjudicate may be more acceptable where the state of the forum also has jurisdiction to prescribe by virtue of its links to the persons, interests, relations or activities involved. However, the purposes and consequences of the different categories of jurisdiction are not necessarily congruent, and balancing the competing interests in the different contexts can lead to different results”.<sup>43</sup>

The previous *Restatement*, the *Restatement* (Second), which followed the dualistic conception of jurisdiction, *inter alia* said of the relationship that “(1) A state having jurisdiction to prescribe a rule of law does not necessarily have jurisdiction to enforce it in all cases. (2) A state does not have jurisdiction to enforce a rule of law prescribed by it unless it had jurisdiction to prescribe the rule”.<sup>44</sup> Brownlie plays down any major importance to the distinction, and thus categorisation generally, writing that there:

“... is no essential distinction between the legal bases for and limits upon substantive (or legislative) jurisdiction, on the one hand, and, on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other. If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful”.<sup>45</sup>

Taking a somewhat similar approach is Bowett, who after stating that there are two forms of jurisdiction holds that “The relationship between the two kinds of jurisdiction is reasonably clear. There can be no enforcement jurisdiction unless there is prescriptive jurisdiction; yet there may be a prescriptive jurisdiction without the possibility of an enforcement jurisdiction, as, for example, where the accused is outside the territory of the prescribing State and not amenable to extradition”.<sup>46</sup> He then states that “... jurisdiction hinges, fundamentally, on the power to prescribe...”.<sup>47</sup> This approach, identifying the disparate forms or elements of jurisdiction then proceeding to focus on a single conception of it, usually the prescriptive element, is a common one. The European Committee on Crime Problems, for example, takes such an approach, following somewhat similar reasoning to Bowett.<sup>48</sup> This methodology results in examinations of subject area focusing upon jurisdiction as a single conception. Judicial or adjudicative jurisdiction is explicitly or implicitly deemed to be subservient to, and reliant upon, the existence of prescriptive or legislative jurisdiction. The latter then necessarily becoming the main focus of examination. A unified approach is undoubtedly the preferable method in coming to an understanding of this subject. It is, in general, the approach that will be taken.

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<sup>43</sup> *Restatement* (Third), *supra* note 31, at p 231.

<sup>44</sup> American Law Institute, *Restatement of the Law (Second), The Foreign Relations Law of the United States*, American Law Institute Publishers, St Paul Minn., 1965, at p 21-22.

<sup>45</sup> Brownlie, *supra* note 10, at p 310.

<sup>46</sup> Bowett, *supra* note 4, at p 1.

<sup>47</sup> *Ibid.*

<sup>48</sup> European Committee on Crime Problems, *supra* note 25, at p 7. This work defined the three forms of jurisdiction, prescriptive, judicial and executive as “the activities of the legislature when determining the substance of the norms and their scope”, “the activities of judicial bodies when deciding their respective competences and when applying and interpreting the law”, and “in some jurisdictions [executive jurisdiction which is] the activities of authorities when exercising their powers to enforce and ensure observance of the law, and when enforcing decisions of the courts” respectively, *ibid.*

A unified approach to legislative and adjudicatory jurisdiction accords with actual State practice. The dissection of “jurisdiction” whilst an important analytical exercise for specific particular purposes, for example in coming to an understanding of the mechanics of jurisdiction on a non- international level, is one that is not adopted to any significant extent on the international level.<sup>49</sup> International law appears to be largely if not exclusively concerned with the existence or absence of a State’s jurisdiction *per se*. If international law was concerned with prescriptive enactments as such it could be argued that the common law of certain States was of no concern to international law as it did not meet a requirement of being grounded in a prescriptive or legislative enactment. Such an approach would fail to encompass some of the most significant examples and cases of the exercise of jurisdiction, for example piracy under English law.<sup>50</sup> Further, it is more often than not the case that it is the assumption or attempt to assume adjudicatory jurisdiction that is operative internationally (giving rise to dispute, academic commentary etcetera), not the promulgation of an enactment explicitly and putatively claiming extraterritorial jurisdiction.<sup>51</sup> As will be seen in the large majority of references in State practice to jurisdiction in international law it is “jurisdiction” that is referred to, not “prescriptive jurisdiction” or “adjudicatory jurisdiction”, in part a reflection of the obfuscated and embryonic nature of the international law of jurisdiction. In a more developed system there would exist a precise international demarcation between prescriptive and adjudicatory jurisdiction. As international law stands it is the assumption of “jurisdiction” that is paramount, “assumption” in the majority of cases denoting the taking of cognisance of circumstances judicially, i.e. adjudicatory jurisdiction. In other instances “assumption” includes prescriptive jurisdiction. This occurs largely where legislative claims to the possible future assumption of adjudicatory jurisdiction are made in controversial and relatively specific circumstances.<sup>52</sup> It is, then, the single conception of jurisdiction which is important on the international plane, not any of its constituent elements.<sup>53</sup> It is jurisdiction in this light, as a single monad, that will form the subject of this examination and unless otherwise stated the term will be used in its unified sense.

Jurisdiction, as was seen, is widely held to denote a facilitative or enabling power, competence or right. This seems to conflict with one of the apparent and central ratios of the Lotus Case.<sup>54</sup>

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<sup>49</sup> The Law Commission of Canada for example appears to imply that the senses of jurisdiction it terms legislative, executive and judicial apply to a municipal conception of the word rather than an international definition, *supra* note 36 at p 4.

<sup>50</sup> For the outstanding modern example see *In re Piracy Jure Gentium*, [1934] AC 586.

<sup>51</sup> This is exactly what lay at the root of the dispute in the Lotus Case, *supra* note 26, where, as the Court states “The Court is asked to state whether or not the principle of international criminal law prevents Turkey from instituting criminal proceedings... Neither the conformity of Article 6 [the Turkish law] nor the application of that article by the Turkish authorities constitutes the point in issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles”, at p 15.

<sup>52</sup> A prominent modern example being the controversy surrounding the United States’ Helms Burton Act, (1996) 35 ILM 1322.

<sup>53</sup> An increasingly important, albeit embryonic and debatable exception to this general rule arises in the context of illegal abductions. There appearing to be some movement away from the long standing international rule encompassed in the maxim *male captus bene dententus*, in that an illegal abduction may give rise to a vitiation of judicial or adjudicatory jurisdiction in the specific instance but leave prescriptive jurisdiction intact. See for example Choo, A.L.-T., *Ex Parte Bennett: The Demise of the Male Captus, Bene Dententus Doctrine in England?*, (1994) 5 CLF 165. This is one of the few places where extraterritorial enforcement jurisdiction may impact upon the other elements of jurisdiction, and as such is important. Generally however the role and effect of such jurisdiction is highly circumscribed by its outright illegality.

<sup>54</sup> *Supra* note 26.



The following passage from the case, responsible for much the fundamental doctrinal imprecision manifest even today, is at the root of this conflict:

“Now the first and foremost restriction imposed by international law upon a State is that- failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial... It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and which in it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory... But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and their jurisdiction... it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable”.<sup>55</sup>

This passage appears to leave little doubt as to the position of the PCIJ in 1927. It seems to hold that general international law is such that States are free to exercise extraterritorial jurisdiction in all cases unless expressly forbidden by international law to do so in the particular circumstances. If this is indeed the case States need not rely on or point to any facilitative right, power or capacity based in international law in the form of jurisdictional norms. Indeed in such a scenario the “jurisdictional regime” itself is otiose. What would be important is not facilitation but interdiction. Here the rules that proscribe the exercise of jurisdiction would logically bear the brunt of any jurisdictional exposition, not any putatively facilitative norms. This is clearly not the case. Rather it is jurisdiction in a facilitative capacity that is almost universally the focus of discussion. This dichotomy is irreconcilable. Either States are wholly free to exercise jurisdiction over non-exclusive municipal fact situations and only limited by certain prohibitive rules or States are not and must explicitly or implicitly justify their exercise of jurisdiction in such circumstances.

It is undoubted that the true nature of international jurisdiction is prohibitory not permissive. It is not the case that the application of a State’s municipal criminal processes may freely occur unless explicitly conflicting with a prohibitive rule. Rather, international law generally prohibits the assumption of extraterritorial jurisdiction, only allowing it in limited situations. Authority for this position is found in the long standing practice of States, the opinion of international commentators and jurists, as well as inherent in logic of the system of jurisdiction itself.<sup>56</sup> The task of substantiating this position must necessarily comprise two aspects, a negative and a positive. Negatively, an attempt must be made to either explain the passage in the Lotus Case as not being of the character it appears to be, or assigning to it the epithet “bad law”.<sup>57</sup> Positively, evidence must be adduced to the contrary. The first aspect is accomplished by contextualising and analysing the above passage. In this regard it must firstly be mentioned that

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<sup>55</sup> Ibid. at pp 18- 19.

<sup>56</sup> The final factor is admittedly self- justifying.

<sup>57</sup> In regard to the possibility that the passage cited from the Lotus Case might be bad law it has been stated that the passage seems “to propagate the idea of the delimitation of jurisdiction by the state itself rather than international law or, in the words of Sir Hersch Lauterpacht, they proclaim the principle of presumptive freedom of State action, and may therefore, have to be read as countenancing a most unfortunate and retrograde theory. It can be confidently asserted that they have been condemned by the majority of the immense number of writers who have discussed them, and today they probably cannot claim to be good law.”, Mann, *supra* note 32, at p 35, footnotes omitted.

the passage deals not with criminal jurisdiction *per se* but all jurisdiction, civil and criminal.<sup>58</sup> This is evidenced by the Court subsequent to the cited passage proceeding to discuss whether criminal jurisdiction in fact accords with the paradigm they proffered, stating:

“Though it is true that in all systems of criminal law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty”.<sup>59</sup>

The Court here emphasises the “fundamental” character of territorial jurisdiction. It almost certainly cannot simultaneously subscribe to a permissive criminal jurisdictional regime. To do so results in an antilogy, the fundamental territorial character of criminal law being *prima facie* antithetical to extraterritorial criminal jurisdiction. It by definition impinges upon it.<sup>60</sup> Surely then the exercise of extraterritorial criminal jurisdiction must be exceptional, and as such is not wholly consistent with a permissive jurisdictional regime. As Jennings states:

“It is submitted... the Lotus judgement, properly understood, is in no ways inconsistent with the scheme set out in the great classical work on the subject, the Harvard Research on Jurisdiction with respect to crime<sup>61</sup>, published in 1935. This assumes that, although the territorial principle is not absolute, *an exercise of extraterritorial jurisdiction requires a justifying principle...*”.<sup>62</sup>

This, then, is one explanation of the cited passage, that whilst putatively ascribing to international law a permissive jurisdictional regime the case in fact, if not doing the opposite, is at a minimum ambiguous upon the point.

The second and more significant element in the substantiation of the proposition that the jurisdictional regime is essentially prohibitory, *i.e.* the exercise of international jurisdiction by States must come within the ambit of a justifying or facilitatory linkage, is State practice. It is, perhaps surprisingly, not difficult to find. One of the strongest examples is found in the practice in regard to piracy in international law. In a rule of jurisdiction unusual in its strength and near universal acceptance all States are entitled to exercise jurisdiction over pirates. It has been illustratively and authoritatively stated in this regard “But whereas *according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or on its own ships, and to crime by its own nationals wherever committed, it is also recognized as extending to piracy...*”.<sup>63</sup> An instance of collective State practice in regard to piracy illustrating and supporting the prohibitory nature of international criminal jurisdiction is Article 13 of the Treaty on International Penal Law 1889 which provides “Crimes considered as piracy by public international law fall within the jurisdiction of the State under whose power the criminals come”.<sup>64</sup> It is axiomatic that in a general permissible jurisdictional regime such a specific permissible provision is redundant, there being no need for explicitly facilitative or permissive rules if States are generally free to

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<sup>58</sup> Succinct arguments against a wholly permissible jurisdictional regime, in line with the present position are found in Jennings, R.Y., General Course on Principles of International Law, [1976- III] RdC 323 at pp 517- 518, and Jennings, R.Y., Extraterritorial Jurisdiction and the United States Antitrust Law, (1957) 33 BYIL 146, at pp 150- 153. Hereinafter Jennings General Course and Jennings Extraterritorial Jurisdiction respectively.

<sup>59</sup> The Lotus Case, *supra* note 26, at p 20.

<sup>60</sup> The only exception is the exercise of extraterritorial jurisdiction over alleged crimes sited outwith the ambit of the territorial jurisdiction of any State.

<sup>61</sup> *Supra* note 29.

<sup>62</sup> Jennings, General Course, *supra* note 58, at p 518, emphasis added.

<sup>63</sup> *In re Piracy Jure Gentium*, *supra* note 50, at p 589, per Viscount Sankey L.C., emphasis added.

<sup>64</sup> (1935) 29 AJIL (Supp) 638, a translation from 18 Martens, *Nouveau Recueil Général de Traités* (2nd sér.), p 432.

exercise their criminal jurisdiction in all cases. The strength of this illustration is particularly manifest as piracy by definition occurs upon the high seas, an area outwith the territorial sovereignty of all States.<sup>65</sup> If there were to be an area where the permissive jurisdictional regime were to operate at all it would certainly be on the high seas.

A relatively recent specific instance of State practice supporting a prohibitive jurisdictional regime is found in the case of *Rivard v. United States*.<sup>66</sup> The Court *inter alia* stated in this case that "The law of nations permits the exercise of jurisdiction by nations under five general principles".<sup>67</sup> The corollary of international law "permitting" the exercise of jurisdiction in certain defined circumstances is that it is generally prohibited. What is supported is the requirement in the assumption of international jurisdiction of, at the very least, the satisfaction of certain conditions. This specific argument can be applied generally, as Jennings states:

"... the fact is that States do not give themselves unlimited discretion in the matter [of extraterritorial jurisdiction]. Their municipal laws- even those of States which make extensive claims to extraterritorial jurisdiction- contain principles of jurisdiction... It seems reasonable to infer from the existence of these principles of extraterritorial jurisdiction, firmly entrenched as they are in the practice of States, that some justifying principle is thought to be necessary to found extraterritorial jurisdiction; that it is not a matter for sovereign discretion".<sup>68</sup>

This reasoning is decisive. Relatedly, there exists the simple fact that "It would be intolerable if States were permitted without any justifying legitimate interest to attempt to control the doings of foreigners in their own countries".<sup>69</sup> This would run counter to the logic inherent in a international legal system founded on independent sovereign (territorial) States, the constitutional cornerstone of the international legal order. The law of jurisdiction is attributable firstly and foremost to the practice of States. Such practice, general and specific, as will been seen throughout this thesis, unequivocally supports a prohibitive jurisdictional regime.

Jurisdiction is a facilitative or enabling power or right, existing on the international level largely as a single entity. This conception goes some way towards a full understanding. Still begging however are fundamental questions. In particular, what are the criteria a State has to satisfy to lawfully assume extraterritorial jurisdiction? or, in other words, how is this facilitatory right triggered?<sup>70</sup> There are also important questions surrounding the issue of the onus or burden of proof. It is useful to consider the latter question first. It may appear surprising, in light of the above discussion which clearly supports the prohibitory nature of international law jurisdictionally, that the question of the onus or burden of proof in the assumption of and disputes over the exercise of extraterritorial criminal jurisdiction has no clear answer.<sup>71</sup> This is easily explained. The jurisdictional regime is prohibitory, this means the assumption of which requires a justification. The corollary of this of course is that the exercise of extraterritorial

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<sup>65</sup> The definition of international piracy is today found in the Law of the Sea Convention 1982, (1982) 21 ILM 1261, Article 101, which is a verbatim replication of Article 15 of the Geneva Convention of the High Seas 1958, (1958) 52 AJIL 842. For a discussion of piracy see Chapter Four.

<sup>66</sup> (1967) 375 F. 2d 882.

<sup>67</sup> *Ibid.* at p 885.

<sup>68</sup> Jennings, *Extraterritorial Jurisdiction*, *supra* note 58, at p 150.

<sup>69</sup> *Ibid.* at p 151.

<sup>70</sup> It is submitted that the term "right" accords moreso with both theory and practice as it directly designates a state of legality. A State may well possess the power and capacity to exercise extraterritorial jurisdiction but to do so lawfully it must be entitled by right by international law to do so. This construction fully accords with an prohibitive jurisdictional regime.

<sup>71</sup> This area of the jurisdictional rules, although fundamentally important, suffers from a lack of State practice. This is due in the main to the reluctance of States to risk what are considered greater interests, such as international good will and friendly relations, by casting aspersions upon the actions of another State on the behalf of a single individual who is accused of a criminal act.

jurisdiction in the absence of any justifying principle is a contravention of international law. It does not necessarily follow however that the State exercising jurisdiction must labour under an onus of proof in assuming jurisdiction in isolation or in disputes over the legality of its assumption. To employ a municipal legal analogy; it is a crime to adopt as one's own property belonging to another without legal justification, but in a trial for theft it is for the prosecution to establish beyond reasonable doubt that the crime has occurred, not the accused to establish his or her innocence. So too it is entirely possible for the onus of proof to lie on the State<sup>72</sup> challenging the exercise of jurisdiction yet the jurisdictional regime providing that the exercise of jurisdiction in the absence of a requisite justification is unlawful. It is clear that jurisdiction in international law does not *per se* mandate a particular structure concerning the onus or burden of proof. The question then arises of what does, or even if it is necessary to insist on a definitive arrangement. It is submitted that there is in the present state of international law no definitive position as to the burden of proof. And further that this is not systemically fatal nor even serious. The former follows from inter-State challenges to the assumption of criminal jurisdiction being a rarity. The latter from it not being useful in such cases for a State to merely have to raise the issue of possible illegality without having to provide reasons for its opinion. This could perhaps lead to the casting of aspersions without having to present authority and/ or evidence supporting an allegation.<sup>73</sup> Likewise for a burden to rest on a State challenging the assumption of jurisdiction alone would leave the assuming State without an obligation to substantiate the legality of its action. In addition clarity, by adding to the relative dearth of internationally related authority, would not be served by such a system. It is clear, then, that a definitive conclusion upon this point *de lex lata* cannot be made, and secondly *de lex ferenda* the best option at present is a continuation of the current system, where in disputes over the assumption of jurisdiction all State parties make their case and, even if that is the end of the matter, *i.e.* there is no recourse to an international tribunal or the ICJ, at least two opinions as to the position of the law have been made.<sup>74</sup>

The final jurisdictional point to be discussed relates to the fundamental question of how the facilitatory or enabling right is triggered?, or, as posed above, what is/are the criteria/criterion that must be met to render lawful the exercise of extraterritorial jurisdiction? Of all the separate jurisdictional issues discussed above this is indubitably the most significant. It is a *sine qua non* of the lawful assumption of international jurisdiction. It concerns the relationship between an abstract facilitative right and the actual legitimate assumption of jurisdiction. In this sense what we are now identifying and defining bridges the gap between international jurisdiction and substantive international criminal law. In light of the importance of the question it is surprising, albeit predictable, that there exists no significant agreement as to its nature and composition. In a survey of this question it becomes evident that there exist two broad approaches. Firstly it is explicitly or implicitly held that what are termed "bases of jurisdiction" themselves comprise this link between the right of jurisdiction and the lawful application of criminal law. Indeed the

<sup>72</sup> It is here necessary to note that whilst challenges to the assumption of jurisdiction can come from either States or individuals dependent upon the nature of the fora and law, international or municipal, for the present purposes it is the challenge by States that is important. The possibility of individuals raising the question of the propriety of the exercise of jurisdiction by a State in international law in a particular case is a matter for the municipal law of that State. Of course it would be optimal if all States permitted such internationally based jurisdictional challenges, thus giving complete effect to the ultimate purport of the jurisdictional rules. However at the present stage of development of international law it is left to affected States to so challenge upon the plane of international law. "Affected" denoting in most cases the State of which the accused is a national.

<sup>73</sup> Brownlie has stated that a rigid burden or presumption could lead to "inconvenience or abuse", *supra* note 10, at p 289.

<sup>74</sup> Interestingly in *Attorney- General of the Government of Israel v. Adolf Eichmann*, (1962) 36 ILR 5, the Israeli courts, while putatively relying on the law as stated in the *Lotus* case went on to provide lengthy justifications of their assumption of jurisdiction. Hereinafter the *Eichmann Case*.

terms “base” and “principle” themselves connote facilitation. The Harvard Draft Convention<sup>75</sup> appears to take this approach. It enumerates the instances of State competence on the basis of specific, distinct, connections between the crime and the State. These generally follow the orthodox categories of jurisdiction in that a territorial, nationality and protective connection are mentioned as well as a connection based purely on the nature of the crime itself. What is important for our present purposes however is not the exclusion or inclusion of particular “principles” of jurisdiction within a jurisdictional scheme, but rather the reliance upon the specific attribute defining the nature of such “principle” itself as the facilitator. It is submitted that this approach fails to accord with actual practice and abstract logic. It is not, for example, a territorial connection *per se* which is the facilitator, but rather the link evidenced by a territorial connection. This leads us to the second broad approach, one where a distinction is drawn between the link establishing the right to exercise jurisdiction and the various modalities of evidencing it.

The solution to the question of the connection between the right of jurisdiction and the application of a State’s criminal law can be approached by finding the common denominator of the apparently disjunctive and *ad hoc* principles of jurisdiction. The obvious commonality is that they all to a greater or lesser degree evince an attachment or connection between the crime and the State. Indeed it is axiomatic that the “principles” of jurisdiction all manifest a connection, a tangible tie, between the crime and the State. It is reasonably deduced that it is the common denominator which is important not what is unique to the “principles”. It is the connection *per se* that is central, not how that connection is proven. This approach finds authoritative recent support. Brownlie avers that whilst the law is unsettled, it is developing in the light of “a principle of substantial and genuine connection between the subject- matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised...”.<sup>76</sup> He later insightfully notes that “it must be remembered that the ‘principles’ are in substance generalizations of a mass of national provisions... [I]t may be that each individual principle is only evidence of the reasonableness of the exercise of jurisdiction”.<sup>77</sup> The latest edition of *Oppenheim’s International Law* states in this regard that there is a tendency “to regard these various categories [of jurisdiction] as parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states”.<sup>78</sup> Whilst it is true that this approach has only recently come to prominence in juristic writings, and indeed explicitly in State practice, it is one of the two main products emanating from the substantiation of this thesis that this approach has existed historically in fact if not in name.

Logic mandates and State practice supports the proposition that the law contain a single operative facilitatory connective, and this being a genuine and real linkage between the crime and the State. The categories<sup>79</sup> of jurisdiction merely illustrate instances where such a linkage so exists. Apropos to this argument are comments made by Jennings over forty years ago. He states:

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<sup>75</sup> Supra note 29.

<sup>76</sup> Supra note 10 at p 298.

<sup>77</sup> Ibid. at p 306.

<sup>78</sup> Supra note 12 at p 457- 8.

<sup>79</sup> In this light “categories” is a term far closer to the true nature of what are normally entitled “bases” or “principles” of jurisdiction, indeed these latter two terms have been employed interchangeably, although without importing their literal meanings. Indeed to speak of “bases” of jurisdiction denotes that the right to exercise jurisdiction in some manner emanates from them as such. It is argued that this is not the case. They merely provide examples of genuine and real connections, and are thus a method of proving such a link.

"States claim extraterritorial jurisdiction in cases where they believe their legitimate interests to be concerned; whether that assumption be rationalized and expressed by means of the nationality claim, the objective territorial claim, the security claim, the passive personality claim or the universality claim. It is reasonable to say, therefore, that international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved... [A] State has a right to extraterritorial jurisdiction where its legitimate interests are concerned..."<sup>80</sup>

Further support for this position, although from a different justificatory position<sup>81</sup>, comes from Mann who has stated in both 1964 and 1984 that "... a State has legislative jurisdiction if its contact with a given set of facts is so close, so substantial, so direct, so weighty that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non- interference and reciprocity and the demands of interdependence). A merely political, economic, commercial or social interest does not itself constitute a sufficient connection".<sup>82</sup> Germane to this approach, implicitly supporting the need for a substantial and genuine connection, is the principle of reasonableness. Putatively acting as a limiting influence, it provides that the exercise of jurisdiction must in all cases be reasonable. The most developed articulation of this principle is found in § 403 of the *Restatement (Third)*.<sup>83</sup> It states firstly that a State may not exercise jurisdiction (to prescribe) if it is unreasonable, even in the face of the existence of a territorial, nationality or security connection. It then proceeds to enumerate eight factors useful in determining whether the exercise of jurisdiction is unreasonable. Among the factors to consider where appropriate are:

- "(a) the link of the activity to the territory of the regulating state, *i.e.* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state".<sup>84</sup>

According to the Comment to § 403 the principle of reasonableness "... has emerged as a principle of international law...".<sup>85</sup> It should be noted, that the test, in this particular form at least, was developed with both civil and criminal law in mind, and that the "criminal"

<sup>80</sup> Jennings, *Extraterritorial Jurisdiction*, supra note 58, at pp 152- 53.

<sup>81</sup> It can generally be said that Mann argues from what can be termed a historically synergetic position where international law, public and private, are closely related. Jennings on the other hand comes to his conclusions through more of an empirical public international law analysis.

<sup>82</sup> Mann, supra note 32, at p 49, and Mann, F.A., *The Doctrine of International Jurisdiction Revisited After Twenty Years*, [1984- III] RdC 19 at p 28.

<sup>83</sup> Supra note 31 at p 244- 45.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid. at p 245.

regulation concerned in large part anti-trust law.<sup>86</sup> This is not to imply that this valuable development is not or can not affect criminal law not concerned with such matters.<sup>87</sup> Indeed it provides not insignificant support for the substantial and genuine connection formulation. It does this by referring to “links” and “connections” and emphasising the relative “importance” to the State concerned. These are precisely the factors giving rise to a substantial and genuine connection. In essence, a reasonable assumption of jurisdiction would almost certainly require a genuine and substantial connection and vice versa, the assumption of jurisdiction in circumstances of a genuine and substantial connection would almost certainly be reasonable.

It has been averred that the essence of the right of jurisdiction comprises a genuine and substantial connection between the object of the exercise of jurisdiction and the State desirous of assuming jurisdiction. This is a crucial point. It provides an objective test for the legality of the assumption of extraterritorial jurisdiction.<sup>88</sup> It has the potential to develop and become more refined over time. For example in addition to the legitimisation of the assumption of jurisdiction by single States it can be used in conflicts of jurisdiction, where two or more States desire to exercise jurisdiction in relation to the same circumstances. In both these respects it provides a focal point. Jurisdiction is not, as it is all too often regarded, comprised of disparate and disjunctive “bases” of jurisdiction devoid of systemic coherence. It centres around a single concept, common to all categories of jurisdiction, that of a substantial and genuine connection between the subject and object of the exercise of extraterritorial jurisdiction.

The right of international jurisdiction, conceived as wholly dependent upon a particular link or connection between the subject and object of the exercise of such jurisdiction, *prima facie* appears to marginalise the so-called “bases” and/or “principles” of jurisdiction. If they do not facilitate the assumption of jurisdiction what is their role? The answer is found in the conception of the bases or theories not in an active, facilitative manner, but rather in a passive, evidential and analytical way. The “bases” or “principles” are thus properly termed “categories”, a term reflecting their passive nature. In regard to States, it is the evidential aspect of the jurisdictional categories which is of primary importance. Explicit or implicit reference to an established category of international jurisdiction provides evidence of a genuine, and accepted, connection between that State and the crime.<sup>89</sup> This distinction, between the facilitative legitimisation of the assumption of jurisdiction and the provision of evidence substantiating the lawful assumption of it, is of considerable conceptual importance. The categories of jurisdiction are an accumulation of justifications. They have established in international law to a greater or lesser degree exactly what amounts to a sufficiently close and genuine connection between a State and the subject of the exercise of extraterritorial jurisdiction. The sufficient and close connection *per se* establishes the legality of the exercise of jurisdiction, the categories of jurisdiction are the historical collection of the disparate

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<sup>86</sup> That the development of the principle of reasonableness in the United States is rooted in the area of anti-trust regulation there is no doubt. Amongst the many relevant cases are *Timberlane Lumber Co. v. Bank of America* (1976) F. 2d 597, and *Mannington Mills Inc. v. Congoleum Corp.* (1979) 595 F. 2d 1287.

<sup>87</sup> There is a debate over the precise nature of the United States’ anti-trust laws in that they straddle the divide between civil and criminal law, see for example Jennings, *Extraterritorial Jurisdiction*, *supra* note 58, at 147-148.

<sup>88</sup> In fact the test is most usually applied only on a “relatively” objective basis, as in practice it is the State exercising jurisdiction which polices itself. As the European Committee on Crime Problems states “the reasonable balancing of interests is performed by the authorities of the prosecuting state, and only by them, which impairs the objectivity of the exercise”, *supra* note 25 at p 31.

<sup>89</sup> Akehurst makes the point of the evidential nature of the categories of jurisdiction, albeit in a somewhat different context, stating that the categories of jurisdiction are “specific heads of jurisdiction which are proved to be legal”, in Akehurst, *supra* note 39, at 167. “Proved legal” they are capable of providing evidence of the legality of the exercise of jurisdiction in like circumstances.

justificational linkages amassed into evidential depositories. Their position as such in turn leads to their value in analysis. This conceptualisation of them, in light of my contextual and substantive thesis, results in the right of jurisdiction not only being understood as a single facilitatory monad but also in the categories being critical in the construction and characterisation of the totality of substantive international criminal law.

## International Criminal Law

The second basic result of our contextual and substantive thesis is an understanding of substantive international criminal law. As an area of law it exists in a close relationship with both State sovereignty and the categories of international jurisdiction. International criminal prescriptions shed light upon, and provide the linkage between, these two basic components of and/ or influences upon the international criminal framework. An exposition of the exact composition and characterisation of international criminal law, as well as examination of its relationship with the other components of the regime requires, of course, a definition of the term. The usage of the term "international criminal law" above perhaps implies that there exists an agreed definition or understanding of what is meant by it as well as its content. This is not the case.<sup>90</sup> Indeed there exists a multitude of conceptions of the term. The decision as to what particular meaning of the term is to be employed is critical. It axiomatically conditions the whole of this analysis.

In order to come to a preliminary understanding of substantive international criminal law it is useful to survey germane opinion. It is clear that this is fundamentally divided into two camps; that which views international criminal law as existing within the realm of public international law alone, and that which does not. It is useful to begin with the latter. In this regard perhaps the most valuable exposition of international criminal law is found in a "seminal article"<sup>91</sup> by Schwarzenberger, The Problem of an International Criminal Law<sup>92</sup>. Here Schwarzenberger identifies six meanings of international criminal law. They are in the meaning of: (a) the territorial scope of municipal criminal law; (b) internationally prescribed municipal criminal law; (c) internationally authorised municipal criminal law; (d) municipal criminal law common to civilised nations; (e) international co-operation in the administration of municipal criminal justice; and (f) international criminal law in the material sense of the term. Whilst further discussion of these meanings will be referred to below for our present purposes it is only necessary to highlight the breadth of the approach taken, one encompassing both international and municipal law. A further instance of this broad approach is founded upon a construction that identifies the separate legal regimes based upon a "division as to the public order that crimes and criminals offend",<sup>93</sup> of which three are identified: crimes and criminals against the

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<sup>90</sup> It has been written "The notion of international crimes is difficult to define because the practice initiated by States at the end of World War II of calling foreign State organs into account for international crimes has not been continued, and, moreover, *no generally recognized criteria for determining the content and limits of the concept of international crimes are perceptible in the field of existing international criminal law.*", Jescheck, H.H., International Crimes, in the *Encyclopaedia of Public International Law*, Vol. 8, supra note 33, at p 332, emphasis added. It is precisely the provision and application of criteria for the determination of the content of substantive international criminal law that forms the second plank of this thesis.

<sup>91</sup> It is so called by Cheng, B., Aviation, Criminal Jurisdiction and Terrorism: The Hague Extradition? Prosecution Formula and Attacks at Airports, in Cheng, B. and Brown, B.D., (eds.) *Contemporary Problems of International Law: Essays in honour of Georg Schwarzenberger on his Eightieth Birthday*, Stevens and Sons, London, 1988, at p 25.

<sup>92</sup> (1950) 3 CLP 263.

<sup>93</sup> Dautricourt, J.Y., The Concept of International Criminal Jurisdiction- Definition and Limitation of the Subject, in Bassiouni, M.C. and Nanda, V.P., (eds.), *A Treatise on International Criminal Law*,



domestic or municipal public order, against the international public order and against the universal or world public order.<sup>94</sup> The first of these is self-explanatory, meaning domestic penal law. The latter two are less clear: crimes against the international public order are stated to “appear to be the sum of all the domestic public orders of all the states concerned with the crime and of the state in the territory of which the criminal took refuge or was arrested”; crimes and criminals against the universal or world public order are those which cannot be “efficiently and impartially put on trial except before an international or universal court or tribunal even though the national state still claims jurisdiction over those crimes or criminals”.<sup>95</sup> Again, as above, the usefulness of this approach presently is that it does not restrict the corpus of international criminal law solely to international law. Further useful authority in support of the multi-faceted nature of international criminal law is found in the ILC’s Draft Statute for an International Criminal Tribunal.<sup>96</sup> Amongst the acts it suggests the tribunal could under certain circumstances take cognisance are “international crimes” in the form of crimes “under general international law” and “crimes under national law... which give effect to provisions of a multilateral treaty”<sup>97</sup>, the latter category of crime being included even though its prescriptive provenance is municipal law. Another approach which emphasises this dualist nature of substantive international criminal law is taken by Bassiouni. He has stated that “International criminal law is a product of the convergence of the international aspects of municipal criminal law and the criminal aspects of international law”.<sup>98</sup> The former of these sources of international criminal law is said to have grown “out of... international efforts with regard to the enforcement of municipal criminal law” and the latter consists “of the establishment by custom or convention of an international prescription which criminalizes a certain type of conduct, irrespective of whether it is enforced internally or externally”.<sup>99</sup> These opinions as to the nature of international criminal law, and thus international crime<sup>100</sup>, provide expansive conceptions of international criminal law. It is conceived as emanating from and existing within both international and municipal law. Substantive international criminal law here is not one singular body of like rules, it is a term of categorisation. Within it are included disparate manifestations of criminal law, limited only by a requisite international affiliation.

The second category of opinion as to the content and nature of substantive international criminal law takes a much narrower and restricted view. It views international criminal law as comprising prescriptions with a single common denominator, this being that their prescriptive basis exists solely in international law. So viewed it is a body of prescriptive rules with a definite and delimited boundary, the line between municipal and international law. Municipal criminal prescriptions, whatever their range of application, are not included. This is not to

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Charles C Thomas, Springfield Ill., 1973, Vol. 1, at p 637. Hereinafter Bassiouni and Nanda, *Treatise*.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> United Nations International Law Commission: Report of the Working Group on a Draft Statute for an International Criminal Court, 16 July 1993, (1994) 33 ILM 253.

<sup>97</sup> Ibid. at p 279.

<sup>98</sup> Bassiouni, M.C., *International Criminal Law; A Draft International Criminal Code*, Sijthoff and Noordhoff, Germantown, 1980 at p 2.

<sup>99</sup> Ibid. at pp 2-3.

<sup>100</sup> Although axiomatic to note- the need for definitional precision mandates the pedantic- the body of substantive international criminal law is taken to comprise the totality of international criminal prescriptions proscribing international crime. It is important to note however that an “international crime” can but need not be a crime “against” international law, but can instead be a crime “under” international law. The former being prescribed by international law itself whilst the latter being prescribed by municipal law. The distinction is made in Kunz, J.L., The United Nations Convention on Genocide, (1949) 43 AJIL 738 at p 745, and referred to in Dinstein, Y., International Criminal Law, (1985) 20 IsLR 206 at p 225.

imply that those holding such a view agree to the substantive (international) content, rather they agree as to where international criminal law as a corpus of law exists, and what it excludes. Amongst the support for this position is the following definition equating the body of law to a type of jurisdiction:

“International criminal law is means by which States acquire criminal jurisdiction in circumstances where this would not normally arise. In other words, international law provides that, when a particularly heinous act occurs, any State that secures custody of the offender has the right to try him regardless of his nationality, the nationality of his victim or the geographic location of his offence.”<sup>101</sup>

The same author writes that the offences which might be considered as constituting the body of international criminal law might “correctly be described as being contrary to international law and justifying trial, even by a country which would not have the right to exercise jurisdiction in accordance with the normal rules that operate to ground such jurisdiction... [T]he offences with which international law is concerned are those defined by international law”.<sup>102</sup> It has recently been observed in the Canadian Supreme Court that “crimes under international law” are “designed to enforce the prescriptions of international law... They are acts universally recognized as criminal according to general principles of law recognized by the community of nations”.<sup>103</sup> The content of this type of international criminal law, as a wholly international phenomenon, is limited to acts traditionally termed *delicta juris gentium*. Piracy is almost always cited as the original and outstanding example.<sup>104</sup> This conception of international criminal law has come to include other acts, including war crimes and crimes against humanity.<sup>105</sup> The American Law Institute’s *Restatement* (Third) also implicitly takes a limited view of substantive international criminal law, linking “offences against the law of nations” and “international crime”.<sup>106</sup> A further approach distinguishes between three distinct categories international criminal law, all of them existing within international law. It holds that this body of law comprises: an international criminal law addressed to States, an international criminal law of individual responsibility, and an international criminal law defining minimum standards of criminal justice.<sup>107</sup> A somewhat similar, again wholly international, elucidation of three possible meanings of international crime submits that international crimes may “simply be illegal acts of particularly serious nature, such as aggression, which give rise to a high level of state responsibility and the possibility of severe sanctions against the offending state”.<sup>108</sup> It continues that an international crime may “be a state act giving rise to individual responsibility,

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<sup>101</sup> Green, L.C., International Criminal Law and the Protection of Human Rights, in Cheng and Brown, *Contemporary Problems*, supra note 26, 116 at p 118.

<sup>102</sup> Green, L.C., International Crimes and the Legal Process, (1980) 29 ICLQ 567, at p 570- 571.

<sup>103</sup> R v. Finta, (1994) 112 DLR (4th) 513 at p 529- 30 per La Forest J.

<sup>104</sup> In re Piracy Jure Gentium, supra note 50, it was stated:

“With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. .. [A pirate] is no longer a national, but “*hostis humani generis*” and as such he is justiciable by any State anywhere”, at p 589 per Viscount Sankey L.C., referring to Grotius’ *De Jure Belli ac Pacis*, Vol. 2, cap. 20, § 40.

<sup>105</sup> These were the acts under discussion in the R v. Finta, supra note 103, and the Eichmann Case, supra note 74.

<sup>106</sup> The *Restatement* (Third), supra note 31, at p 255.

<sup>107</sup> Ryu, P.K. and Silving, H., International Criminal Law- A Search for a Meaning, Bassiouni and Nanda, *Treatise*, Vol. 1, supra note 93, at pp 23- 32.

<sup>108</sup> McCormack, T.L.H. and Simpson, G.J., The International Law Commission’s Draft Code of Crimes against Peace and Security of Mankind: An Appraisal of the Substantive Provisions, (1994) 5 CLF 1 at p 11.

as well as, or instead of, state responsibility.”, or finally may result in individuals being “held responsible at international law for criminal acts that they have carried out as individuals”.<sup>109</sup>

It has been illustrated that substantive international criminal law is conceived in many and differing ways. These disparate meanings can be categorised into those which include prescriptions based within municipal criminal law, and those which do not. Within these two broad bodies of opinion are a multitude of different conceptions and constructions. It is not our immediate purpose however to highlight the lack of consensus but rather to establish the parameters of this analysis. To this end a conclusion as to the appropriate construction to adopt must be made. The key to this decision is alluded to in several of the above definitions of international criminal law; international jurisdiction. A criminal prescription exercised with reference to the categories of international jurisdiction is in some sense at least “international”. That the law of jurisdiction exists to facilitate the application of criminal prescriptions in an other than solely municipal sense leads to this conclusion being axiomatic. Further, to exclude those prescriptions born from municipal criminal law purely for the reasons of their prescriptive provenance is an overly exclusionary approach not mandated by any compelling rationale. Just as, for example, the municipal law relating to diplomatic immunity may affect and has affected the corresponding international law and so can be viewed as existing within international law so can municipal criminal laws, at least those with an international connection of whatever nature. Indeed of the sources of international law as found in Article 38(1) of the Statute of the International Court of Justice both international custom and the general principles of law recognised by civilised nations can and do undoubtedly comprise municipal law. Indeed, the case is particularly strong in regard to international criminal law because of the inextricable relationship between it and jurisdiction, which is a subject all would agree belongs in the realm of international law generally and affects the municipal criminal law of States. Whilst it is of course necessary and useful to distinguish between prescriptions having their prescriptive provenance in international or municipal law, it does not follow that the latter must not or should not be included within the corpus of substantive international criminal law itself. As in English criminal law where common law crimes and statutory crimes are equally regarded as being part of English criminal law even though their prescriptive sources differ so too can crimes having their source in international and municipal law be regarded as comprising substantive international criminal law. An exclusionary approach to the content of substantive international criminal law serves no purpose and does not accord with actual practice. An inclusionary approach will be adopted, with only those criminal prescriptions which have no international connection whatsoever (*i.e.* are not applied with explicit or implicit reference to international jurisdiction) being excluded.

A preliminary construction of substantive international criminal law limited only by the parameters inherent in the scope of this study<sup>110</sup> yet founded upon positive grounds is the approach to be adopted. Such a construction logically includes within substantive international criminal law all prescriptions having, or capable of having, other than purely municipal application, interest and concern. This is consonant with the literal meaning of international criminal law in that it includes all prescriptions with international connections of any kind. This construction purposefully includes elements of municipal criminal law. Thus it includes, for example, Schwarzenberger’s category of international criminal law in the meaning of the territorial scope of municipal criminal law.<sup>111</sup> Indeed, this is the largest single prescriptive type of international criminal provision. Of the constructions of international criminal law proffered

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<sup>109</sup> Ibid. at p 12.

<sup>110</sup> The most important of these arises from the nature of the subjects amenable, and not amenable, to international criminal jurisdiction. In particular the exclusion of States, for discussion of the exclusion of crimes of States as international crimes see below.

<sup>111</sup> Supra note 92.

above an approach similar to Schwarzenberger's is most suited to our purposes.<sup>112</sup> This follows from it being the most expansive of constructions, as well as focusing upon the distinction and relationship between international and municipal law in the criminal sphere. In regard to the distinction, four of the five categories of jurisdiction justify the extraterritorial application of prescriptions founded within municipal law, the universal being the exception. With regard to the latter the relationship between international and municipal criminal law is relevant throughout the categories, and particularly so in relation to the prescriptions related to the universal and protective categories of jurisdiction. All the above factors mandate an expansive approach being taken, one where substantive international criminal law comprises a decentralised body of generally distinct constituent groupings of criminal prescriptions having or capable of having other than purely municipal application, interest and concern.

In apparent contradiction to the inclusive and expansive approach to international criminal law subscribed to above a preliminary exclusion must be made, namely that of crimes of State. As was evident in the opinions of the content of international criminal law above one candidate for inclusion was such crimes. It is the present purpose only to discount the possibility of them existing within substantive international criminal law, not to delve to any extent into the debate concerning either the existence or logic of crimes of State.<sup>113</sup> The rationale for this exclusion is found in both the nature of "crimes of State" and international jurisdiction. In regard to the former it is useful to outline what crimes of State putatively are. The modern notion of the criminal responsibility of States centres around the work of the International Law Commission, in particular Article 19 of its Draft Articles on State Responsibility.<sup>114</sup> Article 19(2) states "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime".<sup>115</sup> Article 19(3) then provides instances of such possible crimes, including aggression and genocide. Whilst these acts are *prima facie* criminal, as actions of States they are not in any conception of law as it now stands crimes at all.<sup>116</sup> They are incorrectly given the epithet "international crimes" and are in fact international delicts, albeit of the most serious nature and giving rise to a form of aggravated State responsibility.<sup>117</sup> The ILC

<sup>112</sup> The adoption of a Schwarzenberger-type analysis does not imply an adoption of his conclusions. As will be seen in Chapter Four below the present author unequivocally supports the existence of prescriptions founded within international law itself, Schwarzenberger patently does not, writing that "... international criminal law in any true sense does not exist", *supra* note 92 at p 295.

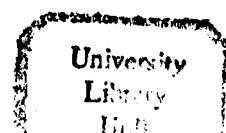
<sup>113</sup> See for example Weiler, J.H.H., Cassese, A. and Spinedi, M., (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Walter de Gruyter, Berlin, 1989.

<sup>114</sup> Part One of the Draft Articles, including Article 19, are found at [1980] YBILC, Vol. 2, Part 2, p 30 *et seq.* They are also found at (1998) 37 ILM 440, with Article 19 at p 447-8.

<sup>115</sup> *Ibid.*

<sup>116</sup> Interestingly it was the incongruity and supposed impossibility of the application of criminal prescriptions to States in the world of power politics, an argument resting on the present lack of an international rule of law in the municipal sense of that term, which leads Schwarzenberger to discount its existence, stating "In such a situation an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these States... With other schemes of this type they share the deficiency of taking for granted as essential condition for their realisation, a *sine qua non* which cannot easily be attained: the transformation of the present system of world power politics in disguise into at least a world federation.", *supra* note 92 at pp 295-96.

<sup>117</sup> It has been stated, after an attempt to reconcile the legal and sociological meanings of "crime" with the notion of crimes of State and State responsibility that "International crimes [of States] fail to satisfy the requirements of any definition of crime... the whole idea is inappropriate in contemporary international law.", in Gilbert, G., *The Criminal Responsibility of States*, (1990) 39 ICLQ 345 at p 369.



itself states in this regard that the principle significance of the distinction between international delict and international crimes is the recognition of "... a limited category comprising particularly serious wrongs, generally called international "crimes" and a much broader category comprising the whole range of less serious wrongs".<sup>118</sup> Indeed, it must be remembered that Article 19 is found in draft articles on State responsibility, an area of international law roughly analogous to delict, not criminal law.<sup>119</sup> Perhaps the most fundamental reason for not including crimes of State within substantive international criminal law is that the object of these provisions are States, not private individuals or concerns. Criminal law in the widest possible sense, including international criminal law, has traditionally and logically only applied to the acts of non- public legal persons.<sup>120</sup> A further and even more directly relevant reason is that not to do so would conflict with the law of jurisdiction. Jurisdiction, as defined above, is a facilitative right of States. It exists to enable States singly or collectively to take cognisance over the alleged crimes of private legal persons. The jurisdictional categories, the territorial and active personality for example, do not and can not accommodate crimes of State. My conception of substantive international criminal law remains; it is comprised of criminal prescriptions having or capable of having other than purely municipal application, interest and concern.

### International Jurisdiction and Crime- Analytical Framework

International jurisdiction and international criminal law have been defined and distinguished above. It is my thesis however that only through a contextual and substantive analysis can both be fully and properly understood. This thesis is generally substantiated through an exposition of the existence and application of the five categories of jurisdiction. Particularly, this thesis will produce understanding in regard to two related propositions. Firstly, that jurisdiction exists as a single facilitative right in international law. This will be accomplished through a conjunctive analysis. It will beyond doubt establish that in practice as well as logic this approach to jurisdiction is the correct one. The second proposition is that the totality of substantive international criminal law can be discovered and characterised with reference to the categories of jurisdiction. The approach taken here is disjunctive. It will provide a logical and systemic exposition of the content of international criminal law and lead to its categorisation. It is necessary here to reiterate and expand upon the conceptual framework as well as to outline precisely how the subsequent chapters will support it. The substantive international criminal complex is composed of three central elements. These are international jurisdiction as right, substantive international criminal law, and the categories of jurisdiction. Each of these elements exist in an inextricable and symbiotic relationship with the others. In isolation they are otiose. To take the most obvious example; international criminal law as a corpus of prescriptive rules is redundant and wholly ineffectual without jurisdiction as right rendering lawful the application of those rules in specific instances.

Jurisdiction as right exists to legitimate the application of substantive international criminal law. It is a single facilitative operative that renders lawful the application of such prescriptions. As such it must be temporally present during the application of such prescriptions. So required, it is useful to regard it as being interposed between the underlying motivations and will of States to act and the lawful execution of that motivation or will via the application of law. It is

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<sup>118</sup> [1976] YBILC, Vol II, Part 2 para 6.

<sup>119</sup> A further factor discounting crimes of State is the general uncertainty surrounding them. Article 19 is contained not in a binding international instrument but rather a controversial set Draft Articles of the ILC. *Oppenheim's International Law* states "There are no international judicial decisions laying down and applying the principle of criminal responsibility of States", *supra* note 12, at p 536.

<sup>120</sup> Any system of criminal law presupposes an authority of some nature capable of or authorising coercion.

certainly possible for States to utilise an international criminal prescription in the absence of the right to do so, but this would be action in violation of international law, the right of international jurisdiction being a *sine qua non* of the legitimate and lawful application of international criminal prescriptions. To hold otherwise would eliminate the *raison d'être* of jurisdiction as a facilitative right. It is a facilitative operative not merely an *ex post facto* justificatory instrument.<sup>121</sup> This position assumes the jurisdictional regime is prohibitory, and that States can only lawfully act when they have the right to do so. The right, as will be demonstrated, exists in circumstances of a genuine and real connective or linkage between the State applying an international criminal prescription and the object of that exercise.

Substantive international criminal law is comprised of all criminal prescriptions having or being capable of having other than purely municipal application, interest and concern. Conceptually it exists between jurisdiction as right and the categories of criminal jurisdiction. As such it has an immediate and direct relationship with both. Indeed the nature of this area of law in general is driven and formed mainly by the commonly accepted manifestations of substantive international criminal law. In regard to jurisdiction as right the prescriptions within international criminal law are, as mentioned, only exercised lawfully in its presence. It is the relationship between the categories of jurisdiction and substantive international criminal law that is central for our purposes. The former are evidential depositories. They contain prescriptions historically applied internationally with the explicit or implicit acceptance of States. Each category of jurisdiction mirrors a grouping of substantive international criminal law. Indeed the precise nature of international criminal law *per se* is responsible for the differing categories of jurisdiction themselves. In addition to substantive international criminal law being comprised of prescriptions of two types of provenance, those grounded in international law and municipal law, are the further distinctions founded upon the defining characteristics of the categories themselves. These include for example their personal or territorial application. These latter distinctions lead directly to categorisation of distinct groupings and indeed sub- groupings of substantive international criminal law, which in turn gives rise to comparative opportunities. As will be seen these sub- groupings centre around the interests served by the prescriptions; homicide/ violence, fraud/ deception, what can be termed direct State interests, the traffic in proscribed substances and public policy/ morality. The crux of the relationship between international criminal law and the categories of jurisdiction, then, is that the latter are a product of the historical application of the disparate groupings of international criminal law providing the definitional characteristics requisite for its complete exposition and categorisation.

The final central component of the international criminal complex are the categories of jurisdiction. As discussed it accords with actual practice and logic to entitle the so-called bases, theories and/ or principles categories. This appellation accurately reflects their nature. They themselves are inert and passive. They play an evidential role, each category being a collection of particular past instances of applied international criminal law that in turn provide evidence as to the legality of present applications (*i.e.* the existence of jurisdiction as right). In this sense the international criminal complex is circular. The categories of jurisdiction affect through the provision of evidence the element of the complex which produced it. The whole complex is self-perpetrating and symbiotic. It in this sense rightly mirrors general international law in that cumulative State practice over time results in a new rule of customary international law being

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<sup>121</sup> This is to conflate jurisdiction as right, which is facilitative, and the categories of jurisdiction, which are evidential and justificatory. This is a common yet fundamental conceptual error. The latter is of crucial importance in understanding and analysing the former but is, and must be, conceived as being distinct from it.

developed<sup>122</sup>, and that new rule legitimises and provides evidence as to the legality of acts akin to that which gave rise to the rule in the first instance. The relationship between the categories of jurisdiction and jurisdiction as right and international criminal law, then, is one of evidence and substantiation. They are disparate collective instances of accepted genuine and real connectives, and as such can legitimise applications of international criminal law.

