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UNIVERSAL JURISDICTION:

The duty of states to enact and enforce legislation -

Chapter One

I. INTRODUCTION

There are a number of different types of jurisdiction and it will be helpful to clarify the distinctions between these forms of jurisdiction for the purposes of this memorandum. Since every national and international legal system defines these concepts differently in some respects, the definitions used here may not correspond exactly with those used in *any* jurisdiction, but are designed to help readers from a wide variety of backgrounds understand some occasionally difficult legal concepts. For the purposes of this memorandum, jurisdiction in its broad sense simply means the legitimate legal authority of an institution (legislature, executive or court) to decide legal questions.

A. Legislative, executive and judicial jurisdiction

Three types of extraterritorial jurisdiction should be distinguished: (1) legislative, prescriptive or substantive (the power of a state to apply its own law to cases with a foreign component),¹ (2) executive (the power of a state to perform acts in another state's territory)² and (3) judicial or adjudicative (the power of a state's courts to try cases with a foreign component).³ This memorandum is primarily concerned with the latter form of jurisdiction - the legitimate authority of a national court to try crimes under international law which occurred outside its territory, either directly under international law or as crimes under its own criminal law.⁴ This

¹ Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145 (1972-1973); Ian Brownlie, *Principles of Public International Law* 313 (Oxford: Oxford University Press 5th ed. 1998) (Legislative or substantive jurisdiction is "the power to make decisions or rules enforceable within state territory"); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 786 (1988) ("a state's authority to make its law applicable to certain actors, events or things").

² Akehurst, *Jurisdiction in International Law*, *supra*, n. 1, 145. Randall, *supra*, n. 1, 786, identifies this concept somewhat differently as enforcement jurisdiction: "a state's authority to compel certain actors to comply with its laws and to redress noncompliance".

³ Akehurst, *Jurisdiction in International Law*, *supra*, n. 1, 145; Randall, *supra*, n. 1, 786 ("a state's authority to subject certain actors or things to the processes of its judicial or administrative tribunals").

⁴ From the point of view of international law, it is consistent with the approach of military courts throughout history, which generally considered that they were enforcing international law directly when trying persons for war crimes, to view the trial of persons for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances" as the direct enforcement of international criminal law, whether the court is a national or an international one.

From the point of view of national law, some states follow a *monist* approach, which sees the two systems of law, international and national, as

"part of one single legal structure, the various national systems of law being derived by way of delegation from the international legal system. Since international law can thus be seen as essentially part of the same legal order as municipal law, and as superior to it, it can be regarded as incorporated in municipal law, giving rise to no difficulty of principle in its application as international law within states."

Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 54 (London and New York: Longman 9th ed. 1992) (paperback edition 1996)

memorandum also addresses legislative jurisdiction, to the extent that national penal codes define conduct abroad which is also a crime under international law as a crime over which national courts may exercise universal jurisdiction.⁵ However, when the definitions of the crimes in national law are consistent with definitions of crimes under international law, it is misleading to describe the action of national legislatures as an exercise of legislative jurisdiction.⁶ The legislature in such cases is not seeking to legislate its own national criminal law values for other states, but instead to facilitate the task of its national courts in their role as agents of the international community in enforcing international law.⁷

B. Personal and subject matter jurisdiction

Personal jurisdiction (*ratione personae*) means the legitimate legal authority of a court to try a particular person or class of persons. Subject matter jurisdiction (*ratione materiae*) means the legitimate legal authority of a court to try cases involving particular crimes. The focus of this memorandum is on a different type of jurisdiction: geographic jurisdiction over particular places (*ratione loci*).

C. Four principles of extraterritorial jurisdiction

(footnote omitted). Other states follow a *dualist* approach, which considers

“international law and the internal law of states as totally separate legal systems. Being separate systems international law would not *as such* form part of the internal law of a state: to the extent that in particular instances rules of international law may apply within a state they do so by virtue of their adoption by the internal law of the state, and apply as part of that internal law and not as international law.”

Ibid., 53 (emphasis in original). Even in monist states, however, courts today are often reluctant to enforce international criminal (as opposed to civil) law directly - whether customary or conventional - without some national legislation expressly providing that the court may do so and specifying the appropriate penalty under national law.

⁵ Many states extend the reach of their penal codes to include ordinary crimes, such as murder, committed abroad by anyone, usually subject to a number of conditions, such as the subsequent presence of the suspect in the territorial state or a requirement that the conduct also be a crime under the law of the territorial state (double criminality). This memorandum is concerned with such legislation only to the extent that it permits national courts to exercise universal jurisdiction over conduct amounting to crimes under international law, such as murder as a crime against humanity.

⁶ Adjudicatory and legislative (prescriptive) jurisdiction are independent concepts. As one observer has stated, “An important point to note . . . is that the exercise of adjudicatory jurisdiction does not depend on the exercise of prescriptive jurisdiction - a court in hearing a case (i.e. in exercising adjudicatory jurisdiction), can apply foreign law rather than its own law.” Daniel Bodansky, *Human Rights and Universal Jurisdiction*, in Mark Gibney, ed., *World Justice? U.S. Courts and Human Rights* 3 (Boulder/San Francisco/Oxford: Westview Press 1991).

⁷ As one commentator has explained, “when a state asserts universal jurisdiction, it is not prescribing a domestic legal rule that applies worldwide. Instead, it is merely exercising adjudicatory jurisdiction on the basis of a rule of international law.” Bodansky, *supra*, n. 6, 10.

It is usually stated that there are four principles of extraterritorial jurisdiction, which are described in more detail below in Section II of this chapter: (1) the active personality principle (based on the nationality of the suspect), (2) the passive personality principle (based on nationality of the victim), (3) protective jurisdiction (based on harm to a state's own national interests) and (4) the universality principle (permitting a court in any state to try someone for a crime committed in another state not linked to the forum state by the nationality of the suspect or victim or by harm to its own national interests). National courts often cite one or more of these four principles of extraterritorial jurisdiction concerning *ordinary crimes under national law* when exercising jurisdiction over *crimes under national law of international concern* and *crimes under international law*. Some scholars and courts have argued that there is fifth form of extraterritorial jurisdiction: the representational principle (based on jurisdiction delegated by another state). As explained below, however, when there is no link in the case to the forum state, this principle is simply another form of universal jurisdiction.

D. Decentralized enforcement of international law

With respect to crimes under international law and ordinary crimes under national law of international law, the four principles of extraterritorial jurisdiction are only supplementary, since the courts in these cases are primarily acting as agents of the entire international community to enforce international law, even when the crimes are also defined in national law, rather than acting to enforce their own national law.⁸ As explained by a leading authority on the subject, when exercising universal jurisdiction over crimes under customary or conventional international law, "national courts act instead of international organs. Seen in this light, State courts act as instruments of decentralized enforcement of international law."⁹ Similarly, a *United States* Court of Appeals has explained: "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."¹⁰ It is a matter of fundamental importance that the jurisdictional basis in such cases be understood rooted in international - rather than national - law under the principle of universal jurisdiction because restrictions on jurisdiction which might be permissible under national law are not permissible under international law.¹¹

⁸ Brownlie points out that the customary law and general principles of law relating to jurisdiction, such as territoriality, active and passive personality and protection, "are emanations of the concept of domestic jurisdiction and its concomitant, the principle of non-intervention in the internal affairs of states. These basis principles do not apply to or do not apply very helpfully to . . . crimes under international law. In these areas, special rules have evolved." Brownlie, *supra*, n. 1, 314 (footnotes omitted). Some authors sometimes overlook this essential distinction by looking only at the basis under *national law* for extraterritorial jurisdiction over a *crime under international law* which is also a crime under national law. See, for example, Malcolm S. Shaw, *International Law* 466 (Cambridge: Cambridge University Press 1997) (discussing under the nationality principle the exercise of jurisdiction for war crimes over persons who were non-nationals at the time of the crime who subsequently became citizens or residents of the United Kingdom). As Sir Hersch Lauterpacht explained, when national courts bring to justice those responsible for war crimes: "War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action finds no warrant in and is contrary to international law." *The Law of Nations and the Punishment of War Crimes*, 21 Brit. Y.B. Int'l L. 58, 64 (1944).

