Report of the Task Force on Extraterritorial Jurisdiction

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The importance of extraterritorial jurisdiction

In a world where businesses and individuals are increasingly operating in a global context, the issue of the extraterritorial application of national laws is assuming progressively greater importance. Traditionally, the exercise of jurisdiction by a state was generally limited to persons, property and acts within its territory. However, the growth of multinational corporations doing business across borders and on a global scale, the ease of modern travel between states, the globalisation of banking and stock exchanges, technological developments such as the internet, and the emergence of transnational criminal enterprises and activities, have combined to encourage states to exercise jurisdiction beyond their territorial boundaries.

The steady increase in states exercising extraterritorial jurisdiction has not, however, resulted in an abatement of the controversies surrounding such exercises. Extraterritorial jurisdiction involves a fundamental dilemma. On the one hand, every state has the right to regulate its own public order, so it is entitled to legislate for conduct occurring within its territory. This principle is often considered to be a corollary of state sovereignty. On the other hand, businesses and individuals are increasingly acting, and producing effects, across state borders. In doing so, they enliven the desire of states to assert their laws extraterritorially, which often results in the application of two or more national laws to the same conduct.

A law can be made to apply extraterritorially by any of the three branches of government. A legislature may pass a law expressly applicable to extraterritorial conduct, such as one prohibiting its citizens or corporations from bribing public officials in other states. Regulators may apply domestic laws to extraterritorial conduct, such as prohibiting cartels producing effects in the regulator's state, as well as cartels formed within the regulator's state. Individuals and corporations may also seek to invoke the law of a state in respect of extraterritorial conduct or assets, such as an individual seeking a judicial remedy for an extraterritorial tort eg, a crime under international law or certain human rights violations,

or a company filing for bankruptcy in one state with respect to worldwide assets. In such cases, courts must decide whether the law can or should have extraterritorial reach.

The desire of states, through their legislatures, executives and courts, to apply or enforce their national laws extraterritorially, and the concomitant risk of conflict that is created, raises two important questions:

1) when can and should a state be able to regulate conduct occurring outside its territory; and
2) how should overlaps of jurisdiction between two or more states be resolved?

The first question goes to the authority of a state under international law to assert its jurisdiction extraterritorially. It considers the bases on which international law permits states to exercise extraterritorial jurisdiction and the limits imposed on such exercises. As the law is not settled in some areas, this also raises questions about the practice of states and policy issues.

The second question goes to the appropriateness of a state asserting extraterritorial jurisdiction in a given case. Even where jurisdiction exists, a state may decline to exercise it based on doctrines such as comity, a reasonableness test, or the principle of subsidiarity. Where multiple states have an interest in the same conduct, they may also coordinate their conduct in order to resolve clashes of jurisdiction or seek to harmonise their laws.

A full understanding of both issues is thus required in order to understand the contours of extraterritorial jurisdiction, in both theory and practice.

Definitions and concepts

This section sets out definitions and fundamental concepts that form the basis of this report's examination of extraterritorial jurisdiction.

Jurisdiction

International law governing jurisdiction 'describes the limits of the legal competence of a State… to make, apply, and enforce rules of conduct upon persons. It concerns essentially the extent of each state's right to regulate conduct or the consequences of events'.[1] Although the term

1 *Oppenheim's International Law* (Robert Jennings & Arthur Watts eds, 9th ed 1992) 456; see also Vaughan Lowe, 'Jurisdiction' in *International Law* (Malcolm D Evans ed, 2nd ed 2006) 335.

'jurisdiction' is also used to describe the competence of international tribunals to hear a case, this report focuses on the exercise of jurisdiction by states rather than by international courts.

The fact that international law regulates the ability of states to exercise extraterritorial criminal jurisdiction is uncontroversial. Whether it also regulates the ability of states to exercise extraterritorial civil jurisdiction is, however, open to debate. Some commentators argue that international law imposes no restrictions on the jurisdiction of states in the civil sphere.[2] Others argue that similar jurisdictional issues arise in the criminal and civil spheres, particularly as the enforcement of civil jurisdiction often involves criminal sanctions, so the schemes are or should be the same or similar.[3]

This Introduction sets out the types of jurisdiction and bases of jurisdiction usually discussed in the criminal context. The individual chapters then explore to what extent these bases of jurisdiction are relied upon in other areas of law.

TYPES OF JURISDICTION

There are two approaches to distinguishing between different types of jurisdiction when exercised by a state.[4]

Outside the United States, the most common approach is to distinguish between prescriptive and enforcement jurisdiction. Prescriptive jurisdiction refers to the authority of a state to make its law applicable to particular persons or circumstances, usually through adopting legislation

2 See eg, Michael Akehurst, 'Jurisdiction in International Law' (1972–73) 46 *Brit Y B Int'l L* 145, 177 (concluding that customary international law imposes no limits on civil jurisdiction); Gerald Fitzmaurice, 'The General Principles of International Law' (1957 II) 92 *Recueil des Cours* 1, 218; Peter Manczuk, *Akehurst's Modern Introduction to Int'l Law* (7th rev ed 1997) 110.

3 See eg, Ian Brownlie, *Principles of Public International Law* (6th ed 2003) 298 (there is no reason in principle to distinguish between the permissibility under international law of civil and criminal cases); F A Mann, 'The Doctrine of Jurisdiction in International Law' (1964 I) 111 *Recueil Des Cours* 1, 73–81 (international law imposes substantial limits on civil jurisdiction); F A Mann, 'The Doctrine of Jurisdiction Revisited After Twenty Years' (1984 III) 186 *Recueil Des Cours* 19, 20–33, 67-77.

4 See eg, Restatement (Third) of the Foreign Relations Law of the United States § 401 (1987) (distinguishing jurisdiction to prescribe, adjudicate and enforce) [hereinafter Restatement (Third)]; Manczuk, *supra* n 2 at 109; Luc Reydams, '*Universal Jurisdiction: International and Muncipal Legal Perspectives*' (2003) 25 n 68 (distinguishing between legislative, judicial and executive jurisdiction, by reference to the branches of state authority); Brownlie, *supra* n 3 (distinguishing between legislative, or prescriptive, jurisdiction and executive, or enforcement, jurisdiction); Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *J Int'l Crim Just* 735, 736–37 (distinguishing between prescriptive and enforcement jurisdiction).

or, in some cases, through courts developing the law. Enforcement jurisdiction refers to the authority of a state to take action to enforce those laws through, for example, arresting, detaining, prosecuting, convicting, sentencing and punishing persons for breaking those laws.

Inside the United States, it is more common to distinguish between legislative, executive and adjudicatory jurisdiction. Legislative jurisdiction refers to the authority of the legislature to make laws applying to particular people or circumstances. Adjudicatory jurisdiction deals with the authority of courts to apply the law in particular cases. Executive jurisdiction refers to the authority of the executive to enforce laws or decisions emanating from the legislature or courts.

Authorities generally accept that legislative jurisdiction is a form of prescriptive jurisdiction and that executive jurisdiction is a form of enforcement jurisdiction. Debate exists, however, over whether adjudicatory jurisdiction is a form of prescriptive or enforcement jurisdiction, whether it straddles the two forms of jurisdiction, or whether it should be treated as a third concept.

EXERCISING JURISDICTION

States have authority under international law to exercise prescriptive and enforcement jurisdiction in their own territory. However, their ability to exercise these forms of jurisdiction extraterritorially is more complicated as it depends, at least in part, on what form of jurisdiction is being exercised.

Prescriptive/legislative jurisdiction: Two views exist on international law's approach to prescriptive/legislative jurisdiction. On the first view, articulated in the1927 decision of the Permanent Court of International Justice in the *Lotus* case, a state is entitled to extend its prescriptive jurisdiction outside its territory, subject to any rules prohibiting such prescription in certain cases.[5] However, some commentators question whether this approach applies to cases under international law in

5 *SS 'Lotus' (Fr v Turk)* 1927 PCIJ (ser A) No 10 at 18–19 (7 September) ('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.').

general,[6] as opposed to cases regarding the exercise of extraterritorial jurisdiction on the high seas.

The second view is that a state is not able to extend its prescriptive jurisdiction outside its territory unless permissive rules support such an exercise. Proponents of this view argue that states tend to justify their exercise of prescriptive jurisdiction on these permissive bases, rather than leave it to other states to object to the exercise of jurisdiction based on a prohibitive norm. Accordingly, assertions of extraterritorial jurisdiction are permitted only where there is a nexus between the state seeking to assert jurisdiction and the regulated persons or conduct falling within one of the established bases of jurisdiction.[7] This report generally adopts this second approach.

Executive/enforcement jurisdiction: There is general agreement that, subject to a permissive rule to the contrary, a state may not exercise executive jurisdiction in the territory of another state without the second

6 According to Judges Higgins, Kooijmans and Burguenthal in the *Arrest Warrant* case, the *Lotus* case represents the 'high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies': Arrest Warrant of 11 April 2000 (*Arrest Warrant*) (*Dem Rep of Congo v Bel*) 2002 ICJ 3 para 51 at 78 (14 February) (joint separate opinion of Judges Higgins, Kooijmans and Burguenthal). Similar criticisms have been levelled in separate and dissenting opinions discussing the *Lotus* approach in other contexts. See eg, *Fisheries* case (*UK v Nor*) 1951 ICJ 116, para 10 (separate opinion of Judge Alvarez) (observing that although the principle that states have the right to do everything not expressly forbidden by international law was 'formerly correct, in the days of absolute sovereignty' it 'is no longer so at the present day'); 'Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion', 1996 ICJ 226, 394–96 (8 July) (dissenting opinion of Judge Shahabudeen). The continued validity *vel non* of the PCIJ view (not, strictly speaking, a holding) in *Lotus* remains a subject of debate. Compare *Arrest Warrant*, 2002 ICJ 3 para 15 (separate opinion of Pres Guillaume) and *ibid* para 50 (joint separate opinion of Judges Higgins, Kooijmans and Burguenthal) (stating that '[t]he application of this celebrated dictum would have clear attendant dangers in some fields of international law') with *ibid* paras 51, 56, 76 (dissenting opinion of Judge Van den Wyngaert) (applying the *Lotus* test).

7 Lowe, *supra* n 1 at 342 ('The best view is that it is necessary for there to be some clear connecting factor, of a kind whose use is approved by international law, between the legislating state and the conduct that it seeks to regulate. The notion of the need for a linking point…accords closely with the actual practice of states.'); see also R Y Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *Brit YB Int'l L* 146, 150–61 (emphasising the need to cabin the scope of extraterritorial jurisdiction and summarising possible limiting principles).

state's consent.[8] Thus, a state cannot investigate a crime, arrest a suspect, or enforce its judgment or judicial processes in another state's territory without the latter state's permission. That does not mean, however, that it cannot undertake enforcement measures within its own territory, such as by prosecuting an offender found within the state's territory even, potentially, for acts committed outside its territory. Nor would it prevent a state requesting extradition of a suspect from another state.

Adjudicatory jurisdiction: To the extent that adjudicatory jurisdiction can be categorised as prescriptive or enforcement jurisdiction, it is subject to the same rules as set out above.[9] However, as its allocation between these concepts is controversial, so too is its application.

Where a national court asserts that its domestic laws are applicable to particular conduct occurring outside its state's territory, it is exercising prescriptive jurisdiction and should be subject to those principles. Where it convicts, sentences and punishes an offender, it is exercising enforcement jurisdiction and should accordingly be subject to the enforcement rules.

However, the appropriate principles are less clear when dealing with cases where a national court hears a case without asserting the application of its own laws. In the tort context, for example, a court in State A may hear a case about a tort occurring in State B, but may apply the law of State B in resolving the claim. In the criminal context, State A may hear a claim about a war crime committed in State B, but might apply international law rather than its domestic law to resolve the case.[10] It

8 See *supra* n 5 at 18 ('[T]he 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 powers 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 custom or from a convention.'); *Arrest Warrant* case, *supra* n 6 para 4 (separate opinion of Pres Guillaume); *ibid* para 54 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal); *ibid* para 49 (dissenting opinion of Van den Wyngaert).

9 O'Keefe, *supra* n 4 at 745; Lowe, *supra* n 1 at 332–33.

10 Some commentators argue that when a national court applies international (or internationally agreed) norms, it should not be limited by the principles of prescriptive jurisdiction because the state is not asserting the application of its own laws to extraterritorial conduct. See eg, Daniel Bodansky, 'Human Rights and Universal Jurisdiction' in *Human Rights and Universal Jurisdiction* (Mark Gibney ed, 1991) 1, 3–11; Rüdiger Wolfrum, 'The Decentralized Prosecution of International Crimes through National Courts' (1994) 24 *Isr YB Int'l L* 183, 186. However, given that it is difficult to apply broadly articulated international norms to specific facts and that international law does not resolve many issues, judges regularly draw on domestic laws and principles when deciding such cases. See Donald Francis Donovan & Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *Am J Int'l L* 142, 144–45. As a result, these cases still involve prescription, though possibly to a lesser extent: *ibid*.

is not clear whether domestic courts applying foreign or international law should be constrained by the same principles as those asserting the application of their own domestic law.

BASES OF JURISDICTION

The starting point for jurisdiction is that all states have competence over events occurring and persons (whether nationals, residents or otherwise) present in their territory. This principle, known as the 'principle of territoriality', is the most common and least controversial basis for jurisdiction. In addition, states have long recognised the right of a state to exercise jurisdiction over persons or events located outside its territory in certain circumstances, based on the effects doctrine, the nationality or personality principle, the protective principle or the universality principle. This list is not necessarily exhaustive, as other bases of jurisdiction may be recognised in the future. Nor are all of these bases of jurisdiction equally well accepted. Nonetheless, as these represent the most discussed bases of jurisdiction, they form the primary focus of this report.

The territoriality principle: The right of states to regulate events occurring in, and persons present within, their territory, is not controversial. However, states have been pushing the limits of this jurisdictional basis in two main ways.

First, some states have been asserting territorial jurisdiction based on relatively minor contacts with the territory only. For example, the Bribery and Corruption Committee notes that the US Foreign Corrupt Practices Act ('FCPA') relies primarily on territorial jurisdiction, but defines it broadly to require only a limited territorial nexus to the improper activity, such as the 'use of the mails or other instrumentality of interstate or foreign commerce in furtherance of' the improper activity.[11] This permits US regulators to enforce the FCPA based on minimal territorial contact.[12] Minimal contacts may also be used by individuals and companies to invoke a state's extraterritorial jurisdiction. For example, international companies without extensive US operations may seek bankruptcy protection within the United States based solely on having property there, including in at least one case simply having a recently-opened bank account.

In the criminal field, the Criminal Committee notes that some states

11 See generally Report of the Bribery and Corruption Committee, under 'Transnational anti-bribery legislation: the FCPA' at p 223.

12 See also Report of the Securities Committee, under 'Introduction' at p 275, discussing the similar approach of the United States in the securities field.

have recently shown an increased tendency to broaden the ambit of their criminal law by extending the principle of territoriality to crimes where only a small part of the conduct constituting the offence takes place in the forum state.[13] This tendency has been particularly apparent in the prosecution of business crime, corruption and international fraud, and intersects with current issues relating to the regulation of the internet and financial crimes crossing international and electronic borders.

Secondly, some states assert jurisdiction based on the effects doctrine, which refers to the ability of a state to assert jurisdiction over certain conduct committed by foreigners outside its jurisdiction where the conduct has a certain effect within the state. The effects doctrine is often considered to be an extension of the territoriality principle which focuses on the location of the conduct's effects, rather than the location of the conduct or offenders.

Although many systems recognise some form of the effects test, there is disagreement over what it means and how the test should be applied. The Antitrust Committee notes, for example, that the US Department of Justice ('DOJ') prosecutes 'foreign conduct that was meant to produce, and did produce some substantial effect in the United States', while the European Commission extends extraterritorial jurisdiction to cartel cases where the economic effects in the European Union are 'direct, immediate, reasonably foreseeable and substantial'.[14] By contrast, China's new Anti-Monopoly Law applies the effects doctrine, but it appears very reluctant to apply its laws beyond its territorial boundaries, while Japan appears to apply the effects doctrine, but its laws provide no guidance on the contours of the effects test.[15]

Controversy over the effects doctrine exists in subject areas other than antitrust.[16] For example, the Tort Committee found that, in some states, committing a tort within the state's jurisdiction can include situations where the cause of action arose within the jurisdiction because the damage caused by the tort was suffered there, even if the defendant's initial conduct occurred outside the forum state.[17] In other countries, territorial jurisdiction is more strictly limited to the place in which the tortious

13 See generally Report of the Criminal Committee, under 'Expansion of the territoriality principle' at p 142.

14 Compare *US v Nippon Paper Indus Co Ltd*, 109 F3d 1 (1st Cir 1997) with Joined Cases C-89/85 etc; *Ahlström v Comm'n* (*Wood Pulp*), 1993 ECR I-1307; 4 CMLR 901 (1988). See generally Report of the Antitrust Committee, under 'Cartels and unilateral conduct' at p 50.

15 See generally Report of the Antitrust Committee, under 'Basis of jurisdiction' at pp 48–49.

16 *Supra* n 13, at p 144.

17 See generally Report of the Tort Committee, under 'Jurisdiction based on effects within the jurisdiction' at pp 126–127.

conduct occurred. Common law countries are more likely to permit jurisdiction explicitly over extraterritorial torts, allowing effects-based jurisdiction in cases where some degree of damage, including consequential loss, occurs within their territory. In civil law countries, effects-based jurisdiction is generally not permitted except to the extent that a state has adopted a broad interpretation of the commission of a tort.

Although the effects doctrine remains controversial, its acceptability appears to be changing. For example, the Antitrust Committee found that virtually all jurisdictions apply some form of the effects test, whilst noting that both the meaning and application of the test vary considerably and in some cases are under-developed.[18] The Committee also reports that US courts have cut back on their historically aggressive extraterritorial reach in the antitrust area, while the UK courts have recently expanded their extraterritorial jurisdiction to provide some measure of EU-wide private damage remedies in this area.[19] However, this may be contrasted with the use of the effects doctrine in criminal cases, where some commentators have argued that the broadening of the principle of territoriality has resulted in improper prosecutions against foreign nationals, based on limited evidence that particular elements of the relevant offence occurred in the state seeking to exercise jurisdiction.[20]

The nationality/personality principle: The nationality or personality principle refers to the ability of a state to assert jurisdiction over its citizens and, in some cases, its residents or domiciliaries acting outside its borders. There are two main forms of the nationality or personality principle: active and passive.

The active nationality or personality principle focuses on the nationality (or, in some cases, the residence or domicile) of the alleged wrongdoer. In criminal law, for example, it refers to the ability of a state to extend its jurisdiction to crimes committed by its nationals abroad. Thus, State A would assume jurisdiction over certain conduct committed by one of its nationals in State B. The Criminal Committee found that most states recognise jurisdiction based on the nationality of the defendant, though some limit this to certain crimes, while fewer states recognise jurisdiction based on residence or domicile of a defendant.[21]

The passive nationality or personality principle focuses on the nationality (or, in some cases, the residence or domicile) of the victim of the alleged

18 *Supra* n 15, at p 50.

19 *Hoffman-LaRoche Ltd v Empagran*, 542 US 155 (2004); *Provimi Limited v Roche Products Limited* [2003] 2 All ER (Comm) 683; [2003] EWHC 961 (Comm). *Supra* n 15, at pp 48–49, 66–67, 68–69, 71.

20 *Supra* n 13, at p 144.

21 *Ibid.*

wrongdoing. In criminal law, for example, it would permit a state to prosecute a foreigner for a crime committed outside its territory but against one of its nationals. Thus, State A would assume jurisdiction over a foreigner who committed a crime in State B against a national of State A. The Criminal Committee found that civil law states are more likely than common law states to recognise jurisdiction based on the nationality of the victim, and that the existence and exercise of passive personality jurisdiction is often controversial, although the acceptability of passive personality jurisdiction appears to be increasing, at least in respect of some offences.[22]

While jurisdiction based on the nationality of the defendants is well accepted in criminal law, the same is not true in tort law. The Tort Committee found that most jurisdictions do not recognise tort jurisdiction solely on the basis of the defendant's nationality, but that such jurisdiction is permitted in France and countries adopting the French code, including Belgium and Luxembourg, as well as in Finland, in cases where the Brussels Regime is inapplicable.[23] However, most states do recognise tort jurisdiction based on the defendant's domicile or residence.[24]

Protective principle: The protective principle refers to the ability of a state to assert jurisdiction over certain conduct committed by foreigners outside its jurisdiction where the conduct could prejudice the state's most vital interests. The requirement that the conduct prejudice 'vital' interests makes this basis of jurisdiction narrower than most of the others. Common examples of such jurisdiction include State A prosecuting a foreigner acting in State B for engaging in espionage, counterfeiting, immigration scams, arms control laws, and perjury before consuls.[25]

Universality principle: The universality principle refers to a state's ability to assert jurisdiction over certain conduct committed by foreigners against foreigners occurring outside its territory and not implicating that state's essential interests. Unlike the other forms of extraterritorial jurisdiction listed above, the universality principle is not based on a particular connection between the case and the state exercising jurisdiction. Universality is most commonly discussed in the context of criminal law, but this terminology also appears in other fields.

In the criminal sphere, different approaches exist with respect to the definition of and rationale for the universality principle.[26] According to one approach, universal jurisdiction refers to 'jurisdiction based solely

22 *Ibid*, under 'Passive personality principle' at p 147.
23 *Supra* n 17, under 'Jurisdiction based on nationality' at p 127.
24 *Ibid*, under 'Jurisdiction based on residence or domicile' at p 125.
25 *Supra* n 13, under 'Protective principle' at pp 149–150.
26 *Ibid*, under 'Universality principle' at pp 150–151.

on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.[27] Following this approach, universal jurisdiction exists based on the nature of the crime, without regard to whether there are connections between the crime and the state exercising jurisdiction. According to another approach, universal jurisdiction refers to jurisdiction exercised without any link between the state and the crime based on territory, nationality or protection of the interests of the state.[28] Following this approach, universal jurisdiction is defined by the absence of jurisdictional links between the state and the crime, rather than by the nature of the crime.[29]

In the tort sphere, universal civil jurisdiction is even more controversial than in the criminal sphere.[30] Universal civil jurisdiction refers to the ability of states to provide civil judicial remedies for violations of human rights and other fundamental norms of international law without requiring a link between the subject matter of the dispute or the parties on the one hand and the forum on the other. The main state practice in favour of universal civil jurisdiction comes from the United States, where two federal statutes authorise US courts to exercise extraterritorial jurisdiction over torts arising from certain violations of international

27 Princeton Univ Program in Law & Pub Affairs, 'The Princeton Principles on Universal Jurisdiction' 28 (2001) [hereinafter 'Princeton Principles']; see also *ibid* at 23 ('This is the universal jurisdiction: it is jurisdiction based solely on the nature of the crime.'); M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Va J Int'l L* 81 (arguing that universal jurisdiction exists over the most serious international crimes); Kenneth C Randall, 'Universal Jurisdiction Under International Law' (1988) 66 *Tex L Rev* 785, 788 (stating that the universality principle 'provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended'); Comm on Int'l Human Rights Law and Practice, Int'l Law Assoc, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses 2 (2000) [hereinafter 'ILA Report'] (defining universal jurisdiction as entitling or even requiring a state 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 victim').

28 See eg, Int'l Law Comm'n [ILC], Preliminary Report On The Obligation to Extradite or Prosecute ('*Aut Dedere Aut Judicare*'), 19 UN Doc A/CN4/571 (7 June 2006) [hereinafter 'Preliminary Report'] (prepared by Zdzislaw Galicki), available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/379/01/PDF/N0637901.pdf?OpenElement; Reydams, *supra* n 4, at 5; O'Keefe, *supra* n 4 at 745.

29 Preliminary Report, *supra* n 28; see also Reydams, *supra* n 4 at 5; O'Keefe, *supra* n 4 at 745.

30 *Supra* n 17, under 'Universal civil jurisdiction' at pp 128–130.

law.[31] In addition, several civil law countries permit individual claimants to seek relief for civil wrongs in the context of related criminal proceedings, which are called *actions civiles*.[32] As many of the states that recognise *actions civiles* also recognise universal criminal jurisdiction, this could be seen as permitting a form of universal civil jurisdiction.

In the insolvency context, the same notion of territoriality and universality emerges, but its application is slightly different. Insolvency law distinguishes between a territorial approach, which describes a nation's purported exercise of exclusive jurisdiction over the assets and parties within its borders only, and a universality approach, which envisions a single court having worldwide jurisdiction over an entire multinational bankruptcy case, no matter where the assets are located.[33] Insolvency law also recognises a form of modified universality, where a single main case for the insolvency of a transnational business is opened in the business's home country, but where that court may recognise secondary proceedings opened in foreign courts as a supplement to the main proceeding.[34]

Sources

This report is concerned with the concept of extraterritorial jurisdiction under international law, and thus the concept is defined by the traditional sources of international law: treaties, custom, and general principles of law.[35] The report also examines the practice of extraterritorial jurisdiction, which in some circumstances has not yet crystallised into fully accepted international norms.

TREATIES

Treaties are written agreements entered into by states that create legal

31 *Ibid*, under 'Universal civil jurisdiction' at pp 112–117.

32 *Ibid*, under 'Special jurisdiction' at pp 120–121.

33 See generally Report of the Insolvency Committee, under 'Territorialism' and 'Universalism' at pp 313–315.

34 *Ibid*, under 'Modified universalism' at pp 315–316.

35 See Statute of the International Court of Justice, Article 38(1)(a), (b), and (c), 26 June 1945, 59 Stat 1055, 33 UNTS 993 [hereinafter 'ICJ Statute']. As a matter of practice, general principles of law are less often cited than treaties and custom. International judicial decisions and academic commentary are subsidiary means for determining international law, used primarily to identify, interpret and clarify rules of international law: see ICJ Statute, Article 38(1)(d); for a comprehensive analysis of Article 38, see A Pellet, 'Article 38' in Zimmerman et al, *The Statute of the International Court of Justice: A Commentary* (2006) 677–792.

rights and obligations between them.[36] As a matter of treaty law, treaties are only binding on the states that are parties to them. However, treaties may also, in certain circumstances, serve as evidence of customary international law.[37]

No generally binding treaty exists regulating extraterritorial jurisdiction. In some areas, specific treaties exist. For example, multiple treaties exist in the area of bribery and corruption, including the United Nations Convention Against Corruption and the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions.[38]

In other areas, attempts to develop a generally binding treaty, even dealing with limited areas, have thus far been unsuccessful. For example, the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters attempted to establish basic principles concerning extraterritorial jurisdiction over civil and commercial matters, including extraterritorial tort jurisdiction.[39] However, the negotiations ultimately ceased because no agreement could be reached and no final text was adopted.[40]

Some treaties exist which deal with jurisdiction on a regional level. For example, the European Union has multiple instruments governing certain aspects of extraterritorial jurisdiction, including the Brussels Convention, the Lugano Convention, and the Brussels Regulation. It has also adopted directives in a number of areas, such as insolvency, growing out of its treaties. It is not clear, however, that these regional rules influence the principles applicable under international law more generally.[41]

CUSTOMARY INTERNATIONAL LAW

Unlike treaties, customary international law binds all states except persistent objectors. The rules of customary international law can be: (i) mandatory, ie, they require states to act in a certain way; (ii) prohibitory, ie, they prohibit states from acting in a certain way; and (iii) permissive, ie, they permit states to act in a certain way. Rules with respect to jurisdiction can be of all three types, though most often, rules concerning jurisdiction

36 ICJ Statute, Article 38(1)(a) (referring to 'international conventions, whether general or particular').

37 See *infra*.

38 *Supra* n 11, under 'Provisions of major anti-corruption treaties' at pp 224–227, and Annex 1 at www.ibanet.org/images/downloads/etjtfbriberyannex1.pdf.

39 *Supra* n 17, under 'The Draft Hague Convention' at pp 89–92.

40 *Ibid*, last paragraph.

41 *Ibid*, under 'The Brussels regime' at pp 92–95.

are permissive rules that allow states to assert their jurisdiction, but do not require them to do so.

The Statute of the International Court of Justice refers to 'international custom, as evidence of a general practice accepted as law'.[42] The development of a rule of customary international law requires two elements: state practice and *opinio juris* (the belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law).[43] However, it is not always clear which actions constitute state practice and *opinio juris*, how uniform such state practice and *opinio juris* must be, and what is the proper relationship between these elements.[44] Accordingly, any reliance on custom requires some discussion of methodological issues.

In terms of state practice, this report follows the approach that both physical and verbal acts of the executive, legislative and judicial organs of a state can contribute to the formation of customary international law.[45] In establishing state practice in the field of jurisdiction, three forms of practice may be particularly important: (i) legislation and treaties that permit, require or prohibit the exercise of jurisdiction in certain cases; (ii) decisions of national courts and regulatory bodies either exercising or refusing to exercise jurisdiction; and (iii) reactions of states' legislatures, courts and/or executives to the exercise of jurisdiction by other states.

In terms of *opinio juris*, the relevant test is whether states assert jurisdiction, or refrain from asserting jurisdiction, based on a belief that such actions are permitted, required or prohibited under international law. While there are different views with respect to the specific practices

42 ICJ Statute, Article 38(1)(b).

43 See Continental Shelf *(Libya v Malta)* 1985 ICJ 13 para 27 (3 June); Military and Paramilitary Activities (*Nicaragua Case*) (*Nicar v US*) 1986 ICJ 14 para 183 (27 June); North Sea Continental Shelf (*FRG v Den; FRG v Neth*) 1969 ICJ 3 para 77 (20 February).

44 Brownlie, *supra* n 3 at 6–10.

45 Jennings, *supra* n 1 at 26 ('The practice of states in this context [Article 38] embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.'). In assessing the weight to be attributed to national courts' decisions as state practice, attention needs to be paid to the level of the court within the hierarchy of the national legal system. Final decisions that are no longer subject to appeal should be accorded more significant weight than decisions pending appeal.

that represent *opinio juris*,[46] all agree that the key is that the practice must be based on a perception of legal rights or obligations rather than policy or habit. *Opinio juris* is often defined as a belief that certain actions are required or prohibited by law.[47] However, this formulation is not appropriate when dealing with permissive customary rules, as distinct from mandatory or prohibitory ones.[48]

State practice includes both action and inaction. However, the motivation behind inaction can be difficult to determine in the context of permissive jurisdictional rules because international law does not require a state to 'legislate up to the full scope of the jurisdiction allowed by international law'.[49] Accordingly, restraint on the part of legislatures in enacting jurisdiction over particular categories, or decisions by courts refusing jurisdiction in a particular case, will be relevant only if they evidence a belief that such jurisdiction is not permitted under international law.[50]

State practice also includes both actions and reactions. If one state exercises jurisdiction over a particular case or category of cases, and other states acquiesce in that exercise, or object to it, then their reactions form an important source of state practice. These reactions can take the form of statements, legislation, court interventions, *amicus* briefs, and

46 *Nicaragua Case, supra* n 43 (noting ratification by parties to a case of treaties embodying a rule as a factor in determining *opinio juris*); Bruno Simma & Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View' (2000) 93 *Am J Int'l L* 302, 306–07; *ibid* at 311 ('Modern positivism… considers the acceptance of the practice of international bodies by states eg, in the cases of the Yugoslavia and Rwanda Tribunals and the Nuremberg and Tokyo Tribunals, as establishing the required *opinio juris*.').

47 ICJ Statute, Article 38(1)(b) (custom is 'general practice *accepted as law*') (emphasis added); Brownlie, *supra* n 3 at 8–10; J Brierly, *The Law of Nations* (5th ed 1954) 60–63.

48 See Manczuk, *supra* n 2 at 44.

49 See Arrest Warrant supra n 6.

50 If states fail to exercise jurisdiction because they believe such an exercise is inappropriate, rather than not permitted under international law, their practice will not be relevant to whether jurisdiction exists, but might be relevant to the determination of when the exercise of jurisdiction is appropriate. Cf *SS 'Lotus' supra* n 5 at 28 ('Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.').

countermeasures.[51] Where states fail to protest the alleged illegality of an action, this can amount to acquiescence in the legality of the action or it can be attributable to other, non-legal, causes.

Traditionally, custom has been based primarily on state practice, with *opinio juris* being used to distinguish between practice that was legally obligatory and practice that was not.[52] In recent times, a modern approach to custom has been mooted, which places greater emphasis on statements about the law, rather than on the actual practice of states, when dealing with more normative issues, such as human rights.[53] This approach, however, remains controversial.[54]

The relevance of treaty practice in establishing custom is difficult to assess. Treaties can codify existing customary rules, crystallise emerging customary rules, and be a catalyst for the development of new customary rules.[55] With respect to prohibitory or mandatory customary norms, the relevance of state practice under treaties can be ambiguous because that practice might be followed out of a sense of treaty obligation only or out of a sense of customary international law obligation. Things are clearer with respect to permissive norms, as state practice under treaties is followed out of a belief that the state is allowed to act in accordance with the treaty.