The categories and right of jurisdiction and the corpus of substantive international criminal law exist in a framework. It reflects *lex lata*. This thesis is a contextual and substantive analysis of the law as it is, not as it ought to be. Accordingly, the central focus of examination is and must be State practice. It comprises international criminal prescriptions, generally in the form of legislative and judicial references to extraterritorial jurisdiction. It also includes conventional international law, international judicial decisions and the writings of jurists. All of this authority is firstly categorised according to jurisdictional category or categories to which it relates. Subsequently the examination is founded upon orthodox lines in that it is based upon the five traditional categories of jurisdiction reflecting territory, personality, protection and universality. It is in the contextual and substantive analysis of these categories that this discussion departs from the orthodox. Particularly, it is in the concentration on prescriptions and their application as evidence of the framework generally (the substance) and the two products thereof that renders this examination unique. The building blocks of this examination are the five categories of jurisdiction. They firstly will be examined as to their existence and precise application, following which they will be subjected to conjunctive and disjunctive analysis. The first two components, existence and application, serve three main functions. They serve to clarify the hitherto general obfuscation surrounding this subject area; explicitly and/ or implicitly supported are such basic tenets as the general prohibitive nature of the jurisdictional regime and the related conception of jurisdiction as a facilitative right in international law. More particularly, clarified is the precise nature and position of the five categories *per se*, as evidential depositories. Secondly they evidence that this thesis is in fact based upon State practice. Finally, and importantly, they set the stage from which the conjunctive and disjunctive analyses can be made, which comprise the final third of each chapter. As noted above the former is to the effect that jurisdiction is in fact a single right in international law evidenced by reference to one or more of five categories of jurisdiction. This is done through highlighting both the congruity of interests served by all the categories and the frequent explicit or implicit multiplicitous reference to them in the same case. The product of the disjunctive analysis is identification and categorisation of the totality of substantive international criminal law; the common denominators within each category providing the basis of a distinct grouping of prescription. This thesis establishes that it is only through a substantive and contextual analysis of the categories of jurisdiction that jurisdiction and substantive international criminal law can be properly and fully understood.

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<sup>122</sup> There is, of course, the need for *opinio juris*. See for example, the North Sea Continental Shelf Cases, [1969] ICJ Rep 3, and Akehurst, M., Custom as a Source of International Law, (1974- 75) 47 BYIL 1.

## Chapter Two- The Territorial Category

### Introduction

The territorial category of jurisdiction explicitly or implicitly provides the evidential linkage most commonly employed by States, that of a connection of some nature to the spatial area lawfully controlled by it under international law. This stands true not only with regard to States in the Anglo-American legal tradition, there no longer appearing any major criminal law system which does not base its rules on jurisdiction primarily upon territoriality.<sup>1</sup> Given the critical role that territory plays in the international legal system this is not unusual. It is a *sine qua non* of statehood and sovereignty, and it is a direct and manifest concomitant of State sovereignty that States have jurisdiction over all persons, citizens and aliens alike, within its territory.<sup>2</sup> There exists an inextricable and symbiotic relationship between territory, statehood and jurisdiction. It is axiomatic that reference to the territorial category, an adjunct of sovereignty itself, will continue to be category most frequently referred to. This noted, as well as the role of territory being intrinsic to international jurisdiction, so too it is oxymoronic, the extent to which the internationally operative component of the territorial category exists in international law being consonant with the extent to which jurisdiction is assumed in relation to persons and/ or events occurring to a greater or lesser degree outwith a State's territory. In this light the territorial category mirrors the contradictions extant within "extra- territorial" jurisdiction itself. The international legal system is predicated upon the equality of sovereign territorial States. A body of law permitting the assumption of sovereign competence in circumstances not consonant with this basic constitutional tenet is definitionally exceptional.

### The Territorial Category- Existence

The existence of the territorial category is unquestioned. There exists unimpeachable authority in support of it within all sources of international law. Illustrative of its existence, various forms, and development are criminally related conventions.<sup>3</sup> It is clear that all criminally tangential conventions refer to the territorial category. Article 1 of the Treaty on International Penal Law 1889 provides "Crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, of the victim, or of the injured party".<sup>4</sup> The Montreal Convention for the Suppression of Unlawful

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<sup>1</sup> European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe, Strasbourg, 1990, p 21. This work is based upon a Council of Europe survey, Questionnaires and Replies, European Committee on Crime Problems, 4 October 1990, PC-R-EJ/INF Bil., hereinafter Questionnaires and Replies.

<sup>2</sup> *Compania Naviera Vascongado v. Steamship Cristina* [1938] AC 485 at 496 per Lord MacMillian.

<sup>3</sup> Germane also are conventions relating or referring to territory generally, such as the Charter of the United Nations, discussed in Chapter One. Also relevant are treaties of extradition, Article 1 of the Agreement of 4 April 1960 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Israel, appended to The Israel (Extradition) Order 1960 SI 1960 No. 1660, for example, provides:

"The Contracting Parties agree to extradite to each other, in the circumstances stated in the present Agreement, those persons who, being accused or convicted of any of the offences enumerated in Article 3 and committed within the territory of the one Party, or on the high seas on board a vessel registered in the territory of that Party, shall be found within the territory of the other Party."

<sup>4</sup> (1935) 29 AJIL (Supp) 638.



Acts against the Safety of Civil Aviation 1971<sup>5</sup> provides a significantly more complex territorial provision. Article 5 *inter alia* provides that States shall establish their jurisdiction:

“... (a) when the offence is committed in the territory of that State; (b) when the offence is committed against or on board an aircraft registered in that State; (c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board; (d) when the offence is committed against or on board an aircraft leased without crew to an lessee who has his principal place of business or, of the lessee has no such place of business, his permanent residence, in that State”.

This provision contains four distinct territorial connections.<sup>6</sup> International judicial<sup>7</sup> authority supporting the territorial category is found in Island of Palmas Case:

“Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations”.<sup>8</sup>

Municipal law provides abundant and unequivocal authority substantiating the existence of the territorial category as well as graphic evidence of its evolution. Marshall Ch J. in *The Antelope* stated in 1825 “No principle of general law is more universally acknowledged than the perfect equality of nations... [I]t results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate only on itself alone”.<sup>9</sup> In *The Schooner Exchange v. M’Faddon and Others*<sup>10</sup>, often cited as authority for the pre- eminence of the territorial category,<sup>11</sup> Marshall, Ch. J. wrote:

“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself... [T]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects”.<sup>12</sup>

In stark contrast to these restrictive views is a recent Privy Council decision where it was stated “Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality”.<sup>13</sup>

Municipal legislation not surprisingly provides weighty evidence in support of the existence of the territorial category. The Canadian Criminal Code contains a general statement of its application, *inter alia* providing that “Subject to this Act or any other Act of Parliament, no person shall be convicted... of an offence committed outside Canada”.<sup>14</sup> Article 1(1) of the

<sup>5</sup> (1971) UKTS 10, Cmnd 5524. Hereinafter the Montreal Convention. The Convention was amended by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation 1988, (1991) UKTS 20, Cmnd 1470.

<sup>6</sup> It is also noteworthy for its mandatory nature. Rather more orthodox references to the territorial category include the Article 8(1) of the Convention on the Protection of Nuclear Material 1980, (1979) 18 ILM 1422, and Article 4(1) of the Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, (1989) Misc 14 Cmnd 804.

<sup>7</sup> Technically arbitral.

<sup>8</sup> *Island of Palmas Case (Netherlands v. US)*, (1928) 2 RIAA 829, at p 838 per Max Huber.

<sup>9</sup> (1825) 6 L.Ed. 268 at p 280.

<sup>10</sup> (1812) 3 L.Ed 287.

<sup>11</sup> In 1939 it was termed a judgement which “has illumined the jurisprudence of the world”, *Chung Chi Cheung v. The King*, [1939] AC 160 at 168 per Lord Atkin.

<sup>12</sup> *Supra* note 10 at p 293- 294.

<sup>13</sup> *Liangsiriprasert v. United States and another*, [1990] 2 All ER 866 at p 878.

<sup>14</sup> Canadian Criminal Code, Revised Statutes of Canada 1985, c .C-46, s. 6 (2).

Japanese Penal Code provides that “This Code shall apply to any person who commits a crime within Japan”.<sup>15</sup> Section 5(1) of the Ugandan Penal Code states “The jurisdiction of the courts of Uganda for the purposes of this Code extends to every place within Uganda”.<sup>16</sup> The Chilean Penal Code provides that Chilean criminal law applies to anyone present upon Chilean territory, foreigner or national, with neither the nationality of the victim nor the nature of the rights or goods affected being relevant.<sup>17</sup> The Dutch Criminal Code provides that Dutch substantive criminal law is “applicable to anyone who commits any offence within the Netherlands”.<sup>18</sup> Finally, Section 62 of the Austrian Penal Law states that “Austrian Penal Law applies to all offences committed in this country”.<sup>19</sup>

Juristic authority not only substantiates the existence of the category but also provides insight into its origins. It is particularly interesting to note the effect ascribed to private international law. Relevant are two general maxims found in Story’s *Commentaries on the Conflict of Laws*, first published in 1834:

- “1. As every nation possesses an exclusive sovereignty and jurisdiction within its own territory, the laws of every State affect and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural-born subjects or aliens; and also all contracts made and acts done within it.
2. No State can, by its laws, directly affect or bind property out of its own territory or bind persons not resident therein, except that every nation has a right to bind its own subjects by its own laws in every other place”.<sup>20</sup>

It is axiomatic that these maxims mirror to a not insignificant extent the public international law relating *inter alia* to the territorial category. Whilst it is evident that private international law has had some influence upon the development of the territorial category in public international law,<sup>21</sup> it would be misleading to ascribe to this area of law too much influence. Private international law by and large affects States only peripherally, public international law affects them directly. The role of territory in the choice of law leads to convenience and perhaps fairness as between the parties, in public international law it forms a basic tool in the defence of the existence and functioning of the State itself.<sup>22</sup> As such it is the fundamental, indeed

<sup>15</sup> Japanese Penal Code, supplied to author by Japanese Embassy, London, 30 January 1997.

<sup>16</sup> Blanplain, R., (Ed), *International Encyclopaedia of Laws: Criminal Law* (Vol. 2), Kluwer Law Publishers, Deventer, 1993, at p 74.

<sup>17</sup> Section 5, *ibid.*, Vol. 1, p 64. Section 6 provides that the prosecution of acts committed outside Chile must be explicitly designated by law. In 1975 jurisdiction based upon the territorial category became the basic rule in the then West Germany, Strafgesetzbuch [StGB] § 3(1) (W. Ger.), cited in Meyer, J., *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, (1990) 31 HILJ 108 at p 110.

<sup>18</sup> Article 2, *Questionnaires and Replies*, *supra* note 1 at p 11.

<sup>19</sup> *Ibid.* p 2.

<sup>20</sup> Ss 18-22. These axioms largely mirror those found in *De Conflictu Legum Diversarum In Diversis Imperiis* by Ulrich Huber published in 1684, translated into English by Llewelyn Davies, D.J., in (1937) 18 BYIL 49 at p 64. The relationship between the private and public international law on jurisdiction is emphasised by Mann in Mann, F.A., *The Doctrine of Jurisdiction in International Law*, [1964] 1 RdC at p 24. He avers that Story’s maxims are not merely rules of private international law but rather “general maxims of international jurisprudence” that express principles of public international law, at p 33.

<sup>21</sup> The Supreme Court of Israel in *Amsterdam and Others v. Minister of Finance*, [1952] ILR 229 implied that the particular Storyan conception of territorial jurisdiction “obtains” in both the fields of private and public international law, at p 235.

<sup>22</sup> The fields of private international law and public international law are universally accepted as distinct. The conjunctive plank of this thesis however is related to private international law to the extent that it supports a “proper law” approach to international criminal jurisdiction. For the approach in private international law see Mann, F.A., *The Proper Law in the Conflict of Laws*, (1987) 36 ICLQ

constitutional, norms of international law that are paramount and must be emphasised, as indeed the majority of writers on the subject do. For example, it being written that the territorial principle is a “concomitant of sovereignty” and is based “... upon the two tenets of sovereignty and equality of sovereign States”.<sup>23</sup> Its critical role was emphasised when it was written that the category “... is a logical outgrowth of the conception of law enforcement as a means of keeping the peace”.<sup>24</sup> Brownlie states that the territorial category “... has received universal recognition and is but a single application of the essential territoriality of sovereignty, the sum of legal competences, which a state has”.<sup>25</sup> The predominance of the territorial category is alluded to in the following: “It has long been an unquestioned postulate of legal theory that criminal jurisdiction is essentially territorial and that a State has very wide powers to exercise jurisdiction over nationals and aliens for unlawful acts committed in whole or in part within its territory”.<sup>26</sup> Implicit is not only that criminal jurisdiction “essentially” territorial, but also that it admits extensions, including “qualified” aspects to cope with circumstances outwith those covered by a completely literal application of the category.<sup>27</sup>

### The Territorial Category- Application

There exist four manifestations or arms of the territorial category; literal or “simple”, objective, subjective, and ubiquitous. These correspond to the three physically possible scenarios in which territory can provide a nexus to a crime. A crime may be wholly committed within the confines of the territory of a single State, a crime initiated outwith may conclude, terminate, or have effects within the territory of a State, and finally a crime may begin or occur in a State with effects or its termination occurring outwith that State. The vast majority of criminal prosecutions throughout the globe are justified with reference to the first arm of the category. Here the prescriptions can be classed as fully territorial and therefore truly municipal.<sup>28</sup> In the vast majority of cases the application of these prescriptions will have no international legal connection whatsoever.<sup>29</sup> Reference to the objective arm of the territorial category occurs where an offence concludes or has its effects within a State. This is the most controversial of the arms *inter alia* because it gives rise to difficulties in the ascription of what precisely is needed to

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437, and its advocacy in public international law Sarkar, L., The Proper Law of Crime in International Law, (1962) 11 ICLQ 446.

<sup>23</sup> Bassiouni, M.C., *International Extradition and World Public Order*, Leyden, Sijthoff, 1974, p 205. Bowett avers that the proposition that a State has the right to regulate conduct within its own territory is axiomatic, in Bowett, D.W., Jurisdiction: Changing Patterns of Authority Over Activities and Resources, (1982) 53 BYIL 1 at p 4.

<sup>24</sup> Perkins, R.M., The Territorial Principle in Criminal Law, (1971) HasLJ 1155 at p 1155. The author later alludes to the reasoning behind the Anglo- American States being wed to the notion of the territoriality of criminal law stating “It would have been surprising if the common law had adopted any basis for criminal justice other than the territorial principle, because the beginning of our criminal justice in the troublous days of the dawn of civilisation in the British Isles was concerned so exclusively with the problem of keeping the peace.” at p 1157.

<sup>25</sup> Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press, Fourth Edition, 1991, at p 300.

<sup>26</sup> Garcia- Mora, M.R., Criminal Jurisdiction over Foreigners for Treason and Offenses Against the Safety of the State Committed upon Foreign Territory, (1957-58) UPLR 567 at p 567.

<sup>27</sup> The terminology is used by Gilbert, G., Crimes Sans Frontières: Jurisdictional Problems in English Law, (1992) 63 BYIL 415 at pp 416- 417.

<sup>28</sup> Of course it is the same prescriptions being applied in some international fashion that leads them on that occasion or in that manner to become part of the corpus of international criminal law.

<sup>29</sup> Exceptions include the possible application of human rights norms, for example the right to a fair trial under Article 14 of the International Covenant on Civil and Political Rights 1966, (1977) 6 UKTS, Cmnd. 6702, and the law relating to diplomatic immunity, Article 29 of the Vienna Convention on Diplomatic Relations 1961, (1965) 12 UKTS, Cmnd 2565, providing that diplomatic agents shall not be liable to any form of arrest.

occur with a State's territory to found jurisdiction with reference to it. Reference to the subjective arm of the category occurs where jurisdiction is assumed over persons who initiate criminal activity within a State's territory with that activity taking effect or being completed outwith. It has engendered none of the controversy of its counterpart, *inter alia* because jurisdiction is assumed over acts that in some sense tangibly occurred within the assuming State. It is particularly important in regard to States who refuse to extradite their own nationals. If jurisdiction was not here exercised on a subjective basis an accused would escape being subjected to criminal proceedings.<sup>30</sup> States combining the subjective and objective arms take what is termed an ubiquitous approach to the category. Such application brings nothing new to the category as a whole, nor could it. It generally provides that "an offence as a whole may be considered to have been committed in the place where a part of it has been committed".<sup>31</sup> Here it is a territorial linkage *per se* that is crucial, not any particular manifestation of such. It is this latter approach that is implicitly or explicitly most widely taken by States.

### Common Law States- Objective Arm

The objective arm of the territorial category of jurisdiction generally justifies the assumption of jurisdiction where a crime is completed or its effects are felt within a State's territory. It is employed in regard to all the types of prescriptive sub- grouping existing within international criminal law; homicide/ violence, fraud/ deception, direct State interests, and those relating to the traffic in proscribed substances. In regard to the grouping of homicide/ violence in 1548 the English Parliament prophetically enacted "... where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by jurors of the county where the death shall happen... shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die...".<sup>32</sup> Nearly three centuries later, in 9 George IV, C.31, the same type of provision replaced municipal applicability with that of international, venue with international jurisdiction. The Northern Irish case of *County Council of Fermanagh v. Farrendon*<sup>33</sup> provides an illustrative homicide/ violence judicial example. Here Farrendon, in Northern Ireland, was shot from across the border within the then Irish Free State, he claimed and received compensation. On appeal from the award of compensation, the issue being whether the injury to Farrendon 'occurred' in Fermanagh, Moore, L.J. stated:

"I think that if a man fires at another with intent to wound, the intent is present during every fraction of space and moment of time that is traversed by the bullet from the moment it leaves the lethal weapon until it strikes or passes its victim. There, therefore, was continuous malice in 'the intent' of the bullet, not only in Donegal, till it crossed

<sup>30</sup> It is States in the civil law tradition who mainly subscribe to such a position. In *Service of Summons in Criminal Proceedings (Austria) Case* (1969) 38 ILR 133 at p 134, the Austrian Supreme Court appears to hold that it would be in contravention of international law to do so, stating "It may also be observed that in criminal matters there is a generally recognised rule of international law that a State's own nationals must never be extradited to another in whose territory they have committed a criminal offence". Clearly the Court was mistaken. Although a State is certainly entitled to refuse to extradite its nationals it is undoubtedly not bound to do so. Common law States do extradite their own nationals in certain circumstances, even when the State to which the national is sent would not have so acted in return, as the United States did in *Escobedo v United States*, (1980) 623 F 2d 1098. Generally see Gilbert, G., *Aspects of Extradition Law*, Martinus Nijhoff, London, 1991 p 95-99 and Shearer, I.A., *Extradition in International Law*, Manchester Press, Manchester, 1971, Chp 4, p 94-131.

<sup>31</sup> European Committee on Crime Problems, *supra* note 1 at p 8.

<sup>32</sup> (1548) 2 and 3 Edw VI C. 24.

<sup>33</sup> (1923-24) 2 Ann Dig 109, (1923) 2 IR 180.

the border, but in Fermanagh, from the border till it struck the applicant; in other words, it is the same thing as if the assailant was himself firing it at every inch of its course".<sup>34</sup>

This case provides insight into the ineluctable problems attendant with the operation of the objective arm of the category, including the difficulty surrounding the question of whether it is the complete offence, a constituent element, actual effect, or otherwise, that is necessary to found jurisdiction.<sup>35</sup> The general facts of this case have been used on numerous occasions in illustrating the subjective and objective arms.<sup>36</sup> The State where the bullet 'took effect' i.e. where it was aimed, being entitled under international law to claim jurisdiction with reference to the objective arm of the territorial category and the State in which the trigger was pulled with reference to the subjective arm.

A second sub- grouping of prescriptions applied with explicit or implicit reference to the objective arm of the territorial category are those related to fraud and deception. An illuminative early Scottish example is *HMA v. Witherington*.<sup>37</sup> Here it was held that the courts in Scotland had properly taken cognisance of crimes of falsehood, fraud, and wilful imposition even though the accused was outwith Scotland during the relevant period. The Lord Justice-General *inter alia* stated:

"The objection is rested on these considerations, that the panel is an Englishman; that the only fraud or criminal act alleged against him was committed in England: that he was never was in Scotland, and is not subject to the criminal law or to the jurisdiction of the criminal Courts of Scotland; that criminal jurisdiction does not extend *extra territorium*, and that the true foundation of ordinary criminal jurisdiction is the *locus delicti*".<sup>38</sup>

To which he answered "The argument is certainly plausible, and there is, at first sight, something startling and paradoxical in the proposition that a man may commit a crime in a place in which he was never personally present. This proposition is nevertheless not only technically or constructively, but actually, true...".<sup>39</sup> A modern English case is *DPP v. Stonehouse*.<sup>40</sup> Here Stonehouse was convicted of offences of dishonesty and forgery as well as of attempting to obtain property by deception. The case arose from Stonehouse's sham drowning in Miami. He appealed against conviction. The appeal was conjoined with the question "Whether the offence of attempting... to obtain property in England by deception, the final act alleged to constitute the offence of attempt having occurred outside the jurisdiction of the English courts, is triable in an English court, all the remaining acts necessary to constitute

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<sup>34</sup> Ibid. at p 110.

<sup>35</sup> As will be seen this problem obtains in all the prescriptive sub- groupings. A similar American illustration is *Simpson v. State*, (1893) 92 Ga 41, where in similar circumstances it was held "The well established theory of law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual... [S]o, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point it strikes... [T]he act of the accused did take effect in this State", at p 43-46. Quoted in (1935) 29 AJIL (Supp) p 490.

<sup>36</sup> For example Akehurst, M., *A Modern Introduction to International Law*, Sixth Edition, Routledge, London, 1987, p 105.

<sup>37</sup> (1880-81) 8 SC (JC) 41.

<sup>38</sup> Ibid. at p 46.

<sup>39</sup> Ibid. In *Strassheim v. Daily*, (1910) 221 US 280, the Supreme Court of the United States held in a case of obtaining money by false pretences that "Acts done outside a jurisdiction but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.", at p 285.

<sup>40</sup> [1978] AC 55.

the complete offence being intended to take place in England".<sup>41</sup> The House of Lords was unanimous in holding that the crimes were triable in England. It overcame the problem caused by the absence of actual actions in England by ascribing to the media the role of conveyor of effect. Lord Edmund-Davies stated "... jurisdiction to try persons in this country in respect of acts committed abroad rests upon the rules of international comity" and the "... law must keep in step with technical advances in international communications and the dissemination of news, and one who has it in mind that they will be utilised by others and, indeed, banks on their doing so must, in my judgement, be treated no differently from one who himself posts a letter or telephones a message or makes a personal broadcast...".<sup>42</sup>

Prescriptions capable of being subsumed under the heading direct State interests are also justified with reference to the objective arm of the territorial category by common law States.<sup>43</sup> An interesting example of which is *Ford v. United States*.<sup>44</sup> Here, in a case of conspiracy to breach prohibition restrictions, it was held:

"... the conspiring was directed to the violation of the United States law within the United States by men within and without it, and everything done was at the procurement and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country".<sup>45</sup>

The case of *S v. Mharapara*<sup>46</sup> is noteworthy as it straddles the direct State interests sub-grouping and that of fraud/ deception. It arose out of the theft by a Zimbabwean national employed in the Zimbabwean diplomatic service of governmental funds in Belgium. It was held by the Zimbabwean Supreme Court that:

"... a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one State or where the *locus commissi* is fortuitous so far as the harm flowing from the crime is concerned... [A] more flexible and realistic approach based on the place of impact, or intended impact, of the crime must be favoured".<sup>47</sup>

In *US v. Endicott*<sup>48</sup> Robertson, a Canadian citizen, was convicted of conspiracy, and aiding and abetting, in relation to weapons offences. He contended on appeal that the United States court lacked jurisdiction. His conviction was affirmed, the Court stating that United States "... jurisdiction extends to acts occurring outside its territory if those acts are intended to produce detrimental effects in the United States... [R]obertson was charged with, and convicted of, involvement in a conspiracy intended to have detrimental effects in the United States".<sup>49</sup> As is clear these cases are distinct from the above two sub-groupings in that they actually affect or intend to affect public interests in an immediate and direct manner.

A final distinct sub-grouping of prescriptions justified with reference to the objective arm by common law States are those relating to the traffic in proscribed substances. Here there exist two outstanding modern precedents, one American and one English. The English case is

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<sup>41</sup> *Ibid.* at p 64.

<sup>42</sup> *Ibid.* p 82- 84. He quoted from *Strassheim v. Daily*, *supra* note 39. This case would today be jurisdictionally governed by the Criminal Justice Act 1993, for which see below.

<sup>43</sup> Whilst this heading is *prima facie* indistinct, its exact content and parameters will become clearer as the discussion proceeds, and particularly so in Chapter Five.

<sup>44</sup> (1925) 273 US 593.

<sup>45</sup> *Ibid.* at p 619.

<sup>46</sup> [1986] 1 SALR 556.

<sup>47</sup> *Ibid.* at p 563- 564.

<sup>48</sup> (1986) 803 F 2d 506.

<sup>49</sup> *Ibid.* at p 514.

*Liangsiriprasert v. United States and another*.<sup>50</sup> This case broke new ground in English criminal law. Prior to this case English law required some act in pursuant of a conspiracy hatched abroad to occur in England to enable it assume jurisdiction.<sup>51</sup> Here, after reviewing authority, Lord Griffiths held:

“Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong”.<sup>52</sup>

This position has been explicitly incorporated into English law by the Court of Appeal in *R v. Sansom et al.*<sup>53</sup>

The authority elicited above bring to the fore the particular problems raised by inchoate crimes. Similar problems concern crimes of participation and criminal omissions.<sup>54</sup> These classes of crimes pose for the objective arm an undoubted conundrum. On the one hand States naturally desire to punish those who conspire and/ or attempt to violate their laws yet in doing so they may well assume jurisdiction over persons who have not “acted” in any literal sense of the term within their territory. It may well be the case that no acts at all, constituent elements of the offence or otherwise, have taken place within the territory of the State desirous to assume jurisdiction.<sup>55</sup> State practice appears to deem sufficient for the lawful assumption of jurisdiction an intent to commit that crime within that State. Such an approach, in light of the lack of State protest, must be held to be consonant with both jurisdiction generally and the objective arm of the territorial category in particular.

#### Common Law States- Subjective Arm

The sub- groupings of prescriptions justified with reference to the subjective arm largely mirror those justified by the objective arm.<sup>56</sup> In regard to crimes of homicide/ violence an early example is a New York statute prescribing duelling, stating:

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<sup>50</sup> Supra note 13. The American is *United States v. Noriega*, (1990) 746 F Supp 1506, discussed below.

<sup>51</sup> See for example *Board of Trade v. Owen*, [1957] 1 All ER 411. This rule was applied in the New Zealand case of *R v. Sanders*, [1984] 1 NZLR 636, in regard to the importation of heroin.

<sup>52</sup> Supra note 13 at p 878.

<sup>53</sup> [1991] 2 WLR 366.

<sup>54</sup> In English law it appears that there is a complete absence of authority on the question of the *locus* of an omission. Hirst suggests that should such a case arise an omission should be tried at the location where it should have been done, as opposed to where the individual may be at the moment the act he was obliged to perform was omitted. Hirst, M., Jurisdiction Over Cross-Frontier Offences, (1981) 97 LQR 80 at p 86.

<sup>55</sup> In regard to attempts any former requirement under the territorial category for a constituent element of the crime to occur within a State's territory has been abandoned. Akehurst has stated “... the ‘constituent elements’ approach is not followed in the case of attempts...”, in Akehurst, M., Jurisdiction in International Law, (1972-73) 43 BYIL 145 at p 152 note 2.

<sup>56</sup> Whilst the majority of common law subjective, and objective, territorial prescriptions are either crime- specific or individually judicially applied, exceptions exist. A general subjective provision is s. 778a of the California Penal Code of 1872 which *inter alia* stated “Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable

“A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried, and convicted in any county of the state”.<sup>57</sup>

A somewhat similar English example is s. 10 of the Offences Against the Person Act 1861. It *inter alia* states:

“Where any person... being criminally stricken, poisoned, or otherwise hurt in any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter... may be dealt with, inquired of, tried, determined, and punished... in England and Ireland...”.<sup>58</sup>

The subjective arm is widely used by common law States to justify the assumption of jurisdiction over prescriptions within the theft/ deception sub- grouping. In the English case of *Treacy v DPP*<sup>59</sup> at issue was whether the posting of a letter abroad from within England demanding money with menaces amounted to blackmail under s. 21 of the Theft Act 1968. Without reference to territorial application in the Act the Court had to either follow the presumption against the extraterritorial application of statutes<sup>60</sup> or hold that the offence was in fact committed within the United Kingdom. The House of Lords, by three to two, chose the latter, holding that the demand requisite for the offence of blackmail being made when the letter was posted.<sup>61</sup> English law on this point has been changed, such facts would now be governed by section 1 of the Criminal Justice Act 1993.<sup>62</sup> A specific subjective provision is also found in s. 5(1) of the 1993 Act, with it providing that courts in England and Wales may take cognisance over certain crimes of conspiracy and attempt where the agreement or completed crime is to be wholly performed abroad. This provision overcame the previous lack of jurisdiction in such cases.<sup>63</sup> The Law Commission of England and Wales gave the reasons for such an amendment as it being:

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for such crime in this state in the same manner as if the same had been committed entirely within this state”, Cited in the Harvard Research Draft Convention on Jurisdiction With Respect to Crime, (1935) 29 AJIL (Supp) 439 at p 486, hereinafter Harvard Research.

<sup>57</sup> New York, Cons. Laws, 1923, c. 41, s 1047. Cited in Harvard Research, *ibid.* at p 485.

<sup>58</sup> Section 10 also contains a reference to the objective territorial category, enabling the English or Irish courts to take cognisance of situations where the cause of death occurred outwith England with the death occurring in England or Ireland.

<sup>59</sup> [1971] AC 537, the case has been jurisdictionally overtaken by statute, see below.

<sup>60</sup> Lord Morris of Borth-Y-Guest in his dissenting opinion said “It is... a general rule of construction that unless there is something which points to a contrary intention a statute will be taken to apply only to the United Kingdom”, *ibid.* at p 552.

<sup>61</sup> It is relevant to note the comments of Lord Diplock upon international law. He stated that the only relevant reason for supposing that Parliament intended a geographical limitation to apply to the Theft Act “... is to be found in the international rules of comity which, in the absence of express provision to the contrary, it is presumed that Parliament did not intend to break”. He then accepted both the objective and subjective extensions of the territorial category, stating in regard to the latter “There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom”, *ibid.* at p 561- 562.

<sup>62</sup> See the ubiquitous section below.

<sup>63</sup> See for example Att- Gen’s Reference (No. 1 of 1982) [1983] QB 751. Section 3 deals with the converse situation, thus covering such an instance as that in *DPP v. Stonehouse*, *supra* note 40.



“...detrimental to this country, and in particular to its reputation as an international financial centre, if those who, when in this country, conspire, incite others or attempt to commit criminal fraud abroad may do so without being punishable in our courts”.<sup>64</sup>

The offences covered by this provision are laid out in section 1(1), and include the offences of theft, obtaining property by deception, blackmail and forgery contained in the Theft Acts 1968 and 1978 and the Forgery and Counterfeiting Act 1981.

The sub- grouping of direct State interests is also justified with reference to the subjective arm. A relevant example is the UK Sexual Offences (Conspiracy and Incitement) Act 1996. It *inter alia* prescribes conspiracy and incitement to commit certain sexual acts outside the United Kingdom.<sup>65</sup> Section 1 provides that English and Welsh courts have jurisdiction over conspiracies to commit certain sexual offences against children where *inter alia* the agreed act would involved conduct outwith the United Kingdom, the act is proscribed where it occurs, and a party or parties to the agreement did anything towards it formation within England and Wales. Clearly this prescription assumes jurisdiction with reference to the subjective territorial arm of jurisdiction, it doing so to prevent and punish activities deemed sufficiently inimical to the interests of the State that their commission outwith the United Kingdom does not militate against prosecution.<sup>66</sup> A United Kingdom example of a prescription within the sub- grouping of the traffic in proscribed substances is section 20 of the Misuse of Drugs Act 1971. It proscribes the assistance in or inducement of, in the UK, the commission elsewhere of an offence punishable under the provisions of a corresponding law in the place where it was committed.<sup>67</sup>

#### Common Law States- Ubiquitous Arm

In practice most common law States employ a ubiquitous approach to the territorial category.<sup>68</sup> This is not a new development, over sixty years ago it was written “National experience has demonstrated that neither the subjective nor the objective application, taken alone, can be made sufficiently comprehensive to serve as a rationalization of contemporary practice”.<sup>69</sup> An exposition of this arm of the category mandates a more expansive prescriptive taxonomy. This follows from its actual application and nature leading to it being applied on a general and non-crime specific basis. A prominent example is section 7 of New Zealand’s Crimes Act 1961. It provides:

“Place of Commission of Offence- For the purposes of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event”.<sup>70</sup>

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<sup>64</sup> Law Commission Report No. 180, 1989, para. 1.5. See for the jurisdictional provisions of the Act Holroyd, J., and Chuah, J., Trying Frauds with a Foreign Element, (1994) 58 JCL 388.

<sup>65</sup> It should be noted that this Act was a compromise piece of legislation resulting from the clamour to act against so- called “sex- tourists”, and has been in effect supplanted by the Sex Offenders Act 1997, for which see Chapter 3.

<sup>66</sup> They comprise *inter alia* the risks posed by paedophiles to United Kingdom society.

<sup>67</sup> See for example *R v. Vickers* [1975] 2 QB 664 and *R v. Murtaq Ali* [1990] CLR 648.

<sup>68</sup> It has been stated that the United States makes *de facto* usage of the “ubiquity theory” in its “... combination of the objective territoriality or effects theory and the subjective territoriality theory...”, in Blakesley, C.L. and Lagodny, O., Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law, (1991) 24 VJTL 1 at p 15.

<sup>69</sup> Harvard Research *supra* note 56 at p 494.

<sup>70</sup> This follows the general territorial provision in section 6, noted above.

This provides for the assumption of jurisdiction with implicit reference to a conflation of the subjective and objective arms of the category. Subjectively it does so by providing for jurisdiction in cases where any act, omission or event necessary to the completion of the offence occurs in New Zealand and the person charged was at the time of the act, omission or event in New Zealand, and objectively by providing for jurisdiction where any act, omission or event necessary to the completion of the offence occurs in New Zealand and the person charged was at the time outside the State. An illustration of this provision is *Tipple v. Pain*.<sup>71</sup> At issue here was New Zealand jurisdiction in a case of the consignment of explosives without prior consent. They were consigned in Australia. It was held that both limbs of s. 7 applied. The “any act or omission forming part of any offence” was held to be the plaintiff’s omission to discharge the duty to obtain consent, and the “any event necessary to the completion of any offence” was the landing of the goods in New Zealand. It was stated the relevant prescription was “... limited first to consignments made in New Zealand but irrespective of their destination and secondly to consignments to New Zealand wherever made”.<sup>72</sup>

An illustration of a particular ubiquitous approach, within the theft/ deception sub- grouping of prescriptions, is found in the UK Criminal Justice Act 1993. The relevant provision, s. 2, provides:

“(1) For the purposes of this Part, “relevant event”, in relation to any Group A offence, means any act or omission or other event (including the result of one or more acts or omissions) proof of which is required for conviction of the offence.

(2) For the purpose of determining whether or not a particular event is a relevant event in relation to a Group A offence, any question as to where it occurred is to be disregarded.

(3) A person may be guilty of a Group A offence if any of the events which are relevant in relation to the offence occurred in England and Wales.”

The offences to which this provision applies are the same as s. 5(1) of the 1993 Act as discussed above. The rationale behind these provisions was stated as being founded in modern crimes of dishonesty which:

“... often involve complex operations designed to conceal the dishonest conduct and to make detection and conviction as difficult as possible, and the planning preparation and execution of the many operations which are involved in a complicated swindle frequently take place in several different countries”.<sup>73</sup>

Further it was stated:

“We also have in mind, in considering questions of policy, that London is one of the world’s principal financial centres, and that it is in the national interest that for it to remain so”.<sup>74</sup>

### Non- Common Law States- Objective Arm

In general, the prescriptive taxonomy applied to common law reference to the territorial category is also applicable to non- common law States, with the proviso that such States often tend to take a wide and non- crime specific approach to jurisdiction. The most well-known instance of the assumption of jurisdiction with reference to the objective arm by a non- common law State concerned a prescription within the sub- grouping homicide/ violence. It is the Case of the *SS Lotus*<sup>75</sup>, the most discussed and cited authority in international jurisdiction.<sup>76</sup> The

<sup>71</sup> [1983] NZLR 257.

<sup>72</sup> Ibid. at p 261. It is useful to note that the purpose of the statute was given as “safety in the air”, an interest not necessarily territorial, *ibid*.

<sup>73</sup> Law Commission Report No. 180, 1989, para. 1.2.

<sup>74</sup> Ibid. para. 2.24.

<sup>75</sup> (1927) PCIJ Rep., Series A No 10.

origins of this case lie in the collision at sea of French and Turkish ships near Turkey, but outside Turkish territorial waters. Eight Turkish nationals lost their lives. The officer on watch on the French ship, a French national, and the captain of the Turkish ship were arrested when the ship arrived at Constantinople. They were convicted with an offence akin to involuntary<sup>77</sup> manslaughter.<sup>78</sup> Turkey and France agreed to put the following question to the Permanent Court of International Justice:

“Has Turkey... acted in conflict with the principles of international law-and if so, what principles-by instituting, following the collision... on the high seas between the French steamer *Lotus* and the Turkish steamer *Boz-Kourt* and upon the arrival of the French steamer at Constantinople... joint criminal proceedings... in consequence of the loss of the *Boz-Kourt* having involved the death of eight Turkish sailors and passengers?”<sup>79</sup>

The Court held by 7 to 5 that Turkey had not acted in contravention of international law. This case stands as an international condonation of the assumption of jurisdiction with reference to the objective arm in a case of homicide/ violence. The Court unequivocally accepted the idea that through an extension of the territorial category States can lawfully take cognisance of acts that only partially occurred within their territory, it stated:

“Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways that vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty”.<sup>80</sup>

The Court then explicitly supports the objective arm:

“No argument has come to the knowledge of the Court from which could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author of the offence happens to be at the time of the offence. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects have taken place there... [t]here is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle”.<sup>81</sup>

Once the Court had supported the existence of the objective territorial category, by assimilating the Turkish vessel to Turkish territory, the answer to the question put to the Court was obvious, Turkey had not acted in contravention of any norm of international law.<sup>82</sup>

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<sup>76</sup> An early bibliography is found in Hudson's World Court Reports Vol. II (1927-32) p 20.

<sup>77</sup> That it required no *mens rea* is of some significance. The lack of intention led to the dissent of Judge Loder, who thought the objective territorial category could only operate where crimes were committed intentionally, and to considerable debate amongst scholars, who held much of the same opinion.

<sup>78</sup> The relevant prescription was Article 6 of the Turkish Penal Code 1926, taken verbatim from the then Italian Penal Code, it *inter alia* states “Any foreigner who... commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey”, cited in the judgement, *supra* note 75, pp 13- 14.

<sup>79</sup> *Supra* note 75 at p 5.

<sup>80</sup> *Ibid.* p 20.

<sup>81</sup> *Ibid.*

<sup>82</sup> International law on this point is now governed by Article 97 of the Convention on the Law of the Sea 1982, (1982) 21 ILM 1261, it *inter alia* provides “In the event of a collision or any other incident

A general non- crime specific reference to the objective arm is made by the Treaty on International Penal Law 1889.<sup>83</sup> Article 2 provides: "Acts of a criminal nature committed in a State, which would be justiciable by its authorities if their effects were produced there; but which only injure rights and interests protected by the laws of another State, will be tried by the courts and punished according to the laws of the latter". Similarly section 8 of the German Penal Code of 1927 states "An act is committed at each place in which the elements of the punishable action have been realized according to the intention of the actor".<sup>84</sup> Particularly, an instance where a theft/ deception prescription is justified by the objective arm is found in a Dutch Supreme Court case in 1954 where it was held that jurisdiction was properly assumed in a case of fraud where an accused, whilst abroad, fraudulently induced someone in the Netherlands to deliver certain property.<sup>85</sup> An example within the sub- grouping direct State interests is the Schwartz Case<sup>86</sup> where jurisdiction was assumed by a French court in a case of espionage where a letter was sent from abroad to France in order to obtain secret information. In a broadly similar vein, in that direct public interests are being protected, is *Public Prosecutor v. Janos V*<sup>87</sup> where jurisdiction was assumed in a case of aircraft hijacking by Austria, the plane being flown to Austria from Romania.<sup>88</sup>

In regard to inchoate and participatory crimes and crimes of omission non- common law States adopt only a vaguely congruent approach. Certain States, for example in crimes of attempt, deem an intent sufficient to found territorial jurisdiction. Danish law, for example provides that the *locus delicti* of an attempt is determined by "the place where the consequence has been intended to take effect".<sup>89</sup> In contrast to Denmark are Thailand and Italy. Thailand appears to do away with the need for even a specific intent, with section 5 of the Thai Penal Code *inter alia* stating:

"In the case of preparation or attempt to commit any act provided by the law to be an offence, even though it is done outside the Kingdom, if the consequence of the doing of such an act, when carried through to the stage of accomplishment of the offence, will occur within the Kingdom, it shall be deemed that the preparation or attempt to commit such offence is done within the Kingdom".<sup>90</sup>

Italy on the other hand relies upon "constituent elements", with "... an attempt to commit an offence [being] regarded as an offence in itself and the determination of the *locus delicti* [being] exclusively based on the constituent elements of the attempt; the place intended for the commission of the offence is of no relevance".<sup>91</sup> What can be concluded in relation to these

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of navigation concerning a ship on the high seas... no penal or disciplinary proceedings may be instituted... except before the judicial or administrative authorities either of the flag state or of the state of which such person is a national".

<sup>83</sup> (1935) 29 AJIL (Supp) 638. Signed by five South American countries, Argentina, Bolivia, Paraguay, Peru, and Uruguay.

<sup>84</sup> Harvard Research, *supra* note 56, at p 507.

<sup>85</sup> The case is noted in *Questionnaires and Replies*, *supra* note 1 at p 20.

<sup>86</sup> Decision of Feb. 25, 1911, 1915 S.Jur I 171 (Cass. Crim), cited in Blakesley, C.L., *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime*, [1984] ULR 685 at 696 note 27, hereinafter Blakesley, *Conceptual Framework*.

<sup>87</sup> (1972) 71 ILR 229.

<sup>88</sup> This is consonant with the provisions of the Montreal Convention, *supra* note 5.

<sup>89</sup> *Questionnaires and Replies*, *supra* note 1 at p 32. The Brazilian Penal Code of 1927 provides similarly, it states "An attempt committed abroad is deemed committed in the country, when it was the intention of the perpetrator that its effects should take place within it", cited in Harvard Research, *supra* note 56, at p 507.

<sup>90</sup> Thai Penal Code section 5, sent to author by letter dated 25 March 1997 from Ministry of Foreign Affairs, Bangkok.

<sup>91</sup> *Questionnaires and Replies*, *supra* note 1 at p 33.

types of crimes is that there is a wide variance in State practice, and even though they exist at the margins of the category their international legality cannot be questioned.

#### Non- Common Law States- Subjective Arm

Reference to the subjective arm by non- common law States is largely congruent with that of common- law States.<sup>92</sup> An application of a prescription that can be categorised as existing within both the homicide/ violence and direct State interests groupings is the Italian South Tyrol Terrorism Case.<sup>93</sup> Here a conviction of *inter alia* two Italian nationals for possession of explosives, guns and ammunitions in Austria, with the intent to commit terrorist acts in Italy was upheld. Clearly the security of, and lives within, both States were threatened. The Austrian Supreme Court held:

“... the accused committed the acts in question in Austria, and therefore, according to the principle of territoriality contained in Article 32 of the Criminal Code is subject... to Austrian jurisdiction. Austrian criminal law ordinarily protects both alien and national objects of protection and gives them equal treatment *lege non distinguente* wherever the object of protection may be and wherever the results may be felt”.<sup>94</sup>

Another somewhat similar Brazilian example is found in *The Tennyson*<sup>95</sup> where Brazil assumed jurisdiction over an explosion on a British vessel on the high seas, the explosive devices being placed on board in Brazilian waters. A conflation of subjective reference in regard to circumstances of theft/ deception and direct State interests is found in the French case of *Re Feld and Newman*.<sup>96</sup> Here the Criminal Chambers of the Court of Cassation held that the French courts did indeed have jurisdiction over charges of fraud where inferior quality goods were supplied to the French armed forces in the then West Germany. The appellants had averred that since the goods, half-track trucks, were delivered in the German Federal Republic the facts could not sustain the basis of a criminal offence in French law. The Court disagreed holding that constituent elements of the offence occurred in France, namely the negotiation and signature of the contract and the presentation of the bills for payment.

*Adams v Public Prosecutor of the Canton of City of Basle*<sup>97</sup> is an interesting recent Swiss assumption of jurisdiction with reference to the subjective arm of the territorial category *prima facie* within the theft/ deception sub- grouping. Here Adams was convicted of unlawfully communicating business secrets in that he had given the Commission of the European Communities information concerning Hoffman La Roche, of which he was an employee. It resulted in competition proceedings being taken by the EC Commission against the company. The actual communication of business secrets occurred outside Swiss territory, in Brussels. Notwithstanding this fact the Swiss Supreme Court held that the Swiss courts had jurisdiction to judge the facts in accordance with its Criminal Code. In justifying its assumption the Court held that since the accused had formed an intention to communicate the business secrets in Switzerland, sent a letter and made a telephone call from Switzerland to the Commission in

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<sup>92</sup> The proviso concerning the generality of approach of non- common law States notwithstanding. A general subjective example being an early Spanish statute providing “The cognizance of crimes begun in Spain and consummated and frustrated in foreign countries falls to the Spanish Courts and Judges, in case the acts done in Spain constitute a crime in themselves, and only in respect of those [acts]”, Spanish Law of Organisation of the Judicial Power (1870) Article 355. Cited in Harvard Research *supra* note 56 at p 487. Whilst general, the provision is limited to acts which themselves were punishable in Spain.

<sup>93</sup> (1968) 71 ILR 235.

<sup>94</sup> *Ibid.* at p 237.

<sup>95</sup> Cited in Harvard Research, *supra* note 56 at p 487.

<sup>96</sup> (1967) 48 ILR 88.

<sup>97</sup> *Adams v Staatsanwaltschaft Des Kantons Basel-Stadt*, [1978] 3 CMLR 480.

Brussels, took into his possession certain company documents and prepared and commenced his journey to Brussels in Switzerland he had began to commit the offence within Switzerland.

#### Non- Common Law States- Ubiquitous Arm

The majority of non- common law States today either expressly or implicitly employ the ubiquitous arm of the territorial category. This accords with the general approach most of these States take to jurisdiction itself. The Austrian Penal Code is typical of many. It provides in section 67 (2):

“The offender has committed the punishable offence at each place where he has acted or where he should have acted, or where a result corresponding to the constituting elements of the offence has either totally or partially ensued according to the conception of the offender”.<sup>98</sup>

Italian law contains a similar provision, Article 6 of its Penal Code *inter alia* providing “An offence shall be deemed to have been committed in the territory of the State when the act or omission that constitutes it occurred therein in whole or in part, or when the effects produced by the act or omission took place therein”.<sup>99</sup> Section 9 of the German Penal Code provides that a crime is deemed to have occurred in the place where the perpetrator acted or in the place where the proscribed harm occurred.<sup>100</sup> Bulgaria adopts a similar ubiquitous approach.<sup>101</sup> Finally, the Thai Penal Code provides in section 5:

“Whenever any offence is even partially committed within the Kingdom, or the consequence of the commission of which, as intended by the offender, occurs within the Kingdom, or, by the nature of the commission of which, the consequence resulting therefrom should occur within the Kingdom, it shall be deemed that such offence is committed within the Kingdom”.<sup>102</sup>

#### The Territorial Category- Conjunctive Analysis

The conjunctive plank of this thesis comprises two approaches; the elicitation of authority evincing the congruence of interests protected by the various categories, and that which refers in the assumption of jurisdiction to more than a single category. They both establish that what is crucial jurisdictionally is a single facilitative connective, a linkage of a requisite character between the State and the object of the exercise of jurisdiction, evidenced by one or often more separate linkages. Firstly the congruence of interests. There is no doubt that the interests putatively served by the territorial category transcend it and to a greater or lesser degree are served by all the jurisdictional categories. Of course the precise characterisation of “interests” is here critical. It is conceded that the sub- groupings employed above; homicide/ violence, fraud/ deception, direct State interests and the traffic in proscribed substances do not readily admit detailed differentiation. They are however suitable for our purposes. Whilst there is a significant degree of overlap between them they are, as will come to the fore, centrally distinct.

It is clear that the interests served by homicide/ violence prescriptions are also served by all five orthodox jurisdictional categories. Here it is not a territorial connection *per se* that is crucial in the assumption of jurisdiction, but rather the coincidence of *situs* that leads to the territorial category being the most often employed. In *County Council of Fermanagh v.*

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<sup>98</sup> Section 67 para. 2, cited in *Questionnaires and Replies*, supra note 1 at p 9.

<sup>99</sup> Ibid.

<sup>100</sup> Blakesley, C.L. and Lagodny, O., supra note 68 at p 15.

<sup>101</sup> Blanplain, R., (Ed), *International Encyclopaedia of Laws: Criminal Law* (Vol. 1), Kluwer Law Publishers, Deventer, 1993, 42.

<sup>102</sup> Supra note 90.

Farrendon<sup>103</sup> and *Simpson v. State*<sup>104</sup> somewhat convoluted legal fictions were employed to “place” the crime within the territory of the State.<sup>105</sup> The question arises of what, precisely, are the interests protected by homicide prescriptions to which there is no simple easy answer. Generally, it has been said that the purposes of criminal law *inter alia* are:

- “(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes”.<sup>106</sup>

Clearly the interests protected by prescriptions concerning homicide are manifold, public and private, political, social, cultural and religious. A complete adumbration of the interests is here not useful nor possible.<sup>107</sup> It is crucial only to note that they are deemed by States to be of such a nature to lead to the extra-ordinary application of criminal law. It is necessary further to note that the interests protected are generally immediately private, and universally regarded as worthy of concerted protection with their being applied with reference to all jurisdictional categories. The UK Offences Against the Person Act 1861 prescribes murder and manslaughter committed outwith the United Kingdom by “subjects of Her Majesty”<sup>108</sup>, a reference to the active personality category. Perhaps axiomatically it can be noted that the universal category focuses mainly upon homicide/ violence prescriptions.<sup>109</sup> In *US v. Felix- Gutierrez*<sup>110</sup> implicit reference to the protective category is made in a case of *inter alia* murder. The passive personality category has also been referred to with an American court holding “... the nationality of the victims, who are also United States government agents, clearly supports jurisdiction”.<sup>111</sup>

As homicide/ violence, theft/ deception prescriptions are justified with reference to all the jurisdictional categories. Clearly here the interests are not solely or utterly territorial, rather they concern property and are generally immediately private. A territorial justification is found in *The Queen v. Holmes*<sup>112</sup> where a conviction for obtaining by false pretences was upheld; Holmes having posted a letter from Nottingham to France, inducing £150 to be returned to Nottingham. Jurisdiction was upheld as the receiving of the money and the posting of the letter took place in Nottingham.<sup>113</sup> In the Credit Card Fraud Case<sup>114</sup>, jurisdiction was assumed by Austria over a case of theft/ deception with reference to, *inter alia*, the active personality category. It was held, where credit cards had been used fraudulently in Germany, that “Even assuming that the place of the commission of the offence was abroad, Austrian jurisdiction in relation to the accused is given since he was an Austrian national at the time of the commission of the offence”.<sup>115</sup> The universal category of jurisdiction is used to justify cases of theft/

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<sup>103</sup> Supra note 33.