⁹ Rüdiger Wolfrum, *The Decentralized Prosecution of International Offences through a National Courts*, 24 Israel Y.B. Int'l L. 183, 186 (1994).

¹⁰ *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (see also the authorities cited in Section V.A of this chapter).

¹¹ As noted below in Section II.E of this chapter, however, Brownlie, while recognizing that all states have

jurisdiction over certain crimes under international law no matter where they are committed, prefers not to use the term “universality” to describe such jurisdiction.

Nevertheless, these supplementary jurisdictional principles continue to play an important role in practice. Although many of the prosecutions in national military courts for war crimes committed before and during the Second World War, particularly those of the *United Kingdom* and the *United States*, were based directly on international law, states are now less inclined to authorize their courts to try persons for crimes under international law directly.¹² They are far more willing to exercise universal jurisdiction when such crimes are incorporated in their own penal codes and when based on one or more of these more limited principles of extraterritorial jurisdiction. However, as explained below in Section II.E of this chapter, the codification of crimes under international law in national penal codes has often subjected them to limits applicable to ordinary crimes in a manner which is inconsistent with international law.

II. THE FIVE PRINCIPLES OF GEOGRAPHIC JURISDICTION (*RATIONE LOCI*)

The following section briefly analyzes the five principles of geographic jurisdiction (*ratione loci*). These are territorial jurisdiction (based on the place where the crime occurred) and four types of extraterritorial jurisdiction: active personality jurisdiction (based on the nationality of the suspect), passive personality jurisdiction (based on the nationality of the victim), protective jurisdiction (based on harm to the forum state's own particular interests) and universal jurisdiction (not linked to the nationality of the suspect or victim or to harm to the forum state's own national interests).

A. Territorial jurisdiction

¹² See generally Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 Brit. Y.B. Int'l L. 382 (1951) (describing direct enforcement of international law by national courts).

The primary form of national criminal jurisdiction is jurisdiction over crimes committed in the territory of a state (territorial jurisdiction). This form of jurisdiction is accepted by all states as an essential aspect of state sovereignty.¹³ It often has a number of practical advantages as the territorial state is the one where victims, witnesses, written and material evidence and the suspect usually are located, and it will have a presumed state interest in prosecuting the crime.¹⁴ Territorial jurisdiction has been extended in geographic scope to include ships flying the national flag and aircraft registered in the state, although, strictly speaking, the jurisdiction is extraterritorial.¹⁵ Jurisdiction over non-self-governing territories and occupied territories have sometimes been viewed as aspects of territorial jurisdiction, although jurisdiction over occupied territories has sometimes also been characterized as belligerent jurisdiction (See Section II.C of this chapter on the passive personality principle and II.D in this chapter on the protective principle).¹⁶ However, to the extent that the occupying power is exercising jurisdiction over crimes under international law, as opposed to simply enforcing the law of the occupied territory or legislation of the occupying power, that jurisdiction is more accurately described as a form of universal jurisdiction (that is, the decentralized enforcement of international law by national courts).

Authorities differ on the scope of territorial jurisdiction over crimes which are committed across national borders (transnational crimes). A widely accepted view (doctrine of ubiquity or objective territoriality) is that if the effects of the crime are felt in the state seeking to assert territorial jurisdiction (object state), then territorial jurisdiction “is founded when any essential constituent element of a crime is consummated on state territory”.¹⁷ Such an element in a prosecution for murder could be the death in the state of the court (forum state) caused by someone firing across the border from another state or, in a prosecution for conspiracy, a step in the forum state to further the conspiracy agreed in another state. It could also include funding or training of armed fighters in one state to fight in the territorial state. Others believe that it is sufficient for the exercise of territorial jurisdiction if the crime commenced within the state (subject state), but was completed outside the state (subjective principle).¹⁸ The differences between national jurisdictions with respect to these two territorial jurisdiction doctrines can lead to significantly different

¹³ Brownlie, *supra*, n. 1, 303. See also M. Cherif Bassiouni, *Theories of Jurisdiction and their Application in Extradition Law and Practice*, 5 Cal. W. Int'l L.J. 1, 3-34 (1974); Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 Utah L. Rev. 685, 688-701; Dinstein, *Universality Principle and War Crimes*, in Michael Schmitt & Leslie Green, eds, *The Law of Armed Conflict: Into the Next Millennium*, 71 Int'l L. Stud. 17, 17-18 (U.S. Naval War College 1998); Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 435, 495 (Supp. 1935); Marc Henzelin, *Le Principe de l'Universalité en Droit Pénal International: Droit et Obligation pour les Etats de Poursuivre et Juger Selon le Principe de l'Universalité* 22-25 (Bâle/Genève/Munich: Helbing & Lichtenhahn et Bruxelles: Bruylant 2000).

¹⁴ Brownlie, *supra*, n. 1, 303; Menno T. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in International Law Association, *Report of the Sixty-Eighth Conference held at Taipei, Taiwan, Republic of China, 24-30 May 1998*, 563, 564 (London 1998) (1998 ILA Report).

¹⁵ *France v. Turkey (The Lotus Case)*, 1927 P.C.I.J. (Ser. A) No. 9, 23.

¹⁶ See the discussion in Bassiouni, *Theories of Jurisdiction*, *supra*, n. 13, 7-9, of jurisdiction over territories under military occupation where the courts were enforcing the national law of the occupied territory as an extension of the territorial principle.

¹⁷ Brownlie, *supra*, n. 1, 304.

¹⁸ *Ibid.*, 303-304.

results, particularly concerning the problem of conspiracy and inchoate offences where elements are committed abroad.

To a great extent, international law limits *executive jurisdiction* to the forum state so that, for example, police in the forum state may not carry out an arrest in another state without that state's consent. However, nearly three-quarters of a century ago, the Permanent Court of International Justice made clear that international law did not limit *adjudicative jurisdiction* to the territory of the forum state, absent a clear rule to the contrary:

“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 cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

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 in which 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, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. 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 the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”¹⁹

The rest of this section describes the various forms of extraterritorial jurisdiction which are permissible under international law.

B. Active personality (nationality of suspect) jurisdiction

Jurisdiction based on the nationality of the suspect (active personality principle or *la compétence personnelle active* -sometimes called the nationality, allegiance or personality principle), “as a mark of allegiance and an aspect of sovereignty, is also recognized as a basis for jurisdiction over extra-territorial acts” which violate the forum state's ordinary criminal law.²⁰ Jurisdiction based on the nationality of

¹⁹ *France v. Turkey (The Lotus Case)*, 1927 P.C.I.J. (Ser. A) No. 9, 18-19. Although *The Lotus* was based on an increasingly outdated concept of the international legal framework in which states were seen as free to do anything when there was not an international law rule to the contrary, the basic principle of extraterritorial adjudicative jurisdiction remains valid today.