GENERAL PRINCIPLES OF LAW

General principles are the third primary traditional source of international law.[56] What constitutes a general principle of law, however, is a question of significant debate. Some maintain that general principles refer to general principles of international law, while others maintain that general principles are rather those fundamental propositions or features

51 Reactions are often public, but may also be communicated to other states in private, for example by diplomatic notes. There is some debate as to whether private communications are a relevant form of state practice in establishing customary norms. Regardless of this debate, in practice, such statements inevitably have less effect on the development of customary norms.

52 See ICJ Statute, Article 38(1)(b); see also *supra* n 43.

53 See Theodor Meron, 'Revival of Customary Humanitarian Law' (2005) 99 *Am J Int'l L* 817, 817 & n 3; Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *Am J Int'l L* 757, 758–59.

54 See Meron, *supra* n 53 at 817; J Patrick Kelly, The Twilight of Customary International Law (2000) 40 *Va J Int'l L* 449.

55 See North Sea Continental Shelf (*FRG v Den; FRG v Neth*) 1969 ICJ.3 paras 63, 77 (20 February); Pellet, *supra* n 35 at 779.

56 For a comprehensive discussion of general principles of law, see *ibid* at 764–773.

that underpin all municipal legal systems.[57] Whether those principles are based in natural law or are binding by virtue of their prevalence is a further issue of debate.[58] As such, there are clearly different approaches to the methodology for deriving general principles of law – both comparative and conceptual approaches have received notable support.[59]

General principles may serve a range of important functions: 'the provision of legal rules in those areas which, while outside the normal scope of national rules of private law, do not fall within the traditional scope of international law'; rules of law 'which can fill gaps or weaknesses in the law which might otherwise be left by the operation of custom and treaty'; and the provision of 'a background of legal principles in the light of which custom and treaties have to be applied and as such […] may operate to modify their application'.[60]

Approaches to dealing with overlapping jurisdiction

One of the most difficult aspects of the exercise of extraterritorial jurisdiction is that it usually occurs in instances where more than one state has a claim to jurisdiction. For example, if a national of State A commits a crime in State B against a national of State C, all three states might have a legitimate basis on which to exercise jurisdiction based on the principles of active personality, territoriality and passive personality, and State D may also seek to exercise jurisdiction based on the principle of universality.

This dilemma leads to the question of how state authorities (legislative, executive and judicial) should approach cases where more than one state

57 See Malcolm L Shaw, *International Law* (5th ed 2003) 94 (surveying debate).

58 Compare eg, C W Jenks, *The Common Law of Mankind* (1958), and South West Africa (*Liber v S Afr; Eth v S Afr*) 1966 ICJ 6, 294–99 (18 July) (dissenting opinion of Judge Tanaka), and F T F Jalet, 'The Quest for the General Principles of Law Recognized by Civilized Nations' (1963) 10 *UCLA L Rev* 1041, 1044, with Advisory Comm of Jurists, Permanent Court of Int'l Justice, Procès-Verbau of the Proceedings of the Committee: 16 June –24 July 1920 at 324-25 (1920); F A Mann, 'Reflections on a Commercial Law of Nations' (1957) 33 *Brit YB Int'l L Brit* 20, 38–39.

59 See Wolfgang Friedmann, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 *Am J Int'l L* 279, 284–85, 289; Lord Asquith, 'In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd and the Sheikh of Abu Dhabi' (1952) 1 *Int'l & Comp L* Q 251; Bin Cheng, *General Principles of Law as Applied By International Courts And Tribunals* (2006) 24; Friederich R Kratochvil, *Rules, Norms, And Decisions* (1989) 12.

60 Jennings & Watts, *supra* n 1 at 40 ('General principles of law…do not have just a supplementary role, but may give rise to rules of independent legal force; and it is to be noted that general principles of law are included in Article 38 of the Statute of the Court in the same manner as are treaties and custom, rather than as one of the "subsidiary means" referred to in Article 38 (1) (d).').

has jurisdiction. In some cases, the fact that more than one state might exercise jurisdiction in theory does not lead to conflict in practice because only one state wishes to assert jurisdiction. But individuals and companies will not always know that ahead of time, so they may still have to be prepared to deal with the competing jurisdictional claims of both states. In other cases, multiple states may have and wish to exercise jurisdiction over the same conduct, individuals and/or companies. The situation is complicated when the states wish to apply different substantive laws, or laws with vastly different penalties for the same conduct.

As will be seen below, each committee considers a number of ways in which the problems caused by overlapping jurisdiction might be resolved. The purpose of this section is to provide a broad introduction to some of the approaches that exist for dealing with cases of overlapping jurisdiction, which include:

(a) creating a legal hierarchy or other test to determine which state has priority;
(b) encouraging states to adopt discretionary doctrines to refrain from exercising jurisdiction in certain circumstances (ie, no legal hierarchy, but consideration of doctrines such as reasonableness and comity to temper the use of extraterritorial jurisdiction);
(c) establishing methods of mutual recognition and cooperation between multiple states with jurisdiction (ie, no legal hierarchy, but systems to encourage cooperation between states to avoid jurisdictional conflicts); and
(d) encouraging harmonisation of laws (ie, no legal hierarchy, but encouraging convergence in the substance of laws to reduce the problems caused by jurisdictional conflicts).

Legal hierarchies and balancing tests

One way of resolving conflicts between overlapping jurisdictional claims is to establish mandatory rules that states must follow when determining whether or not to exercise jurisdiction in any given case. These rules could take the form of a legal hierarchy which must be followed, or set of principles that must be considered, in determining whether a state has, or should exercise, jurisdiction.

IMPOSING A LEGAL HIERARCHY

Following the first approach, a hierarchy could be established between potential bases of jurisdiction. For example, if State A has custody of an

accused who is alleged to have committed a crime in its territory, State A might have priority in prosecuting the crime over State B if State B's only connection to the crime is that the victim was one of its nationals.

There are obvious difficulties in recognising a formal hierarchy. While some jurisdictional bases might generally be regarded as stronger than others, it might be difficult to agree upon a hierarchy between all bases of jurisdiction. In addition, enacting a strict order of priority might enhance predictability but undermine justice in individual cases where more flexibility is required.

An alternative to creating a hierarchy between all of the bases of jurisdiction is to give primacy to certain types of jurisdiction, such as those based on traditional grounds for jurisdiction, like territoriality and nationality, and to make other forms of jurisdiction subsidiary, like jurisdiction based on protection and universality. This would allow bases of jurisdiction to be grouped together into broader categories that might be given primary or subsidiary status, rather than requiring a strict hierarchical relationship between all bases.

The Criminal Committee notes the existence of approaches based on primacy and subsidiarity in recent, specialised contexts.[61] For example, the Rome Statute for the International Criminal Court establishes the principle of complementarity, which gives national courts with traditional connections to a crime the first opportunity to investigate and prosecute alleged offenders, with ICC prosecution available where those states are 'unwilling or unable genuinely to proceed'.[62] A handful of states have also built notions of subsidiarity into their legislation or case law, for example Spanish courts have recognised universal jurisdiction but declared it subsidiary to the jurisdiction of the territorial state.[63]

As with adopting a strict hierarchy, recognising categories of primacy and subsidiarity might result in injustices in particular cases. The primacy and subsidiarity approach would also not resolve conflicts between bases of jurisdiction within each category (ie, within the primary category and within the subsidiary category), as opposed to between categories. This would allow for more flexibility in states deciding whether to exercise jurisdiction within those categories, but would also result in less certainty.

61 *Supra* n 13, under 'Subsidiarity approach' at pp 171–173.

62 Rome Statute of the International Criminal Court, Article 75(2), entered into force 1 July 2002 (2187 UNTS 90); see also Article 17(1)(a) and (b) (ICC cannot exercise jurisdiction where a state has investigated but, in good faith, decided not to prosecute) and preamble (ICC jurisdiction complementary to national criminal jurisdictions).

63 See eg, Sentencia del Tribunal Constitucional español reconociendo el principio de jurisdicción penal universal en los casos de crímines contra la humanidad, STC, 26 September 2005, Fundamentos jurídicos, 4.

To safeguard against injustice, any hierarchical approach would need to be subject to limits. For example, even if the territorial state were granted *prima facie* priority in prosecuting a crime, they might lose that priority if they were unable or unwilling to prosecute a claim.

IMPOSING A BALANCING TEST

An alternative to adopting a strict or rough hierarchy is to set out principles that states must consider in determining whether or not to exercise jurisdiction. These principles would be designed to test whether the state should exercise jurisdiction or defer to another state's exercise of jurisdiction.

Following this approach courts could, for example, adopt a reasonableness test to determine whether to exercise jurisdiction. Such a test would involve considering a number of factors, such as the links between the state and the conduct, the links between the conduct and another state wishing to exercise jurisdiction, where the case might be more conveniently heard, and the interests of justice. These factors would often suggest that courts with traditional connections (such as territoriality or nationality) would have a stronger basis for exercising jurisdiction compared with other states. However, this would not necessarily be so where, for example, the interests of justice suggest that such a state might not properly exercise jurisdiction in the case.

The Criminal Committee, for example, examines the possibility of a balancing or reasonableness test, whereby national courts or prosecuting authorities asked to exercise extraterritorial criminal jurisdiction would engage in a 'balancing test', weighing multiple factors to determine whether asserting such jurisdiction is possible and/or appropriate in the particular case.[64] Examples of this approach include the reasonableness test for jurisdiction in the Third Restatement of the Law, the US Foreign Relations Law, the 'real and substantial connection test' for criminal jurisdiction in Canada, and possibly also the test for deciding between arrest warrants under the European Arrest Warrant ('EAW') system.

The advantage of a balancing test over establishing a strict hierarchy is that it would allow flexibility and may permit more just outcomes in particular cases. It may also be easier to reach agreement on the factors that should be considered, as opposed to a strict or rough hierarchy for every case. The disadvantage of a balancing test is that it risks being applied in an overly-subjective manner, resulting in inconsistency and indeterminacy.

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64 *Supra* n 13, under 'Balancing or resonableness test' at pp 168–169.

Discretionary doctrines

A second way of dealing with overlapping jurisdictional claims is to establish discretionary doctrines that permit, but do not require, a state to refrain from exercising jurisdiction in particular circumstances.

A commonly employed discretionary doctrine is that of international comity. Following this principle, a state with jurisdiction may decline to exercise it if another state has a greater interest in applying its law to the conduct. In *Hoffman-LaRoche Ltd v Empagran*, for example, the US Supreme Court relied heavily on the doctrine of comity to restrict the extraterritorial reach of the Foreign Trade Antitrust Improvements Act, holding that, in determining congressional intent with respect to the extraterritorial reach of a statute, ambiguous statutes should be construed 'to avoid unreasonable interference with the sovereign authority of other nations'.[65] The Antitrust Committee advocates that states should rely on comity as a doctrine to honour the competition and antitrust laws of other nations and to restrict the extraterritorial reach of their national laws.[66] By contrast, the Criminal Committee notes that it is not clear whether the comity doctrine applies generally in the criminal context.[67]

Another discretionary doctrine is *forum non conveniens* under which civil proceedings can be stayed or dismissed in favour of proceedings in another jurisdiction with closer ties to the defendant or where the burden of the litigation is less onerous for the defendant.[68] The Tort Committee notes that this doctrine is widely recognised in common law states, but civil law countries do not generally recognise such a doctrine.[69] However, the Criminal Committee found that neither civil nor common law systems appear to apply the doctrine of *forum non conveniens* to criminal cases.[70] Many states apply some form of the 'double jeopardy' principle, which prohibits an individual being tried for the same crime twice, but only precludes repeat prosecutions within a single jurisdiction, and does not preclude prosecution in State A, followed by prosecution in State B (or prosecution in an international criminal court or tribunal).[71]

The difference between these discretionary doctrines, and the hierarchy or balancing test indicated above, is that they permit a state not

65 *Hoffman-LaRoche Ltd v Empagran, supra* n 19 at 164. *See supra* n 15, under 'The issues relating to extraterritorial enforcement' at pp 66–67.
66 *Supra* n 15, under 'Recommendations' at pp 73, 76.
67 *Supra* n 13, under 'Balancing and resonableness test' at p 168.
68 *Supra* n 17, under 'Jurisdictional limitations: forum non conveniens' at p 127.
69 *Ibid.*
70 *Supra* n 13, under 'Balancing and resonableness test' at p 168.
71 *Ibid*, under '*Ne bis in idem* – the rule against double jeopardy' at p 192.

to exercise jurisdiction but do not require such restraint, even if another state has a better claim to exercising jurisdiction over the conduct.

Cooperation and mutual recognition

Instead of asking states to decide unilaterally whether to exercise jurisdiction, particularly in cases where more than one state has an interest, another approach is to mandate or encourage states to coordinate their approaches or to adopt systems of mutual recognition. Cooperation can be helpful in avoiding jurisdictional conflicts, as well as in dealing with some of the complexities created by extraterritorial jurisdiction, such as the collection of evidence outside a state's borders.

Systems of cooperation can be put in place to avoid jurisdictional conflicts and to deal with overlapping jurisdictional claims once they arise. Systems of mutual recognition provide common examples of the former approach. Mutual recognition does not seek the harmonisation of substantive laws. Instead, a system is developed where one state's jurisdiction is given primacy with respect to certain actors and conduct and other states generally defer to the decisions of that state.

There are many areas where systems of cooperation or mutual recognition can be seen. The Securities Committee notes that an area where mutual recognition has been implemented, at least in part, is in the context of securities regulation in the European Union.[72] Moreover, quite recently, the concept of mutual recognition is being widely discussed in the United States and the US Securities Exchange Commission ('SEC') has begun talks with a few regulators with the intent to lead towards a limited type of mutual recognition. Under the EU passport, cross-border securities market activity takes place on the basis of approvals and authorisations obtained in the home Member State, whilst a host Member State can only add limited (if any) additional requirements. With the passport, a regulated entity can provide services or conduct activities across the European Union by meeting only a single country's regulatory requirements.

The Insolvency Committee notes that cooperation and mutual recognition were the central drivers towards the development of the EU Insolvency Regulation and the UNCITRAL Model Cross-Border Insolvency Law.[73] For example, under the EU Insolvency Regulation, where a debtor opens an insolvency proceeding in its home country, defined as the

72 *Supra* n 12, under 'Convergence or standardisation, exemption and recognition' at p 280.
73 *Supra* n 33, under 'Competing jurisdictional claims: the quest for international solutions' at p 317.

debtor's centre of main interest ('COMI'), that court will have primary jurisdiction over the case and any proceedings opened in other states will be secondary and subject to the law of the primary jurisdiction. However, disputes often emerge about which state can be considered the centre of the debtor's main interests, particularly when dealing with multinational companies and multinational corporate groups.[74]

A number of the committees recommend increasing cooperation between states on a broad range of issues, from substantive definitions to enforcement actions. For example, the Antitrust Committee proposes that authorities reviewing merger notifications where multiple agencies assert jurisdiction should coordinate to give precedence to countries where the transaction will give rise to the most substantive competition concerns and to ensure any remedies imposed are compatible and enforceable with a multijurisdictional effect.[75] Similarly, the Criminal Committee recommends that states should cooperate in resolving competing jurisdictional claims, citing as examples mutual legal assistance treaties, the 2007 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the UK and US', the 2005 EC Green paper 'On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings', and recent efforts within the European Union, International Criminal Police Organisation ('Interpol') and the European Police Office ('Europol') to increase cooperation in the investigation and cooperation of international crimes.[76]

Cooperation can also take place after a case comes to light in working out, for example, which state should prosecute the case. For example, the Bribery and Corruption Committee notes that the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions exhorts states having extraterritorial jurisdiction to work towards agreeing on a single prosecuting jurisdiction, while the UN Convention Against Corruption encourages states to coordinate their actions, but does not require them to agree to one centralised prosecution.[77] The Securities Committee likewise recommends that a protocol should be developed to identify a lead regulator who would be responsible for running an investigation in order to avoid duplication of information requests and interviews by regulators.[78]

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74 *Ibid*, at pp 327–331, 333–334.

75 *Supra* n 15, under 'Recommendations' at p 73.

76 *Supra* n 13, under 'State practice and illustrations' at pp 178–179, 'Difficulties in investigations and prosecutions and possible solutions' at p 185.

77 *Supra* n 11, at pp 229–230, 254.

78 *Supra* n 12, under 'Streamlining cross-border enforcement' at p 300.

Cooperation between states may also be helpful on the practical level of mounting prosecutions. For example, when anti-competitive offenders are located abroad, the evidence of their conduct often also lies abroad. In such cases, the Antitrust Committee notes that it is helpful for the agencies in the various states to cooperate, as occurred in the *International Air Cargo Cartel* and the *Marine Hose* cases.[79] International and regional organisations such as Interpol and Europol have also increased cooperation on the investigation and prosecution of international crimes, including crimes based on extraterritorial criminal jurisdiction.[80]

Cooperation in enforcing jurisdiction is helpful, but it is not a panacea for all problems arising out of extraterritorial jurisdiction. Even if states later agree that one will take the lead in, for example, prosecuting certain behaviour, individuals and businesses will not know which state that is ahead of time, and thus must still be conscious of all possible laws that could be applied to them. This potentially raises due process issues such as the principle of legality (no crime without law) and investigations *in absentia*. States are also less likely to cooperate where they have different substantive laws and have a particular interest in the case.

Harmonisation of laws

Overlapping jurisdictional claims are most problematic where multiple states wish to assert jurisdiction and their substantive rules diverge. One way of dealing with this situation is to seek to standardise the substantive laws so that individuals and businesses are not subjected to conflicting standards, regardless of which state or states eventually exercise jurisdiction. This approach does not focus on jurisdiction *per se*, but rather on harmonising substantive laws so that jurisdictional conflict becomes less problematic. The problem of conflicting legal standards and outcomes is evident in many areas. The Antitrust Committee notes that there have been examples where one competition authority clears a merger and another prohibits it.[81] In *Gencor-Lonrho*, the European

79 Office of Fair Trading ('OFT') Press Release, 'OFT Investigation into Alleged Price Coordination in Relation to Long Haul Passenger Flights to and from the UK' (22 June 2006) (announcing the OFT will undertake civil and criminal investigations in relation to fuel surcharges and long-haul passenger flights to and from the UK); OFT Press Release, 'OFT Bring Criminal Charges in International Bid Rigging, Price Fixing, and Market Allocation Cartel' (19 December 2007) (announcing the OFT is bringing criminal charges in international bid rigging, price fixing and market allocation cartel). See generally *supra* n 15, under 'Cartels and unilateral conduct' at pp 50–51 and 'Cartels' at pp 51–52.

80 *Supra* n 13, under 'Difficulties in investigations and prosecutions and possible solutions' at p 185.

81 *Supra* n 15, under 'Mergers' at p 57.

Union prohibited a merger that the South African competition authority had already cleared,[82] while in *GE/Honeywell*, the European Commission prohibited a merger after it had been cleared by the US Federal Trade Commission.[83] In an effort to avoid such problems, the committee recommends that states adopt the International Competition Network's Recommended Practices on merger control.[84]

The Securities Committee recommends that appropriate responses to cross-border regulatory issues are likely to occur on a spectrum from harmonisation to the various types of recognition of another system (mutual or unilateral), depending on the policy goals implicated.[85] The committee commends the effort to harmonise accounting principles in accordance with International Financial Reporting Standards ('IFRS') and suggests that states should work together to increase harmonisation between, for example, the IFRS adopted by the International Accounting Standards Board, the IFRS as adopted by the European Union, and the US Generally Accepted Accounting Principles ('GAAP').[86] The Committee also recommends standardising common definitions in the field, such as the definition of 'sophisticated persons'.[87]

Even where the substantive law is harmonised, remedies may differ between countries. For example, in the bribery and corruption context, the Norwegian authorities commenced an investigation against the Norwegian oil company Statoil for bribes allegedly paid in Iran, resulting in the company having to pay a US$3 million fine.[88] As Statoil was also listed in the United States, the US authorities subsequently commenced an investigation of the same conduct, leading to the SEC and DOJ both prosecuting the company. The US case was ultimately resolved by a settlement in which the company agreed to pay a fine of US$21 million to the US authorities, minus the amount it had already paid to the Norwegian authorities. The Antitrust Committee recommends that enforcement agencies should coordinate at the remedies stage, having regard to their ability to enforce a particular remedy in practice, to avoid unnecessary duplication.[89]

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82 Case IV/M619, *Gencor/Lonrho*, OJ 1996 L 11/30; Case T-102/96 *Gencor Ltd v Comm'n* [1999] ECR II-753, 4 CMLR 971 (1999).

83 Commission Decision, COMP/M2220, *General Electric/Honeywell*, OJ 2001 L 48/1, aff'd Case T-210/01, *General Electric v Com'n* [2005] ECR II-5575.

84 *Supra* n 15, under 'Recommendations' at p 75.

85 *Supra* n 12, under 'Convergence or standardisation, exemption and recognition' at p 285.

86 *Ibid*, at pp 281, 293.

87 *Ibid*, under 'Sophisticated person definition' at pp 295–298.

88 *Supra* n 11, under 'Introduction and scope' at pp 211–212.

89 *Supra* n 15, under 'Recommendations' at p 75.

Sometimes the difference in law is not about what conduct is prohibited, but which entities may be prosecuted and whether that prosecution is civil or criminal. In the area of bribery and corruption, the committee notes that some states permit criminal prosecutions of individuals but not companies, while others permit criminal prosecutions of both, which raises questions about double jeopardy.[90] Likewise, the Antitrust Committee notes that most issues arising out of extraterritorial prosecution in cartel enforcement hinge on the different approaches taken by jurisdictions (like the United States) that provide for criminal prosecution of companies and individuals, and jurisdictions (like the European Union and most EU Member States) that treat cartel conduct as purely civil in nature and that exclude individuals from prosecution.[91]

When it comes to trying to harmonise laws, the initiative is usually led by international bodies. For example, the Securities Committee notes that the International Organisation of Securities Commissions ('IOSCO') has done work on harmonising rules about disclosure, prohibitions on insider trading and principles for regulators.[92] In the European Union, the Committee of European Securities Regulators ('CESR') was established to seek improved coordination among securities regulators within the European Economic Area ('EEA') and to promote consistent supervision and enforcement.[93] Likewise, the Insolvency Committee commends the previous work of the IBA, including the IBA Model International Insolvency Cooperation Act and the IBA Cross-Border Insolvency Concordat, which provided the first model cross-border insolvency law and the first model for multijurisdictional court-to-court communication and cooperation in the insolvency field.[94] These efforts significantly informed the development of The Model Law on Cross-Border Insolvency by the United Nations Commission on International Trade Law, which has formally been incorporated into the laws of several jurisdictions to date.[95]

The OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions provides a good example of an international body helping to harmonise substantive laws. However, it has adopted a 'functional equivalence' approach, prescribing minimum standards for implementation at the national level while allowing for substantial latitude in implementation. The result is limited

90 *Supra* n 11, at pp 234, 237–238, 260. For further discussion of the double jeopardy principle, see *supra* n 13, under '*Ne bis in idem* – the rule against double jeopardy' at pp 192—93.

91 *Supra* n 15, under 'Cartels' at p 51.

92 *Supra* n 12, under 'Convergence or standardisation, exemption and recognition' at p 281.

93 *Ibid*, at pp 278, 285–286.

94 *Supra* n 33, under 'Introduction and scope of report' at p 309.

95 *Ibid*, under 'The uncitral model cross-border insolvency law' at pp 318–321.

harmonisation only, permitting differences between the substantive conduct prohibited by the implementing legislation in different countries and many other significant features, including jurisdictional requirements, subject persons (in particular, whether there is corporate criminal liability), penalties, statutes of limitations, exceptions and defences, and others.[96]

As with cooperation, there are many advantages to harmonisation of laws, but it is not a remedy for all of the problems relating to extraterritorial jurisdiction. Even when laws are harmonised, different legal systems are still likely to interpret the same rules in different ways. For example, the Securities Committee notes the problem of different national regulators in the European Union interpreting the same securities provisions in different ways.[97] Further, harmonisation does not answer the question about which state should exercise jurisdiction if multiple states could exercise jurisdiction. But harmonisation does provide a way of lessening the difficulties that arise from extraterritorial jurisdiction because, even if doubt about which state should exercise jurisdiction remains, there is at least agreement on the substantive laws that regulate the conduct.

96 *Supra* n 11, under 'Introduction and scope' at p 209.
97 *Supra* n 12, under 'Convergence or standardisation, exemption and recognition' at p 282.

Foreword by David W Rivkin[1]

The importance of extraterritorial jurisdiction

As globalisation continues to shrink the commercial world, governments and courts are increasingly seeking to extend their reach beyond national borders. The ever-widening scope of activities caught in these jurisdictional battles is causing concern within the international business community. Many jurisdictions now apply their laws extraterritorially in a myriad of fields, including antitrust, banking, bribery and corruption, criminal, insolvency, securities, transport, tax, telecommunications, tort, trade sanctions, privacy and human rights. These developments raise questions about when it is appropriate for states to exercise extraterritorial jurisdiction, what the benefits and problems of such exercises of jurisdiction are, and whether there are ways to minimise the risk of jurisdictional conflict.

As Chair of the IBA Legal Practice Division, I formed the Division's Task Force on Extraterritorial Jurisdiction in order to examine the law and practice on the extraterritorial application of national law and to make recommendations for resolving some of the controversies arising from such exercises of extraterritorial jurisdiction.

The IBA Legal Practice Division is in a unique position to examine these issues. Since the IBA was established in 1947, it has become the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA now has a membership of more than 30,000 individual lawyers and more than 195 bar associations and law societies spanning all continents. Its Legal Practice Division operates through more than 50 substantive committees containing many of the worldwide experts in those fields of law. Because its membership includes lawyers from a wide range of states specialising in a broad array of practice

1 Debevoise & Plimpton LLP; Chair, IBA Legal Practice Division.

areas, the Legal Practice Division is ideally suited to review the subject of extraterritorial jurisdiction.

In fact, the IBA Legal Practice Division has already made substantial contributions in this area. As described more specifically in the report of the Antitrust Committee of the Task Force, about a decade ago the IBA Antitrust Committee worked with antitrust regulators around the world to form the Global Competition Network ('GCN'). Its goal was to enhance communication among regulators about merger regulation and other competition issues that cut across national lines and to facilitate pre-merger reviews of multinational deals. Since then, the GCN has become the central forum in which regulators discuss these issues, and its actions have led to significantly enhanced coordination among antitrust regulators and easier review of multinational mergers. At the GCN annual meeting this year in Kyoto, Japan, its current president recognised the IBA for its importance in the formation of the organisation. In forming this Task Force, it has been my hope that the IBA Legal Practice Division can provide, through its expert analysis of the issues and its recommendations for actions by governments, private parties and organisations like the IBA, a similar benefit and reduction in the number of controversies arising from the exercise of extraterritorial jurisdiction.

This report more than meets my hopes and expectations. The IBA Legal Practice Division is enormously indebted to the Task Force Co-Chairs – Michael A Greene of A&L Goodbody, Dublin, Ireland and Claus von Wobeser of von Wobeser y Sierra ,Mexico City, Mexico – for their excellent work in assembling the committees and providing their expert guidance to the committees in accomplishing their work. We are also enormously grateful to Anthea Roberts of Debevoise & Plimpton, London, and now a lecturer of international law at the London School of Economics for her intellectual guidance and management of the Task Force. Michael, Claus and Anthea devoted many hours to the work of the Task Force. This report is a permanent testament to their labour.

I also want to join Michael and Claus in their thanks to the chairs of the Task Force committees, the rapporteurs for each committee and the committee members. Each committee report reflects the hard work of those chairs and rapporteurs and the valuable contributions of each committee's members. They have brought together many diverse points of view and backgrounds to draft reports that present an extraordinarily thoughtful analysis of the problems and helpful solutions for the future.

The IBA Legal Practice Division hopes that this report will be a valuable contribution to the debate surrounding the exercise of extraterritorial jurisdiction. In particular, we hope that it will provide guidance

to decision makers in national governments and to NGOs, private practitioners, corporations and others in working together to resolve the problems that arise in this context. The IBA Legal Practice Division plans to follow up on the recommendations made by the Task Force and to assist in those developments in the future.

Foreword by Michael Greene and Claus von Wobeser

The activity of the IBA Legal Practice Division Task Force

As issues arising out of the extraterritorial application of law span many areas of law, the Task Force on Extraterritorial Jurisdiction of the IBA Legal Practice Division had to be selective, and so took on the challenge of examining these issues in the following six areas of law:

(1) Antitrust and Competition
(2) Tort Law
(3) Criminal Law
(4) Bribery and Corruption
(5) Securities
(6) Insolvency

The Task Force chose to focus on these six fields in order to identify common themes and differences arising across a variety of civil and criminal fields. The selection of these areas was intended to be representative rather than exhaustive, as controversies about the extraterritorial application of national law arise in many other areas of law as well.

As each area of law required specialist expertise, the Task Force composed committees in each of these six areas. Each committee aimed to combine members with expertise in the field, representing multiple legal systems as well as different view points within legal practice. The committees were comprised of private practitioners, in-house lawyers, government lawyers, members of the judiciary, academics, and those working for international organisations and non-governmental organisations.

The Task Force did not dictate that each committee focus on the same questions or follow an identical formula. The pressing issues posed by the extraterritorial application of national law vary among areas of the law. In some cases, the primary focus is on legislation, while in others it is on regulatory actions or judicial decisions. The debate about extraterritorial jurisdiction is also well developed in some areas but only just emerging in others.

Instead, the Task Force asked the committees to identify relevant issues concerning the extraterritorial application of national laws that arise in their areas. They were also given a choice of which branch or branches of government they wished to focus on. In determining their focus, the committees were instructed to keep in mind the two overarching questions identified above.

Given both time and space constraints, the committees were necessarily selective and focused on some issues but not others. At the beginning of each chapter, the relevant committee identifies the issues on which it chose to focus on for its report. Each committee also identifies particular recommendations that it makes in its area.

We are delighted with the result of more than two years hard work contained in this publication. We are very grateful to all of those committee Chairs, Rapporteurs and committee members who have given their time so generously to this project. We are particularly indebted to Anthea Roberts for helping to steer this work to completion. Her expert knowledge of the subject matter combined with her skill in keeping busy professionals focused on meeting schedules and maintaining standards enabled the Task Force to achieve its objectives on time. We would also like to acknowledge with thanks the support of Louise Byrne and her colleagues at Debevoise & Plimpton as well as Tim Licence, Jackie Davis and Laura Shipway at the IBA.

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CHAPTER 1

Antitrust

Antitrust Committee

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Introduction

The extraterritorial application of antitrust law

In a world where business acts on an increasingly global scale, the extraterritorial application of antitrust laws assumes major importance.[1] Where business is conducted within national boundaries, the application of national competition laws is relatively straightforward. Under international law principles countries are allowed to exercise jurisdiction, whether this is *prescriptive* jurisdiction to enact specific rules, or *enforcement* jurisdiction to take coercive measures, to ensure compliance with those rules. Within national boundaries, the *territoriality principle* is often the basis of jurisdiction (ie, jurisdiction may be exercised by a state over its territory including legal persons who are located there or who carry out activities there). The problems and issues arise where the scope of companies' activities are no longer tied to their location. How far can national antitrust rules apply to that conduct? This will depend on the principles of extraterritoriality which are accepted by a particular state, for example the *principle of nationality* (ie, jurisdiction may be exercised by a state over the acts of its nationals, even where the act took place abroad) and the *effects doctrine* (ie, jurisdiction of a state may be exercised over an act conducted abroad which has effects in that state).

In this chapter we examine the extraterritorial application of the antitrust laws in a number of key jurisdictions, namely the United States, the European Union, Australia, Brazil, Canada, China, France, Germany, Japan, Korea, and the United Kingdom. The chapter is based on the

1 See eg, Antitrust Modernisation Comm'n, Reports and Recommendations (2007), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm. The Recommendations addressed extraterritoriality and contained a section titled, 'US Antitrust Laws Should Not Interfere with Other Nations' Decisions on How to Best Regulate Their Economies', *ibid* at 229, http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf.

work carried out by the IBA Task Force on Extraterritoriality.[2] The aim of the chapter is to identify in the field of antitrust the main principles governing extraterritoriality and the actual and potential conflicts and problems which may arise. In this respect, the chapter seeks to answer two fundamental questions:

(a) When *can* a state enforce its antitrust laws against persons or conduct occurring outside its territory? This goes to the power of a state under public international law – what bases of jurisdiction are permitted and what legal limits are imposed?

(b) When *should* a state exercise such extraterritorial jurisdiction? This goes to issues of coordination and discretion – even where jurisdiction might exist, how far does this lead to overlap or conflict of jurisdiction between two or more states and what factors are relevant in determining whether jurisdiction should be exercised?

The questions highlight the relationship between prescriptive and enforcement jurisdiction. The former embraces those acts by a state, usually legislative, where the state asserts the right to enforce its extraterritorial jurisdictional powers and where any related limits on such powers may be found. The latter embraces acts designed to enforce the prescriptive jurisdiction, either by administrative/executive action by the agencies of the state, or by judicial/adjudicatory action through the courts.