<sup>104</sup> Supra note 35.

<sup>105</sup> It will be recalled that the Georgian Court held that the accused in law accompanied the bullet across the border up to the point it struck, supra note 35.

<sup>106</sup> Proposed Official Draft of the American Law Institute’s Model Penal Code, Art. 1 1.02, cited in Smith, J., *Criminal Law*, Eighth Edition, Butterworths, London, 1996, p 3.

<sup>107</sup> The task is one of substantiating the axiomatic, *prima facie* puerile yet Sisyphian.

<sup>108</sup> See Chapter Three.

<sup>109</sup> See Chapter Four.

<sup>110</sup> (1991) 940 F 2d 1200, see below.

<sup>111</sup> *US v. Benitez*, (1984) 741 F 2d 1312 at p 1316.

<sup>112</sup> (1883-84) 12 QBD 23.

<sup>113</sup> In *Ministère Public v. Brabant*, (1972) 73 ILR 369 the Luxembourg Superior Court of Justice held that Luxembourg had territorial jurisdiction over charges of forgery even though the actual forging occurred in France. It was held that since the accused made use of his forgeries in Luxembourg jurisdiction stood.

<sup>114</sup> (1987) 86 ILR 562.

<sup>115</sup> *Ibid.* 562- 563.

deception in cases of piracy as well as war crimes.<sup>116</sup> In the UK case of *In re Piracy Jure Gentium*<sup>117</sup> the House of Lords held that attempted robbery amounted to piracy *jure gentium*, stating that “Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*”.<sup>118</sup> In *US v. Bowman*<sup>119</sup> the United States Supreme Court implicitly held the crime of conspiracy to defraud the government was justified with reference to the protective category of jurisdiction.<sup>120</sup> An example of the passive personality category being utilised to serve the interests protected fraud/deceptions prescriptions is found section 8 of the Thai Penal Code where it provides for the assumption of jurisdiction, *inter alia*, over aliens where the “injured person” is a Thai in relation to the crimes of theft, snatching, and fraud.<sup>121</sup>

It is axiomatic that prescriptions within the sub- grouping direct State interests will be substantiated by categories additional to that of the territorial. Indeed a distinct category, the protective, exists precisely for this purpose. As will be seen the interests served by this sub- grouping of prescriptions are the most difficult to define.<sup>122</sup> At the core of it is an interest immediate and central to the State *per se*, a public interest affecting both persons and property. In *Yenkichi Ito v. US*<sup>123</sup> it was the territorial category that was relied upon in upholding a conviction for conspiracy to breach immigration law.<sup>124</sup> In *Bolduc v. Attorney- General of Quebec et al.*<sup>125</sup> an immigration prescription was justified with reference to the subjective arm of the territorial category. Here the accused was accused of conspiracy to breach not Canadian immigration law but American. Dismissing a plea to jurisdiction the Supreme Court of Canada stated “... creating a system in Canada for bringing persons into the United States unlawfully would seem to me to constitute a definite manifestation of international activities of dubious legality”.<sup>126</sup> Employed in the reasoning was a “codifier’s report”, which *inter alia* states:

“In light of the ever increasing international nature of criminal activity, it is desirable and in the interest of the Comity of Nations, that Canada should discourage International criminals from using its territory as a basis for planning criminal acts in other Countries. Conversely, it is desirable that Canada should deter International criminals from conspiring abroad to commit offences in Canada”.<sup>127</sup>

This case is of interest as it is a vicarious adoption of an immigration concern, in addition to Canada protecting itself from becoming a staging post for persons committing crimes in other States. In contrast to these cases is *US v. Khalje*<sup>128</sup> where the accused’s conviction for false personation and presentment of a visa application was affirmed with reference to protective

<sup>116</sup> For the present purposes piracy (in the form of attempted robbery) can reasonable exist within the grouping theft/ deception as in involves *inter alia* acts of depredation for private ends. For the international definitions of both crimes see Chapter Four.

<sup>117</sup> [1934] AC 586.

<sup>118</sup> *Ibid.* at p 588.

<sup>119</sup> (1922) 67 L Ed 149.

<sup>120</sup> See Chapter Five.

<sup>121</sup> Thai Penal Code section 8, *supra* note 90.

<sup>122</sup> Whilst the above two groupings roughly follow the traditional classification of prescriptions into those relating to crimes against the person and those relating to crimes against property it is here rather less satisfactory to employ the heading crimes against the State. A thorough attempt at definition is made in Chapter Five.

<sup>123</sup> (1933) 64 F 2d 73.

<sup>124</sup> Interestingly the convictions for the actual bringing into, attempting, and aiding, abetting, and assisting the bringing of illegal aliens into the United States were quashed for lack of jurisdiction.

<sup>125</sup> (1982) 137 DLR (3rd) 674.

<sup>126</sup> *Ibid.* per Chouinard, J.

<sup>127</sup> *Ibid.* p 682. The latter situation, dealing with extraterritorial conspiracies is dealt with by s. 423(4) of the Criminal Code.

<sup>128</sup> (1981) F 2d 90.



category. It was held "... under the protective principle of international law, which requires only a potentially adverse effect on security or governmental functions- here, to control immigration- to support jurisdiction".<sup>129</sup> Clearly all these prescriptions protect a governmental interest directly threatened: the control of a State's borders.

In a somewhat similar vein to immigration offences are those relating to the traffic in proscribed substances. In *United States v. Noriega*<sup>130</sup> reference was made to the objective arm of the territorial category. The Court stated:

"Noriega's activities, if true, undoubtedly produced effects within this country as deleterious as the hypothetical bullet fired across the border... While the ability of the United States to reach and proscribe extraterritorial conduct having effects in this country does not depend on the amount of or magnitude of the consequences, the importation of over 2,000 pounds of cocaine clearly has a harmful impact and merits jurisdiction".<sup>131</sup>

It was further held that "... international law principles have expanded to permit jurisdiction upon a mere showing of *intent* to produce effects in this country, without requiring proof of an overt act or effect within the United States".<sup>132</sup> In *US v. Egan*<sup>133</sup> the protective category was explicitly referred to justify the application of a drug trafficking prescription, the Court stating:

"The unlawful importation of drugs bypasses the federal customs laws, and thus directly challenges a governmental function... [I]n addition, it has been suggested that, in view of the size of the drug problem in the United States and the dimension of the unlawful importation of controlled substances, such unlawful importation represents a threat to the security of the United States".<sup>134</sup>

Here the interests affected by the traffic in proscribed substances are seen to be immediate and public yet the crimes are committed not with the direct intention of affecting State interests.

The second approach of the conjunctive component elicits authority making multiplicitous reference to the jurisdictional categories. If States employ the territorial linkage merely as one of a number of justifying connectives, then it is not the territorial connection *per se* that is central, rather the underlying interest protected. Jurisdiction as a right within international law is triggered by, *inter alia*, a connection to territory. It is a pre-eminent connective, yet remains only one of five. It is employed in conjunction with the other connectives in all of the prescriptive sub-groupings outlined above. In *US v. Felix- Gutierrez*<sup>135</sup> a prosecution of a case of kidnapping and murder of a Drug Enforcement Agent the Court held "Here, three of the international law principles permitting extraterritorial jurisdiction have application: (i) territorial, (ii) protective, and (iii) passive personality".<sup>136</sup> Significantly the Court held later "We need not decide whether any one of these facts or principles, standing alone, would be sufficient. Rather we hold that cumulatively applied they require the conclusion that giving extraterritorial effect... to the statute in Felix's case does not violate international law principles".<sup>137</sup> In *US v. Layton*, concerning the murder of a Congressman in Guyana, it was

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<sup>129</sup> Ibid. at p 92. See also *Rocha v. United States*, (1961) F 2d 545.

<sup>130</sup> Supra note 50. See also *Rivard v. US*, (1967) 375 F 2d 882.

<sup>131</sup> Supra note 50 at p 1514. Whilst the territorial category was employed in the justification of the charges relating to the traffic in proscribed substances the protective category was implicitly used in regard the application of anti- racketeering offences. See Chapter Five.

<sup>132</sup> Supra note 50 at p 1513, italics are those of the Court.

<sup>133</sup> (1980) 501 F Supp 1252.

<sup>134</sup> Ibid. at p 1258. The passage refers to Meyer, E.T., *Drug Smuggling and the Protective Principle: A Journey into Uncharted Waters*, (1979) 39 LaLR 1189. See Chapter 5.

<sup>135</sup> Supra note 110.

<sup>136</sup> Ibid. at p 1205.

<sup>137</sup> Ibid. at p 1206.

held that jurisdiction “can be located in at least four... principles- protective, territorial, passive personality and nationality jurisdiction”.<sup>138</sup>

A similar multiplicitous approach is taken in regard to drug trafficking. In *US v. Smith*<sup>139</sup> the appellant, a United States citizen, and others, questioned the jurisdiction of the United States. They were found transferring marihuana from a flagless vessel to a United States registered vessel approximately one hundred miles off the Massachusetts coast. The conviction was affirmed, with the Court stating “Although to some extent all of the above [six principles] are applicable in some degree to the present circumstances, the objective territorial principle is most in point”.<sup>140</sup> The statement is illuminatively footnoted with “These principles are not mutually exclusive but may in fact overlap”.<sup>141</sup> In *Chua Han Mow v US*<sup>142</sup> Chua was convicted of conspiracy to import, and distribution, of heroin, all his acts occurring in Malaysia. The Court held as to the distribution “... Chua intended to create a detrimental effect in the United States and committed acts which resulted in such an effect when the heroin unlawfully entered the country. Chua’s... prosecution is therefore justified under the ‘objective’ territorial principle” and further, “We are persuaded that the protective principle also justifies Chua’s prosecution”.<sup>143</sup> The Court later concluded that both the objective arm and the protective category were “equally applicable to the conspiracy count”.<sup>144</sup> In *DPP v. Doot*<sup>145</sup> the House of Lords was asked “Whether an agreement made outside the jurisdiction of the English courts to import a dangerous drug into England and carried out by importing it into England is a conspiracy that can be tried in England”. It did so in the affirmative, with Lord Wilberforce in a rare English judicial reference to international jurisdiction, stating:

“The present case involves international elements- the accused are aliens and the conspiracy was initiated abroad- but there can be no question here of any breach of the rules of international law if they are prosecuted in this country. Under the objective territorial principle... or the principle of universality... or both, the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law”.<sup>146</sup>

Theft/ deception prescriptions are often justified with reference to more than one jurisdictional category. The Credit Card Case<sup>147</sup>, mentioned above, is one such instance. There both the active personality and territorial categories were employed. An interesting American example is *US v. Columba- Colella*.<sup>148</sup> It is noteworthy not only because of a multiplicitous reference to jurisdictional categories but because, after such reference, the Court demurred the assumption. In this case a conviction for receiving a stolen vehicle was quashed. The appellant had, in Mexico, agreed to sell on a car which he knew had been stolen in Texas. The Court held that there was no basis for jurisdiction upon the facts. It firstly looked to the active personality category stating that “Had the defendant been a United States citizen, there would have been no problem, for a country may supervise and regulate the acts of its citizens both within and without its territory”.<sup>149</sup> Then it looked to the objective territorial and protective categories,

<sup>138</sup> (1981) 509 F Supp 212 at p 216. See Chapter Five.

<sup>139</sup> (1982) 680 F 2d 255.

<sup>140</sup> *Ibid.* at p 258. The six “principles” were the territorial, national, protective, universal, passive personality and objective territorial.

<sup>141</sup> *Ibid.*, citing (1976) *US v. King*, 552 F 2d 833.

<sup>142</sup> (1984) 730 F 2d 1308.

<sup>143</sup> *Ibid.* at p 1312.

<sup>144</sup> *Ibid.*

<sup>145</sup> [1973] AC 807.

<sup>146</sup> *Ibid.* at p 817. It will be averred in Chapter Four that the trade in proscribed substances does not come within the ambit of universal category.

<sup>147</sup> *Supra* note 114.

<sup>148</sup> (1979) 604 F Supp 356.

<sup>149</sup> *Ibid.* at p 358.

holding that neither applied as there were not either objective effects within the United States nor a threat to its security or the interference with a governmental function. This case clearly involved the right of the individual in the property of his car, and indeed, as the Court says the possibility of there being "... an open season on motor vehicles in American border towns..."<sup>150</sup>, these interests were implicitly deemed not sufficient to found jurisdiction.

The territorial category provides strong and perhaps surprising support for the conjunctive component of this thesis. Indeed, it is the less orthodox and established categories that naturally provide the strongest support for it. That the most fundamental of categories provides any evidence of the unitary nature of jurisdiction at all itself is very significant. It is a reflection of the evolving nature of international crime and the resultant attempts to proscribe it. In regard to the latter, the jurisdictional difficulties inherent in the application of inchoate and participatory crimes have been at the forefront of jurisdictional developments. Many of the principal precedents are cases of attempt or conspiracy. The difficulties in ascribing a territorial effect to extraterritorial conspiracies or attempts are as manifest as the desire States have in proscribing them. Instantaneous communications and mass travel have exacerbated the problem. An outstanding modern precedent illustrating the effect of inchoate crimes as well as judicial recognition of the modern internationality of crime is the Canadian case of *Libman v The Queen*.<sup>151</sup> Libman had been charged with fraud and conspiracy to commit fraud. He had been behind a scheme whereby telephonists in Canada fraudulently induced individuals in the United States to send money to addresses in Central America, a share of the proceeds eventually making itself back to Libman. In dismissing the challenge to jurisdiction *La Forest J* for the Supreme Court of Canada stated:

"... the criminal law is undoubtedly intended for the protection of the public, it does not do so solely by the simple expedient of directly protecting the public from harm. Rather, in conformity with its major purposes, it attempts to underline the fundamental values of our society... [I]n doing so, it reinforces the law abiding sentiments in society... [I]t would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making".<sup>152</sup>

Critically, the basis for assuming jurisdiction was that a significant portion of the activities constituting that offence took place in Canada, in particular, that there was a real and substantial link between the offence and Canada. *La Forest* stated "Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international comity".<sup>153</sup> This case authoritatively supports the conjunctive thesis. It advocates a unified approach to jurisdiction. Jurisdiction is contingent upon the existence of a real and substantive link between the State and the object of the assumption of jurisdiction, in this case they are that of territory and personality.

### The Territorial Category- Disjunctive Analysis

The territorial category analysed disjunctively leads to the construction of a distinct grouping of international criminal law. In essence, this analysis highlights exactly what sets the

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<sup>150</sup> Ibid. at 357.

<sup>151</sup> (1985) 21 DLR (4th) 174.

<sup>152</sup> Ibid. at p 199.

<sup>153</sup> Ibid. at p 200. There appears to have been a diminution of the criteria requisite to found jurisdiction. In 1984 what was needed in such cases was that "a material element has occurred within the territory of the forum state", Law Reform Commission of Canada, *Extraterritorial Jurisdiction, Working Paper 37*, Ministry of Supply and Services Canada, Ottawa, 1984, p 8.

prescriptions justified with reference to the category apart from all others. Here it is its defining characteristic, the denominator common to the prescriptions, that is critical. It is this defining characteristic that lies at the centre of this as indeed every grouping of substantive international criminal law. Here it is simply a connection of some sort to the territory of the State in question. This self-evident fact belies the complexity inherent in the construction a distinct body of territorial international criminal law. There are, as was seen, a variety of disparate forms which the “connections” to territory take. These range from constituent elements (i.e. those acts comprising the offence), to any act occurring in the commission of the offence, to an intent to commit an offence within a State. By isolating and defining these various connections between the territory of a State and the object of the assumption of jurisdiction a distinct grouping of international criminal law will be identified. Together with the prescriptions justified in relation to the other four categories what is resultant is a complete, taxonomically structured, exposition of the corpus of substantive international criminal law.

The most orthodox and historical connection to territory, and the one most consonant with a literal construction of the category, is that where a constituent element of the offence occurs within the territory of the jurisdiction assuming State. What it generally denoted here is that an element of the offence required to be proven occur within the State to substantiate its taking of cognisance. This is a relatively restricted approach to territorial jurisdiction where States assume jurisdiction only where an element of the *actus reus* occurs within its territory.<sup>154</sup> In 1931 this approach was described as one where States “... predicated jurisdiction upon some one act not amounting to a crime in itself but which, taken together with other acts committed outside the territory, does amount to a crime by the law of the state where the single act... was committed”.<sup>155</sup> This “constituent element” approach suffers in that often the result or effect of a crime is not a part of the *actus reus*. This in turn can lead to elaborate prescriptive differentiations, something not altogether satisfactorily done in English law in the form of the result-conduct crime distinction.<sup>156</sup> It is evident that this relatively restricted approach finds little favour today, being the victim of both the expansion in frequency and potency of international criminality and the particular problems caused by inchoate crimes. This approach is however that most in accord with a literal and perhaps logical application of territorial category. It is here predominately useful to note that at the historical core of the grouping of territorial international criminal law is a tangible, physical, connection within a State’s territory in the form of a constituent element of the offence.

It is a tangible connection to territory less particular in its requirements that is more commonly, implicitly or explicitly, adopted by States today. This type of approach is consonant with a general ubiquitous approach to territorial jurisdiction. Here what is required to found jurisdiction is any actual occurrence (or omission) within the territory of the jurisdiction assuming State. A modern example, proffered above, is found in the New Zealand Crimes Act 1961. It will be recalled that section 7 *inter alia* states:

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<sup>154</sup> This is the approach that appears to be taken by the UK Criminal Justice Act 1993 discussed above, a “relevant event” being any act or omission or other event of which proof is required for conviction of the offence.

<sup>155</sup> Berge, W, Criminal Jurisdiction and the Territorial Principle, (1931- 32) Mich LR 238 at p 240.

<sup>156</sup> See Hirst, *supra* note 54, and Gilbert, G., *supra* note 27. English law has generally required that any constituent element of the offence occur in England, and, in regard to result crimes, that the essential element of the offence, took place in England, see Lew, J., The Extra-Territorial Jurisdiction of the English Courts, [1978] ICLQ 168 at p 171. Additional to this distinction there has been a dispute over whether the English courts operate upon a terminatory or initiatory theory, with Williams arguing that the former was consonant with judicial practice, in Williams, G., Venue and Ambit of the Criminal Law, (1965) 81 LQR 276 As was seen above both statutory and common law developments have rendered much of these debates otiose.

“For the purposes of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event”.

As was seen Italian law contains a similar provision, with Article 6 stating “... An offence shall be deemed to have been committed in the territory of the State when the act or omission that constitutes it occurred therein in whole or in part, or when the effects produced by the act or omission took place therein”.<sup>157</sup> This wider less technically demanding approach is also applied in Canada, where all that is necessary to found jurisdiction is that “... a significant portion of the activities constituting the offence took place in Canada... it is sufficient that there be a real and substantial link between an offence and this country”.<sup>158</sup> In England this approach is implicitly taken today, the position being described as one where “... the English courts have decisively begun to move away from definitional obsessions and technical formulations... [R]ather, they now appear to seek... to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England...”.<sup>159</sup> Although these approaches take a less rigorous stance towards the nature of the territorial connection required they all demand an occurrence of some variety to occur within the territory of the jurisdiction assuming State.

A final approach to the requisite connection between a State and offender/ crime that can be identified requires no actual or tangible occurrence upon a State’s territory. This in large measure is the result of the desire to assume jurisdiction over international inchoate and participatory crimes. It has, as was seen, led to the creation of what is termed in certain American cases the “intent doctrine”. In *US v. Noriega* it was held:

“In the drug smuggling context, the ‘intent doctrine’ has resulted in jurisdiction over persons who attempted to import narcotics into the United States but never actually succeeded in entering the United States or delivering the drugs within its borders. The fact that no act was committed and no repercussions were felt within the United States did not preclude jurisdiction over conduct that was clearly directed at the United States”.<sup>160</sup>

This approach is in effect mirrored in *Liangsiriprasert v. United States* and another<sup>161</sup> where an intended result was held sufficient to found jurisdiction in English law. It was stated:

“But why should an overt act be necessary to found jurisdiction?... The only purpose of looking for an overt act in England in the case of a conspiracy entered abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing... it defeats the preventative purpose of the crime of conspiracy to have to wait until some overt act is performed in pursuance of the conspiracy”.<sup>162</sup>

This goes to the crux of the issue. Inchoate crimes exist precisely to arrest commission of the substantive offence. Where they occur outwith a State’s territory a conflict arises between an application of a version of the territorial category mandating an actual, tangible, territorial linkage, and a version requiring a lesser connection, in the form of an intent. It is clear in regard to inchoate crimes the latter approach has prevailed. From the point of view of the construction of a distinct grouping of international criminal law founded upon a territorial connection this conditional dilution causes difficulties, the distinction between a territorial international crime

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<sup>157</sup> *Questionnaires and Replies*, supra note 1 at p 9.

<sup>158</sup> *Libman v. The Queen*, supra note 151 at p 200

<sup>159</sup> *Ibid.* at p 189, per La Forest J. An exception being inchoate crimes, see below.

<sup>160</sup> *US v. Noriega*, supra note 50 at p 1513.

<sup>161</sup> Supra note 13.

<sup>162</sup> *Ibid.* at 878.

and an wholly extraterritorial international crime hinging upon a state of mind. Critically however there is still a connection to territory, however abstract and intangible. It is this, in whatever guise, that defines the territorial grouping of international criminal law.

The defining characteristic of the territorial grouping of international criminal law is a connection to territory. This ranges from a constituent element of an offence to an intention to commit it within that State. It is necessary to take this disjunctive analysis further by relating the common denominator of the grouping to the sub- groupings identified above; homicide/ violence, fraud/ deception, direct State interests and drug trafficking. As was demonstrated above it is possible to categorise territorial international prescriptions as existing within these broad sub- groupings. Clearly they protect both immediately public and immediately private interests.<sup>163</sup> They contain prescriptions protecting persons, property, and the State. Of the other groupings only the active personality serves such a wide range of interests. Even the identification and categorisation of these sub- groupings of territorial international criminal law does not lead to a full adumbration of the grouping. The vast number of these prescriptions, and the elastic and ad hoc composition of the grouping renders this impossible. Undoubtedly there exist prescriptions which up to this point have existed solely in the realm of municipal law and will, when the facts demand, be applied internationally. At that stage the prescription will enter substantive international criminal law. The difficulty is further exacerbated both by States enacting general territorial provisions that apply internationally and by the precise spatial application of many prescriptions often being decided on a case-by-case basis by the judiciary. In the latter putatively wholly territorial provisions are applied extraterritorially and thus come within the territorial category of international criminal law. Clearly the composition of the territorial grouping is elastic, unsettled and transitory. Prescriptions may exist within or without on a case- by- case or State- by- State basis. This does not affect the disjunctive component of my thesis nor its usefulness. An illustration of the importance of classifying international prescriptions as territorial or otherwise came to the fore in recent Canadian extradition proceedings. Here an extradition request by Romania of seven Taiwanese nationals was refused because, in effect, Romania was not applying a territorial international prescription.<sup>164</sup> Had the prescription that Romania been applying been capable of being construed as existing within the territorial grouping then extradition may have been granted. In addition to the law of extradition providing evidence of the usefulness of this component of my thesis is the resultant clarity and concision of thought. It is necessary and central in the development of a coherent and visible system of international criminal law.<sup>165</sup>

#### Territorial Category- Conclusion

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<sup>163</sup> Amongst the States in the Southern African Development Community the territorial grouping of prescriptions are most widely applied to theft and drug trafficking, affecting *prima facie* private and mixed public/ private interests respectively, see Ntanda Nsereko, D.D., When Crime Crosses Borders, A Southern African Perspective, (1997) 41 JAL 192.

<sup>164</sup> *Romania (State) v. Cheng*, (1997) 114 CCC 3d 289. It was applying a passive personality prescription. For a discussion of the case see McConnel, M., "Forward This Cargo to Taiwan": Canadian Extradition Law and Practice Relating to Crime on the High Seas, (1997) 8 CLF 335.

<sup>165</sup> It also is significant in possible conflicts of criminal jurisdiction.

Territory is the lifeblood of statehood. It is not at all surprising that criminal activities upon, affecting, or intended to affect, the territory of States are actively proscribed. There thus exists a multitude of crimes extant within the grouping of substantive international criminal law entitled territorial. Not only are they prevalent they are distinct, their defining characteristic being an attachment to territory of some definitive nature. Jurisdictionally, the territorial category lends significant yet ironic support to the conjunctive element of this thesis.

## Chapter Three- The Active Personality Category

### Introduction

Reference to the active personality or nationality<sup>1</sup> category of jurisdiction justifies the assumption of jurisdiction by States over the putative offences of individuals existing in certain close relations with that State wherever they may have been committed. It is widely recognised as one of the two fundamental jurisdictional linkages, along with that of territory, between a State and an alleged offender.<sup>2</sup> In spite of its unassailable position it provides strong support for the conjunctive as well as disjunctive components of this thesis. Resultant from this analysis will be support for jurisdiction being triggered by a single operative factor (a genuine and real connective between the individual and the State), and the identification and characterisation of a further grouping of substantive international criminal law. In regard to the former it will be demonstrated that at its most fundamental level it is similar to the other orthodox categories in that it is a genuine and real connective that both impels and justifies the application of extraterritorial criminal jurisdiction. With reference to the latter, this examination will lead to analysis and categorisation of the prescriptions exercised with reference to the active personality category as a distinct grouping of international criminal law. Affecting this category fundamentally is the general duality of approach towards it; with expansive usage or potential usage of it by States whose legal systems are not from the common law tradition, and the limited, even exceptional use of it by States from that background. The general non- crime specific approach to the active personality category in turn brings to the fore certain issues. It is clear, like territory, that the active personality category is inextricably linked with State sovereignty. Further, it is informed and affected by, and influences, a multitude of various factors including the law of extradition, public policy and morality considerations, the collective efforts against certain acts of international concern and national chauvinism.

### The Active Personality Category- Existence

Support for the existence of the active personality category is found in all the sources of international law. Conventionally, the active personality category finds widespread support and usage. Indeed, not only is such reference widespread it is also occasionally mandatory. An example is Article 3 of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents 1973<sup>3</sup> which *inter alia* states "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases... (b) when the offender is a national of that State...". Other conventional instances of reference to the category include those in relation to the traffic in prescribed drugs<sup>4</sup>, hostage taking<sup>5</sup>, nuclear material offences<sup>6</sup> and certain maritime offences<sup>7</sup>. These and other conventional instances of the application of the active personality category are significant for several reasons. Firstly they necessarily evince a

<sup>1</sup> It is incorrect to title the category "nationality". As will be seen, the category justifies the assumption of jurisdiction over non- nationals.

<sup>2</sup> Blakesley states that the nationality category of jurisdiction is the "second most important" of the five "theories of jurisdiction" he identifies, in Blakesley, C.L., A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes, [1984] ULR 685, at p 706.

<sup>3</sup> (1980) UKTS 3, Cmnd. 7765.

<sup>4</sup> Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, (1989) Misc 14 Cm., 804, Article 4 (1)(b)(i).

<sup>5</sup> International Convention Against the Taking of Hostages 1979, (1983) UKTS 81, Cmnd. 9100, Article 5(1)(b).

<sup>6</sup> Convention on the Protection of Nuclear Material 1980, (1979) 18 ILM 1422, Article 8(1)(b).

<sup>7</sup> International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, (1988) 27 ILM 672, Article 6(1)(c).



widespread acceptance of the active personality category, as the conventions containing such provisions are generally widely subscribed to, and additionally subscribed to by States of the various municipal legal traditions. Further, the relevant provisions are not- uncommonly mandatory, not merely permissive. Finally, they shed important light on the nature of some of the prescriptions within the active personality grouping of international criminal law.

The general dearth of international jurisdictional precedents results in only a relatively limited amount of support for the active personality category coming from this source of law. An interesting early example is found in the Award of the Tribunal of Arbitration following the Treaty of 29 February 1892 between the United States and the United Kingdom.<sup>8</sup> It *inter alia* provided that the United States and Great Britain “shall forbid their citizens and subjects respectively to kill, capture or pursue... the fur seals on the high sea in the part of the Pacific Ocean inclusive of the Bering Sea...”<sup>9</sup> A further interesting international judicial precedent, although not a case of disputed criminal jurisdiction yet relevant for its comments upon nationality, is the *Nottebohm Case*.<sup>10</sup> The issue here was the extension of diplomatic protection to Nottebohm by Liechtenstein. It was held by the International Court of Justice that:

“... nationality has its most immediate, its most far reaching and, for most people, its only effect within the legal system of the State conferring it. Nationality above all serves to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State”.<sup>11</sup>

Clearly “obligations... imposed” upon nationals may take the form of criminal prescriptions. A final instance to be noted, where the active personality category was referred to in a case of disputed international jurisdiction, is the Report on Extraterritorial Crime and the Cutting Case.<sup>12</sup> Here in an adumbration of the theories of criminal jurisdiction was mentioned the non-territorial theory of “personal, over citizens: a. generally; b. in particular places, e.g., barbarous lands; c. as to particular acts”.<sup>13</sup>

Municipal legislation provides abundant and unequivocal evidence in support of the existence of the active personality category. It takes two types; crime specific and non- crime specific. It can generally be stated that it is States with a common law background that take the former approach (if at all) and States from a non- common law background that take the later. An example of the latter includes the following provision of the Danish Penal Code:

“1. Under Danish criminal jurisdiction shall also come acts committed outside the territory of the Danish State by a Danish national or a person resident in the Danish State,

(1) where the act was committed outside the territory recognised by international law as belonging to any State, provided acts of the kind in question are punishable with a sentence more than simple detention, or,

(2) where the act was committed within the territory of a foreign State provided it is also punishable under the law in force in that territory”.<sup>14</sup>

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<sup>8</sup> It is appended to the UK Bering Sea Award Act 1894.

<sup>9</sup> Article 2.

<sup>10</sup> *Liechtenstein v. Guatemala*, (Second Phase), (1955) 22 ILR 349.

<sup>11</sup> *Ibid.* at p 357.

<sup>12</sup> Moore, J.B., (1887) *Foreign Relations of the United States* 751. The Report was written upon request from the US Department of State.

<sup>13</sup> *Ibid.* at p 770.

<sup>14</sup> Section 7, European Committee on Crime Problems, Select Committee of Experts on Extraterritorial Jurisdiction, Questionnaires and Replies, Doc PC-R-EJ(86) Bil, 4 Oct. 1990, Strasbourg, at p 6. Hereinafter Questionnaires and Replies.

The former type of reference to the category includes the treason prescription in the Canadian Criminal Code, it states:

- “(1) Every one commits high treason who, in Canada,
- (a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
  - (b) levies war against Canada or does any act preparatory thereto; or
  - (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are.
- (2) Every one commits treason who, in Canada,
- (a) uses force or violence for the purpose of overthrowing the government of Canada or a province;
  - (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;
  - (c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a);
  - (d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or
  - (e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.
- (3) Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada.
- (a) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or
  - (b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2)”.<sup>15</sup>

Amongst the large body of municipal judicial authority providing support for the existence of the category is the relatively recent case decided in the Third Circuit of the United States Court of Appeals, *US v. Harvey*.<sup>16</sup> Among the issues in this case was the extraterritorial application of the American Protection of Children from Sexual Exploitation Act as amended.<sup>17</sup> It was alleged that Harvey, an American citizen, had contravened the Act in the Philippines. It was held as to its range of application that “... international law permits criminal jurisdiction based on ‘nationality- as applied to nationals, wherever located’... [W]e hold extraterritorial application of the Act in this case does not violate international law... Harvey, a US citizen, brought illegal materials into this country. No tenet of intentional law prohibits Congress from punishing the wrongful conduct of its citizens, even if some of that conduct occurs abroad”.<sup>18</sup> In stark contrast to this relatively novel reference to the active personality category is the South African case of *R v. Holm and Pienaar*.<sup>19</sup> In this case of treason the South African Supreme Court *inter alia* stated “... so far as high treason is committed by a subject is concerned, there exists no international custom or comity which debars a state from trying and punishing the offender no matter where the offence has been committed”.<sup>20</sup> In the Israeli case of *Weiss v. Inspector General of the Police* it was *inter alia* stated in regard to the category that “From a

<sup>15</sup> Criminal Code of Canada, Revised Statutes of Canada 1985 as amended, s. 46, c. C-46.

<sup>16</sup> (1993) 2 F. 3d 1318.

<sup>17</sup> (1988) 18 USC § 2251- 57.

<sup>18</sup> Supra note 16 p 1328-29.

<sup>19</sup> (1948) 13 CILC 462.

<sup>20</sup> Ibid. at p 468.

purely historical point of view, the concept of personality preceded the concept of territoriality in criminal law, being derived from feudal concepts of allegiance between the King and his subjects, and... it continues to operate even today as regards certain offences..."<sup>21</sup> The court further stated "... the law of nations permits every State to apply its jurisdiction against its own citizens even when they are situate outside its boundaries".<sup>22</sup>

Amongst the most lucid and authoritative juristic statements in support of the existence of the category is Article 5 of the Harvard Research Draft Convention on Jurisdiction with Respect to Crime, it states:

- "A State has jurisdiction with respect to any crime committed outside its territory,
- (a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or
  - (b) By a corporation or other juristic person which had the national character of that State when the crime was committed".<sup>23</sup>

Over fifty years subsequent the American Law Institute's Restatement of the Law (Third), Section 402 *inter alia* stated "Subject to § 403 [a reasonableness limitation], a state has jurisdiction to prescribe law with respect to (2) the activities, interests, status, or relations of its nationals outside as well as within its territory..."<sup>24</sup> Halsbury's Laws of England provides that "A state has jurisdiction with respect to any crime committed outside its territory by a person who is its national at the time the offence was committed or when he is prosecuted and punished".<sup>25</sup> It should be noted that the value of these supporting pronouncements is enhanced by them emanating from States historically and firmly wedded to the primacy of the territorial category.

#### The Active Personality Category- Application

Reference to the active personality category takes two forms. Firstly there is a general non-crime specific approach. Here it is referred to purely with regard to the relationship between the individual and the State, without explicit or dependent reference to the crime itself in the assuming State's law. This is the approach generally taken by non- common law States.<sup>26</sup> The second approach is most commonly taken by States in the common law tradition and is a crime specific, exceptional approach. This dichotomy of State practice has consequences of a general and particular nature. Generally it results in there not being one definite and discrete grouping of international criminal prescriptions applied in relation to the category. In this respect it is akin to that of the territorial category. This lack of specificity is in part the result of even more fundamental considerations than those identified as providing the impetus for particular

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<sup>21</sup> (1958) 26 ILR 219 at p 225.

<sup>22</sup> Ibid.

<sup>23</sup> The Harvard Research Draft Convention on Jurisdiction with Respect to Crime, (1935) 29 AJIL (Supp) 439 at 440. Hereinafter the Harvard Draft Convention. The Commentary to Article 5 *inter alia* states "The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded." at p 519.

<sup>24</sup> American Law Institute, *Restatement of the Law; The Foreign Relations Law of the United States, (Third)*, American Law Institute Publishers, St. Paul Minn., 1987, at p 237-8.

<sup>25</sup> *Halsbury's Laws of England*, Fourth Edition, Volume 18, para. 1527 at p 782.

<sup>26</sup> It should be noted that whilst the preponderance of authority cited emanates from western legal systems (to large measure due to the state of development of the law in such States and wide- spread travel of persons to and from them), States outside the western legal traditions affect jurisdiction equally through their practice and by becoming parties to germane international conventions. In regard to the former, the then Soviet Union took a general approach to the category with Soviet citizens being subjected to Soviet criminal law regardless of the *loci delicti*, Bassiouni. M.C., and Savitsky, V.M., *The Criminal Justice System of the USSR*, (1979), cited in Blakesley, *supra* note 2 at p 710 note 68.

reference to the category. They revolve around the nature of the relationship between a State and its citizens, residents and others, which in turn concern notions of allegiance, national chauvinism and extradition. It is important to keep in mind not only the dichotomy *per se* but also the reasons for such practice. It is not implied that non- crime specific practice is irrelevant or of a lesser importance. As will be seen reference by non- common law States to the category is *inter alia* illustrative of the role played by the underlying considerations mentioned above. On a more practical level however, it must be conceded that an exposition of reference to the category by States in the Anglo- American legal tradition provides greater concrete and particular support for this thesis. The exceptional and specific application being necessarily reflective of certain specified concerns and interests leading to an elicitation of both commonality and dissimilarity amongst the categories.

### Common Law States

Common law States, as stated above, refer to the active personality category only exceptionally.<sup>27</sup> The position in the United Kingdom being typical, namely that “It is, no doubt, true that the general rule is that offences committed by British subjects out of England are not punishable by the criminal law of this country”.<sup>28</sup> This noted there have been and still are long-standing exceptions to this rule. In the late nineteenth century for example it was held that “All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever”.<sup>29</sup> In spite of the historical standing of practice recourse to the category by common law States is still in two senses exceptional. It is an approach apart from the traditional emphasis upon territory and it is applied on a crime- specific basis. For each prescription applied with reference to the category an explicit exception to the general rule of the territoriality of that State’s criminal law must be made.<sup>30</sup> As such the prescriptions highlighted below are more significant and illuminating than general active personality provisions cited from non- common law States.

The sub- grouping of prescriptions protecting the interests affected by crimes of homicide/ violence have been long justified with reference to the active personality category. The UK Offences Against the Person Act 1861 *inter alia* refers to the category in regard to the crimes of murder and manslaughter. Section 9 states:

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

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<sup>27</sup> State practice is not constant, approaches adapt and evolve. As will be seen, recourse to the category by common law States has significantly increased in recent times. The Israeli move away from a system relying upon the territorial category to one employing the active personality to a greater extent is discussed in Shachor-Landau, C., Extra-territorial Penal Jurisdiction and Extradition, (1980) 29 ICLQ 274.

<sup>28</sup> *R v. Page*, [1953] 2 All ER 1355 at 1356 per Lord Goddard CJ.

<sup>29</sup> *Macleod v. A-G for New South Wales* [1891] AC 455 at p 458-59 per Lord Halsbury, LC.

<sup>30</sup> Whilst it is of course possible for the number and extent of the exceptions to a general rule to render that rule otiose that point has not yet been reached. In English law recourse to the category while exceptional is not extraordinary.

Of note in this reference to the category is that it is not “nationality” *per se* that provides the linkage between the alleged offender and the UK but rather the status of “subjects of Her Majesty”. Such a class of individual being wider than nationals.<sup>31</sup> A relatively recent example of this provision being referred to is *R v. Page*.<sup>32</sup> This was an appeal against a court-martial conviction for murder in regard to the killing of an Egyptian national in Egypt. As a court-martial the issue was not directly concerned with the application of s. 9 (the proceedings took place outwith England). It was stated *obiter* however that if in fact the proceedings had taken place within England then s. 9 would be applicable, as indeed the counsel for the appellant conceded.<sup>33</sup> It was held that the nationality of the victim was not material to the case, it was solely the nature of the alleged perpetrator’s relation to England, *i.e.* him being a subject, that was significant in founding the jurisdiction of the English courts.<sup>34</sup>

Central to the origins of the active personality category are prescriptions within the sub-grouping entitled direct State interests, in particular those relating to the crime of treason. It sits along side piracy as a crime with the greatest extraterritorial pedigree. Affecting the State directly and immediately it is properly included within this sub-grouping. In England it is the Treason Act 1351 as amended that provides the basis for the jurisdiction of the English courts over treason. It *inter alia* provides “... when a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen... or be adherent to the King’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere... that ought to be judged treason”. In itself this provision appears to provide for unlimited jurisdiction in that it is limited neither territorially or personally,<sup>35</sup> it therefore being implicitly limited. In England and elsewhere “Treason is committed by a person owing allegiance...”.<sup>36</sup> Nationals are undoubtedly within this category, as are others. It is upon allegiance that the crime centres, and only persons (including by definition nationals) owing allegiance to the Crown can commit acts of treason. In *Joyce v. DPP*<sup>37</sup> it was held that “if an alien is under British protection he occupies the same position

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<sup>31</sup> In *R v. Bernard*, (1858) 8 STR 887, it was apparently held that an alien resident in the United Kingdom was “subject” within the meaning of this statute for acts committed within it, but not, it seems, for acts committed without. This case involved the application of the forerunner to s. 9 of the 1861 Act, namely 9 Geo. 4, c. 31, s. 7. In terms of international law the assumption of jurisdiction was with reference to the territorial category.

<sup>32</sup> *Supra* note 28. An interesting example of the application of the previous manifestation of s. 9 of the 1861 Act is found in the case of *R v. Azzopardi* (1843) 1 Cox CC 28, where a native of Malta, a British subject, was convicted of murdering a Dutch woman in the then Smyrna, now Izmir, in Turkey.

<sup>33</sup> *Ibid.* at p 1355. Recently the provision has been applied to Mohan Singh Kular. He was convicted for the murder of his wife in the Punjab, see *The Times*, 4 November 1997.

<sup>34</sup> This case highlights the application of extraterritorial jurisdiction over members of armed forces, which is a particular extension of the category. Indeed to the extent that the category is predicated upon allegiance as opposed to nationality the case may even be greater for the application of a State’s laws extraterritorially to members of the armed forces than civilians. The assumption of jurisdiction in such circumstances is often mirrored with a demurral of the assumption of jurisdiction by the territorial State. In Canada, amongst the exemptions to the general rule that everyone in Canada is subject to the laws of the country and jurisdiction of the courts are, “... exemptions grounded on reason and recognized by civilised countries as being rules of international law...” including an “exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces...”, In the Matter of a Reference as to whether Members of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts, [1943] SCR 483 at pp 485 and 501 per Kerwin J.

<sup>35</sup> To come within the category it must be conditional upon a personal connection.

<sup>36</sup> *Halsbury’s Laws of England*, Fourth Edition, Vol 11(1), para 634, p 472.

<sup>37</sup> [1946] AC 347. For a discussion of the case see Lauterpacht, H., Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens, (1945-47) 9 CLJ 330.

when abroad as he would occupy if he were a British subject".<sup>38</sup> From this it is clear, according to Lord Porter at least, that allegiance is owed, and thus an amenability to a charge of treason exists, as a corollary of "British protection" not merely British citizenship.<sup>39</sup> Of course the question is then how does one come to be afforded British protection. An answer is by residing within Britain (thus introducing resident aliens into the equation). Indeed H. Lauterpacht writes:

"The rule of English law in the matter of obligations of allegiance owed by the alien residing within the realm is clear and fully in conformity with the existing international practice on the matter. An alien owes allegiance to and is subject to the law of the country, including the law of treason, in respect of acts committed within the territory which he resides".<sup>40</sup>

Of course this statement turns upon the construction of "residing" or "residence". In *Joyce* that the accused was not resident within the UK was met by the Court relying upon the notion of allegiance following from protection, which was in turn consequent to his carrying a British passport. In the UK therefore not only are UK nationals and alien residents capable of committing treason so too are all persons afforded British protection. The United States and Canada additionally define treason with reference to allegiance not nationality. In regard to the former it has been stated "Treason is a breach of allegiance; and can be committed only by one who owes allegiance, perpetual or temporary".<sup>41</sup> In Canada it is also clear that the crime of treason is capable of being committed by persons owing allegiance to Canada who need not be Canadian citizens.<sup>42</sup> It is clear, then, that treason is concerned with the protection of interests fundamentally and directly hostile to the existence and safety of the State as such and is a crime that centres upon the concept of allegiance, which is or can be owed by nationals, resident aliens and others deemed to owe allegiance to that State by virtue of their being given protection by it.

Alongside treason are a number of treason-like offences existing within the sub- grouping direct State interests. English examples include certain offences against the Official Secrets Act 1989<sup>43</sup>, the Foreign Enlistment Act 1870<sup>44</sup>, the Unlawful Oaths Acts 1797- 1812 and the Explosive Substances Act 1883.<sup>45</sup> By way of illustration s. 5 of the Foreign Enlistment Act 1870 *inter alia* states "if any person without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any

<sup>38</sup> Ibid. at p 375 per Lord Porter (dissenting ).

<sup>39</sup> See below. It is interesting to note that this allegiance/ protection justification is in large measure analogous to that proffered by non- common law States for the general active personality reference. Further examples of the extraterritorial application of treason in English law include *R v. Casement* [1917] 1 KB 98, and *R v. Lynch* [1903] 1 KB 444.

<sup>40</sup> Supra note 37 at p 333.

<sup>41</sup> *US v. Wiltberger*, (1820) 5 L. Ed 37 at p 43 per Marshall CJ. In *Kawakita v. US*, (1952) 96 L. Ed 1249, it was stated "We... reject the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them" at p 1262- 1263, treason thus applying to nationals resident abroad.

<sup>42</sup> As was stated, the relevant provision refers explicitly to Canadian citizens and persons who owe "allegiance to Her Majesty in right of Canada", see above p 54.

<sup>43</sup> Section 15 (1) of the Official Secrets Act 1989 states "Any act- (a) done by a British citizen or Crown servant; or (b) done by any person in any of the Channel Islands or the Isle of Man or any colony, shall, if it would be an offence by that person under any provision of this Act... [with limited exceptions]... when done in the United Kingdom, be an offence under that provision". This provision is illuminative as it is an instance where employees of the State are included with those to whom the category relates.

<sup>44</sup> For an example of the extraterritorial application of the Act see *R v. Jameson* [1896] 2 QB 431.

<sup>45</sup> Section 2 as amended *inter alia* states "A person who in the United Kingdom or (being a citizen of the United Kingdom and Colonies) in the Republic of Ireland unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or cause serious injury to property... shall be guilty of an offence..."

commission... he shall be guilty of an offence...".<sup>46</sup> A final UK example to be noted within this sub- grouping is the Representation of the People Act 1983. It *inter alia* provides that offences under the Act committed by Commonwealth citizens and citizens of the Republic of Ireland outside the United Kingdom in regard to proceedings within the United Kingdom, may be deemed to have been committed within the United Kingdom.<sup>47</sup> The inclusion of both Commonwealth and Irish nationals within the ambit of this provision, although being a corollary of their status in regard to the United Kingdom franchise, is none the less a wide ranging application of the category. Canadian treason-like offences referring to the active personality category include offences under the Canadian Official Secrets Act<sup>48</sup> and the Foreign Enlistment Act.<sup>49</sup> An example in United States criminal law is found in the prescription concerning "influence- peddling", which provides "Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government... with intent to influence the measures or conduct of any foreign government... in relation to any disputes or controversies with the United States or to defeat the measures of the United States, shall be fined...".<sup>50</sup>

Extant also within the sub- grouping direct State interests are immigration offences. They differ from the above offences however in that it is not an affectation of a governmental interest *per se* that is intentionally threatened but rather a governmental prerogative or function that is at issue.<sup>51</sup> In spite of this it is still possible to include these offences within this sub- grouping as directly and immediately affected are public interests. In English law the relevant prescription is s. 25 of the Immigration Act 1971. It *inter alia* provides "Any person knowingly concerned in making or carrying out arrangements for securing the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an illegal entrant shall be guilty of an offence...". The application of this is limited by s. 25(5):

"Subsection (1) above shall apply to things done outside as well as to things done inside the United Kingdom where they are done-

(a) by a British citizen, a British Dependent Territories citizen, or a British Overseas citizen;

(b) by a person who under the British Nationality Act 1981 is a British subject; or

(c) by a British protected person (within the meaning of that Act)."

While there appears to be differing categories of persons subjected to the possible exercise of this provision, and for UK law there indeed is, for the purposes of international law these

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<sup>46</sup> For a discussion of this and other examples of the extraterritorial application of English law with reference to the active personality category and otherwise, see Lew, J.D.M., The Extra-territorial Criminal Jurisdiction of English Courts, [1978] 27 ICLQ 168.

<sup>47</sup> Section 178 as substituted by the Representation of the People Act 1985, s 24, Sch 4, para 62. Interestingly s. 92 (1) of the 1983 Act, as amended, appears to employ an objective territorial reference. It provides "No person shall, with intent to influence persons to give.. their votes at a parliamentary or local election, include... any material relating to the elections in any programme service... provided from a place outside the United Kingdom otherwise [than in connection with the BBC...]".

<sup>48</sup> Revised Statutes of Canada 1985, c. O-3, ss. 13 and 14.

<sup>49</sup> Revised Statute of Canada 1985, c. F-29, ss. 3 and 16.

<sup>50</sup> 18 USC § 953.

<sup>51</sup> The motivation of the individual is most likely solely private rather than political/ public.

classes of individual are assimilated within the category.<sup>52</sup> The United States also extraterritorially applies immigration related legislation.<sup>53</sup>

A further sub- grouping of crimes justified with reference to the active personality category by common law States are those concerned with the traffic in proscribed substances. An example of explicit United States statutory reference to the active personality category is found in the following drug- offence provision:

“It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or resident alien of the United States on board any vessel, to... possess with intent to distribute, a controlled substance”.<sup>54</sup>

This provision is clearly a reference to the category, albeit limited in that it only applies to United States citizens and resident aliens upon vessels. In light of the jurisdictional regime over flag registered ships upon the high seas and elsewhere<sup>55</sup> the provision employs an active personality connection only in regard to the possession of controlled substances by nationals or resident aliens aboard foreign vessels either on the high seas or within a third State’s territorial sea or internal waters. With regard to the statute itself it unusually explicitly endorses its extraterritorial application, it reads “This section is intended to reach acts of possession committed outside the territorial jurisdiction of the United States”.<sup>56</sup>

A sub- grouping of crimes generally unique to the active personality category are prescriptions under the head morality/ public policy. The historical example of a crime of this type is bigamy. In English law the crime is proscribed by s. 57 of the Offences Against the Person Act 1861, it *inter alia* states:

“Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony... Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England or Ireland by any other than a subject of Her Majesty...”.

Canadian law contains a similar provision, it *inter alia* reads:

“(1) Every one commits bigamy who (a) in Canada, (i) being married, goes through a form of marriage with another person,... (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraph(s) (a)(i)...

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<sup>52</sup> The power of determining the persons deemed nationals of a State is not uncontroversial, for support of the position that it is wholly within the power of that State, see *Oppenheimer v Cattermole*, [1973] Ch 264 at 270.

<sup>53</sup> As will be seen in below and in Chapter Five this is done not with reference to the active personality category but rather the protective.

<sup>54</sup> Maritime Drug Law Enforcement Act, 46 USC App § 1903(a).