²⁰ Brownlie, *supra*, n. 1, 306 (and authorities cited); see also Bassiouni, *Theories of Jurisdiction*, *supra*, n. 13, 40-43; Blakesley, *supra*, n. 13, 519; Geoff Gilbert, *Crimes Sans Frontières: Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int'l L. 415, 417-418 (1992); Henzelin, *supra*, n. 13, 25-27.

the suspect is included in many treaties providing for the repression of crimes of international concern.²¹ It is also one of the bases of extraterritorial jurisdiction in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²²

²¹ *See, for example*, International Convention against the Taking of Hostages (Hostage Taking Convention), 17 December 1979, U.N. G.A. Res. 34/146, U.N. G.A.O.R. Supp. (No. 46), at 245, U.N. Doc. A/34/46 (1980), 18 Int'l Leg. Mat. 1456 (1979), Art. 5 (b).

²² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), Art. 5 (1) (b), U.N. G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51 at 197, U.N. Doc. A/39/51 (1984) ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 [definition of torture] in the following cases: . . . (b) When the alleged offender is a national of that State[.]").

Some authorities appear to treat the exercise of jurisdiction over a suspect based on that person's nationality in the state at the time of the investigation or prosecution when the crime occurred *before* the suspect became a national or resident as an example of the active personality principle.²³ However, when the crime is a crime under international law, it is more accurate to consider it as an exercise of universal jurisdiction, and it is usually seen as such.²⁴ Similarly, some authorities treat extraterritorial jurisdiction over alien residents as active personality jurisdiction, but such jurisdiction also falls outside this principle.²⁵ As one commentator has explained with regard to treaties imposing obligations to exercise extraterritorial jurisdiction over stateless persons resident in the territory of a state party, such jurisdiction is not active personality jurisdiction.²⁶

²³ This view is taken by some of the older authorities, such as the 1935 Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 519, Art. 5 (a), although the commentary concedes that this position is "possibly a little difficult to justify theoretically", Harvard Research, *supra*, n. 13, 532. Usually, exponents recognize that the concept of active personality would have to be extended beyond its original meaning. See, for example, Brownlie, *supra*, n. 1, 306 (footnotes omitted) ("[t]he application of the principle may be extended by reliance on residence and other connections as evidence of allegiance owed by aliens and also by ignoring changes of nationality."); Dinstein, *Universality Principle*, *supra*, n. 13, 18 ("The active personality principle usually also covers non-nationals serving the State in different capacities (such as members of the diplomatic service or of the armed forces), and at times is even extended to permanent residents."). However, as noted half a century after the Harvard Research Draft Convention by Judge Toohey of the High Court of Australia in *Polyukhovich v. Australia*, (1991), 172 CLR 501, F.C. 91/026 (*obtainable from http://www.austlii.edu.au/cases/cth/high_ct/172clr501.html*) (Toohey, J.), para. 24, "There appears to be no consensus that 'nationality of offender' basis for jurisdiction will include the situation where an offender later becomes a national."

²⁴ For example, during the debates over the drafting of the United Kingdom's War Crimes Act 1991, which permitted national courts to exercise jurisdiction over war crimes committed during the Second World War by persons who subsequently became UK citizens or residents, as well in scholarly commentary afterwards, it was generally considered that the Act was based on universal jurisdiction. See, for example, *War Crimes: Report of the War Crimes Inquiry* (H.M.S.O. Cmd 1989) (Hetherington-Chalmers Report), paras 6.31, 9.22.

²⁵ In the Harvard Research commentary on Article 5 of its draft Convention, providing for active personality jurisdiction, it stated that "[d]omiciled or resident aliens are not assimilated to the position of nationals under the present article". Harvard Research, *supra*, n. 13, 533. It explained, after reviewing state practice, that "it seems clear in principle that domicile alone does not afford an adequate basis for the unrestricted competence which this article recognizes. In view of the jurisdiction over crime committed by aliens abroad which is recognized in other articles of this Convention [including Article 10, providing for universal jurisdiction], it seems wholly undesirable to attempt an assimilation of domiciled aliens to the position of nationals." *Ibid.* It noted that even in "[t]he one case in which such an assimilation would be most plausible", stateless persons, provisions in national law assimilating them to nationals for the purposes of extraterritorial jurisdiction "are not supported by general practice; the case is not one likely to arise often; and when the case does arise a jurisdiction on some other principle will ordinarily be found under other articles of this Convention". *Ibid.*, 533-534. This conclusion is reinforced by Article 6 of the draft Convention, which contains a limited list of other persons, including public officials and members of national ship or aircraft crews, assimilated to the position of nationals for the purpose of nationality jurisdiction. *Ibid.*, 539. Therefore, in this memorandum, legislation providing for extraterritorial jurisdiction over alien residents or stateless persons is treated as based on universal, not nationality, jurisdiction.

²⁶ Sami Schubber, *The International Convention against the Taking of Hostages*, 52 Brit. Y. B. Int'l L. 205, 222 (1981). Schubber, commenting on a treaty provision stating that a state party may exercise jurisdiction over a person who is habitually resident in its territory suspected of hostage-taking if it considers it appropriate, points out that, under Article 5 (1) of the Convention Relating to the Status of Stateless Persons, a stateless person is "a person who is not considered as a national by any State under the operation of its law". He adds that, "[u]nder customary law, a State presumably may not exercise jurisdiction over a stateless person except on the territorial principle or extra-territorial principles in certain limited situations, e.g. universal jurisdiction or the security principle". *Ibid.*

C. Passive personality (nationality of the victim) jurisdiction

The passive personality principle (*la compétence personnelle passive*) permits the exercise of jurisdiction over a crime committed outside the territory of the state based solely upon the nationality of the victim.²⁷

Many states authorize their courts to exercise jurisdiction over crimes under their ordinary criminal law committed against their nationals outside the state's territory. However, many other states, including France, the United Kingdom and the United States in the past, have strongly dissented with respect to certain applications of that principle.²⁸ They contended that no state may exercise adjudicative jurisdiction over crimes under its own national law committed against its nationals in the territory of another state.²⁹ Whatever the merits may be of this argument, it has no relevance to the exercise of jurisdiction when the crimes against victims who are nationals of the forum state are not only ordinary crimes under that state's own law, but also crimes under international law or crimes of international concern over which the state may exercise universal jurisdiction.³⁰

²⁷ Blakesley, *supra*, n. 13, 713-716. See also Bassiouni, *Theories of Jurisdiction*, *supra*, n. 13, 43-47; Dinstein, *Universality Principle*, *supra*, n. 13, 18 (“[I]n at least some settings the passive personality principle is too well entrenched in state practice to be seriously contested.”) (footnote omitted); Gilbert, *supra*, n. 20, 418-419; Louis Henkin, R.C. Pugh, Oscar Schachter & H. Smit, *International Law, Cases and Materials* 46, 475 (2nd ed. 1989); Henzelin, *supra*, n. 13, 28; Daniel P. O’Connell, *International Law* 828-829 (2d ed. 1970); David J. Harris, *Cases and Materials on International Law* 251, 252-253, 265, 275 (4th ed. 1991).

²⁸ See, for example, *The Lotus (France v. Turkey)*, 1927 P.C.I.J. (Ser. A), No. 9, 4; the *Costa Rica Packet* case, (1891), Moore, 5 Int’l Arb. 4948 (views of Great Britain); and the *Cutting* case, U.S. For. Rel. 751-867 (1888), reported in John B. Moore, 2 Digest Int’l L. 228-242 (1887) (views of the United States).