It is enforcement jurisdiction which gives rise to the majority of conflicts and problems. One example is in the context of merger control in the European Union: the thresholds stipulated in the European Community Merger Regulation ('ECMR')[3] are such that transactions with a Community dimension must be notified to the European Commission, therefore ensuring that EC jurisdiction is asserted on a sound territorial

2 Kei Amemiya Morrison & Foerster LLP, Andrea Appella, Rachel Brandenburger Freshfields Bruckhaus Deringer, Antonio Bavasso Allen & Overy LLP and University College London, Ilene Knable Gotts Wachtell Lipton Rosen & Katz, Ted Henneberry Heller Ehrman LLP, Joseph Seon Hur Yoon Yang Kim Shin & Yu, Thomas Jones Allen & Overy LLP, Donald Klawiter Morgan Lewis, Greg McCurdy Microsoft Corporation, Janet McDavid Hogan & Hartson, Hewitt Pate Hunton & Williams LLP, Dave Poddar Mallesons Stephen Jaques, José Augusto Caleiro Regazzini TozziniFreire, Michael Reynolds Allen & Overy LLP, Dr Marc Reysen Howrey LLP, Philippe Rincazaux Orrick Herrington & Sutcliffe LLP, Gavin Robert Linklaters, William Rowley QC McMillan Binch Mendelsohn LLP, Tefft Smith Kirkland & Ellis LLP, Gary Spratling Gibson Dunn & Crutcher LLP, Omar Wakil Torys LLP, Diane Wood US Court of Appeals (Chicago) for the Seventh Circuit. The LPD Task Force on Extraterritoriality in Antitrust Jurisdiction was coordinated by Michael Reynolds and Antonio Bavasso with the assistance of Louise Tolley of Allen & Overy LLP.

3 Council Regulation 139/2004, OJ 2004 L 24/1.

basis where two or more of the parties have significant activity in the European Union. Notwithstanding this, in the absence of cooperation from the authorities in the jurisdiction where the firms are located, it may prove difficult for the European Commission to enforce the ECMR against notifying parties, or third parties, located outside the European Union and not owning assets in the European Union.[4]

Scope of the chapter

The remainder of the chapter is split into the following three sections:

- Bases of jurisdiction, which identifies, for each of the jurisdictions listed, the general principles which govern the rules on extraterritoriality and the establishment of jurisdiction, and how these principles are enforced, for example through the collection of information and evidence, the imposition of fines and criminal sanctions (where applicable), and extraterritorial enforcement of judgments;
- Resolving competing jurisdictional claims, which discusses the extraterritoriality issues in relation to the administrative and judicial regulation of cartels, unilateral conduct (including criminal enforcement) and mergers; and
- Recommendations, which proposes steps which could be taken to minimise or resolve overlaps and conflicts arising from the extraterritorial exercise of jurisdiction.

Bases of jurisdiction

Competition law is acquiring an increasingly international dimension, bringing it into the realms of public international law. Trade and investment on a global scale are much more widespread and the geographical reach of the effects of cartels, mergers and unilateral firm conduct is ever expanding. Due to the lack of one uniform set of supranational rules (with the exception of the European Union), a regime of competition law based on national regulation within a system of state cooperation has developed. States must now achieve a balance between applying their domestic laws extraterritorially and allowing the state with the closest nexus to the particular transaction to judge the case (positive comity).

4 See Int'l Competition Network, ICN Merger Working Group: Analytical Framework Subgroup Merger Remedies Review Project para 3.2 (June 2005), www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Remedies_Study.pdf.

The tables in the Annex,[5] available online at the IBA website, contain an analysis of the rules on extraterritoriality for each of a number of key antitrust jurisdictions (namely the United States, the European Union, Australia, Brazil, Canada, China, France, Germany, Japan, Korea and the United Kingdom) in terms of both prescriptive and enforcement jurisdiction.

First, the tables identify the general principles which govern the rules on extraterritoriality and the establishment of jurisdiction (including comity principles). These would include such principles as the principle of territoriality, the principle of nationality and the effects doctrine (as explained above). They also consider how these principles are applied by particular jurisdictions in three different sectors: behavioural matters (ie, cartels and unilateral conduct), mergers and private litigation.

Secondly, each jurisdictional analysis covers issues relating to enforcement jurisdiction. This includes: the collection of information and evidence (including leniency and discovery); the sharing of information and evidence with other agencies; the basis for the calculation and imposition of fines, remedies, and criminal sanctions; and the extraterritorial enforcement of administrative decisions or judgments.

The tables show clearly that states around the world do still continue to adopt different approaches to the concept of extraterritoriality. In practice, smaller states tend to be far less proactive than the United States and European Union in actually attempting to assert extraterritorial jurisdiction for numerous reasons, for example, historical deference to the older, more established US and European legal systems, lack of power and resources, and difficulties in collecting evidence located abroad. Many countries also have a far less mature system of private enforcement compared to, for example, the United States.

However, despite the lack of centralised bureaucratic control of international competition law, generally accepted principles do exist. These objectives attempt to govern when a state should be able to regulate foreign persons or conduct occurring outside its territory and how conflicts of concurrent jurisdiction should be resolved. For example, it is evident from the tables that there is a fair degree of consensus on the application of an 'effects based' jurisdictional framework to determine the extraterritorial application of competition laws. However, the working definition of 'effects' varies considerably – or it may be that many jurisdictions merely espouse the 'effects test', without any, let alone a consistent, statutory or judicial delimitation.

5 www.ibanet.org/images/downloads/etjtfantitrustannex1.pdf.

In comparing the divergence in the willingness or reluctance of different jurisdictions to embrace extraterritoriality, the following points can be noted:

- While the US courts have cut back on their historically aggressive extraterritorial reach, the UK courts have recently expanded their jurisdiction, at present providing some measure of EU-wide private damages remedies.
- Korea is showing a willingness to change its previously passive approach to extraterritoriality.
- Brazilian legislation is clear with respect to extraterritorial issues in behavioural matters, making use of the territoriality principle combined with the effects doctrine.
- France and Germany apply principles of extraterritoriality and use the effects doctrine as the decisive criterion.
- Canada has, until recently, adopted a restrained and cautious approach to the extraterritorial enforcement of its competition laws. However, the authorities are showing interest in expanding the application of the widely drafted Canadian laws.
- Japan appears to apply the effects doctrine, but there is no guidance on this issue.
- Chinese law recognises the territoriality principle, and its new anti-monopoly law applies the effects doctrine. However, China appears to be very reluctant to apply its laws beyond Chinese territorial boundaries.
- Australia has a limited scope of extraterritorial application of its competition laws as the proposed transaction or conduct in question must be assessed by reference to its impact on a market in Australia.

Resolving competing jurisdictional claims

The following sections discuss the extraterritoriality issues which arise (predominantly) as a result of the exercise of enforcement jurisdiction (and, in particular, issues arising as a result of competing jurisdictional claims). To this end, enforcement jurisdiction can be broadly divided into three areas (the first two encompassing administrative action by agencies of the state, and the third covering judicial/adjudicatory action through the courts):

- cartels and unilateral conduct (ie, behavioural matters), including criminal enforcement;
- mergers; and
- private enforcement and litigation.

Each of these areas presents its own distinct problems. The issues

increasingly arise in the wider international arena, and not just between Brussels and Washington, as more and more countries introduce or strengthen their antitrust laws. This section therefore considers where issues have occurred or could occur in jurisdictions other than the United States and EC (and in particular certain EU Member States which have specific issues that arise under their own national antitrust laws). The work of the International Competition Network ('ICN') is also considered. The ICN was set up in 2001 to help achieve greater convergence in international antitrust enforcement and the resolution of conflicts. It has done a great deal of work in this area in its working parties on Merger Control, its Cartel Working Group, and the recently-established Group on Unilateral Conduct.

Cartels and unilateral conduct

Cartels are operating on an increasingly global basis. For this reason questions arise as to, for example, how far the European Union could take action where US and Japanese companies conspire to raise prices for certain goods in Asian markets on the basis that there were residual, if tenuous, effects on prices for consumers in Europe? An Asian producer who relies on these raw materials for the sale of his products in Europe may have to raise the price of the end products supplied into Europe to recover that additional cost. If he sells those products to a European distributor, the ability of that distributor to compete against other European distributors who obtain their products from a manufacturer not exposed to the cartelised raw material price would be affected. Is that effect too remote to trigger the application of the Community competition rules?

There are also important procedural issues. When anti-competitive offenders are located abroad, the evidence of their conduct often also lies abroad. There is extensive international cooperation between agencies as was seen recently in both the *International Air Cargo Cartel* case,[6] and

6 On 22 June 2006, the Office of Fair Trading (OFT) announced it will undertake civil and criminal investigations in relation to fuel surcharges and long-haul passenger flights to and from the United Kingdom. There are also existing civil claims in the United States, Australia and Canada. See OFT Press Release, 'OFT Investigation into Alleged Price Coordination in Relation to Long Haul Passenger Flights to and from UK' (22 June 2006), www.oft.gov.uk/news/press/2006/airlines; see also Samantha Spence & Nelson Jung, 'Price Fixing Allegations: Turbulence Ahead?' (24 July 2006), http://competition.practicallaw.com/9-203-5654.

the *Marine Hose* case.[7] But what happens when that cooperation does not produce the information the agency requires? How far can it act directly in carrying out investigations in foreign countries through requests for information, interviews with executives, or even on-the-spot inspections? Can it order the extradition of executives of foreign companies?

Extraterritorial questions also arise in abuse of dominance cases. It is true that most antitrust enforcement agencies can only invoke their antitrust laws against dominant firms who abuse their position on the basis of a dominant position held in their own jurisdiction. However, this does not mean that extraterritorial issues and conflicts cannot arise particularly in relation to business conduct by multinational companies operating in a global economy.

The analysis undertaken in 'Bases of jurisdiction' above establishes that there is a fair degree of consensus among agencies (and courts) on the application of an 'effects-based' jurisdiction test for cartel and unilateral conduct cases. For example, the US Department of Justice ('DOJ') prosecutes 'foreign conduct that was meant to produce, and did produce some substantial effect in the US'.[8] The European Commission (if not the European Court of Justice) applies a similar policy and extends extraterritorial jurisdiction to cartel cases where the economic effects in the European Union are 'direct, immediate, reasonably foreseeable and substantial'.[9] The expansion, however, of global antitrust enforcement, while having the salutary benefit of punishing competition abuses and harm to consumers, also directly exacerbates the tension inherent in exercising extraterritorial jurisdiction. Efforts by enforcement authorities especially through organisations such as the Organisation for Economic Cooperation and Development ('OECD') and ICN have achieved some success in mitigating the conflicts, especially in mergers and cartel cases. However, despite having a similar 'effects' based jurisdictional framework, the contrast in the experience between, on the one hand, international cartel enforcement and, on the other, unilateral conduct cases involving multinational companies, could not be more stark in terms of comity and collaboration among enforcement authorities.

7 See OFT Press Release, 'OFT Brings Criminal Charges in International Bid Rigging, Price Fixing and Market Allocation Cartel' (19 December 2007), www.oft.gov.uk/news/press/?s=2007.

8 *United States v Nippon Paper Indus Co Ltd*, 109 F 3d (1st Cir 1997).

9 Case C-89/85, *Osakeyhtio v Comm'n* [1993] ECR I-1307.

CARTELS

In cartel enforcement, there has been of course an increasing global awareness of the pernicious effects of cartels on society and, more fundamentally, a recognition that detection and punishment require cooperation and collaboration among enforcement authorities. Similarly, there is no dispute – in principle at least – over the imposition of multiple remedies for cartel violations on the grounds of 'dual sovereignty', ie, each sovereign is entitled to seek penalties for violations of its laws from the ill effects of the cartel in their respective jurisdictions. Moreover, authorities expressly advocate that the prospect of multiple penalties will further deter cartel behaviour. Such joint interest has minimised, though not eliminated, the potential conflicts in prosecution of cartel cases.

The effective orchestration of the 'stick' of multijurisdictional criminal liability and the 'carrot' of multijurisdictional leniency, whilst in theory being a powerful tool in combating international anti-competitive behaviour, also raises distinct issues in relation to extraterritorial enforcement. In fact, most issues arising out of extraterritorial prosecution in cartel enforcement hinge upon the different approaches taken by those jurisdictions that provide for criminal prosecution of companies and individuals, most notably the United States, versus those adhering to the prevailing practice, such as the European Union and most EU Member States, of treating cartel conduct as purely civil in nature, and excluding individuals from prosecution. Notably, this balance is showing signs of change, with several countries having introduced, or considering the introduction of, criminal penalties for price-fixing cartels and other serious anti-competitive activities.

In the United Kingdom, criminal penalties for cartel activities include terms of up to five years' imprisonment and/or an unlimited fine, while in Canada the Competition Act[10] provides for criminal penalties of fines and imprisonment for such conduct as conspiracy, price maintenance, bid rigging, and misleading advertising. In Japan, violators of the Antimonopoly Act[11] can face imprisonment of up to three years or a fine of five million yen, and firms can face fines of up to 100 million yen. In Australia, proposed amendments to the competition laws would impose maximum penalties for the cartel offence of a term of imprisonment of five years and a fine of AU$220,000 for individuals and a fine for corporations that is the greater of AU$10 million or three times the value

10 Competition Act, RSC, ch 34 (1985).

11 Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No 54 of 1974.

of the benefit from the cartel or, where the value cannot be determined, ten per cent of annual group turnover.[12]

Despite these signs of change, the dichotomy between the countries that do and do not provide for criminal enforcement of cartel activities remains. It has led to issues, if not tension, mostly in the sharing of information and, in the case of individuals, issues involving travel restrictions, extradition and possible double jeopardy, and disproportionate punishment. The question arises, for example, whether an EU national from a Member State that does not provide for criminal prosecution of individuals for cartel offences, might be made subject to extradition to the United States, if found and detained while travelling in the United Kingdom.[13]

Extradition from the United Kingdom to the United States, for example, is subject to the US authorities showing that there is double criminality between the United States and the United Kingdom. This means in simple terms that the conduct concerned would be punishable with at least 12 months' imprisonment if it had occurred in the United Kingdom. This would ordinarily be the case for conduct after June 2003 when the UK cartel offence became law,[14] provided US prosecutors have some basis for asserting US jurisdiction over the conduct. For conduct prior to that date, in the *Norris* case it was argued that it was still possible to extradite a person from the United Kingdom to the United States on the basis that the conduct amounted to the criminal offence of conspiracy to defraud.[15] The House of Lords in that case however recently ruled not to extradite Norris on charges of price fixing from 1989 to 2000 on the basis that mere price fixing, without more, was not a criminal offence pre-Enterprise Act under 'conspiracy to defraud'. Their Lordships made it clear that such a prosecution could be brought if there were aggravating features, such as dishonest misrepresentation, which accompanied the price fixing, but the fact that the price fixing was undisclosed is not, of itself, sufficient to found a prosecution at common law.

It is always important to note that, even where price fixing is not a criminal offence, cartel conduct often includes other criminal conduct which may provide prosecutors with additional offences on which to base an extradition request. Common examples, apart from conspiracy

12 Discussion Paper: Criminal Penalties for Serious Cartel Conduct, www.treasury.gov.au/documents/1330/PDF/Cartels_Bill_Discussion_paper.pdf.

13 Note that this may raise issues under the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222.

14 See (UK) Enterprise Act 2002 c 40 s 188.

15 (UK) Criminal Justice Act 1987 c 38 s 12.

to defraud, are false accounting and obstruction of justice. Thus, in the *Norris* case, the House of Lords also held that the charges relating to alleged attempts to obstruct the investigation by the US DOJ were extraditable offences, but remitted the case to the district judge for reconsideration of issues arising under the Human Rights Act.[16]

Nevertheless, there has been an unprecedented increase in multinational cooperation and collaboration with respect to investigations, information sharing and most recently, in providing suitable punishment of individuals in the appropriate locale, as illustrated recently by the criminal charges jointly brought by the United States and the United Kingdom against three British nationals in the *Marine Hose* cartel, and the willingness of the United States to transfer these individuals to the United Kingdom to serve their sentences. However, there are still restrictions on formal information sharing, especially for information obtained by compulsory process, due to domestic laws on disclosure of confidential personal information, as well as on the ability to extradite individuals due to a lack of 'dual criminality' between jurisdictions. At the same time, the limits on formal information sharing have been eclipsed by the amount of informal information sharing now taking place outside the scope of the formal agreements. Despite this, in practice, many countries resist further cooperation with US enforcement entities in particular because, for example, these jurisdictions do not necessarily agree with the criminalisation of competition law, do not recognise broad US-style discovery, do not acknowledge US-style privileges, and/or do not have extradition treaties with the United States.

While the US–UK coordination in the *Marine Hose* cartel case is a major step forward in resolving potential conflict, there remain important questions as to the extent to which sentences can be imposed repeatedly, given the number of jurisdictions affected. The same holds true in relation to the European Commission's recent rules for calculating fines, where it now may take into account a firm's global role in a cartel, beyond its impact ('effect') in the European Union. In the European Union, that may very well violate the principle of proportionality. Similarly, there are restrictions on the ability of enforcement agencies to provide information on individuals that may lead to personal criminal exposure due to the need to protect the rights of individual defendants. The use of cross waivers in multiple leniency applications has mitigated some of these concerns.

Finally, in terms of leniency more generally, issues arise due to

16 (UK) Human Rights Act 1998 c 42.

the fact that there exists a multijurisdictional patchwork of leniency programmes, each with their application timing, their particular discovery and cooperation obligations, and their respective liability exposures, producing possibly incompatible requirements. As a result, a corporation could receive immunity in one jurisdiction but find itself 'third-in' in another (subject to minimal protections and maximum carve-outs), or discover that seeking leniency in one jurisdiction has subjected it to joint and several liability in another jurisdiction that does not offer a leniency programme.

The problems associated with multiple leniency regimes are magnified for individual employees where there is an actual or perceived conflict between their interests and the interests of the employer corporation. Where a corporation is not likely to be 'first-in' for immunity, the risk of prosecution for the individuals can be very significant (although there is of course nothing to stop an employee – in the United Kingdom at least – making a unilateral personal leniency application in advance of his or her employer).

The *Marine Hose* case involves a novel solution to the very significant personal impact for foreign nationals who participate in a cartel that involves both conduct and 'effect' in the United States. The solution would not have been possible without the criminalisation of cartel conduct in both countries. As some of the conduct occurred in both the United States and the United Kingdom, the UK defendants concerned were able to agree to a split jurisdiction deal which did not involve them being prosecuted twice for the same conduct, thereby avoiding any difficulty with double jeopardy. The case also involved French, German, and Italian defendants. As this type of cartel conduct is not criminalised in their respective jurisdictions, they are being dealt with in the United States, and some of them have pleaded guilty in the United States and been sentenced to periods of imprisonment.[17] One example of increasing cooperation between prosecutorial authorities is a guidance paper jointly issued by the Attorney-Generals of the United Kingdom and United States in January 2007 entitled 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction Between the United Kingdom and the United States of America'.[18] The paper provides for greater information sharing

17 See *United States v Caleca*, No 07-60269-CR-KAM (SD Fla filed 15 November 2007), available at www.usdoj.gov/atr/cases/caleca_2.htm.

18 British Attorney-General, 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction Between the United Kingdom and the Unites States of America (2007)', www.attorneygeneral.gov.uk/attachments/AG_Guidance-Criminal_Cases_with_the_USA_2007.pdf.

and early consultation between UK and US prosecutors in criminal cases involving concurrent jurisdiction. Although not binding on either side, the paper demonstrates an increasing awareness of the need for government cooperation in all serious criminal cases (including criminal cartel cases) involving competing jurisdiction claims. The Guidance specifically excludes third parties from objecting or seeking to review a decision made under it. Thus, it provides no protection for individual rights that may be affected.

UNILATERAL CONDUCT

Unlike cartel enforcement, or even merger review, in the case of the unilateral conduct cases there is a marked divergence as to what the appropriate rules should be and fundamental disagreement over the benefits of enforcement. Thus the legal and economic framework applied by different competition authorities to assess whether a company is dominant or has substantial market power may lead to divergent outcomes. For example, the same type of business conduct by the same global company may be regarded as an abuse in one jurisdiction and as legitimate competition on the merits in another. That divergence, of course, is exemplified by the *Microsoft* case.[19] Furthermore, the remedies imposed to correct an abuse in one jurisdiction may have effects beyond it, as also demonstrated in the *Microsoft* case. The impact on global business and, specifically, innovation from conflicting rules and remedies, which some officials have characterised as 'a race to the bottom', remains the most intractable issue currently in international antitrust jurisprudence today.

Given the divergence in basic jurisprudential philosophies and rules, there is little surprise that there is very little comity involved in unilateral conduct cases, even when there are formal comity agreements, such as between the United States and the European Union, calling for mutual consideration of the impact of enforcement on the other's interests. Both the US and EU courts take the position that even where conduct is permitted in a foreign country, this does not preclude the right of the European Union and the United States to impose their own rules on that

19 See Case T-201/04, *Microsoft Corp v Comm'n* [2007] ECR 00; EU Press Release, 'Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine' (24 March 2004), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en; EU Press Release, 'Antitrust: Commission Welcomes CFI Ruling Upholding Commission's Decision on Microsoft's Abuse of Dominant Market Position' (17 September 2007), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/359&format=PDF&aged=1&language=EN&guiLanguage=en.

conduct, unless of course the foreign conduct is compelled by the relevant foreign law. The lack of convergence and comity is most evident in the area of remedies, as illustrated by the recent relief in the *Microsoft* case.

The ICN has established a working group to identify, as a first step, basic principles that most authorities can agree upon in unilateral conduct cases. Since the fundamental differences in rules have been set, in most cases, by the courts, it is not at all clear what overall effect this effort can have. Without leadership by the agencies, however, there will be little prospect of any progress.

CONCLUSIONS

The increasing consensus that effective cartel enforcement requires international collaboration has provided the necessary predicate among enforcement agencies to work to resolve conflicts arising out of extraterritorial jurisdiction.

There is widespread consensus to the effect that cartel enforcement is necessary to protect consumer welfare. There is further widespread consensus that the 'effects'-based test is consistent with each sovereign's need to detect and punish anti-competitive behaviour.

- While 'practical' comity appears to be the practice in the prosecution of companies engaged in multinational cartels, there are a myriad of unresolved issues relating to the protection of the basic rights of individuals subject to criminal prosecution in the United States, the United Kingdom, Canada, Australia and potentially states especially with respect to multiple and disproportionate punishment.
- In the case of enforcement in relation to unilateral conduct, however, the lack of convergence has accentuated the conflicts in extraterritorial application of respective competition regimes. That lack of consistency is detrimental to effective antitrust enforcement.
- Despite the professed agreement on principles of comity among nations, the lack of convergence in unilateral conduct cases has, as a practical matter, limited the grounds for the exercise of comity.

Mergers

In mergers, a key question arises when the prohibition of a merger between foreign undertakings, on account of effects on its territory, will prevent the whole merger taking place around the world. The seriousness of the problem is compounded when, in mergers affecting international markets, one agency applying its rules approves the merger

while another agency looking at exactly the same transaction comes to a different conclusion. For example, in *Gencor-Lonrho*,[20] the European Union prohibited a merger that had already been cleared in South Africa by the South African *competition* authority under South African merger control law. The most striking recent example is *GE/Honeywell*,[21] where the European Commission prohibited a merger that had already been cleared by the DOJ. Alternatively, there is the situation where two agencies approve a merger but subject it to conditions and remedies that are contradictory and incompatible.

A number of specific observations can be made regarding the issue of extraterritoriality in the context of merger control. Each of these observations has also been considered with particular regard to the well-developed merger control regimes in the United States, the European Union and Canada.

NOTIFICATION THRESHOLDS

The use of financial thresholds based on turnover/revenue or asset values is designed to provide a clear, 'bright-line' test for merger notification. Such tests, which avoid the use of market share thresholds in order to enhance legal certainty, form the basis of the notification tests of the European Union, the United States, and Canada.

The principal concern regarding the extraterritorial application of merger control rules is the possibility of review of a transaction by multiple jurisdictions, including jurisdictions where the transaction has limited or no substantive impact. The notification thresholds of some jurisdictions, including the European Union, the United States, and Canada, are defined at a level that means that many multinational firms face a high likelihood of merger review of the same transaction in multiple jurisdictions. The size of the transaction test may be met simply because of the size of the parties involved in the transaction, even if there is little or no nexus specific to the jurisdiction in question. For example, in the European Union, joint purchases by firms active in the European Union can trigger a filing requirement even though the sales and assets of the target in the European Union are nominal or even non-existent.

A related, but distinct, issue arises with regard to the size of interest

20 Commission Decision IV/M.619, OJ 1996 L 11/30 (EC), available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m619_en.pdf; Case T-102/96, *Gencor Ltd v Comm'n* [1999] ECR II-753.

21 Commission Decision COMP/M2220, OJ 2001 L 48/1 (EC), aff'd Case T-210/01, *Gen Elec v Comm'n* [2005] ECR II-5575, available at http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2220_en.pdf.

in the target that is acquired. The notification thresholds of certain jurisdictions may trigger a filing even where the size of the interest that the buyer acquires in the target would suggest there is little, if any, possibility of an impact on the competitive structure of the market. In the United States, the jurisdictional test is not tied to the concept of control, with the result that even a one to two per cent purchase of shares in a large foreign corporation could become subject to Hart-Scott-Rodino[22] ('HSR') notification where the acquirer is a US issuer (in contrast to the position where the acquirer is itself a foreign issuer, where the acquisition by that foreign acquirer will be notifiable, inter alia, only where that acquisition confers control over the foreign issuer).

By contrast, in Canada, notification is required only if the target has Canadian assets and at least 20 per cent of its voting shares are acquired. Similarly, in the European Union, the ECMR depends on the concept of control, which includes the ability to exercise decisive influence, which means that shareholdings of less than 20 per cent, with commensurate voting rights, are unlikely to require notification.

Notification burden on merging parties

In practice, it is recognised that the use of turnover or asset notification thresholds in order to achieve legal certainty means that a proportion of transactions will require reporting in which substantive concerns in fact do not arise. However, in such cases, some effort should be made to reduce the notification burden on the merging parties as, currently, issues of cost and time arise in mergers that involve extraterritorial considerations (ie, where the primary impact of the transaction is not in that jurisdiction).

The EU, US and Canadian rules all capture numerous transactions that do not give rise to substantive concerns. In both the United States and Canada, it is estimated that approximately 95 per cent of notified transactions are non-problematic. However, the Canadian notification regime is designed to impose a light regulatory burden on parties to non-problematic transactions, and the review process in such cases is usually completed within two weeks. In addition to a Short Form option, which in practice is used more often than the Long Form filing, merger parties can, and regularly do, seek exemption from filing obligations by requesting an Advance Ruling Certificate ('ARC'). ARC applications have no formal information requirements and are usually made in the form of

22 Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 USC s 18a.

a lawyer's letter to the Commissioner of Competition. The letters typically describe the parties, the proposed transaction, and the anticipated competitive impact. If a merger does not raise material competition concerns, the letter would typically be very brief and the ARC would be issued within two weeks.

In the United States, the Notification and Report Form does not require a detailed analysis of, or commentary on, the relevant markets or competitive conditions. In the absence of substantive concerns, the burden on the filing parties is fairly modest, and the 30-day initial waiting period may be terminated early with the agreement of the reviewing agency.

In the European Union, over 60 per cent of Phase I clearance cases in 2007 were dealt with by way of a simplified procedure, ie, a 'Short Form' notification where the transaction does not give rise to material horizontal overlaps or vertical relationships between the parties. However, the information burden in relation to a 'Short Form' notification is considerable. In particular, the Short Form still requires a substantial amount of information to be provided on market definition. Further, although the Short Form notification (somewhat) reduces the information burden on the parties, it does not shorten the time period for review of the transaction. The European Commission still almost invariably takes the full 25-working day period of a Phase I investigation.

There is also the issue of the information burden (including, particularly, a legal requirement to provide information) placed by reviewing agencies on third parties outside the jurisdiction in question. Often the quantity and scope of requests are not limited to ensure they are genuinely proportionate to what additional information is necessary (not simply useful) to determine the impact of the transaction. Such requests for information clearly raise issues as to the ability of the agency in question to enforce the information request. However, as a practical matter, corporate entities active at an international level may often regard themselves as bound to respond and are therefore subject to a considerable burden. The European Commission in particular has not refrained from sending detailed and lengthy information requests to third parties simply because they are located outside the European Union in the context of merger control proceedings.

DISTINCTION BETWEEN DOMESTIC AND FOREIGN ACQUIRERS

Jurisdictions vary in the approach they take to transactions involving foreign and domestic entities.

The ECMR, for example, catches transactions involving firms that have

substantial operations in the European Union, irrespective of whether or not the firms have their seat or their principal fields of activity there. No jurisdictional or substantive distinction is made between EU-based firms or firms based outside the European Union. As a matter of European law, it may be questionable whether the European Commission could assert jurisdiction over a transaction, even where there is a Community dimension under the ECMR, if the transaction was *not* implemented in the European Union or it is *not* foreseeable that the transaction would produce immediate and substantial effects in the European Union. However, as a practical matter, firms in such situations have not been willing to take the risk of completing such transactions without prior authorisation from the European Commission.

By contrast, in the United States, HSR notification thresholds do distinguish between acquisitions by US and non-US acquirers. An acquisition of foreign assets by a foreign acquirer is only notifiable under the HSR Act if the aggregate sales or aggregate assets of both the acquirer and acquired persons is greater than US$119.6 million, or if the value of the assets being acquired is greater than US$200 million. By contrast, these same thresholds do not apply to acquisitions by domestic acquirers – the thresholds applicable to domestic acquirers are much lower. But even if these higher thresholds are met, the acquisition still may not be notifiable if another exemption applies.

In Canada, as in the European Union, no jurisdictional or substantive distinction is made between domestic-based firms or firms based outside the country. However, the notification thresholds require in all cases that there be a clear nexus to Canada in the form of material Canadian assets or revenues. The target, at least, must always have significant assets in Canada, or Canadian assets that are generating significant revenues.

CONCLUSIONS

- There exists an international patchwork of merger control rules across the (more than 80) nations which have their own national merger control regime, each with differing levels of sophistication and development and often with varying requirements, for example, mandatory versus voluntary notification requirements, pre- and post-completion filings, and differing investigation periods for the relevant agencies.
- There is a lack of consistency in the types of notification thresholds adopted: financial thresholds based on turnover or asset values provide enhanced legal certainty, but many jurisdictions continue to rely on

market share tests.

- There is often a lack of consideration for the nexus of the transaction to a particular country, in the assessment of whether merger control jurisdiction is established. Transactions may be caught by a merger control regime simply due to the size of the parties involved or the type of interest being acquired in the target. This in turn may lead to conflicts with jurisdictions in which the transaction will have substantial effects on the local market, particularly with regard to prohibitions/conditional decisions.
- These differences may all lead to conflicts between authorities. In the worst case scenario, the merger could be cleared in one jurisdiction and prohibited in another or may be subjected to conflicting sets of remedies by different reviewing agencies.
- However, it is helpful that, on occasion and in appropriate circumstances (but seemingly increasingly), antitrust agencies have been prepared to defer in their reviews to other reviewing agencies that are better placed to lead. Indeed, deference in appropriate circumstances by one agency to another that is better placed has helped avoid duplication of end result whilst also enhancing the efficiency of the remedy negotiation process (helping to prevent a GE/Honeywell-style situation from recurring).
- The multijurisdictional notification process may be costly and time consuming for the merging parties, who are often required to produce large volumes of information, which may well need to be 'repackaged' and provided in different ways for each of the countries where a filing is to be made.
- There is no real consensus on how transactions involving foreign entities are to be treated, leading to inconsistent approaches.
- The ICN Recommended Practices[23] contains general principles which should be applied in all merger control regimes, and which should ensure greater consistency between regimes.

Private enforcement/litigation

Issues of extraterritoriality not only arise in the area of administrative public enforcement, but also in the sphere of judicial enforcement through the courts. So far, issues have arisen mainly in relation to US antitrust law due to the broad scope of application of the US laws and

23 ICN Recommended Practices for Merger Notification Procedures, www.international-competitionnetwork.org/media/archive0611/mnprecpractices.pdf (last visited 9 June 2008) [hereinafter Recommended Practices].

the fact that it is in the United States that private antitrust enforcement is most developed. However, this position may be changing as private enforcement becomes more prevalent in other countries. For example, in the 27 Member States of the European Union, the European Commission is seeking to stimulate increased private enforcement by facilitating private damages actions.[24]

This section first provides a snapshot look at the current state of US enforcement of its antitrust laws, situated in a global context, and focusing on the extraterritorial reach of US antitrust law. It then considers extraterritorial enforcement in states outside the United States, looking in particular at the assertion of extraterritorial jurisdiction by the UK courts, and the efforts by the European Commission and the UK Office of Fair Trading ('OFT') to encourage private litigation.

The issues relating to extraterritorial enforcement

The most significant extraterritoriality effects have long emanated from the United States. However, virtually all jurisdictions apply some form of an 'effects' test, which can result in extraterritorial implications for their private and cartel enforcement efforts (as has been seen above, particularly in the context of challenges to alleged unilateral dominance abuses and anti-competitive mergers). Of particular note is that, while the US courts have cut back on their historically aggressive extraterritorial reach, the courts in the United Kingdom have recently expanded their jurisdiction, at present providing some measure of EU-wide private damage remedies.