<sup>55</sup> Article 92 of the Convention on the Law of the Sea 1982, (1982) 22 ILM 1261, contains the rule regarding the high seas. Article 27(1) containing in effect an enunciation of the general rule of the exclusivity of flag- State jurisdiction even within the territorial sea of foreign States, lists specific circumstances where the rule does not apply. One of which is concerned with traffic in drugs. Article 27(d) permitting a coastal State to exercise jurisdiction on board a foreign ship passing through its territorial sea “if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances”.

<sup>56</sup> 46 USC § 1903 (h). This is unusual in that the recent expansion of criminal jurisdiction in the United States has in the main been a result of judicial rather than legislative activity. That noted, a further example is found in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC § 959, where it is specifically stated that it is intended to reach prohibited acts committed outside the territorial jurisdiction of the United States.



and, pursuant thereto, does outside Canada anything mentioned in those subparagraph(s) in circumstances mentioned therein".<sup>57</sup>

A judicial application of the English provision is *R v. Earl Russell*.<sup>58</sup> This case centred upon the issue of the extraterritorial application of s. 57, with counsel for Earl Russell averring that the section "does not in express terms apply to any offence committed beyond the King's dominions" and so, since the second marriage occurred outwith the King's dominions, in the United States, there was no case to answer and the indictment should be quashed.<sup>59</sup> It was held that the statute is "plain in its ordinary signification", s. 57 applying to cases of bigamy by subjects of Her Majesty wherever committed. The Earl, upon this ruling, pleaded guilty.

Broadly similar to the crime of bigamy in being suitable for categorisation under the head morality/ public policy are offences relating to the sexual abuse of minors. A recent judicial example of which is *US v. Thomas*<sup>60</sup>, an application of the Protection of Children Against Sexual Exploitation Act 1988, as amended.<sup>61</sup> In this case Thomas, an American citizen, was *inter alia* convicted of engaging a minor in sexually explicit conduct for the purpose of creating a visual depiction of that conduct. In his defence it was argued that since the conduct occurred outside the United States in a foreign State (Mexico) the United States lacked jurisdiction. The statute itself was silent as to the scope of its application. It was held that the provision did apply to acts committed outwith the United States, including those occurring in foreign States. The Court stated "... the exercise of extraterritorial power may be inferred from the nature of the offences and Congress' other legislative efforts to eliminate the type of crime involved".<sup>62</sup> Further the Court stated "Punishing the creation of child pornography outside the United States that is actually, is intended to be, or may reasonably be expected to be transported in interstate or foreign commerce is an important enforcement tool. We, therefore, believe it likely that under section 2551(a) Congress intended to reach extraterritorial acts that otherwise satisfy the statutory elements".<sup>63</sup> Subsequently the Court referred to international law, stating "Before concluding that section 2551(a) applies to Thomas' extraterritorial acts, however, we consider whether such application would violate international law... International law permits a country to apply its statutes to extraterritorial acts of its nationals... In this case counsel conceded at oral argument that Thomas is an American national. We, therefore, conclude that section 2551(a) applies to the acts on which Thomas' conviction was based, whether or not Thomas committed those acts in the United States".<sup>64</sup> A further United States example is *US v. Harvey*<sup>65</sup> where, as seen above, the Court referred to Harvey's nationality as legitimising the extraterritorial application of the provision in international law.<sup>66</sup>

In the United Kingdom the Sex Offenders Act 1997 provides that courts in both Scotland and in England, Wales and Northern Ireland may assume jurisdiction with reference to the active

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<sup>57</sup> The Canadian Criminal Code, Revised Statutes of Canada 1985 c. C-46 s 290.

<sup>58</sup> [1901] AC 446.

<sup>59</sup> *Ibid.* at 448.

<sup>60</sup> (1990) 893 F 2d 1066.

<sup>61</sup> 18 USC § 2251. Canada, by the Act to Amend the Criminal Code (Child prostitution, child sex tourism, criminal harassment and female genital mutilation) 1997, has similarly referred to the category.

<sup>62</sup> *Supra* note 60 at p 1068.

<sup>63</sup> *Ibid.* at p 1069.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Supra* note 16.

<sup>66</sup> It will be recalled that the Court held "No tenet of international law prohibits Congress from punishing the wrongful acts of its citizens, even if some of that conduct occurs abroad.", *ibid.* at p 1329.

personality category over a range of sexual offences committed against minors.<sup>67</sup> The relevant provision of Scottish law *inter alia* states:

“(1) Subject to subsection (2) below, any act done by a person in a country or territory outside the United Kingdom which- (a) constituted an offence under the law in force in that country or territory; and (b) would constitute a listed sexual offence if it had been done in Scotland, shall constitute that sexual offence. (2) No proceedings shall by virtue of this section be brought against any person unless he was at the commencement of this section, or has subsequently become, a British citizen or resident in the United Kingdom”.

“Listed Offences” for the purpose of the section are found in ss. 8(7) and 8(8), and include rape of a girl under the age of 16, indecent assault of a person under that age, taking and distributing indecent images of children, and conspiracy or incitement to commit such offence. The corresponding English provisions are broadly similar, with s. 7 referring to the category, and the relevant offences being enumerated in schedule 1 s. 1. A more historical English reference to the category in a somewhat similar offence is in regard to procuration. Section 2(1) of the Sexual Offences Act 1956, as amended, providing “It is an offence for a person to procure a woman, by threats or intimidation, to have sexual intercourse in any part of the world”. Whilst ambiguous, it is said that British subjects can be tried in England for crimes of procuration committed abroad.<sup>68</sup>

Three final incongruous examples of prescriptions under the heading morality/ public policy to be proffered are the US Marine Mammal Protection Act 1972<sup>69</sup>, the US prescriptions relating to offshore gaming ships<sup>70</sup> and the UK law proscribing slave trading. The scope of the first Act was at issue in *US v. Mitchell*.<sup>71</sup> It was held on appeal that the statute and related regulations did apply in US territory and on the high seas, but not within the territorial waters of another sovereign State.<sup>72</sup> The latter American provision *inter alia* states: “It shall be unlawful for any citizen or resident of the United States... to set up, operate, or own or hold any interest in any gambling ship... if such gambling ship is on the high seas, or is an American vessel, or otherwise within the jurisdiction of the United States, and it is not within the jurisdiction of any State”.<sup>73</sup> As with the MMPA this is a limited reference to the category, it being held to apply to, other than geographical areas or instances where the United States otherwise has jurisdiction<sup>74</sup>,

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<sup>67</sup> This Act followed closely the Sexual Offences (Conspiracy and Incitement) Act 1996, which was criticised for only proscribing the acts of “sex- tourists” corporally occurring within the UK. See for a history the developments in this area Curbs on Child Sex: New laws are planned to stamp out the paedophilia crimes of British tourists, *The Sunday Times*, 9 July 1995, Section 5 (Travel) p 3. Referred to are States following a similar line and a Swedish prosecution.

<sup>68</sup> *Halsbury's Laws of England*, 4th Edition, Vol. 11(1) para 634 at p 472. In addition to s. 2(1) are s. 3(1), procuration by false pretences; s. 22(1) procuration of a woman into common prostitution; s. 23(1) procuration of a woman under the age of 21; and s. 29(1) procuration of a woman who is a defective.

<sup>69</sup> 16 USC § 1361 et seq, hereinafter the MMPA.

<sup>70</sup> 18 USC § 1082 (a)(1), as amended, entitled Gambling Ships.

<sup>71</sup> (1977) 553 F 2d 966.

<sup>72</sup> The result of which was Mitchell's conviction being quashed, the act upon which the prosecution was based occurred within three miles of the coast of the Bahamas.

<sup>73</sup> *Supra* note 70.

<sup>74</sup> As where there exists an agreement between the United States and another State where that State concedes to the United States vicarious jurisdiction in specific instances. An interesting example of this is found in the Agreement of 13 November 1981 between the United Kingdom and the United States, by which the United Kingdom cedes jurisdiction to the United States over its private vessels “outside the limits of the territorial sea and contiguous zone of the United States... in any cases [American authorities] reasonably believe that the vessel has on board a cargo of drugs for importation into the United States.”, (1982) 21 ILM 439, it was interpreted in *US v. Davies* (1990) 905 F 2d 245.

only the high seas. A final illustration is section 9 of the UK Slave Trade Act 1824. It *inter alia* provides “If any subject or subjects of His Majesty, or any person or persons residing or being within any of the dominions... belonging to His Majesty shall... upon the high seas... knowingly and wilfully carry away... any person or persons as a slave...[he] shall be deemed and adjudged guilty of piracy, felony and robbery...”.<sup>75</sup> This provision is jurisdictionally supplemented by s. 26 of the Slave Trade Act 1873 which reads:

“Any offence against this Act or said enactments with respect to which this Act is to be construed as one<sup>76</sup>, or otherwise in connexion with the slave trade, shall for all purposes of and incidental to the trial and punishment of a person guilty of such offence... be deemed to have been committed either in the place in which the offence was committed... or in any place in which the person guilty of the offence may for the time being be, either in Her Majesty’s dominions, or in any foreign port or place in which Her Majesty has jurisdiction...”.<sup>77</sup>

### Non- Common Law States

Non- common law States, generally adopting a wide approach to extraterritorial jurisdiction, take either a non-crime specific approach to the active personality category or provide widely for its assumption on a crime- specific basis. Within these two broad approaches there exists significant variation, with certain limitations being placed by most States employing general reference.<sup>78</sup> Austrian practice is typical of a type of non-crime specific approach. The applicable provision, s. 65 paragraph 1 of the Austrian Penal Code, *inter alia* states:

“For other offences committed abroad than those referred to in Section 63 and 64<sup>79</sup>, Austrian penal statutes apply under the proviso that these offences are also punishable under the law of the State where they were committed:

1. if the offender was an Austrian citizen at the time when he committed the offence, or if he acquired the Austrian citizenship later on and is still holding it at the time when the criminal proceedings are instituted against him”.<sup>80</sup>

There exist three further relevant Austrian provisions. Section 65 paragraph 2 provides that the punishment imposed upon the conclusion of proceedings justified with reference to the category cannot exceed that which could have been imposed had the State where the offence actually

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<sup>75</sup> Slave Trade Act 1824, 5 Geo. 4, c. 119, s. 9.

<sup>76</sup> The 1824 Act is by s. 24 of the 1873 Act.

<sup>77</sup> 36 & 37 Vict., c. 88.

<sup>78</sup> An exception is found in the Criminal Code of Belarus. Article 5 entitled Effect of the Criminal Code of the Republic of Belarus in Respect of the Actions Committed Outside the Territory of the Republic of Belarus *inter alia* provides:

“Citizens of the Republic of Belarus who have committed a crime abroad shall be liable to criminal responsibility under this Code if they have been brought to criminal responsibility or brought to trial on the territory of the Republic of Belarus. The same grounds shall be used to bring to responsibility apatrides staying in the Republic of Belarus who have committed crimes outside the territory of the Republic of Belarus. If such persons have been penalised abroad for the crimes committed, the court may commute the punishment metered out to them or completely free the guilty person from serving the punishment. Foreign citizens who have committed crimes outside the territory of the Republic of Belarus shall be liable to responsibility under the criminal legislation of the Republic of Belarus in cases envisaged by international treaties”.

The article is cited at [http://www.belarus.net:80/softinfo/catal\\_la/100093.htm](http://www.belarus.net:80/softinfo/catal_la/100093.htm)

<sup>79</sup> These offences include those justified with reference to the protective and universal categories of jurisdiction, as well as those committed outside Austria by an Austrian against an Austrian, which is dealt with under section 64 (1)(7), see below.

<sup>80</sup> Questionnaires and Replies, supra note 14 at p 6.

occurred convicted the accused.<sup>81</sup> Section 65 paragraph 3 provides that "In cases where no penal jurisdiction is established at the place where the offence was committed, it is sufficient that the offence is punishable under Austrian law".<sup>82</sup> Section 64 paragraph 1, sub-paragraph 7 is also relevant. It *inter alia* provides:

"... the following offences committed abroad shall be punished according to the Austrian penal statutes, irrespective of the penal law of the State where the offence was committed:

7. criminal offences committed by an Austrian citizen against an Austrian citizen, if both have their domicile or permanent residence in the country".<sup>83</sup>

The Austrian approach is generally akin to that followed by Denmark. It will be recalled s. 7 of Danish Criminal Code *inter alia* states:

"1 Under Danish criminal jurisdiction shall also come acts committed outside the territory of the Danish State by a Danish national or a person resident in the Danish State,

(1) where the act was committed outside the territory recognised by international law as belonging to any State, provided acts of the kind in question are punishable with a sentence more than simple detention, or,

(2) where the act was committed within the territory of a foreign State provided it is also punishable under the law in force in that territory."<sup>84</sup>

German law is also broadly similar with section 7 (2)(1) of the German Penal Code *inter alia* providing that German criminal law is "applicable to offences committed abroad if the offence is punishable in the *locus delicti* and if the offender was a German national at the time of the offence or became a German national subsequent to the offence".<sup>85</sup> Common to all these general active personality category references is the central and conditional position given to the role of the *lex loci delicti*.

A somewhat different approach to the active personality category is found in the practice of Italy and France. It generally focuses upon, in addition to the punishability of the offence under the *lex loci delicti*, the categorisation of the offence by the law of the forum. Here what is of primary importance is the nature of the criminal act as defined by French or Italian law. Particularly, French law provides that in regard to crimes of the most serious character, "crimes", a different set of requirements governing the application of the category apply than for crimes deemed to be of a lesser character, "délits".<sup>86</sup> In regard to the former no reference to the law of the *lex loci delicti* is required, whereas in relation to *délits* it is required.<sup>87</sup> The position in Italy is somewhat analogous. Article 9 of the Italian Penal Code *inter alia* states:

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<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid., Part 3, p 2. For discussion of this provision see below.

<sup>84</sup> Supra note 14.

<sup>85</sup> Questionnaires and Replies, supra note 14 at p 7.

<sup>86</sup> Article 689 of the French Code de Procédure Pénal. For a discussion of French reference to the category see Blakesley, supra note 2, at pp 707- 709.

<sup>87</sup> The requisite conditions for the application of the category in regard to *crimes* are that the offence is punishable under French law, that such application will not run in opposition to the rule *non bis in idem*, and that the statute of limitations has not run, Articles 689 and 692 of the French Code see Blakesley, *ibid.* at note 63, pp 707-708. In regard to *délits*, in contrast, in addition to the above are the requirements that it must be punishable by the laws of the country in which it was committed, that a complaint be made by either the victim of the crime or the government of the State in which it was committed, and the *ministère public* assents to such a prosecution proceeding, Article 689 and 691 of the French Code, Blakesley, *ibid.*

"A citizen who, apart from the cases specified in the two preceding articles<sup>88</sup>, commits in a foreign territory an offence which Italian law prescribes life imprisonment or imprisonment for a minimum of not less than three years, shall be punished according to that law, provided he is within the territory of the State.

With respect to offences for which a punishment restrictive of personal liberty for a lesser period is prescribed, the offender shall be punished on the demand of the Minister of Justice, or on petition (*istanza*) or complaint (*querela*) of the victim.

If, in the case designated in the preceding provisions, the offence was committed to the detriment of a foreign State or alien, the offender shall be punished on the demand of the Minister of Justice, provided his extradition has not been granted, or has not been accepted by the government of the State in which he has committed the offence".<sup>89</sup>

A third approach to the active personality category by non- common law States is that where the prescriptions justified with reference to it are enumerated within a criminal code, a general and expansive reference and yet crime- specific. An example of such a provision is found in Article 8 of the Thai Penal Code. It *inter alia* provides:

"Whoever commits an offence outside the Kingdom shall be punished in the Kingdom, provided that: the offender be a Thai person, and there be a request for punishment by the Government of the country where the offence has occurred or by the injured person... and provided further that the offence be any of the following..."<sup>90</sup>

The Penal Code then enumerates thirteen categories of offences, including "Offences relating to Causing Public Dangers", "Offences relating to Sexuality", offences against life and the body, and offences of theft, extortion and fraud. A similar approach is taken by Japan. Article 3 of the Penal Code of Japan lists sixteen types of offence that "apply to a Japanese who commits one of the following crimes outside Japan", they include arson, indecency with persons under thirteen years of age, homicide, abortion and computer fraud.<sup>91</sup> Similar general yet enumerative approaches are taken by the Netherlands and Norway.<sup>92</sup> China interestingly adopts an approach both enumerative and general with Article 4 of the Chinese Criminal Code taking the former. It provides that the Code applies to citizens of the People's Republic of China in regard to "counter- revolution", counterfeiting national currency, embezzlement, accepting bribes, divulging State secrets, posing as a State functionary to practise fraud, forging official documents, certificates and seals and the traffic in proscribed substances. Article 5 by contrast provides that the Code also applies "to any Chinese citizen who commits a crime outside the territory of the People's Republic of China that is not specified in the preceding article, if for that crime this Code prescribes a minimum of three years" with the proviso that the act must be punishable by the *lex loci delicti*.<sup>93</sup>

### The Active Personality Category- Conjunctive Analysis

The two approaches within the conjunctive component of this thesis applied to the active personality category; the elicitation of authority evincing the congruence of interests protected by the various categories, and that referring to more than one category in the assumption of

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<sup>88</sup> These articles *inter alia* concern the application of universal jurisdiction and conventionally mandated assumptions of jurisdiction, Questionnaires and Replies, supra note 14 at p 2 and p 22.

<sup>89</sup> *Ibid.*, Part 2, at p 7.

<sup>90</sup> Thai Penal Code s. 8, sent to author by letter dated 25 March 1997 from Ministry of Foreign Affairs, Bangkok.

<sup>91</sup> The Penal Code of Japan, Law No. 45 of 1907 as amended, Articles 3, 108, 176, 199, 214 and 246(2). A copy of the Code in English was provided to the author by the Japanese Embassy London.

<sup>92</sup> Questionnaires and Replies, supra note 14 at p 8- 9.

<sup>93</sup> Blanplain, E., (ed.), *International Encyclopaedia of laws: Criminal Law*, Vol. 1, Kluwer Law Publishers, Deventer, 1993, Chinese Criminal Law, p 55- 56.

jurisdiction, both provide strong support for a unified conception of jurisdiction. It is clear that, in general, the interests putatively served by reference to the active personality category correspond with the interests served by the other four.<sup>94</sup> The significant conjunction noted it is also evident that the active personality category is to an extent particular, as was the territorial. Here the particularity results from it being centred upon the especial relationship between a State and certain classes of persons. In addition to this are factors such as a population being a *sine qua non* of Statehood itself, national chauvinism and paternalism. Thus whilst there is a significant conjunction of interests served between the active personality and other categories, it retains a distinctiveness. Both the conjunctive and disjunctive elements of this thesis find explicit and strong support in regard to it.

The interests protected by the application of prescriptions justified with reference to the active personality category are both immediate and underlying. In general, common law references to the category reflect the former and non- common law the latter. It is useful to analyse the underlying motivations for and interests served by the active personality category below in the disjunctive component of this analysis. Immediately, there exists a large degree of similarity in the interests served by the several specific sub- groupings of prescriptions identified with reference the active personality category and the other four categories, homicide/ violence prescriptions being found, for example, in one of the long standing UK references to the category, in the form of s. 9 of the Offences Against the Person Act 1861. The interests served by such prescriptions are also served by all the other categories, as was seen in regard to the territorial and will be seen below in regard to the universal, protective and passive personality categories. Perhaps surprisingly, rare is reference to the category by States justifying the application of prescriptions within the sub- grouping fraud/ deception. Notable examples being Article 8 of the Thai Penal Code<sup>95</sup> and Articles 3 and 246- 250 of the Japanese Penal Code. The latter prescribe fraud, computer fraud, breach of trust, constructive fraud and attempts to commit those offences by Japanese citizens outwith Japan.<sup>96</sup> The interests protected by prescriptions dealing with the traffic in proscribed substances are also putatively served by reference to the active personality and other categories. An explicit United States reference to the active personality category regarding in a such a prescription was noted above.<sup>97</sup> As was Article 4 of the Chinese Criminal Code, referring *inter alia* to the traffic in proscribed substances.<sup>98</sup>

It is with regard to the sub- grouping of prescriptions under the heading direct State interests that the most pronounced conflation of reference occurs. This is not surprising, even in light of the existence of a category of jurisdiction precisely serving this function. It is not surprising because of the importance and nature of the relationship between an individual and his or her

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<sup>94</sup> As with all the categories the basic differentiation in approach between common and non- common law States affects this analysis. It is however a problem more apparent than real. As seen above the United States, for example, refers to the category in respect of a wide range of criminal prescriptions, and not infrequently. Further, non- common law States whilst leaving the door open to expansive reference to the category in fact do so only on limited occasions. In the Netherlands, for example, for the four years 1981- 1984 inclusive, there were 711 cases registered by the Dutch courts as relating to crimes contrary to the criminal code committed by Dutch nationals abroad. In respect of which there were 128 convictions. In Norway 47 persons were charged with 164 crimes committed outside Norwegian territory in 1983(including those charged in regard to offences committed on Norwegian ships and aircraft). Luxembourg states that the prosecution of crimes on this basis is "extremely rare", Questionnaires and Replies, supra note 14 at p 38.

<sup>95</sup> Supra p 14.

<sup>96</sup> Supra note 91. Such interests are also served by *inter alia* the territorial category, see Chapter Two.

<sup>97</sup> Supra p 61. An example of the application of a drug prescription with reference to the territorial category, it will be recalled, is DPP v. Doot, [1973] AC 807, see Chapter Two.

<sup>98</sup> Supra p 66.

State. Indeed crimes of treason are the prototypical active personality offences, dating in English criminal law from 1351. The offence of treason, however particularly defined, is undoubtedly one affecting or attempting to affect directly and immediately public interests. As will be seen in Chapter Five the protective category justifies the assumption of jurisdiction over offences precisely of such a character. In regard to the other three categories it is sufficient here to recall that the territorial category was referred to justify the assumption of jurisdiction over, for example, an immigration offence in *Yenkichi Ito v. US*<sup>99</sup>, an interest undoubtedly directly affecting the State. As will be seen the universal category, for example in the form of justifying the assumption of jurisdiction over piracy, and the passive personality category, for example substantiating the assumption of jurisdiction over certain “terrorist crimes” also protect direct State interests.<sup>100</sup>

The interests protected by prescriptions under the heading public policy/ morality are to a significant extent unique to the active personality category. As such these prescriptions support primarily not the conjunctive component of this thesis but rather the disjunctive element. Here what is important to note is the evidence this type of interest provides in support or otherwise of the underlying proposition that States inevitably and solely act in their own interests. It has been implicit throughout this discussion that the actions of States can be analysed empirically. That reference to the jurisdictional categories is a necessary consequence of the nature of States and the international legal system, that system being one generally comprised of sovereign competitive States limited only by international law and practical necessity. The existence of a sub- grouping of prescriptions exercised by States putatively serving the interests of morality appear to contradict this conclusion. The issue goes to exactly what is the interest here being served. It is submitted that States do not act altruistically. Public policy/ morality prescriptions whilst serving interests unique to themselves are founded upon self- serving considerations. They include personal, party political or State popularity and goodwill, political, cultural or religious intolerance or bigotry, paternalism, the threat posed by recidivism, and conceptions of the bond that citizenship itself provides between those persons and the State. Of course there may occur instances where a State acts with apparent total altruism, but these will be exceptional.<sup>101</sup> States are primarily concerned with their own perpetuation and aggrandisement, reference to the categories of jurisdiction including the active personality is means of acting in this regard.

The second plank of the conjunctive thesis comprises the elicitation of authority making multiplicitous reference to the jurisdictional categories. Here two types of authority exist; general and specific. Generally, significant are the provisions referring to active personality together with passive personality. Austria’s reference to the category, it will be recalled *inter alia* comprised “criminal offences committed by an Austrian citizen against an Austrian citizen, if both have their domicile or permanent residence in the country”.<sup>102</sup> Under Austrian law the reference to the victim leads to the requirement of criminality by the *lex loci delicti* being dispensed with. Similar provision is found in Portuguese criminal law with Article 5(1)(d) of the Portuguese Criminal Code providing for its application to all offences committed abroad against Portuguese nationals against Portuguese who normally reside in Portugal at the time of the offence found in Portugal.<sup>103</sup> Again this provision differs from the general Portuguese active personality provision, in Article 5(1)(c), in that there is no requirement that the act be an

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<sup>99</sup> (1933) 64 F 2d 73.

<sup>100</sup> See Chapters Four and Six respectively.

<sup>101</sup> It is in a State’s interest to be seen to act altruistically.

<sup>102</sup> *Supra* p 13.

<sup>103</sup> Questionnaires and Replies, *supra* note 14 at p 9.

offence by the *lex loci delicti*.<sup>104</sup> Chilean criminal law provides somewhat similarly, with section 6(6) of the Chilean Penal Code providing for the application of Chilean criminal law to offences committed outwith Chile by Chileans against other Chileans.<sup>105</sup> Clearly all these provisions conjoin reference to the active and passive personality categories, providing strong support for a unified conception of jurisdiction.<sup>106</sup>

Specific multiplicitous reference to the active personality exists in relation to all the other categories. In the case of *US v. Smith*<sup>107</sup> a conviction for drug- trafficking was affirmed with the Court referring to the active personality category as well as what it viewed as all the other (five) “principles”.<sup>108</sup> In *US v. Layton* the active personality category was referred to in conjunction with the protective, territorial, and passive personality.<sup>109</sup> In the Belgian case of *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*<sup>110</sup> reference to the active personality category was conjoined with that of the universal. In the English case of *Joyce v. DPP*<sup>111</sup> the House of Lords appears to have implicitly conjoined reference to the active personality category with that of the protective. Lord Jowitt L.C. stating “No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for *its own security* requires that all those who commit the crime, whether they commit it within or without the realm should be amenable to its laws”.<sup>112</sup> In the Zambian case of *The People v. Roxburgh*<sup>113</sup> both the active personality category and the ubiquitous arm of the territorial category were referred to in a case of bigamy, a conviction being quashed as the accused was not a national of Zambia and the offence did not even partially occur in Zambia. Finally in the *Credit Card Fraud Case*<sup>114</sup>, in a case of the fraudulent use of credit and cheque cards with the cards being stolen in Austria but used *inter alia* in Germany, the Austrian Supreme Court referred to both the active personality category and ubiquitous arm of the territorial category.

### The Active Personality Category- Disjunctive Analysis

The active personality category analysed disjunctively results in the construction of a distinct grouping of international criminal law. It is axiomatic that this grouping centres around the personal relationship between the accused and the State assuming jurisdiction. Two related issues arise; the nature of the relationship itself, and the reasons for its existence. It is useful to deal with the latter first. It is clear that there is not one universally accepted reason for either general or specific reference to the category. Different explanations are proffered by different States, and by the same State in regard to dissimilar situations. Reflecting several of the germane factors is the following:

“... it is said that a man should not be withdrawn from his natural judges; that the State owes to its subjects the protection of its laws, and that it fails in this duty if it hands over any of them to a foreign jurisdiction, and thus deprives him of the guarantees afforded by the law of their own country; that it is impossible to place entire confidence in the justice of a foreign State, especially with regard to the subjects of another

<sup>104</sup> *International Encyclopaedia of laws: Criminal Law*, supra note 93, Portuguese Criminal Law, p 39.

<sup>105</sup> Chilean Criminal Law, *ibid.* p 65.

<sup>106</sup> For a discussion of the passive personality category see Chapter 6.

<sup>107</sup> (1982) 680 F 2d 255.

<sup>108</sup> *Ibid.* at p 258. See Chapter Two.

<sup>109</sup> (1981) 509 F Supp 212 at p 216. See Chapter Five.

<sup>110</sup> (1986) 77 ILR 537. See Chapter Four.

<sup>111</sup> Supra note 37.

<sup>112</sup> *Ibid.* at p 372. Emphasis added. See further Chapter Five.

<sup>113</sup> (1972) 74 ILR 157.

<sup>114</sup> (1987) 86 ILR 562



country; and that it is serious disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and resources, and from those who could bear witness to his previous life and character".<sup>115</sup>

This statement, made in the context of the extradition of a State's own nationals, is in effect an adumbration of a number of the reasons proffered as justifying reference to the category, a prohibition upon the extradition of nationals being the predominate immediate reason given for general reference.<sup>116</sup> The Austrian government for example states "The reason for the implementation of this principle is that Austrian nationals, when committing offences abroad, shall not go unpunished. This might without such jurisdiction, happen, as extradition of Austrian nationals is prevented by a constitutional provision".<sup>117</sup> Norway and the Netherlands whilst also giving their non- extradition of nationals as a reason for the inclusion of a expansive active personality provision within their criminal law go further. The Norwegian position being due to "the link to Norway [being] of such a character that it should be possible to prosecute in Norway even if the offence was committed abroad by a Norwegian subject".<sup>118</sup> The Netherlands *inter alia* justifies its position as for "the protection of Dutch, mainly public, interests the upholding of the loyalty of Dutch nationals vis-à-vis the Dutch nation and some other particular national values".<sup>119</sup>

Concluding that general reference to the category is largely a consequence of the exclusion of nationals from extradition raises the question why such exclusion. The answer is found in the relationship between the State and its citizens. It has two components, the State providing its protection, legal, diplomatic or otherwise, to its nationals<sup>120</sup> (and perhaps less clearly residents) and, in return, the individual's duty to act in conformity with its criminal laws wherever he or she may be. The latter element of this relationship is discussed by Hall:

"The authority possessed by a state community over its members being the result of the personal relation between it and the individuals of which it is formed; its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state; but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of

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<sup>115</sup> Report of the Royal Commission on Extradition, Parliamentary Papers, 1878, Vol. 24, Reports, p 903 at p 908, micro fiche No. 84.176.

<sup>116</sup> Article 6 of the European Convention on Extradition 1957, appended to the European Convention on Extradition Order 1990, S.I. 1507/1990, Statutory Instruments 1990, Part II, Section II, p 3781, gives parties the right to refuse the extradition of nationals. In the Declarations/ Reservations to the Convention, Schedule 3, *ibid.* pp 3791- 3807, Cyprus, the then Federal Republic of Germany, France, Greece, Liechtenstein, Luxembourg and Portugal provide unequivocally that they refuse to extradite their nationals.

<sup>117</sup> Questionnaires and Replies, *supra* note 14 at p 35. This and the following comments were in response to the question "Is it apparent from the legal history or case-law what is regarded the purpose of this [the active personality] principle?", at p 8. The then Federal Republic of Germany put forth a justification purely citing constitutional bar on the non- extradition nationals as the reason for a general active personality provision, at p 35.

<sup>118</sup> *Ibid.* p 36. It is also mentioned that the category fulfils a role arising from the rules on jurisdictional immunity in that it "makes it opportune to prosecute in Norway persons who enjoy immunity during their stay in other countries".

<sup>119</sup> *Ibid.* at p 36.

<sup>120</sup> This idea of a "special duty of protection" owed by the State to its citizens is termed in German *Treupflicht*, and is said to require the non- extradition of German nationals, Shearer, I.A., *Extradition in International Law*, Manchester, Manchester University Press, 1971, at p 105. A manifestation of this reasoning is found in the Extradition of German Nationals Case, [1954] ILR 232, where the German Federal Court stated "... the home State should not lend its assistance so as to enable another State to exercise jurisdiction over its nationals when that State is unable to do so in exercise of its own unaided power".

compelling observance by punishment if a person who has broken them returns within its jurisdiction".<sup>121</sup>

Both components of the relationship are succinctly supported by Lord Jowitt who states "Whether you look to feudal law for the origin of this conception [allegiance] or find it in the elementary necessities of any political society, it is clear that fundamentally it recognizes the need of the man for protection and of the sovereign lord for service".<sup>122</sup> The centrality of the personal relationship is perhaps most clearly seen in regard the crime of treason, it being founded upon the betrayal of allegiance. It is this relationship between the State and certain persons that lies at the heart of the category, and as such the centre of this grouping of international criminal law.

Proffered above are reasons why the active personality category, and the related grouping of international criminal law, exist. What remains to be discussed is the precise nature of the relationship between States and the relevant classes of persons. As is evident above there is here a degree of inconsistency in what exactly it comprises, germane being nationality, allegiance, residence and indeed employment. Nationality, forming a central role in the application of the category, and indeed in international law itself,<sup>123</sup> forms the cornerstone of this grouping of international criminal law. The Harvard Draft Convention<sup>124</sup> as seen above provides that it is "nationals", natural or legal, over which a State may assume jurisdiction. It further provides that "persons assimilated to nationals" may also come within this category, they being aliens employed by that State to carry out a public function and aliens engaged upon a ship or aircraft flying that State's flag.<sup>125</sup> The Comment to the Draft Convention lists as justifications for the category:

"It has been said that (1) since the State is composed of nationals, who are its members, the State's law should apply to them wherever they may be; (2) that the State is primarily interested in and affected by the conduct of its nationals; (3) that penal laws are of a personal character, like those governing civil status, and that, while only reasons *d'ordre public* justify their application to aliens within the territory, they apply normally to nationals of the State everywhere; (4) that the protection of nationals abroad gives rise to a reciprocal duty of obedience; (5) that any offence committed by a national abroad causes a disturbance of the social and moral order in the State of his allegiance; (6) that the national knows best his own State's penal law, that he is more likely to be fairly and effectively tried under his own State's law and by his own State's courts, and that the more appropriate jurisdiction from the point of view of the accused should be considered rather than a jurisdiction determined by reference to the offence; (7) that without the exercise of such jurisdiction many crimes would go unpunished, especially where States refuse to extradite their nationals".<sup>126</sup>

Clearly explicit is the relationship between nationality and allegiance. Indeed it can be argued that in addition to or indeed even in place of nationality it is allegiance which is operative. As was seen in *Joyce v. DPP*<sup>127</sup> it was precisely on the issue of allegiance as opposed to nationality

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<sup>121</sup> Higgins, P.A., (ed.), *Halls's A Treatise on International Law*, (Eighth Edition), Clarendon Press, Oxford, 1924, at p 56- 57.

<sup>122</sup> *Joyce v. DPP*, supra note 37 at p 366.

<sup>123</sup> Brownlie lists as consequent to nationality *inter alia* diplomatic protection, "numerous duties" in relation to war and neutrality, extradition, the exercise of civil and criminal jurisdiction, and possibly forcible humanitarian intervention, in Brownlie, I., *Principles of Public International Law*, Oxford, Clarendon Press, Fourth Edition, 1991, at p 382.

<sup>124</sup> Supra note 23.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid. at p 519- 20.

<sup>127</sup> Supra note 37.

that the case turned. It is axiomatic that all nationals owe a duty of allegiance to the State to which they are members, in this sense allegiance is a corollary of nationality.

It is not possible, as was seen above, to limit the grouping of international criminal law based upon the active personality category to those prescriptions explicitly referring to nationality and/ or allegiance. There is no question that the grouping contains prescriptions applying to residents. The relevant Danish provision for example applies to residents as well as nationals.<sup>128</sup> A variation on this is a provision of Italian law which refers not to alien residents but rather to "stateless persons residing in the territory of the State".<sup>129</sup> A further variation in reference to the category is found in the Canadian bigamy provision, which is limited in application to resident nationals. This approach staves off the possibility of application to a citizen having little or no connection with Canada other than his/her Canadian nationality. Apropos to which the Canadian Law Reform Commission stated "... we think that it would be wrong in principle to enact legislation to make all Canadian citizens outside Canada generally subject to Canadian criminal law. Many of them were born outside Canada and many permanently reside outside Canada with little or no thought of returning here".<sup>130</sup> Indeed reference to the category with no regard to actual residence opens the door to subjection to the criminal laws of a State solely on the basis of the accident of birth and nothing more.<sup>131</sup> From the examples of State practice proffered it is clear that there are significant variations in the classes of individuals deemed susceptible to having jurisdiction exercised over them with reference to the category. This does not detract from the conclusion that there exists a grouping of substantive international criminal law centred upon its applicability being contingent upon the accused existing in a certain personal relationship with that State. That relationship revolving around nationality and allegiance as well as encompassing in some instances residence and employment. All prescriptions within the grouping referring to one or more of these relationships.

The grouping of substantive international criminal law based upon the active personality category, as seen, is comprised of sub- groupings that to a significant extent mirror those found within the territorial grouping. Particularly pronounced was the correlation between the homicide/ violence and direct State interest sub- groupings. There was a lesser yet tangible similarity in the presence of sub-groupings serving the interests threatened by the traffic in proscribed substances and crimes of fraud and deception. Notable in the active personality grouping is the presence of a sub- grouping containing prescriptions relating to morality/ public policy crimes. This is largely unique to the category and is a result of the nature and effect of the relationship between the State the classes of individuals coming within the ambit of it. Generally significant however is the large degree similarity of sub- groupings between the active personality and territorial groupings, and as will be seen below, the other three groupings. The active personality grouping of substantive international criminal law, then,

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<sup>128</sup> Supra p 54- 55. A similar position is taken by Norway in s 12 (3) of its Penal Code, Questionnaires and Replies, supra note 14 at p 41. The UK Sex Offenders Act 1997 applies to British citizens and residents, see p 11 above.

<sup>129</sup> Ibid. at p 41.

<sup>130</sup> Law Reform Commission of Canada, Extraterritorial Jurisdiction, Working Paper 37, Ministry of Supply and Services Canada, Ottawa, 1984, p 73.

<sup>131</sup> In criticising the English provision on bigamy Lew states "It is quite illogical and unjust for the English courts to exercise jurisdiction over a prosecution for bigamy in respect of a British subject who is domiciled or normally resident in a country which allows polygamy and who has married a second time in that country." Lew, supra note 46 at p 185. This risk is perhaps more apparent than real, Collins, L. (ed), in Dicey and Morris' *The Conflict of Laws*, Sweet and Maxwell, London, 1993, Vol 2, states "... if a British citizen, or a British Overseas citizen whose personal law permitted polygamy married two wives in the country where he was domiciled, it is inconceivable that he would be prosecuted for bigamy in England. His conduct was lawful by his personal law and by the law of the place he acted, and there would be strong reasons of a public nature against a prosecution.", p 705.

centres upon particular relationships between the State and alleged offenders and is comprised of several sub- groupings serving the distinct interests categorised as homicide/ violence, direct State interests, fraud/ deception, the traffic in proscribed substances and morality/ public policy.

#### The Active Personality Category- Conclusion

The active personality category is founded upon the relationship between persons and States. It is employed both in regard to the protection of interests similar to those protected by the other categories of jurisdiction, as well as in conjunction with the other categories multipliciously. As such the category provides support for the conjunctive element of this thesis. Disjunctively there unquestionably exists a grouping of substantive international criminal law centred upon the relationship between a State and an accused. State practice dictates that it comprises in addition to those prescriptions founded upon the relationship of nationality (and *a fortiori* allegiance) also those based upon residence and certain types of employment. The prescriptions extant within the grouping reflect this common denominator. They generally relate to crimes either centred upon the relationship itself, such as treason, or affect interests regarded as so inimical or morally depraved so as to justify reference to the category in regard to them.

## Chapter Four- The Universal Category

### Introduction

Reference to the universal category of jurisdiction substantiates the taking of cognisance over crimes with their prescriptive basis in customary international law. It is unique in that its application is dependent not upon any link extraneous to the crime itself. Rather it is the prescriptions themselves which are operative. The category and the prescriptions justified in relation thereto are *sui generis*.<sup>1</sup> The latter are international crimes in the material sense of the term.<sup>2</sup> Otiose is the need for municipal criminalisation of the particular crime.<sup>3</sup> The universal category permits the assumption of jurisdiction over those accused of such crimes when under the normal jurisdictional rules it would not be so permitted.<sup>4</sup> The relationship between international crimes in the material sense of the term and the universal category is central. Indeed it is the unique jurisdictional characteristic attaching to these prescriptions that is their defining characteristic. An act amenable to justification with reference to the universal category is necessarily also an international crime in the material sense of the term and vice versa. This unique jurisdictional characteristic sets these international crimes apart from all others, and as such will come to the fore in the disjunctive component of my thesis. Further, unlike the other four jurisdictional categories, the singularity of the universal category *inter alia* results in a complete adumbration of the prescriptions exercised with reference to it being possible. The four crimes or sub- groupings of crimes exercised with reference to the universal category are piracy, war crimes, crimes against humanity and genocide.

### The Universal Category- Existence

The existence of the universal category justifying the assumption of jurisdiction over crimes prescribed by customary international law is undeniable. There exists authority in support of it within all the sources of international law, stronger support being found in municipal sources and juristic writings than conventions and international judicial authority. Conventionally, the relative dearth of direct authority results from the friction between the category and the powerful influences of sovereignty and the orthodox jurisdiction of States. Further, the subjection of an act to customary international criminality and thus its amenability to justification with reference to the universal category by all States is not conventionally possible, save where an explicit convention is adhered to by all States. There does exist however indirect conventional support. A unique conventional reference to an "international

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<sup>1</sup> Feller states "This principle [the universality] is of a *specific* nature, i.e. it relates to certain categories of offence and not to all the offences known to the criminal law.", Feller, S.Z., Jurisdiction Over Offenses With a Foreign Element, in Bassiouni, M.C. and Nanda, V.P., (eds.), *A Treatise on International Criminal Law*, Charles C Thomas, Springfield, 1973, Vol. 2, p 33, [emphasis his]. Moore in the Case of the SS Lotus, (1927) PCIJ Rep Series A, No. 10, said of piracy that "... in its jurisdictional aspects [it] is *sui generis*", at p 71. Hereinafter the Lotus Case.

<sup>2</sup> A crime under international law has been defined as "a norm under international law accepted and recognised by the international community of States as a whole of being as such a fundamental character that its violation gives rise to the criminal responsibility of individuals", in Article 26 (1) of the International Law Commission's Draft Statute for an International Criminal Court of 16 July 1993, (1994) 33 ILM 253 at p 268.

<sup>3</sup> This is from the perspective of international law, municipally it is contingent upon the approach taken by the respective State. One adhering to a monist approach need not adopt any municipal prescriptive provision, whilst one subscribing to a dualist approach would have to take such action.

<sup>4</sup> In regard to genocide it has been averred that States have jurisdiction to define and punish even though none of the other accepted "bases of jurisdiction" are present, American Law Institute, Restatement of the Law: The Foreign Relations of the United States, (Third), American Law Institute Publishers, St. Paul, Minn., 1987, section 404, p 254.

crime” is found in the Convention on the Prevention and Punishment of the Crime of Genocide 1948.<sup>5</sup> Article 1 *inter alia* states “The Contracting Parties confirm that genocide... is a crime under international law”. If this “confirmation” is not tantamount to an ascription of jurisdictional universality then the provision itself is redundant. Further indirect conventional evidence of the existence of the universal category is found in the numerous conventions that provide for the assumption of jurisdiction in the absence of orthodox linkages. The predominant examples are the Geneva Conventions of 1949.<sup>6</sup> Common to all is:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before their own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party makes out a *prima facie* case”.<sup>7</sup>

The Law of the Sea Convention 1982 in effect provides similarly in the case of piracy. It provides by Article 100 that “All States shall co- operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”. More significantly Article 105 *inter alia* provides “On the high seas, or in any place outside the jurisdiction of any State may seize a pirate ship or aircraft... and arrest the persons on board. The courts of the State which carried out the seizure may decide on the penalties to be imposed...”. Clearly in both these examples it is the nature of the crime itself that is jurisdictionally central. Also significant is the very wide- spread adherence to these conventions.<sup>8</sup>

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<sup>5</sup> (1948) 78 UNTS 227. In light of the proffered understanding of international crimes in the material sense of the term an averment of such a status necessarily supports the contention that the act is subject to justification by the universal category. This Convention gives rise to difficulties in this approach discussed below.

<sup>6</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31, (hereinafter Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85, (Convention II); Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, (Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, (Convention IV, collectively the Geneva Conventions 1949).

<sup>7</sup> Article 49 Convention I, Article 50 Convention II, Article 129 Convention III, Article 146 Convention IV, *ibid*. The International Committee of the Red Cross, in its Commentary on the Additional Protocols 1977 to the Geneva Conventions states “Grave breaches have two special aspects. One is the duty... [upon parties]... to take any legislative measure necessary to establish adequate penal sanctions... The other is that such breaches are subject to universal jurisdiction”, ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, at p 975.

<sup>8</sup> There is debate as to the effect of wide- spread conventional adherence and the development of custom. Baxter, taking a conservative approach, states “The adherence of the great majority of the nations of the world might be taken as having established standards which even non- parties would be required to observe only if the international community were prepared to accept the existence of true international legislation”, Baxter, R.R., Multilateral Treaties as Evidence of Customary International Law, (1965- 66) 41 BYIL 275, at p 285. Indeed wide acceptance of a convention may in fact actually prevent the transposition into custom of its terms. This logic of this notion, referred to as the “Baxter paradox” by Meron in Meron, T., The Geneva Conventions as Customary Law, (1987) 81 AJIL 348, at 365, is that because “practically all the potential participants in creating customary law have become parties, little evidence is available to demonstrate that non- parties behave in accordance with the Conventions and are thus creating concordant customary law”, *ibid*. C.f. Baxter’s later statement

As with international convention there exists a relative dearth of direct international judicial authority substantiating the existence of the universal category. This is directly resultant from the lack of international criminal precedents. This noted, whenever international courts or tribunals have existed such authority has been produced. The International Military Tribunal (IMT) established following the Second World War stated "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law".<sup>9</sup> A significant recent international precedent comes from the jurisdictional challenge to the International Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*.<sup>10</sup> Here, in response to the challenge, the Tribunal held that the offences with which the accused was charged were those "which, if proven, do not affect the interests of one State alone but shock the conscience of mankind". It then cited with approval: "These norms [concerning crimes against laws and customs of war], due to highly ethical and moral content, have a universal character, not a moral one..."<sup>11</sup> and "[These crimes] involve the perpetration of an international crime which all the nations of the world are interested in preventing".<sup>12</sup>

Municipal legislation provides rather stronger authority for the existence of the category. It is particularly useful to highlight statutes from States from the common law tradition. Section 9 of Australia's War Crimes Act 1945, as amended by the War Crimes Amendment Act 1988, *inter alia* provides:

"(1) A person who: (a) on or after 1 September 1939 and on or before 8 May 1945; and (b) whether as an individual or as a member of an organisation; committed a war crime is guilty of an indictable offence against this Act."

Although temporally and, by section 5 of the Act, spatially limited, this is an undoubted implicit reference to the universal category. A more general approach is found in the Canadian Criminal Code, with s. 7 (3.71) *inter alia* providing:

"Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if

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that conventions of humanitarian nature might pass into customary international law more readily than others as they provide "restraints on conduct that would otherwise be anarchical" and that "they are directed to the protection of human rights rather than to the interests of States", at p 286. An authoritative and reasonable approach to this issue is that it is "... axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or *indeed developing them...*", *Continental Shelf (Libyan Arab Jamahiriya/ Malta)*, Judgement, [1985] ICJ Rep 13 at 29, [emphasis added].

<sup>9</sup> International Military Tribunal (Nuremberg), Judgement and Sentences, (1947) 41 AJIL 172 at p 216. The IMT was governed by the Charter of the International Military Tribunal, which was annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis of 8 August 1945, (1945) 8 UNTS 279, also known as the London Agreement.

<sup>10</sup> Case No. IT-94-I-AR72, (1996) 35 ILM 32. The Tribunal was set up under Security Council Resolution 827 (1993), 32 ILM 1203. The Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, and the Secretary- General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia are found at (1993) 32 ILM 1159. Hereinafter the Yugoslavian Tribunal and the Secretary- General's Report respectively.

<sup>11</sup> Case of General Wagener, decided by the Supreme Military Tribunal of Italy, cited *ibid.*, at p 51.

<sup>12</sup> Attorney- General for the Government of Israel v. Adolf Eichmann, (1962) 36 ILR 5 at 293, cited *ibid.* at p 51. Hereinafter the Eichmann Case.

committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,... (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the persons presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada”.<sup>13</sup>

In municipal case law are abundant and unequivocal statements in support of the universal category. The cases following the Second World War tried by the individual Allied Powers provide some relatively early examples. In *Re Eisentrager*<sup>14</sup> a United States Military Commission in Shanghai held that a war crime is “a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers”.<sup>15</sup> In the Dutch case of *In re Rohrig, Brunner and Heinze*<sup>16</sup> the Special Criminal Court stated in regard to jurisdiction over war crimes “This rule has the same universality as that applied internationally in the rule that treats pirates as enemies of mankind... This principle must be applied also to the trial of the accused since [the alleged crimes are] a matter of concern to the whole of mankind”.<sup>17</sup> In the recent Australian case of *Polyukhovich v. The Commonwealth of Australia and Another*<sup>18</sup> is found a statement providing authority for the existence of the category as well as explicit support for the proffered approach to the relationship between the category and material international crimes:

“... the two questions- whether a crime exists and the scope of the jurisdiction to prosecute- are inextricably linked. An international crime is constituted, precisely, where conduct is identified which offends all humanity, not only those in a particular locality; the nature of the conduct creates the need for international accountability. Where conduct, because of its magnitude, affects the moral interests of humanity and then assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail”.<sup>19</sup>

Juristic writings support both the category and its relationship with material international crimes. One such statement being:

“The existence of the concept “international crimes,” i.e., offences which endanger the fundamental values of the international community as a whole, has given rise to the universality principle, whereby every state which is a member of that community has the power to retaliate against such offences wherever they may have been committed”.<sup>20</sup>

Randall describes the universal category as providing “every State with jurisdiction over a limited category of offences generally recognized as of universal concern, regardless of the situs of the offence and the nationalities of the offender and offended”.<sup>21</sup> Further it has been written that the universal category applies to “crimes which are founded in international law... recognised... as attacks on the international order”.<sup>22</sup> The International Law Commission, upon the direction of the General Assembly, issued the Principles of International Law Recognized in

<sup>13</sup> Revised Statutes of Canada 1985, c. C-46, as amended.

<sup>14</sup> (1949) 1 LRTWC 8.

<sup>15</sup> *Ibid.* p 15.

<sup>16</sup> (1950) 17 ILR 393.

<sup>17</sup> *Ibid.* p 395. On appeal the Special Court of Cassation, although not explicitly supporting or denying the applicability and existence of the universal principle in regard to war crimes, preferred to refer to the passive personality category, see below.

<sup>18</sup> (1991) 172 CommLR 501.

<sup>19</sup> *Ibid.* at p 663 per Toohey J.

<sup>20</sup> Feller, S.Z., *supra* note 1 at p 20.

<sup>21</sup> Randall, K.C., *Universal Jurisdiction Under International Law*, (1988) 66 TLR 785 at p 788.

<sup>22</sup> Mann, F.A., *The Doctrine of Jurisdiction in International Law*, (1964- I) RdC 1 at p 95.



the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal in 1950, the sixth principle of which *inter alia* states that war crimes and crimes against humanity are “punishable as crimes under international law”.<sup>23</sup> Article 26 of the 1993 ILC Draft Statute provides that the proposed court may have jurisdiction over *inter alia* crimes under “general international law”.<sup>24</sup> The rationale behind the inclusion of this provision is obvious; it is necessary to include within the court’s jurisdiction crimes of an international nature, and at the heart of this grouping of crime are crimes rooted in customary law. As the Commentary to Article 26 itself states this provision “... is intended to cover international crimes which have their basis in customary international law...”.<sup>25</sup> The Commentary gives as examples “genocide, in the case of States not parties to the Genocide Convention, or other crimes against humanity not covered by the 1949 Geneva Conventions”.<sup>26</sup>

### The Universal Category- Application

The universal category is *sui generis*. Unlike other categories it is possible to fully and precisely identify the prescriptions exercised with reference to it. There exist four sub-groupings of such crimes; piracy, genocide, war crimes and crimes against humanity. These are included as they are prescriptions founded within customary international law. As such they are amenable to application by every State. Excluded are the manifold and disparate crimes proscribed by international convention, including those containing an *aut dedere aut judicare* provision. This is because such provisions strictly provide for the assumption of jurisdiction only *inter se* the parties to that convention. Until and unless they come to exist apart from the convention from which they had their origins they cannot be justified with reference to the universal category. This distinction is followed by the Law Commission of Canada where, in examining the universal category, it discusses under the heading “universal crimes”, piracy and war crimes.<sup>27</sup> In contrast are what it terms “Offences under International Treaties” defining them as “... multilateral treaties (conventions) relating to crimes which, although they may not be declaratory of customary international law, have international criminal jurisdiction implications for the states party to them...”, it includes within the latter, *inter alia*, conventions concerning aircraft<sup>28</sup>, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents 1973<sup>29</sup>, the Single Convention on Narcotic Drugs<sup>30</sup> and its Amending Protocol<sup>31</sup>, the Slavery Convention 1926<sup>32</sup>, the

<sup>23</sup> (1950), 5 UN GOAR Supp. (No 12) 11 UN Doc A/1316 (1950), (1950) 41 AJIL 126.