²⁹ Shaw, *supra*, n. 8, 467.

³⁰ See Brownlie, *supra*, n. 1, 306 (“This is the least justifiable, as a general principle, of the various bases of jurisdiction, and in any case certain of its applications fall under the principles of protection and universality . . .”).

Indeed, France, the United Kingdom and the United States have all since become parties to treaties which permit states to exercise universal jurisdiction over aliens (including nationals of non-states parties) who have committed crimes of international concern over their own nationals.³¹ The United States has enacted legislation giving its courts jurisdiction over aliens who have committed crimes under international and national law against its nationals and its courts have accepted the legitimacy of the exercise of extraterritorial jurisdiction over crimes of international concern against United States nationals.³² Moreover, leading scholarly authority has concluded that customary international law permits states to exercise jurisdiction over crimes committed against their nationals abroad.³³

One of the most well-known cases since the Second World War in which a court has cited the passive personality principle as one of the bases for exercising jurisdiction is the *Eichmann* case. In addition to the protective principle and universal jurisdiction, the District Court of Jerusalem held that the link between the victims and the State of Israel (and the Palestine Mandate) alone was a sufficient basis.³⁴ Although the State of Israel was a successor to the Palestine Mandate, some of the residents of which may have perished in the Holocaust, this ground was criticized on the basis that Israel did not exist at the time of the crimes. In any event, it was also unnecessary, given that the court was exercising universal jurisdiction over genocide, crimes against humanity and war crimes.

Passive personality principle and belligerent jurisdiction. Courts have sometimes appeared to extend the passive personality principle beyond its limits to include jurisdiction over victims who are

³¹ For example, all three states are parties to the Hostage Taking Convention, *supra*, n. 21. Article 5 of this convention provides that states parties may exercise extraterritorial jurisdiction over an alien who took a national of the state hostage. Article 5 (1) (c) of the Convention against Torture provides: (“Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 [torture, attempt to commit torture and complicity or participation in torture] in the following cases: . . . (c) When the victim is a national of that State if that State considers it appropriate.”).

³² The United States Federal criminal jurisdiction extends to certain ordinary crimes under national law (see the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 1203, Pub. L. No. 98-473, ch. 19, para. 1210, 98 Stat. at 2164, expanding the special maritime and territorial jurisdiction of the United States to include “[a]ny place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States”). In addition, the 1986 Omnibus Diplomatic Security and Anti-Terrorism Act, Pub. L. No. 99-399, tit. XII, para. 1202 (a), 100 Stat. 853, 896, provides for federal jurisdiction over homicide and physical violence abroad where the victim is a United States national. See also 18 U.S.C. § 1203 (Hostage taking), Pub. L. 98-473, tit. II, § 2002 (a), Oct. 12, 1984, 98 Stat. 2186, *as amended*, Pub. L. 100-690, tit. VII, § 7028, Nov. 18, 1988, 102 Stat. 4397. A Federal court held that it had passive (as well as universal) jurisdiction under this provision over a Lebanese citizen who had been arrested in international waters and was being prosecuted for the hijacking of an airplane with passengers who were United States nationals. *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), *aff’d*, 924 F.2d 1086, 1091 (D.C. Cir. 1991). See also *United States v. Rezaq*, 134 F.3d 1123, 1133 (D.C. Cir.), *cert. denied*, 525 U.S. 834 (1998) (accepting passive personality principle); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 221-222 (S.D.N.Y. 2000) (same).

³³ See, for example, C.J.R. Dugard, Opinion, in *Bouterse* case, 7 July 2000, para. 6.1.1 (“Customary international law permits a state to exercise criminal jurisdiction where the victim of the crime is a national.”).

³⁴ *Attorney General of Israel v. Eichmann*, 36 Int’l L. Rep. 18, 50-57 (Dist. Ct. Jerusalem 12 December 1961).

nationals of allied states in an armed conflict.³⁵ In some cases, they also characterize it as a form of protective jurisdiction (see discussion of the concept of belligerent jurisdiction as part of protective jurisdiction in Section II.D of this chapter). However, the exercise of jurisdiction over war crimes and crimes against humanity against allied nationals is one of several forms of extraterritorial jurisdiction which should really be seen as an exercise of universal jurisdiction to the extent that the courts are acting as agents of the entire international community by prosecuting crimes under international, not national, law.³⁶

D. Protective jurisdiction

³⁵ See, for example, Eric David, *Elements de Droit Pénal International*, para. 3.89 (Brussels: Presses Universitaires de Bruxelles 7th ed. 1997-1998/1).

³⁶ More than half a century ago, the Chairman of the United Nations War Crimes Commission, Lord Wright of Durley, reached the same conclusion in his foreword to the final volume of the Commission's collection of law reports of trials of persons suspected of war crimes during the Second World War:

“As to jurisdiction the traditional rule is that a Military Court, whether national or international, derives its jurisdiction over war crimes from the bare fact that the person charged is within the custody of the Court ; his nationality, the place where the offence was committed, the nationality of the victims are not generally material. This has been sometimes described as universality of jurisdiction as being contrary to the general rule that courts have a jurisdiction limited to the national territory or to the nationality of the injured person. In certain trials dealt with in these Reports, the accused came from several different nations and so also did the victims, and in some trials the crimes were committed on the High Seas or in allied or enemy countries.”

Lord Wright of Durley, *Foreword*, 15 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* x (London: H.M.S.O. 1949).

National law in most states permits courts to exercise jurisdiction over conduct by persons abroad which harms the national - particularly the security - interests of the forum state in violation of its own national criminal law (protective or security principle or *compétence réelle ou compétence de protection*).³⁷ This principle has been used to prosecute national security offences; currency offences; counterfeiting currency, stamps, seals and emblems; desecration of flags; economic crimes; forgery, fraud or perjury in connection with official documents, such as passports and visas; immigration offences and political offences.³⁸

³⁷ Shaw, *supra*, n. 8, 468-469 (noting uncertainties about its extent in practice and particularly what conduct is included); see also Bassiouni, *Theories of Jurisdiction*, *supra*, n. 13, 47-50; Blakesley, *supra*, n. 13, 701-706; Gilbert, *supra*, n. 20, 419-420; Henzelin, *supra*, n. 13, 28-29.

³⁸ Brownlie, *supra*, n. 1, 307; Yoram Dinstein, *The Extra-Territorial Jurisdiction of States: The Protective Principle*, 65 (2) *Annuaire d'Institut de Droit International*, 305, 305-315 (1993); Shaw, *supra*, n. 8, 469.

Protective principle and belligerent jurisdiction. The doctrine which provides that any belligerent in an international armed conflict has jurisdiction to try enemy nationals for war crimes committed against allied nationals, nationals of co-belligerents and stateless persons - in some cases before the forum state had even entered the war (belligerent jurisdiction) is now outdated and may never have been an accurate description of the basis for jurisdiction over war crimes.³⁹ This doctrine has sometimes been seen as an extension beyond its natural limits of the protective - rather than the passive personality - principle, since it is seen as in the interest of the forum state to bring those to justice who have harmed the national interests of its allies, although this rationale would not explain its extension to war crimes against stateless persons.⁴⁰ However, this contention is not strictly correct, since the state is acting as an agent of the international community as a whole in repressing such crimes. Indeed, it is now generally accepted that neutral states may exercise extraterritorial jurisdiction over anyone who is suspected of war crimes.⁴¹ Belligerent jurisdiction over war crimes is, therefore, properly seen simply as an exercise of universal jurisdiction.⁴²

E. Universal jurisdiction and the *aut dedere aut judicare* rule

There are two important related, but conceptually distinct, rules of international law.