It must be recognised that economic and political forces do and will affect countries' (US and non-US) antitrust enforcement policies and practices. Thus, economic and political considerations can provide solutions to the challenges presented by the overlapping and sometimes conflicting extraterritorial effects of the private enforcement of antitrust laws. Indeed, there is an increasing awareness that competition law and its enforcement are inextricably linked with economic policy and international relations and that the trade policies of certain states (such as subsidies for agricultural products and the like) continue to generate friction between nations. Whilst a detailed analysis of these economic and political factors is beyond the scope of this chapter, our conclusions and recommendations include not only judicial remedies but also some

24 Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 final (2 April 2008), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

economic and political solutions to the issues surrounding competing jurisdictional claims.

US private antitrust enforcement: an attractive forum: The United States is such a huge economic and political component of the global marketplace that its antitrust enforcement policies and practices necessarily have the most dramatic potential for sweeping, worldwide extraterritorial effects. That is true both as a matter of practical effect – most sizable companies sell into the US marketplace – and as a source of precedent for other countries' own antitrust policies and enforcement practices. This reflects the fact that the United States has a well-developed antitrust jurisprudence covering the full panoply of potentially anti-competitive conduct: it has a fully-staffed and functioning criminal and civil enforcement regime; and the United States has established comprehensive procedures for the recovery of compensatory damages by (and prescriptive relief for the benefit of) private parties injured by antitrust misconduct.

In the United States, a losing antitrust defendant must pay treble damages, as well as costs and attorneys' fees. Plaintiffs can prove damages with a relaxed causation standard that is less rigorous than usually applied in the proof of contract damages. Liability is joint and several, with no right to contribution from other liable defendants, even those subject to the same judgment. Thus, plaintiffs could, although in practice rarely do, demand full payment of an entire judgment (trebled plus attorneys' fees) from one defendant. That defendant, in turn, would have no recourse to demand contribution from the other defendants on its payment to the plaintiffs.

Most cases are brought as class actions, raising the potential for massive exposure to all purchasers over many years. The Clayton Act's four-year statute of limitation on recovery of damages is readily and regularly extended based on the judicially-created doctrine of 'fraudulent concealment' which recognises the secretive nature of antitrust conspiracies and the inference that a plaintiff did not have a reasonable opportunity to discover the conduct on its own. Further, plaintiffs can use a successful government enforcement action as *prima facie* evidence of a defendant's misconduct. This coat-tail effect has been exploited by a highly-developed and now well-financed plaintiffs' antitrust bar that, as a matter of US ethics, is allowed to operate on a percentage of recovery contingency fee basis.

In the United States, only 'direct' purchasers from the alleged co-conspirators may file suit under the federal antitrust statutes (referred to generally as the Sherman and Clayton Acts). This limitation was adopted

by the US Supreme Court in its *Illinois Brick* decision,[25] wherein the Court interpreted the Clayton Act,[26] to limit antitrust standing only to 'direct' purchasers of the products/services in question, excluding 'indirect' purchasers (eg, ultimate consumers buying from a direct-from-the-manufacturer-purchasing distributor) from claiming antitrust damages in US federal courts and ruling that there could be no defence that a direct purchaser just 'passed on' the price fixed overcharge to its customer, thereby suffering no damages. The Court rejected standing for indirect purchasers because it was concerned about the effect on defendants of treble damages; the increased complexity of tracing causation between sellers and several levels of indirect purchasers; and the risk, in the absence of a pass-on defence, of double liability in damages for the defendant, amounting to sixfold liability under mandatory trebling.

But, complicating the US antitrust enforcement system, subsequent to *Illinois Brick*, a large number of individual states (including most of the large states like California, New York, Texas, and Illinois) passed legislation – so-called '*Illinois Brick* repealer statutes' – that permit indirect purchasers to file suit under state antitrust laws. The US Supreme Court has since ruled that such individual state legislation is permissible. The resulting patchwork of separate state statutes with differing standing, proof of damages, and other requirements has given added leverage to US antitrust plaintiffs' counsel, allowing them to pursue identical antitrust claims in federal and multiple individual state courts. A survey of this variegated landscape is beyond the scope of this publication, but potential defendants should be aware that many states have broadened the pool of potential plaintiffs to each and every purchaser in the chain of distribution, sometimes even including the ultimate consumers of finished products that embodied the allegedly price-fixed intermediate good – a pool of plaintiffs that the holding in *Illinois Brick* attempted to foreclose.

The US Congress recently passed the Class Action Fairness Act, to allow for the consolidation in a single Federal Court of multiple, individual state indirect purchaser actions, but solely for discovery and other pre-trial purposes. That new law has facilitated broad settlements, but does not affect the complicated issues of allocation of damages recognised by the US Supreme Court in *Illinois Brick* in rejecting a 'pass-on' defence.

As is evident, the US system gives substantial leverage to antitrust plaintiffs, making it a very attractive forum for plaintiffs. Not only are the financial stakes high, but these typically complex cases are tried to a jury of citizens who are unlikely to have any or much understanding of

25 *Ill Brick v Ill*, 431 US 720 (1977).

26 Clayton Act, 15 USC ss 12–19, 26–27, 52–53 (2002).

the industry realities involved. And experience – and much US jury focus group research – has taught that most probable jurors are suspicious of big corporations, believing that they are prone to engaging in anti-competitive, 'unfair' behaviour and to trying to cover that up. In short, the United States is not a favourable forum for antitrust defendants.

As discussed below, no non-US country has embraced much, let alone the entire US private litigation model. Fortunately US courts, and the DOJ, have acknowledged the need to weigh the important countervailing foreign government interests and policies in the exercise of their jurisdiction over foreign companies and conduct that primarily takes place and has its effects beyond the borders of the United States and its territories.

The paradigm hypothetical scenario testing the extent of US antitrust law's extraterritorial effects is where five companies, each based in different countries (A, B, C, D, and E, none of which is the United States), engage in a cartel to fix the global price of a product. The price of the product rises in the United States. A buyer in country B wishes to sue the companies. The buyer wishes to take advantage of US class actions, discovery rules, contingency fees, and treble damages and tries to sue the non-US companies in the United States under the US antitrust laws. Will a US court have extraterritorial jurisdiction over such a suit? If so, should the US court, taking into account recent Supreme Court decisions and international comity concerns, even hear the case?

The US retreat from aggressive extraterritorial enforcement: The extraterritorial reach of US antitrust law has a long judicial, legislative, and administrative history. Since 1897, US courts have wrestled with the question of just how far and to what degree US antitrust law extends beyond US borders. Up through the late 1970s, US courts appeared to be increasingly willing to extend US antitrust law to conduct outside of the United States. Then, in 1982, Congress passed the Foreign Trade Antitrust Improvements Act ('FTAIA') which attempted to limit the reach of US courts. Since 1982, there have been several attempts to amend the FTAIA, but none of these attempts has succeeded. Thus, US courts have been left to determine what exactly are the limits imposed by the vague and general terms of the FTAIA grant of jurisdiction to remedy 'direct, substantial and reasonably foreseeable effects' of anti-competitive conduct on US commerce.

Initially, US courts expansively interpreted the FTAIA to provide a US forum for treble damage class actions to even non-US located purchasers, for their non-US purchases. More recently, US courts (including the Supreme Court), have embraced a more narrow interpretation, closing

the door on such 'foreign injury' claims and generally limiting the extraterritorial reach of the FTAIA and thereby the US antitrust laws. In short, there must be more than a global conspiracy that also impacts US prices or commerce. At a minimum, the foreign harm must be proximately caused by the domestic effect, something that has proven to be essentially impossible to show.

In *Empagran*,[27] the Supreme Court relied heavily on the doctrine of comity to restrict the extraterritorial reach of the FTAIA. The Court noted that, in determining congressional intent with respect to the extraterritorial reach of a statute, ambiguous statutes should be construed 'to avoid unreasonable interference with the sovereign authority of other nations'.[28] The Court therefore assumes that Congress takes 'account of the legitimate sovereign interests of other nations when [it] write[s] American laws', and must further assume that acts of Congress 'ought never to be construed to violate the law of nations if any other possible construction remains'.[29] This rule of statutory construction helps harmonise potentially conflicting laws of different nations – a harmony particularly needed in today's highly interdependent commercial world.

In the wake of the Supreme Court's decision in *Empagran*, the Court has made it even more difficult for would-be antitrust plaintiffs:

- Antitrust claims are subject to a more rigorous pleading standard: allegations of parallel conduct and a bare allegation of conspiracy will not suffice, and 'plausible' grounds are required to infer an agreement (conduct that is consistent with both lawful conduct and with a conspiracy is not sufficient to establish plausibility).
- Securities are not subject to antitrust laws: securities underwriters' practices in connection with initial public offerings are not subject to liability under the antitrust laws because the securities laws are 'clearly incompatible' with application of the antitrust laws.
- A market share of 65 per cent is not necessarily monopolistic: the courts will find 'predatory bidding' conduct (such as paying too much for raw materials and overbuying to impede competition) only where the plaintiff establishes a dangerous probability that the defendant could recoup its losses from such conduct in the marketplace.
- Vertical restraints are not illegal per se, but subject to the rule of reason: resale price maintenance agreements, for example, are not per se unlawful under section 1 of the Sherman Act;[30] courts are required

27 *F Hoffman-LaRoche Ltd v Empagran S*, 542 US 155 (2004).
28 *Ibid* at 164.
29 *Ibid* at 164, quoting *Murray v Schooner Charming Betty*, 6 US (2 Cranch) 64, 118 (1804).
30 Sherman Act, 15 USC ss 1–7 (2002).

to assess their competitive effects on a case-by-case basis to determine whether the restraints 'unreasonably' restrain trade.

Non-US extraterritorial enforcement: Most other countries have thus far declined to embrace several key aspects of the US approach to antitrust enforcement, especially class actions, broad discovery, treble damages, and the criminalisation of antitrust violations. Indeed, many countries have cited these elements of US antitrust enforcement as reasons for erecting such legal barriers as blocking legislation, frustration of judgments statutes, and clawback provisions to mitigate or, in some cases, completely thwart US-style penalties.

In addition, many countries differ from the United States regarding what competition is and what levels of aggressive competition against rivals should be allowed. For example, some countries actively encourage the development of 'national champions' – domestic firms that can effectively compete in the international marketplace while providing jobs and GDP at home, while other countries pursue public–private enterprises that constitute effective monopolies, and still other countries espouse a free market rationale tempered with a social welfare ethos.

With respect to the extraterritorial reach of non-US jurisdictions, the European Union and such countries as Argentina, Austria, Belgium, Brazil, Canada, China, Czech Republic, Denmark, Finland, France, Germany, Italy, Japan, Norway, Portugal, Russia, South Africa, South Korea, Spain, and Switzerland purport to use some form of the 'effects test' to determine the extraterritorial application of their competition laws. In addition, the language of the competition laws of dozens of other countries expressly invoke a territorial 'effect' as a trigger for extraterritorial enforcement but contain little or no elaboration.

In the jurisdictions that have tried to explicate 'effects', the working definition of 'effects' varies considerably. For example, Canada limits 'effects' to those that are 'real and substantial', while the European Union limits 'effects' to those that are 'immediate and substantial'. Many jurisdictions merely espouse the 'effects test' without consistent statutory or judicial delimitation. China's emerging competition law apparently limits extraterritorial reach to conduct that eliminates or has a restrictive effect on competition.

Within this variegated landscape, the US antitrust laws, with their relatively rigorous effects test, their stringent causation requirements, and their strong comity restraints, provide some of the clearest guidance for corporations and potential plaintiffs. As noted, the US approach is in many respects more circumscribed than the potential reach of other jurisdictions, wherein there is no quantitative triggering 'effect' and no

qualitative causal imperative. Accordingly, in this area, the US model is a good one.

The United Kingdom's expansive assertion of extraterritorial jurisdiction: In the United Kingdom, the case of *Provimi Limited v Roche Products Limited*[31] found that where there is a nexus between a European cartel and the United Kingdom, proceedings may be brought in the English courts in respect of all EU-wide losses sustained as a result of that cartel. Hence, claimants need not pursue separate claims in a number of European jurisdictions since all losses can form part of the claim in the English court.

In *Provimi*, the English court allowed a claim to proceed in England where the defendants were domiciled outside the United Kingdom, and where a claimant was not only domiciled outside the United Kingdom, but also purchased the vitamins outside the United Kingdom. Thus, a purchaser based in Germany who had purchased vitamins in Germany was able to bring a claim in England against the English subsidiary of the cartellist. The chain of logic of *Provimi* was that, if the German customer could sue the British subsidiary of Roche in London even though it had never bought from it, it could also sue in London the German company from which it had actually bought the vitamins. This was the result of the application by the UK court of the concept of 'undertaking' within Article 81 EC[32] and of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[33] (known as the 'Brussels Regulation').

The case settled before going to the Court of Appeal. Critics of the *Provimi* holding have argued that it represents a clear case of forum shopping, with UK courts offering discovery and class actions likely to be a favourite forum for private claimants. It should further be noted that the OFT has, in a recent set of Recommendations to the UK Government,[34] endorsed the *Provimi* grant of a broad private right of action for antitrust damages. OFT also urges making it easier to bring successful standalone individual and representative actions, and allowing the judge to order that representative actions proceed on an 'opt-out' basis (ie, on behalf of consumers/businesses at large with individuals deciding whether to 'opt

31 *Provimi Ltd v Roche Products Ltd et al* [2003] EWHC 961 (Comm) (UK).

32 Treaty Establishing the European Community, 10 November 1997, OJ 1997 C 340/3, Article 81.

33 Council Regulation 44/2001, OJ 2000 L 12/1.

34 Private actions in competition law, effective redress for consumers and business, Recommendations from the OFT, www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf.

out' of the action), rather than an opt-in basis, thus opening the door to what is widely regarded as *the* key feature of the US class-action litigation regime.

The European Commission's encouragement of private litigation: While no other jurisdiction offers as wide a panoply of private litigation options as the United States, many jurisdictions do provide for some kind of private enforcement of competition law, some offer the possibility for a form of class or representative action, and a few appear to permit some kind of recovery of punitive or exemplary damages. However, there remains uncertainty regarding what anti-competitive 'effect' will trigger many of these jurisdictions' competition laws.

A number of EU countries permit private litigation under their competition laws, eg, Germany, Ireland, Spain and the United Kingdom, while some, like Denmark, Finland and the Netherlands allow for private lawsuits regarding competition law under general tort theory and practice. Some jurisdictions only permit private actions after the matter has been heard and decided by the competition authority. Rules governing private enforcement of competition laws vary widely from jurisdiction to jurisdiction, creating a patchwork of widely divergent access and remediation. Such factors as the unavailability of contingency fees, discovery restrictions, and 'loser pays' policies continue to further limit private enforcement.

Countries like Belgium, France, Germany, Ireland and Spain allow for some kind of associational representative actions on behalf of consumers to redress competition law violations, while the competition law of Norway and Sweden allow for an 'opt-in' form of class action. In the United Kingdom, there are two alternative forms of action: follow-on representative proceedings and group litigation orders. There remain significant factors that limit the effectiveness of these representative actions, namely, restrictive class membership standing rules, resistance to forms of contingency fee arrangements, pro-defendant discovery rules, and limited remedies.

Several countries, most notably Germany and the United Kingdom, are developing alternative fee schedules which, if not as liberal as US-style contingency fee arrangements, do offer the possibility for members of a representative class to defer and defray the costs of bringing enforcement actions. The European Commission is expected to publish a white paper that will recommend the institution of some kind of representative mechanism for the enforcement of EU competition law, but it is unclear at this time how the European Commission will address issues of class fees, standing, discovery, and remedies, with forces opposing US-style class

actions steering the discussion towards a more limited class action regime.

Traditionally, EU jurisdictions have rejected US-style treble damages for antitrust violations and have refused to enforce judgments containing such punitive awards. But this trend may be changing. In the European Union, the European Commission has, for the past couple of years, raised the possibility of allowing the doubling of damages in certain antitrust cases. In France, a proposed revision of the Civil Code includes a provision allowing for the award of punitive damages, in addition to compensatory damages, when a party has engaged in an obviously deliberate and notably lucrative fault. In Germany, the Monopolies Commission has called for the awarding of double damages in certain antitrust cases. In Spain, the Tribunal Supremo has recently opined that it is sometimes difficult to distinguish coercive sanctions from reparative damages, and the imposition of punitive damages may not be anathema to Spanish law. However, a UK court recently rejected a claim for punitive damages for antitrust infringement against members of the vitamins cartel on the basis that this would infringe the EU legal principle against double jeopardy due to the fines already imposed by the European Commission.[35]

It should be noted that the US Congress has considered, but not passed, 'de-trebling' certain antitrust conduct namely, where foreign conduct is central to the antitrust complaint, the conduct is undertaken by foreign nationals, and the conduct is lawful under the foreign law. Moreover, the DOJ can free leniency defendants from the possibility of treble damages in any follow-on US private litigation.

CONCLUSIONS

- While there has been some positive shift towards 'convergence' or 'harmonisation' (in particular due to the achievements of the ICN), more remains to be done in this area; and any further solutions imposed must overcome the difficulties of both honouring and incorporating the social, political, legal, and economic realities within and between sovereign nations.
- The extraterritorial reach of the competition laws of more than 120 nations creates multijurisdictional overlap that causes confusion, conflict, duplication, and inefficiencies, requiring energetic comity and efforts at consistency.
- The most effective redress of multijurisdictional overlap has come in the form of bilateral agreements between nations with similar approaches

35 See *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch).

to competition policy.

- The US and other countries' courts and antitrust enforcers should exercise extraterritorial jurisdiction only when the foreign conduct has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce and, in the case of a foreign harm, may exercise extraterritorial jurisdiction over a foreign defendant if the foreign harm was proximately caused by the domestic effect ie, a rigorous double-effects test.
- The logic of the US Supreme Court *Empagran* decision suggests that the US judiciary is likely to continue to exercise caution in applying US competition and antitrust laws extraterritorially.
- While US courts appear to be reining in the extraterritorial reach of national competition laws, English courts, particularly in cases like *Provimi Limited v Roche Products Limited*, have found extraterritorial jurisdiction of UK competition law where there is a nexus between a European cartel and the United Kingdom. While this may be a unique development related to efforts to provide an EU-wide forum, it is something that should be addressed by the EU as part of its current reform initiatives for private litigation. The European Commission is in the process of putting together recommendations on how to encourage private actions for damages across the EU Member States.
- The competition laws of many countries state that extraterritorial application of that country's competition law is limited to conduct that causes some kind of 'effect' in that country, but very few countries have determined the quantum or quality of the 'effect' needed to trigger the competition law or determined the level of causation between the conduct and the 'effect' that would sustain a competition claim in that country.
- The lack of coordination among nations regarding the policy and practice of leniency and immunity, particularly the spectre of multiple punishment, potential civil liability, and variant discovery rules, has limited the usefulness of any given nation's leniency programme.
- Resistance to US-style antitrust law, ie, treble damages, class actions, contingency fees etc; continue to impede coordination between US competition law and the competition laws of many nations, perpetuating these nations' blocking legislation, frustration of judgments statutes and clawback provisions.
- There is an information deficit about the extraterritorial operation of many countries' competition laws which subjects international businesses to unknown legal liabilities and which hinders truly effective cross-border discourse regarding the possibilities for meaningful coordination.

Recommendations

Summary

This section makes recommendations for steps that could be taken to minimise or resolve overlaps and conflicts arising from the extraterritorial exercises of jurisdiction. In general terms, there are four potential models which could be adopted: (i) creating a legal hierarchy (ie, determination of which state has priority and why); (ii) recognising discretionary doctrines (ie, no legal hierarchy, but considerations such as reasonableness and comity that might temper the use of extraterritorial jurisdiction); (iii) establishing methods of cooperation (ie, no legal hierarchy but systems to encourage cooperation rather than conflict); and (iv) encouraging harmonisation or mutual recognition.

The specific recommendations proposed in relation to each of the three themes discussed in 'Resolving competing jurisdictional claims', *supra*, are set out below. However, the various proposals can be summarised in a number of overarching recommendations:

- The framework adopted should be dominated by comity, and nations should honour the antitrust laws of other nations and restrict the extraterritorial reach of their national laws.
- Nations should engage in meaningful bilateral negotiations to bring about effective coordination of antitrust laws and merger control rules, a coordination which can then be expanded to the establishment of regional jurisdictional entities.
- Cooperation agreements between enforcement authorities should be entered into in order to streamline the sharing of information, the implementation of a leniency regime, and the fair and efficient prosecution of multinational corporations.
- Constant dialogue should be maintained between authorities regarding such issues as the definition and delineation of 'effect' in order to minimise conflicts and work towards creating a consistent approach.
- Authorities reviewing merger notifications where multiple agencies assert jurisdiction should coordinate first, to give precedence to countries where the transaction will give rise to the most substantive competition concerns and secondly, to ensure any remedies imposed are compatible and enforceable with a multijurisdictional effect.

Cartels and unilateral firm conduct

As illustrated by the increasing international collaboration and cooperation in cartel enforcement, both bilaterally and through

organisations such as the OECD and the ICN, continued dialogue and communication is critical to limiting any potential adverse effects from the extraterritorial application of any one country's laws.

Despite the lack of convergence on basic principles in unilateral conduct enforcement, nevertheless, the ICN's ongoing efforts to find common ground represents a positive step towards minimising those differences and need to be supported.

In cartel enforcement, much more work is required to minimise any disproportionate cumulative punishment being imposed on either individuals or firms. In particular, punitive measures that go beyond the impact within a sovereign jurisdiction, such as the European Union's most recent guidelines on fines, should only be utilised in the most extreme cases.

More work is needed to arrive at a workable international leniency regime which allows in some cases for central reporting rather than the present multiple regulator model. The present mixture of national and regional leniency regimes overlaid with the availability in some jurisdictions of criminal prosecutions presents intractable problems and causes unjust outcomes for regulators, corporations and individuals alike. Cartels are a global problem and need to be regulated as such. There ought to be scope for the introduction of an international leniency regime including the availability of a US 'marker' type system where no initial admission of wrongdoing is necessary.

In unilateral conduct cases, agencies should coordinate at the remedies stage, have regard to their ability to enforce a particular remedy in practice and, in appropriate cases, defer to the agency which is better placed to deal with the remedy negotiation process, which will help avoid duplication of end result.

Mergers

As a starting principle, we consider that many of the problems associated with extraterritorial application of merger control laws could be prevented, or mitigated, by the adoption of the ICN Recommended Practices.[36] The principal recommendation is therefore to urge all jurisdictions to comply with the principles set out in the Recommended Practices which reflect both a considerable degree of discussion and a

36 Indeed, the merger control regimes in Canada, European Union and the United States are to a significant degree already in conformity with the Recommended Practices. The fact that features of these regimes are cited by way of illustration below does not detract from the fact that, overall, they are already largely compliant.

workable international consensus.

A number of specific observations with regard to the effect of implementation of the Recommended Practices in the context of extraterritorial application of merger control rules are set out below.

- Inter-agency coordination is vital where multiple agencies assert jurisdiction over a transaction: jurisdictions in which the transaction raises the most serious substantive concerns should take the lead in the review, with other authorities acting to the extent there are compelling reasons to do so.[37]
- Agencies should also coordinate at the remedies stage and should have regard to their ability to enforce a particular remedy in practice.[38] Deference in appropriate circumstances by one agency to another that is better placed will help avoid duplication of end result whilst also enhancing the efficiency of the remedy negotiation process.
- Notification tests should be designed as far as possible to avoid catching transactions where there is no prospect of the transaction having a substantive impact on competition within that particular jurisdiction.[39]
- Specifically, notification thresholds should, where possible, incorporate the need for both parties to the transaction to have local turnover of assets (to serve as proxies for the requirement that the transaction should be capable of having a substantive impact in the relevant territory).[40]
- In relation to the ECMR, consideration should be given to amending the turnover thresholds to avoid catching joint ventures where the joint venture is implemented entirely outside the European Union but where the parent companies generate sufficient turnover within the European Union to satisfy the Community Dimension thresholds.
- Where substantive concerns can, in effect, be ruled out, jurisdictions should seek to minimise the notification burden to reduce the costs and time involved in filing (perhaps by taking account of the Canadian

37 See Recommended Practices, *supra* n 22 ('Interagency coordination should be tailored to the particular transaction under review and the needs of the competition agencies conducting the merger investigations').

38 See *ibid* ('Reviewing agencies should seek remedies tailored to cure domestic competitive concerns and endeavor to avoid inconsistency with remedies in other reviewing jurisdictions').

39 See *ibid*.

40 See *ibid* ('Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory').

model).[41] In particular, in the context of the ECMR, one potential revision to the current system might be to provide for a shorter time period for review (eg, 15, rather than 25, working days) for cases notified using the Short Form.

- Reviewing agencies should seek to limit the quantity and scope of requests on third parties outside the jurisdiction in question, and ensure they are genuinely proportionate to what additional information is necessary (not simply useful) to determine the impact of the transaction.[42]
- More merger control regimes should provide for flexibility to cover situations where the commercial context of the transaction demands increased speed of review or the ability to close (eg, the acquisition of a bankrupt business or public bid situations), as currently provided for in the United States and the European Union.

Private enforcement/litigation

The recommendations are designed to minimise the inherent tensions that can result when the enforcement of antitrust laws have extraterritorial effects which conflict with antitrust enforcement policies and practices of other nations.

- Nations should exercise active comity – honouring the competition and antitrust laws of other nations and restricting the extraterritorial reach of their national laws.
- Nations should engage in meaningful bilateral negotiations to bring about effective coordination of competition and antitrust laws, a coordination which can then be expanded to the establishment of regional jurisdictional entities.
- The United States should consider the elimination of treble damages against foreign antitrust defendants, as a quid pro quo for change in the competition laws of other nations eg, the establishment of meaningful collective action or the removal of clawback and frustration statutes.
- The US courts should continue to exercise the judicial restraint found in *Empagran* and its progeny.

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41 See *ibid* ('Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns'); *ibid* ('Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns').

42 See *ibid* ('Competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on *merging parties and third parties* in connection with merger investigations') (*emphasis added*).

- An EU-wide solution to cross-border EU damages claims should be addressed as part of EU reform in this area.

Possible remedies include:

- Bilateral treaties between nations with comparable approaches to competition policy.
- Cooperation agreements to streamline the sharing of information, the implementation of a leniency regime, and the fair and efficient prosecution of multinational corporations.
- Maintaining a dialogue between authorities regarding the definition and delineation of 'effect' and the accordance of deference/preference among enforcement jurisdictions.
- Each country with a competition law should create user-friendly websites that present that nation's competition laws, treaties, or other agreements that affect those laws, guidelines for interpreting and applying those laws, news features regarding how those laws are working in that nation, commentaries on the laws, and discussions regarding trends in those laws.

CHAPTER 2

Tort

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Introduction

As the movement of individuals and goods across state borders increases significantly, so too does the importance of extraterritorial tort jurisdiction. It is therefore necessary to establish a clear understanding of the reach and boundaries of extraterritorial tort jurisdiction. Today, however, a certain degree of uncertainty exists regarding the scope and the limitations of such jurisdiction.

This report represents the first effort in more than 20 years to consider the scope of extraterritorial tort jurisdiction under international law. While the scope of extraterritorial civil (including tort) jurisdiction has been considered in the past by leading scholars, recent scholarship has focused more on specific aspects of extraterritorial tort jurisdiction.[1]

The report surveys treaty law and state practice on the assertion of extraterritorial tort jurisdiction and considers how such treaty law and state practice may impact the scope of extraterritorial tort jurisdiction under public international law. As previous studies in this area followed a different methodology, the challenge of providing such a survey was significant.

In order to ensure representation of a wide range of perspectives, the committee included experts with different perspectives and experience, including representatives from government, academia, private practice, multinational corporations and human rights organisations. The committee was greatly assisted by the network of lawyers of the IBA, which was instrumental in expanding the geographical coverage of our report, allowing the committee to benefit from reports by lawyers with expertise in extraterritorial tort jurisdiction from many different parts of the world.

The definition of the three components of the concept of extraterritorial tort jurisdiction largely determined the scope of this report:

1 See Sir Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* 218; F A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours* 73; F A Mann, 'The Doctrine of Jurisdiction in International Law Revisited After Twenty Years' (1984) 186 *Recueil des Cours* 18. Recent scholarship has greatly informed this report and is cited where appropriate.

- *Extraterritorial*: This report covers torts where the tortious act was performed outside of the territory of the forum. These include torts that have their effect within the jurisdiction of the forum state, even though under some views such torts should not be considered extraterritorial.
- *Tort*: This report covers liability for extraterritorial torts. Torts include civil, as opposed to criminal, wrongs on which a lawsuit may be brought and a remedy obtained.[2] In particular, the report focuses on common torts, such as negligence, intentional torts and defamation. The report does not cover claims that are based on contract, nor does it address certain subject-matter areas within the scope of other committees, such as antitrust, securities, corruption and insolvency.
- *Jurisdiction*: This report only covers the jurisdiction of *courts* to hear a case. It does not cover other forms of jurisdiction, such as the jurisdiction of legislatures or enforcement agencies to act or promulgate laws or regulations that reach outside of the territory of the state. As such, this report focuses on what is sometimes called adjudicatory jurisdiction, instead of legislative and executive jurisdiction.[3]

Jurisdiction concerns both international and national law. As a matter of international law, it concerns the permissible scope of a state's right to exercise jurisdiction. As a matter of national law, it concerns the power of courts to hear particular cases. Jurisdiction under national law is, of course, significant in defining the limits of jurisdiction under international law and *vice versa*. However, the two concepts are not identical as national legal systems may assert jurisdiction in a manner that

2 *Black's Law Dictionary* (8th ed 2004). Note, however, that this report will consider civil claims made in the context of criminal proceedings, whether those claims are initiated by victims or those acting on their behalf, including *actions civiles*. The import of such claims to the concept of universal civil jurisdiction is addressed *infra* n 175.

3 Authorities differ about whether and when adjudication corresponds to prescriptive or enforcement jurisdiction, or whether it represents a third form of jurisdiction. Compare Restatement (Third) of the Foreign Relations Law of the United States s 401 (1987) ('Restatement (third) Foreign Relations') (distinguishing jurisdiction to prescribe, adjudicate and enforce) with Ian Brownlie, *Principles of Public International Law* (6th ed 2003) 297 (considering jurisdiction as an aspect of sovereignty referring to judicial, legislative, and administrative competence, then distinguishing between legislative or prescriptive, and executive or enforcement, jurisdiction). See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev ed 1997) 109 (same); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003) 25 n 68 (distinguishing between legislative, judicial and executive jurisdiction, by reference to the branches of state authority; Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *J Int'l Crim Justice* 735, 736–37 (distinguishing between prescriptive and enforcement jurisdiction).

is more restrictive than that permitted under international law.[4]

To determine the proper scope of extraterritorial tort jurisdiction under international law, it is necessary to examine both treaty law and customary international law. In considering customary law the report focuses on state practice, including the national laws of individual states regarding extraterritorial tort jurisdiction and actual case law based on those laws.[5] In addition to reviewing existing literature, the committee undertook an independent survey of 23 states' national laws and court decisions on extraterritorial tort jurisdiction to identify state practice.[6]

Although this report generally aims to summarise what the law currently is, rather than what it should be, it concludes by setting forth certain recommendations with respect to the future development of this area of law.

This report is structured as follows: 'Treaty law' discusses treaty law, which provides limited guidance on the scope of extraterritorial tort jurisdiction under international law. 'State practice' describes state practice regarding the scope of extraterritorial tort jurisdiction in various common law and civil law countries. 'Conclusions and recommendations' attempts to identify areas with respect to which there is general convergence in state practice, clarify the competing positions in areas where state practice diverges, and make some observations and recommendations for future development.

Treaty law

Introduction

In the absence of a universal treaty governing extraterritorial tort jurisdiction, treaty law provides only limited guidance with respect to the scope of extraterritorial tort jurisdiction under international law.

4 Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* (9th ed 1992) 456–57, s 136.

5 Customary international law consists of state practice and *opinio juris* – the belief that such practice is required, prohibited or allowed by international law. Members of the committee disagree as to whether it is appropriate to consider that domestic legislation covering extraterritorial torts suggests a state opinion that such jurisdictional practices are legitimate under international law and may therefore represent *opinio juris* for the purposes of identifying customary international legal rules.

6 The 23 states surveyed are Argentina, Australia, Bahrain, Brazil, China, Denmark, Finland, France, Germany, Israel, India, Malaysia, Mexico, Norway, Poland, Russia, South Korea, Spain, Sweden, UAE, United Kingdom, United States, and Venezuela. The survey was conducted by sending questionnaires to IBA members in these states. In addition, this report draws on case law and statutes from countries that were not formally surveyed.

Nevertheless, this report will follow the traditional order of sources as listed in Article 38(1) of the Statute of the International Court of Justice (the 'ICJ') and begin its discussion of extraterritorial tort jurisdiction with a description of the treaties (and draft treaty) that touch upon the report's subject matter.[7]

Efforts at the international level to agree on principles governing extraterritorial tort jurisdiction have thus far been unsuccessful. The most notable attempt was made in the context of the negotiations on the Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 2001 ('Draft Hague Convention').[8] These negotiations produced an annotated draft that did not generate consensus. The Draft Hague Convention is not binding and the legal significance of the text and the underlying negotiation history are disputed.[9] Nevertheless, the negotiations surrounding the relevant portions of the Draft Hague Convention do shed some light on states' positions with respect to the scope of extraterritorial tort jurisdiction and help identify the more contentious issues in this complex field of law.