<sup>24</sup> Supra note 2. The term is defined above at note 2. The final draft version adopted by the ILC, UN Doc A/49/355 of 1 Sept. 1994, differs slightly. Lauterpacht avers that the works of the ILC are “at least in the category of writings of the most qualified publicists”, in Lauterpacht, E., (ed.) *International Law, being the collected papers of Hersch Lauterpacht*, Vol. 1, 1970, p 445. The statute of the International Criminal Court adopted by the Rome conference 17 July 1998 includes genocide, war crimes and crimes against humanity as core crimes, Rome Statute of the International Criminal Court, <http://www.un.org/icc/romestat.htm>.

<sup>25</sup> Ibid. p 268.

<sup>26</sup> Ibid. p 269.

<sup>27</sup> Law Reform Commission of Canada, *Extraterritorial Jurisdiction*, Working paper 37, Ministry of Supply and Services, Ottawa, 1984, at p 80.

<sup>28</sup> Namely the Tokyo Convention on offences and Certain Other Acts on Aircraft 1963, (1969) UKTS 126, Cmnd. 4230; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, (1972) UKTS 39, Cmnd. 4956; and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971, (1974) UKTS 10, Cmnd. 5524.

<sup>29</sup> (1980) UKTS 3, Cmnd. 7765.

<sup>30</sup> (1964) 520 UNTS 204.

<sup>31</sup> (1972) 11 ILM 804.

<sup>32</sup> Properly called the International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade 1926, (1927) UKTS 16, Cmnd. 2910.

International Convention for the Suppression of White Slave Traffic 1910<sup>33</sup>, the International Convention against the Taking of Hostages 1979<sup>34</sup>, and the Convention on the Physical Protection of Nuclear Material 1980.<sup>35</sup> The universal category being centrally affected by the existence of customary international prescription, it is useful to examine it on the basis of its international and municipal application, rather than, as in the other categories, common law and non- common law State application. This is also useful in that international law authoritatively defines these crimes as well as ascribes to them their unique jurisdictional characteristic.

## The Universal Category- International Application

### Piracy

In international law piracy is defined by the Convention on the Law of the Sea 1982<sup>36</sup>, the relevant provisions mirroring those in the Geneva Convention on the High Seas 1958.<sup>37</sup> Article 101 of the 1982 Convention provides :

“Piracy consists in any of the following acts: (a) any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State. (b) any act of voluntary participation in the operation of a ship or of an aircraft with any knowledge of facts making it a pirate ship or aircraft. (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

This is undoubtedly the modern conception of piracy in international law.<sup>38</sup> It has three core requirements; that it occur outwith the area of control of any State, that it comprise an act of an unwarranted nature, and that it be committed for private ends. Further, the piratical act must be committed by persons aboard a private vessel, not under the control of any State. The formerly requisite element of a particular intent, namely an intent to plunder<sup>39</sup>, as well as the need for the piratical act to actually succeed for the international crime of piracy to lie appear to no longer be mandatory.<sup>40</sup> Although the prescriptive source of the crime of piracy is customary international law, there are two relevant provisions in the 1982 Convention, Article 100 and Article 105 which, as seen above, *inter alia* provide for the seizure, arrest and trial of pirates. These relevant conventional provisions both clarify the precise composition of the prescription as well as support its existence in custom.

### Genocide

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<sup>33</sup> (1910) 211 CTS 45, as amended by the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic 1949, (1949) 98 UNTS 101.

<sup>34</sup> (1983) UKTS 81, Cmnd. 9100.

<sup>35</sup> (1979) 18 ILM 1422.

<sup>36</sup> (1982) 21 ILM 1261.

<sup>37</sup> 5 UKTS (1963), Cmnd 1929.

<sup>38</sup> Piracy lies at the root of the universal category, a pirate being considered a *hostis humani generis* prior to the development of international law in its modern sense. The Law Reform Commission of Canada has stated “The oldest of the universal crimes is piracy”, *supra* note 27, at p 80. Bassiouni states that the existence of the universal category “stems from the customary international practices regarding pirates and brigands in the 1600’s”, Bassiouni, M.C., *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff, London, 1992, p 513.

<sup>39</sup> *Animo furendi*.

<sup>40</sup> The latter was the issue in the well known English case of *In re Piracy Jure Gentium* [1934] AC 586, where the House of Lords held that a frustrated attempt to commit piracy was piracy *jure gentium*. See below.

The international crime of genocide is a relatively modern one.<sup>41</sup> It owes its existence to the Convention on the Prevention and Punishment of Genocide 1948.<sup>42</sup> The Convention today forms the core of the conventional law on genocide.<sup>43</sup> Four articles from the Convention are of importance for the present purposes. Article 1, recognising the internationally criminal nature of genocide, Articles 2 and 3 defining and prescribing the act, and Article 6, the jurisdictional article. Article 1 states "The Contracting Parties confirm that genocide whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish".

Article 2 provides:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group".

Article 3 is the prescriptive clause, it reads:

"The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide".

Article 6 states:

"Persons charged with genocide or with any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

Each of these merit comment. Article 1 is significant in that it "confirms" that genocide is a crime under international law. Clearly this is significant in that it supports the existence of the crime in international law as a customary offence.<sup>44</sup> The definition of genocide in Article 2 is

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<sup>41</sup> The term "genocide" was coined by R. Lemkin who also did much of the work leading up to the adoption of the Genocide Convention, *supra* note 5. See Lemkin, R., *Axis Rule in Occupied Europe*, Washington, Carnegie Endowment for World Peace, 1944, and Lemkin, R., Genocide as a Crime Under International Law, (1947) 41 AJIL 145.

<sup>42</sup> *Supra* note 5. As of 5 August 1998 there were 125 parties to the Genocide Convention, <http://www.un.org/Depts/Treaty>.

<sup>43</sup> Bassiouni has stated that "... 'Genocide' remains a single instrument crime", in Bassiouni, M.C., (ed.), *International Crimes: Digest/ Index of International Instruments 1815-1985, Vol. 1*, New York, Oceana, 1986, at p 395. However, other international instruments do aim to protect analogous interests from similar attacks, for example the Convention on the Elimination of All Forms of Racial Discrimination 1966, Articles 4 and 5, annexed to General Assembly Resolution 2106 (XX) of 19 January 1966, (1966) 5 ILM 350, *inter alia* protects racial and ethnic groups from violence and bodily harm.

<sup>44</sup> Of course that the term was only coined several years prior to the Convention itself causes difficulty. In spite of this it has recently been stated "The prohibition against genocide clearly pre-existed the Convention as a prohibition of customary international law", in Higgins, R., *Problems and Process; International Law and How We Use It*, Clarendon Press, Oxford, 1994 at p 29.

fraught with potential difficulty.<sup>45</sup> Illustrative of this is the long and contentious ratification process in the United States Senate.<sup>46</sup> This noted this is the definition that has been adopted by a number of States including the United Kingdom and Israel.<sup>47</sup> Internationally, it has been adopted in the statutes for both the Yugoslavian and Rwandan tribunals.<sup>48</sup> Article 3, the prescriptive clause, is significant in that it explicitly makes punishable genocide and related inchoate and participatory crimes.

It is Article 6 of the Genocide Convention that is the most problematic. It provides that the assumption of jurisdiction must be made with reference to the territorial category or, alternatively, by an international penal tribunal accepted by the Contracting Parties concerned. This provision *prima facie* conflicts with genocide being an international crime in the material sense and *a fortiori* the understanding of international crimes and the category presently taken. This difficulty is overcome by reference to both the Convention itself and to State practice following its adoption. In regard to the former it appears that, in spite of reference to the territorial category, it is not the exclusive category which can justify the assumption of jurisdiction over the crime. The report of the committee of the General Assembly involved in the adoption of the Convention states on this issue: "The first part of Article 6 contemplates the obligation of the State in whose territory acts of genocide have been committed. Thus, in particular, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State".<sup>49</sup> The words "in particular", have been said to denote that Article 6 does not "rule out the application of other principles of jurisdiction" in addition to that of the active personality category.<sup>50</sup> International authority outwith the Convention provides strong support for the relationship between the universal category and genocide. The International Court of Justice in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion)<sup>51</sup> stated that a

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<sup>45</sup> Paramount in the objections to the conventional definition of genocide is that political groups are not amongst those against which it can be committed. Whilst it is beyond the scope of the present work to examine this question, the root of genocide is *genos*, meaning in Greek race or tribe, which suggests something other than merely political groups.

<sup>46</sup> At the time of its drafting the United States was a staunch supporter of the Convention, it became stalled in the process of ratification. Forty years subsequent, in February 1986, the US Senate finally adopted the Convention. The Resolution of Ratification, known as the Lugar- Helms- Hatch Sovereignty Package, S. Exec. Rep. 2, 99th Cong., 1st sess. 26- 27 [1985], did not adopt the Convention outright. Rather it was adopted with two reservations and five "understandings". For a useful discussion of the Genocide Convention in the United States see LeBlanc, L.J., *The United States and the Genocide Convention*, London, Duke University Press, 1991, which contains the Sovereignty Package and the act implementing the Convention into United States law, the Genocide Convention Implementation Act 1988, (the Proximore Act).

<sup>47</sup> See below.

<sup>48</sup> The Yugoslavian Tribunal is cited at *supra* note 10, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violation committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, was set up by Security Council Resolution 955 (1994), 33 ILM 1600, its Statute is found at (1994) 33 ILM 1602. Hereinafter the Rwandan Tribunal.

<sup>49</sup> Report of the Ad Hoc Committee on Genocide, UN Doc E/794 (1948) at p 11- 12, cited in LeBlanc, *supra* note 48 at p 179. For a description of the process leading to the adoption of the Genocide Convention 1948 see LeBlanc, *ibid.*, at pp 25-28.

<sup>50</sup> LeBlanc, *ibid.*, at p 57. Further, it has recently been stated that the omission of reference to universal jurisdiction in the Genocide Convention does not necessarily exclude that possibility, in Kuper, L., *Theoretical Issues Relating to Genocide: Uses and Abuses*, in Andreopoulos, G.J., (ed.), *Genocide: Conceptual and Historical Dimensions*, Philadelphia, University of Pennsylvania Press, 1994, at p 44.

<sup>51</sup> (1951) ICJ Rep 15.

“special characteristic” of the Convention is the “universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’... The Genocide Convention was therefore intended by the General Assembly to be definitely universal in scope”.<sup>52</sup> Further international authority is found in the Secretary-General’s Report annexed to the Yugoslavian Statute, it *inter alia* states that the Genocide Convention “is today considered part of international customary law...”.<sup>53</sup> Of course the assumption of jurisdiction by the Yugoslavian Tribunal is expressly provided for, leaving open the question as to how and if this authority affects the customary position of genocide. Apropos to which it has been written that “the legal basis for the Tribunal is a Security Council resolution... the Tribunal exercises jurisdiction on the basis of internationality and not universality...”.<sup>54</sup> While it must be conceded that the binding nature of Security Council Resolutions under Article 25 of the UN Charter can lead to this conclusion, it is not necessary to “over- ride” or “contract- out” of the customary international law of jurisdiction as a crime prescribed by customary international law is by that very fact amenable to being prosecuted with reference to the universal category by any State individually or by States collectively. However, that noted, the application of the Statute is certainly not universal, it does not apply to all persons accused of such crimes wherever and whenever they were allegedly committed. Article 8 of the Statute limits the Tribunals’ application on both a temporal and geographical basis, it applying to the land surface, airspace and territorial waters of the former Yugoslavia to acts occurring after 1 January 1991. This self- limitation however is not to be construed as supporting the conclusion that genocide is not an international crime subject to the assumption of jurisdiction with reference to the universal category. Germane here is the inclusion of genocide as a “core crime” in the Statute of the International Criminal Court as adopted by the Rome Conference, as indeed are war crimes and crimes against humanity.<sup>55</sup>

## War Crimes and Crimes Against Humanity

Current and authoritative international definitions of the sub- grouping of crimes under the headings war crimes and crimes against humanity are found in the Yugoslavian Statute.<sup>56</sup> The basis of the crimes within the former sub- grouping are the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto<sup>57</sup> and the Geneva Conventions 1949.<sup>58</sup> Both are stated by Secretary General’s Report to have “beyond doubt become part of international customary law” and to give rise to individual responsibility for breaches of certain of their provisions.<sup>59</sup> The former sub- grouping of “war crimes” are reproduced in Article 3 of the Yugoslavian Statute entitled Violations of the Laws or Customs of War, it provides:

“The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

<sup>52</sup> Ibid. at p 23. As an explanation of the existence of genocide as a crime in customary international law at the time of the adoption of the Convention the Court stated that genocide “is contrary to moral law and to the spirit and aims of the United Nations”. Such a metaphysical approach is not consonant with a clear, precise and positivistic body of international criminal law.

<sup>53</sup> Supra note 10 at p 1172.

<sup>54</sup> Fenrick, W.J., Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia, (1995) 6 DJCIL, 103 at p 104.

<sup>55</sup> Supra note 24. The other core crime being aggression. For a discussion of the possible effect of the Statute and Court on State jurisdiction see the Conclusion.

<sup>56</sup> Supra note 10. The formulation in the Statute of the International Criminal Court is broader in scope, see Article 8, supra note 24.

<sup>57</sup> (1908) 2 AJIL 90.

<sup>58</sup> Supra note 7.

<sup>59</sup> Supra note 10 at p 1170- 71.

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art or science;
- (e) plunder of public or private property”.

Article 2, entitled Grave Breaches of the Geneva Conventions 1949, provides:

“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:

- (a) wilful killing;
- (b) torture or inhumane treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of a fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages”.<sup>60</sup>

The sub- grouping of crimes under the heading crimes against humanity have a more unorthodox pedigree. Their origin is found in the Charter of the International Military Tribunal,<sup>61</sup> which the Secretary- General’s Report also states has “beyond doubt become part of international customary law”.<sup>62</sup> Based upon these origins is Article 5 of the Yugoslavian Statute, it provides:

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<sup>60</sup> This provision mirrors the common “grave breach” articles in the four 1949 Conventions. They begin: “Grave breaches... shall be those involving any of the following acts, if committed against persons or property protected by the Conventions: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health...”. The definition of grave breaches contained in Conventions I and II are identical and continue “... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. The conclusion of the exposition of grave breaches in Convention III provides “... compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of a fair and regular trial prescribed in this Convention”. In Convention IV the definition continues “... unlawful deportation or transfer or unlawful confinement of protected persons, compelling a person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of a fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

<sup>61</sup> Supra note 9. This was the first occasion the term “crime against humanity” entered into positive international law, Wexler, L.S., The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, (1994) 32 Col JTL 289. The Accord (London Agreement) and the Charter have been said to represent a “quasi- revolution in international law”, *ibid.* at p 304. The problems resultant from the unorthodox pedigree of this class of crimes is discussed in Bassiouni, M.C., “Crimes Against Humanity”: The Need for a Specialized Convention, (1994) 31 Col JTL 457.

<sup>62</sup> Supra note 10 at p 1170.

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecution on political, racial, and religious grounds;
- (i) other inhumane acts”.<sup>63</sup>

In contrast to the strong conventional and other international reference to the above crimes is scant international judicial authority. This is a result of the limited recourse States have had to international criminal courts or tribunals, prior to recent developments there was only the activity following the conclusion of the Second World War. During the proceedings of the IMT there were prosecuted at Nuremberg 22 individuals and 7 organisations. As with the newly formed Tribunals difficulties exist in the ascription to the universal category the assumption of jurisdiction by the IMT. These follow largely from the manner of its creation. The IMT makes only one reference to the category<sup>64</sup> cited above.<sup>65</sup> Fifty years subsequent has been the conviction of Dusko Tadic on 7 May 1997.<sup>66</sup> Tadic was convicted of offences against the laws and customs of war as in Article 3 of the Statute, and of crimes against humanity under Article 5. The judgement held that the Geneva Conventions 1949, the laws and customs of war as found in Article 3, and crimes against humanity as in Article 5 of the Statute all existed in the corpus of customary international law. There thus was no question of conflict between the application of the prescriptions in the present case and the principle of *nullem crimen sine lege*.<sup>67</sup> The question of the jurisdiction of the tribunal was explicitly and directly dealt with not in the judgement but rather by the Appeals Chamber prior to his conviction.<sup>68</sup> The Appeals Chamber held that the crimes that it was applying “do not affect the interests of one State alone but shock the conscience of mankind”, and that “... universal jurisdiction being nowadays acknowledged in the case of international crimes...”.<sup>69</sup>

#### The Universal Category- Municipal Application

##### Piracy

The definition of piracy above is the international manifestation, not any municipal version.<sup>70</sup> It may or may not precisely correspond with municipal law conceptions.<sup>71</sup> To a certain extent

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<sup>63</sup> This formulation is largely congruous with that found in Article 7 of the Statute of the International Criminal Court, *supra* note 24.

<sup>64</sup> Randall, *supra* note 21 at p 806.

<sup>65</sup> *Supra* p 76.

<sup>66</sup> Prosecutor v. Dusko Tadic, Case No. IT-94-I-T, 7 May 1997, excerpts in (1997) 36 ILM 908.

<sup>67</sup> *Ibid.* in paras 577, 609, and 623 respectively.

<sup>68</sup> *Supra* note 10.

<sup>69</sup> *Ibid.* at pp 51- 53.

<sup>70</sup> For a detailed examination of the latter see Dubner, B.H., *The Law of International Sea Piracy*, Martinus Nijhoff, London, 1980.

<sup>71</sup> For an discussion of the early English and American municipal piracy law see Dickinson, E.D., *Is the Crime of Piracy Obsolete?*, (1924-25) 38 HLR 334 at 340-343.

municipal definitions are not relevant for the present purposes.<sup>72</sup> The fundamental characteristic of the universal category being that it justifies the assumption of jurisdiction over international crimes in the material sense of the term, not municipal crimes. In this regard it has been authoritatively stated:

“With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but “*hostis humani generis*” and as such he is justiciable by any State anywhere”.<sup>73</sup>

It is important that the role given municipal law in the above quotation is one of recognition, not constitution. To prevent the pirate escaping sanction and being free from the possibility of being tried by the criminal justice system of any State, there is piracy *jure gentium*. The pirate is open to the sanction of the State that gains custody of him. An illustration of State practice wholly adopting the international manifestation of piracy is found in s. 74 of the Canadian Criminal Code. It provides “(1) Every one commits piracy who does any act that, by the law of nations, is piracy. (2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life”.

## Genocide

The outstanding municipal genocide precedent is Attorney- General of the Government of Israel v. Adolf Eichmann.<sup>74</sup> It is particularly authoritative due to the thorough approach and intrinsic quality of the reasoning in both the judgements of the District Court of Jerusalem and the Israeli Supreme Court. The District Court judgement is also significant due to its treatment of the jurisdictional problems caused by Article 6 of the Convention. It stated:

“The words “confirm” in Article 1 of the Convention and “recognized” in the Advisory Opinion indicate confirmation and recognition *ex tunc*, namely, recognition and confirmation that the said principles [*inter alia* the definition and prescription of genocide] were already part of customary international law when the dreadful crimes were perpetrated...”<sup>75</sup>

The Court slightly later in its judgement states:

“We must therefore draw a clear distinction between the first part of Article 1... a general provision which confirms a principle of customary international law... and Article 6, which comprises a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future... [T]his latter

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<sup>72</sup> Of course State practice in conflict with the international definition of the crime is significant in part because it would conflict with an international obligation. Equally, State practice in conformity with international practice is evidence of an international obligation being complied with and would solidify the definition of the crime in customary international law.

<sup>73</sup> Viscount Sankey L.C. In re Piracy *Jure Gentium*, supra note 40 at p 589, quoting from Grotius, *De Jure Belli ac Pacis*, vol. 2, cap. 20, § 40.

<sup>74</sup> Supra note 12. Amongst the literature are Fawcett, J.E.S., *The Eichmann Case*, (1962) 38 BYIL 181; Green, L.C., *The Eichmann Case*, (1960) 23 MLR 507; and Schwarzenberger, G., *The Eichmann Judgement: An Essay in Censorial Jurisprudence*, (1962) 15 CLP 248.

<sup>75</sup> *Ibid.* at p 35.



obligation... constitutes no part of the principles of customary international law, which are also binding outside the conventional application of the Convention".<sup>76</sup>

In this regard the District Court said:

"... in the Convention for the Prevention and Punishment of Genocide the Members of the United Nations... contented themselves with the determination of territorial jurisdiction as a compulsory minimum. It is the consensus of opinion that the absence from this Convention of a provision establishing the principle of universality (together with the failure to constitute an international criminal tribunal) is a grave defect in the Convention... but there is nothing in this defect to lead us to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question".<sup>77</sup>

Implicitly acting under this view Israel had enacted a jurisdictional provision by which it justified the assumption of jurisdiction over genocide with reference to the universal category.<sup>78</sup> Further State practice is found in the German Penal Code. Section 220a of which provides Germany with jurisdiction over alleged acts of genocide "irrespective of the place of the commission of the offence and the nationality of the offender".<sup>79</sup> In support of the conventional definition of genocide is Article 137 of the Spanish Penal Code and section 1(1) of the UK Genocide Act 1969, both following that in the Genocide Convention.<sup>80</sup>

### War Crimes and Crimes Against Humanity

In contrast to the dearth of international judicial application of the sub- groupings of prescriptions under the heading war crimes and crimes against humanity is municipal judicial application. Again, however, such application tends to have occurred immediately following the Second World War and in relatively recent times. In regard to the former reference to the category is found in the trials that took place under the auspices of the courts or tribunals of the Allies as individual States after the Second World War.<sup>81</sup> A prominent example is the case of *In re List*<sup>82</sup> prosecuted by the United States Zonal Tribunal.<sup>83</sup> It stated: "The crimes defined in Control Council Law No. 10... were crimes under pre- existing rules of International Law-

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<sup>76</sup> Ibid. at p 36.

<sup>77</sup> Ibid. at pp 38- 39.

<sup>78</sup> Section 5 of the Israeli Nazis and Nazi Collaborators (Punishment) Law, *inter alia* provides that "any person who had committed outside Israel an act which is an offence under this Law may be prosecuted and punished in Israel as if he had committed the act in Israel", Law 5710/ 1950, cited in Eichmann, *supra* note 12 at p 39.

<sup>79</sup> Vierucci, L., The First Steps of the International Criminal Tribunal for the Former Yugoslavia, (1995) 6 EJIL 134. This was to be applied to Tadic, who was arrested in Munich on 13 February 1994.

<sup>80</sup> The Spanish position is noted in Questionnaires and Replies, European Committee on Crime Problems, 4 October 1990, PC-R-EJ/INF Bil, at p 48. Section 1(1) of the UK Genocide Act 1969 provides "A person commits an offence if he commits any act falling within the definition of "genocide" in Article II of the Genocide Convention".

<sup>81</sup> The IMT only tried individuals whose crimes had no particular localisation and could be deemed "major" war criminals, Wexler, *supra* note 62 at p 306. Article 1 of the Charter of the IMT *inter alia* states that it is created for the "just and prompt trial of the major war criminals of the European Axis", thus leaving "minor" war criminals to be tried by the individual Allies.

<sup>82</sup> (1948) 15 Ann Dig 632.

<sup>83</sup> The law under which most of the national prosecutions took place, Allied Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, defined crimes against humanity in Article II 2 (c) as "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture rape, or other inhumane acts committed against any civilian population, or persecution on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated", Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, 1 Ferencz 488.

some by conventional law and some by customary law... An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances".<sup>84</sup> A further example is *In re Eisentrager*<sup>85</sup> where the United States Military Commission in Shanghai said that a war crime is "a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers".<sup>86</sup>

A recent municipal instance of reference to the universal category in regard to war crimes and crimes against humanity is the Canadian case of *R v. Finta*.<sup>87</sup> This case followed an amendment to the Canadian Criminal Code, expanding Canadian jurisdiction over war crimes and crimes against humanity.<sup>88</sup> The core of the relevant legislation is found in the Canadian Criminal Code s. 7 (3.71), outlined above. The provision was applied against Irma Finta in respect of alleged war crimes and crimes against humanity occurring during the Second World War. At the time he was a Hungarian national. He had emigrated to Canada in 1951, becoming a Canadian citizen in 1956. Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter of 8617 Jews between 16 May and 30 June 1944 at or about Szegeed, Hungary. In the indictment it was also stated that these offences constituted war crimes and crimes against humanity under s 7 (3.71).<sup>89</sup> At his trial he was acquitted of all charges. Appeals by the Crown to the Ontario Court of Appeal and then the Supreme Court of Canada were both dismissed.<sup>90</sup> At no time in the course of the proceedings against Finta was it held that the Canadian legislature or courts lacked jurisdiction to proceed against him even though his alleged crimes occurred outside Canada and at the time he was a non-national. It was the presence of Finta within Canada which was at the heart, and the *sine qua non*, of Canada's assumption of jurisdiction over him.<sup>91</sup> Particularly germane are comments found in the judgement of La Forest J. (dissenting).<sup>92</sup> He states:

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<sup>84</sup> Supra note 82 at p 634- 636.

<sup>85</sup> Supra note 14.

<sup>86</sup> Ibid. p 15.

<sup>87</sup> (1994) 112 DLR (4th) 513, [Supreme Court of Canada], (1992) 92 DLR (4th) 1, [Ontario Court of Appeal].

<sup>88</sup> For a discussion of the deficiencies of the prior legislation and the process from which the amendment emerged see Green, L.C., Canadian Law, War Crimes and Crimes Against Humanity, (1988) 59 BYIL 217 at p 221- 228.

<sup>89</sup> "War crimes" and "crimes against humanity" in this context are defined by s. 7 (3.76) of the Criminal Code. It *inter alia* states:

"'crime against humanity' means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group or persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations.

'war crime' means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts."

<sup>90</sup> See further Arnell, P., War Crimes- A Comparative Opportunity, (1996) 13 IntR 29.

<sup>91</sup> It is the custody of the accused and custody alone which is the requisite nexus between the State exercising jurisdiction and alleged perpetrator of an international crime. States are, of course, entitled to impose further conditions upon themselves. Canada does, namely that "(1) the act or omission was committed outside the territorial boundaries of Canada; (2) the act or omission constitutes a crime against humanity or a war crime; (3) the act or omission, had it been committed in Canada, would

“War crimes and crimes against humanity are crimes under international law. They are designed to enforce the prescriptions of international law for the protection of the lives and the basic human rights of the individual, particularly, as befits an international prescription, against the action of states. They are acts universally recognized as criminal according to general principles of law recognized by the community of nations”.<sup>93</sup>

He later continues “... war crimes and crimes against humanity reflect the views of the members of the family of nations... they may be found not only in international conventions but also in customary international law”.<sup>94</sup> He states as to the relationship of international crimes and jurisdiction:

“Since war crimes and crimes against humanity are crimes against international prescriptions and, indeed, go to the very structure of the international legal order; they are not under international law subject to the general legal prescription (reflected in s. 6(2) of our Criminal Code) that crimes must ordinarily be prosecuted and punished in the state where they are committed... Indeed, the international community has encouraged member states to prosecute war crimes and crimes against humanity wherever they have been committed”.<sup>95</sup>

Of further interest is La Forest’s reference to the Report of the Deschênes Commission on War Criminals,<sup>96</sup> it being of the view (prior to the amendment to the Criminal Code) that there was no absolute need to introduce new legislation as a prosecution could be based upon the “violation of the general principles of law recognized by the community of nations”.<sup>97</sup>

A further recent case is *Polyukhovich v. The Commonwealth of Australia and Another*.<sup>98</sup> Most relevant here are the comments upon the validity of s. 9 of the Australian War Crimes Act 1945, as amended by the War Crimes Amendment Act 1988. The proceedings arose from the prosecution of Ivan Polyukhovich. It was alleged that he had committed war crimes in the Ukraine between 1942 and 1943, when it was under German occupation. At the time Polyukhovich was not an Australian national. The case turned upon whether the Act was consonant with a valid exercise of “external affairs power” in part governed by s. 51 (xxix) of the Australian Constitution.<sup>99</sup> In support of this position the Commonwealth *inter alia* argued that the Act was “a valid exercise of the external affairs power because Australia has jurisdiction in international law to prosecute war crimes and crimes against humanity which occurred outside Australia against non- nationals”.<sup>100</sup> The jurisdictional challenge was dismissed, Brennan J. *inter alia* stating:

“... the Act was said to be a law adapted and appropriate to the exercise of a right which international law specially confers on each nation to try those charged with the

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have constituted an offence against the laws of Canada in force at the time...”, *R v. Finta* (1994), supra note 87 at p 591 per Cory J. In regard to these conditions one of the issues in the appeal was whether the trial judge was correct in leaving the determination of the second point above to the jury. The Supreme Court held that as the issue went to whether the essential elements of the offence have been proven it was properly left to the jury.

<sup>92</sup> Although dissenting, the disagreement with the majority was essentially concerned with what was to be left to the jury, not the position of war crimes and crimes against humanity in international law.

<sup>93</sup> Supra note 87 at 529- 530 per La Forest J.

<sup>94</sup> Ibid. at p 531.

<sup>95</sup> Ibid. at p 532.

<sup>96</sup> Deschênes, J., Canada Commission on War Criminals Report, 1986. The Commission was created by Order in Council P.C. 1985- 348.

<sup>97</sup> Supra note 87 at p 533. This option was dismissed by the Commission, La Forest notes, “on the grounds that a prosecution under international law appears too esoteric”, *ibid*.

<sup>98</sup> Supra note 18.

<sup>99</sup> UK statute 63 & 64 Vict, c. 12.

<sup>100</sup> Supra note 18 at p 658 per Toohey J.

commission of international crimes, especially war crimes... Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order... International law recognizes certain international crimes in respect of which any country may exercise criminal jurisdiction regardless of the citizenship or residence of the alleged offender or of the place where the offence was committed".<sup>101</sup>

*Demjanjuk v. Petrovsky*<sup>102</sup> is yet a further instance of recent State practice, illustrating the position of both the United States, where it was decided, and Israel, the State which had instigated the proceedings. This case arose from an extradition request by Israel for John Demjanjuk alleging that he was guilty of crimes under the Nazis and Nazi Collaborators (Punishment) Law, 5710/ 1950.<sup>103</sup> At issue was Israeli jurisdiction because under the relevant American statute the extradition complaint must charge an offence "within the jurisdiction of [the relevant] foreign government".<sup>104</sup> It was held:

"Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations... When proceeding on that jurisdictional premise, [the universal category] neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offences against the law of nations or against humanity and that the prosecuting nation is acting for all nations".<sup>105</sup>

#### The Universal Category- Conjunctive Analysis

Given the unique nature of the universal category and the prescriptions exercised with reference thereto it would not be surprising if it failed in providing support for the conjunctive plank of this thesis. Material international crimes are alone, and by definition, justified with reference to the universal category. International crimes prescribed by national law are of a fundamentally different nature. "Quasi- universal" and "universal *inter se*" are oxymorons. Crimes proscribed by multilateral convention with their prescriptive basis in municipal law are wholly distinct from those prescribed by customary international law. Such a basic distinction would perhaps lead to the conclusion that each would be jurisdictionally distinct, that the category would fail to support the contention that jurisdiction is a single right in international law operative in the presence of a requisite facilitative connective. This is not the case. The universal category in fact provides support for both components of the conjunctive thesis; that the interests protected by the prescriptions exercised with reference to it are akin to those protected by prescriptions justified with reference to the other four categories, and that the former prescriptions are justified with reference to more than the universal category.

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<sup>101</sup> Ibid. at p 562- 63.

<sup>102</sup> (1985) 776 F 2d 571.

<sup>103</sup> The same statute under which Eichmann was tried.

<sup>104</sup> Supra note 102 at p 580.

<sup>105</sup> Ibid. at p 582- 583. Demjanjuk was extradited to Israel on 28 February 1986. He was convicted by the District Court of Jerusalem on 18 February 1988, being sentenced to death on 25 April of that year. His conviction was later quashed by the Israeli Supreme Court. He arrived back in the United States on 22 September 1993. See Keesing's Contemporary Archives 1986 p 34839, 1988 p 36189, 1993 p 39581 and p 39667. His conviction was overturned for non- jurisdictional reasons.

It is clear that the universal category is similar to the other categories to the extent that the interests served by them are largely common.<sup>106</sup> The prescriptions justified with reference to the universal category are largely capable of being characterised similarly. Namely as homicide/ violence, theft/ deception and direct State interests. It axiomatically concerns crimes of homicide/ violence, genocide being the homicidal exemplar. Not so obviously is piracy included as serving interests of homicide/ violence. It will be recalled however that Article 101 of the 1982 Convention *inter alia* prescribes "... illegal acts of violence".<sup>107</sup> The interests protected by prescriptions of theft/ deception are also served with reference to the universal category, with "robbery" and "appropriation", being *inter alia* crimes against property the central characteristic of this sub- grouping. For example it will be recalled that the issue In re Piracy Jure Gentium<sup>108</sup> was whether attempted robbery constituted the crime, robbery being an offence against persons and property. Article 2 of the Yugoslavian Statute incorporating the 1949 Geneva Conventions<sup>109</sup> *inter alia* prescribes the "extensive destruction and appropriation of property", acts which can undoubtedly be classified as being within the theft/ deception sub- grouping, albeit on a large scale. It is again axiomatic that "direct State interests" are protected by the prescriptions justified by the universal category. In regard to piracy it has been written:

"Pirates are usually robbers, and of all robbers they are peculiarly obnoxious because they maraud upon the open seas, the great highway of all maritime nations. So heinous is the offence considered, so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and enemies of mankind. They are international criminals. It follows that they may be arrested by the authorised agents of any state and taken for trial anywhere. The jurisdiction is universal".<sup>110</sup>

Clearly the security and safety of trade upon the high seas is an interest that is immediate and public, criteria for inclusion within "direct State interests". The question of whether direct State interests are protected by war crimes, crimes against humanity and genocide is less clear. This follows from those representing States themselves often being implicated in one manner or other in the contexts in which such crimes occur. This noted however there are certain circumstances, for example in a clear case of aggression or where one State to an international armed conflict utilises unlawful practices, that the State attacked or affected benefits from the protection afforded by these sub- groupings of material international crimes.<sup>111</sup> Of the distinct sub- groupings identified in relation to the other jurisdictional categories only that protecting the interests affected by the traffic in proscribed substances is not extant within the universal category.<sup>112</sup>

The second plank of the conjunctive thesis evinces authority making multiplicitous reference to the jurisdictional categories. There exists such authority making reference to the universal category together with one or more of all the other categories. Of this it is not surprising that most prevalent is that conflating the universal with the protective and passive personality categories. This being the result of the relative position of these categories as against the territorial and active personality categories as well as the affinity between the interests they

<sup>106</sup> What sets it apart is the scale of the crimes concerned or the particular context in which they occur, see below.

<sup>107</sup> Supra note 36.

<sup>108</sup> Supra note 40.

<sup>109</sup> Supra note 10.

<sup>110</sup> Dickinson, supra note 71 at p 338.

<sup>111</sup> It is significant to note that these sub- groupings of crimes do not generally and directly protect State interests *per se*.

<sup>112</sup> It is perhaps only a matter of time given the widespread conventional and judicial activity in the area. In regard to the sub- grouping morality/ public policy, it is possible to include at the very least genocide and crimes against humanity purely due to horrific nature of such crimes.

directly serve.<sup>113</sup> The Eichmann Case<sup>114</sup>, discussed above in relation to genocide is such an instance. Eichmann was charged under s 1(a) of the Nazis and Nazi Collaborators (Punishment) Law, 5710/ 1950, it *inter alia* states:

“A person who has committed one of the following offences-

(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the second World War, in an enemy country, an act constituting a war crime; is liable to the death penalty”.<sup>115</sup>

The District Court *inter alia* held in regard to Israel’s jurisdiction:

“... the power of the State of Israel to enact the law in question or Israel’s ‘right to punish’ is based... on a dual foundation: the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people”.<sup>116</sup>

Clearly both the legislative definition of genocide as a “crime against the Jewish people” and the District Court’s reliance upon the “specific character as intended to exterminate the Jewish people” as a foundation for the assumption of jurisdiction is tantamount to reliance upon the protective as well as passive personality categories. This was explicitly held to be in the case in the Supreme Court’s judgement:

“In regard to the crimes directed against the Jews the District Court found additional support for its jurisdiction in the connecting link between the State of Israel and the Jewish people... It therefore upheld its criminal and penal jurisdiction by virtue also of the “protective” principle and the principle of “passive personality”. It should be made clear that we fully agree with every word said by the Court on this subject...”<sup>117</sup>

The Dutch case of *In re Rohrig, Brunner and Heinze*<sup>118</sup> is a further example of reference to the universal and another jurisdictional category or categories. Here the court of first instance undoubtedly relied upon the universal principle in the exercise of jurisdiction over persons allegedly guilty of war crimes.<sup>119</sup> On appeal the Special Court of Cassation, *inter alia* held:

“... the law of nations, in its present state of development empowers a belligerent State to have enemy criminals who have offended against its legal interests tried by the judicial organs designated by it on the basis of internationally accepted laws and customs of war... Though, in general, the principle of jurisdiction over enemy war crimes operates within the doctrine of territoriality, the same order of ideas applies to the rule that war crimes must be tried on the basis of the principle of passive nationality (referring to the nationality of the victims) or even on the basis of the wider principle of the protection of national interests”.<sup>120</sup>

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<sup>113</sup> As to the latter Chapters Five and Six will support a not insignificant conflation between the three categories.

<sup>114</sup> Supra note 12.

<sup>115</sup> Ibid. at p 20.

<sup>116</sup> Ibid. at p 26. Eichmann was convicted under each of the three groups of offences. The District Court judgement was given on 12 December 1961 and the Supreme Court ruling on 29 May 1962. He was hanged on 31 May 1962.

<sup>117</sup> Ibid. at p 304. The Supreme Court agreed *in toto* with the District Court’s judgement, at p 279.

<sup>118</sup> Supra note 16.

<sup>119</sup> Noted supra p 77.

<sup>120</sup> Ibid. at p 397. The victims of the alleged acts were Dutch. This case is interesting that it appears to recognise the applicability of the passive personality category as well as the protective but not the universal as it holds that international law empowers not all States but rather belligerent States. See also *In re Gerbsch*, (1949) 16 Ann Dig 399.

A modern instance where, mistakenly, an assumption of jurisdiction was made with reference to the universal and passive personality categories is *US v. Yunis*.<sup>121</sup> Here, in a challenge to the assumption of jurisdiction over charges of aircraft piracy and hostage taking, it was held both the universal and passive personality “principles” supported the assumption of jurisdiction.<sup>122</sup> The territorial and active personality categories have also been referred to in conjunction with the universal. It will be recalled that in the English case of *DPP v. Doot*<sup>123</sup> Lord Wilberforce stated in a case of the traffic in proscribed substances “Under the objective territorial principle... or the principle of universality... or both, the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law”.<sup>124</sup> In *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*<sup>125</sup> jurisdiction was assumed and apparently justified with reference to the universal and active personality categories. The Belgium Court of Appeal holding that “the applicants committed acts on the high seas which fall within the application of the notion of “piracy”... [T]here is no provision of municipal or international law which imposes restrictions on the competence of Belgian courts, in relation to their own nationals, to take measures...”<sup>126</sup>

### The Universal Category- Disjunctive Analysis

The universal category analysed disjunctively leads to the construction of a distinct and unique grouping of substantive international criminal law. Its defining characteristic, lying at the centre of this grouping, is that the prescriptions exercised with reference thereto are crimes in customary international law. These prescriptions are international crimes in the material sense of that term. As a result it is possible to construct a discrete grouping of this body of substantive criminal law.<sup>127</sup> This is not to imply that the content of this grouping is static; as we have seen several crimes or categories of crimes exist at the margins of inclusion: aircraft hijacking, drug trafficking, and crimes against internationally protected persons for example. In time, if States individually or collectively continue to assume jurisdiction over these crimes with reference to the category, as well as, along with jurists, claim that they are in fact properly included they will come to exist within the category. However, at this stage it can safely only be said that there exist four such groupings of crimes; piracy, genocide, war crimes and crimes against humanity.<sup>128</sup> In analysing this grouping of international criminal law it is useful to highlight not only what the prescriptions extant within it have in common but also what sets them apart from other international criminal prescriptions. In a critical respect, as mentioned, these are the same: they have their prescriptive basis in customary international law, their application thus requiring no connective other than custody of the alleged offender.

As it was demonstrated above the interests protected by the prescriptions justified with reference to the universal category are largely congruent with those protected by all of the other

<sup>121</sup> (1988) 681 F Supp 896. It is mistaken as an international crime in the material sense of the term was not being charged. On appeal the jurisdictional question was side-stepped, with it being held that even if Yunis’ argument had merit the Court could not directly apply international law.

<sup>122</sup> *Ibid.* at pp 899- 903.

<sup>123</sup> [1973] AC 807. See Chapter Two.

<sup>124</sup> *Ibid.* at p 817. Again, as with *US v. Yunis*, *supra* note 121, it is submitted that the Court erred in deeming relevant the universal category to the offence charged.

<sup>125</sup> (1986) 77 ILR 537.

<sup>126</sup> *Ibid.* at p 538- 539.

<sup>127</sup> This must be qualified to the extent that there exists not inconsiderable imprecision in the content of the sub- groupings within it.

<sup>128</sup> It is critically important to take a conservative approach towards inclusion. The great need for conceptual clarity and understanding, the importance of the distinction between contractual agreements over criminal jurisdiction and the operation of the universal category, and the truly exceptional nature of the category all militate against any other approach.

categories. What sets the prescriptions apart is the scale upon which they operate or the context in which they occur. Piracy applies in the latter case, with it being limited in application to the area outwith the sovereign control of any State.<sup>129</sup> This goes not an inconsiderable way in providing the rationale for the historic development of the category. It being restricted in application to "... the international highways of the sea".<sup>130</sup> The contextual application of war crimes as in the "grave breach" provisions of the Geneva Conventions 1949 is, like piracy, limited. The application of the prescriptions therein are limited, *inter alia*, to the context of an international armed conflict.<sup>131</sup> Crimes against humanity and war crimes other than those defined by the Geneva Conventions also must be committed in an armed conflict, although it may be international or internal.<sup>132</sup> Genocide, in contrast, is not conditional upon a particular context for its occurrence. It is conditional solely upon the acts itself reaching the threshold manifest within its definition. Whilst an international tribunal has not shed light on this precise question the definition of genocide is commonly understood to connote crimes of a large scale.<sup>133</sup> The United States Senate, in one of the "understandings" issued upon ratification of the Convention states "... the term 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial, or religious group as such by the acts specified in Article II".<sup>134</sup> It is submitted that this definition would accord with an international judicial pronouncement on the question.

The existence of piracy, genocide, war crimes, and crimes against humanity as crimes in customary international law is a further, and for the present purposes, more central feature of the prescriptions exercised with reference to the category. Authority supporting this position has been highlighted throughout this chapter and only the most pertinent of authority will be cited presently. J.B. Moore, in his dissenting opinion in the Lotus Case, stated of piracy:

"Though statutes may provide for its punishment, it is an offence against the law of nations, and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind- *hosti humani generis*- whom any nation in the interest of all may punish..."<sup>135</sup>

This is a clear and unambiguous statement that piracy is "an offence against the law of nations". In regard to war crimes and crimes against humanity it is useful to cite from the "Principles of International Law Recognized by the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal" adopted by the International Law Commission in 1950:

<sup>129</sup> The 1982 Convention Article 101 (a) (ii), see p 3 above. It is possible therefore that a piratical act could be committed on land, if the *loci delicti* was *terra nullius*. Piratical acts can also be committed in an exclusive economic zone, Article 58 (2) of the 1982 Convention so facilitates.

<sup>130</sup> Dickinson, E.D., *supra* note 71, at p 357.

<sup>131</sup> The judgement in Prosecutor v. Tadic, *supra* note 68, states that the grave breach regime applies "... only to armed conflicts of an international character and to offences committed against persons or property regarded as "protected", in particular civilians in the hands of a party to the conflict which they are not nationals", at para 559. The dissenting opinion of Judge McDonald concurs as to the law on this point but not the holding of the Trial Chamber that the conditions were not satisfied.

<sup>132</sup> *Ibid*.

<sup>133</sup> It is hoped that trials of genocide, for example against Ratko Mladic and Radovan Karadzic by the ICTY, Indictment IT-95-18, 15 November 1995, will clarify this issue.

<sup>134</sup> *Supra* note 46, cited in LeBlanc, *supra* note 46 at p 253.

<sup>135</sup> *Supra* note 1 at p 71. Section 26(1) of the UK Merchant Shipping and Maritime Security Act 1997 provides that "For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 that are set out in Schedule 5 shall be treated as constituting part of the law of nations." Schedule 5 *inter alia* lists Article 101 defining piracy, noted above p 6.



“Principle I- Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II- The fact that internal 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”.<sup>136</sup>

Principle VI sets out as crimes punishable as crimes under international law *inter alia* war crimes and crimes against humanity.<sup>137</sup> In regard to genocide it is here sufficient to refer to the Genocide Convention<sup>138</sup> itself which confirms that genocide “... is a crime under international law”.

As important as the substantiation of the existence of these sub- groupings of crimes in customary international law is the establishment of the jurisdictional consequence. As has been seen throughout this chapter it is not difficult to find support for the proposition that international crimes in the material sense of the term are necessarily subject to being exercised with reference to the universal category. The United Nations War Crimes Commission following the Second World War stated in this regard “... the right to punish war crimes... is possessed by any independent State whatsoever, just as the right to punish the offence of piracy.”.<sup>139</sup> In the Eichmann Case the Israeli Supreme Court stated “The abhorrent crimes defined in [the law applied to Eichmann]... are grave offences against the law of nations itself (*delicta juris gentium*)... The jurisdiction to try crimes under international law is *universal*”.<sup>140</sup> In *Polyukhovich v. The Commonwealth of Australia and Another*<sup>141</sup> Brennan J states “International law recognises certain international crimes in respect of which any country may exercise criminal jurisdiction”.<sup>142</sup> Finally in *Re List* the United States Military Tribunal held that it was “The *inherent nature* of a war crime [that] is ordinarily sufficient for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen”.<sup>143</sup>

The final questions that must be addressed in the disjunctive analysis are how an act comes to exist as an international crime in the material sense of the term, and why it does so. The former question is answered quite simply. An act comes to exist as a material international crime just as any other rule of customary international law is established, through the requisite State practice and *opinio juris*. As has been abundantly illustrated above the sub- groupings of crimes mentioned have both been regarded as international crimes and prosecuted as such by States individually and collectively for varying yet not- inconsiderable lengths of time. In regard to the latter issue the answer lies in the nature and gravity of the offences in question. They generally can be said to threaten the international community as such in some way. With regard to piracy and war crimes it is written that they are justified with reference to the universal category because while such offences might threaten the peace and security of the state which exercised jurisdiction they additionally threaten “primarily the peace and security of other states or of the international community as a whole”.<sup>144</sup> Justice Robert Jackson, the United States’ representative to the IMT, compared war crimes to piracy, calling both forms of

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<sup>136</sup> (1950) 41 AJIL 126. This follows “affirmation” of the principles by the General Assembly in GA Res. 95(1), 1946, 1 UN GAOR (Part II) at 188, UN Doc. A/64/Add. 1.

<sup>137</sup> Also included are crimes against peace, which, it is submitted apply to States as such and so are outwith the scope of this study.

<sup>138</sup> Supra note 5.

<sup>139</sup> (1949) 15 WCR 26.

<sup>140</sup> Supra note 12 at p 26. Emphasis the Court’s.

<sup>141</sup> Supra note 19.

<sup>142</sup> Ibid. at p 563.

<sup>143</sup> Supra note 82 at p 636. Emphasis added.

<sup>144</sup> Wright, Q., *War Criminals*, (1945) 39 AJIL 257 at 280.

“illegal warfare”.<sup>145</sup> The Israeli Supreme Court in the Eichmann Case stated, illustrating the reasons for their inclusion, that:

“... these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct”.<sup>146</sup>

### The Universal Category- Conclusion

The universal category of jurisdiction justifies the assumption of jurisdiction over international crimes in the material sense of that term. There are four sub- groupings of such crimes; piracy, genocide, war crimes and crimes against humanity. These prescriptions are unique, yet the category provides strong support for the conjunctive as well as disjunctive component of this thesis.

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<sup>145</sup> Jackson, R., Trial of German War Criminals, S. Doc. No. 129, 79th Cong. 1st Sess. (1946), cited in Randall, *supra* note 21, at p 803.

<sup>146</sup> *Supra* note 12 at p 291- 292.

## Chapter Five- The Protective Category

### Introduction

The protective category of jurisdiction justifies the assumption of jurisdiction by States over crimes committed “with the intention of damaging their fundamental interests”.<sup>1</sup> As generally with the other categories there exists wide variation in both the number of States having recourse to it and the particular crimes so justified.<sup>2</sup> At its core the category is relatively well defined, it exists to legitimise the extraterritorial application of a State’s criminal law aimed at deterring<sup>3</sup> and punishing acts inimical to the fundamental security and interests of that State. This core characteristic leads to the protective category being in this respect akin to the universal in that in both a single overriding objective both provides the impetus behind the category and its delimitation, the protection of the fundamental interests and security of individual States themselves being central to the protective category and of the community of States with regard to the universal. Again somewhat similar to the universal category the protective category is largely, if not crime specific, then interest specific. It is the crimes or more particularly the interests served by the prescriptions themselves which define and delimit the category’s application, not certain attributes or circumstances such as the *loci delicti* or relationship of the perpetrator to the State in question. Unfortunately these interests are fluid and, in general, viewed subjectively; factors which militate against exhaustive enumeration. In addition to the similarities with the universal category the protective is akin to the other three categories in that they all serve to a greater or lesser extent the protection of direct State interests. Whilst not being definitionally definitive for these categories such interests are undoubtedly served by reference to them. The protective category is *sui generis*, yet, significantly, provides strong support for both the conjunctive and disjunctive planks of this thesis.

### The Protective Category- Existence

There is no doubt that the protective category of jurisdiction exists in modern international law. Authority can be found in all the sources of it, although it must be conceded that convention and international judicial authority provide only somewhat tangential support. Conventionally an interesting indirect or implicit reference to the category is found in the Convention between Member States of the European Communities on Double Jeopardy 1987.<sup>4</sup> Here a general international *non bis in idem* provision in Article 1 is qualified by *inter alia* Article 2 (1)(b) which states that a Member State may declare not to be bound by the general rule if “the facts which were the subject of the judgement rendered abroad constitute an offence directed against the security or other equally essential interests of that Member State”.<sup>5</sup> An identical provision is found in Article 55 of the Convention Applying the Schengen

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<sup>1</sup> The Council of Europe’s European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe Publications, Strasbourg, 1990, p 13.