Universal jurisdiction is the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.⁴³ Sometimes this rule is called permissive universal

³⁹ See Richard R. Baxter, *Municipal and International Bases of Jurisdiction over War Criminals*, 28 Brit. Y.B. Int'l L. 382, 391 (1951) (citing *United States v. Remmele*, 1949, 15 *Law Reports of Trials of War Criminals* 44 (1949)).

⁴⁰ One writer has argued that a doctrine of "general interest and concern" permits belligerents to try persons who have committed crimes against nationals of allies and co-belligerents, as well as stateless persons, but he also claimed that this doctrine is not based on universal jurisdiction. Therefore, he claimed, neutral states could not prosecute persons accused of war crimes. B. V. A. Röling, *The Law of War and the National Jurisdiction since 1945*, 100 *Recueil des Cours* 329, 359-360 (1960 - Part II). Apart from Röling, apparently the only author to claim that neutral states could not exercise universal jurisdiction over war crimes is D. W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources* 1, 12 (1982).

⁴¹ See, for example, G.I.A.D. Draper, *The Red Cross Conventions* 105 (1958); Richard D. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 28 Brit. Y.B. Int'l L. 382, 392 (1951) ("If a neutral State should, by reason of the availability of the accused, witnesses and evidence be the most convenient *locus* in which to try a war criminal, there is no reason why that State should not perform that function."); L.C. Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 Brit. Y.B. Int'l L. 457, 463 (1962); Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 Am. J. Int'l L. 393, 426 (1952); *British Military Manual, Part III - The Law of War on Land*, para. 637 (1958).

⁴² See footnote 36 above.

⁴³ Other definitions are similar. See, for example, Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000 (*Final ILA Report*) 3 ("Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.") (footnote omitted); Randall, *supra*, n. 1, 788.

jurisdiction. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. As explained above, when a national court is exercising jurisdiction over conduct amounting to crimes under international law or ordinary crimes of international concern committed abroad, as opposed to conduct simply amounting to ordinary crimes, the court is really acting as an agent of the international community enforcing international law.

Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not shield a person suspected of certain categories of crimes. Instead, it is *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.⁴⁴ As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court.⁴⁵

⁴⁴ The contemporary phrase *aut dedere aut judicare* literally means “either surrender (or deliver) or try (or judge)”. However, it is usually described as an obligation to extradite or prosecute. The phrase is a modern adaptation of the phrase *aut dedere aut punire* (surrender or punish) used by Grotius in *De Jure Belli ac Pacis*, Bk. II, Ch. XXI, §§ IV-VI, and, before him, by Covarruvias (1512-1574). It is designed to be more consistent with the fundamental principle of criminal law of the presumption of innocence. The contemporary formulation does not fully reflect this principle, since the duty to prosecute - as opposed to the duty to investigate - arises only at the point when the prosecutors have sufficient admissible evidence. It would be better to use the phrase *aut dedere aut prosequi* (extradite or prosecute), as used by a leading commentator, although this phrase still does not capture all the nuances of the duty. See generally Marc Henzelin, *Le Principe de l’Universalité en Droit Pénal International: Droit et Obligation pour les Etats de Poursuivre et Juger Selon le Principe de l’Universalité* (Bâle/Genève/Munich: Helbing & Lichtenhahn et Bruxelles: Bruylant 2000). The principle is more accurately reflected in the obligation in provisions of various treaties, such as Article 7 of the Convention against Torture, of the state where the suspect is located, if it does not extradite that person, to submit the case to its competent authorities for the purpose of prosecution. If the decision not to prosecute were taken on impermissible grounds which were inconsistent with the independence of the prosecutor or if the legal proceedings were taken with the purpose of shielding the suspect from criminal responsibility, the obligation to extradite would remain. Of course, if another state had sufficient admissible evidence, and the requested state did not, the obligation to extradite would also still remain.

The above history of these phrases and their rationales is based in part on accounts in a number of sources, including: M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* 3-5 (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995); M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in M. Cherif Bassiouni, ed., *International Criminal Law* 3, 5 (Ardsley, New York: Transnational Publishers, Inc. 2nd. ed. 1999); Henri Donnedieu de Vabres, *Introduction à l’étude du droit pénal international: essai d’histoire et de critique sur la compétence criminelle dans les rapports avec l’étranger* 183 (Paris: Sirey 1922); Henzelin, *supra*, 98 n. 477.

⁴⁵ Every state could face this eventuality at some point. For example, no other state might seek an alien suspect’s extradition and no international criminal court might have jurisdiction over the crime or the suspect or the case might be inadmissible for some reason in such a court. Therefore, as a practical matter, the view of some that the *aut dedere aut judicare* rule today does not require a state to exercise universal jurisdiction is not strictly correct. It is true that some early treaties expressly imposed an *aut dedere aut judicare* obligation only with respect to suspects who were nationals of the requested state. Now, however, the usual rule is to impose such an obligation regardless of the nationality of the suspect. Therefore, in some cases, the principle will require the exercise of territorial or other principles of extraterritorial jurisdiction; in other cases, however, the only way the requested state will be able to fulfill its obligations under international law will be to exercise universal jurisdiction. Indeed, almost every treaty imposing an *aut dedere aut judicare* obligation expressly

The International Law Commission, which has incorporated the *aut dedere aut judicare* rule in the 1996 Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code of Crimes) has explained the principle and its rationale as follows:

requires states parties to provide for universal jurisdiction in the event that extradition is not possible (see discussion of Convention against Torture in Chapter Nine, Section II.A and of other treaties in Chapter Thirteen, Section II).

“The obligation to prosecute or extradite is imposed on the custodial State in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by the national authorities of that State or by another State which indicates that it is willing to prosecute the case by requesting extradition. The custodial State is in a unique position to ensure the implementation of the present Code by virtue of the presence of the alleged offender in its territory. Therefore the custodial State has an obligation to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction. The obligation to extradite or prosecute applies to a State which has custody of ‘an individual alleged to have committed a crime.’ This phrase is used to refer to a person who is singled out, not on the basis of unsubstantiated allegations, but on the basis of pertinent factual information.”⁴⁶

The International Law Commission noted that the duty either to prosecute or extradite would depend on the sufficiency of the evidence.⁴⁷

⁴⁶ 1996 Draft Code of Crimes, Commentary to Article 8, para. 3. International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session, 51 U.N. G.A.O.R. Supp. (N.10) at 9, U.N. Doc. A/51/10 (1996).

⁴⁷ *Ibid.*, paras 4 & 5.

As explained in the introduction to this memorandum, some scholars distinguish universal jurisdiction over three different categories of crimes. The first category involves *serious ordinary crimes*, such as murder.⁴⁸ The second category involves *crimes under national law of international concern* which international law permits any state to punish, but which are not defined under customary international law, such as piracy (before it was defined as a crime under international law), theft of nuclear materials, certain forms of hostage-taking and hijacking. Often treaties expressly authorize states parties to exercise universal jurisdiction and usually impose an *aut dedere aut judicare* obligation (see the discussion of such treaties in Chapter Thirteen). The third category comprises *crimes defined under international law itself*, such as war crimes, crimes against humanity, genocide and torture, where the states are directly punishing a breach of international law.⁴⁹ Most of the crimes of concern to

⁴⁸ It is a popular misunderstanding, sometimes shared by experts, that the ability to exercise universal jurisdiction under international law is based solely on the nature of the crime. Perhaps the most well known recent exponent of this view is Lord Millet, who claimed in his opinion in the *Pinochet* case that

“crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.”