In Europe, greater consensus with respect to the scope of extraterritorial tort jurisdiction has emerged. There are three instruments of European law that govern certain aspects of extraterritorial tort jurisdiction: (i) the 1968 Brussels Convention;[10] (ii) the 1988 Lugano

7 The ICJ Statute lists four sources of international law to be applied by the ICJ: (1) international conventions; (2) customary international law; (3) general principles of law recognised by civilised nations; and (4) judicial decisions and the teachings of the most highly-qualified publicists: ICJ Article 38(1)(a). This article is widely considered to describe the sources of international law.

8 See Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Interim Text ('Draft Hague Convention'), available at www.hcch.net/upload/wop/jdgm2001draft_e.pdf.

9 The members of the committee disagree on the legal weight that should be given to statements made in the context of the negotiations.

10 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Brussels Convention'), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:HTML.

Convention;[11] and (iii) the 2000 Brussels Regulation.[12] These instruments together form a general legal scheme for the allocation of jurisdiction among courts in European countries, termed the Brussels Regime. Although the Brussels Regime pertains directly to extraterritorial tort jurisdiction, the ability to derive conclusions from it concerning the scope of extraterritorial tort jurisdiction under general international law is limited insofar as the Regime provides for rules that primarily operate among countries belonging to a relatively integrated political and economic entity.[13]

There are other treaties that deal with specific aspects of extraterritorial tort jurisdiction. Among these treaties, the debate surrounding Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Convention against Torture' or 'CAT') is of particular relevance to the discussion of universal civil jurisdiction.[14] Article 14 requires the provision of a civil remedy for torture. The debate surrounding whether such a remedy is limited to acts committed within the forum or whether the CAT may be read to also require the exercise of extraterritorial jurisdiction over torture is a useful example of disagreement concerning the existence of universal civil jurisdiction in a particular context.

The Draft Hague Convention

The Draft Hague Convention attempted to establish basic principles concerning extraterritorial jurisdiction over civil and commercial

11 Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Lugano Convention'), available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm. In addition to EU Member States, the Lugano Convention is also open to Member States of the European Free Trade Association ('EFTA') (Iceland, Liechtenstein, Norway and Switzerland) as well as non-EU or EFTA countries upon the unanimous agreement of the contracting states: *ibid* Article 62(1).

12 Council Regulation (EC) No 44/2001 (22 December 2000) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the 'Brussels Regulation'), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_012/l_01220010116en00010023.pdf.

13 The Brussels Regulation does not create new jurisdictional rules for non-Member State domiciliaries. For non-European domiciliary claimants, the Regulation directs courts to the domestic jurisdictional rules of the seised court. See, *supra* n 12, Article 4(1). For domiciliaries of states outside Europe, therefore, it is necessary to look at the individual practices of the Member States. This analysis will be performed in the section below discussing state practice.

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

matters, including extraterritorial tort jurisdiction. While negotiations ultimately ceased and no final text was adopted, the Draft Hague Convention nonetheless warrants discussion because it is the most notable effort to date at achieving some international agreement concerning extraterritorial civil jurisdiction.

The Draft Hague Convention began with two basic principles governing jurisdiction generally. First, it provided that a defendant may be sued in the courts of the state where that defendant was habitually resident.[15] Secondly, it permitted jurisdiction by agreement of the parties to the dispute.[16]

Specific to tort jurisdiction, Article 10 of the Draft Hague Convention provided for jurisdiction of the state (i) in which the act or omission that caused injury occurred or (ii) in which the injury arose (unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that state).

Article 18 of the Draft Hague Convention set forth limits on the power of contracting states to exercise jurisdiction over residents of other contracting states. Specifically, Article 18(1) required a connection between the forum state and the dispute or potentially the defendant.[17] Article 18(2) would have further provided a set of factors that were insufficient to provide the necessary connection for a state to legitimately

15 *Supra* n 8, Article 3(1).

16 *Ibid* Article 4.

17 Some countries were of the view that Article 18(1) should be eliminated to remain true to the 'concept of the Convention that there be a limited number of required bases of jurisdictions… a limited number of… prohibited jurisdictions, and that any other jurisdiction not listed in either category should remain open for the exercise of jurisdiction under national law…': *supra* n 8, Article 18(1) n 106. This concept was known as the 'grey area' or 'grey zone' which would allow states to vary their jurisdictional rules within agreed bounds of required and prohibited bases of jurisdiction: *ibid*. The grey area grounds for jurisdiction would not be recognised under the Convention but could be asserted under national law: see Preliminary Draft Convention on Jurisdictional and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission – Report by Peter Nygh and Fausto Pocar ('Nygh & Pocar Report') at 28, Preliminary Document No 11 of August 2000. The size of the grey area was the subject of much debate. See *supra* n 8 Article 18(1) n 106; Letter from Jeffrey D Kovar, US Department of State Assistant Legal Adviser for Private International Law, to J H A van Loon, Secretary-General (22 February 2000) ('Kovar Letter'), available at www.cptech.org/ecom/hague/kovar2loon22022000.pdf.

claim jurisdiction over a dispute.[18] These provisions sparked much debate and ultimately no agreement was reached.

Despite this disagreement regarding the scope of the prohibited grounds for jurisdiction in Article 18(1) and (2), however, there may have been some degree of provisional agreement that, in the case that such a concept is adopted, states should be permitted to assert extraterritorial civil jurisdiction over human rights violations and abuses.[19] Article 18(3) was specifically included in the Draft Hague Convention as an exception to the prohibited exercises of jurisdiction provided for by Article 18(1) and (2) to permit states to entertain civil suits to redress human rights violations, notwithstanding the lack of substantial connection to the dispute. As the Report by Peter Nygh and Fausto Pocar on the Preliminary Draft Convention on Jurisdictional and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission explained:

'[T]he chief aim of the Convention is not to regulate civil actions of this kind [, seeking relief or damages following a serious violation of human rights], but rather to define the rules of jurisdiction for civil and commercial relations among individuals within an international setting. The Convention does not therefore need to include jurisdictional rules for proceedings based on an infringement of fundamental human rights, but merely to leave Contracting States entirely free to adopt national rules in this field and ensure that the Convention does not prevent them from doing so.'[20]

The formulation of this provision, however, was not agreed upon before the treaty negotiations ceased for other reasons.

Irresolvable disagreements between the United States and European states led to the collapse of negotiations. In its letter setting forth its concerns with respect to the direction of the negotiations, for example,

18 While the concept of prohibited grounds was generally accepted, there was disagreement regarding exactly which bases should be prohibited in the Convention: see *supra* n 8, Article 18(2) nn107-119; Nygh & Pocar, *supra* n 17 at 28–29; Kovar Letter, *supra* n 17. In particular, there was debate over whether jurisdiction based on the following connections between the defendant and the forum state should be prohibited: temporary presence, presence of property, unrelated commercial activity, signing of the contract from which the dispute arose, presence of a subsidiary or other related entity, and the existence of a related criminal action.

19 See eg, Kovar Letter, *supra* n 17 ('A generally-acceptable provision that exempts existing civil suits to redress human rights violations from prohibition under Article 18 is necessary or there will be intense opposition to this convention in the United States'). But see *supra* n 8 Article 18(3) n 124 ('There was no consensus on the proposed paragraph 3. It is included in the text…to facilitate future discussion.'). It is not clear whether this should be read to suggest disagreement as to the idea of Article 18(3) itself or merely disagreement as to the wording of the provision.

20 Nygh & Pocar Report, *supra* n 17 at 84.

the United States expressed concern that the foreseeability test established in Article 10[21] could not pass US constitutional review,[22] and that a clause must be added to permit jurisdiction over all torts arising out of a defendant's forum activity.[23] It also objected to the jurisdictional limitations established in Article 10(4) concerning multistate damages.[24] Meanwhile, European states were not in favour of the position taken by the Unites States for a more expansive tort jurisdiction. Attempts at compromise resulted in provisions the parties felt were either irreconcilable with their domestic law or too uncertain in their application.[25]

The Brussels Regime

The Brussels Regime[26] regulates the allocation of jurisdiction over certain civil or commercial cases brought before the national courts of European states.[27] In cases involving non-European domiciliaries, the Brussels Regulation merely directs courts to the domestic rules of the seised court.[28] The Brussels Regime therefore cannot fully inform the discussion concerning extraterritorial tort jurisdiction as the rules of individual Member States, to which the Brussels Regulation defers in matters of non-

21 S*upra* n 8, Article 10(1)(b) ('A plaintiff may bring an action in tort or delict in the courts of the State… in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.').

22 See *infra* 'Extraterritorial jurisdiction over ordinary torts' on jurisdictional limitations.

23 See Kovar Letter, *supra* n 17.

24 *Ibid.*

25 *Ibid.*

26 While the three instruments that constitute the Brussels Regime (Brussels Convention, Lugano Convention and Brussels Regulation) differ in certain respects, this report need not distinguish them at length and will focus on the Brussels Regulation, which covers the majority of relevant cases. Most notably, perhaps, the Brussels Convention and Regulation, but not the Lugano Convention, come within the jurisdiction of the Court of Justice of the European Communities ('ECJ'). A national court may submit questions to the ECJ regarding the interpretation of these instruments and the ECJ ruling is binding on the national court. Interpretations of the same provisions in the Brussels Regulation and Convention are influential for, but not binding on, the interpretation of the Lugano Convention.

27 See Briggs & Rees, *Civil Jurisdiction and Judgments* (4th ed 2005) para 2.01.

28 According to Article 4(1), non-EU domiciliaries can be sued in any Member State according to the jurisdictional rules of that Member State: see C-351/89, *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317. Note, however, that unlike those cases falling outside the subject matter of the Brussels Regulation, these cases may still be subject to other rules in the Regulation, such as the rule of *lis pendens*. That is, they are covered by the Regulation, but the Regulation itself looks to the domestic rules of Member States.

domiciliaries, remain relevant. These practices will be discussed below in the section pertaining to state practice.

The fundamental jurisdictional rule of the Brussels Regulation is that defendants domiciled in Member States are entitled to defend claims against them in their home courts (the 'domiciliary rule'). Article 2(1) of the Brussels Regulation provides that, '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.[29] This rule, however, is subject to various exceptions that allow for extraterritorial exercises of jurisdiction in tort.

One exception to the domiciliary rule is Article 5(3), which permits a person domiciled in one Member State to be sued for a tort in the courts of the place where the harmful event occurred. Article 5 of the Brussels Regulation provides: 'A person domiciled in a Member State may, in another Member State, be sued…in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'[30] According to the European Court of Justice (the 'ECJ'), this rule 'must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it'.[31] Thus, claimants have the choice of suing in either forum.

The first alternative – where the damage occurred – has received

29 S*upra* n 12, Article 2(1). The Brussels Regulation does not define the domicile of natural persons, leaving the issue to be determined by the law of the national court hearing the case: Article 59(1). In the case of corporations, 'domicile' refers to the company's (i) statutory seat, which is the place of its registered office or, in the absence of such an office, the place of incorporation; (ii) place of central administration; or (iii) principal place of business: Article 60. Alternatively, a defendant company domiciled in a Member State may be sued in another Member State in 'a dispute arising out of the operations of a branch… if the branch… is situated in that [second] state': Article 5(5).

30 *Ibid* Article 5. The phrase 'matters relating to tort, delict or quasi-delict' is an 'autonomous concept' particular to European law. The ECJ has defined this phrase negatively; it encompasses any action for liability that is not based in contract: Case 189/87, *Kalfelis v Bankhaus Schroder, Munchmeyer, Hengst and Co* [1998] ECR 5565, paras 15–16 (the phrase 'must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1)'). Some other language versions, such as those of Sweden and Denmark, actually use a term equivalent to 'non-contractual' matters, instead of tort. Note also that Article 5(3) of the Brussels and Lugano Conventions gives jurisdiction over the place where the harmful event did occur, but not where it may occur, though the ECJ has held that it should be interpreted in this more expansive way: Case 167/00, *Verein fuer Konsumenteninformation v Henkel* [2002] ECR I-8111.

31 Case 21/76, *Handelskwekerij GJ Bier NV v SA Mines de Potasse d'Alsace* [1976] ECR 1735, paras 24–25 (French domiciliary discharged poisonous effluent into a river which was eventually used on Dutch crops that then perished; claimant had the choice of suing in the Netherlands or in France).

considerable attention from the ECJ, which has limited it to the place where the direct physical injury or economic loss from an act or omission was first suffered.[32] The concept does not extend to damages inflicted on indirect victims[33] or consequential damages, even if suffered by the direct victim.[34] There is little direct authority on the meaning of the second alternative – where the event giving rise to the damage occurred. One English court held that in an action for negligent misstatement the appropriate forum was the country where the misstatement originated, not where it was received and comprehended.[35] In the defamation context, the ECJ has held that a claimant suing an EU-based publisher has a choice of fora.[36] The claimant may bring an action against the publisher before the courts of the Member State where the publisher is established, seeking damages for all harm caused by the defamation, or it may sue in any Member State where the publication was distributed and injury to reputation occurred, seeking damages only in respect of harm caused in that state.

Another exception to the domiciliary rule is Article 5(4), which provides that a person domiciled in a Member State may be sued in another Member State 'as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings'.[37] Thus, in an *action civile* brought in a criminal proceeding, the court may order compensation in a case in which it would not otherwise have jurisdiction under the Brussels Regulation.[38]

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32 In some cases, where it is difficult to determine where the damage actually occurred, the ECJ has been prepared to find a workable solution that satisfies the tests of foreseeability and certainty. For example, in Case 51/97, *Reunion Europeenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht* [1998] ECR I-6511, paras 33–37, the ECJ permitted the person receiving cargo that had been damaged on the high seas to sue in the place where the goods were meant to be delivered.

33 For example, in Case 220/88, *Dumez France SA v Hessiche Landesbank* [1990] ECR I-49, para 22, French banks, whose German subsidiaries were made insolvent by the negligence of defendants in Germany, were not able to sue the defendants in France because the direct harm or injury had first been suffered in Germany, even though consequential losses were incurred in France.

34 In Case 364/93, *Marinari v Lloyds Bank plc* [1995] ECR I-2719, paras 14–15, 21, an Italian who suffered financial injury in Italy, as a result of promissory notes being confiscated in England, could not sue in Italy because the place of the harmful event and initial damage arising from it was England.

35 *Domicrest Ltd v Swiss Bank Corp* [1999] QB 548.

36 Case 68/93, *Shevill v Press Alliance* [1995] ECR I-415.

37 *Supra* n 12, Article 5(4).

38 See *infra* '*action civiles*'.

Ultimately, the Brussels Regime creates a limited jurisdictional regime for a community of relatively integrated states. In exchange for granting recognition and enforcement to court decisions from other Member States, the state-parties agreed to limit the permissible bases of tort jurisdiction over EU citizens to the defendant's domicile or the forum in which the tort occurred. Beyond that, EU Member States remain able to assert jurisdiction over non-domiciliaries according to their national laws.

Convention against torture

The CAT provides for extraterritorial criminal jurisdiction.[39] It also requires State Parties to provide civil redress for domestic torture under Article 14.[40] Less clear is whether Article 14 extends the obligation to provide civil redress to extraterritorial torture.[41]

Some scholars consider the placement of Article 14(1) among other provisions in the CAT that have a territorial focus, and the savings clause in Article 14(2), allowing states to adopt more expansive remedies under their national law, as evidence that Article 14(1) should be read narrowly. This reading is also consistent, they argue, with the lack of discussion one

39 *Supra* n 14, Article 5(2) ('Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over [the offences referred to in Article 4] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him…').

40 *Supra* n 14, Article 14 ('(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and equitable compensation including the means for as full rehabilitation as possible. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.').

41 See Brief of *Amicus Curiae* the European Comm'n at 18, *Sosa v Alvarez-Machain*, 542 US 692 (2004) (No 03-339) (European Comm'n *Amicus* Brief) ('There is disagreement whether the Convention requires States to exercise universal jurisdiction or simply jurisdiction over torture committed in their territory.'). Compare Christopher Keith Hall, 'The Duty of State Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18 *Eur J Int'l Law* 921, 937 ('Article 14 was intended to provide for victims and their families to recover reparations for torture committed abroad') and Alexander Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong' *ibid* at 955, 961 ('Article 14… [extends] to the acts of torture committed beyond the forum state's territory'), with Andrew Byrnes, 'Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?', in *Torture As Tort* (Craig Scott ed 2001) 537, 549 (concluding that 'it is difficult to argue unequivocally that article 14… must be interpreted' to require states to provide the same remedies for torture that occurs outside their jurisdiction as they must for torture that occurs within it) and Hazel Fox, 'The CAT "requires States Parties to provide a civil remedy for reparation, but only in respect of violations occurring within their own jurisdiction"' (2004) *The Law of State Immunity* 525.

would expect to see in the *travaux préparatoires* regarding an expansive reading of 14(1), if such an interpretation is what the drafters intended.[42] Other scholars note that during the drafting process of the CAT, Article 14 was expressly limited to torture committed within the jurisdiction of a state party, but the limiting language was eventually dropped – an omission made more significant in light of the inclusion of territorial restrictions in other Articles of the CAT.[43] It has also been observed that an extraterritorial interpretation of Article 14 is consistent with the purposes of the Convention – 'to address the scourge of torture, to bring perpetrators to justice, and to provide reparation for victims'.[44]

Three States Parties have opposed an extraterritorial reading of Article 14. Upon ratifying the CAT, the United States declared that Article 14 only requires remedies for 'acts of torture committed in territory under the jurisdiction of that State Party'.[45] In the United Kingdom, the House of Lords held that the '[Convention] requires a private right for damages only for acts of torture committed in territory under the jurisdiction of the forum state'.[46] Similarly, a Canadian appellate court has stated that 'no state interprets Article 14 to require it to take civil jurisdiction over a foreign state for acts committed outside the forum state'.[47] In addition, reporting to the Committee against Torture, New Zealand stated that

42 Byrnes, *supra* n 41 at 543, 547, 549 (concluding that 'it is difficult to argue unequivocally that article 14… must be interpreted' to require states to provide the same remedies for torture that occurs outside their jurisdiction as they must for torture that occurs within it); Menno T Kamminga, 'Universal Civil Jurisdiction: Is it Legal? Is it Desirable?' (2005) 99 *Am Soc'y Int'l L Proc* 123, 124 ('In view of the elaborate provisions on universal criminal jurisdiction contained in the Convention, it cannot be assumed that the Convention provides for an implicit obligation to provide for universal civil jurisdiction').

43 Byrnes, *supra* n 41 at 545–48; Orakhelashvili, *supra* n 41 at 961. The United States has taken the view that this change in language was a mistake. 'Summary and Analysis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in 'Message from the President of the United States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', 20 May 1988, S Treaty Doc No 100-20, at 13–14 (1988).

44 Byrnes, *supra* n 41 at 545. See also Hall, *supra* n 41 at 922, 926–27; Orakhelashvili, *supra* n 41 at 961; Donald Francis Donovan & Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction', (2006) 100 *Am J Int'l L* 142, 148.

45 US Reservations, Declarations and Understandings, Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, Cong Rec S 17486-01 (27 October 1990).

46 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, para 25.

47 *Bouzari v Islamic Republic of Iran* [2004] 71 OR3d 675, para 78. But see *Ferrini v Federal Republic of Germany* (Cass Sez Un5044/04), para 9 (2000) (finding that 'universal jurisdiction can also apply to civil actions against torture'); *Prosecutor v Furundzija*, Case No IT-95-17/1-T, Judgment, para 155 (10 December 1998) (noting that in limited circumstances, states may exercise universal civil jurisdiction over torture). However, both of the latter cases relied on peremptory norms against torture, not Article 14.

it only provides compensation for injury in New Zealand or to a New Zealand resident; Germany offered a similar view.[48] On the other hand, the Committee against Torture has suggested that Article 14 does apply extraterritorially.[49]

State practice

This section describes state practice in various jurisdictions, including Argentina, Australia, Bolivia, Bulgaria, Brazil, Canada, China, Columbia, Costa Rica, Denmark, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, Myanmar, Netherlands, Norway, Panama, Poland, Romania, Russia, Senegal, Spain, Sweden, the United Kingdom, the United States and Venezuela. The significance of this state practice, however, remains controversial amongst members of the committee.[50]

Common law countries (excluding the United States)

Presence of the defendant in the forum

In common law countries, the primary basis for establishing jurisdiction is service on a defendant while present in the adjudicating forum.[51] Presence may be substantial and permanent or transient – such as where the defendant only visits the forum to attend a meeting[52] – and there need be no connection between the forum and either the defendant or

48 Second Periodic Report of New Zealand, UN Doc CAT/C/29/Add4, paras 35-40 (1997); Second Periodic Report of Germany, UN Doc CAT/C/29/Add2, para 39 (1997). But see Hall, *supra* n 41 at 937 n 67 (noting that neither state claimed that it was not required to provide foreign victims of torture abroad by other foreigners with a forum to seek and obtain reparations).

49 See Committee against Torture, 'Conclusions and recommendations (Canada)', para 5(f), UN Doc CAT/C/CR/34/CAN (7 July 2005) (rejecting the *Bouzari* court's interpretation of Article 14). There is debate on how much weight to give such a statement by the committee. See *supra* n 46 [2006] 2 WLR 1424, para 57 (Lord Hoffmann) (according the committee's statement little or no weight): *ibid* para 23 (Lord Bingham) (same). For a contrary view, see Hall, *supra* n 41 at 928; Orakhelashvili, *supra* n 41 at 963.

50 See *supra* n 5 regarding the committee's disagreement over whether domestic legislation asserting jurisdiction over extraterritorial torts could be considered *opinio juris*.

51 See *Colt Indus Inc v Sarlie* [1966] 1 WLR 440 (UK CA) (process served on foreign defendant in England while there on business for a few days); see also *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283 (UK CA). In the United Kingdom, the common law rules of personal jurisdiction apply only where the defendant is not domiciled in an EU or EFTA Member State: see eg, *Cooley v Ramsey* [2008] EWHC 129.

52 See *Maharanee of Baroda v Wildenstein*, *supra*, n 51 (process served on foreign defendant while visiting England to attend the Ascot races).

the substance of the action.[53] For corporations, 'presence' is established where the entity carries on business at a fixed and definite place,[54] including where it uses a local agent.[55] A corporation's activity within the jurisdiction need not constitute a substantial part of, or even be incidental to, its principal objective to be considered present within the jurisdiction for purposes of service.[56]

Where a defendant is present in the forum, courts in common law countries automatically have jurisdiction[57]; courts may only exercise their discretion to stay the proceedings, for example on grounds of *forum non conveniens* (discussed further below).

SUBMISSION TO THE JURISDICTION

Courts may also assert jurisdiction over a foreign defendant based on consent. A defendant may consent to jurisdiction *ex post* or *ex ante*, explicitly or implicitly.

Parties may expressly agree to submit their dispute to the jurisdiction of local courts through a forum-selection clause whose scope applies to any dispute between the parties, including tort claims.[58] Consent or submission may also be implicit: a person not otherwise subject to the

53 See *Evers v Firth* [1987] 10 NSWLR 22 (Australia) (process served on defendant in New South Wales for a tort that occurred in Queensland, though there was no connection with the forum other than the defendant's presence there); *Perrett v Robinson* (1985) 1 Qd R. 83 (Australia) (process served on defendant in Queensland though the tort occurred in the Northern Territory and the parties were at all times residents in the Northern Territory); *Colt Indus Inc v Sarlie, supra*, n 51 at 440-41 (process served on American defendant while in England for five days for a tort that occurred in the United States).

54 See *The Theodohos* [1977] 2 Lloyd's Rep 428 (QBD (Adm Ct)).

55 See *Commonwealth Bank v White* [1999] VSC 262 (Australia) (process served on a foreign company in Australia via its local agent was sufficient where the agent maintained an office in the country and did not engage in any business independent from that of the foreign company); CA 2652/94, *Tendler v Le Club Méditerranée (Israel) Ltd*, 94(3) Pad-Or 398 (Israel) (local branch of foreign company regarded as its 'authorized agent' for service of process); *Adams v Cape Indus plc* [1990] Ch 433, 523-531 (UK CA) (examining authorities on the presence of a corporation at common law).

56 See *South India Shipping Corp v Import-Export Bank of Korea* [1985] 1 WLR 585 (UK CA).

57 Adrian Briggs & Peter Rees, *Civil Jurisdiction and Judgments* (4th ed 2005) 290; *Clerk & Lindsell on Torts* (19th ed 2006) 372.

58 See Civil Procedure Rules 1998 ('English CPR'), Rule 6.15 and Rule 6.20(5)(d), available at www.justice.gov.uk/civil/procrules_fin/index.htm; Federal Court Rules, Federal Court of Australia Act 1976, O 8 r 2 Item 17 (Australia) ('FCR Aust'), available at www.comlaw.gov.au/ComLaw/legislation/legislativeinstrumentcompilation1.nsf/0/72CF5E9ECA09F0E6CA2573CA0022F66A/$file/FederalCourtRulesV1.pdf; Uniform Civil Procedure Rules 2005, Civil Procedures Act 2005 (NSW) ('UCPR') Schedule 6 para (h), available at www.legislation.nsw.gov.au/. See also *The Vikfrost* [1980] 1 Lloyd's Rep 560 (UK CA).

jurisdiction of a particular forum may preclude himself, by his own conduct, from later objecting to it. For example, a court may deem the act of a foreign plaintiff filing suit in the local forum as evidence of consent to that forum's jurisdiction in a counterclaim filed against that plaintiff.[59] Similarly, a defendant arguing on the merits or applying for various remedies in the local forum may be deemed to have tacitly consented to that forum's jurisdiction.[60] A defendant, however, does not submit to a court's jurisdiction by making an application in the proceedings if he has specifically reserved his objection to jurisdiction.[61]

Jurisdiction upon consent or submission to the forum by a foreign defendant is also automatic, subject only to the discretionary limitations discussed below. Nonetheless, in circumstances where the defendant is not present in the adjudicating forum or has not designated an address or an authorised person for service of process, a plaintiff will only be able to serve its suit through a request for permission to serve out of the jurisdiction under one of the grounds specified in the rules of civil procedure.[62]

SERVICE OUT OF THE JURISDICTION

Process may also be served abroad when the defendant is not present within or has not consented to jurisdiction. Due to potential interference with foreign fora, jurisdiction is discretionary; the court may refuse to permit service of process and thus decline to exercise jurisdiction.[63] The plaintiff bears the burden to show that the court is the *forum conveniens* and must demonstrate good reasons why service on a foreign defendant

59 See *Metal Scrap Trade Corp v Kate Shipping Co* [1990] 1 WLR 115, 130 (HL); *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528; *Balkanbank v Taher (No 2)* [1995] 1 WLR 1067 (UK CA); *Republic of Liberia v Gulf Oceanic Inc* [1985] 1 Lloyd's Rep 539, 544, 547 (UK CA).

60 See *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438, 444 (HL).

61 *Ibid*; *Esal Ltd v Pujara* [1989] 2 Lloyd's Rep 479 (UK CA).

62 See English CPR Rule 6.20. In England a contractual forum-selection clause has been acknowledged as an independent ground for permission to serve out of the jurisdiction: *ibid* Rule 6.20(5)(d). See also Israeli Civil Law Procedure Regulations ('Israeli CLPR'), 5744-1984, reg 500.

63 See *George Monro Ltd v American Cyanamid Corp* [1944] KB 432, 437 (UK CA); *The Brabo* [1949] AC 326, 357; *Mackender v Feldia* [1967] 2 QB 590, 599 (CA); *Derby & Co Ltd v Larsson* [1976] 1 WLR 202, 204 (HL); *The Sky One* [1988] 1 Lloyd's Rep 238, 241 (CA); CA 837/87, *Hoida v Hindi*, 44(4) PD 545, 550 (Israel) (where the Israeli Supreme Court emphasised that whenever national courts transgress their territorial jurisdiction they risk colliding with other jurisdictions and obstructing international comity).

should be permitted.[64] In deciding whether to exercise its jurisdiction, the court will consider the nature of the dispute, the legal and practical issues involved, and the strength of the merits of the claim.[65] In some common law jurisdictions, where service outside the jurisdiction is allowed without leave of the court in specified circumstances, the court retains its discretion to set aside service upon the application of the defendant.[66]

The traditional approach: the place of the tort: Historically, common law courts exercised caution in allowing service abroad, believing that such jurisdiction was 'exorbitant' and interfered with the sovereignty of the country where service was to occur.[67] Thus, the traditional formulation of the right to service abroad was that service could be effected where an action was 'founded on a tort committed within the jurisdiction'.[68] According to the decision of the Privy Council in *Distillers Co (Biochemicals) Ltd v Thompson*,[69] the meaning of the term 'tort' in this context required that the act or omission, rather than the damage, took place within the jurisdiction.

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64 See *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 481 (HL) (UK); *Amin Rasheed Shipping Corp v Kuwait Insurance Co Ltd* [1984] AC 50. See also CA 4601/02, *Rada Ta'asiyot Electroniyot Ltd v Bodstray Co Ltd*, 58(2) PD 465, 472 (Israel). In practice the defendant should identify any issues which are appropriate to be tried in a foreign court: see *Limit (No 3) Ltd v PDV Ins Co* [2005] EWCA Civ 383, [73]; *Sawyer v Atari Interactive Inc* [2005] EWHC 2351 (Ch). Under English CPR, if there is any doubt as to the construction of the headings under Rule 6.20 (service out of the jurisdiction where the permission of the court is required), that doubt is to be resolved in favour of the defendant.

65 See *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438.

66 See *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, 217 (PC) (NZ); *Canadian Commercial Bank v Carpenter* (1990) 62 DLR (4th) 734 (BCCA) (Canada); *Singh v Howden Petroleum Ltd* (1979) 1000 DLR (3d) 121 (Canada).

67 See *George Monro Ltd v American Cyanamid Corp* [1944] KB 432, 437 (UK CA); *The Siskina v Distos Compania Naviera SA* [1979] AC 210, 254; *Amin Rasheed Shipping Corp v Kuwait Insurance Co Ltd, supra* n 64 at 65; CA. 98/67, *Livhar v 'Gazit ve-Shaham' Khevra le-Vinyan Ltd* [1967] 21(2) PD 243, 250 (Israel).

68 Statutes in some common law jurisdictions continue to apply the traditional formulation: see eg, British Columbia, the Supreme Court Rules, BC Reg 221/90, rule 13(1) available at www.qp.gov.bc.ca/statreg/reg/C/CourtRules/CourtRules221_90/221_90_01.htm#rule13, and Court Jurisdiction and Proceedings Transfer Act [SBC 2003] Chapter 28, section 10(b) available at www.qp.gov.bc.ca/statreg/stat/C/03028_01.htm#section10, requiring that a proceeding 'concerns a tort committed in British Columbia'; Israeli CLPR 500(7) (requiring that '[t]he claim is made in respect of an act or an omission within the jurisdiction').

69 See *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 (PC 1970) (appeal taken from New South Wales). Israeli courts have followed *Distillers* and require the tortious act or omission to have taken place in the jurisdiction as a prerequisite to service abroad: see CA 565/77, *Mizrakhi v Nobel's Explosive Co*, 32(2) PD 115, 119-120 (Israel). Unlike the procedural rules of other common law jurisdictions, the Israeli CLPR are unchanged, and this jurisprudence remains good law. Damage sustained in the jurisdiction alone would not suffice to permit service abroad in Israel.

Identification of the 'place of the tort' is not always a straightforward task. While there is little difficulty when all the key elements of a tort occur in one place, such elements may be scattered across several different countries. In these cases, common law courts traditionally would ask: '[W]here in substance did the cause of action arise?'[70] Resolution of this question would depend on the nature of the individual tort. For example, in *Distillers*, where the plaintiff sued the defendant for damages suffered in New South Wales as a result of her mother having taken thalidomide during her pregnancy, the Privy Council held that the cause of action had arisen in New South Wales because the defendant failed to communicate to the plaintiff the potentially dangerous effect of its product there, irrespective of where the damage was suffered.[71] Similarly, a plaintiff injured by defective machinery was permitted to bring suit in England against its foreign manufacturer because the substantial wrongdoing – marketing the defective product – occurred in England.[72]

Expanding the doctrine: damage suffered in the forum: Recently many common law jurisdictions have been more willing to allow service where damage was suffered in the forum.[73] Courts today are aware of the increasing frequency with which they are asked to adjudicate transnational litigation involving foreign events and parties and recognise such proceedings should not be subject to overly-restrictive rules.