<sup>2</sup> A valuable contribution to the understanding of the protective category, in particular the Swedish and American reference to it, is found in Cameron, I., *The Protective Principle of International Criminal Jurisdiction*, Dartmouth Publishing Company, Aldershot, 1994.

<sup>3</sup> Interestingly it has been noted that criminal prescriptions being exercised with reference to the category exist perhaps moreso for reasons of deterrence than actual application. This being due to the limited co-operation States can expect to when it comes to investigating such crimes, Cameron, *ibid.* p 92- 93.

<sup>4</sup> (1987) Cmnd. 438.

<sup>5</sup> *Ibid.*

Agreement 1985 of 1990.<sup>6</sup> Another species of indirect or implicit support for the category is found in the subject matter of various criminally related conventions, for example the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents 1973.<sup>7</sup> It is clear that this convention permits the assumption of jurisdiction in part in circumstances similar to those that the category generally would justify in regard to the persons employed by that State.<sup>8</sup>

Although rare, two instances of international judicial or quasi judicial authority supporting the existence of the protective category can be cited. In the Case of the SS Lotus<sup>9</sup> Judge Loder, dissenting, as an exception to the general rule that “no criminal law... can apply or have effect outside the national territory” stated:

“Now, this rule has gradually undergone an important modification in the legislation of a somewhat large majority of civilised States, a modification which does not seem to have encountered objections and which may be regarded as having been accepted. This modification tends to except from the strict rule governing the jurisdiction over offences committed by foreigners abroad such offences, in so far as they are directed against the State itself or against its security or credit. The injured State may try the guilty persons according to its own law if they happen to be in its territory or, if necessary, it may ask for their extradition”.<sup>10</sup>

A second quasi judicial instance is found in the Report on Extraterritorial Crime and the Cutting Case<sup>11</sup> where included as a non- territorial “theory” of criminal jurisdiction is that “As to particular offences, whether by citizens or foreigners... (c) Against safety of state, counterfeiting or forging national seals, paper moneys, bank bills, authorized by law”.<sup>12</sup> This is later said to be “regarded as an exception to the general principles of criminal jurisprudence, and is placed by those who maintain and defend it upon the high ground of necessity and self- defense”.<sup>13</sup>

In contrast to the relative dearth of international authority in support of the existence of the protective category are both municipal legislation and judicial precedent. In regard to the former, a historical reference to the category is found in the Swedish Criminal Code of 1864. It *inter alia* provided that “where the King gave permission to prosecute foreigners could be prosecuted for crimes committed abroad against ‘Sweden or Swedish man’”.<sup>14</sup> Presently the relevant Swedish provision states that Swedish courts have jurisdiction over crimes “... committed against the Swedish nation, a Swedish municipal authority or other assembly or

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<sup>6</sup> (1991) 30 ILM 84. It is interesting to note that in addition to this provision permitting the assumption of jurisdiction in the face of an existing judgement on the same facts, it provides that it is not necessary to refer to the *lex loci delicti*, an indication of the nature of the category.

<sup>7</sup> (1980) UKTS 3, Cmnd. 7765.

<sup>8</sup> As will be seen below in the practice of the United States.

<sup>9</sup> (1927) PCIJ Rep., Series A No 10.

<sup>10</sup> Ibid. at p 35- 36.

<sup>11</sup> Moore, J.B., Report on Extraterritorial Crime and the Cutting Case, [1887] Foreign Relations of the United States 751.

<sup>12</sup> Ibid. at p 770.

<sup>13</sup> Ibid. at p 780.

<sup>14</sup> Cameron, *supra* note 2 at p 98. Such legislation in fact “... antedates the establishment of modern national States and the formulation of the modern territorial theory of penal competence.”, The Comment to the Harvard Draft Convention of Jurisdiction with Respect to Crime 1935, (1935) 29 AJIL (Supp) 439 at p 543. Hereinafter the Commentary to the Harvard Draft Convention and Harvard Draft Convention.

against a Swedish public institution".<sup>15</sup> A legislative example from States in the common law tradition is the United States' counterfeiting provision. It *inter alia* states:

"A person who, outside the United States, engages in the act of-

(1) making, dealing, or possessing any counterfeit obligation or other security of the United States; or

(2) making, dealing, or possessing any plate, stone, or other thing, or any part thereof, used to counterfeit such obligation or security,

... shall be fined under this title, imprisoned not more than 20 years, or both".<sup>16</sup>

Relatively recent municipal judicial reference in support of the existence of the category is the American case of *United States v. Marino- Garcia*.<sup>17</sup> Here the Court, while unequivocally supporting the existence of the category does so in a relatively controversial yet limited manner, stating "... the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas which threaten their security or governmental functions".<sup>18</sup> A recent significant implicit reference to the protective category is *Liangsiriprasert v. United States Government and Another*.<sup>19</sup> Here the Privy Council stated:

"If the inchoate crime [of conspiracy, attempt or incitement] is aimed at England with the consequent injury to English society, why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders... If evidence is obtained that a terrorist cell operating abroad is planning a bombing campaign in London what sense can there be in the authorities holding their hand and not acting until the cell comes into England... Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England".<sup>20</sup>

It is clear that the assumption of jurisdiction is founded in the intended "injury to English society", and as such is tantamount to a reference to the protective category. A final judicial instance to be proffered in support of the category is the *Espionage Prosecution Case*<sup>21</sup> decided by Federal Supreme Court of Germany. In a challenge to its jurisdiction it *inter alia* stated "The condition in Section 99 of the Criminal Code that the offence must be directed against the Federal Republic... clearly demonstrated that the overriding consideration... is that of protection.", and the "fact that international law as such 'permits' espionage does not mean that individual States are prohibited from taking legal measures to punish the activities of intelligence services directed against them".<sup>22</sup> Further the Court held that there is "... a justifiable interest worthy of protection in the exercise of criminal jurisdiction over such acts which are nevertheless permitted by international law. Such a solution is to be regarded as

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<sup>15</sup> Chapter 2, section 3, paragraph 4 of the Swedish Penal Code, cited in Cameron, *supra* note 2, at p 101. Such practice is common in Europe, the European Committee on Crime Problems stating that "All member states [of the Council of Europe] have in one way or another reserved the right to take cognisance of offences committed abroad with the intention of damaging their fundamental interests", *Extraterritorial Criminal Jurisdiction*, *supra* note 1 at p 13.

<sup>16</sup> 18 USC § 470, part of Chapter 25, Counterfeiting and Forgery.

<sup>17</sup> (1982) 679 F 2d 1373.

<sup>18</sup> *Ibid.* at p 1381. The statement is better understood in its context, drug trafficking on the high seas, for discussion of this case see below.

<sup>19</sup> [1990] 2 ALL ER 866.

<sup>20</sup> *Ibid.* at p 878.

<sup>21</sup> (1991) 94 ILR 68.

<sup>22</sup> *Ibid.* p 74- 75.

acceptable for the overriding reason that such activity must be effectively combated and deterred".<sup>23</sup>

Juristic authority provides strong support for the existence of the category. A report under the Committee of Experts for the Progressive Codification of International Law written by Brierly and De Visscher *inter alia* states "The exception from the territorial theory most commonly claimed is that in favour of jurisdiction over crimes against the security or credit of a State.", and "Positive law contains two exceptions to [territorial competence] which are of serious importance:... one which is based upon the nature of the interests prejudiced, relates to offences against the security or credit of the State...".<sup>24</sup> The Harvard Draft Convention<sup>25</sup> contains two relevant articles, Article 7 entitled "Protection- Security of the State" and Article 8 "Protection- Counterfeiting". They state:

"7. A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place it was committed.

8. A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of falsification or counterfeiting, or an uttering of false copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority".<sup>26</sup>

*Starke's International Law* states "International law recognises that each state may exercise jurisdiction over crimes against its security and integrity or its vital economic interests. Most criminal codes contain rules embodying in the national idiom the substance of this principle, which is generally known as the protective principle".<sup>27</sup> Jennings in 1957 wrote "The claim that a State may exercise extraterritorial jurisdiction over crimes directed against its security, credit, political independence or territorial integrity- it is variously defined- has, though... traditionally suspect in Anglo- American jurisprudence, a firm place in the practice of a number of States".<sup>28</sup> Finally, it was written in 1979 that "The protective principle is one of the six bases recognized in international law for the exercise of criminal jurisdiction by a sovereign state. According to this principle, a sovereign state has jurisdiction to prosecute those who commit acts outside of its territory which have a potentially adverse effect on its security or governmental functions, even though no criminal effect actually occurs within the state".<sup>29</sup>

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<sup>23</sup> Ibid. p 75.

<sup>24</sup> Brierly, J.L. and De Visscher, C, Report of Sub- Committee of the Committee of Experts for the Progressive Codification of International Law, Criminal Competence of States in Respect of Offences Committed Outside Their Territory 1926, (1926) 20 AJIL 252, at pp 255 per Brierly and 258 per De Visscher.

<sup>25</sup> Supra note 14.

<sup>26</sup> Ibid. at p 440. It is useful to note that the American Law Institute's Restatement of the Law (Third), American Law Institute Publishers, St Paul Minn, 1987, published over a half century subsequent to the Harvard Draft Convention, closely follows it. Section 402 (3) providing that States have prescriptive jurisdiction over "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.", at p 238. The following commentary elaborates on the latter as being "offences threatening the integrity of governmental functions that are generally recognised as crimes by developed legal systems, e.g. espionage, counterfeiting, of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws", at p 240.

<sup>27</sup> Shearer, I.A., *Starke's International Law*, Eleventh Edition, Butterworths, London, 1994, at p 211.

<sup>28</sup> Jennings, R.Y., Extraterritorial Jurisdiction and U.S. Antitrust Laws, (1957) 33 BYIL 146, at p 154.

<sup>29</sup> Meyer, E.T., Drug Smuggling and the Protective Principle: A Journey into Uncharted Waters, (1979) 39 LaLR 1189 at 1189- 1190.

## The Protective Category- Application

As with the three other categories of jurisdiction which justify the application of prescriptions grounded in municipal law the protective category is referred to dichotomously, with common law and non- common law States generally taking distinct approaches. Again as with the other categories common law States usually make exceptional, crime specific, reference and non- common law States take a more general approach. This position however is affected by the category definitionally centring around conceptions of State security. Whilst the two types of State continue to take either a specific and exceptional or general and ordinarily wide approach to jurisdiction the overriding nature of the category affects the distinction between them. Indeed in comparison to the territorial and active personality categories the approaches by both groups of States are relatively akin. The particular expositional and analytical difficulty here lies not in the dichotomous application of the category but rather in conclusively, objectively, and distinctly defining the interests triggering its application. States themselves, the entities giving rise to norms of international law, do not and are not likely to constrain their jurisdictional capabilities in an area so fundamental as their own security and survival. And indeed even if States were predisposed to greatly limit their claims to jurisdiction with reference to the protective category, "security" and "fundamental interests" are terms of art.<sup>30</sup> The following exposition of common law and non- common law recourse to the category will highlight the broad parameters of the category. Further and particular categorisation of application of the category is of course affected by its *raison d'être*, the protection of direct State interests. As was seen above in regard to the territorial and active personality categories, prescriptions relating to the protection direct State interests comprised a separate sub- grouping of offences within the groupings of international criminal law justified with reference to them. Here, equally, under the umbrella of direct State interests there exist several sub- groupings of prescription. The difference being that all of them to a greater or lesser degree protect a State interest of a requisite nature.

### Common Law States

An exposition of the application of the protective category by common law States is largely an exposition of the practice of the United States. This follows from it making the greatest, widest and most explicit recourse to the category, which in turn perhaps results from it being the "target" of the relevant crimes moreso than other States. As was seen above orthodox manifestation of the protective category justifies the assumption of jurisdiction over crimes affecting State security as well as certain currency/ counterfeiting-type crimes. Prototypical reference to the category in regard to the application of a prescription of the former description is found in the case of *US v. Zehe*<sup>31</sup>, an application of Chapter 37 of Title 18 of the United States Code, entitled Espionage and Censorship. Here a conviction of an East German national for acts of espionage committed in the then German Democratic Republic and in Mexico was affirmed, the Court implicitly referred to the protective category. It stated

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<sup>30</sup> In regard to which it is written by Cameron *supra* note 2 at p 127, in part citing Agee, I., *Straffrättend allmänna del. Föreläsningar. Andra häftet*, Stockholm, 1961, at pp 206- 217, that State security in part encompasses:

"... such matters as "public order", "state security", and "the uninterrupted performance of public functions". While these descriptions give a basic idea of what the offence is about, for a proper idea of the content and function of the prescribed conduct, the complex of interests which lie behind the offence have to be examined more closely, and the limits of these interest's protection, as laid down by the operative words of the offence (i.e. which concrete acts are made criminal) must be ascertained".

<sup>31</sup> (1985) 601 F Supp 196.

“... under principles of international law recognized by United States Courts, Congress is competent to punish criminal acts, wherever and by whomever committed, that threaten national security or directly obstruct governmental functions”.<sup>32</sup> The Court continued “... espionage is an offense that is as likely to occur within foreign countries as within this country because of the large number of United States defense installations and military personnel located abroad. Furthermore, the essence of an espionage crime is that it is directed against the national security of a country and so does not logically depend on locality”.<sup>33</sup> It is clear that espionage in the sense of military subterfuge is one of the prototypical offences justified with reference to the category. This in no small part follows from the State where the activities occur being reasonably disinclined to criminalise and/ or prosecute and punish such acts, and indeed perhaps may even be covertly involved with the commission of them.

The second orthodox type of prescriptions justified with reference to the category concern counterfeiting. The relevant provision in the criminal law of the United States explicitly providing for its extraterritorial application is 18 USC § 470, cited above. A judicial assumption of jurisdiction concerned not protecting an economic interest *per se*, but containing general a statement about the category is *US v. Birch*.<sup>34</sup> This was an appeal against conviction for forging military passes under 18 USC § 499. All the conduct took part in Germany. It was held:

“The basis found in international law for the extraterritorial application of § 499 is the principle of protective jurisdiction. The protective principle determines jurisdiction ‘by reference to the national interest injured by the offence’... [B]ecause the national interest is injured by the falsification of official documents no matter where the counterfeit is prepared, we conclude that Congress intended § 499 to apply to persons who commit its proscribed acts abroad”.<sup>35</sup>

Akin to the crimes of counterfeiting are other what can be termed public- economic crimes; namely embezzlement, theft, and bankruptcy in relation to public funds or property. Like counterfeiting their commission is generally not committed with the sole or main intention to cause harm to the State. Rather such crimes are committed for the personal enrichment of the perpetrator, their particular nature causing or possibly causing immediate and direct economic harm to the State.<sup>36</sup> In the United States embezzlement and theft of public money, property or records is prescribed by 18 USC § 641. Whilst this provision contains no explicit extraterritorial jurisdictional provision it has been judicially held to so apply in *US v. Cotton*.<sup>37</sup> Here convictions of Cotton and another for the theft of governmental property in Japan were affirmed with apparent implicit reference to the protective category. The root of the uncertainty surrounding the general jurisdictional nature of this type of provision results from the oft cited decision of *US v. Bowman*,<sup>38</sup> a case of conspiracy to defraud the United States government under §35 of the then Criminal Code, where it was held:

“Crimes against private individuals or their property, like assaults, murder, burglary... which affect the peace and good order of the community, must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it... But the same rule of interpretation should not be applied to criminal statutes, which are, as a class, not logically dependent on their locality for the government’s jurisdiction,

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<sup>32</sup> *Ibid.* at p 198.

<sup>33</sup> *Ibid.*

<sup>34</sup> (1972) 470 F 2d 808.

<sup>35</sup> *Ibid.* at p 811- 812, citing the Harvard Draft Convention, *supra* note 14.

<sup>36</sup> Of course counterfeiting of a State’s currency or theft of its property if committed with impunity will have political ramifications.

<sup>37</sup> (1973) 741 F 2d 744.

<sup>38</sup> (1922) 67 L Ed 149.



but are enacted because of the right of a government to defend itself against obstruction or fraud, wherever perpetrated..."<sup>39</sup>

Clearly this is an imperfect jurisdictional authority. Whilst broadly supporting the protective category in regard to governmental "obstruction or fraud" it excludes from extraterritorial application crimes which are today manifestly so applied. Admittedly this case was decided in 1922, prior to the Harvard Draft Convention.<sup>40</sup> Roughly akin to the crime of public embezzlement is the offence of concealment of assets in bankruptcy. In the United States it is provided for by 18 USC § 152, the extraterritorial applicability of which was considered in *Stegman v. US*.<sup>41</sup> Here, an appeal against conviction was dismissed even though the fraudulent transfer and concealment of assets occurred whilst the accused was outside the United States, in Canada. It was held that the relevant section "... was enacted to serve important interests of government, not merely to protect individuals who might be harmed by the prohibited conduct"<sup>42</sup>, an undoubted implicit reference to the protective category

Prescriptions relating to the traffic in proscribed substances are in the United States widely justified with reference to the protective category. A recent example is *Chua Han Mow v. US*.<sup>43</sup> Here the accused was convicted of distribution and conspiracy to import heroin into the United States even though all the relevant acts had occurred in Malaysia.<sup>44</sup> He appealed against conviction *inter alia* on the ground that the United States did not have jurisdiction over his acts as they occurred outwith the United States. The Ninth Circuit Court of Appeals disagreed and the convictions in regard to both the distribution and conspiracy were upheld. The Court firstly relied upon the fact that the distribution provision explicitly applied to acts outwith the United States, 21 USC § 959 *inter alia* stating "This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States".<sup>45</sup> In regard to the conspiracy charge, the legislation being silent to the question of its spatial applicability, the Court held that it is possible to infer Congressional intent that the conspiracy sections apply extraterritorially "on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses".<sup>46</sup> The Court then examined the question of whether international law permitted the exercise of such jurisdiction. The Court cited with approval "... that drug smuggling compromises a sovereign's control of its own borders [the protective category] might uphold extraterritorial jurisdiction over alien drug smugglers even if the territorial principle did not apply".<sup>47</sup> In *US v. Marino-Garcia*<sup>48</sup> jurisdiction was assumed over the crewmen of two vessels boarded on the high seas by US Coast Guard officials. They were charged with conspiracy to possess and possession of marijuana with an intent to distribute under 21 USCA § 955(a). The Court held, it will be recalled, "... the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas which threaten their security or governmental functions".<sup>49</sup> Whilst this statement is in need of qualification in terms of the law of the sea it does illustrate the interests affected by drug

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<sup>39</sup> *Ibid.* at p. 151 per Chief Justice Taft.

<sup>40</sup> *Supra* note 14.

<sup>41</sup> (1970) 425 F 2d 984.

<sup>42</sup> *Ibid.* at p. 986.

<sup>43</sup> (1984) 730 F 2d 1308.

<sup>44</sup> The former under 21 USC § 959 and the latter under 21 USC § 846 and § 963.

<sup>45</sup> 21 USC § 959 (c).

<sup>46</sup> *Supra* note 43 at p. 1311.

<sup>47</sup> *Ibid.* at p. 1312, from *US v. Schmucker-Bula* (1980) 609 F 2d 399 at 403. A similar type of prescription in that it protects a State's control over its borders relates to immigration offences, for which see below.

<sup>48</sup> *Supra* note 17.

<sup>49</sup> *Ibid.* at p 1381.

trafficking being protected by reference to the category.<sup>50</sup> In *US v. Peterson* it was said in regard to the category that “Protective jurisdiction is proper if the activity threatens the security or governmental functions of the United States” and “Drug trafficking presents the sort of threat to our nation’s ability to function that merits application of the protective principle of jurisdiction”.<sup>51</sup> In *US v. Egan* reference to the protective category was justified similarly, the Court holding that “The unlawful importation of drugs bypasses the federal customs laws, and thus directly challenges a governmental function... it has been suggested that, in view of the size of the drug problem in the United States, and the dimension of the unlawful importation of controlled substances, such unlawful importation represents a threat to the security of the United States”.<sup>52</sup>

The United States Racketeer Influenced and Corrupt Organizations Act<sup>53</sup> has been applied extraterritorially with reference to the protective category, notably in the well known prosecution of Manuel Noriega.<sup>54</sup> Interestingly certain of the drug related offences referred to above were also applied in this case but not justified with reference to the protective category.<sup>55</sup> Noriega was charged with the racketeering offences of participating in a pattern of racketeering activity related to the drug related crimes, conspiracy to violate the racketeering prescriptions, and the usage of the facilities of interstate and foreign commerce in furtherance of a narcotics conspiracy.<sup>56</sup> Unlike the narcotic related offences, the racketeering legislation had not been extraterritorially applied prior to this case. It was held that it did indeed apply to the activities of Noriega which took place outside the United States. Whilst the Court unfortunately did not explicitly deal with the jurisdictional basis for this it implicitly referred to the protective category. In giving its reasoning given for the extraterritorial application of the statute the Court examined the Congressional intent in passing the Act, *inter alia* citing a Congressional Report concerning the influence of organised crime, stating:

“(1) organized crime in the United States... annually drains billions of dollars from America’s economy... (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation’s economic system, harm innocent investors and competing organizations,

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<sup>50</sup> There appears to be nothing in the Law of the Sea Convention 1982, (1982) 21 ILM 1261, preventing the assumption of (judicial) jurisdiction within the territory of a State affected or potentially affected by actions by individuals occurring on the high seas upon a vessel not of its own nationality. However, there does not exist a general right of such an affected or potentially affected State to visit a foreign ship on the high seas, to, for example, affect an arrest. The limited instances where such an exercise of (executive) jurisdiction are allowed are found in Article 110 (1) and do not include suspicion of traffic in proscribed substances, although Article 108 (1) does rather ambiguously state “All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions”. In this case the issue was otiose as the ships in question were stateless.

<sup>51</sup> (1987) 812 F 2d 486 at p 494.

<sup>52</sup> (1980) 501 F Supp 1252 at p 1258.

<sup>53</sup> 18 USC Chapter 96. Hereinafter RICO.

<sup>54</sup> The jurisdictional challenge by Noriega is found at *US v. Noriega*, (1990) 746 F Supp 1506. Noriega was charged with the following drug offences; distributing a controlled substance with the knowledge that it would be unlawfully imported into the United States contrary to 21 USC § 959, importing a controlled substance into the United States from a place outside thereof contrary to 21 USC § 952, conspiracy to commit these offences against 21 USC § 963, and aiding and abetting the violation of § 959 in violation of 18 USC § 2.

<sup>55</sup> It was the objective territorial category which was referred to by the Court, *ibid.* pp 1512- 1513, see Chapter Two.

<sup>56</sup> The former in violation of 18 USC §§ 1962 (c), (d), and the latter 18 USC § 1952 (a)(3) [from the Travel Act].

interfere with free competition, seriously burden interstate and foreign commerce, and undermine the general welfare of the Nation and its citizens".<sup>57</sup>

The Court then states "Though its emphasis is on economic effects RICO itself is not so limited; its history demonstrates concern with our domestic security and welfare as well as our gross national product".<sup>58</sup> This is a clear implicit reference to the protective category.

A further sub- grouping of crimes justified with reference to the protective category in the United States are certain serious crimes against the person, including assassination, kidnapping and assault committed against defined categories of employees or servants of the United States government. The applicable legislative provisions are 18 USC § 351 for members of Congress, Cabinet and the Supreme Court, and 18 USC § 1751 for the President.<sup>59</sup> The provisions are explicitly extraterritorially applicable, 18 USC § 351 (i) for example reading "There is extraterritorial jurisdiction over the conduct prohibited by this section". The former provision was judicially considered in *US v. Layton*.<sup>60</sup> Here Layton was charged *inter alia* with conspiracy and aiding and abetting in the murder of a Congressman in Guyana in 1978. He was convicted. In his appeal against conviction it was held that "The power of Congress to authorise extraterritorial jurisdiction over the alleged crimes in this matter can be located in at least four... principles- protective, territorial, passive personality and nationality jurisdiction. The alleged crimes certainly has a potentially adverse effect upon the security or governmental function of the nation, thereby providing the basis for jurisdiction under the protective principle".<sup>61</sup> It is significant to note that in addition to the above offences Layton was charged and convicted of offences relating to the protection afforded internationally protected persons.<sup>62</sup> It is important to distinguish between the applicability of the protective category to the former offence and the operation the passive personality category and putatively conventional international law in regard to the latter. The relevant convention being the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents 1973.<sup>63</sup> Whilst the assumption of jurisdiction over such offences is made with reference to the Convention, and as such is a supposed instance of contractual jurisdiction, it in fact is a reference to the protective and/ or the passive personality category as the applicable law is not limited to parties of the Convention.<sup>64</sup> This aside the case also illustrates the confluence of interests served by the protective and passive personality categories.

#### Non- Common Law States

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<sup>57</sup> Supra note 43 at p. 1516- 1517, citing RICO Statement of Findings and Purpose, Pub. L. No. 91 452, 84 Stat. 922 (1970), 91st Cong., 2d Sess.

<sup>58</sup> Ibid. at p. 1517.

<sup>59</sup> In addition to such high ranking members being afforded such protection are "lesser" governmental employees, such as officers in the Drug Enforcement Agency (DEA), by 18 USC § 1114. This provision was applied in *US v. Benitz*, (1984) F Supp 1312, a case of attempted murder and conspiracy following an attack on DEA agents in Columbia. It is submitted that this was an assumption of jurisdiction with reference to the passive personality category, it being difficult to conceive of such a crime threatening the fundamental security of the United States. See Chapter Six.

<sup>60</sup> (1981) 509 F Supp 212.

<sup>61</sup> Ibid. at p 216.

<sup>62</sup> Namely conspiracy and aiding and abetting the murder of an internationally protected person under 18 USC § 1117 and §§ 1116, 2.

<sup>63</sup> Supra note 7.

<sup>64</sup> Guyana not being a party to the Convention. A further misapplication of the law of jurisdiction in that the assumption of jurisdiction is not limited to the territory of parties to the Convention is found in United States' implementation of the International Convention Against the Taking of Hostages 1979, (1983) UKTS 81, Cmd. 9100, (1979) 18 ILM 1456, in 18 USC § 1203. See further Chapter Six.

The particular nature of the protective category leads to the practice of non- common law States in regard it being dissimilar to the general approach normally taken by such States. In particular, the protective category is referred to on a general yet crime specific basis. It is referred to specifically in that certain acts are proscribed, and generally, in that this is not exceptional nor done on an *ad hoc* or judicial basis. An illustration of a type of approach largely typical of civil law States is found in French criminal law. It *inter alia* states:

“Every alien who, outside the territory of the Republic, commits, either as author or as accomplice, a *crime* or *délit* against the security of the State or of counterfeiting the seal of the State or national currency in circulation, or a crime against French diplomatic or consular agents or posts is to be prosecuted and adjudged according to the dispositions of French law, whether he is arrested in France or the Government obtains his extradition...”<sup>65</sup>

A rather more explicit reference to the category is made by Austria. The relevant provisions, as stated by Austria, are:

“The following offences committed abroad shall be punished according to the Austrian statutes, irrespective of the penal law of the State where the offence was committed:

1. high treason (section 242), preparations for high treason (section 244), subversive associations (section 246), treason (sections 252 to 258) and criminal offences against the federal armed forces (sections 259 and 260);

2. criminal offences committed by any person against an Austrian civil servant (section 74 paragraph 4) during or because of the performance of his duties, and criminal offences committed by a person in his capacity as Austrian civil servant;

3. false testimony at court (section 288) and false testimony before an administrative authority, if in the latter case the testimony was duly sworn or corroborated by oath (section 289), in proceedings pending at an Austrian court or before an Austrian administrative authority”.<sup>66</sup>

Expanding upon Austria's position is the reply it provided to the question of whether certain interests or categories thereof can be derived from its usage of the protective category, to which it stated “... the following interests are protected: a) national security (sub- para. 1); b) the performance of the duties of Austrian civil servants (sub- para. 2); and the Austrian judiciary as well as administrative authorities in their proceedings (sub- para. 3)”.<sup>67</sup>

<sup>65</sup> Article 694 of the *Code de Procédure Pénal*, cited and translated in Blakesley, C.L., A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime, [1984] ULR 685 at p 703. See also the French reply in Select Committee of Experts on Extraterritorial Jurisdiction, Questionnaire and Replies, Doc PC-R-EJ/INF Bil, 4 Oct. 1990. Hereinafter Questionnaire and Replies. A French judicial example is *In Re Bayot*, (1923- 24) 2 Ann Dig 109, where it was held that an exception to the application of the territorial category exists in the case of the protection of certain State interests and is “... based on the right of legitimate defence [which give] French courts jurisdiction to take cognisance of crimes aimed at the security of the State committed outside French territory by a foreigner who has been arrested in France”, *ibid*.

<sup>66</sup> Questionnaire and Replies, *supra* note 65 at p 20.

<sup>67</sup> *Ibid*. p 27. The precise question was: “Does the law specify or can one derive from the law which (categories of) interests are intended to be protected by this principle? Can you describe those interests? Apart from the protection of the state, do they included such interests as the protection of the national fiscal, monetary, economic or social systems, the prevention of environmental pollution, damage to national health, or any private or semi- private interests.”, at p 10. Austria responded to the latter half of the question by stating “As far as interests e.g. the monetary system or national health are concerned, the universality principle prevails, although also certain aspects of the protection principle are involved.”, at p 27. Clearly this conception of the universal category does not equate with the one proffered in the present work, see Chapter Four.

A somewhat similar and largely orthodox reference to the protective category is Article 7 of the Italian Penal Code, it states:

“A citizen or alien who commits any of the following offences in foreign territory shall be punished according to Italian law:

- 1) offences against the personality of the State;
- 2) offences of counterfeiting money which is legal tender in the territory of the State, or duty- bearing paper or Italian public credit securities;
- 3) offences committed by public officers in the service of the State by abusing the powers or violating the duties pertaining to their office”.<sup>68</sup>

Article 8 contains a supplementary provision which can to an extent be assimilated to the protective category. It states “A citizen or alien who commits in foreign territory a political offence not among those specified in subparagraph (1) of the preceding Article shall be punished according to Italian law on demand of the Minister of Justice”, a political offence being defined as “... any offence which injures a political interest of a State, or a political right of a citizen. A common offence inspired, in whole or in part, by political motives shall also be deemed to be a political offence”.<sup>69</sup> As it has been stated above Swedish reference to the category rather vaguely provides that Swedish courts have jurisdiction over “... committed against the Swedish nation, a Swedish municipal authority or other assembly or against a Swedish public institution”.<sup>70</sup>

Chile takes a relatively restrictive approach towards the category. It referring to it only in regard to foreigners who “forge the seal of the State,... counterfeits Chilean money or if he forged letters or certificate of debt from a State, municipality or public body”.<sup>71</sup> Japan makes rather wider reference, with Article 2 of the Japanese Penal Code providing for the extraterritorial application of certain crimes contained within the code regardless of who commits them.<sup>72</sup> The Code mirrors the two orthodox approaches to the category, with two Chapters concerning “political” crimes and four “economic” crimes. In regard to the former is Chapter II entitled Crimes Concerning Insurrection, “insurrection” defined as creating “a disorder for the purpose of overthrowing the government, usurping the territorial sovereignty

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<sup>68</sup> Ibid. at p 22.

<sup>69</sup> Ibid. A Dutch judicial instance of implicit reference to the category in regard to an economic crime is Public Prosecutor v. L, (1951) 18 ILR 206. Here the conviction of a Belgian national domiciled in Belgium for acting as an accessory to currency offences in contravention of the Dutch Currency Decree of 10 October 1945 for acts committed in Belgium was upheld.

<sup>70</sup> Supra note 14. It is significant to note that this provision concerns not the extraterritorial application of Swedish criminal law, but rather the legitimate ability of Swedish courts to take cognisance over certain alleged criminal acts. It follows from there being no presumption as to the spatial limitation of Swedish criminal law, Cameron states “... the basic assumption as far as the spatial scope of Danish criminal law is concerned [is] the same as in Sweden: the law is universally applicable unless a national limitation (territorial, personal or with regard to the protected interest) follows implicitly or explicitly from how a specific crime is formulated”, at p 169. The provision enabling Danish courts to assume jurisdiction over protective- type offences refers to crimes which “violate the independence, security, Constitution or public authorities of the Danish State, official duties towards the State or such interests the legal protection of which depends on a personal connection with the Danish State”, *ibid*.

<sup>71</sup> Chilean Criminal Law, Blanplain, E., (ed.), *International Encyclopaedia of Laws: Criminal Law*, Vol. 1, Kluwer Law Publishers, Deventer, 1993, p 66. Hereinafter *International Encyclopaedia of Laws*. Interestingly proffered as additional references to the protective category are crimes committed by certain classes of individuals, such as civil servants, military personnel and diplomats, these in fact being forms of active personality reference.

<sup>72</sup> *Inter alia* providing “This Code shall apply to any person who commits one of the following crimes outside Japan...”, The Penal Code of Japan, Law No. 45 of 1907 as amended, Article 2. A copy of the Code in English was provided to the author by the London Japanese Embassy.

of the State, or otherwise subverting the national constitution".<sup>73</sup> Additional to the substantive offence are the offences of preparation and plotting and assistance.<sup>74</sup> Chapter III entitled Crimes Concerning Foreign Aggression *inter alia* proscribes the inducement of foreign aggression, assistance to the enemy, and attempts, preparations and plots related thereto.<sup>75</sup> Chinese reference to the category is found in Article 6 of the Chinese Criminal Code which provides that it may be applicable to any foreigner who commits a crime outside the territory of the People's Republic of China, "against the state of the People's Republic or against its citizens".<sup>76</sup> This provision is conditional upon both the crime attracting a minimum punishment within Chinese criminal law and criminality under the *lex loci delicti*.<sup>77</sup>

### The Protective Category- Conjunctive Analysis

The protective category provides particularly strong support for the conjunctive component of this thesis. This is resultant firstly from its elastic and opaque nature leading to relative uncertainty in its application. This in turn results in States being more likely to buttress their jurisdictional claims by referring to another category in conjunction with it. Secondly, the central character and importance of the interests served by reference to the category themselves lead to its conjunctive application. Indeed, that the approach of the conjunctive component highlighting the similarity of interests served by reference to the categories will be given strong support has already been demonstrated. It has been seen above that the territorial and active personality categories operate to justify the assumption of jurisdiction over distinct sub- groupings of prescriptions protecting direct State interests with the universal category doing so in an indirect manner, and it will be seen below that the passive personality category operates similarly.

The first element of the conjunctive thesis evinces a correlation of interests served by reference to the various categories. In regard to the protective the most distinct correlation is between crimes of espionage and treason. As was seen above espionage is one of the crimes forming the cornerstone of the protective category. A recent example, referred to above is the Espionage Prosecution Case.<sup>78</sup> Here, the last director of the Central Detection Agency of the Ministry for State Security of the former German Democratic Republic challenged an arrest warrant relating to espionage contrary to section 99 of the German Criminal Code. He argued firstly that his arrest violated the Basic Law of the Federal Republic, and secondly that his prosecution was prohibited by international law. His first argument was based on the principle of the equality of treatment enshrined in Article 3(1) of the Basic Law. It was claimed that this was breached as he was being tried for an act which in the converse circumstances one would not be liable. The Court dismissed the argument, stating:

"The fact that persons engaging in espionage activity from the territory of their State against the Federal Republic can be prosecuted, whereas such persons engaging in such

<sup>73</sup> Ibid. Article 77. For the "economic" crimes see below.

<sup>74</sup> Ibid. Articles 78 and 79.

<sup>75</sup> Ibid. Articles 81, 82, 87 and 88 respectively, Article 81 states "A person who in conspiracy with a foreign state causes the use of armed force against Japan shall be punished with death". Article 82 provides "A person who, when a foreign state uses armed force against Japan, sides with such state by engaging in the military service of such state, or otherwise affording military advantage to such state, shall be punished with death or with imprisonment at forced labor for life or not less than two years". It is useful to note that by Article 4-2 of the Code Japan provides for the assumption of jurisdiction of "crimes punishable by a treaty even if committed outside Japanese territory".

<sup>76</sup> Chinese Criminal Law, *International Encyclopaedia of Laws*, supra note 71, Vol. 1, at p 56. For further on this provision's conflation of reference to the protective and passive personality categories see below.

<sup>77</sup> Ibid.

<sup>78</sup> Supra note 21.

activity from the territory of the Federal Republic against other States are not liable to prosecution, under the Criminal Code of the Federal Republic, cannot be regarded as a violation of Article 3(1) of the Basic Law. The legitimate State interest in preventing such attacks, which are not tolerated by international law, justifies such a difference of treatment. At least it enables the impact of the intelligence services of foreign States to be effectively combated".<sup>79</sup>

As seen above, the Court similarly dismissed the accused's second argument, holding "The condition in Section 99 of the Criminal Code that the offence must be directed against the Federal Republic... clearly demonstrated that the overriding consideration... is that of protection".<sup>80</sup> This is a classic instance of reference to the category. The direct and immediate interest protected was State security. It was effected via the prosecution of one involved in gathering "information against institutions of the Federal Republic".<sup>81</sup> Treason is a crime protecting similar interests to that of espionage. It can be distinguished from espionage not with reference to the interests served but rather by the class of individual committing it, treason only capable of being committed by those owing allegiance to the affected State. *Joyce v. DPP*<sup>82</sup> provides an interesting comparison. It will be recalled that what lie at the crux of the case was the question of the existence of allegiance of Joyce to the Crown, the United Kingdom not availing itself of its right under international law to assume jurisdiction solely with reference to the protection of its fundamental interests.<sup>83</sup> A further example is the South African case of *R v. Neumann*.<sup>84</sup> Here the indictment *inter alia* stated that Neumann is guilty of High Treason "In that, whereas the accused owed allegiance to His Majesty King George VI and his Government of the Union of South Africa... the accused did unlawfully and with hostile intention disturb, impair or endanger the independence or security of the State, or attempt to do so...".<sup>85</sup> It was stated in the judgement "... when it is emphasised that the punishment of high treason is the outstanding method of preservation of the very existence of the Sovereign State, it would, we think, follow that the actual place of commission of the treasonable act can have no bearing on the nature of the crime as constituted by the common law of that State".<sup>86</sup> Slightly later in the judgement it is stated "The Union of South Africa being a Sovereign State [is] therefore automatically entitled to punish crime directed against its independence and safety...".<sup>87</sup> Clearly these cases evince the congruity between the interests protected by the crimes of treason and espionage, between assumptions of jurisdiction evidenced by the protective and active personality jurisdictional categories. What is operative is the particular attack on the particular State interest. The existence of an extraneous factor, such as allegiance, is a further evidential factor supporting the existence of the right to take cognisance over the offence.

A confluence of interests also occurs between those served by the second orthodox type of prescription relating to counterfeiting and similar crimes, and certain interests served by prescriptions justified with reference to other categories. Here, there is a broad similarity between such prescriptions and certain of those classified as theft/ fraud prescriptions. It is clear that attacks upon a State's economy, either directly via counterfeiting of currency or governmental bonds, or indirectly via for example particular cases of fraud, are accepted as legitimate instances of referral to both the protective and other categories of jurisdiction. The

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<sup>79</sup> *Ibid.* p 74.

<sup>80</sup> *Ibid.* p 74- 75.

<sup>81</sup> *Ibid.* p 72. This case is largely congruent with the United States case of *US v. Zehe*, *supra* note 31.

<sup>82</sup> [1946] AC 347.

<sup>83</sup> See Chapter Three.

<sup>84</sup> (1949) 3 SALR 1238.

<sup>85</sup> *Ibid.* at p 1244.

<sup>86</sup> *Ibid.* at p 1248, per Murray, J.

<sup>87</sup> *Ibid.* at p 1250, per Murray, J.

protective category was implicitly relied upon in the case of conspiracy to defraud the United States Government in *US v. Bowman*<sup>88</sup> noted above. An instance where a somewhat similar economic interest was affected yet served not by reference, implicit or explicit, to the protective category is the Malaysian case of *Public Prosecutor v. Loh Ah Hoo*.<sup>89</sup> This case was an appeal from acquittal of charges of knowingly being concerned in an attempt to fraudulently evade customs duty under s. 135(1)(g) of the Customs Act 1967. The Sessions Court had acquitted the respondent as the relevant acts had been committed in Singapore. It was held "... it seems to me that a simple test to apply is this. If a person's criminal act or responsibility for the criminal act runs from outside the jurisdiction to within it he is liable".<sup>90</sup> Later it was stated "In the present case the respondent was responsible for the preparatory acts done in Singapore... the acts culminated within the jurisdiction when the goods and the declaration for which he was responsible reached the customs at Johore Bahru. He was therefore responsible...".<sup>91</sup> This reference to the objective territorial category is contrasted with the Jamaican case of *Smith (James) v. R*<sup>92</sup>, where categories other than the protective were referred to even though the reference to the protective was objectively competent. Here, an appeal against conviction of conspiracy to defraud the Jamaican government, the Privy Council implicitly held that reference to the active personality category and the subjective arm of the territorial category founded Jamaican jurisdiction. The former applied in regard to the substantive offence in that the accused was a person employed in the service of the Jamaican government<sup>93</sup> and the latter over the offence of conspiracy.

The interests behind the prevention and punishment of crimes related to the traffic in proscribed substances are also served by reference to the protective and other categories. A significant example noted above of an implicit reliance upon the protective category is *Liangsiriprasert v. United States Government and Another*.<sup>94</sup> A further example was *US v. Peterson*, where it was succinctly stated "Drug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle".<sup>95</sup> As has been seen in Chapters Two and Three above the traffic in proscribed substances has given rise to the justification of criminal prescriptions with reference to both the territorial<sup>96</sup> and active personality<sup>97</sup> categories and indeed, albeit mistakenly, the universal<sup>98</sup> in Chapter Four. It will further be seen in Chapter Six that the passive personality category is to an extent employed in serving similar interests.

Further interests which are reasonably categorised as direct State interests are also justified with reference to the protective and other categories. Pre- eminent amongst the relevant prescriptions here are those relating to the control of immigration. In *Rocha v. United States*<sup>99</sup> it was held that reference to the protective category applied to the acts of aliens committed abroad, particularly under the Immigration and Nationality Act, 18 USC § 1546. This case concerned making a false oath before a consular officer abroad, the accused had intended to gain entry into the United States by claiming preferred status by virtue of a marital relationship. The marriage was not bona fide. It was stated by the Court:

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<sup>88</sup> Supra note 38.

<sup>89</sup> [1974] MalLJ 216.

<sup>90</sup> Ibid. p 217 per Syed Othman, J.

<sup>91</sup> Ibid.

<sup>92</sup> (1992) 41 WIR 272.

<sup>93</sup> By virtue of s. 24(1) of the Criminal Justice (Administration) Act.

<sup>94</sup> Supra note 19.

<sup>95</sup> Supra note 51 at p 494.

<sup>96</sup> In *US v. Noriega*, (1990) 746 F. Supp 1506 for example.

<sup>97</sup> In e.g. the US Maritime Drug Law Enforcement Act, 46 USC § 1903(a).

<sup>98</sup> In *DPP v. Doot*, [1973] AC 807.

<sup>99</sup> (1961) 288 F. 2d 545.



“The acts done to violate § 1546 of Title 18 were all done outside the state, but they were intended (at least at the point of time when the fraudulent document was used to gain entry) to produce, and did so produce, a detrimental effect on the sovereignty of the United States. Thus under ‘the protective principle’... there is, and should be, jurisdiction. A sovereign state must be able to protect itself from those who attack its sovereignty”.<sup>100</sup>

A further American example is found in *US v. Pizzarusso*.<sup>101</sup> Here the conviction of a Canadian citizen for statements made outwith the United States under 18 USC § 1546 was upheld, the Court *inter alia* stating “The utterance by an alien of a ‘false statement with respect to a material fact’ in a visa application constitutes an affront to the very sovereignty of the United States. These false statements must be said to have a deleterious influence on valid governmental interests”.<sup>102</sup> The Court referred to the protective category and held “... jurisdiction exists because these actions have a ‘potentially adverse effect; upon security or governmental functions... there need not be any actual effect in this country as would be required under the objective territorial principle’”.<sup>103</sup> As has been seen interests related to the control of immigration have been served with reference to the territorial and active personality categories. In *Yenkichi Ito v. US*<sup>104</sup> and *Bolduc v. Attorney- General of Quebec et al*<sup>105</sup> the objective and subjective arms of the territorial category were referred to respectively. Section 25 of the UK Immigration Act 1971 refers to the active personality category in serving akin interests.<sup>106</sup>

The second approach within the conjunctive plank of this thesis evinces authority making multiplicitous reference to the categories in the face of the same facts. The protective category provides an abundance of such authority. It being both general and specific. Specifically there is particular conflation between the protective, objective arm of the territorial, and the passive personality categories. Explicitly specific reference to the protective and objective territorial categories is found in *US v. Egan*<sup>107</sup>, referred to above. Here the Court held in justifying its assumption of jurisdiction in a case of trafficking in proscribed substances that the objective territorial and protective categories were applicable.<sup>108</sup> In *US v. Smith*<sup>109</sup>, an appeal against conviction for possession of marihuana with intent to distribute and conspiracy to do the same, six “principles” were deemed applicable. The Court, after referring to “six principles of international jurisdiction” stated “Although to some extent all of the above are applicable in some degree to the present circumstances, the objective territorial principle is most in point”.<sup>110</sup> The statement is footnoted with “These principles are not mutually exclusive but may in fact overlap”.<sup>111</sup> Unfortunately the judgement does not precisely state how the six “principles” were “at least to some degree applicable”. A final instance where the protective category was referred to in conjunction with other categories to be proffered is *US v. Layton*.<sup>112</sup> It will be recalled that, in a case concerning the murder of a Congressman in

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<sup>100</sup> *Ibid.* at p 549.

<sup>101</sup> (1968) 388 F. 2d 8.

<sup>102</sup> *Ibid.* at p 9- 10.

<sup>103</sup> *Ibid.* at p 10- 11. See also *US v. Khalje*, (1981) F. 2d 90.

<sup>104</sup> (1933) 64 F 2d 73. See Chapter Two.

<sup>105</sup> (1982) 137 DLR (3rd) 674. See Chapter Two.

<sup>106</sup> See Chapter Three.

<sup>107</sup> *Supra* note 52.

<sup>108</sup> *Ibid.* at p 1257, as did *Chua Han Mow v. US*, *supra* note 43.

<sup>109</sup> (1982) 680 F. 2d 255.

<sup>110</sup> *Ibid.* at p 258. See Chapter Two.

<sup>111</sup> *Ibid.*, citing (1976) *US v. King*, 552 F. 2d 833.

<sup>112</sup> *Supra* note 60 at p 216.

Guyana, that the Court held that jurisdiction “can be located in at least four... principles-protective, territorial, passive personality and nationality jurisdiction”.<sup>113</sup>

In contrast to explicit multiplicitous authority is that where the protective category is implicitly referred to in apparent conjunction with other categories. A recent Canadian example is *United States of America v. Lépine*.<sup>114</sup> This case was an appeal by the United States against a refusal to extradite the respondent from Canada to the United States on the charge of conspiracy to distribute cocaine in violation of 21 USC § 846 heard by the Supreme Court of Canada. The extradition judge had dismissed the application on the basis that the United States had no jurisdiction to prosecute the offence charged, believing that there was no evidence that the acts pursuant to the charge were intended to produce detrimental effects in the United States or that there was any substantive link between the conspiracy and the United States.<sup>115</sup> The Supreme Court unanimously allowed the appeal. By a decision of five to two it was held that the approach to the question of jurisdiction by the extradition judge was misplaced. It was not for the extradition judge, it held, to consider whether the requesting State has jurisdiction over the offence charged but instead that the act or conduct would be an extradition crime if the crime had been committed in Canada. A “mirror image” or “reverse image” approach, adjudicating upon whether in exactly converse circumstances Canada would have jurisdiction, was not the one to be employed. However, La Forest J., for the majority commented *obiter* that even if that were to be the approach to be taken Canada would have jurisdiction. After reviewing the facts he stated “All of these acts taken together are quite sufficient overt acts in the United States... to constitute ‘a real and substantial link’ to the United States...”.<sup>116</sup> Slightly later in the judgement it is stated “In considering this matter it is well to take cognisance of the real nature of drug trafficking and other transnational crimes”.<sup>117</sup> In *US v. Caicedo*<sup>118</sup> the Ninth Circuit of the United States Court of Appeals took a similar approach. Here, in case of possession and conspiracy to distribute cocaine the defendants being captured on a stateless ship in international waters, it was stated:

“Punishing crimes committed on foreign soil; it is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States’ pursuit of its interests”.<sup>119</sup>

It was held that the assumption of jurisdiction over stateless vessels on the high seas was consistent with international law and due process and the defendants were remanded into custody. A final example of implicit specific reference to be highlighted is *S v. Mharapara*.<sup>120</sup> Here, where it was alleged that an employee of the Zimbabwe government in Belgium had stolen public funds, the Zimbabwe Supreme Court held:

“With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the

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<sup>113</sup> Ibid.

<sup>114</sup> (1994) 111 DLR (4th) 31.

<sup>115</sup> Ibid. p 35.

<sup>116</sup> Ibid. p 39. The judgement cited *R v. Libman* (1985) 21 DLR (4th) 174, discussed in Chapter Two.

<sup>117</sup> Ibid. p 40. Here referred to is *Liangsiriprasert v. United States*, supra note 19.

<sup>118</sup> (1995) 47 F 3d 370.

<sup>119</sup> Ibid. p 372. While this quotation deals with a conflation of a United States constitutional issue ( a violation of due process) and international law, the significance of the unitary link approach to jurisdiction is nonetheless important.

<sup>120</sup> [1986] 1 SALR 556.

preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by the commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus a strict interpretation of the principle of territoriality could create injustice... A more flexible and realistic approach based on the place of impact, or of intended impact, of the crime must be favoured".<sup>121</sup>

In all these three cases the protective category was implicitly referred to. It was done so in the face of facts which also supported reference to one or more of the other categories.

A final type of multiplicitous reference is a general one, where in legislative or statutory form a State combines reference to the protective and another category or categories. Three examples will be referred to. It will be recalled that the Italian Penal Code provides in its reference to the protective category that "A citizen or alien who commits any of the following offences in foreign territory shall be punished according to Italian law: 1) offences against the personality of the State...".<sup>122</sup> This provision combines a reference to both the active personality and protective categories. A general conflation of reference between the protective and passive personality categories is found in the State practice of China. It will be recalled that Article 6 of the Chinese Criminal Code provides for the applicability of Chinese criminal law to "...any foreigner who commits a crime outside the territory of the People's Republic of China, against the state of the People's Republic or against its citizens".<sup>123</sup> Bulgarian criminal law provides similarly, conflating reference to the protective category with the passive personality, assuming jurisdiction when "the national interests of the Republic of Bulgaria or its citizens are affected".<sup>124</sup>

### The Protective Category- Disjunctive Analysis

Of the five categories of jurisdiction it is perhaps the most difficult to construct a distinct and discrete grouping of substantive international criminal law in relation to the protective. It is manifestly evident from the above that there does exist such a grouping, one that is properly apart from others. Yet, it is opaque. This is resultant from the category being both generally interest- specific and the prescriptions exercised with reference thereto being based within municipal criminal law. Like international crimes in the material sense of the term those exercised with reference to the protective category are defined solely by reference to the interests actually or possibly affected. There is no extraneous factor like territory or a personal connection which defines this grouping. It is thus crime specific, but unlike the universal grouping it is inherently indistinct. The prescriptions exercised with reference to the category being within municipal criminal law leads to the category being given manifold interpretations. Numerous variations in the prescriptions justified with reference to it are present. Whilst it must be conceded that the periphery of all categories are to a greater or lesser degree indistinct, here obfuscation is the most pronounced. This is because it is much more difficult to fully and objectively define direct State interests. The category and related grouping of international criminal law are founded upon considerations that are collectively subjective. They are affected or influenced by such things as municipal political

<sup>121</sup> Ibid. p 563-564. Interestingly this case overruled a Zimbabwe High Court, [1985] 4 SALR 42, ruling to the extent that the active personality linkage founded jurisdiction within Zimbabwe in the circumstances. It being held that while under international law this was permissive, no such enactment had taken advantage of the possibility within the municipal law of Zimbabwe.