R. v. Bow Street Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3), [1999] 2 All ER 97, 177. However, he cited only one case for the first proposition, which simply said that “one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction”, *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, 10 December 1998. However, the Trial Chamber did not say that *only* crimes that violated a *jus cogens* prohibition were subject to universal jurisdiction, but simply that “one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction”. *Ibid.*, para. 156. The three grounds cited by Lord Millet in support of the second supposed requirement - that it was “implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in *Eichmann*, and the definitions used in the more recent Conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda” - do not support a restrictive reading of universal jurisdiction under international law. First, as documented in this memorandum and in the material supplied by Amnesty International and the interveners to the House of Lords in the *Pinochet* case, universal jurisdiction has applied for centuries to other crimes, including brigandage, piracy, slavery, trafficking in women and children, destruction and damage to undersea cables, counterfeiting and even ordinary crimes. Second, the reasoning of judgment in the *Eichmann* case is not limited to the enormous crimes at issue, but applied to other crimes under international law. Third, the Statutes of the two International Criminal Tribunals are based on international, not universal, jurisdiction.

Similarly, one leading expert on universal jurisdiction has asserted that the view that the universality principle includes ordinary crimes such as murder “is not in conformity with international law.” Dinstein, *Universality Principle*, *supra*, n. 13, 18. He argued that “[h]ad the universality principle been applicable to a broad range of ordinary crimes, there would be no *raison d’être* for the other bases of jurisdiction.” *Ibid.*, 18-19. He disagreed with Brownlie, who observed that “[a] considerable number of states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy”, citing as one instance, “common crimes, such as murder, where the state in which the offence occurred has refused extradition and is unwilling to try the case itself”. Brownlie, *supra*, n 1, 307-308. Dinstein did not discuss the legislation enacted over the past two centuries in many countries providing universal jurisdiction over ordinary crimes - not just in cases where the territorial state has refused extradition - which has been adopted, apparently without protest by other states.

⁴⁹ Professor Ian Brownlie, after noting that it was “now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Conventions of 1949, may be punished by any state which obtains custody of persons suspected of responsibility”, then stated:

Amnesty International and discussed in this paper are crimes under international law, but whenever other crimes are discussed, the difference is noted. As stated above, all the crimes within the jurisdiction of the Yugoslavia and Rwanda Tribunals and almost all the crimes within the jurisdiction of the International Criminal Court are crimes under international law.

1. No requirement in international law of a specific link to the forum

“This is often expressed as an acceptance of the principle of universality, but this is not strictly correct, since what is punished is the breach of international law; and the case is thus different from the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal. In so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgivings, it may be important to maintain the distinction.”

Ian Brownlie, *supra*, n. 1, 308. See also Tim Hillier, *Principles of Public International Law* 137 (London/Sydney: Cavendish Publishing Limited 2d ed. 1999) (“Brownlie argues, correctly, it is submitted, that a distinction needs to be drawn between such cases where what is being punished is the breach of international law (*delicta juris gentium*) and the true application of the universality principle, where international law merely provides that States have a liberty to assert jurisdiction over certain specific acts which are not themselves necessarily breaches of international law. The distinction may be important, since the strict application of the universal principle would seem to depend upon the municipal law of the State asserting jurisdiction, whereas jurisdiction over international crimes involves interpretation of the provisions of international law.”); Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* 113 (London: Routledge 7th ed. 1997) (agreeing with Brownlie that war crimes and crimes against humanity “are a violation of international law, directly punishable under international law itself (and thus universal crimes), and they may be dealt with by national courts or by international tribunals . . . But, in a strict sense, they are not a reflection of the universality principle of jurisdiction, granting states the liberty to prosecute persons under their national law for certain acts which, as such, are not criminal under international law”). However, the term “universal jurisdiction” to describe jurisdiction over all three types of crimes is now so widely used, by governments, non-governmental organizations, scholars and the press, that this memorandum follows the general usage.

Customary international law permits states to exercise universal jurisdiction over crimes under international law (and treaties require states parties to do so with respect to certain crimes of international concern if they fail to extradite suspects) without requiring *any* specific link to the forum - such as presence in the territory at the time of an investigation (as opposed to time of trial) or a request for extradition - other than the presence of the accused at the time of trial.⁵⁰ This broad type of universal jurisdiction ensures that the courts of *any* state can act as effective agents for the international community. On the basis of such jurisdiction, a prosecutor or an investigating judge may commence an investigation when the exact whereabouts of a suspect are unknown, thus permitting the gathering of evidence, such as statements of victims and witnesses, while such evidence is fresh. The ability to exercise such jurisdiction will also enable prosecutors and investigating judges to file extradition requests directed to states where a suspect is located, but where the authorities are unable or unwilling to act, or to issue international arrest warrants. More than half a century ago, the drafters of the Geneva Conventions recognized the need for such broad universal jurisdiction by expressly authorizing states parties to request the extradition of a person suspected of grave breaches of those treaties where there is no link whatsoever between the suspect and the forum state other than the general interest of all states in repressing crimes under international law (see Chapter Three, Section II.B.2).

2. National law limits on universal jurisdiction

Unfortunately, many of the states which permit their courts to exercise universal jurisdiction over crimes under international law or crimes of international concern have failed to provide their courts with the full extent of such jurisdiction authorized - or required - under international law. These national law limits on universal jurisdiction (which are different from limitations applicable to crimes generally or particular classes of crimes, such as statutes of limitations and official immunities) fall into a number of categories. The specific legislative provisions in various countries are discussed in Chapters Four, Six, Eight and Ten. In some of the countries mentioned below, other legislative provisions contain broader jurisdiction.

⁵⁰ Amnesty International believes that trials *in absentia*, except in the case of an accused who has deliberately absented himself or herself after the trial has begun, or for as long as an accused continues to disrupt the proceedings, are unjust. Amnesty International, *The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial*, July 1997 (IOR 40/11/97), Section IV.C.2. Trials *in absentia* are not authorized under the Yugoslavia, Rwanda or Rome Statutes.