As a result, in the past 20 years, service abroad based on damage suffered within the forum has emerged as a new ground for service. In much of Australia and Canada, this jurisdictional premise is interpreted broadly, allowing service abroad where any damage suffered from a tort occurs in the forum, including consequential economic loss from a personal injury first suffered in a foreign country.[74] English courts have also followed this line of authority. In *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc*, a tort case involving inducing breach of contract, the court accepted this expanded notion of service abroad, holding that

70 See *Distillers Co (Biochemicals) Ltd v Thompson*, *supra* n 69.

71 *Ibid.*

72 See *Castree v E R Squib & Sons Ltd* [1980] 1 WLR 1248 (expanding the principle established in *Distillers*). While the UK Court of Appeal in *Castree* still looked at the place of the act/omission, it found that place to be where the (negligent) act of marketing occurred, rather than the place of the (negligent) act of manufacture: *ibid.*

73 See *Booth v Phillips* [2004] 1 WLR 3292; CA 2705/97, *Ha-Geves A Sinai (1989) Ltd v The Lockformer Co* 52(1) PD 109, 114 (Israel).

74 See *Flaherty v Girgis* (1985) 4 NSWLR 248 (Australia) (claimant allowed to sue in New South Wales where she had incurred hospitalisation expenses after an accident in Queensland); *Vile v Von Wendt* (1979) 103 DLR (3d) 356 (Ont CA) (Ontario jurisdiction was proper, even though the tort was committed in Quebec, because the damage was sustained in Ontario).

the plaintiff should show that either the tortious act was committed within the jurisdiction or the damage was sustained there.[75]

The expansion of circumstances in which a court may permit service out of the jurisdiction across common law countries is now reflected in many local rules of civil procedure.[76] For example the English Civil Procedure Rules now allow for service outside the jurisdiction for claims made in tort where the damage *either* results from an act committed within the jurisdiction *or* is sustained within the jurisdiction.[77] The Australian Federal Court Rules allow for service abroad where proceedings are 'based on a tort committed in Australia' or are 'based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring)'.[78]

Other instances exist in which courts may claim jurisdiction even when the tort or the damage suffered has not occurred within the jurisdiction. Jurisdiction may be asserted as to a claim for an injunction relating to an act which is taking place, or is about to take place, within the jurisdiction.[79] Jurisdiction may also be proper when the litigation concerns property within the relevant jurisdiction.[80]

JURISDICTIONAL LIMITATIONS

Even in those cases where a forum's jurisdiction has been established, either through service within or out of the jurisdiction, common law courts still retain discretion whether to exercise jurisdiction. One such restraint is the doctrine of *lis alibi pendens*, which grants the court discretion to stay proceedings commenced before it where legal proceedings involving the same parties in respect to the same dispute are already pending in another forum.[81]

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75 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 449 (CA).

76 See eg, UCPR Schedule 6 paras (d) and (e); Victoria Supreme Court (General Civil Procedure) Rules ('Victoria SCR'), SR No 148/2005, r 7.01(1)(j), available at www.supremecourt.vic.gov.au; Rules of Civil Procedure (Ontario), RRO 1990, Reg 194, r 17.02(h) (2004), available at www.canlii.org/on/laws/regu/1990r.194/20080421/whole.html.

77 See English CPR Rule 6.20(8)(a) and (b).

78 See FCR Aust, O 8 r 2 items 4 and 5.

79 English CPR Rule 6.20(2); UCPR, Schedule 6 para (n); Israeli CLPR 500(6).

80 English CPR Rule 6.20(10); FCR Aust O 8 r 2 items 6(b) and 19; UCPR Schedule 6 para (j).

81 See *Jopson v James* [1908] 77 LJ Ch 824 (CA); *The Christiansborg* [1885] 10 PD 141 (CA), distinguished in *The Mannheim* [1897] P 13; *The Marinero* [1955] 1 All ER 676. Cf *Re Bryan* [1904] 20 TLR 290 (Australia). See also *Williams and Glyns Bank plc v Astro Dinamico Cia Naviera SA* [1984] 1 WLR 438 (HL) *and Georgian Shipping Enterprises SA*; *New Hampshire Insurance Co v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep 539.

If a claim has little or no substantive connection with the forum in which proceedings have commenced, the defendant can apply for a stay of those proceedings on the ground of *forum non conveniens*. In considering whether there is a more appropriate forum abroad 'for the ends of justice',[82] common law courts look for the forum with which the action had the most real and substantial connection.[83] In doing so, courts consider the convenience or expense of litigating in the local forum over the foreign one, the availability of witnesses, the law governing the relevant event, and the places where the parties reside or carry on business.[84] Even if the court concludes there is another forum that is *prima facie* more appropriate, certain factors may nevertheless militate against granting a stay, such as if the plaintiff would not obtain justice in the foreign jurisdiction.[85]

In cases where the tort is committed within the forum, common law courts will rarely grant a stay of local proceedings.[86] In cases where the tort is committed outside the forum, but the forum nevertheless retains jurisdiction, for example because the defendant was coincidentally present in the forum, the doctrine of *forum non conveniens* serves as a check on generous rules of service.[87]

In addition to the doctrine of *forum non conveniens*, there are other local rules in common law countries that limit the exercise of extraterritorial

82 *Spiliada Maritime Corp v Cansulex Ltd, supra* n 64 at 474; *The Abidin Daver* [1984] AC 398, 411 (HL); *Sim v Robinow* [1892] 19 R 665, 668 (Scotland) ('[T]he plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.').

83 The exact formula applied by the courts varies across legal systems. In England, a defendant asking the court to stay the proceedings is required to show that an alternative forum exists that is 'clearly and distinctly' more appropriate, see *Spiliada Maritime Corp v Cansulex Ltd, supra* n 64 at 477), while in Australia the test is stricter and the defendant must show that the court is a 'clearly inappropriate' forum, see *Voth v Manildra Flour Mills Ltd* [1990] 171 CLR 538 (Australia).

84 *Spiliada Maritime Corp v Cansulex Ltd, supra* n 64 at 477–78.

85 *Ibid.* In England the availability of legal aid (or some other form of financial aid in bringing proceedings) may also be a factor in determining issues of *forum non conveniens*. See *Carlson v Rio Tinto plc* [1999] CLC 551; *Connelly v RTZ Corp plc* [1998] AC 854, 873 (HL) (Lord Goff). Similarly, a lack of financial assistance to afford necessary legal representation in the appropriate forum is also a factor: see *Lubbe v Cape plc* [2000] 4 All ER 268.

86 See eg, *Dow Jones & Co, Inc v Gutnick* [2003] 210 CLR 575 (Australia) (jurisdiction was proper in a defamation suit brought by an Australian against a New Jersey publisher where the bulk of the subscriptions was in the United States and the material was hosted on a New Jersey server, but the server was accessed by subscribers in Australia).

87 See CA 4716/93 *Ha-Khevra ha-Arvit le-Bituakh Shkhem v Zrikat*, 48(3) PD 265, 272 (Israel) ('[T]he difference between a [tort] event within the state and a [tort] event outside the state is a substantial, fundamental and significant one, and the location of the accident may turn the balance of connections [between the action and the forum] on its head.').

tort jurisdiction on sensitive matters. These include the 'act of state' doctrine,[88] foreign state immunity,[89] diplomatic and consular immunity,[90] and the immunity of international officials.[91] Contrary to the *forum non conveniens* doctrine, which allows judicial discretion to stay the proceedings, these doctrines completely bar the court from hearing the case. The nature and extent of such doctrines lies outside the scope of this report.

United States[92]

EXTRATERRITORIAL JURISDICTION OVER ORDINARY TORTS

Presence of the defendant in the forum: As in other common law countries, the traditional basis for jurisdiction in the United States is the presence of

88 See *Kuwait Airways* [1995] 1 WLR 1147 (UK); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* [1988] 165 CLR 30, 40–41; Foreign States Immunities Act 1985 (Australia).

89 See *The Christina* [1938] AC 485, 490; *Trendex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 553–554, 567–569, 578–579 (CA); State Immunity Act 1978, s 1(1) (UK); Foreign States Immunities Act 1985 (Australia); CA 7092/94 *Her Majesty the Queen in Right of Canada v Edelson*, 51(1) PD 625 (Israel).

90 See the Diplomatic Privileges Act 1964 (UK); the Consular Relations Act 1968 (UK); CA (TA) 4289/98 *Shalom v Attorney-General*, 58(3) PM 1 (Israel).

91 See the International Organisations Act 1968 (UK); UN Immunities and Privileges Ordinance 1947 and UN Immunities and Privileges Order 1947 (Israel); DCM (Jm) 4262/04 *United Nations Truce Supervision Organisation v Siragnian*, 63(1) PM 817 (Israel).

92 While the sources of US law clearly place it within the general tradition of the common law, certain developments call for separate treatment. Therefore, this report dedicates a section to the analysis of these distinguishing features of the US system. One important distinction to note up front is that US courts distinguish between personal jurisdiction – the ability of a court to assert jurisdiction over and render an enforceable judgment against a defendant – and subject-matter jurisdiction – the competence of a court to adjudicate the case itself. For a court to assert jurisdiction over a dispute, it must have both personal jurisdiction over the defendant and subject-matter jurisdiction over the claim at issue. Thus, in the context of this report, a court must have jurisdiction over a defendant who may or may not reside in the forum (personal jurisdiction) and jurisdiction to adjudicate a claim involving a tort that occurred outside the forum (subject-matter jurisdiction).

the defendant in the adjudicating forum.[93] The foundation of jurisdiction was originally understood in the United States to be the state's physical power over the defendant.[94] Thus, '[t]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit'.[95]

Historically, to exercise jurisdiction with respect to a tort committed outside a state by a defendant found within the state, US courts relied on the common law notion of transitory torts, where 'the tortfeasor's wrongful acts create an obligation which follows him across national boundaries'.[96] The codification of jurisdictional authorisation in modern practice[97] has since limited this concept, typically permitting courts to exercise jurisdiction over a defendant only when there is some nexus

93 See *Pennoyer v Neff*, 95 US 714, 722 (1877) (it is a principle of public law that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory'); Joseph Story, *Commentaries on the Conflict of Laws* (1846) ss 554, 543 ('[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found…'); Arthur T von Mehren & Donald T Trautman, 'Jurisdiction to Adjudicate: A Suggested Analysis' (1966) 79 *Harv L Rev* 1121, 1137-38 (jurisdiction in the United States is based on presence, domicile, and residence); *Burnham v Super Ct of Cal, Cty of Marin*, 495 US 604, 610 (1990) (plurality opinion) (Scalia, J ('Among the most firmly established principles of personal jurisdiction in American tradition is that courts of a State have jurisdiction over nonresidents who are physically present in the State.').

94 Restatement (Second) of Conflict of Laws s 28 cmt (a) (1988); *Burnham v Super Ct of Cal, Cty of Marin, supra* n 93 at 618.

95 *Burnham v Super Ct of Cal, Cty of Marin, supra* n 93 at 610–11.

96 Jeffrey M Blum & Ralph G Steinhardt, 'Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filitarga v Pena-Irala' (1981) 22 *Harv Int'l L J* 53, 63; *Livingston v Jefferson*, 15 F Cas 660, 664 (CCDVa 1811) (Case No 8,411) ('[A]ctions are deemed transitory, where transactions on which they are founded might have taken place anywhere; but are local where their cause is in its nature necessarily local.'). A court could adjudicate a transitory tort only if: (1) the defendant is properly within the court's jurisdiction, (2) the tort in question falls within the court's subject-matter jurisdiction, (3) the tort was actionable under the law of the place where it was committed, and (4) that law does not go against the interests or public policy of the forum state: *Dennick v Central R Co of New Jersey*, 103 US 11, 13–15 (1880).

97 See Ro*ss v Product Development Corp*, 736 F Supp 285, 288 (DDC 1989) ('[F]or a court to properly exercise jurisdiction over a non-resident defendant, service of process over that defendant must be authorized by statute and must be within the limits set by the due process clause of the United States Constitution.'); Gary Born, *International Civil Litigation in United States Courts* (3d ed 1996) 67 (discussing the requirement for legislative authorisation to exercise jurisdiction).

between the forum state and a tort committed outside it.[98]

These laws typically allow courts to exercise personal jurisdiction on the basis of the defendant's domicile or residence or a defendant corporation's registration or incorporation.[99] In addition, foreign defendants engaging in continuous and systematic business in the forum may be considered present for jurisdictional purposes.[100] Transient presence also remains a valid basis for personal jurisdiction in the United States, under so-called 'tag jurisdiction'. Such jurisdiction may be premised solely on the service of process on a defendant temporarily present in the forum state, on the theory that such service provides adequate notice of the suit in question.[101]

Consent to jurisdiction: US courts may also assert personal jurisdiction over a defendant who expressly or impliedly consents to jurisdiction.[102] Consent may be obtained, for example, by an explicit, *ex ante* agreement between the parties. In the United States, forum selection agreements serve as an adequate basis for a court to exercise jurisdiction in tort in

98 Jurisdiction over the defendant (ie, personal jurisdiction) is a matter of state law, whether the defendant is in federal or state court: see Federal Rules of Civil Procedure, 4(k) (2007) ('Fed R Civ P'). The extent to which states permit their courts to assert jurisdiction over out-of-state defendants varies from state to state. In New York, for example, 'a court may exercise personal jurisdiction over any non-domiciliary… who… commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce': New York State Civil Practice Law & Rules s 302(a)(3) (2007) ('NY CPLR').

99 See *Milliken v Meyer*, 311 US 457, 462–63 (1941) (holding that domicile within one of the United States is sufficient for jurisdictional purposes even where the defendant is served outside the forum); Restatement (Second) of Conflict of Laws s 41 (1971) ('A state has power to exercise judicial jurisdiction over a domestic corporation.'); Restatement (Third) Foreign Relations Law of the United States s 421(2)(e) (1987) ('a state's exercise of jurisdiction… is reasonable if the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state').

100 NY CPLR s 302(a)(1); *Perkins v Benguet Consol Mining Co*, 342 US 437, 446–47 (1952); *McGowan v Smith*, 437 NYS 2d 643, 645 (NY 1981). See eg, *Cipriari v Serbvicos Aereos Cruzeiro do Sul*, SA 232 F Supp 433, 441 (SDNY 1964) (jurisdiction with respect to a tort that occurred in Brazil properly asserted over a Brazilian corporation that maintained a purchasing office in New York on a 'doing business' rationale).

101 *Burnham v Super Ct of Cal, Cty of Marin*, *supra* n 93 at 618 (Scalia, J); *ibid* at 636–37 (Brennan, J, concurring in the judgment).

102 *Pennoyer v Neff*, 95 US 714, 722 (1877), *supra* n 93 at 733 (When a suit 'involve[es] merely a determination of the personal liability of the defendant, he must be brought with [the court's] jurisdiction by service of process within the State, or his voluntary appearance.').

the absence of a connection with the forum, so long as the clause contemplates adjudication of the tort claim.[103] A defendant's litigation behaviour may also constitute consent to a court's jurisdiction. For example, a defendant who makes a general appearance after the initiation of suit and does not object to the court's jurisdiction implicitly consents, *ex post*, to the court's exercise of jurisdiction.[104] The court's jurisdiction in these instances is also predicated on having subject-matter jurisdiction over the specific claim at issue.[105]

Service outside of the forum: In modern jurisdictional practice, state 'long-arm statutes' authorise a court's exercise of personal jurisdiction over

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103 *Carnival Cruise Lines, Inc v Shute*, 499 US 585 (1991); *Asoma Corp v SK Shipping Co*, 467 F3d 817, 819 (2d Cir 2006) (forum selection clause requiring disputes to be litigated in New York applicable to a cargo damage claim against a South Korean corporate defendant); *Terra Int'l v Mississippi Chemical Corp*, 119 F3d 688, 693-94 (8th Cir 1997) (noting that a majority of cases that have considered 'arising out of' forum selection clauses have found that such clauses include tort claims); *Caperton v AT Massey Coal Co*, __SE2d __, 2008 WL 918444 (W Va 2008) (noting that courts routinely hold that tort claims are governed by forum selection clauses that encompass all claims 'related to', 'in connection with' or 'arising from' the contract); Restatement (Third) Foreign Relations Law of the United States s 421(2)(g) (1987) ('[A] state's exercise of jurisdiction… is reasonable if the person… has consented to the exercise of jurisdiction.').

104 See Fed R Civ P 12(h)(1) (failure to raise the defence of lack of personal jurisdiction is waived if not properly raised pursuant to the Federal Rules of Civil Procedure); NY CPLR s 3211(e) (failure to object to jurisdiction in a pre-answer motion to dismiss or, if no such motion is made, if the answer to the complaint constitutes waiver); *Godley v Morning News*, 156 US 518, 521 (1895) (jurisdiction properly asserted when the defendant has made a general appearance or has waived an objection to the court's exercise of jurisdiction).

105 See *supra* n 92. If both parties bound by the forum selection agreement are not US citizens or residents, the litigation will be in a state, rather than federal court, because the federal court would not have subject-matter jurisdiction over the dispute. Federal courts are courts of 'limited jurisdiction', meaning they can only assert jurisdiction in cases that have a diversity of citizenship between the parties (either citizens of two or more states or of at least one state and a foreign country) or that involve a question of federal law: see 28 USC s 1331 (federal question jurisdiction); s 1332 (diversity jurisdiction); see also US Constitution Article III, s 2. State courts are courts of 'general jurisdiction', permitting them to assert jurisdiction over any claim, without regard to the identity of the parties or the law that governs the claim, so long as federal courts do not have exclusive jurisdiction to adjudicate the claim. States may, however, place limits on their courts' jurisdiction, for example by denying jurisdiction to claims that arise in other states. In New York, in cases in which a non-domiciliary of New York brings suit against a foreign corporation, courts typically only have subject-matter jurisdiction when there is some connection between the subject matter of the dispute or the parties and the state: NY Bus Corp Law s 1314(b). But New York provides an exception. New York courts may not dismiss cases in which there is no connection to New York so long as the claim arises out of or relates to a contract that contains a New York choice of forum clause and a New York choice of law clause, and involves an obligation of greater than one million dollars: NY Gen Oblig Law s 5-1402.

an absent defendant in certain circumstances.[106] Some long-arm statutes enumerate the bases upon which the adjudicating forum may exercise this jurisdiction. Other long-arm statutes permit the adjudicating forum to assert personal jurisdiction over an absent defendant so long as the assertion of jurisdiction is consistent with the US Constitution.[107]

Most, if not all, states authorise jurisdiction where the tortious act or its consequent injury occurred within the state. Where the act is committed outside the state, an additional connection with the state is typically required.[108] Thus, while jurisdiction will not depend on the defendant's presence in the forum, the long-arm statute authorises courts to adjudicate extraterritorial torts where the damages are suffered in the state and there is sufficient connection to the state to warrant the assertion of jurisdiction.

A state's ability to exercise personal jurisdiction over an absent defendant is not unlimited. The US Supreme Court has held that the assertion of jurisdiction must comport with the Due Process Clause of the 14th Amendment to the US Constitution.[109] While this was originally interpreted narrowly – only permitting jurisdiction over people and property within the forum state – as trade, communications and transportation expanded, new theories under which courts may exercise jurisdiction over defendants outside of the adjudicating forum developed.[110] Now, a court may exercise jurisdiction over a person who has had 'minimum contacts' with the forum state *and* where the exercise of jurisdiction over the defendant is reasonable.[111] In addition, the cause of action must arise out of or be related to the defendant's minimum

106 *Black's Law Dictionary* (8th ed 2004) ('A [long-arm] statute provid[es] for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect.').

107 Compare Cal Civ Proc s 410.10 (2004) ('A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.'), with NY CPLR s 302 (enumerating the bases upon which a court may exercise jurisdiction). See *infra* for an explanation of US constitutional limits on personal jurisdiction.

108 See eg, NY CPLR s 302(a)(3).

109 *Pennoyer v Neff*, *supra* n 93 at 732-33.

110 *Burnham v Super Ct of Cal, Cty of Marin*, *supra* n 93 at 617.

111 *International Shoe Co v Washington*, 326 US 310, 316 (1945).

contacts with the forum.[112]

A defendant establishes minimum contacts with a state when it 'purposefully avails' itself of the benefits and protections of the state.[113] Mere knowledge of the possibility of contacts with the forum does not suffice for jurisdictional purposes.[114] However, the US Supreme Court is split on whether a defendant's knowledge that its product will contact the forum state is sufficient for establishing minimum contacts.[115]

In the intentional torts context, courts apply the 'effects test', inquiring whether the defendant purposefully directed the action that led to the alleged injury in the adjudicating forum.[116] Under this test, minimum contacts are established where: (1) the defendant allegedly committed an intentional tort; (2) the plaintiff suffered the brunt of the injury in the

112 *Burger King Corp v Rudzewicz*, 471 US 462, 472-73 (1985) (quoting *Helicopteros Nacionales de Colombia, SA v Hall*, 466 US 408, 414 (1984)). This concept of asserting jurisdiction on claims arising out of or related to the defendant's contacts with the adjudicating forum is often referred to as 'specific jurisdiction'. See von Mehren & Trautman, *supra* n 93 at 1136. 'General jurisdiction' based on a defendant's continuous and systematic presence in the adjudicating forum, permits jurisdiction over claims unrelated to the defendant's contacts with the forum: see eg, *Helicopteros Nacionales de Colombia SA v Hall*, *supra* n 112 at 415. This report considers general jurisdiction in its analysis of jurisdiction based on a defendant's presence within the forum. See *supra*.

113 *Hanson v Denkla*, 357 US 235, 253 (1958).

114 *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 297 (1980). Plaintiffs were injured while driving their car (purchased in New York) in Oklahoma: *ibid* at 288. Plaintiffs then brought a product liability suit in Oklahoma against the New York retail car dealer and regional distributor: *ibid*. The court rejected the plaintiff's argument that the defendants had purposeful contacts with the forum on the theory that it was foreseeable that a car would enter Oklahoma: *ibid* at 295–99.

115 *Asahi Metal Indus Co v Superior Ct of Cal*, 480 US 102 (1987). In the plurality opinion written by Justice O'Connor, the purposeful availment requirement could not be met simply by placing a product in the stream of commerce: *ibid* at 113. Instead, a 'substantial connection… [from] an action of the defendant purposefully directed toward the forum state' was necessary to satisfy the requirement: *ibid*. Justice Brennan's plurality opinion concluded that a defendant's knowledge that its product would enter the forum would suffice for purposeful availment purposes: *ibid* at 117. For courts that followed Justice O'Connor's more stringent standard, see eg, *Rodriguez v Fullerton Tires Corp*, 115 F3d 81 (1st Cir 1997). For courts that followed Justice Brennan's plurality, see eg, *Ruston Gas Turbines, Inc v Donaldson Co*, 9 F3d 415 (5th Cir 1993).

116 *Calder v Jones*, 465 US 783 (1984) (personal jurisdiction established in California where a California plaintiff alleged that the Florida defendant intentionally committed a tort aimed at the forum state where the plaintiff suffered the brunt of the injury).

forum; and (3) the alleged tortious activity was aimed at the forum.[117]

As to the reasonableness requirement, the assertion of jurisdiction must comport with 'traditional notions of fair play and substantial justice'.[118] Thus, courts consider the interest of the plaintiff in adjudicating the claim in the chosen forum, the burden on the defendant, the interest of the forum in adjudicating the claim, the judicial system's interest in efficient dispute resolution and the shared interest of the states in furthering substantive polices.[119] When analysing the reasonableness of exercising jurisdiction over a foreign defendant, courts must consider 'the procedural and substantive policies of other nations', as '[g]reat care and reserve should be exercised when extending [US] notions of personal jurisdiction into the international field'.[120] Thus, even if the defendant meets the minimum contacts requirement, jurisdiction will not pass constitutional muster if the exercise of that jurisdiction is unreasonable.[121]

Jurisdictional limitations: Courts in the United States may, in their discretion, abstain from exercising otherwise proper jurisdiction in an extraterritorial tort case. For example, they may apply the doctrine of *forum non conveniens*[122] or defer to a foreign proceeding on the principle of

117 *Calder v Jones, supra* n 116 at 789-90; *Fielding v Hubert Burda Media Inc*, 415 F3d 419, 424-28 (5th Cir 2005); *Schwarzenegger v Fred Martin Motor Co*, 374 F3d 797, 805-07 (9th Cir 2004). See also *Indianapolis Colts, Inc v Metro Baltimore Football Club Ltd*, 34 F3d 410, 412 (7th Cir 1994) (Posner, J) (*Calder v Jones, supra* n 116 requires 'more than [bringing] about an injury to an interest located in a particular state', but rather '"enter[ing]" the state in some fashion, as by the sale… of the magazine containing defamatory material').

118 *International Shoe Co v Washington, supra* n 111 at 316 (internal quotation omitted).

119 *Burger King*, 471 US at 478.

120 *Asahi Metal Indus Co v Superior Ct of Cal, supra* n 115 at 115 (quoting *United States v First National City Bank*, 379 US 378, 404 (1965) (Harlan, J dissenting)).

121 See *Asahi Metal Indus Co v Superior Ct of Cal, supra* n 115 at 114–16 (1987) (holding that the court's assertion of jurisdiction was constitutionally unreasonable because the Taiwanese corporate plaintiff did not have a strong interest in the forum, the burden on the overseas defendant was significant and the forum had minimal interest in adjudicating the claim).

122 See eg, *Piper Aircraft Co v Reyno*, 454 US 235 (1981); *Ford v Brown*, 319 F3d 1302, 1310 (11th Cir 2003) (application of *forum non conveniens* appropriate in a tort suit filed in Florida, where defendant lived, for torts arising in Hong Kong). Federal law governs the application of *forum non conveniens* in federal court: see *Ravelo Monegro v Rosa*, 211 F3d 509, 511–12 (9th Cir 2000).

comity.[123] When considering whether to dismiss or stay an action on *forum non conveniens* grounds, courts consider whether the alternate foreign forum is adequate and available,[124] the private interests of the litigants,[125] and the public interests of the local and foreign fora.[126]

Yet other common law doctrines, such as the 'act of state' doctrine, may preclude courts from adjudicating the merits of the dispute.[127] In some circumstances, for example where issues of foreign policy are directly implicated, a court may also be constitutionally restricted from hearing the merits by the political question doctrine.[128] Furthermore, sovereign immunity also prohibits courts in the United States from exercising personal jurisdiction over a foreign government or its agencies or instrumentalities that commit a tort outside the United States.[129]

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123 See *Ungaro-Benages v Dresdner Bank AG*, 379 F3d 1227, 1232 (11th Cir 2004) (declining to exercise otherwise proper jurisdiction on international comity grounds in light of prospective proceedings in Germany in a suit involving Nazi-era theft of stock); *Bi v Union Carbide Chem & Plastics Co*, 984 F2d 582, 585–87 (2d Cir 1993) (rejecting class-action plaintiffs' standing in US court in deference to a democratically passed statute in India giving the Indian government exclusive standing to seek compensation for victims of a mass tort occurring in India).

124 *Piper Aircraft Co v Reyno*, *supra* n 122 at 241, 255 n 22.

125 Private interests include: 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of case easy, expeditious and inexpensive': *Piper Aircraft Co v Reyno*, *supra* n 122 at 241 n 6 (citation omitted).

126 Public interests include: 'the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty': *ibid* (citation omitted).

127 See eg, *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 428 (1964); *Corrie v Catepillar Inc*, 403 F Supp 2d 1019, 1032 (WD Wash 2005) (holding that the act of state doctrine barred the court from entertaining the plaintiff's Alien Tort Statute suit).

128 *Baker v Carr*, 369 US 186 (1962). See also *Joo v Japan*, 413 F3d 45, 52–53 (DC Cir 2005) (dismissing, on political question grounds, claim alleging Japanese soldiers subjected certain women to sexual slavery and torture before and during World War II); *Schnieder v Kissinger*, 412 F3d 190 (DC Cir 2005) (dismissing, on political question grounds, complaint against United States and Henry Kissinger alleging they caused the kidnapping, torture and death of a Chilean general).

129 Foreign Sovereign Immunities Act of 1976, 28 USC ss 1603–1611 (2006) ('FSIA'). While the FSIA provides an exception to sovereign immunity for some torts and therefore grants personal jurisdiction over foreign governments or their agencies and instrumentalities, that exception applies to torts only 'occurring in the United States': *ibid* at s 1605.

UNIVERSAL CIVIL JURISDICTION

Alien Tort Statute and Torture Victims Protection Act:[130] The Alien Tort Statute ('ATS') gives US federal district courts 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[131] The Torture Victims Protection Act ('TVPA') permits civil claims against individuals who, 'under actual or apparent authority, or color of law, of any foreign nation', committed torture and/or extrajudicial killing.[132] These statutes raise questions about the nature and limits of the jurisdiction they permit courts to assert.

The ATS and TVPA are often characterised as forms of universal civil tort jurisdiction.[133] Neither statute requires any connection between the conduct, victim or perpetrator and the United States – indeed, the only textual requirements imposed by the ATS are that the plaintiff must not be a US citizen and that the cause of action is a tort under the laws of nations.[134] The US government has argued that the ATS should not apply to claims arising within the jurisdiction of foreign sovereigns, particularly claims about a foreign sovereign's treatment of its own citizens.[135] But this suggestion has not been adopted by the courts and many ATS cases have no substantive connection with the United States.[136]

The US Supreme Court has not commented on whether the ATS and TVPA are forms of universal civil jurisdiction, though Justice Stephen Breyer adopted this characterisation of the ATS in *Sosa v Alvarez-*

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130 These statutes confer subject-matter jurisdiction on federal courts in the United States. Courts that have adjudicated claims under these statutes have also ensured they could assert personal jurisdiction over the defendants in these cases. See *supra* n 92.

131 Alien Tort Claims Act ('Alien Tort Statute' or 'ATS'), 28 USC s 1350 (2006) (originally enacted in An Act to Establish the Judicial Courts of the United States, ch 20, 1 Stat 73, s 9 (1789)).

132 Torture Victim Protection Act of 1991, PubL 102-256, 106 Stat 73 (codified at 28 USC s 1350-Note (2006)).

133 See Donovan & Roberts, *supra* n 32 at 146–49; K Lee Boyd, 'Universal Jurisdiction and Structural Reasonableness' (2005) 40 *Tex Int'l LJ* 1, 1–12.

134 Although both statutes remain subject to the ordinary rules for establishing personal jurisdiction, since personal jurisdiction can be founded on tag jurisdiction and minimum contacts, ATS and TVPA cases can proceed with very little connection to the United States.

135 See eg, *Brief for the United States as Amicus Curiae Supporting Rehearing En Banc* at 3, 8–14, *Sarei v Rio Tinto* (9th Cir 2007) (Nos 02-56256, 02-56390).

136 See eg, *Filartiga v Pena-Irala*, 630 F2d 876, 878-80 (2d Cir 1980) (claim of torture committed in Paraguay by Paraguayan official); *Kadic v Karadžić*, 70 F3d 232, 236 (2nd Cir 1995) (claim about atrocities committed in Bosnia by leader of Bosnian-Serb forces); *In re Estate of Marcos Human Rights Litig*, 978 F2d 493, 495–96 (9th Cir 1992) (claim for torture and wrongful death committed in the Philippines by former Philippine president).

Machain.[137] He reasoned that 'universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well' because many nations allow victims to attach claims for civil compensation to criminal prosecutions, so universal civil jurisdiction 'would be no more threatening' than universal criminal jurisdiction.[138] In applying the ATS to cases with no US connection, he stated that courts should, as a matter of international comity, consider not only whether the substantive behaviour was prohibited by international law, but also whether it was subject to universal jurisdiction.[139] Other US courts have also characterised the ATS as a form of universal civil jurisdiction.[140]

Norms actionable under the ATS/TVPA: The TVPA expressly applies only to torture and extrajudicial killing, whereas the ATS speaks of torts in violation of the laws of nations without listing particular norms.

In *Sosa v Alvarez-Machain*, the Supreme Court held that the ATS authorises the recognition of federal common law causes of action for a 'very limited' set of violations of international law.[141] When the ATS was enacted in 1789, these norms included offences against ambassadors, violations of safe conduct and piracy.[142] Federal courts can recognise modern day equivalents of these causes of action, provided the norms are 'accepted by the civilized world and defined with a specificity comparable to the features of the 18-century paradigms'.[143]

The Supreme Court also advocated 'judicial caution' in recognising private rights of action under the ATS for numerous reasons, including that 'a decision to create a private right of action is one better left to legislative judgment in the great majority of cases', and courts should be 'wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs'.[144]

Debate exists about which norms pass the *Sosa* test and caution must be used in relying on pre-*Sosa* case law. Norms that have been held to pass the

137 *Sosa v Alvarez-Machain*, 542 US 692 (2004).

138 *Ibid* at 762–63.

139 *Ibid* at 762.

140 See eg, *Kadic v Karadžić*, *supra* n 136 at 240; *Beanal v Freeport-McMoRan Inc*, 969 F Supp 362, 371 (ED La 1997); *Presbyterian Church v Talisman Energy*, 244 FSupp 2d 289, 306 (SDNY 2003).

141 *Sosa v Alvarez-Machain, supra* n 137 at 712.

142 *Ibid* at 715, 725, 732.

143 *Ibid* at 725. The Court also endorsed earlier cases that required the norms to be 'specific/definable, universal and obligatory': *ibid* at 732 (citing *Filartiga*, 630 F2d at 890; *Tel-Oren v Libyan Arab Republic*, 726 F2d 774, 781 (DC Cir 1984); *In re Estate of Marcos Human Rights Litig*, 25 F3d 1467, 1475 (9th Cir 1994)).