<sup>122</sup> Supra note 68.

<sup>123</sup> Supra note 71.

<sup>124</sup> Bulgarian Criminal Law, *International Encyclopaedia of Laws*, Vol. 1, supra note 71, p 43.

considerations, relative wealth of the State, its vulnerability to criminal extraterritorial intrusion or possible criminal affectation, and its position in relation to other States in the international community.<sup>125</sup> Further these considerations are not static. The areas of State regulation, State perceptions, the type, scale, and effect of criminal activities are all wide, amorphous and fluid. What was once regarded as outside the bounds of reference may not be so today. Despite these inherent difficulties it is possible to identify a common denominator or denominators amongst the prescriptions justified with reference to the category. Further it is possible to expose several additional fundamental characteristics of prescriptions exercised with reference to it. The former is, of course, that they all exist to prevent and punish acts which affect or intend to affect direct public interests of States.

As has been identified above the interests protected by reference to the category can be divided into three types; political, economic, and other, with all the prescriptions identified able to be subsumed within one or other of them. The former is the most pronounced of the resultant sub-groupings. Its cornerstone is that all of the prescriptions within it serve to protect State "security, territorial integrity and political independence".<sup>126</sup> These prescriptions protect immediately public interests; the governance of the State *per se*. They are committed with the intention to so affect such an interest. Espionage here is the prototypical example. Title 18 of the United States Code, entitled Espionage and Censorship provides several illuminative illustrations of the manifestation of this interest. It *inter alia* proscribes by § 793 the gathering, transmitting or losing of defense information, § 794 gathering, or delivering defense information to aid foreign government, § 795 photographing and sketching defense installations, § 796 use of aircraft for photographing defense installations and § 798 disclosure of classified information.<sup>127</sup> It is axiomatic that these prescriptions all centre around the prevention and punishment of attacks upon political interests of the United States. The acts intentionally and directly attack condition precedents of Statehood and the most basic attributes thereof. Namely the existence of a government itself and to a degree the capability to enter into international relations, both *sine qua non* of Statehood.<sup>128</sup> Further they affect the right each State has to self-defence, as provided for in Article 51 of the Charter of the United Nations.

The second widely accepted type of protective prescriptions serve to punish and prevent economic injury. They traditionally took the form of prescriptions protecting a State's currency, seals, etcetera from counterfeiting.<sup>129</sup> Illuminatively the Japanese Penal Code contains numerically greater prescriptions of this type than explicitly political ones, four chapters as opposed to two. They include Chapter XVI entitled Crimes of Counterfeiting Currency. It states:

"A person who counterfeits or alters a current coin, paper money, or bank-note for the purpose of uttering shall be punished with imprisonment at forced labor for life or for not less than three years. (2) The same shall apply to a person who utters a counterfeit or altered coin, paper money, or bank-note or who delivers or imports the same for the purpose of uttering".<sup>130</sup>

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<sup>125</sup> This inherent definitional opacity and collective subjectivity is the single major concern surrounding the category and grouping, with Brierly noting that a "serious objection" to this type of jurisdiction is that "Every State is at present regarded as the judge of what endangers its own security", *supra* note 24 at 255- 256.

<sup>126</sup> Harvard Draft Convention, *supra* note 14.

<sup>127</sup> An explicit territorial limitation upon these sections was repealed in 1961, Public Law 87- 369, s.2, 4 October 1961.

<sup>128</sup> Montevideo Convention on Rights and Duties of States 1933, (1934) 28 AJIL (Supp) 75.

<sup>129</sup> Harvard Draft Convention, *supra* note 14.

<sup>130</sup> *Supra* note 72. Attempts are proscribed by Article 2(4), Chapter I.

Chapter XVII, Crimes of Documentary Forgery, proscribes without regard to *loci delicti* or nationality of alleged perpetrator the forgery of Imperial or State documents, the forgery of an official document, the untrue entry in an authenticated deed etc., the uttering of a false document, and the illegal production of electro-magnetic record.<sup>131</sup> These prescriptions are congruent with the United States application economic reference to the category. Common amongst these prescriptions, setting them apart from others, is their being concerned with the prevention and punishment of acts having a direct, immediate, and deleterious effect or intended effect upon the performance and functioning of a State's economy. Again, as with the political type of prescription these attack a direct attribute of Statehood and/ or core function of governance. They may or may not however be committed with the intention of affecting such an attribute or function.

The final sub- grouping of protective prescriptions sit ill at ease with classification as explicitly political or economic. They differ in that the crimes they proscribe are committed without either the intention of affecting the State's political machinery or well- being nor directly affecting or intending to affect a State's economic attributes or functions. Within this sub- grouping are prescriptions relating to immigration, the traffic in proscribed substances, and the US racketeering legislation. Of these the most historical are immigration offences. In the United States the relevant legislation states "Whoever... uses, attempts to use, possess, obtains, accepts or received any immigration visa or permit, or other document required for entry into the United States, knowing it to be... falsely made... shall be fined or imprisoned".<sup>132</sup> This type of prescription differs from the above explicitly political in that here there is no intention to directly affect the political infrastructure or competence of the State. The effect although unquestionable is only incidental to the offence, not a requisite element of it. The same is true of prescriptions relating to the traffic in proscribed substances. Not only does the covert importation of proscribed substances subvert the States control of its borders, the consequential effects of the drug trade within the State themselves deleteriously impact upon such things as municipal crime with all its attendant costs and governmental spending on social services. As it was said in *US v. Egan* "The unlawful importation of drugs bypasses the federal customs laws, and thus directly challenges a governmental function... it has been suggested that, in view of the size of the drug problem in the United States, and the dimension of the unlawful importation of controlled substances, such unlawful importation represents a threat to the security of the United States".<sup>133</sup> Akin to this rationale is that behind the extraterritorial application of the racketeering provisions. This final sub- grouping of protective prescription can be characterised with reference to its purpose being the prevention and punishment of extraterritorial acts of such a degree or nature that although not committed intentionally and/ or directly concerned with the inimical affectation of the political or economic well- being of State functions and attributes can be objectively adjudged to do so.

The above classification is useful in that the content and nature of the grouping of substantive international criminal law relative to the protective category has been highlighted in the form of three distinct sub- groupings. It is perhaps as important to emphasise the overriding congruencies. Central to these is that the interests putatively served by such prescriptions are manifestly public ones. This is the crucial and indeed definitive condition of such a prescription. It is implicit or indeed explicit throughout the grouping of protective prescriptions. Bulgarian criminal law for example refers to the category when "the national interests of the Republic of Bulgaria or its citizens are affected... the only limitation [being]

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<sup>131</sup> Chapter XVIII Crimes of Counterfeiting Securities and Chapter XIX, Crimes of Counterfeiting Seals, also implicitly refer to the category.

<sup>132</sup> 18 USC § 1546.

<sup>133</sup> *Supra* note 58.

that the offence should not be of a private character".<sup>134</sup> This characteristic distinguishes this grouping of substantive international criminal law from that justified with reference to the passive personality category of jurisdiction.<sup>135</sup> If the distinction between these two groupings of substantive international criminal law is to remain and retain validity then clearly the protective must centre around the protection of public interests. Of course crimes inevitably and necessarily threaten both public and private interests simultaneously, and the task of ascribing to a prescription a species of "interest" it protects is wrought with difficulty, crimes relating to the traffic in proscribed substances providing a germane example of this "cross-over" of interest. Indeed it is wholly reasonable to aver that all crimes affect public interests, by virtue of the State deeming it necessary to become involved subsequent to the commission of the act at all. This however does not fatally affect the position that this grouping of international criminal law is centred only around acts affecting or attempting to affect public interests. The distinction is found in the immediacy and degree of that affectation, the significance of that interest to that State, and the existence of an intention to affect such an interest, the test for inclusion being usefully served by reference to the requirements of Statehood itself.

A second subsidiary and disputed characteristic of this grouping of international criminal law relates to the *loci delicti* of the acts it proscribes and the class of persons to which it applies. Logically this grouping of prescriptions would be limited to wholly extraterritorial crimes committed by non-nationals and non-residents. There existing, of course, categories of jurisdiction justifying the application of territorial and personal relationship based prescriptions. The original *raison d'être* of this grouping of prescriptions was that central State interests could be and were affected or threatened in the absence of a territorial, or other, connection between that act and the State. Indeed the existence of such connections would have rendered the existence and development of this body of international criminal law otiose. State practice unfortunately does not always abide by conceptual niceties. The protective category and objective arm of the territorial category for example have been relied upon in the face of the same facts and conjunctively. The view that this category of criminal prescription, and the right of jurisdiction evidenced with reference to the category, only legitimately apply in regard to wholly extraterritorial crime by non-nationals or non-residents can only be stated *de lex ferenda*. This is not to imply that there are no authorities in this regard. It will be recalled it was stated in *US v. Pizzarusso* "Under the [protective category] all the elements of the crime occur in the foreign country and jurisdiction exists because these actions have a 'potentially adverse effect' upon security or governmental functions... there need not be any actual effect in this country as would be required under the objective territorial principle".<sup>136</sup> In *US v. Khalje*<sup>137</sup>, a immigration offence case under 18 USC § 1546, this line of reasoning was followed. The appellant arguing in his appeal against conviction that jurisdiction was improperly assumed as "under the principle of objective territoriality, the adverse effects within the United States needed to support jurisdiction were lacking" to which the Court upheld jurisdiction with reference to the protective principle stating that it "requires only a potentially adverse effect on security or governmental functions- here, control of immigration- to support jurisdiction".<sup>138</sup> Additionally where there has been an effect upon the State it has occurred extraterritorially, a reason given in support of the application of the protective

<sup>134</sup> *Bulgarian Criminal Law, International Encyclopaedia of Laws*, Vol. 1, supra note 71, p 43.

<sup>135</sup> Such is the otherwise congruence between them that they have been conjoined and termed the "injured forum" theory of jurisdiction, Perkins, R.M., *The Territorial principle in Criminal Law*, (1971) 22 HLJ 1155 at 1155. It is here written that, according to the injured forum theory, "A nation may take jurisdiction of any crime which has the effect of causing harm to it".

<sup>136</sup> Supra note 104.

<sup>137</sup> (1981) 658 F 2d 90.

<sup>138</sup> *Ibid.* p 92.

category to crimes of espionage being that they were “as likely to occur within foreign countries as within this country because of the large number of United States defense installations and military personnel located abroad”.<sup>139</sup> In contradistinction to this authority is that where the protective category is employed where reference to other categories manifestly applies. In *US v. Layton*<sup>140</sup> for example. Relevant here, as with the objective arm of the territorial category is the vexed question of “effect”; it being within or outwith a territory, or extant at all. In light of the present State practice, particularly by the United States in regard to the traffic in proscribed substances, the only conclusion that can be drawn in regard to the spatial and personal application of this grouping of criminal law is that it only generally concerns wholly extraterritorial crimes committed by non- nationals or non- residents.

#### Protective Category- Conclusion

The protective category of jurisdiction centres around the interest putatively or potentially affected by the crime in question. In this respect the category is congruous with the universal. From a standpoint desirous of the definite and limited applicability of criminal law, this is a core considerably less tangible and objectively ascertainable than that of the other categories. The dangers inherent in its application are manifest. The existence of a limiting mechanism then assumes more importance. Such could provide that the category shall not apply where the act was committed “in exercise of a liberty guaranteed the alien by the law of the place it was committed”.<sup>141</sup> Or alternatively that it would only apply where the “... conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems”.<sup>142</sup> These limitations cannot presently be said to be part of the customary law of jurisdiction. This category of jurisdiction then, indubitably extant, is a step apart from the more tangible and orthodox categories. It thus lends particularly strong support to the conjunctive component of this thesis. The grouping of prescriptions justified with reference to the category serve to protect the fundamental interests of States. As such it is critically important from the viewpoint of States. It can be conceived as a significant weapon in the armoury providing for the protection, perpetuation, and stability of sovereign States, and thus the international community.<sup>143</sup> The protective grouping of prescriptions are centred upon an

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<sup>139</sup> Ibid. In regard to acts of espionage committed within or against such locations as embassies and consulates it has been averred that the protective linkage can be supplanted by a linkage of territory, somewhat analogous to the position of ships and aircraft.

<sup>140</sup> Supra note 60.

<sup>141</sup> Harvard Draft Convention, supra note 14 at p. 440.

<sup>142</sup> American Law Institute, Restatement of the Law: The Foreign Relations of the United States, (Second), American Law Institute Publishers, St. Paul, Minn., 1965, Section 33.

<sup>143</sup> It has been written that “The first function of international law has been to identify, as the supreme normative principle of the political organisation of mankind, the idea of a society of sovereign states.” in Bull, H., *The Anarchical Society: A Study of Order in World Politics*, Macmillian Press, London, 1977, p 140.

explicit (direct) or objectively (incidental) implicit attack upon the survival or basic attribute of the State itself. They are “a very special class of crimes, the consequences of which may be of the utmost gravity to the State against which they are directed”.<sup>144</sup> This grouping of criminal law, and the category which justifies its application is thus both exceptional and ordinary. The former in that it generally relates to crimes where the other categories do not apply, and the latter in that they serve to protect such basic underlying interests that the non-protection of which is unquestionable.

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<sup>144</sup> Brierly, *supra* note 24 at p 255.



## Chapter Six- The Passive Personality Category

### Introduction

Reference to the passive personality category justifies the assumption of jurisdiction over an accused in cases where the victim of the alleged crime is in a relationship of a particular nature with that State.<sup>1</sup> It has been and remains the most questioned of jurisdictional categories.<sup>2</sup> As with the protective category this uncertainty and obfuscation results in further strength being given to the conjunctive plank of this thesis; its relative position leading to it often being referred to in conjunction with other categories. Also germane is the similarity between the passive personality category and certain other categories, particularly the protective. Predictably, but with ironical result, reference to the passive personality category has given rise to the two most significant international jurisdictional precedents, the Lotus Case<sup>3</sup> and Cutting Case<sup>4</sup>. These, particularly the former, have done the law of international criminal jurisdiction a disservice, leaving it for years mired in obfuscation. Yet, modern developments, conventional, legislative and judicial have all generally led to the reduction in the value of these precedents leaving them, in regard to the passive personality category at least, of historical significance only.

### Passive Personality Category- Existence

It is correct to state that the passive personality category exists within customary international law. All historical doubts and objections are today unequivocally without foundation. Questions do persist however in regard to its precise nature. It is useful in the establishment of the category's existence to firstly highlight some of the most significant counter- authority and so bring to the fore the main policy and practical reasons weighing against it. Significant here are all six dissenting judgements in the Lotus Case.<sup>5</sup> Judge Loder *inter alia* stated:

“The criminal law of a State... cannot extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction”.<sup>6</sup>

Judge Moore in his judgement<sup>7</sup> based his opposition to the category not only upon the sovereignty of States but also upon the nature and practical application of the category. After

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<sup>1</sup> An orthodox definition stating “the passive- personality theory of jurisdiction provides a state with competence to prosecute and punish perpetrators of criminal conduct that is aimed at or harms the nationals of the asserting state”, Blakesley, C.L., Jurisdiction as Legal Protection Against Terrorism, (1987) ConnLR 895 at 938. Hereinafter Blakesley Protection. Whilst it is common to delimit the category with reference to the victims being nationals of the State in question certain States include those habitually resident or domiciled within it, for example France and Portugal, see European Committee of Crime Problems, Select Committee of Experts on Extraterritorial Jurisdiction, Questionnaires and Replies, PC-REJ/INF Bil, Council of Europe, p. 16, hereinafter Questionnaires and Replies.

<sup>2</sup> A useful recent examination of the category is Watson, G.R., The Passive Personality Principle, 28 (1993) TILJ 1. It is therein stated “Passive personality jurisdiction is probably the most controversial form of extraterritorial criminal jurisdiction”, at p 2.

<sup>3</sup> Case of the SS Lotus, (France v. Turkey), (1927) PCIJ Rep, Series A, No. 10. Hereinafter the Lotus Case.

<sup>4</sup> Moore, J.B., Report on Extraterritorial Crime and the Cutting Case, (1887) Foreign Relations of the United States 751.

<sup>5</sup> Supra note 3. A brief synopsis of the dissenting judgements in regard to the passive personality category is found in Hudson, M.O., The Sixth Year of the Permanent Court of International Justice, (1928) 22 AJIL 1 at pp 12- 15.

<sup>6</sup> Supra note 3, at p 35.

<sup>7</sup> Judge Moore dissented only upon the issue of the existence of the category, he agreed with the majority on the issue of where jurisdiction lies following collision at sea.

stating that it is contrary to “well- settled principles of international law” he states, giving the category the epithet “protective principle”, that it means:

“... that the citizen of one country, when he visits another country, takes with him for his “protection” the law of his own country and subjects those with whom he comes into contact to the operation of that law. In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes... It is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for protection”.<sup>8</sup>

Similar reasoning is found in the correspondence between Mexico and the United States in the Cutting Case, the United States Secretary of State stating:

“[T]he assumption of the Mexican Tribunal, under the law of Mexico, to punish a citizen of the United States for an offence wholly committed and consummated in his own country against its laws was an invasion of the independence of this Government... As to the question of international law, I am unable to discover any principle upon which the assumption of jurisdiction... can be justified. [I]t has consistently been laid down in the United States as a rule of action that citizens of the United States cannot be held answerable in foreign countries for offences that were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state... [T]o say that he may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they came, and thus subject citizens of the United States to infinite criminal responsibility”.<sup>9</sup>

A recent adumbration of reasons militating against the category are found in the Netherlands’ reply to the Questionnaire on Extraterritorial Criminal Jurisdiction.<sup>10</sup> In response to a question of whether the category had a place in Dutch criminal law the Dutch Government, *inter alia*, quoted from an “explanatory memoranda” to a piece of Dutch criminal legislation<sup>11</sup>:

“The passive personality principle is unknown to Dutch ordinary criminal law, applicable in times of peace. There are good reasons for this.... These objections are mainly to the effect that this principle is characterised by a general lack of trust in, or respect for, the criminal procedures of other states, which due to the place where the

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<sup>8</sup> Supra note 3 at p 91-92. Briefly commenting upon the Lotus Case states “... it is essential to the very notion of a crime that the act should be a contravention of some law to which the accused is subject, and the suggestion that every individual is or may be subject to the laws of every State at all times and in all places is intolerable in itself, as well as being an anarchical principal at variance with the whole organization of the world into independent, but *territorially delimited* States”, Brierly, J.L., The Lotus Case, (1928) 44 LQR 154 at p 161- 162 (emphasis his). He explains such claims as being in part “... the juridical by-product of the aggressive racial nationalism which was launched by the French Revolution...” as well as the refusal of certain States to extradite their nationals, at 162.

<sup>9</sup> Supra note 4 at pp 753- 757. Cited in Blakesley, C.L., A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes, [1984] ULR 685 at p 716. Hereinafter Blakesley Framework.

<sup>10</sup> Supra note 1.

<sup>11</sup> The legislation being that which incorporated into Dutch law the UN Convention on the Prevention and Punishment of Crimes Against Certain Internationally Protected Persons, including Diplomatic Agents 1973, (1974) 12 ILM 42. Hereinafter the IPP Convention.

offence has been committed, might assert stronger claims to exercise jurisdiction... Such a principle of jurisdiction which seems to be based exclusively on the embodiment of a state's own "raison d'être", is not consistent with the fundamentals of Dutch criminal law...

Apart from that, the passive personality principle as a primary principle of jurisdiction seems also to be incompatible with the basic ideas of international criminal law, which has as its main purpose to prevent jurisdictional conflicts between states and to further international co-operation in criminal matters.

Another objection which may be raised to this principle is to the effect that, in its most radical appearance, it subjects offenders in a very arbitrary way indeed to the jurisdiction of a foreign state. The requirement of legal security or predictability should in our (the Dutch Government's) view imply that the offender knew, or at least should reasonably have known, that the victim of his offence had the nationality of the prosecuting state".<sup>12</sup>

Clearly the persuasive force of these arguments remain. They have however been overcome. Generally responsible is the manifest international desire to co-ordinate action to suppress internationally behaviour inimical to all States. Indeed, the origin of the Dutch comments lay in the enactment of legislation related to precisely such a desire.

It is conventional international law that is responsible for the entrenchment of the category within customary international law. Of course it is not solely responsible. Certain States have relied and still do refer to it in circumstances not dealt with by convention. And indeed while the germane international conventions affect the category *per se*, their most significant effect follows from their permitting or obligating States to refer to the category within their municipal law. The original modern conventional reference to the category is in the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963.<sup>13</sup> Article 4 of which *inter alia* provides:

"A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases...

(b) the offence has been committed by or against a national or permanent resident of such State".

Clearly Article 4(b) refers to the category. It is however an executive not judicial reference. It permits not the taking of judicial competence over crimes committed on board but rather the interference in flight with an aircraft on which an offence has been committed. If such were to occur it follows that that State would be under an obligation to deliver the accused to the State of registration in order that it exercise judicial jurisdiction.<sup>14</sup>

The IPP Convention<sup>15</sup> also refers to the category in an ambiguous manner. The relevant provision is Article 3, it *inter alia* states:

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases...

(c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State".

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<sup>12</sup> Supra note 1 at p 4-5.

<sup>13</sup> (1969) UKTS 126, Cmnd 4230.

<sup>14</sup> Harris agrees stating that Article 4 applies only "to the exercise of executive jurisdiction while the aircraft is in flight.", in Harris, D.J., *Cases and Materials on International Law* (Third Ed.), Sweet and Maxwell, London, 1983, p 236.

<sup>15</sup> Supra note 11.

Clearly what is operative is not explicitly nationality (or residence, domicile etc.) of the victim of a crime but rather the status of "internationally protected person"<sup>16</sup>, they not necessarily equating. The International Convention Against the Taking of Hostages 1979<sup>17</sup> provides in Article 5:

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed...

(d) with respect to a hostage who is a national of that State, if that State considers it appropriate".

Article 5(d) is an unambiguous, permissive, international reference to the category.<sup>18</sup>

The formula in the Hostages Convention has been followed in later treaties. The Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment 1984<sup>19</sup> is a notable example. Article 5 *inter alia* states:

"1. Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(c) when the victim is a national of that State if that State considers it appropriate".

Similar provisions are found in the International Maritime Organization's Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988<sup>20</sup> and its Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.<sup>21</sup> The Convention on the Safety of United Nations and Associated Personnel 1994<sup>22</sup> again follows this formula in Article 10(2)(b). A final convention to note is European Convention on Offences Relating to Cultural Property 1985.<sup>23</sup> It is significant in that it provides for mandatory reference to the category. Article 13 *inter alia* states:

"1. Each party shall take the necessary measures in order to establish its competence to prosecute any offences relating to cultural property...

e. committed outside its territory when the cultural property against which that offence was directed belongs to the said Party or one of its nationals".

In contradistinction to the abundant conventional authority in support of the existence of the category is the dearth of international judicial authority. Indeed the authority that does exist is at best ambivalent. In the *Lotus Case* the precise issue of the existence of the category was side-stepped. The majority decision of the Permanent Court of International Justice preferring to refer to the objective arm of the territorial category in support of Turkey's assumption of jurisdiction. The Court held:

"... the Court does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of

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<sup>16</sup> The definition of international protected persons in Article 1 includes Heads of State, Ministers of Foreign Affairs, as well as all persons who are representatives or officials of States or international organisations of an intergovernmental character who are entitled pursuant to international law to special protection.

<sup>17</sup> (1979) 18 ILM 1456. Hereinafter the Hostages Convention.

<sup>18</sup> Unlike the IPP Convention this is a "pure" reference in that it is not conflated with the protective category, the crime protecting in part purely private interests. Article 1 provides:

"Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person... in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages... within the meaning of this Convention".

<sup>19</sup> (1985) 23 ILM 1027. Hereinafter the Torture Convention.

<sup>20</sup> (1988) 27 ILM 668, in Article 6. Hereinafter the Maritime Navigation Convention.

<sup>21</sup> (1988) 27 ILM 685, in Article 3.

<sup>22</sup> (1995) 34 ILM 482.

<sup>23</sup> (1986) 25 ILM 44.

the victim. For this contention only relates to the case where the nationality of the victim is the only criterion on which the criminal jurisdiction of the State is based. Even if that argument were correct generally speaking- and in regard to this the Court reserves its opinion- it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced is effects on the Turkish vessel and consequently in a place assimilated to Turkish territory...".<sup>24</sup>

The Cutting Case again is ambiguous as to the existence of the category. It is here implicitly concluded, after *inter alia* citing the laws of Greece, Russia, Sweden, Norway, and Italy, that the category should not, rather than does not, exist.<sup>25</sup>

In concordance with the support given by conventional authority is municipal case law and legislation, both to a significant extent resultant from that conventional treatment. In regard to the former two cases will be cited. In the United States case of *US v. Benitez*<sup>26</sup> the assumption of jurisdiction over *inter alia* charges of conspiracy to murder was upheld. The Court held that in part applicable was reference to the passive personality category, stating that "the nationality of the victims... clearly supports jurisdiction".<sup>27</sup> A second non- common law authority is the Dutch case of *In re Gerbsch*.<sup>28</sup> At issue here was the jurisdiction of the Dutch courts over war crimes and crimes against humanity committed against Dutch nationals outside the Netherlands. It was held by the Special Criminal Court that:

"The Netherlands legislature, in thus entrusting the Netherlands courts with the trial of such crimes, by whomsoever and wheresoever committed, had applied the so- called principle of passive nationality to the Netherlands Criminal Code, for the defence of general or important individual Dutch legal interests. The application of this principle of jurisdiction had been adopted in their legislation by several States, in earlier laws as well as in more recent war codes, as an internationally recognized principle. There was no conflicting principle of international law".<sup>29</sup>

Even more pronounced than municipal case law in supporting the existence of the category is municipal legislation. A relatively early example is the legislative provision that lay at the heart of the jurisdictional dispute in the Lotus Case, Article 6 of the Turkish Penal Code of 1 March 1926. It *inter alia* states:

"Any foreigner who... commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey".<sup>30</sup>

It is sufficient at this stage to cite only one modern legislative reference to the category, that of France, its value enhanced by the fact that in the Lotus proceedings France argued:

"... according to international law as established by the practice of civilised nations, in their relations with each other, a State is not entitled, apart from express or implicit special agreements, to extend the criminal jurisdiction of its courts to include a crime or offence committed by a foreigner abroad solely in consequence of the fact that one of its nationals has been a victim of the crime or offence".<sup>31</sup>

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<sup>24</sup> Supra note 3 at p 22- 23.

<sup>25</sup> Supra note 4 at p 839- 840.

<sup>26</sup> (1984) 741 F 2d 1312.

<sup>27</sup> Ibid. at p 1316.

<sup>28</sup> (1949) 16 Ann Dig 399.

<sup>29</sup> Ibid.

<sup>30</sup> Official Gazette No. 320 of 13 March 1926, cited in the Lotus Case, supra note 3, at pp 14- 15. The Harvard Research Draft Convention on Jurisdiction, (1935) 29 AJIL (Supp) 439 lists over twenty States that in one form or other then referred to the category, at p 578.

<sup>31</sup> The Lotus Case, supra note 3 at p 7.

The modern French provision dates from 1975 and is found in Article 689 of the Code of Criminal Procedure. It provides:

“Any foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national”.<sup>32</sup>

The final type of authority in support of the category to be proffered is the opinion of jurists. Blakesley, after surveying recourse to the category avers “Certainly, given the wide acceptance of this principle, it would be difficult to say that international law bars a broad application of it”.<sup>33</sup> Bassiouni comes to a similar conclusion writing that “the theory is relied upon by a number of states and must continue to be considered applicable in any situation where it is not prohibited by international law”.<sup>34</sup> Shaw states in relation to the category that “Under this heading, a state will claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of that state”.<sup>35</sup> And although he comments that opinion is that “it is a rather dubious ground” implicitly concludes that it does exist in the corpus of international customary law.<sup>36</sup> Shearer employs explicit language, stating that “international law recognises the passive nationality principle” but then goes on to aver that it does so “only subject to certain qualifications”.<sup>37</sup> *Oppenheim’s International Law* provides that the category has not “met with wide acceptance, although it has been accepted in certain contexts...”.<sup>38</sup> Finally two instances of juristic authority supporting the existence of the category but in an unsatisfactory way provide that “Although the passive personality linkage has been received partly positively and partly negatively, it is doubtful if this principle can be considered an established rule in international law”<sup>39</sup> and “It seems doubtful that this limited amount of state practice amounts to a rule of customary international law endorsing passive personality jurisdiction. On the other hand, it seems equally doubtful that state practice has generated a rule of customary international *barring* passive personality jurisdiction”.<sup>40</sup> It is fundamentally important to conclude that either the lawful ability of States to assume cognisance in certain circumstances does or does not so exist, there is no middle ground. The evidence proffered above unequivocally supports that ability in regard to the passive personality category.

### The Passive Personality Category- Application

The passive personality category is unique in two respects; in the degree of obfuscation and uncertainty that surrounds its existence and application and in the extent of the relationship it has with conventional international law. Further, it is only partially congruent with the two most orthodox categories, the territorial and the active personality, in that it is only generally follows the usual dichotomy in application between States in the common law and non-

<sup>32</sup> Law of 11 July 1975, No. 75- 624, translated and cited by Blakesley *Protection*, supra note 1 at 938.

<sup>33</sup> Blakesley *Framework*, supra note 11, at p 716- 717 footnote 99.

<sup>34</sup> Bassiouni, M.C., *International Extradition and World Public Order*, Sijthoff, Leyden, 1974, p 256. Hereinafter Bassiouni *International Extradition*.

<sup>35</sup> Shaw, M.N., *International Law*, (Third Edition) Grotius Publications, Cambridge, 1991, p 408.

<sup>36</sup> *Ibid.* p 408-409.

<sup>37</sup> Shearer, I.A., *Starke’s International Law*, (Eleventh Edition), Butterworths, London, 1994, p 210-211. Unfortunately he does not then clearly elucidate upon these “qualifications”, stating only that, from the Cutting Case, a State that does not admit the category is not bound to acquiesce in its application by another State in regard to its nationals. It is submitted that this point is far from settled, and in regard to so-called “terrorist offences” it appears to be mistaken.

<sup>38</sup> Jennings, R.Y., and Watts, A., (eds.), *Oppenheim’s International Law*, (Ninth Edition), Vol. 1, Longman Group, Harlow, 1992, p 472.

<sup>39</sup> Malekian, F., *International Criminal Law: The Legal and Critical Analysis of International Crimes*, Borgstrom Tryckeri AB, Uppsala, 1991, p 16.

<sup>40</sup> Watson, supra note 2 at p 13- 14. Emphasis his.

common law traditions. Common law States, particularly but not exclusively the United States, have acted upon their conventional obligations and enacted legislation prescribing the acts proscribed by those conventions. Further, the United States makes not- insignificant reference unrelated to convention. Certain non- common law States on the other hand tend to, in addition to acting upon conventional obligations, refer to the category in a much more wide- spread or general manner whilst others take a much more limited approach.

### Common Law States

An exposition of the application of the passive personality category by common law States is unique in that there is only a limited range of sub- groupings of prescriptions justified with reference to it. In fact there are only two. They are prescriptions protecting direct State interests, and prescriptions protecting serious but private interests, for example murder. In the practice of common law States that of the United States predominates. Its practice, as with France, is doubly significant in light of its historical antipathy towards the category. In the United States the category has come to exist in a piecemeal and *ad hoc* manner.<sup>41</sup> The first legislative reference followed the IPP Convention<sup>42</sup> and was enacted into United States federal criminal law by 18 USC § 1116. This *inter alia* provides:

“(a) Whoever kills or attempts to kill a foreign official guest, or internationally protected person shall be punished...

(c) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States”.<sup>43</sup>

The IPP Convention is further implemented in 18 USC § 112 in regard to the crime of assault and 18 USC 1201 §§ (a)(4), (e) in regard to kidnapping. The jurisdictional provision in these sections is identical to that in paragraph (c) above. Equally, it is found in 18 USC § 878, as amended, prescribing threats and extortion against *inter alia* internationally protected persons.

Similar United States reference to the category followed the Hostages Convention.<sup>44</sup> The relevant provision is 18 USC § 1203. It *inter alia* provides:

“(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished...

(b)(1) It is not an offense under this section if the conduct required for the offence occurred outside the United States unless-

(A) the offender or the person seized or detained is a national of the United States”.

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<sup>41</sup> Watson describes it as “creeping into United States law”, *ibid.* at p 9.

<sup>42</sup> *Supra* note 11.

<sup>43</sup> Interestingly subsection (c) was recently amended bringing in into line with the precise formula of Article 3 of the IPP Convention. The previous version read:

“If the victim of an offence under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offence if the alleged offender is present within the United States, irrespective of the place where the offence was committed or the nationality of the victim or the alleged offender”.

The change was effected by the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104- 132, 24 April 1996. Hereinafter the 1996 Antiterrorism Act. In addition to this change it made other significant amendments to the jurisdiction of the United States which will be mentioned below.

<sup>44</sup> *Supra* note 17.

This prescription was applied in the prosecution of Fawaz Yunis, who was allegedly involved in the seizure of a Jordanian registered aircraft in Beirut in 1985. He was *inter alia* charged with the substantive offence of hostage taking and of conspiring to commit that offence. His pre-trial challenge of the jurisdiction of the United States was dismissed in spite of the only nexus to the United States being the presence of several American nationals on board the flight. The Court held that the Hostage Convention's permissive reference to the passive personality category overcame any possible doubts over the assumption of jurisdiction.<sup>45</sup> On appeal against conviction of *inter alia* conspiracy and hostage taking it was held that:

“Since two of the passengers on Flight 402 were US citizens, section 1203(b)(1)(A), authorizing the assertion of US jurisdiction where “the offender or the person seized or detained is a national of the United States” is satisfied”.<sup>46</sup>

The Court further held that jurisdiction was not “precluded by the norms of customary international law”.<sup>47</sup>

Reference to the category in the United States also follows the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction 1972.<sup>48</sup> Section 175 of Title 18 of the United States Code applying to an offence committed “by or against a national of the United States”. This is noteworthy because the convention itself is only very general jurisdictionally. Article 4 merely states that:

“Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production... within the territory of such State, under its jurisdiction or under its control anywhere”.

Similar reference is found in the recently amended series of offences related to nuclear materials. The convention upon which the crimes are based is the Convention on the Physical Protection of Nuclear Material 1979.<sup>49</sup> Whilst it does contain a jurisdictional article, Article 8, referred to explicitly are only the territorial and active personality categories. The relevant provision in the Convention therefore is necessarily Article 8 (3), which provides that the Convention “does not exclude any criminal jurisdiction exercised in accordance with national law”. The related jurisdictional provision in United States law is interesting in that it was not included in the original version of the legislation. Originally 18 USC § 831 followed the Convention precisely, by the Antiterrorism and Effective Death Penalty Act of 1996<sup>50</sup> however it was supplemented. Section 831(c)(2), referring solely to the offender being a national of the United States, was changed to that of “an offender or victim is- (A) a national of the United States; or (B) a United States corporation or other legal entity”.<sup>51</sup>

The prescriptions in United States law following the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970<sup>52</sup> refer to the category and also have been recently amended, the original legislative section as well as the Convention itself not so referring. The relevant provision is 49 USC § 46502(b). Subsection (2) as amended *inter alia* states that “There is

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<sup>45</sup> US v. Yunis (1988) 896 F Supp 896 at 902.

<sup>46</sup> US v. Yunis (1991) 924 F 2d 1086 at 1090.

<sup>47</sup> Ibid. at p 1091.

<sup>48</sup> (1972) 1015 UNTS 163. The law implementing the Convention is Public Law 101-298, Sec. 3(1), 22 May 1990.

<sup>49</sup> (1979) 18 ILM 1419.

<sup>50</sup> Supra note 43.

<sup>51</sup> By Section 502. This amendment is additionally significant in that it provides that the “victims” need not be natural persons but may also include corporations or other legal entities. This position is also followed by Germany and Italy, Questionnaire and Replies, supra note 1 at p 10.

<sup>52</sup> (1972) 39 UKTS Cmnd 4956.



jurisdiction over the offense in paragraph (1) if-- (A) a national of the United States was aboard the aircraft". A further aircraft related reference to the category is 18 USC § 32, prescribing the destruction of aircraft or aircraft facilities. Subsection (b) has been amended by the 1996 Antiterrorism Act to provide for jurisdiction if "... a national of the United States was on board, or would have been on board the aircraft...". While this section of the United States Code does not explicitly mention the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971<sup>53</sup> there exists significant symmetry between it and the offences contained within this section.

Canadian reference to the category solely relates to crimes subjected to conventional treatment. Section 7(2.1) of the Canadian Criminal Code *inter alia* states:

"Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform attached to the continental shelf of any state or against or on board a ship navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 78.1, shall be deemed to commit that act or omission in Canada if it is committed... (f) in such a way as to seize, injure or kill, or threaten to injure or kill, a Canadian citizen..."<sup>54</sup>

This provision is founded upon the Maritime Navigation Convention<sup>55</sup> and its Protocol.<sup>56</sup>

Further Canadian reference to the category relates to torture, hostage taking and crimes against internationally protected persons. The former is dealt with in its jurisdictional aspects by section 7(3.7)(d) which *inter alia* provides that the offence will be deemed to have occurred in Canada if the victim was a Canadian citizen. The substantive offence is found in s 269.1 which *inter alia* provides that:

"(1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years".

This prescription is rooted in the Torture Convention.<sup>57</sup> The Canadian hostage- taking prescription follows the same pattern.<sup>58</sup> A final instance of Canadian recourse to the passive personality category to be noted is found in s 7(3)(d) of the Criminal Code prescribing crimes against internationally protected persons. The substantive crimes include murder, manslaughter and assault.<sup>59</sup> For all prescriptions capable of being exercised with reference to the passive personality category in Canadian law it is important to note that their application is conditional upon, if the alleged offender is not a Canadian citizen, the consent of the Attorney General of Canada.<sup>60</sup>

Australia refers to the category only on a very limited and oblique basis. Section 10 of the Crimes (Internationally Protected Persons) Act 1976 *inter alia* provides:

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<sup>53</sup> (1971) 10 ILM 1151.

<sup>54</sup> Section 78.1 *inter alia* provides "(1) Every one who seizes or exercises control over a ship or fixed platform by force or threat of force or by any other form of intimidation is guilty of an indictable offence and liable to imprisonment for life".

<sup>55</sup> Supra note 20.

<sup>56</sup> Supra note 21.

<sup>57</sup> Supra note 19.

<sup>58</sup> It is provided for jurisdictionally by s. 7(3.1)(e) and substantively by s. 279.1.

<sup>59</sup> The full listing of substantive offences is found in the jurisdictional section, s. 7(3)(d).

<sup>60</sup> By s. 3(7) of the Criminal Code. Section 3(6) provides for the plea of *autrefois acquit*, *autrefois convict* in regard to these offences.

“A person is not liable to be charged for an offence against this Act unless... (b) the offence is committed after the Convention enters into force for Australia and the person is found in Australia or Australia is required by article 3 of the Convention to establish jurisdiction over the offence”.

It will be recalled that Article 3 provides that States shall establish jurisdiction over offences where the victim is an internationally protected person who enjoys his status by virtue of the functions he exercises for that State.<sup>61</sup> The sole explicit reference to the category in Australian law is in the Crimes (Ships and Fixed Platforms) Act 1992. This piece of legislation takes an interesting approach to the category, referring to it on a vicarious basis. Section 18(1) *inter alia* provides:

“Proceedings must not be commenced against a person for an offence against this Division unless, when the alleged offence was committed... (b) the alleged offence had an Australian element or a Convention State element”.

The term “Convention State element” is defined in 18(4), it *inter alia* provides:

“For the purposes of this section, an offence against this Division had a Convention State element if one of the following circumstances applied:... (e) during the commission of the alleged offence, a national of a Convention State was seized, threatened, injured or killed and the Convention State had extended its jurisdiction under Article 6(2)(b) of the Convention”.

This is a vicarious reference in that Australia does not refer to it in regard to its own nationals but does in regard to other State parties which have done so.<sup>62</sup>

A similar vicarious approach to the category is taken by the United Kingdom in the Suppression of Terrorism Act 1989. Section 4(3) of which provides:

“If a person who is a national of a convention country but not a citizen of the United Kingdom and Colonies does outside the United Kingdom and that convention country any act which makes him in that convention country guilty of an offence and which, if he had been a citizen of the United Kingdom and Colonies, would have been in any part of the United Kingdom guilty of an offence mentioned in paragraph 1, 2 or 13 of Schedule 1 to this Act, he shall, in any part of the United Kingdom, be guilty of the offence or offences aforesaid of which the act would have made him guilty of he had been such a citizen”.

The effect of this provision is to provide for the vicarious application of the passive personality category where the State party in question provides for it for the relevant offences; murder, manslaughter and certain explosives offences. This is the extent of direct reference to the passive personality category in the United Kingdom law. In the other instances born of conventional international law where legally kindred States have enacted passive personality provisions the United Kingdom has not. Rather, in at least one instance, it has over-stepped the limits of jurisdiction as found in the convention. This is in relation to the offences involving nuclear material where the Nuclear Materials Act 1983 refers to the universal category.<sup>63</sup> Further instances where the United Kingdom had the opportunity to enact passive personality provision, in regard to the Hostages and IPP Conventions for example it failed to do so. The

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<sup>61</sup> Noted supra p 120- 121.

<sup>62</sup> This provision leads to the anomalous situation whereby, for example, in an incident where an Australian and a Canadian are injured and/ or killed by a national of a third State on a ship or fixed platform and the other conditions are met (Canada being a State which has extended its jurisdiction under Article 6(2)(b)), the offender would be liable to stand trial in Australia for the crime against the Canadian but not the Australian.

<sup>63</sup> Section 1(1) provides *inter alia* that “If any person, whatever his nationality, does outside the United Kingdom...”. The requirement of executive sanction for proceedings to be commenced in s. 3 may in practice mitigate this problem.

Taking of Hostages Act 1982 and the Internationally Protected Persons Act 1978 take a broad jurisdictional approach<sup>64</sup>, again further than the respective conventions mandate.

Whilst it is undoubtedly true that common law States predominately refer to the category in relation to prescriptions enacted pursuant to international convention, other reference exists. The United States in fact makes two further forms of reference; one referring to the category in regard to crimes of a similar nature to those above yet not being founded in convention and another referring to the category in regard to common crimes. In regard to the former of pre-eminent importance is Chapter 113B of the United States Code, relating to terrorism. The central provision is found in 18 USC § 2332, incorporated into United States law by the Omnibus Security and Antiterrorism Act of 1986.<sup>65</sup> It *inter alia* provides:

“(a) Homicide.- Whoever kills a national of the United States, while such national is outside the United States, shall-

(1) if the killing is murder... be fined under this title, punished by death or imprisonment for any term of years or for life, or both;...

(d) Limitation on Prosecution.- No prosecution for any offence described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgement of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.”

The section also prescribes manslaughter, attempt and conspiracy and serious assaults. This Chapter has been amended several times. In 1994 § 2332a was inserted into the Code.<sup>66</sup> It concerns the use of weapons of mass destruction, *inter alia* providing:

“(a) Offense.- A person who uses, or attempts or conspires to use, a weapon of mass destruction-

(1) against a national of the United States while such national is outside of the United States...

(3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States,

shall be imprisoned for any term of years or for life, and if death result, shall be punished by death or imprisoned for any term of years or for life”.

The 1996 Antiterrorism Act has supplemented Chapter 113B, adding §§ 2332b and 2332c. Section 2332b provides an interesting admixture of jurisdictional reference. It *inter alia* provides that:

“(a) Prohibited Acts.--

(1) Offences.-- Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)--

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States;...

(b) Jurisdictional Bases.--

(1) Circumstances.-- The circumstances referred to in subsection (a) are...

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States”.

A more orthodox reference to the category is Section 2332c. It *inter alia* provides:

“(a) Prohibited Acts--

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<sup>64</sup> Both by s. 1.

<sup>65</sup> Public Law 99-339. Signed into law by President Reagan 17 August 1986.

<sup>66</sup> By Public Law 103-322, 13 Sept. 1994.

(1) Offense.-- A person shall be punished under paragraph (2) if that person, without lawful authority, uses, attempts or conspires to use, a chemical weapon against--  
(A) a national of the United States while such national is outside of the United States... ”<sup>67</sup>

Further non- conventionally mandated United States reference relates to employees of the United States who are not internationally protected persons. The relevant provisions are 18 USC §§ 1114, 1112 and 1117 prescribing murder and attempted murder, manslaughter and conspiracy to do the same respectively. Those being protected by these provisions are listed in 18 USC § 1114 and *inter alia* include judges, marshalls, members of the Federal Bureau of Investigations, any officer or employee of the Drug Enforcement Administration and any attorney, examiner, claim agent or other employees of the Federal Deposit Insurance Corporation.<sup>68</sup> A noteworthy case applying a similar type of prescription is *US v. Felix-Gutierrez*.<sup>69</sup> Here the accused was charged and convicted with being an accessory after the fact following the kidnapping and murder of a DEA Special Agent in Mexico in 1985.<sup>70</sup> He challenged the jurisdiction of the United States. The Court held that:

“We have no doubt that whether the kidnapping and murder of such federal agents constitutes an offense against the United States is *not* dependent upon the locus of the act. We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially... We conclude that the crime of “accessory after the fact” gives rise extraterritorial jurisdiction to the same extent as the underlying offense”.<sup>71</sup>

Referring to what the Court termed “international law jurisdictional limitations” it stated that “Here, three of the international law principles permitting extraterritorial jurisdiction have application: (i) territorial, (ii) protective, and (iii) passive personality”.<sup>72</sup>

In contrast to the above prescriptions, generally being within the sub- grouping of direct State interests, are two exceptions in United States criminal law. The first pertains to crimes occurring in what is known as the “special maritime and territorial jurisdiction of the United States”. It is defined by 18 USC § 7 *inter alia* as:

“... (7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States”.<sup>73</sup>

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<sup>67</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, (1993) 32 ILM 800, does not explicitly refer to the passive personality category.

<sup>68</sup> Congressmen, Cabinet Members and Supreme Court Justices are provided for by 18 USC § 351 for the crimes of assassination, kidnapping and assault, the President by 18 USC § 1751. These prescriptions are properly being deemed to refer to the protective category.

<sup>69</sup> (1991) 940 F 2d 1200.

<sup>70</sup> It is 18 USC § 3 that prescribes the offence, it *inter alia* provides that “Whoever, knowing that an offence against the United States had been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent apprehension, trial or punishment is an accessory after the fact”. Kidnapping a DEA agent is prescribed by 18 USC § 1201(a)(5).

<sup>71</sup> *Supra* note 69 at pp 1204- 1205. Emphasis the Court’s.

<sup>72</sup> *Ibid.* at p 1205. The territorial category was held to apply as after the kidnapping and murder had occurred in Mexico Felix- Gutierrez had travelled to the United States.

<sup>73</sup> Subsection 7 was added to the United States Code in 1984 by Public Law 98- 473, and subsection 8 in 1994 by Public Law 103- 322.

The second relates to murder and is a conflation of reference to the active and passive personality categories. Section 1119 of Title 18 of the United States Code, entitled "Foreign murder of United States national", *inter alia* states:

"(b) Offense.- A person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished..."

This jurisdictional claim is limited:

"(c) Limitations on Prosecution.- (1) No prosecution may be instituted against any person under this section except upon the written approval of the Attorney General... No prosecution shall be approved if prosecution has been previously undertaken by a foreign country for the same conduct.

(2) No prosecution shall be approved under this section unless the Attorney General in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return".<sup>74</sup>

### Non- Common Law States

Reference to the passive personality category by non- common law States only generally follows the pattern of application such States make to the other categories. Whilst a number of States follow a general, unexceptional and non- crime specific approach others take an approach akin to that of common law States. German law contains a broad version of the former type of reference. It provides that German criminal law applies "generally to offences committed abroad against a German national where the conduct attracts a punitive sanction in the *locus delicti* or the *locus delicti* is not subject to any criminal jurisdiction".<sup>75</sup> German reference is thus not limited by, for example, the requirement that the alleged offender had the intention to harm a German national, a denunciation by the State of the *locus delicti*, nor a complaint by the victim.<sup>76</sup> It is a complete and discrete reference to the passive personality category. Ironically, therefore, it is classified under German law as coming under the "principle of protection",<sup>77</sup> a misapplication of that epithet, the interests directly protected by the application of criminal law on this basis not being distinguished as between private and public. Belgian criminal law also contains a general reference to the category but one that is limited in its scope to offences liable to be punished by a certain penalty in the *lex loci delicti*. It provides that offences committed outside Belgium by foreigners against Belgian citizens are punishable in Belgium if that conduct was punishable according to the law of the place where it occurred with imprisonment of more than five years.<sup>78</sup>

Somewhat similar to these provisions, with reference to the criminality of the act under the *lex loci delicti*, is the criminal law of Portugal. Article 5-1 (c) of the Portuguese Criminal Code provides that Portuguese criminal law applies if:

"(i) the offender is found in Portugal;

<sup>74</sup> Added to the United States Code by Public Law 103- 322, 13 Sept. 1994.

<sup>75</sup> StGB § 7(1). Questionnaires and Replies, supra note 1 at p 2.

<sup>76</sup> Questionnaires and Replies, supra note 1 at p 7. The former point opens the door to the criticism that "it will be thus the merest accident that West German law applies" to the alleged offender, and that he will be subjected to a "foreign criminal law to which he has no relation whatsoever", Meyer, J., The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction, (1990) 31 HILJ 108 at p 113- 114.

<sup>77</sup> Ibid. p 112.

<sup>78</sup> Belgian Criminal Law, Blanplain, E., (ed.), *International Encyclopaedia of Laws: Criminal Law*, Vol. 1, Kluwer Law Publishers, Deventer, 1993, p 56. Hereinafter *International Encyclopaedia of Laws*.