Custodial universal jurisdiction. The term “custodial” universal jurisdiction is used in this paper to describe the situation where national law requires that the suspect must be in the territory or under the jurisdiction or control of the forum state, such as occupied territory or territory in which the military or security forces are operating as part of a peace-keeping or other international operation, before its authorities can invoke jurisdiction, even with respect to starting an investigation with a view to requesting extradition. Generally, it is considered sufficient under this restrictive type of universal jurisdiction that the suspect be in the territory of the forum state at the time an investigation formally opens.⁵¹ In contrast to this restrictive approach, the Geneva Conventions of 1949 envisage that any state party may request the extradition of a person suspected of grave breaches of those conventions whenever it has sufficient evidence to establish a *prima facie* case (see discussion in Chapter Three, Section II.B.2)

As discussed below, the custodial universal jurisdiction approach, which is followed by states such as *France*, greatly limits the ability of the state’s courts to act as agents of international justice. It can also impose a difficult or impossible burden for victims when filing a complaint in states which require them to prove that a suspect whose presence has not been widely reported is in the territory. Some states have attempted to restrict the concept of custody by distinguishing the situation where a state has formal custody of a suspect from where the suspect is in the territory of a state. For example, the United States delegation at the Rome Diplomatic Conference tried to limit the concept to the situation where one of the members of its armed forces was present in the territory of the receiving state under a status of forces agreement (SOFA) and, therefore, within the “custody” of the sending state rather than the “custody” of the receiving state. This narrow definition was not generally accepted by other delegations.⁵²

Requirements of subsequent adoption of citizenship or residence. Another common restriction in national legislation on the scope of universal jurisdiction which courts may exercise over crimes under international law is that it applies only when the suspect subsequently becomes a citizen or

⁵¹ Although the Convention against Torture expressly requires states parties to take measures to establish extraterritorial jurisdiction on a number of listed grounds, including custodial universal jurisdiction, it makes clear that this list is not an exhaustive list of grounds of extraterritorial jurisdiction. Article 5 (2) provides that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences [torture] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.” However, Article 5 (3) states that “[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.” As discussed below, in many states internal law incorporates international law, including rules concerning universal jurisdiction, or otherwise provides for universal jurisdiction.

⁵² The Republic of Korea proposal, which had wide support, provided that the International Criminal Court might exercise jurisdiction, based on express state consent by one or more of the following states, either as parties to the Statute or by acceptance of the Court’s jurisdiction:

- “(a) the State on the territory of which the act in question occur[red], or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) the State that has custody of the suspect with respect to the crime;
- (c) the State of which the accused of the crime is a national; or
- (d) the State of which the victim is a national.”

Informal paper submitted to the Committee of the Whole, July 1998.

resident of the forum state after the crime was committed. This limit is found in certain provisions of the legislation of some countries, such as *Australia*, *Kyrgyzstan* and the *United Kingdom*.

Requirement that an extradition request be refused. As a general rule, there is no requirement in contemporary international treaties that an extradition request have been made and refused before the state can exercise universal jurisdiction. However, a number of states, including *Colombia* and *Denmark*, have legislative provisions requiring that an extradition request have been made and refused before their courts can exercise universal jurisdiction with respect to certain crimes, although not necessarily with respect to all crimes. In addition, a few regional and pre-Second World War international treaties require requested states to exercise jurisdiction over persons if an extradition request by another state party is refused; most others require requested states to exercise jurisdiction if they fail to extradite the suspects, whether or not there has been an extradition request.⁵³

⁵³ An example of a regional treaty requiring the exercise of jurisdiction only if there has been a *refusal of a formal extradition request* is the European Convention on the Suppression of Terrorism, Art. 7, E.T.S., No. 90, 27 January 1977. Generally, international treaties impose such a requirement based solely on a *failure to extradite*, independently of any request. *See, for example*, Convention against Torture, Arts 5 & 7.

Double criminality. A number of states, such as *Brazil, Germany,* and the *United Kingdom,* have legislative provisions with regard to certain crimes which require that the conduct be a crime in both their own jurisdiction and the jurisdiction of the territorial state or the requesting state making an extradition request based on universal jurisdiction. To the extent that such double criminality requirements apply to crimes under international law, they are inconsistent with international law, at least since Nuremberg. For more than half a century, it has been settled that persons can be held individually criminally responsible, not only when the law of the territorial state does not make conduct which is criminal under international law a crime, but even when the state or its officials require the commission of the crime under international law.⁵⁴

Geographic limits. Some legislation limits the scope of universal jurisdiction for certain crimes geographically to areas under military occupation by the state's armed forces, such as certain provisions in the legislation of *Brazil* and *Côte d'Ivoire*, or by the armed forces of a particular enemy state, such as the *United Kingdom*, with respect to some of its universal legislation which specifically concerns war crimes during the Second World War.

Temporal limitations to particular time periods. A number of states, such as *Australia*, have special legislative provisions on universal jurisdiction which is specifically limited to certain crimes to a particular period, such as the Second World War.

Prohibitions on retrospective application of universal jurisdiction. Some legislation is limited to crimes committed after a certain date which is later than the time when the conduct became recognized as a crime under international law. Countries with such limitations include *New Zealand*. Such temporal limits are not required by international law under the prohibition of *retroactive* criminal legislation that makes conduct that was lawful at the time it occurred a crime afterwards. It is a fundamental principle of international law, as recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other international instruments, that national courts may prosecute persons for crimes which were contrary to international law at the time of the conduct, even if the national law was enacted afterwards.⁵⁵ Such *retrospective* legislation simply provides a new forum for the prosecution of conduct that was a crime when it occurred.

⁵⁴ As the Nuremberg Tribunal explained, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of a State if the State in authorizing action moves outside its competence under international law." Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), 42.

⁵⁵ Universal Declaration of Human Rights, Art. 11 (2) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed. . . ."); International Covenant on Civil and Political Rights, Art. 15 (2) ("Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.").

3. Representational principle - a special form of universal jurisdiction

A few scholars and courts have posited a fifth form of extraterritorial jurisdiction - the vicarious administration of justice or representational principle (*compétence déléguée* or *Kompetenz-verteilungsprinzip* in the broad sense). According to this theory, a state acquires the power to exercise extraterritorial jurisdiction based on a delegation of jurisdiction by the territorial state (or other state with jurisdiction based on active or passive personality or on the protective principle) to the forum state, either expressly or impliedly, when the forum state takes the initiative independently of another state with jurisdiction.⁵⁶

Advocates of this special concept of extraterritorial jurisdiction distinguish two types of representational jurisdiction. Under the first and most narrow of these categories (*la compétence distribuée* or *Kompetenzverteilungsprinzip* in the narrow sense), the territorial state is seen as delegating the prosecution and trial of a crime in its territory to the state of the origin, domicile or residence of the alleged perpetrator.⁵⁷ Under the second, broader category (*la compétence de représentation* or *stellvertretende Strafrechtspflege*), the forum state may prosecute and try a suspect found in its territory following the refusal or failure to extradite the suspect under the *aut dedere aut judicare* rule.⁵⁸

With regard to the first category of representational jurisdiction, it is true that under some treaty arrangements, states expressly agree to transfer criminal proceedings to another state or to defer to other states in the exercise of jurisdiction over crimes committed in their territories as a matter of convenience, for example, when a suspect is charged with a series of car thefts in a number of states and it would economize resources to have a single trial in one state.⁵⁹ However, such treaties simply provide practical arrangements for the exercise of universal jurisdiction - that is, the exercise of jurisdiction over a suspect and a crime where there is no necessary link to the forum state. They do not really create a new form of jurisdiction.

⁵⁶ For a discussion of the representational principle, see European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* 14 (Strasbourg: Council of Europe 1990) (stating that this principle “refers to cases in which a State may exercise extraterritorial jurisdiction where it is deemed to be acting for another State which is more directly involved, provided certain conditions are met”); Geoff Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms* 102 (The Hague/Boston/London: Martinus Nijhoff Publishers 1998) (“The idea behind this form of extraterritorial jurisdiction is that the State exercising it is ‘stepping into the shoes’ of a State with a more pressing claim to prosecute.”); Henzelin, *supra*, n. 13, 30-32.

⁵⁷ Henzelin, *supra*, n. 13, 31.

⁵⁸ *Ibid.*, 131. The Austrian Supreme Court explained the basis for application of the principle in the second situation as follows:

“The extraditing State also has the right, in the cases where extradition for whatever reason is not possible, although according to the nature of the offence it would be permissible, to carry out a prosecution and impose punishment, instead of such action being taken by the requesting State.”