144 *Ibid* at 725–28.

Sosa threshold include: state-sponsored torture, crimes against humanity, forced labour, child labour, genocide, prolonged arbitrary detention, violations of the rights of ambassadors, and extrajudicial killing.[145] In addition, courts have held that claims of aiding and abetting violations of international law are actionable under the ATS.[146] Norms that have been held to fall below the *Sosa* threshold include: short arbitrary detentions, detention without being informed of the availability of consular notification and access, manufacture and use of herbicide for defoliant purposes, sexual violence, statutory rape, parental child abduction, torture committed by private actors, property destruction unrelated to genocide or war crimes, forced exile, flawed judicial proceedings resulting in a death sentence, non-consensual medical experimentation, respect for the remains of those who died as a result of hostilities, and the rights to life, liberty, security of person, peaceful assembly, association, privacy, and

145 *Aldana v Del Monte Fresh Produce*, 416 F 3d 1242, 1247 (11th Cir 2005) (state-sponsored torture actionable); *Bowoto v Chevron Corp,* No C 99-02506, 2007 US Dist LEXIS 59374, at *10 (ND Cal 13 August 2007) (crimes against humanity actionable); *Roe v Bridgestone Corp*, 492 F Supp 2d 988, 1010, 1022 (SD Ind 2007) (forced labour can be actionable; child labour actionable); *Almog v Arab Bank*, 471 F Supp 2d 257, 274 (EDNY 2007) (genocide and crimes against humanity actionable); *Kiobel v Royal Dutch Petroleum Co*, 456 F Supp 2d 457, 465–467 (SDNY 2006) (some forms of torture, prolonged arbitrary detention pursuant to a state policy, and crimes against humanity actionable); *Mwani v Bin Ladin*, No 99-125, 2006 US Dist LEXIS 89483, at *9–10 (DDC 28 September 2006) (breach of the rights of ambassadors ie, attacks on American diplomatic missions, actionable); *Doe v Exxon Mobil Corp*, 393 F Supp. 2d 20, 24 (DDC 2005) (genocide and crimes against humanity actionable); *Doe v Saravia*, 348 F Supp 2d 1112, 1153–57 (ED Cal 2004) (extrajudicial killing and crimes against humanity actionable).

146 *Khulumani v Barclay Nat'l Bank Ltd*, 504 F3d 254, 260 (2nd Cir 2007), aff'd sub nom, *American Isuzu Motors Inc v Ntsebeza*, ___ S Ct ___, 2008 WL 117862 (US 2008) (liability under the ATS can be premised on an aiding or abetting theory). Four justices of the Supreme Court were unable to participate in the review of the petitioners' *certiorari* petition because of financial and personal conflicts of interest with the corporate defendants, thus the Supreme Court lacked a quorum to consider granting *certiorari* and was required to affirm the Second Circuit's decision: *ibid* at *1. See also *Vietnam Ass'n for Victims of Agent Orange v Dow Chemical Co*, 517 F3d 104, 123 n 5 (2nd Cir 2008) (noting that a plaintiff may plead a theory of aiding and abetting liability under the ATS in the Second Circuit (*Khulumani v Barclay Nat'l Bank Ltd* at 260)); *Almog v Arab Bank*, 471 F Supp 2d 257, 285–86, 294 (EDNY 2007) (liability under the ATS can be premised on an aiding or abetting theory); *Kiobel v Royal Dutch Petroleum Co,* 456 F Supp 2d 457, 463–64 (SDNY 2006) (same).

family, as well as occupational health and safety.[147] Courts have split on the actionability of other norms, such as cruel, inhuman and degrading treatment[148] and acts of terrorism.[149]

Limitations on the exercise of the ATS/TVPA: In addition to setting a high threshold for establishing an ATS cause of action, the Supreme Court cautioned lower courts to exercise restraint, noting two potential doctrinal grounds.

First, in a footnote in *Sosa*, the Supreme Court mentioned – but did not rule on – the argument that 'international law requires that before asserting a claim in a foreign forum, the claimant must have exhausted

147 *Sosa v Alvarez-Machain, supra* n 137 at 738 (one-day arbitrary detention not actionable); *Mora v People of New York*, ___ F 3d ___, 2008 WL 1820836, at *16–17 (2nd Cir 24 April 2008) (detention without being informed of the availability of consular notification and access not actionable); *Vietnam Ass'n for Victims of Agent Orange v Dow Chemical Co, supra* n 146 (supplying and manufacturing herbicide ('Agent Orange') primarily for defoliant purposes not actionable); *Cisneros v Aragon*, 485 F 3d 1226, 1230–31 (10th Cir 2007) (statutory rape not actionable; sexual violence not actionable); *Taveras v Taveraz*, 477 F 3d 767, 776 (6th Cir 2007) (cross-border parental-child abduction not actionable); *Igartúa-De la Rosa v United States*, 417 F 3d 145, 151–52 (1st Cir 2005) (voting rights not actionable); *Aldana v Del Monte Fresh Produce, supra* n 145 (short detention not actionable, torture by private actors not actionable); *Kiobel v Royal Dutch Petroleum Co, supra* n 145 at 464–67 (property destruction unrelated to genocide or war crimes not actionable; forced exile not actionable; extrajudicial killing from flawed judicial proceedings not actionable; violations of the rights to life, liberty, security of person, peaceful assembly and association not actionable); *Frazer v Chi Bridge & Iron*, No H-05-3109, 2006 US Dist LEXIS 23367, at *20–21 (SDTex 27 March 2006) (violations of the principles of occupational health and safety adopted by the Organization of American States not actionable); *Saleh v Titan Corp*, 436 F Supp 2d 55, 57–58 (DDC 2006) (torture by private actors not actionable); *Ibrahim v Titan Corp*, 391 F Supp 2d 10, 14–15 (DDC 2005) (torture by private actors not actionable); *Doe v Exxon Mobil Corp*, 393 F Supp 2d 20, 24 (DDC 2005) (sexual violence not actionable); *Abdullahi v Pfizer Inc*, 2005 WL 1870811, at *16 (SDNY 2005) (non-consensual medical experimentation not actionable); *Adamu v Pfizer Inc*, 399 F Supp 2d 495, 501 (SDNY 2005) (same); *Weiss v Am Jewish Comm*, 335 F Supp 2d 469 (SDNY 2004) (construction of a victims' memorial at the site where such victims' remains may be found is not actionable).

148 Compare *Aldana v Del Monte Fresh Produce, supra* n 145 (cruel, inhuman and degrading treatment not actionable) with *Roe v Bridgestone Corp*, 492 F Supp 2d 988, 1023–24 (SD Ind 2007) (cruel, inhuman and degrading treatment can be actionable) and *Doe v Qi*, 349 F Supp 2d 1258, 1321–22 (ND Cal 2004) (cruel, inhuman and degrading treatment is actionable).

149 Compare *Almog v Arab Bank*, 471 F Supp 2d 257, 285 (EDNY 2007) (some forms of terrorism, including organised, systemic suicide bombings and other murderous attacks against civilians for the purpose of intimidating a civilian population, are actionable) with *Saperstein v Palestinian Auth*, No 04-20225, 2006 US Dist LEXIS 92778, at *26 (SD Fla 22 December 2006) (terrorism not actionable).

any remedies available in the domestic legal system'.[150] Exhaustion is not an express jurisdictional requirement of the ATS, although it is for the TVPA.[151] Post-*Sosa*, circuit courts have split on the issue. The Seventh Circuit incorporated the exhaustion requirement of the TVPA into the ATS, for claims of torture and extrajudicial killing.[152] The Eleventh Circuit, however, ruled otherwise,[153] and an *en banc* hearing is pending in the Ninth Circuit.[154]

Secondly, the Supreme Court stated that courts should consider exercising 'case-specific deference to the political branches', particularly when the executive viewed the case as impacting on foreign relations.[155] As an example, the Court cited pending cases against corporations alleged to have participated in or abetted the apartheid regime in South Africa, which have been subject to objection by the post-apartheid Government of South Africa and the United States.[156]

Reactions to the ATS/TVPA: Reactions to the ATS and TVPA have been mixed. Three states, Australia, Switzerland and the United Kingdom, have opposed the validity of universal civil jurisdiction as a general matter,[157] while another, South Africa, has objected to US courts hearing particular cases involving their interests.[158] The European Commission, on the other hand, while acknowledging that universal civil jurisdiction is not well-established, has provided some support for the concept.[159]

Three ICJ judges noted the ATS provides a very broad form of extraterritorial jurisdiction, but that it has not attracted the approval

150 542 US at 733 n 21. The court declared that it 'would certainly consider this requirement in an appropriate case': *ibid.*

151 28 USC s 1350 n s 2(b).

152 *Enahoro v Abubakar*, 408 F 3d 877, 884–86 (7th Cir 2005).

153 *Jean v Dorelien*, 431 F 3d 776, 781 (11th Cir 2005).

154 *Sarei v Rio Tinto plc*, 499 F 3d 923 (9th Cir 2007).

155 *Sosa v Alvarez-Machain, supra* n 137 at 733 n 21.

156 *Ibid*; see *infra* n 158.

157 See eg, *Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae* at 2–3, *Sosa v Alvarez-Machain, supra* n 137 (universal civil jurisdiction is not yet a recognised basis of jurisdiction); *Brief of the Government of the United Kingdom and the Commonwealth of Australia as Amici Curiae in Support of the Defendants Motion for Rehearing En Banc, Sarei v Rio Tinto*, 487 F 3d 1193 (9th Cir 2007) (Nos 02-56256, 02-56390).

158 See *Brief for Republic of South Africa as Amicus Curiae, Khulumani v Barclay Nat'l Bank*, 504 F 3d 254, (2nd Cir 2007) (No 05-2141); Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, 11 July 2003, *In re South African Apartheid Litig*, 346 F Supp 2d 538 (SDNY 2004) (MDL No 1499). The US Supreme Court has affirmed the Second Circuit's decision permitting the case to proceed in the district court: see *supra* n 146.

159 European Comm'n *Amicus* Brief, *supra* n 41 at 17–22.

of states generally.[160] The concept has been given some support by the Restatement of the Foreign Relations Law of the United States and the International Law Association,[161] while academic commentary has been mixed.[162]

Civil law countries[163]

GENERAL JURISDICTION: DOMICILIARY RULE

The fundamental jurisdictional rule in civil law countries is the domiciliary or residence rule: defendants domiciled or residing in a civil law country are entitled to defend claims against them in their domiciliary

160 Arrest Warrant of 11 April 2000 (*Congo v Belg*), 2002 ICJ 3, 77 (14 February) (Joint Separate Opinions of Judges Higgins, Kooijmans and Buergenthal) ('While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of states generally').

161 See Restatement (Third) Foreign Relations s 404, cmt b (1987) ('In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy'); Committee on International Human Rights Law and Practice, International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses, 3 n 6 (2000) (the United States has exercised universal jurisdiction under the ATS for the purpose of obtaining civil law remedies 'with some success').

162 Compare Beth Stephens, 'Translating Filartiga: "A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations"' (2002) 27 *Yale J Int'l L* (arguing that universal civil jurisdiction does and should exist); Beth Van Schaack, 'In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention' (2001) 42 *Harv Int'l L J* 141 (same); with eg, Curtis Bradley, 'Universal Jurisdiction and U.S. Law' (2001) *U Chi L Forum* 323, 343–49 (positing that it is not clear that universal jurisdiction applies to civil jurisdiction and that the application of universal jurisdiction in civil cases is more problematic than in criminal cases).

163 This subsection has largely been written on the basis of the answers provided for Argentina, Brazil, Denmark, Finland, France, Germany, Norway, Russia, Spain, Sweden, and Venezuela, but evidence of state practice from other jurisdictions is also noted. It is not always clear whether a jurisdiction should be defined as civil law or not. For example, the legal tradition of the Scandinavian countries (Denmark, Finland, Iceland, Norway and Sweden) is sometimes categorised as a legal system of its own. See Camilla Baasch Andersen et al, 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World' (2nd ed), 1 *J Comp L* 1, 140, available at www.wildy.co.uk/ jcl/pdfs/twining.pdf. However, the Scandinavian legal system can also be categorised as a legal family within the civil law tradition (thus comprising of the Romanistic, Germanic, and Scandinavian legal families). See Zweigert & Kotz, *An Introduction To Comparative Law* (3d ed 1998) 277–85. Hence, for the purpose of this report, civil law includes the legal systems of the Scandinavian jurisdictions.

courts.[164]

The domiciliary or residence rule does not generally allow jurisdiction over a person temporarily present in the jurisdiction, nor does it generally permit a suit to be brought in all fora where a company carries on business. However, two caveats should be made. First, courts in Venezuela, for example, arguably may exercise tort jurisdiction over a defendant if service of process was personally served on the defendant within the jurisdiction.[165] Secondly, some civil law jurisdictions, such as Brazil, define domicile of legal persons very broadly, establishing that corporations will be deemed domiciled as long as their offices, agencies or branches operate in the country.[166] Similarly, the Scandinavian jurisdictions allow jurisdiction over corporations and other business associations operating in the jurisdiction, even if the company is not domiciled or registered in the country, provided that the case is related to the company's operations in the jurisdiction.[167]

GENERAL JURISDICTION: AGREEMENT BY THE PARTIES

At least some civil law countries, such as Spain, Germany, Venezuela and the Scandinavian countries, grant jurisdiction to their courts when the parties have agreed to it, explicitly or tacitly.[168] In principle, such agreement is valid even if the parties have no link to the forum state, as the will of the parties is sufficient to establish jurisdiction.[169] Similarly, Russia permits jurisdiction by agreement for certain matters when one of the parties is a foreign person.[170]

164 See Organic Law on the Judicial Power 1985 ('LOPJ'), Article 22(2) (LOPJ 1985, 6) (Spain); Law No 5,869 of 1973, Code of Civil Procedure ('Brazilian CCP'), Article 88 (Brazil); Civil and Commercial Procedural Code, Article 5 (Argentina); Zivilprozessordnung ('ZPO') [Code of Civil Procedure] ss 13, 17 (FRG); New Code of Civil Procedure ('French CCP'), Tl 3, Ch 2, Articles 42, 43, 46 (France) available at www.legifrance.gouv.fr/html/codes_traduits/somncpca.htm; RSFSR [Code of Civil Procedure] ('Russian CCP'), Article 402(2) (Russia); Law on International Private Law 1998, No 36.511('Venezuelan LIPL'), Article 40 (Venezuela).

165 See Venezuelan LIPL, *supra* n 164, Article 40.

166 See Brazilian CCP, *supra* n 164, Article 88.

167 Danish Administration of Justice Act ('Danish AJA'), s 238(2) (Denmark); Finnish Code of Judicial Procedure ('Finnish CJP'), Ch 10, s 1(2) (Finland); Civil Procedure Act ('Norwegian CCP'), s 4–4(3) (2005) (Norway); Code of Judicial Procedure ('Swedish CJP'), Ch 10, s 5 (Sweden).

168 See eg, LOPJ, *supra* n 164, Article 22.2; ZPO, *supra* n 164, ss 38, 40; Danish AJA, *supra* n 167, s 245; Finnish CJP, *supra* n 167, Ch 10, s 11; Norwegian CCP, *supra* n 167, ss 4–6; Swedish CJP, *supra* n 167, Ch 10 s 16.

169 In the Scandinavian jurisdictions courts have sometimes required that the case has a further connection to the country: see Swedish Svea Court of Appeal, case *RH 2005:1.*

170 Russian CCP, *supra* n 164, Article 404.

SPECIAL JURISDICTION: TORTS

Generally, civil law countries grant jurisdiction over tort or non-contractual liability cases[171] under the *locus delicti* rule – jurisdiction is proper in the place where the tort was committed.

Some civil law jurisdictions provide for jurisdiction over tort cases when the acts from which the tort derives occurred or were committed in their territory, with no specific mention of the place where the damage occurred.[172] In Germany for instance, the place 'where the tortious act was committed' is the place where the defendant acted or where the claimant's legal right (eg, life, body, property) was injured; the place where the damage occurred is irrelevant.[173]

A more inclusive formulation, as applied in France and Sweden, provides for jurisdiction both where the harmful acts occurred and where damage was suffered.[174]

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171 Civil law jurisdictions tend to use 'non-contractual matters' in their codes, statutes and case law to refer to 'all forms of liability that are not based on a contract, including but not limited to all forms of torts, quasi-contracts, delicts, quasi-delicts, and all liability arising under statutes that create private rights of action', therefore embracing numerous forms of liability not generally regarded as traditional torts, such as liability for infringement of copyright and patents, discrimination based on race, gender and other impermissible classifications. See 'Jurisdiction and Choice of Law for Non-Contractual Obligations Part I: Hemispheric Approaches to Jurisdiction and Applicable Law for Noncontractual Civil Liability', presented to the OAS 62nd Regular Session of 10–21 March 2003 by Carlos Manuel Vázquez, available at www.oas.org/DIL/report_applicablelaw_MarchEnglish.pdf.

172 See Spanish CCP, *supra* n 164, s 22.3; Argentinean CCP, *supra* n 164, Article 5, Brazilian CCP, *supra* n 164, Articles 88, 89; ZPO, *supra* n 164, Article 32, Russian CCP, *supra* n 164, Article 402(2).

173 The distinction between the place where the legal right was injured and the place where the damage occurred might be relevant in defamation cases (eg, a newspaper article can injure the claimant's honour at every place where the article is published, but the damage (eg, a loss of profit) can occur somewhere else).

174 See French CCP, *supra* n 164, Article 46; *L'Union des Etudiants Juifs de France v Yahoo Inc*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 12 April 2000, No 00/05308 (asserting jurisdiction on the basis that the defendant's conduct, even if occurred outside France, had caused effects in France); Swedish CJP, *supra* n 167, Ch 10, s 8.

SPECIAL JURISDICTION: *ACTIONS CIVILES* AND OTHER PROCEDURES FOR RAISING CIVIL CLAIMS IN CRIMINAL CASES[175]

At least some civil law countries including Argentina, Bolivia, Bulgaria, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, Netherlands, Norway, Panama, Poland, Romania, Russia, Senegal, Spain, Sweden and Venezuela allow civil claims to be made in the course of criminal proceedings in order for the victim to recover damages. These civil claims in criminal proceedings are made using a variety of procedures such as *actions civiles* or *actio popularis* or by the court awarding civil compensation in lieu of a fine on its own initiative or request.[176] In *actions civiles*, the court may order compensation even though it may not have had jurisdiction to do so had the plaintiff brought the claim in a purely civil action.

Countries recognising the *action civile* generally do not make distinctions according to the basis of the criminal court's jurisdiction. Therefore, *actions civiles* are generally permitted when criminal jurisdiction is premised on the basis of territoriality, active personality, passive personality, the protective principle, and universal jurisdiction, as long as the national law grants jurisdiction to its courts over the criminal case.[177] Precisely because in these cases tort jurisdiction and criminal jurisdiction go hand in hand, it is important to keep in mind that any limitations on or expansions of the criminal court's assertion of jurisdiction will also have an impact on the *action civile* jurisdiction of the court. For example, many countries ratifying the Rome Statute of the International Criminal Court have incorporated into their

175 There was debate within the committee regarding the significance of state practice with regard to *actions civiles* to the recognition of the norm of universal civil jurisdiction under public international law. Under one view, this practice is just another example of a state claiming jurisdiction in a civil action that has no links to the forum country. Under another view, the unique features of an *action civile* distinguish it from an ordinary tort claim such that it can only be an example of a state permitting a civil claim to be brought in the context of criminal proceedings.

176 See eg, Bolivia Criminal Procedure Code, Articles 36–41; Bulgaria Criminal Procedure Code, Article 84; Criminal Law of the People's Republic of China, Article 36; Colombian Code of Criminal Procedure, Articles 45–49; Costa Rican Penal Code (as amended by Law 8272 of 2003), Articles 7, 36; Myanmar Code of Criminal Procedure, Article 545; Panamanian Penal Code, Articles 431–45.

177 Brazil seems to be one of the rare exceptions that requires that a civil claim be one over which a civil court would have jurisdiction.

domestic legislation the crimes actionable under the Rome Statute.[178] In jurisdictions recognising the *action civile*, the incorporation of the Rome Statute has potentially expanded the possibility for civil redress for violations of international law.

The practical implications of the *action civile* for the purposes of asserting extraterritorial jurisdiction over tort cases vary from one jurisdiction to another. For instance, in some jurisdictions, such as Germany, the *action civile* plays a very limited role. However, in other civil law jurisdictions, civil claims have been brought as part of criminal proceedings when criminal jurisdiction was premised on the basis of universal jurisdiction, such as in France and Spain.[179] For example, in the *Pinochet* case, the Audiencia Nacional de España, the high court in Spain decided to freeze funds located around the world of former President of Chile Augusto Pinochet in preparation for the merits phase of his trial.[180] This led to a settlement in which Riggs Bank and two of its board members, indicted for concealment of assets and money laundering on the basis of universal criminal jurisdiction, agreed to pay US$8 million to a victims' fund.[181] In France, *actions civiles* have been permitted against perpetrators of torture in the Rwandan genocide.[182]

178 See Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90. See also Human Rights Law Centre, 'Database of National Implementing Legislation', available at www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php (providing implementing legislation of states that have ratified the Rome Statute).

179 The provisions of the Spanish and French codes permitting victims to file a civil claim in a criminal proceeding include: Spanish Criminal Code, Article 119, available at http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html (in Spanish); Spanish Criminal Procedure Code, Articles 13, 299, 615-21, 625, available at http://noticias.juridicas.com/base_datos /Penal/lecr.html (in Spanish); French Penal Code, Article 2, available at http://lexinter.net/ PROCPEN/titre_ preliminaire.html (in French); French Criminal Procedure Code, Article 418, available at http://lexinter.net/ PROCPEN/constitution_de_partie_civile_tc.htm (in French).

180 See *Pinochet* case, Case 19/97, Central Investigative Court No 5 (Spain), Writ of 19 October 1998, available at www.elclarin.cl/fpa/pdf/p_191198.pdf (in Spanish); *Pinochet* case, Case 40/2005, Central Investigative Court No 5 (Spain), Writ of 25 February 2005, available at www.elclarin.cl/fpa/pdf/p_250205_en.pdf.

181 See *Pinochet* case, Case 40/2005, Central Investigative Court No 5 (Spain), Writ of 25 February 2005, available at www.elclarin.cl/fpa/pdf/p_250205_en.pdf.

182 Cour de Cassation, Chambre Criminelle [Cass Crim] [highest court of ordinary jurisdiction, criminal chamber] 6 January 1998, Bull crim, No 2, at 3, n de pourvoi 96-82491, available at www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069907&dateTexte=. See also Cour d'assises du Gard [criminal court of Gard], 1 July 2005, arrêt de condamnation contre Monsieur Ely Ould Dah (unpublished decision) (civil reparations awarded to victim of Mauritanian torturer) (case discussed in Fédération Internationale des Ligues des Droits de l'Homme, *Développements et enjeux relatifs à l'affaire Ely Ould Dah*, June 2000, available at www.fidh.org/IMG/pdf/ely2005f.pdf).

OTHER BASES FOR EXTRATERRITORIAL JURISDICTION

The 'necessity forum' or 'emergency jurisdiction': Jurisdiction over tort cases could potentially also be asserted on the basis of a necessity or emergency forum, as generally recognised in civil law countries. At least Argentina, France, Finland, Germany, Spain and Switzerland recognise the existence of a 'necessity forum' or an 'emergency jurisdiction' to avoid denial of justice.[183] The rationale of the 'necessity forum' is that courts of a country would have jurisdiction if recourse to another forum is impossible or too burdensome, even in the absence of a statutory basis for such jurisdiction. Though this basis for jurisdiction exists in theory, in practice it is rarely a basis for extraterritorial tort jurisdiction in these countries. In Scandinavian countries, jurisdiction may be asserted over a defendant with no known residence in the local forum or abroad and who is present in the country ('vagabond forum').[184]

Nationality: Most countries do not recognise jurisdiction based solely on nationality, however France traditionally recognises jurisdiction over tort cases when the plaintiff is French, even if the defendant is an alien whose obligations to the French plaintiff arose in a foreign country.[185] Similarly, France recognises jurisdiction over tort cases based on the French nationality of the defendant, even if the tort occurred in a foreign country and involved an alien.[186] Finnish courts may also base their jurisdiction on

183 See eg, Cour de Cassation, Premiere Chambre Civile [Cass 1e civ] [highest court of ordinary jurisdiction, first civil chamber] 1 February 2005, n de pourvoi 01-13742, available at www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007052101&fastReqId=420811981&fastPos=1 (claimant must prove that: (a) the claimant has not been able to bring his case anywhere else (eg, by reason of civil war in his country of residence) and (b) there is a link between the matter and France); Bundesgesetz über das Internationale Privatrecht ('IPRG'), [Federal Code on Private International Law] 18 December 1987, AS 1776 (1988), as amended through 1 January 2008, Article 3 (Switzerland), available at www.admin.ch/ch/d/sr/2/291.de.pdf, English translation available at www.umbricht.ch/pdf/SwissPIL.pdf ('If this Code does not provide for jurisdiction in Switzerland and if proceedings abroad are impossible or cannot reasonably be required to be brought, the Swiss judicial or administrative authorities at the place with which the facts of the case are sufficiently connected shall have jurisdiction').

184 Danish AJA, *supra* n 167, s 246(2); Finnish CJP, *supra* n 167, Ch 10 s 1; Norwegian CCP, *supra* n 167, ss 4–3(2); Swedish CJP, *supra* n 167, Ch 10, s 1(5).

185 French CCP, *supra* n 164, Article 14; Cour de Cassation, Première Chambre Civile [Cass 1e civ] [First Civil Chamber] 17 November 1981, n de pourvoi 80-14728, available at www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007008298&fastReqId=741373969&fastPos=6 (extending Civil Code Articles 14 and 15 to tort cases).

186 French CCP, *supra* n 164, Article 15.

the defendant's Finnish nationality, even when the defendant is domiciled abroad.[187]

Presence of property: German courts have jurisdiction over any defendant who owns assets in Germany, so long as there is a 'reasonable connection' between the facts of the case and Germany, other than the presence of assets.[188] Jurisdiction exercised under the article is not limited to the value of the assets located in Germany.[189] Similar rules apply in some of the Scandinavian countries.[190] Similarly, Russian courts have jurisdiction over defendants who have property on Russian territory.[191]

JURISDICTIONAL LIMITATIONS

The doctrine of *forum non conveniens* generally does not exist in civil law countries. However, in Norway and Sweden there is a general rule that the dispute must have sufficient connection to the jurisdiction.[192] The rule resembles the doctrine of *forum non conveniens* because the result is that jurisdiction can be denied even in cases where the formal jurisdictional requirements have been met.

In Argentina, Brazil and Spain, a version of the political question doctrine or 'acts of government doctrine', applies (in addition to immunity rules recognised under public international law). Under this doctrine, specific elements of certain government acts are politically non-justiciable because they constitute political decisions that should not be scrutinised by the judicial power. In Spain however, courts cannot assert the political question doctrine to limit their jurisdiction when the claimant is seeking reparation for torts committed by the government or

187 Finnish CJP, *supra* n 167, Ch 10 s 1(1).

188 ZPO, *supra* n 164, s 23; Paul R Dubinsky, 'Human Rights Law Meets Private Law Harmonization: The Coming Conflict' (2005) 30 *Yale J Int'l L* 211, 234, nn 83, 89. Such a reasonable connection may exist where the plaintiff or defendant is a German citizen or where the plaintiff is domiciled or has its residence or registered seat in Germany: 1 Business Transactions in Germany s 5A.02 (2007). See also Christopher B Kuner, 'Personal Jurisdiction Based on the Presence of Property in German Law: Past, Present, and Future' (1992) 5 *Transnat'l Law* 691, 705–06.

189 Dubinsky, *supra* n 188 at 234, n 83; Kuner, *supra* n 188 at 707.

190 Danish AJA, *supra* n 167, s 246(3); Finnish CJP, *supra* n 167, Ch 10 s 1; Norwegian CCP, *supra* n 167, ss 4–3(2); Swedish CJP, *supra* n 167, Ch 10 s 3. In Denmark, it appears that no connection between the facts of the case and Denmark, other than the presence of assets, is required. In Norway, the value of the property must be enough to cover the claim.

191 See Russian CPC, *supra* n 164, Article 402(2).

192 Bogdan, M, *Svensk Internationell Privat and Processrätt* [Swedish International Private and Procedural Law] (6th ed 2004) 118. Norwegian CCP, *supra* n 167, ss 4–3(2).

the administration or when the tort affected a fundamental right.[193]

In Germany, the executive branch can also be granted a scope of discretion (*Ermessensspielraum*) or scope for judgment evaluation (*Beurteilungsspielraum*) by law.[194] Courts are only entitled to scrutinise whether the respective public authority has observed the limits of the scope of discretion afforded them and determine whether its decision is based on illegitimate or irrelevant considerations.[195]

Conclusions and recommendations

Historically, there was an opinion that international law imposed no limits on adjudicative jurisdiction in civil cases. Without taking a view on the correctness of this position at the time it was advanced, the committee concludes that, at present, international law imposes certain limits on adjudicative jurisdiction in civil cases.

While many national legal systems explicitly authorise or permit the exercise of extraterritorial adjudicatory jurisdiction, most appear to have a basic rule requiring some relationship between the forum and the litigation.

To be sure, states recognise exceptions to this rule. Most civil and common law jurisdictions recognise the agreement of the parties as a basis for jurisdiction. Many civil law countries also permit emergency or necessity jurisdiction where no other forum is available. There are also instances in which states may claim jurisdiction over torts committed in violation of certain rules of international law. These exceptions, however, are relatively limited in their scope. The committee identified no case in which a state claimed unlimited extraterritorial jurisdiction in torts.

The analysis of treaties and state practice in this chapter of the report has identified key points of convergence across different national jurisdictions on the permissible and prohibited bases for the exertion of extraterritorial tort jurisdiction. However, there remains considerable debate on the extent to which state practice or regional treaties relevant to the exercise of extraterritorial tort jurisdiction are indicative of emerging customary rules in this area. The committee therefore considered it appropriate to limit its conclusions to certain observations with respect to

193 Article 26 of the Law of the Government 1997 (1997, 50) (Spain), available at http://noticias.juridicas.com/base_datos/Admin/l50-1997.html (in Spanish); Article 2(a) of the Law of the Administrative Jurisdiction (LPA 1998, 29) (Spain), available at http://noticias.juridicas.com/base_datos/Admin/l29-1998.html (in Spanish).

194 Bodo Pieroth & Bernhard Schlink, *Grundrechte Staatsrecht II* (21st ed 2005) 269 para 1021.

195 *Ibid.*

common or divergent practices without drawing firm conclusions as to the status of such practices under customary international law.

Points of convergence

Jurisdiction based on commission within the jurisdiction

All the states surveyed exercise jurisdiction over torts committed in their respective jurisdictions. This territorial basis is a primary ground for the exercise of tort jurisdiction in civil law countries under the rule of *locus delicti*, including in cases where both parties are not present in the forum. In common law countries, while the presence of the defendant within the forum has traditionally formed the basis of jurisdiction, when the defendant is located outside the forum, the commission of a tort within a state's jurisdiction is typically the basis for service of process.

Jurisdiction based on residence or domicile

Residence or domicile of the defendant within the forum is also a primary basis for civil jurisdiction in civil law countries. It is also the most commonly invoked basis for jurisdiction in common law countries, as a defendant's residence or domicile in the forum may constitute its constructive presence in the forum allowing process to be served there even when the defendant itself may be located outside the forum.

Jurisdiction based on consent

Most states also permit jurisdiction where the parties consent to it. This most frequently occurs because the parties have specifically agreed that the courts of the chosen forum would have jurisdiction prior to the dispute.

Jurisdictional limitations: sovereign immunities and political questions

All the countries surveyed create an exception to their otherwise applicable jurisdictional rules for immunities provided in treaties and customary international law.

In many jurisdictions, considerations of comity or internal legal regimes result in the application of the act of state or political question doctrines, or their equivalents. These doctrines limit or prohibit judicial consideration of claims related to the acts of foreign sovereigns or those committed to the discretion of other political bodies.

Points with some convergence and some divergence

JURISDICTION BASED ON PRESENCE

Presence of the defendant within the jurisdiction is the primary ground for jurisdiction in common law countries, where even the briefest presence in the forum state may be sufficient to serve process and assert jurisdiction over a defendant. While a few civil law jurisdictions, such as Venezuela, permit jurisdiction on the basis of mere presence within the forum, presence is generally insufficient to justify the exertion of jurisdiction in civil law countries.

Some states, however, define 'domicile' broadly enough to encompass what other jurisdictions term 'presence'. This is particularly true with regard to corporations or other business entities, where the presence of an entity's offices, agencies, or branches may be sufficient to assert jurisdiction. Brazil and the Scandinavian jurisdictions permit such jurisdiction.

Certain jurisdictions – both common law and civil law – authorise jurisdiction on the basis of the presence of property within the forum. Typically, additional restrictions or requirements must be met before jurisdiction may be appropriately exercised. For example, some countries require that there be a connection between the claim and the defendant's property; others require that at least the value of the property within the forum exceeds the costs of enforcing a potential judgment.