- (ii) the offence constitutes a crime in the place where it was committed, except where no punitive power is exercised there;
- (iii) the offence constitutes a crime which allows extradition which cannot be conceded".<sup>79</sup>

Interestingly Portuguese criminal law contains further reference to the category with Article 5-1 (d) of its Criminal Code providing that it applies to all offences committed outside Portugal against a Portuguese citizen committed by a Portuguese citizen who normally resides within Portugal and is found in Portugal after the offence has been committed.<sup>80</sup> This latter provision differs from the former in that there is no reference to the *lex loci delicti* in its application. A somewhat similar example of this conflation of reference to categories is found in the Austrian Criminal Code. Section 64(1) of which *inter alia* states:

"... the following offences committed abroad shall be punished according to the Austrian penal statutes, irrespective of the penal law of the State where the offence was committed:... (7) criminal offences committed by an Austrian citizen against an Austrian citizen, if both have their domicile or permanent residence in the country".<sup>81</sup>

Again there is here no reference to the *lex loci delicti*. A final example of this type of reference to be proffered is Article 6(6) Chilean Criminal code which provides that Chilean criminal law applies to offences that are committed by Chileans against other Chileans while both are outside of Chile.<sup>82</sup> This provision has been described as "a combination of the passive and the active principle of personality, because Chile has no jurisdiction if the actor is a foreigner".<sup>83</sup>

French reference to the category, cited above, provides:

"Any foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national".<sup>84</sup>

This provision must be read in conjunction with Article 692:

"No legal proceedings shall take place if the accused proves that he has been definitively judged abroad and, where convicted, that he has served his sentence or obtained mercy".<sup>85</sup>

In addition to this double jeopardy limitation, its application *in toto* has been described as being "subsidiary" to that of the State capable of referring to the territorial category in all cases except those involving national security.<sup>86</sup> Thus if the crime does not impinge upon a matter of French national security France will not take cognisance of the act unless the country of the *loci delicti* fails to do so.<sup>87</sup> It is important to note however that whilst the French law contains a double jeopardy provision reference to criminality under the *lex loci delicti* is not required. An

<sup>79</sup> Portuguese Criminal Law *International Encyclopaedia of Laws*, *ibid.* at p 39. See also Questionnaires and Replies, *supra* note 1 at p 5.

<sup>80</sup> Portuguese Criminal Law *International Encyclopaedia of Laws*, *ibid.* at p 39.

<sup>81</sup> Questionnaires and Replies, *supra* note 1 at p 2.

<sup>82</sup> Chilean Criminal Law *International Encyclopaedia of Laws*, *supra* note 78 at p 65.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Supra* note 32.

<sup>85</sup> Cited in Questionnaires and Replies, *supra* note 1 at p 7.

<sup>86</sup> Blakesley, C.L., Jurisdictional Issues and Conflicts of Jurisdiction, in Bassiouni, M.C., (ed.) *Legal Responses to Terrorism: US Procedural Aspects*, Dordrecht, Martinus Nijhoff, 1988, p 175. Hereinafter Blakesley Conflicts. Blakesley cites from a debate in the Assemblée Nationale where in response to an argument against the adoption of the provision because of France's historical opposition to it Jean Foyer, the Chairman of the Assembly Committee on Laws, replied that France had lost the Lotus Case, [1975] J.O. Débates Parlementaires, Assemblée Nationale 2763. See also Gaynes, J.B., Bringing the Terrorist to Justice: A Domestic Law Approach, (1978) 11 CILJ 71 at p 78.

<sup>87</sup> Blakesley Conflicts, *ibid.* at p 175- 176. Amongst the reasons given for the promulgation of this new law were the increasing terrorist activity and the need for provision for the punishment of crimes against French citizens when the *lex loci delicti* failed to do so, *ibid.* p 176.

individual may not have been adjudged abroad in regard to an act simply because it was not criminal where committed. In such a case he may still be liable under French law, albeit on a prosecutorial discretion, as to whether French national security has been compromised.

Italian criminal law contains a general reference to the category. Article 10(1) of the Italian Penal Code provides that:

“An alien who [with certain exceptions] commits in foreign territory, to the detriment of the State or citizen, an offence for which Italian law prescribes life imprisonment, or imprisonment for a minimum of not less than one year, shall be punished according to that law, provided he is within the territory of the State and there is a demand by the Minister of Justice, or a petition (*istanza*) or complaint (*querela*) by the victim”.<sup>88</sup>

A further relevant provision of Italian criminal law is found in Article 7(5) of the Penal Code, incorporating Italy's conventional obligations into its criminal law. It *inter alia* states that Italy shall have jurisdiction over “A citizen or alien who commits... any offence for which specific provisions of law or international convention prescribe the applicability of Italian penal law”.<sup>89</sup> Chinese criminal law provides in Article 6 of its Criminal Code that it may be applicable to “any foreigner who commits a crime outside the territory of the People's Republic of China, against the state of the People's Republic of China or against its citizens, if for that crime this Code prescribes a minimum punishment or fixed term imprisonment of not less than three years”.<sup>90</sup> This provision is not applicable if the crime in question is not punishable according to the law of the place it was committed.<sup>91</sup> Again as in Italy Chinese criminal law provides separately for the municipal application of international conventional obligations, facilitating the exercise of criminal jurisdiction over the crimes proscribed in those treaties to which it is a party.<sup>92</sup>

A distinct form of non- common law practice refers to the category on a crime- specific basis. The Netherlands takes such an approach with Dutch law making two exceptions to its general position of not referring to the category.<sup>93</sup> The first of these relates to the application of Dutch criminal law in time of war and under the articles implementing the Genocide Convention into Dutch law. Article 3(2) of the Dutch Criminal Code provides that Dutch criminal law applies “to anyone, who outside the territory of the United Kingdom in Europe commits an offence [of certain crimes regarding collaboration in war] or in articles 1 and 2 of the Act implementing the Convention on Genocide, if such offence has been committed against or with respect to a Dutch national or a Dutch legal person or if any Dutch interest has thus been or could be injured”.<sup>94</sup> An example of this type of jurisdiction being exercised is found in the case of *In re Gerbsch*<sup>95</sup>, cited above. The second exception in Dutch law is based upon the IPP Convention.<sup>96</sup> Article 4 of the Dutch Criminal Code *inter alia* provides that Dutch criminal law applies to anyone who commits outside the Netherlands certain offences against the person “whether such offence has been committed against an internationally protected person who is employed by the Netherlands Government or belongs to such a person's household, or against his or her property, if the offence is also incriminated by the law of the country where it has been committed”.<sup>97</sup>

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<sup>88</sup> Questionnaires and Replies, supra note 1 at p 3.

<sup>89</sup> *Ibid.* p 2.

<sup>90</sup> Chinese Criminal Law *International Encyclopaedia of Laws*, supra note 78 at p 56.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> The Dutch position is detailed above, supra p 119- 120.

<sup>94</sup> Questionnaires and Replies, supra note 1 at p 4.

<sup>95</sup> Supra note 28.

<sup>96</sup> Supra note 11.

<sup>97</sup> Questionnaires and Replies, supra note 1 at p 4.

Luxembourg takes an approach akin to that of the Netherlands, its criminal law referring to the category in two instances, in regard to certain crimes in time of war, and in regard to crimes committed on board aircraft where the victim is a national of Luxembourg.<sup>98</sup> The Thai Criminal Code also takes a crime-specific approach to the category. It contains a general provision which is then limited in its application to a listed number of offences. The relevant provision is Section 8. It *inter alia* provides:

“Whoever commits an offence outside the Kingdom shall be punished in the Kingdom, provided that:... (b) the offender be an alien, and that the Thai Government or a Thai person be the injured person, and there be a request for punishment by the injured person...”<sup>99</sup>

The provision continues with the proviso that the offence be any of a number of offences including those “Causing Public Dangers”, or relating to “Documents”, sexuality, life, the person, the abandonment of children, the sick or aged, liberty, theft, extortion, fraud, receiving stolen property and mischief.<sup>100</sup> Spain is a further non-common law State taking a crime-specific approach to the category. It refers to it only when the crime in question affects or aims to affect the Spanish monarch, his spouse or successor, and the public authority or functioning of the Spanish State.<sup>101</sup>

### The Passive Personality Category- Conjunctive Analysis

The passive personality is the most tenuously accepted of categories. Whilst it is not strictly accurate to differentiate hierarchically amongst them, in such a scheme the passive personality would undoubtedly exist at the bottom. The relative nature and position of the category leads to very strong support being lent to the conjunctive element of this thesis, whilst making the construction of a distinct and discrete grouping of international criminal law more difficult. The first component of the conjunctive plank of this thesis comprises the elicitation of authority evidencing a correlation of interests served by reference to the passive personality and other categories. This section of analysis, as others below, is greatly affected by the role of convention. Particularly, conventional influence leads to the conflation of interests served by the passive personality and other categories, especially the protective. This conventional conflation of interests is paradigmatically illustrated by the IPP Convention.<sup>102</sup> Here the protection of direct State interests is served by both the passive personality and protective categories. As has been seen the Convention serves to protect classes of individuals defined by the relationship existing between themselves and the State. It provides that States parties to the Convention are bound to legislate for the assumption of jurisdiction where such individuals are the victim of certain offences. The nature of the class of individuals protected<sup>103</sup> necessarily leads to the conclusion that the protection of direct State interests in the form of individuals embodying the State are served by both the protective and passive personality categories. For example in the United States case of *US v. Layton*<sup>104</sup> the victim was a US Congressman. His murder affected a fundamental interest of the United States *per se* in the attack upon a person

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<sup>98</sup> Ibid. p 3.

<sup>99</sup> Penal Code of Thailand, forwarded to author by Ministry of Foreign Affairs, Bangkok, by letter dated 25 March 1997.

<sup>100</sup> Ibid. Section 10 is a *non bis in idem* provision, it *inter alia* providing that a person committing an offence listed in Section 8 shall not be punished again if there is a final judgement acquitting the person by a foreign court or a judgement convicting the person by a foreign court and sentence has been served, *ibid*.

<sup>101</sup> Article 23.3 (b) and (g) of the Judicial Jurisdiction Act 1985, *Questionnaires and Replies*, *supra* note 1 at p 6.

<sup>102</sup> *Supra* note 11.

<sup>103</sup> See note 16 above.

<sup>104</sup> (1981) 509 F Supp 212, discussed in Chapter Five.



effectively embodying the State. This interest can be adjudged to have been served by reference to both the passive personality and protective categories.

Similar to the position of prescriptions based upon the IPP Convention which in effect lead to both the passive personality and protective categories serving similar interests are those related to the Hostages Convention.<sup>105</sup> It will be recalled that definition of “hostage-taking” in the Convention *inter alia* provides that the offence comprises the seizure or detention of a person to compel “a State, an international intergovernmental organisation, a natural or legal person, or a group of persons...”<sup>106</sup> Clearly this offence serves direct State interests and is also capable of being justified with reference to both the passive personality and protective categories. This convention however goes further than the IPP Convention in that it also serves wholly private interests. It does this in that the objects of the offence can be private persons as well as legal persons. The jurisdictional article provides that the assumption of jurisdiction is obligatory where the motive of that act is the affectation of that State *per se* and permissible where the victim of such offence is a national of the relevant State. It will be recalled that the offences in United States law based upon the Convention apply where “(A) the offender or the person seized or detained is a national of the United States” or “the governmental organization sought to be compelled is the Government of the United States”.<sup>107</sup> The former condition precedent is a reference to the category where a national as such is affected by the act. As has been seen above categories other than the passive personality serve similar interests in the form of protecting private individuals from acts akin to seizure and detention by prescriptions within the respective homicide/ violence sub- groupings. Examples being Canada’s prosecution of Irma Finta for *inter alia* kidnapping with reference to the universal category and the United States prosecution of Felix- Gutierrez *inter alia* for the same offence with reference to, in part, the territorial category.<sup>108</sup>

Non- conventionally mandated reference to the category illustrating a correlation of interests includes the specific and general. Specifically it includes those prescriptions that serve to protect the individual in cases of murder etcetera by those provisions linking the victim of the act with the perpetrator, an example being 18 USC § 1119.<sup>109</sup> Here it is clear that the interests served by such a prescription are at least to an extent similar to those served by prescriptions concerning the extraterritorial murder by a national without reference to the nationality of the victim, as the UK Offences Against the Person Act 1861. Thai State practice referred to above provides several further examples. The interests served by general non- conventionally mandated passive personality reference can also be seen to be served by reference to the other categories. Those general prescriptions that refer to the category in areas outwith the spatial area of competence of any State for example, such as the United States “special maritime and territorial jurisdiction”<sup>110</sup> regime, whilst centring upon the nationality of the victim apply to any offence. Indeed this applies to the practice of all the States that take a general approach to the category. For example in the practice of China, where there is a general reference limited only by the condition of criminality under the *lex loci delicti*.

The second component of the conjunctive plank of my thesis evinces authority making multiplicitous reference to the categories; here between the passive personality and the others. It is not surprising that the greatest extent of such reference occurs in relation to the passive

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<sup>105</sup> Supra note 19.

<sup>106</sup> Ibid. Article 1(1).

<sup>107</sup> Supra p 125.

<sup>108</sup> See Chapters Four and Two respectively.

<sup>109</sup> Supra p 130. See also below for similar provisions supporting the multiplicitous reference plank of this conjunctive thesis.

<sup>110</sup> Supra p 129- 130.

personality and protective categories. In *US v. Felix- Gutierrez*<sup>111</sup> it was stated, subsequent to holding that the protective, passive personality as well as the territorial categories facilitated extraterritorial jurisdiction<sup>112</sup> that:

“We need not decide whether any one of these facts or principles, standing alone, would be sufficient. Rather, we hold that cumulatively applied they require the conclusion that giving extraterritorial effect to the... statute in Felix’s case does not violate international law principles”.<sup>113</sup>

Clearly this statement provides strong and direct support for a conjunctive approach to jurisdiction. Two points must be noted. The first is the usage of “facts or principles” in the same sense. This conceptual obfuscation provides insight into the actual nature of jurisdiction, being a single right triggered by various, related but distinct connections. Each “fact” supports one of the categories (in the Court’s language “principles”). Secondly it is necessary to highlight the use of the accumulation of the “facts and principles”. The Court explicitly adopts the wholly reasonable and proper methodology of conflating each in reaching the conclusion that international law was not violated in the case. A further example is the American extradition case of *Ahmad v. Wigan*.<sup>114</sup> Its value is enhanced in that not only does it shed light on American law but also that of Israel, the State wishing to obtain custody through extradition of Ahmad. It was alleged that Ahmad had attacked a passenger bus in the occupied territory of the West Bank. He had come to be in the custody of the United States which, *inter alia*, examined the jurisdiction of Israel in deciding upon extradition. It was held that the Ahmad’s contention that Israel lacked jurisdiction was unfounded. A decision upon the application of Israeli or Jordanian criminal law within the territory of the West Bank was unnecessary as Israel was not relying upon a territorial basis of jurisdiction. Rather, the Court held, making multiplicitous reference to the categories, Israel was “relying on passive personality and protected state interest bases of jurisdiction”.<sup>115</sup>

The Israeli case of *Attorney- General of the Government of Israel v. Adolf Eichmann*<sup>116</sup> is an explicit and authoritative instance of multiplicitous reference to the passive personality and protective categories. As will be recalled from Chapter Four such reference is manifest in both the District Court and Supreme Court judgements. The District Court stated “If an effective link (not necessarily an identity) existed between the State of Israel and the Jewish people, then a crime intended to exterminate the Jewish people has an indubitable connection with the State of Israel”.<sup>117</sup> The Supreme Court agreed, holding that:

“In regard to the crimes against the Jews the District Court found additional support for its jurisdiction<sup>118</sup> in the connecting link between the State of Israel and the Jewish people- including between that the State of Israel and the Jewish victims of the holocaust- and the National Home in Palestine, as explained in its judgement. It therefore upheld its criminal and penal jurisdiction by virtue also of the “protective” principle and the principle of “passive personality”... If in our judgement we have

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<sup>111</sup> Supra note 70.

<sup>112</sup> Ibid. at p 1205.

<sup>113</sup> Ibid. at p 1206.

<sup>114</sup> (1989) 726 F Supp 389.

<sup>115</sup> Ibid. at p 398. The provision in question, s 7(a) of the Israeli Penal Law 5737- 1977, as amended, provides:

“The courts in Israel shall be competent to try under Israeli law a person who committed abroad an act which would have been an offense had it been committed in Israel and which injured or was intended to injure the life, person, health, freedom or property of an Israeli national or resident of Israel.”

This provision is unusual in that it applies to residents as well as nationals.

<sup>116</sup> (1961) 36 ILR 5.

<sup>117</sup> Ibid. at p 52.

<sup>118</sup> The main support flowed from the existence of universal jurisdiction over the offences.

concentrated on the international and universal character of the crimes of which the appellant has been convicted, one of the reasons for our doing so is that some of them were directed against non- Jewish groups".<sup>119</sup>

A final judicial example to be proffered is the Dutch war crimes case of *In Re Rohrig, Brunner and Heinze*.<sup>120</sup> Here it was held by the Special Court of Cassation that:

"Though, in general, the principle of jurisdiction over enemy war crimes operates within the doctrine of territoriality, the same order of ideas applies to the rule that crimes must be tried on the basis of passive nationality (referring to the nationality of the victims) or even on the basis of the wider principle of the protection of national interests".<sup>121</sup>

As significant as judicial multiplicitous reference is such legislative reference. This type of authority is in regard to the passive personality category particularly pronounced. Germane are legislative provisions referring to the passive personality category together with both the protective and the active personality categories. The former was evident in the practice of for example Spain, with reference only being made when the crime in question affects or aims to affect the Spanish monarch, his spouse or successor, and the public authority or functioning of the Spanish State.<sup>122</sup> The latter is found in the practice of *inter alia* Austria and Chile. Austrian reference, it will be recalled refers to "criminal offences committed by an Austrian citizen against an Austrian citizen"<sup>123</sup> and Article 6(6) Chilean Criminal code provides that Chilean criminal law applies to offences that are committed by Chileans against other Chileans while both are outside of Chile.<sup>124</sup> A further final interesting type of legislative multiplicitous reference to be noted is found in § 2332b of the United States Federal Code<sup>125</sup>, which is a multiplicitous reference to the passive personality category and the territorial.

A final type of authority to be proffered in support of the conjunctive component of this thesis is academic commentary and analysis. This unusually forms part of the conjunctive analysis as a result of the sheer weight of explicit and direct support being provided by it. For example Bassiouni, after referring to the *Lotus Case*<sup>126</sup> states:

"... the passive personality theory cannot be solely relied upon as the exclusive basis of jurisdiction to prescribe or enforce the penal laws of one state over a person whose conduct was performed outside the territory of that state. However, when there is an additional jurisdictional basis the passive personality theory serves to reinforce the jurisdictional claim of the given state. Furthermore, in cases of conflict between two states, the one claiming passive personality as an additional basis is to receive priority in extradition".<sup>127</sup>

Whilst today the category can be relied upon in isolation, the underlying assumptions about the nature of international jurisdiction are parallel with the conjunctive plank of this thesis.<sup>128</sup> In particular that the "theory" can serve to "reinforce" a claim to jurisdiction. A somewhat similar approach provides that "Passive personality could prove to be a useful tool in the prosecution

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<sup>119</sup> Supra note 116 at p 304.

<sup>120</sup> (1950) 17 ILR 393.

<sup>121</sup> Ibid. Interestingly the final appellate court did not refer to the universal category, as had the Special Criminal Court, at p 394- 395.

<sup>122</sup> Supra note 102.

<sup>123</sup> Supra p 131.

<sup>124</sup> Supra p 131.

<sup>125</sup> Supra p 128- 129.

<sup>126</sup> Supra note 3.

<sup>127</sup> Bassiouni, *International Extradition*, supra note 40.

<sup>128</sup> Bassiouni's statement is perhaps explained by its date, being written in 1974, prior to many of the conventional and municipal references to the category being made.

of terrorism and a necessary complement to the protective principle”.<sup>129</sup> Another approach avers that the category is a sub- species of another more orthodox category, an example being:

“This principle is derived from the idea of ‘protection’ by the State of its nationals wherever they may be. In a sense it is a corollary of the principle of security and endows jurisdiction upon the State whose national is the victim of the offence committed abroad”.<sup>130</sup>

Again, it has been explicitly stated that the “principle of passive personality may fall within the protective principle. The notion of the passive personality principle is based upon the protection of citizens in foreign territories”.<sup>131</sup> It was stated on behalf of Turkey in the Lotus Case that some States “apply ‘protective’ jurisdiction when certain rights of the State are infringed or threatened, others extend it to the protection of the rights, or certain rights, of their citizens; the principle is the same, the difference is only in its application”.<sup>132</sup> A final original academic approach to be noted equates the passive personality category with the universal, with Akehurst stating “The passive personality principle and the universal principle are often regarded as separate, but it seems more convenient to consider them together. States which object to one will also object to the other, while States which adopt the universality principle are unlikely to apply it in practice except when one of their nationals is the victim of the crime...”.<sup>133</sup>

### The Passive Personality Category- Disjunctive Analysis

The grouping of international criminal law based upon the passive personality category is perhaps the most indistinct of the five groupings corresponding to the jurisdictional categories. The variety of prescriptions justified with reference to the category as well as the general uncertainty surrounding it lead to this conclusion. Such manifold reference, with wide variation within both the general and specific approaches to the category, make procession beyond the most basic of analyses difficult. Axiomatically, this grouping of substantive criminal law centres upon the relationship between the victim of a crime and the State desirous of assuming cognisance over the perpetrator of that act. At this level a distinct and determinate grouping of criminal law exists; all those prescriptions applied in relation to an extraterritorial act on the basis of the relationship of the victim of the crime to the State assuming jurisdiction being included. Further than this most self- evident of conclusions it is difficult to be precise and definite. What is possible, however, is the categorisation of all the prescriptions exercised with reference to the category into two broad types. The first centres upon prescriptions taking a wide non- crime specific approach, not generally distinguishing between the protection of public or private interests. The second is comprised of prescriptions which serve to protect specifically enumerated interests, predominately public. It must be accepted that both of these types of international criminal prescription exist. To deny so is to stand in the face of considerable and definite State practice. It is interesting to note that the correlation between these types of prescription and the orthodox dichotomy of jurisdictional approaches is applicable only to a limited extent. Only in regard to the protective category does State practice fail to stand by the traditional dichotomy to a greater degree. Here, as was seen, both common law States and non- common law States refer to the category specifically and generally, and in regard to crimes affecting public and private interests.

Within the class of prescriptions which take a general non- crime specific approach there is, as was seen, a large degree of variation in State practice. Firstly there are those States who take a

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<sup>129</sup> Gaynes, *supra* note 86 at p 79.

<sup>130</sup> Shachor-Landau, C., Extra-territorial Penal Jurisdiction and Extradition, (1980) 29 ICLQ 274 at p 283.

<sup>131</sup> Malekian, *supra* note 39 at p 14.

<sup>132</sup> Cited in Brierly, *supra* note 8 at p 161.

<sup>133</sup> Akehurst, M., Jurisdiction in International Law, (1972- 73) 43 BYIL 145 at p 163.

general approach limited by reference to either the *lex loci delicti* or the spatial area in which the crime was committed. Germany and Portugal are such States. No distinction is drawn between crimes affecting public or private interests. The requirement of criminality under the *lex loci delicti* militates against one of the pre- eminent criticisms of passive personality prescriptions in that it prevents individuals unknowingly violating a system of criminal law. Individuals will be aware or can fairly be deemed to be aware that their actions attract criminal liability. A variation on this limitation is taken by Belgium, with the category only referred to where the crime is prescribed by the *lex loci delicti* as well as attracting a certain punishment. Chinese criminal law also contains a general non- crime specific provision limited by reference to the punishment attaching to the crime. It will be recalled that Article 6 of the Chinese Criminal Code provides that it may be applicable to “any foreigner who commits a crime outside the territory of the People’s Republic of China, against... its citizens, if for that crime this Code prescribes a minimum punishment or fixed term imprisonment of not less than three years”.<sup>134</sup> The United States also has within its criminal law a general non- crime specific provision providing for the application of its criminal law to crimes affecting both public and private interests, it being limited with reference to space. Namely the “special maritime and territorial jurisdiction of the United States”, it including “Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States”.<sup>135</sup>

Another type of general prescription within this class is distinguished through its being limited through conjunction with a distinguishing feature of another category of jurisdiction. As was seen in the conjunctive component of this analysis one form of this is found in the law of Austria and Chile. Here the assumption of jurisdiction is conditional upon the victim of the act being of that State’s nationality as well as the perpetrator of the crime against him or her. In France the limitation does not relate to the nationality of the perpetrator but instead the interest affected by the crime, albeit by way of its discretionary application. Whilst the relevant provision *prima facie* does not limit the provision to, for instance, terrorist- type crimes, it was seen that it was intended that the provision be employed in regard to such crimes.<sup>136</sup> A further interesting type of prescription within this class is the American prescription conjoining reference to the passive personality, protective and territorial categories.<sup>137</sup> What all these provisions and prescriptions have in common is that they are general and non- crime specific serving and protecting both public and private interests. As such they are a distinct form of international criminal prescription.

The second class of prescriptions defined with reference to the passive personality category is crime specific. As the above prescriptions did not solely emanate from States in the non- common law tradition so too is this sub- grouping not limited to States in the common law tradition. The criminal law of Spain, Luxembourg and the Netherlands for example contain provisions referring to the nationality of the victim on a specific crime- by- crime basis. In all three of these States the prescriptions generally relate to the protection of public interests, whether conventionally mandated or not. The latter two States for example prescribing with reference to the category war crimes, genocide and aircraft related crimes. It is not surprising that the criminal law of Australia, the United Kingdom and Canada contain only limited crime- specific passive personality prescriptions. They are exclusively conventionally mandated. As such the contribution these States make to this class of prescription are limited to those protecting manifestly public interests, either internationally protected persons or their independence or sovereignty through the extortion of it by its nationals being taken hostage. This crime- specific class of prescription is thus largely centred upon the protection of public

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<sup>134</sup> *Chinese Criminal Law International Encyclopaedia of Laws*, supra note 78 at p 56.

<sup>135</sup> Supra p 129- 130.

<sup>136</sup> Supra p 131- 132.

<sup>137</sup> Supra p 128- 129.

interests. However, this limitation stands only to an extent. Thai criminal law, for example, specifically provides that it applies to crimes not able to be included in the sub- grouping direct State interests, such as those against sexuality and theft where a Thai national is a victim of the offence.<sup>138</sup> The recent extension of United States jurisdiction to crimes of murder by and against United States nationals is a further relevant example.<sup>139</sup> It being a prescription relating to the objectively private crime of murder where a United States national is the victim.

It is undoubted that within the corpus of substantive international criminal law a grouping exists which is centred upon prescriptions operating extraterritorially with reference to the status of the victim of the alleged crime. It is noteworthy that this status is not limited to that of nationality.<sup>140</sup> As noted the nature of the category makes it difficult to go further in the categorisation of sub- groupings of international criminal law. It being possible only to identify two very broad classes of such prescription. The most significant characteristic of both is that the majority of relevant prescriptions serve direct State interests. They do so usually but not exclusively subsequent to conventional treatment. There also exist however a further type of prescription protecting private interests, generally within the homicide/ violence sub- grouping. Like the groupings of criminal law corresponding to the territorial and active personality categories this grouping is open- ended. States may add to it by merely assuming jurisdiction with reference to the passive personality category in regard to any crime, with no heed paid to the particular interest affected. In this regard it is distinct from the groupings of prescriptions justified with reference to the universal and protective categories. This is not to imply that the interests served by the passive personality grouping play no role at all. The role of convention and the resultant municipal prescriptions, those lying at the heart of the grouping, all protect public interests of a certain nature, namely those of international concern. However that prescriptions protecting private interests also exist within the grouping, and that they do so in law in the criminal law of two States historically opposed to the category is significant. What can and must be concluded therefore is whilst the sub- grouping direct State interests is predominant, homicide/ violence and indeed all the other sub- groupings identified in relation to the other four more orthodox categories, to an extent at least, exist in relation to the passive personality category.

#### Passive Personality- Conclusion

Passive personality as a category of jurisdiction and as a grouping of substantive international criminal law is rightly regarded as the fifth of five orthodox categories and groupings. Yet in both manifestations it exists in customary international law. Conjunctively analysed the category gives strong and unequivocal support for the position that jurisdiction is a single right in international law operative in light of a requisite connective between an accused and the State desirous of assuming jurisdiction. Disjunctively, the nature and position of the category leads to the construction of a relatively disharmonious and ill- defined grouping of substantive criminal law.

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<sup>138</sup> Supra p 133.

<sup>139</sup> Supra p 130. In regard to the crime- specific prescriptions at least the private interests protected are "serious", in that they largely relate to crimes against the person. It can reasonably be assumed that States having general provisions within their law would take a similar approach.

<sup>140</sup> See note 1 above. Exceptions include residents, corporations and other legal persons.

## International Jurisdiction and Crime- Conclusion

The need for clarity in law is paramount. In the areas of criminal law and international law this need is particularly pronounced. This follows in regard to the former from its coercive nature and the latter its being based upon diffuse and at times opaque sources. In international criminal law therefore the need for clarity and understanding is particularly manifest, and indeed is exacerbated by the novelty of the subject area. This thesis has served this need. It has, through contextual and substantive exposition of State practice, led to complete and proper understanding. A product of this thesis has been the definition of the individual components of the international criminal complex. More importantly, and necessarily, they have been explained in context. It was demonstrated that it is only through a substantive and contextual examination that jurisdiction and international criminal law can be fully and properly understood.

The novelty of the subject area together conjoined the contextual approach taken has mandated an exposition starting from first principles. This entailed authoritatively defining the basic building blocks of the substantive international criminal complex; jurisdiction as right, the categories of jurisdiction and substantive international criminal law. Even prior to this however it was necessary to establish, with reference to State practice, the basic nature of jurisdiction in international law. Namely, that international law generally prohibits the assumption of extraterritorial jurisdiction, only permitting it in particular defined circumstances. This is absolutely critical. It is the premise upon which the whole framework of international jurisdiction and criminal law is founded. Throughout this thesis it has been demonstrated that State practice refers to international law “permitting”, “justifying” or “allowing” the assumption of jurisdiction in the circumstances. Each individual instance supports and evidences the general nature of international jurisdiction.

The substantive and contextual analysis has established that “jurisdiction” is comprised of a right of jurisdiction and five categories of jurisdiction. The former is a single conception. It is a facilitative right that exists in the face of a requisite connection between the State and the object of its assumption of jurisdiction. This requisite connection can take one of five basic forms corresponding to the five categories of jurisdiction. It has been established through the conjunctive analysis that this is undoubtedly the case. It has done so firstly by establishing that in fact jurisdiction is assumed by States with reference to different categories where similar interests are being served and secondly by establishing that often States refer to more than one category in the same set of facts. Both of these components of the conjunctive analysis marginalise the individuality and facilitatory nature of the categories and substantiate the unitary conception of jurisdiction as a single facilitatory right in international law. It in turn results in the categories having an evidential role jurisdictionally. Reflecting past accepted assumptions of jurisdiction they provide evidential support for the existence of the right to exercise jurisdiction in like circumstances. Although reference to one category is sufficient to legitimate the assumption of jurisdiction reference to more than one will further strengthen that State’s case. In this respect my analysis provides the basis from which the law of jurisdiction can further develop. In the future this analysis can be used to not only establish the legality of one State’s assumption of jurisdiction but be used in the face of competing claims.<sup>1</sup> Indeed in this and other respects the law of jurisdiction is embryonic, my thesis laying the groundwork for understanding and future development.

In addition to the contextual and substantive approach shedding light upon jurisdiction substantive international criminal law was also defined and analysed. A cornerstone of the

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<sup>1</sup> Such a scheme would seem to be needed in the current jurisdictional dispute between the United States and the United Kingdom and Libya in regard to the Lockerbie bombing.

contextual approach was that a logical and reasonable approach to definition and categorisation is with reference to the categories of jurisdiction. In fact this methodology alone is capable of identifying all the prescriptions applied internationally. The corpus of substantive international criminal law was thus characterised with reference to the categories; there thus existing five broad groupings of substantive international criminal law. It was also possible, to greater or lesser degrees, to further dissect and categorise international prescriptions on the basis of the interests putatively served by them, sub- groupings of homicide/ violence, theft/ deception, direct state interests, the traffic in proscribed substances and morality/ public policy being identified. Of course the fundamentally important distinction between those prescriptions having their prescriptive provenance in municipal law and international law was noted, the *corpus* including both types. Again, as with the jurisdictional analysis, in addition to leading to understanding *per se* it provides the stage from which further development can be made.

The proposed permanent international criminal court is a welcome development.<sup>2</sup> Two points concerning it can be made. Firstly it in no way impeaches my thesis. We have been concerned with State jurisdiction. The jurisdiction bestowed upon the court contractually, by a multilateral convention, is wholly distinct. It is true that optimally the court would have been given a wider jurisdiction, something approaching that which States individually themselves already enjoy, but this limitation does not affect this thesis. Secondly, whilst it is far too early to conclude what effect the court will have on international criminal law and jurisdiction it is hoped that it will prove to be a very useful enforcement institution. It could do this, and fill a *lacuna* in the international criminal complex, by becoming seized of cases where there exist disputes over State jurisdiction. Here the court could step in and try the case to the satisfaction of the State parties concerned, the dispute between Libya, the United States and the United Kingdom seemingly well- suited for such treatment. In this respect the court would be a welcome addition indeed to the system of law and jurisdiction proffered in this thesis.

Jurisdiction in international criminal law is a fundamentally important area yet one greatly under- developed, as is the body of substantive international criminal law. This is partly due to understanding being contingent not only upon comprehension of each component *per se* but also as integrally related components of the substantive international criminal complex. Substantive international criminal law in turn is only one part of the general international criminal complex along side evidential and procedural international criminal law. This thesis argues that a contextual and substantive approach is the only one leading to full and proper understanding. It advances comprehension in areas heretofore characterised by uncertainties. Only when these uncertainties are clarified and the various components developed, understood and respected in their context can the complex fully and properly serve its fundamentally important purpose; the protection of States and the societies upon which they are based whilst paying due consideration to individuals, the subjects of the operation of the regime.

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<sup>2</sup> The statute of the International Criminal Court , adopted by the Rome conference 17 July 1998, is found at <http://www.un.org/icc/romestat.htm>.



## Bibliography

### Articles:

1. Akehurst, M., Custom as a Source of International Law, (1974- 75) 47 BYIL 1.
2. Akehurst, M., Jurisdiction in International Law, (1972-73) 43 BYIL 145.
3. Arnell, P., War Crimes- A Comparative Opportunity, (1996) 13 International Relations 29.
4. Bassiouni, M.C., "Crimes Against Humanity": The Need for a Specialized Convention, (1994) 31 ColJTL 457.
5. Baxter, R.R., Law in "Her Infinite Variety", (1980) 29 ICLQ 549.
6. Baxter, R.R., Multilateral Treaties as Evidence of Customary International Law, (1965- 66) 41 BYIL 275.
7. Becket, W.E., Criminal Jurisdiction Over Foreigners, (1927) 8 BYIL 108.
8. Becket, W.E., The Exercise of Criminal Jurisdiction Over Foreigners , (1925) 6 BYIL 44.
9. Berge, W., Criminal Jurisdiction and the Territorial Principle , (1931-32) 30 MichLR 238.
10. Bergsmo, M., International Criminal Tribunal for the Former Yugoslavia: Recent Developments, (1994) 15 HRLJ 405.
11. Beveridge, F., The Lockerbie Affair , (1992) 41 ICLQ 907.
12. Blakesley, C.L., A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crime, [1984] ULR 685.
13. Blakesley, C.L., Jurisdiction as Legal Protection Against Terrorism, (1987) 19 ConnLR 895.
14. Blakesley, C.L. and Lagodny, O., Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law, (1991) 24 VJTL 1.
15. Blishchenko, I. and Shdanov, N., The Problem of International Criminal Jurisdiction, (1976) 14 CYIL 283.
16. Bolt, A., Practical Problems in Mutual Assistance in Criminal Matters, (1993) 19 CLB 1911.
17. Bourloyannis-Vrailas, M-C., The Convention on the Safety of United Nations and Associated Personnel, (1995) 44 ICLQ 560.
18. Bowett, D.W., Jurisdiction: Changing Patterns of Authority Over Activities and Resources, (1982) 53 BYIL 1.
19. Brand, G., The War Crimes Trial and the Laws of War, (1949) 26 BYIL 414.
20. Bridge, J.W., The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law, (1964) 13 ICLQ 1255.
21. Brierly, J.L., The Lotus Case, (1928) 44 LQR 154.
22. Burns, P., An International Criminal Tribunal: The Difficult Union of Principle and Politics, (1994) 5 CLF 341.
23. Carnegie, A.R., Jurisdiction Over Violations of the Laws and Customs of War, (1963) 39 BYIL 402.
24. Cassese, A., On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, (1998) 9 EJIL 2.
25. Cassese, A., The International Community's "Legal" Response to Terrorism , (1989) 38 ICLQ 589.
26. Chinkin, C., Rape and Sexual Abuse of Women in International Law, (1994) 5 EJIL 326.
27. Choo, A.L.-T., Ex Parte Bennett: The Demise of the Male Captus, Bene Dententus Doctrine in England?, (1994) 5 CLF 165.
28. Clark, R.S., Offences of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg, (1988) 57 NJIL 49.
29. Clark, R.S., United Nations Model Treaties on Cooperation in the Criminal Process, (1992) 18 CLB 1544.

30. Coggins, G.C. and Head, J.W., Beyond Defenders: The Future Problems of Extraterritoriality and Superterritoriality for the Endangered Species Act, (1993) 43 WUJUC 59.
31. Coggins, P. and Roberts, W., Extraterritorial Jurisdiction: An Untamed Adolescent, (1991) 17 CLB 1391.
32. Cohen, M.D., New York v. Kirman/Israel v. Kirman: A Prosecution in Tel Aviv Under Israeli Law for a Narcotics Offence Committed in New York, (1993) 4 CLF 597.
33. Crawford, J., The ILC Adopts a Statute for an International Criminal Court, (1995) 89 AJIL 404.
34. Crawford, J., The ILC's Draft Statute for an International Criminal Tribunal, (1994) 88 AJIL 140.
35. Deschênes, J., Toward International Criminal Justice, (1994) 5 CLF 249.
36. Dickinson, E.D., Is the Crime of Piracy Obsolete?, (1924-25) 38 HLR 334.
37. Dinstein, Y., International Criminal Law, (1975) 5 IYBHR 55.
38. Dinstein, Y., International Criminal Law, (1985) 20 IsLR 206.
39. Dolenc, P., A Slovenian Perspective on the Statute and Rules of the International Tribunal for the Former Yugoslavia, (1994) 5 CLF 451.
40. Dugard, J., Obstacles in the Way of an International Criminal Court, [1997] CLJ 329.
41. Evans, A.E., Acquisition of Custody over the International Fugitive Offender - Alternatives to Extradition: A Survey of United States Practice, (1964) 40 BYIL 77.
42. Evans, M. and Morgan, R., The European Convention for the Protection of Torture: Operational Practice, (1992) 41 ICLQ 590.
43. Fawcett, J.E.S., The Eichmann Case, (1962) 38 BYIL 181.
44. Feller, S.Z., Concurrent Criminal Jurisdiction in the International Sphere, (1981) 16 IsLR 40.
45. Fenrick, W.J., Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia, (1995) 6 DJCIL 103.
46. Fenwick, C., Piracy in the Caribbean, (1961) 55 AJIL 426.
47. Finch, G.A., The Genocide Convention, (1949) 43 AJIL 732.
48. Fitzgerald, P., The Territorial Principle in Penal Law: An Attempted Justification, (1970) 1 GJICL 29.
49. Freestone, D., The 1988 International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (1988) 3 IJECL 305.
50. Garcia Mora, M.R., Criminal Jurisdiction over Foreigners for Treason and Offences Against the Safety of the State Committed on Foreign Territory, (1957-58) 19 UPLR 567.
51. Gaynes, J.B., Bringing the Terrorist to Justice: A Domestic Law Approach, (1978) 11 CILJ 71.
52. Gilbert, G., Crimes Sans Frontiers: Jurisdictional Problems in English Law, (1992) 63 BYIL 415.
53. Gilbert, G., The Criminal Responsibility of States, (1990) 39 ICLQ 345.
54. Graefrath, B., Universal Criminal Jurisdiction and an International Criminal Court, (1990-91) 1 EJIL 67.
55. Green, L.C., Canadian Law, War Crimes and Crimes Against Humanity, (1988) 59 BYIL 217.
56. Green, L.C., International Crimes and the Legal Process, (1980) 29 ICLQ 567.
57. Green, L.C., The Eichmann Case, (1960) 23 MLR 507.
58. Green, L.C., The Santa Maria: Rebels or Pirates?, (1961) 37 BYIL 496.
59. Halbertstam, M., In Defence of the Supreme Court Decision in Alvarez- Machain, (1992) 86 AJIL 736.
60. Halberstam, M., Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, (1988) 82 AJIL 269.
61. Hirst, M., Jurisdiction over Cross Frontier Offences, (1981) 97 LQR 80.

- 62.Hirst, M., The Criminal Law Abroad , [1982] CLR 496.
- 63.Holroyd, J., and Chuah, J., Trying Frauds with a Foreign Element, (1994) 58 JCL 388.
- 64.Hudson, M.O., The Sixth Year of the Permanent Court of International Justice, (1928) 22 AJIL 1.
- 65.Jennings, R.Y., The Limits of State Jurisdiction, (1962) NTIR 209.
- 66.Jennings, R.Y., Extraterritorial Jurisdiction and U.S. Antitrust Laws, (1957) 33 BYIL 146.
- 67.Jennings, R.Y., General Course on Principles of Public International Law, (1967-II) 121 RdC 322.
- 68.Johnson, D.N.H., Piracy in Modern International Law, (1957) TGS 63.
- 69.Kobrick, E.S., The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction, (1987) 87 Col LR 1515.
- 70.Komarow, G., Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems, (1980) 29 ICLQ 21.
- 71.Kunz, J.L., The United Nations Convention on Genocide, (1949) 43 AJIL 738.
- 72.Lauterpacht, H., Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens, [1945-47] CLJ 330.
- 73.Lemkin, R., Genocide as a Crime Under International Law, (1947) 41 AJIL 145.
- 74.Levine, M.W., Cuban Hijackers and the United States: The Need for a Modified *Aut Dedere Aut Judicare* Rule, (1994) 32 Col JTL 133.
- 75.Lew, J., The Extra- Territorial Jurisdiction of the English Courts, [1978] ICLQ 168.
- 76.Lowe, A.V., The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution , (1985) 34 ICLQ 724.
- 77.Maier, H.G., Extraterritorial Jurisdiction at a Cross-roads: An Intersection Between Public and Private International Law , (1982) 76 AJIL 280.
- 78.Mann, F.A., The Doctrine of Jurisdiction in International Law , (1964-I) RdC 1.
- 79.Mann, F.A., The Doctrine of Jurisdiction in International Law Revisited After Twenty Years , (1984-III) RdC 9.
- 80.Mann, F.A., The Proper Law in the Conflict of Laws, (1987) 36 ICLQ 437.
- 81.McConnel, M., "Forward This Cargo to Taiwan": Canadian Extradition Law and Practice Relating to Crime on the High Seas, (1997) 8 CLF 335.
- 82.McCormack, T.L.H. and Simpson, G.J., The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions, (1994) 5 CLF 1.
- 83.McGinley, G., The Achille Lauro Affair- Implications for International Law, (1985) 52 TennLR 691.
- 84.Meron, T., Extraterritoriality of Human Rights Treaties, (1995) 89 AJIL 78.
- 85.Meron, T., Is International Law Moving towards Criminalization?, (1998) 9 EJIL 18.
- 86.Meron, T., Rape as a Crime Under International Humanitarian Law, (1993) 87 AJIL 424.
- 87.Meron, T., The Geneva Conventions as Customary International Law, (1987) 81 AJIL 348.
- 88.Meron, T., War Crimes in Yugoslavia and the Development of International Law, (1994) 88 AJIL 78.
- 89.Meyer, E.T., Drug Smuggling and the Protective Principle: A Journey into Uncharted Waters, (1979) 39 LaLR 1189.
- 90.Meyer, J., The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction, (1990) 31 HILJ. 108.
- 91.Morgenstern, F., Jurisdiction in Seizures Effected in Violation of International Law, (1952) 29 BYIL 265.
- 92.Ntanda Nsereko, D.D., When Crime Crosses Borders, A Southern African Perspective, (1997) 41 JAL 192.
- 93.O'Brien, J.C., The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, (1993) 87 AJIL 639.
- 94.O'Higgins, P., Unlawful Seizure and Irregular Extradition, (1960) 36 BYIL 279.

95. Pella, V.V., Towards an International Criminal Court, (1950) 44 AJIL 37.
96. Perkins, R.M., The Territorial Principle in Criminal Law, (1971) 22 HLJ 1155.
97. Randall, K.C., Universal Jurisdiction Under International Law, (1988) 66 TLR 785.
98. Robertson, A., and Demetriou, M., "But That Was In Another Country...": The Extraterritorial Application of US Antitrust Laws in the US Supreme Court, (1994) 43 ICLQ 417.
99. Rowe, P., War Crimes and the Former Yugoslavia: the Legal Difficulties, (1993) 32 MLLWR 317.
100. Sarkar, L., The Proper Law of Crime in International Law, (1962) 11 ICLQ 446.
101. Schachor-Landau, C., Extraterritorial Penal Jurisdiction and Extradition, (1980) 29 ICLQ 274.
102. Schick, F.B., International Criminal Law- Facts and Illusions, (1948) 11 MLR 290.
103. Schwarzenberger, G., The Eichmann Judgement: An Essay in Censorial Jurisprudence, (1962) 15 CLP 248.
104. Schwarzenberger, G., The Problem of an International Criminal Law, (1950) 3 CLP 263.
105. Scobbie, I., The Lockerbie Cases: Interim Measures, [1992] SLT 159.
106. Semmelman, J., Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: the Ker-Frisbie Doctrine Re-examined, (1992) 30 Col JTL 513.
107. Sherman, T., The Internationalisation of Crime and the World Community' Response, (1993) 19 CLB 1814.
108. Shraga, D. and Zacklin, R., The International Criminal Tribunal for the Former Yugoslavia, (1994) EIIL 360.
109. Shubber, S., Is Hijacking of Aircraft Piracy in International Law?, (1968-69) 43 BYIL 193.
110. Shubber, S., The Destruction of Aircraft in Flight Over Scotland and Niger: The Questions of Jurisdiction and Extradition under International Law, (1995) 66 BYIL 239.
111. Silving, H., In Re Eichmann, (1961) 55 AJIL 307.
112. Smith, D.C., Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in US v. Alvarez-Machain, (1995) 6 EJIL 1.
113. Sullivan, G.R., and Warbrick, C., Territoriality, Theft and Atakpu [R v. Atakpu, [1993] 4 All ER 215], [1994] Crim LR 650.
114. Vierucci, L., The First Steps of the International Criminal Tribunal for the Former Yugoslavia, (1995) 6 EJIL 134.
115. Warbrick, C., International Criminal Law, (1995) 44 ICLQ 466.
116. Warbrick, C. and Sullivan, G.R., Criminal Jurisdiction, (1994) 43 ICLQ 460.
117. Warbrick, C., The United Nations System: A Place for Criminal Courts?, (1995) 5 TLCP 237.
118. Watson, G.R., Offenders Abroad: The Case for Nationality Based Criminal Jurisdiction, (1992) YJIL 41.
119. Watson, G.R., The Passive Personality Principle, (1993) 28 TILJ 1.
120. Weiss, F., Time Limits for the Prosecution of Crimes Against International Law, (1982) 53 BYIL 163.
121. Wexler, L.S., The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, (1994) 32 Col JTL 289.
122. White, G.E., The Marshall Court and International Law: The Piracy Cases, (1989) 83 AJIL 727.
123. Williams, G., Venue and Ambit of the Criminal Law, (1965) 81 LQR 276.
124. Williams, G., The Correlation of Allegiance and Protection, (1947) 9 CLJ 330.
125. Williams, S.A., Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance, (1992) 3 CLF 191.

126. Wise, E.M., Terrorism and the Problems of an International Criminal Law, (1987) 19 ConnLR 799.
127. Wright, Q., War Criminals, (1945) 39 AJIL 257.
128. Yingling, R.T. and Ginnane, R.W., The Geneva Conventions of 1949, (1952) AJIL 393.
129. Zwanenberg, V., Interference with Ships on the High Seas, (1961) 10 ICLQ 785.

Books:

1. Akehurst, M., *A Modern Introduction to International Law*, Sixth Edition, Routledge, London, 1987.
2. Andreopoulos, G.J., (ed.), *Genocide: Conceptual and Historical Dimensions*, University of Pennsylvania Press, Philadelphia, 1994.
3. Bassiouni, M.C., (ed.) *International Crimes: Digest/ Index of International Instruments 1815-1985*, Oceana, New York, 1986.
4. Bassiouni, M.C., *International Criminal Law: A Draft International Criminal Code*, Sijthoff and Noordhoff, Germantown, Maryland, 1980.
5. Bassiouni, M.C., *International Extradition and World Public Order*, Sijthoff, Leyden, 1974.
6. Bassiouni, M.C., (ed.), *Legal Responses to Terrorism: U.S. Procedural Aspects*, Martinus Nijhoff, Dordrecht, 1988.
7. Bassiouni, M.C. and Nanda, V.P., *A Treatise on International Criminal Law*, Charles C Thomas, Springfield, 1973.
8. Blanplain, R., (ed.), *International Encyclopaedia of Laws: Criminal Law*, Kluwer Law Publishers, Deventer, 1993.
9. Bull, H., *The Anarchical Society: A Study of Order in World Politics*, Macmillan Press, London, 1977.
10. Brownlie, I., *Principles of Public International Law*, Fourth Edition, Clarendon Press, Oxford, 1991.
11. Cameron, I., *The Protective Principle of International Criminal Jurisdiction*, Dartmouth Publishing Co., Aldershot, 1993.
12. Cheng, B. and Brown, B.D., (eds.) *Contemporary Problems of International Law: Essays in honour of Georg Schwarzenberger on his Eightieth Birthday*, Stevens and Sons, London, 1988.
13. Collins, L. (ed.), *Dicey and Morris' The Conflict of Laws*, Sweet and Maxwell, London, 1993.
14. Dubner, B.H., *The Law of International Sea Piracy*, Martinus Nijhoff, London, 1980.
15. Gilbert, G., *Aspects of Extradition Law*, Martinus Nijhoff, Dordrecht, 1991.
16. Harris, D.J., *Cases and Materials on International Law* (Third Edition), Sweet and Maxwell, London, 1983.
17. Higgins, P.A., (ed.), *Halls's A Treatise on International Law*, (Eighth Edition), Clarendon Press, Oxford, 1924.
18. Higgins, R., *Problems and Progress; International Law and How We Use It*, Clarendon Press, Oxford, 1994.
19. Jennings, R.Y. and Watts, A.D., *Oppenheim's International Law*, Ninth Edition, Longham, Harlow, 1992.
20. LeBlanc, L.J., *The United States and the Genocide Convention*, Duke University Press, London, 1991.
21. Machiavelli, N., *The Prince*, 1513, (translated by Thomson, N.H.), Dover Publications, New York, 1992.
22. Malekian, F., *International Criminal Law: The Legal and Critical Analysis of International Crimes*, Borgstrom Tryckeri AB, Uppsala, 1991.
23. Morris, D., *The Naked Ape*, Jonathan Cape, London, 1967.
24. Shaw, M.N., *International Law*, (Third Edition) Grotius Publications, Cambridge, 1991.
25. Shearer, I.A., *Extradition in International Law*, Manchester University Press, Manchester, 1971.
26. Shearer, I.A., *Starke's International Law*, Eleventh Edition, Butterworths, London, 1994.
27. Smith, J., *Criminal Law*, Eighth Edition, Butterworths, London, 1996.

28. Weiler, J.H.H., Cassese, A. and Spinedi, M., (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Walter de Gruyter, Berlin, 1989.