Universal Jurisdiction Case (Austria), 28 Int’l L. Rep. 341, 342 (1958); see also *Hungarian Deserter Case* (Austria), 28 Int’l L. Rep. 343 (1959).

⁵⁹ See European Convention on the Transfer of Proceedings in Criminal Matters, E.T.S. 73 (1978); European Convention on the Punishment of Road Traffic Offences, E.T.S. 52 (1972).

The second category, which relies on a characterization of the role of the forum state as acting simply as the overseas agent of the territorial state is not convincing, even in the case of ordinary crimes under national law. It overlooks an important reason frequently cited by scholars and states for exercising jurisdiction over persons found in the forum state suspected of crimes committed abroad. Instead of arguing that the forum state had a duty to enforce the national law of the territorial state, many leading scholars often argued before the Second World War that it was a scandal for a state to permit persons who had committed crimes common to all legal systems to remain in the forum state with complete impunity and that their presence unpunished undermined the rule of law in the forum state itself, as well as internationally.⁶⁰

Under this rationale, the restrictions in the forum state's legislation linked to the law of the territorial state were designed to avoid the perceived injustice of punishing the person more severely abroad than in the state where the crime occurred or in circumstances where the conduct could not be punished at all, rather than being designed to vindicate the territorial state's interests, as the representational theory would have it. As a safeguard against injustice, a person charged with the ordinary crime of murder abroad should not be punished in the forum state if the conduct was not a crime in the territorial state, the crimes or the sentence had been prescribed in that state or the sentences imposed had been served. Indeed, forum states often refuse to prosecute person under the law of the territorial state, particularly when that law was contrary to the forum state's fundamental values. For example, it would refuse to prosecute political crimes or it would even require that the suspect be prosecuted under the law of the forum state applicable to the conduct that would be criminal under general principles of law in any society, such as murder. When the forum state requires that the law of the forum state, including a less severe punishment than the punishment applicable in the territorial state, it is difficult to characterize the exercise of jurisdiction as one representing the interests of the territorial state.

A recent contemporary exposition of this forum-based rationale for exercising universal jurisdiction was given by German court in the *Djaji* case in 1997. It has not been possible to locate and translate the decision, but according to an authoritative summary account of the court's reasoning on universal jurisdiction:

"It concluded that public international law, far from barring prosecution, corroborated and supported the conclusion that the arguments in favour of prosecuting war criminals in Germany prevail over the limiting principle of noninterference. It considered prosecution as one measure among many others implemented by the international community - be they political, military or humanitarian in nature - aimed at limiting and eventually terminating the policy of expansion and oppression, as well as deportations and other human rights violations, on the territory of the former Yugoslavia. In view of all these efforts by the international community, national prosecution could not possibly infringe international law. The court concluded that it would be 'intolerable' under these circumstances if war criminals could live in liberty in Germany. Moreover, the aim of the

⁶⁰ For example, Henri Donnedieu de Vabres stated, in the context of ordinary crimes under national law, the duty of the forum state: "It intervenes, as a result of the failure to act by any other State, to avoid, in the interests of humanity, a scandalous impunity." (*"Il intervient, à défaut de toute autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse."*) Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* 135 (1928), quoted in Harvard Research, *supra*, n. 13, 574.

prosecution was seen as international in nature. The international community is attempting to deter crimes against civilians during armed conflict.”

Lastly, the court considered the particular interests of Germany in this context. Germany must safeguard and foster the trust and reliability of its own citizens in the national and international legal order (*Rechtbewahrungsprinzip*). The basis of this trust would be imperiled among German nationals if prosecutors ignored criminals from the former Yugoslavia. In addition, it is in Germany’s legitimate interest not to be seen by the international community as sheltering international criminals. Those who are under suspicion of having committed the most heinous crimes that are rejected by the community of states must not be seen to be living in a haven inside German borders.”⁶¹

Sometimes, advocates of the concept of an independent representational jurisdiction contend that the failure of the territorial state to request extradition should be seen as a waiver of jurisdiction equivalent to a delegation of the territorial state’s own jurisdiction to the forum state. However, in certain cases, the territorial state may well be unaware of the forum’s state’s investigation or prosecution.

In addition, the failure to request extradition should not be seen as a waiver of jurisdiction in and of itself. In the *Pinochet* case, Chile did not request the extradition of its former President, but it intervened to challenge the exercise of jurisdiction by both the United Kingdom and the request by Spain for his extradition. In some cases, the forum state will refuse to grant an extradition request, for example, when the requesting state wishes to impose the death penalty or is unable to guarantee a trial that is not a sham or unfair. In many cases, the territorial state will not have an extradition treaty with the forum state and, therefore, will not have any legal avenue to ask for extradition. In others, the territorial state may not have diplomatic relations with the forum state and, therefore, be unwilling to accord it any recognition by requesting extradition.

Some proponents of the representational theory claim that all treaties providing for an *aut dedere aut judicare* regime should be seen as a series of hundreds of bilateral waivers of jurisdiction otherwise prohibited by customary international law and delegations of the territorial state’s jurisdiction to each of the other states. This contention is not merely an overly complex explanation for what should simply be seen as imposing a duty on states parties to exercise a jurisdiction that they already have pursuant to a general rule of customary international law, but it also ignores the widespread acceptance of the state practice of prosecuting nationals of non-states parties to such treaties (see Introduction, Section VI.B). Given the widespread recognition by states of the principle of universal jurisdiction, it would seem that the failure of states to object to its exercise is instead confirmation that they believe that the exercise of such jurisdiction is fully consistent with international law.

⁶¹ *Public Prosecutor v. Djaji*, No. 20/96 (Sup. Ct. Bavaria 23 May 1997) (reported in Christoph Safferling, 92 Am. J. Int’l L. 528 (1998)) [*Bayerisches Oberstes Landesgericht, Urteil vom 23. Mai 1997 - 3 StR 20/96*]. The summary is in Safferling, *supra*, 531-532.

Moreover, when there are no links between the forum state and the suspect or the victim or the state's own interest, the national court is simply exercising universal jurisdiction, subject to a number of conditions. Indeed, a leading authority on extradition has commented on the characterization by the European Committee on Crime Problems of extraterritorial jurisdiction under multilateral "anti-terrorism" treaties (1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1971 Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents and 1979 International Convention against the Taking of Hostages) as based on the representational principle and stated that "this seems to be at most a subset of universal jurisdiction".⁶² Similarly, the representational principle is not seen as an independent basis of jurisdiction under international law in other leading commentaries on the subject, most of which list only the five principles outlined above.⁶³

In any event, whatever the merit may be of the concept of representational jurisdiction with regard to conduct that is only an ordinary crime under national law, it simply has no bearing when the forum state is seeking to enforce international law on behalf of the entire international community by prosecuting persons for conduct which constitutes not only ordinary crimes under the law of the territorial state, but also war crimes, crimes against humanity, genocide or torture under international law.

⁶² Gilbert, *supra*, n. 20, 324 n. 508. For a discussion of the provisions of these treaties, see Chapter Thirteen.

⁶³ See, for example, Akehurst, *supra*, n. 1; Bassiouni, *supra*, n. 13; Blakesley, *supra*, n. 13. One of the few contemporary experts to give the representational principle extended treatment is Henzelin, *supra*, n. 13, 30-32, 239-377.