JURISDICTION BASED ON EFFECTS WITHIN THE JURISDICTION

While tortious acts committed within a state's jurisdiction are generally accepted grounds for the state to assert its jurisdiction over a defendant, states' understandings of what constitutes a tort committed within their adjudicating forum vary. In some, committing a tort within the state's jurisdiction can include situations where the cause of action arose within the jurisdiction because the damage caused by the tort was suffered there, even if the place where the defendant's initial conduct occurred was outside the forum state. In such cases, the assertion of jurisdiction is not viewed as an exercise of extraterritorial jurisdiction, but merely an extension of territorial jurisdiction by application of the 'effects principle'. In other countries, territorial jurisdiction is more strictly limited to the place in which the tortious conduct occurred.

Common law countries are much more likely to explicitly permit jurisdiction over extraterritorial torts, allowing effects-based jurisdiction in cases where some degree of damage, including consequential loss, occurs

within their territory, regardless of their definition of 'commission'.

In civil law countries, however, effects-based jurisdiction is generally not permitted except to the extent that a state has adopted a broad interpretation of the commission of a tort. Moreover, under the Brussels Regime, even this type of effects-based jurisdiction is prohibited.

Points of divergence

Jurisdiction based on nationality

Although most jurisdictions do not recognise jurisdiction solely on the basis of a defendant's nationality, such jurisdiction is permitted in France and countries adopting the French code, including Belgium and Luxembourg, as well as in Finland, in cases where the Brussels Regime is inapplicable.

Jurisdiction where there are no contacts with the forum and parties have not consented to jurisdiction

Some jurisdictions permit the assertion of jurisdiction where there are no contacts between the tort or the parties and the forum, and the parties have not mutually consented to jurisdiction. In such cases, jurisdiction may be asserted because the plaintiff demonstrates that no other jurisdiction could hear the case, or because the state permits a form of universal civil jurisdiction.

Jurisdictional limitations: *forum non conveniens*

In common law jurisdictions, principles of comity and fairness – as well as recognition of the limits of those states' assertion of jurisdiction – have led to the development and increasingly frequent application of the *forum non conveniens* doctrine. Under this doctrine, proceedings are stayed or dismissed in favour of proceedings in other jurisdictions with closer ties to the defendant or where the burden of the litigation is less onerous for the defendant.

Civil law countries do not generally recognise the doctrine of *forum non conveniens*. However, in some jurisdictions, such as Norway and Sweden, there is a general rule that the dispute must have sufficient connections to the jurisdiction. In its practical effect, the rule resembles the doctrine of *forum non conveniens*.

Universal civil jurisdiction

Universal civil jurisdiction remains a controversial topic within the area of extraterritorial tort jurisdiction. Under this basis of adjudicatory jurisdiction – invoked in cases alleging civil violations of human rights and other fundamental norms of international law – there is no requirement of a link between the subject matter of the dispute or the parties and the forum.

The committee carefully considered the evidence of treaty law and state practice that could be relevant to the status of universal civil jurisdiction under international law. However, in following this methodology, members of the committee could not reach agreement with respect to two issues: (i) the consideration of *actions civiles* as an example of universal civil jurisdiction and (ii) whether case law and legislation asserting jurisdiction are sufficient to establish the *opinio juris* of a state.

In considering the status of universal civil jurisdiction, the committee considered the following sources.

The debate with respect to Article 14 of the Convention against Torture. The Committee against Torture has suggested that the CAT may require states to provide for universal civil jurisdiction with respect to claims of torture so that torture victims may redress their injuries, no matter where the torture occurred. Three states – the United States, the United Kingdom and Canada – have explicitly rejected such an interpretation.

The United States' Alien Tort Statute and the Torture Victim Protection Act. The Alien Tort Statute and the Torture Victims Protection Act authorise federal courts in the United States to exercise extraterritorial jurisdiction over torts arising from certain violations of international law with no connection to the United States.

Reaction of states to the exercise of universal civil jurisdiction. Three states have objected to the claim that universal civil jurisdiction is an accepted basis of jurisdiction in international law. Others have restricted their objections to US assertions of jurisdiction under these statutes to cases involving their particular interests. A noteworthy feature of the debate is the disagreement over the significance of the lack of formal positions of most states with respect to the practice of universal civil jurisdiction under international law.

Actions civiles and civil claims in criminal cases. Several civil law countries permit individual claimants to seek relief for civil wrongs in the context of related criminal proceedings, including through *actions civiles.* Many the states that permit civil claims to be made in criminal proceedings or which recognise the *action civile* also recognise universal criminal jurisdiction. In these states, a civil claim in a proceeding based on universal criminal jurisdiction could be seen as a form of universal civil jurisdiction.

The Draft Hague Convention. The Draft Hague Convention illustrates the continuing disagreement over valid bases on which to assert jurisdiction, beyond a defendant's domicile or residence, consent, and the place where the tort was committed. In spite of this, the inclusion of language that the Convention would not preclude the exercise of jurisdiction over extraterritorial tort claims for violations of human rights could suggest that there may have been a degree of agreement that such a basis of jurisdiction should not be prohibited.

The committee notes that the concept of universal civil jurisdiction is a relatively new concept; the evidence cited in support of it does not predate the 1980s.

The committee also notes that in recent years there have been significant developments with respect to states' practice and understanding of universal civil jurisdiction. On the one hand, the US Supreme Court limited the scope of the Alien Tort Statute in *Sosa v Alvarez-Machain.* On the other hand, the establishment of the International Criminal Court and the incorporation of its statute into the domestic law of jurisdictions recognising *action civilies* has expanded the possibility of obtaining damages for violations of international law.

The committee acknowledges the fact that the positions of scholars vary widely and the range of opinions includes those who endorse a broad recognition of the doctrine, those who support outright rejection of it, and yet others who propose a cautious acknowledgement of the concept of universal civil jurisdiction, coupled with the recognition that its acceptance in international law is not well established.

Considering that the concept of universal civil jurisdiction is relatively new, that there are methodological disagreements, that state practice can be and is interpreted in different ways, that recent developments demonstrate ongoing changes and evolution in state practice, and that scholarship in this area reflects conflicting views, the committee felt that it would be most appropriate to recognise that there is a degree of

uncertainty with respect to the concept.

Finally, the committee recognises that if universal civil jurisdiction is to be recognised under international law – a point on which the committee expresses no opinion – uncertainties remain about whether international law requires, or domestic law should demand, exhaustion of local remedies before this basis of jurisdiction may be successfully invoked.

Future development

As the negotiations on the Draft Hague Convention demonstrated, there remain significant points of disagreement between states about the appropriate scope of extraterritorial jurisdiction, especially at the margins. In certain respects, the attention focused on these differences has somewhat obscured the points of agreement across jurisdictions from different legal traditions that even the limited survey conducted by the committee has revealed.

One question that arises from a review of this subject area is whether these jurisdictional similarities are sufficiently indicative of the possibility of consensus on general principles that another effort at the creation of a treaty regime – including a concerted approach to the issue of recognition and enforcement of extraterritorial tort judgments – would be worthwhile.

Since the last effort to draft a treaty governing extraterritorial jurisdiction is relatively recent, it is unlikely that another attempt will be launched in the near future. Absent an international jurisdictional regime, states will assert jurisdiction and respond to assertions of jurisdictions on the basis of their current understanding of the rules of international law. As state practice is an essential component of customary international law, such actions will continue to impact its development. There is no guarantee that state approaches to extraterritorial tort jurisdiction will completely harmonise, or that they necessarily should.

As interest in these issues is likely to persist, however, future research and efforts to map developments in state practice and analyse their impact on international law will be important. In particular, research would be most useful on the areas that proved most contentious in the Draft Hague Convention – including universal civil jurisdiction or similar concepts – to determine whether there is a trend toward convergence and *opinio juris* regarding the assertion of extraterritorial tort jurisdiction under public international law.

Recommendations

After considering the preceding conclusions, the committee makes the following recommendations.

Scholars

Expand research: In preparing this report, the committee greatly benefited from the surveys prepared by IBA members. However, the report remains limited in scope to 23 countries. Recognising that this may be the first report of its kind, a valuable next step would be to deepen our knowledge of the practice of states covered by this report and expand it to other countries. As our understanding of states' practices with regard to extraterritorial tort jurisdiction becomes more comprehensive, areas of convergence and divergence and the direction in which state practice may be evolving will become more clear.

Clarify methodology: The committee recommends that scholars focus on a proper methodology to determine the permitted scope of extraterritorial tort jurisdiction. In particular, it would be worthwhile to expound upon those state practices that are relevant for the determination of *opinio juris* and also those assertions of tort jurisdiction that constitute the spectrum of extraterritorial tort jurisdiction. Combined with expanding research on state jurisdictional practice, a clarified methodology will permit a better understanding of the scope of extraterritorial tort jurisdiction under customary international law.

The IBA

Committee on universal civil jurisdiction: The LPD should establish a Committee on Universal Civil Jurisdiction to follow developments in state practice that could be considered to constitute exercises of universal civil jurisdiction, and to explore the import of such practices for the exercise of universal civil jurisdiction under international law.

LPD Draft Treaty or Guidelines: While the committee notes that it may be premature to launch a new effort to conclude a jurisdictional treaty, the committee recommends that the LPD propose a draft treaty or set of guidelines, taking into consideration past and future research and current state practice. An LPD draft treaty or set of guidelines would provide a useful tool for future negotiations on a jurisdiction treaty, one that could continue to evolve and reflect areas of convergence and divergence across national jurisdictions.

STATES

Clarify state practice: States, to the extent that they have an interest in participating and affecting the debate with respect to extraterritorial tort jurisdiction, should make known their positions with respect to extraterritorial tort jurisdiction publicly.

Future treaty: At some point in the future, states should consider the possibility of initiating a new conference to negotiate a treaty on jurisdiction.

CHAPTER 3

Criminal

Criminal Law Committee

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Introduction and overview

As criminal activity increasingly crosses national boundaries, there is a growing need for states to confront issues concerning the exercise of extraterritorial criminal jurisdiction. However, uncertainty remains regarding the proper limits or scope of the extraterritorial reach of domestic criminal jurisdiction. This chapter aims to clarify some aspects of this uncertainty, and to recommend issues for states to take into account when reviewing their laws and policies on extraterritorial criminal jurisdiction.[1]

The scope of this chapter may be broadly described in terms of the following criteria:

- *Extraterritorial* – this chapter focuses on states' exercise of jurisdiction over criminal conduct occurring wholly or primarily outside a state's own territory, although the chapter also discusses the recent tendency by some states to adopt an extended view of 'territory' when exercising criminal jurisdiction.
- *Criminal* – this chapter is concerned with extraterritorial *crimes*, meaning acts that the law makes punishable or breaches of a legal duty treated as the subject matter of a criminal proceeding.[2]
- *Jurisdiction* – this chapter addresses the body of international law concerned with the allocation of jurisdiction among national authorities to investigate and prosecute complaints and of national courts to hear cases, as well as certain practical issues that arise in the exercise of extraterritorial criminal jurisdiction. This chapter does not focus on the jurisdiction given to international courts or tribunals under a treaty or by Security Council resolution.

There is no treaty generally defining the scope or limits of extraterritorial criminal jurisdiction. In determining the proper scope and limits of

1 This chapter has been drafted by the Committee on Extraterritorial Criminal Jurisdiction, the members of which are listed above. This chapter does not necessarily reflect the views of all members of the committee on all points.

2 *Black's Law Dictionary* (8th ed 2004) 399. In relation to the specific crimes of bribery and corruption, see generally *infra* Chapter 4: Bribery and Corruption.

extraterritorial criminal jurisdiction under customary international law, it is necessary to examine state practice, including the national laws of individual states regarding extraterritorial criminal jurisdiction and actual investigations and prosecutions based on those laws. In addition to reviewing existing analyses of state practice,[3] the committee, with the assistance of various IBA members, undertook an independent survey of 27 states' national laws and court decisions on extraterritorial criminal jurisdiction. The 27 states surveyed were Argentina, Australia, Bahrain, Brazil, China, Denmark, Egypt, Finland, France, Germany, India, Republic of Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Tajikistan, United Arab Emirates (UAE), United Kingdom, United States and Venezuela.[4] From this review, it is clear that criminal jurisdiction remains primarily territorial, but that almost all states exercise and recognise some forms of extraterritorial criminal jurisdiction, with some states taking an expansive approach to such jurisdiction.

This chapter does not purport to be an exhaustive analysis of all issues that may arise regarding the scope of extraterritorial criminal jurisdiction, but rather focuses on specific issues concerning such jurisdiction in theory and in practice, including what public international law permits, prohibits or requires by way of extraterritorial criminal jurisdiction. This chapter does not deal with amnesties or immunities, which are distinct

3 Relevant studies of state practice include: *I & II Int'l Comm of the Red Cross, Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck eds, 2005) (focusing on war crimes); Harvard Research in Int'l Law, 'Jurisdiction with Respect to Crime' (Supp 1935) 29 *Am J Int'l L* 435, 495; Amnesty Int'l, 'Universal Jurisdiction: The Duty of States to Enact and Implement Legislation', AI Index: IOR 53/002-018/2001, September 2001 [hereinafter Amnesty International Report] (reviewing state practice in 125 states as of 2001, currently being updated to include all 192 UN Member States, second edition forthcoming 2008); Human Rights Watch, 'Universal Jurisdiction in Europe: The State of the Art, 2006' [hereinafter Human Rights Watch Report] (focusing on Belgium, Denmark, France, Germany, the Netherlands, Norway, Spain and the United Kingdom); Redress, 'Legal Remedies for Victims of "International Crimes": Fostering an EU Approach to Extraterritorial Jurisdiction annex D, 2004' [hereinafter Redress 2004 Report] (focusing on EU countries); Redress, 'Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide, 1999' [hereinafter Redress 1999 Report] (focusing on countries in Western Europe).

4 The survey was conducted by sending questionnaires to IBA members in these states; the results are compiled in the tables in Annex 1, www.ibanet.org/images/downloads/etjtfcriminalannex1.pdf. This chapter also contains information not included in the state surveys, based on independent research conducted by the subcommittee.

matters meriting separate study.[5]

This chapter is structured as follows: 'Bases of criminal jurisdiction' summarises the bases for criminal jurisdiction recognised under public international law and incorporated into national laws, namely the territoriality principle, and the four bases of extraterritorial jurisdiction, being the active personality, passive personality, protective and universality principles. 'Extradition and competing jurisdictional claims' identifies a number of possible mechanisms for resolving and prioritising competing jurisdictional claims and discusses extradition in the context of extraterritorial criminal jurisdiction. 'Issues in the exercise of extraterritorial criminal jurisdiction' sets out issues that may arise in the exercise of extraterritorial criminal jurisdiction by investigating authorities and national courts, including challenges arising in the initiation of cases, difficulties in investigations and prosecutions, and concerns relating to the due process rights of suspects and the accused. Finally, although this chapter generally aims to describe the current state of the law rather than prescribe what the law should be, 'Recommendations' sets forth certain points for states to consider when reviewing their laws and policies on extraterritorial criminal jurisdiction. Annex 1[6] summarises the results of the country survey conducted for the purposes of this chapter. Annex 2[7] provides further examples of state practice relating to the universality principle.

Bases of criminal jurisdiction

The various bases of jurisdiction recognised in international law are outlined in the Introduction to this report.[8] This chapter focuses on these bases of jurisdiction in the particular context of criminal law.

Under international law, all states have the right to exercise criminal jurisdiction over events occurring and persons (whether nationals, residents or others) present in their territory. This 'principle of territoriality' is the most commonly exercised and least controversial basis for criminal jurisdiction, grounded in fundamental concepts of state sovereignty.

However, states also have the right under international law to exercise criminal jurisdiction over persons or events located outside their territory,

5 For a brief discussion of the issue of immunities in the context of bribery and corruption, see *infra* Chapter 4: Bribery and Corruption (section dealing with official immunities).

6 See www.ibanet.org/images/downloads/etjtfcriminalannex1.pdf.

7 See www.ibanet.org/images/downloads/etjtfcriminalannex2.pdf.

8 See *supra* 'Introduction' ('Bases of jurisdiction').

under two principal legal rubrics. First, some states have extended traditional notions of territorial jurisdiction, claiming jurisdiction over events occurring outside but having an impact within the territory of the forum state. Secondly, almost all states exercise 'pure' extraterritorial criminal jurisdiction on one or more of four principal bases: the active personality principle, the passive personality principle, the protective principle and the universality principle.[9] The active and passive personality principles reflect every state's interest in punishing crimes by or against its nationals abroad; the protective principle acknowledges every state's right to protect certain vital interests; and the universality principle largely reflects the fact that there are a limited number of crimes which, by their nature, affect the interests of all states. Not all of these bases of extraterritorial criminal jurisdiction are equally well recognised under international law. Nonetheless, as these four bases represent the most widely-discussed bases of jurisdiction, they form the primary focus of 'Active personality principle', *infra*.

Expansion of the territoriality principle

As stated by Robert Jennings in 1957, the 'first principle of jurisdiction is that in general every State is competent to punish crimes committed upon its own territory. This rule requires no authority to support it; it is "everywhere regarded as of primary importance and of fundamental character"'.[10]

Some states have recently shown an increased tendency to broaden the ambit of their criminal law by extending the principle of territoriality to crimes which occur overseas but have an impact within the forum state, or where only a small part of the conduct constituting the offence takes place in the forum state. This tendency has been particularly apparent in the prosecution of business crime, corruption and international fraud, and increasingly arises in the context of the regulation of the internet and financial crimes crossing international and electronic borders.[11] At the same time, most common law systems have generally treated statutory offences as having extraterritorial ambit only where the statute expressly provided for this.

One way that some states have extended the principle of territoriality is

9 The 'Introduction' combines discussion of active personality and passive personality into one 'nationality or personality principle'.

10 Robert Y Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *Brit YB of Int'l L* 146, 148 (citations omitted) [hereinafter Jennings].

11 See also *infra* Chapter 4: Bribery and Corruption.

by statute. For example, the concept of 'special maritime and territorial jurisdiction' in 18 USC s 7 provides US jurisdiction over bodies of water, land, vessels, aircraft or spacecraft belonging to or reserved for the use of the United States, its citizens or its registered corporations (as well as to any place outside the jurisdiction of any nation with respect to an offence by or against a US national, raising the active and passive personality principles, discussed further below).[12] The Kenya Penal Code also provides for jurisdiction over offences 'committed partly within and partly beyond the jurisdiction' as follows:

'When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.'[13]

Another way that some states have extended the principle of territoriality is through interpretive principles applied by prosecutors and confirmed by national courts. Under the principle of subjective territoriality, the forum state exercises jurisdiction over a crime in which one element takes place in that state or if the crime is seen to have originated in that state.[14] A second principle is the 'effects doctrine',

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12 See also UK Criminal Justice Act 1993 c 36, ss 1-6 which permit prosecution of cases involving fraud and related conduct if any 'relevant event' occurred within the jurisdiction of the English court. A 'relevant event' includes any act, omission or other event (including any result of one or more act or omissions) proof of which is required for conviction of the offence. See eg, *R v Smith* [2004] EWCA (Crim) 631 (holding that deceptive offences include extraterritorial conduct). See also *infra* Chapter 4: Bribery and Corruption, (discussing the broad territorial scope of the US Foreign Corrupt Practices Act, originally enacted in 1977, 15 USC ss78dd-1-3, 78g, 78m (1998)).

13 Penal Code, (1930) Cap 63 s 6 (Kenya).

14 Jennings, *supra* n 8 at 156. See eg, *US v Pasquantino*, 544 US 349 (2005) (holding that an offence of wire fraud under US criminal law was committed by defendants who smuggled alcohol from the United States to Canada – the majority held that the defendants used the US intrastate wires to execute a scheme to defraud a foreign country of tax revenue, and by executing the scheme inside the United States, US prosecutors had jurisdiction to indict the defendants) (but see Ginsburg J, dissenting, noting the long-standing principle of US law that Congress is primarily concerned with domestic conditions and that, in the absence of a clear statement to the contrary, the Court ought not to read into statute an extraterritorial jurisdiction where none is specified); *DPP v Stonehouse* [1978] AC 55 (holding that an English member of parliament who faked his own death in America intending to enable his wife to obtain the proceeds of life insurance policies in England had committed attempted deception in England by ensuring that his death would be reported there); *Treacy v DPP* [1971] AC 537 (HL) (holding that the offence of blackmail was committed in England when a demand was made in a letter posted in England and sent to the recipient in Germany).

also known as 'objective territoriality', which refers to a state's ability to assert jurisdiction over certain conduct committed by foreigners outside its jurisdiction where the conduct has an effect within the state, and thus focuses on the location of the effects of the conduct, not the location of the conduct.[15] For example, the offence of conspiracy to defraud may be committed under UK law by forming an agreement outside England and Wales as long as there is an agreement to commit an offence inside the jurisdiction; no overt act within the jurisdiction of England and Wales is required.[16] Further, under UK law, a conspiracy to defraud may be committed where the object of the conspiracy is to commit fraud overseas, provided that the conduct would have constituted an offence under the local law in question. Similar rules apply in relation to conspiracies and attempts to commit other offences, and in the field of antitrust law, where US courts have asserted jurisdiction over anti-competitive conduct committed by non-US companies acting outside the United States where that conduct has a direct, substantial and reasonably foreseeable effect on US commerce.[17]

Active personality principle

The active personality principle, also known as the active nationality principle, permits a state to prosecute its nationals for crimes committed anywhere in the world if, at the time of the offence, they were such nationals. Thus, State A may exercise jurisdiction over a national of State A, who committed a crime in State B. The active personality principle is the least controversial basis for the exercise of extraterritorial criminal jurisdiction, although it is used more often in civil law than common law systems. As discussed further below, active personality is sometimes defined broadly, for example to include crimes committed by a state's residents or domiciliaries (as opposed to nationals), although this can be

15 Jennings, *supra* n 8 at 156.

16 *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 (PC) (UK).

17 See *supra* Chapter 1: Antitrust (discussing cartels and unilateral conduct). The broadening of the principle of territoriality has resulted in what some regard as improper prosecutions against foreign nationals, particularly in the United States, sometimes based on limited evidence that particular elements of the relevant offence occurred in the state seeking to exercise jurisdiction. Some commentators have suggested that the prosecutions in *R (Bermingham & Ors) v Director of the Serious Fraud Office* [2006] EWHC (Admin) 200 (Eng), and *Norris v United States of America* [2007] EWHC 71 (Eng), fit into this category. These cases are discussed further at *infra* nn 164 and 167 and accompanying text, and in Peter Binning, 'Serious Extradition Risks for International Business People' (2007) 8(2) *Bus L Int'l* 148; J William Rowley QC et al, 'Increasing the Bite Behind the Bark: Extradition in Antitrust Cases' (2007) 8(3) *Bus L Int'l* 298.

more controversial.

There does not appear to be a contemporary comprehensive study documenting the number of states providing for active personality jurisdiction in national legislation. Almost all (25 out of 27) of the states surveyed for this chapter grant some degree of jurisdiction to their courts based on the active personality principle, in the sense of criminalising certain conduct by nationals under domestic law.[18] For example, Argentine courts have jurisdiction over any Argentine citizen for any crime, including crimes committed outside Argentina, if the accused elects to be tried in Argentina in preference to extradition, subject to the approval of the country where the crime occurred if it is seeking extradition.[19] Other states, such as Australia, Kenya and the United Kingdom, limit active personality jurisdiction to specific crimes. For example, UK courts have jurisdiction over UK citizens who commit the offences of murder, bigamy and perjury abroad.[20] Kenyan courts have jurisdiction over Kenyan citizens or permanent residents who commit 'an act outside Kenya which act would constitute a sexual offence had it been committed in Kenya'.[21]

While almost all states surveyed apply the active personality principle with respect to *nationals* committing at least certain crimes abroad, around a third (eight out of 25) also assume jurisdiction over defendants who are *residents* or *domiciliaries* of the state and have committed certain crimes abroad.[22] Just under a third of the states surveyed (seven out of 25) allow extraterritorial jurisdiction over defendants who are public servants, members of the military or other agents of the state serving abroad (although these people are often also nationals of the state).[23] Most states assert jurisdiction over their governmental employees/service members/agents for crimes arising out of or in respect of that particular relationship, but typically prosecutions in this category can readily be based on other factors such as the protective principle or specific contractual or legal commitments.

Dutch courts exercised active personality jurisdiction in convicting a

18 Argentina, Australia, Bahrain, Brazil, China, Denmark, Egypt, Finland, France, Germany, India, Republic of Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Poland, Russia, Spain, Sweden, UAE, United Kingdom, United States and Venezuela. The responses from South Africa and Tajikistan did not address this point.

19 Statute on International Cooperation in Criminal Matters, Art 12, Law No 24767, 13 January 1997 [28565] BO 1 (Argentina).

20 Offences Against the Person Act 1861 c 100, ss 9 & 57(1) (UK); Perjury Act 1911 c 6, s 8 (UK).

21 Sexual Offences Act (2006) Cap 3 s 41 (Kenya) (called 'Extra-territorial Jurisdiction').

22 Denmark, Finland, Malaysia, Netherlands, Norway, Russia, Sweden and UAE.

23 Argentina, Bahrain, Finland, Germany, Russia, Sweden and United Kingdom.

Dutch citizen for complicity in war crimes, after he supplied to Saddam Hussein banned and rare chemicals which were then used to make poison gas that killed Kurds and Iranians.[24] Canadian courts recently exercised active personality jurisdiction in convicting a Canadian citizen of money laundering in connection with an investment company in the Turks and Caicos Islands.[25] In *R v Hape*, the Canadian Supreme Court expressly noted that states may also rely on the active personality or 'nationality principle' to exercise jurisdiction over their nationals abroad, and continued:

> 'The nationality principle is not necessarily problematic as a justification for asserting prescriptive or adjudicative jurisdiction in order to attach domestic consequences to events that occurred abroad, but it does give rise to difficulties in respect of the extraterritorial exercise of enforcement jurisdiction. Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders. When a state's nationals are physically located in the territory of another state, its authority over them is strictly limited.'[26]

The active personality principle may also be used in the business crime context, such as in relation to bribery and corruption issues.[27]

Passive personality principle

The passive personality principle, also known as the passive nationality principle, addresses a state's power to prosecute a foreigner for a crime committed outside its territory against one of its nationals. Thus, State A may assume jurisdiction over a foreigner who committed a crime in State B against a national of State A. The victim must have been a national of the foreign state, State A, at the time of the crime. Sometimes 'passive personality' is defined more broadly to include jurisdiction over crimes committed against residents and domiciliaries of State A although, for this

24 *Openbaar Ministerie/van Anraat, Rechtbank's-Gravenhage [Rb]* [District Court], The Hague, 13 December 2005, RvdW 09/751003-04 s4.1, aff'd, Gerechtshof's-Gravenhage [Hof] [Court of Appeals], The Hague, 9 May 2007, RvdW 2200050906-2 (Netherlands).

25 *R v Hape* [2007] 2 SCR 292, 2007 SCC 26 (Canada), available at http://scc.lexum.umontreal.ca/en/2007/2007scc26/2007scc26.html.

26 *Ibid* para 60. The issue of enforcement jurisdiction, as opposed to adjudicatory jurisdiction, is discussed further in *supra* Chapter 1, 'Introduction'.

27 See *infra* Chapter 4: Bribery and Corruption, discussing nationality jurisdiction, and concluding that the 'availability of nationality jurisdiction in the context of prosecution for international business activities [under various treaties] makes the likelihood of extraterritorial application virtually certain'.

form of the active personality principle, this expanded notion of passive personality principle may be controversial in certain circumstances.

Some states and commentators, particularly from common law jurisdictions, do not regard the passive personality principle as a permissible basis for jurisdiction,[28] but this may be changing, at least in respect of some offences.[29]

The subcommittee is not aware of any contemporary comprehensive study documenting the number of states providing for passive personality jurisdiction in national legislation. Of the 27 states surveyed for this chapter, just over half adopted some version of the passive personality principle of jurisdiction, although generally only for certain crimes.[30] Five states also grant jurisdiction where the victim is a resident or domiciliary of that state.[31] Finnish and Swedish courts may also exercise jurisdiction where the 'victim' is a private corporation or association registered in the state (and thus possesses their state's corporate nationality).[32] For example: Swedish courts have jurisdiction over any crime committed against a Swedish victim in international waters or airspace;[33] Chinese courts have jurisdiction over any crime committed against a Chinese citizen where the minimum penalty for that crime in China is at least three years' imprisonment;[34] French courts have jurisdiction over 'any

28 See eg, Brownlie, *Principles of Public International Law* (6th ed 2003) 302 (deeming it the least justifiable of bases of extraterritorial criminal jurisdiction); Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2007) 42 [hereinafter Cryer] (noting that in most instances, the assertion of passive personality jurisdiction is controversial, and that considerable disagreement remains surrounding the lawfulness of its application); Mann, 'The Doctrine of Jurisdiction in International Law' (1964-I) 111 Rec des Cours 39-41, 92-93 (noting that the passive personality principle has been severely criticised).

29 See eg, Restatement (Third) of the Foreign Relations Law of the United States s 402 (1987), cmt.g (recognising the increasing acceptance of the passive personality principle) [hereinafter Restatement]; O'Connell, *International Law* (2d ed 1970) 828-29 (tentatively accepting the passive personality principle).

30 Brazil, China, Denmark, Finland, France, Germany, Republic of Korea, Malaysia, Mexico, the Netherlands, Poland, Sweden, UAE, United States and Venezuela. The responses from South Africa and Tajikstan did not address this point.

31 Denmark, Finland, Germany, Malaysia and Sweden.

32 Penal Code of Finland (Strafflag 19.12.1889/39) 1:5 (Finland); Penal Code of Sweden (Ds 1999:36) 2:3 (Sweden). Swedish courts may exercise extraterritorial jurisdiction where the victim is a private Swedish corporation or association only where the crime is committed in a 'territory not belonging to any state'.

33 2 ch 3 s Penal Code of Sweden (Ds 1999:36), available at www.sweden.gov.se/sb/d/3926/a/27777.

34 Zhong Hua Ren Min Gong He Guo Xing Fa [Criminal Code] art 8 (Fifth National People's Congress, 1 July 1979, 1 October 1997), www.lawinfochina.com/law/display.asp?id=354 (P.R.C.) (the Code 'may be applicable to foreigners, who outside PRC territory, commit crimes against the PRC state or against its citizens').

crime, as well as to any offence punishable by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time of the offence'.[35]

French courts exercised passive personality jurisdiction in the 1990 *in absentia* trial and conviction of Argentine Captain Alfredo Astiz for the kidnap and disappearance of two French nuns in Argentina.[36] US courts recently exercised passive personality jurisdiction pursuant to 18 USC s 7(8) (discussed above in the context of the expansion of the principle of territoriality), which provides for US jurisdiction '[t]o the extent permitted by international law, [for acts committed on] 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*' (emphasis added). In *United States v Neil,* the Ninth Circuit Court of Appeals upheld the conviction of a national of St Vincent and the Grenadines for sexual contact with an American minor on a cruise ship in Mexican territorial waters.[37] The court specifically invoked the passive personality principle, in addition to relying on the expanded territoriality principle set out in 18 USC s 7(8).[38]

A number of multilateral treaties recognise that states may consider it appropriate to exercise passive personality jurisdiction in relation to certain crimes. For example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) provides for states parties to take measures to establish jurisdiction over torture, including '[w]hen the victim is a national of that

35 C Pén Art 113-7 (France).

36 Cour d'assises [Cass crim] [highest court of ordinary jurisdiction] Paris, 16 March 1990, Arrêt No 1893/89 (France), discussed in Anthony Colangelo, 'The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes' (2005) 36 *Geo J Int'l L* 537, 545.

37 *United States v Neil*, 312 F 3d 419 (9th Cir 2002).

38 *Ibid* at 422–23.

State if that State considers it appropriate'.[39]

However, at least in the states surveyed for this chapter, passive personality jurisdiction does not appear to be regularly exercised, possibly because this form of jurisdiction normally would be exercised only if the territorial state or state of the suspect's nationality (ie, the state with active personality jurisdiction) did not act.

Protective principle

The third head of extraterritorial criminal jurisdiction is known as the protective principle, which recognises a state's power to assert jurisdiction over a limited range of crimes committed by foreigners outside its territory, where the crime prejudices the state's vital interests. The rationale behind this basis of extraterritorial criminal jurisdiction is that states are entitled to protect their own essential security and certain other essential state interests. However, there is no general consensus concerning its scope.

There is no contemporary comprehensive study documenting the

39 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 5(1)(b), 26 June 1987, 1465 UNTS 85 [hereinafter Convention against Torture]. Other examples of treaties recognising that states parties may exercise passive personality jurisdiction, if they wish, include: International Convention for the Suppression of Acts of Nuclear Terrorism, entry into force 7 July 2007, S Treaty Doc No 110-4, 2005 WL 5653114; International Convention for the Protection of All Persons from Enforced Disappearance Article 9(1)(c), opened for signature 6 February 2007, 39 ILM 966 (not yet in force); 2002 UN Convention Against Corruption Article 42(2)(a), entry into force 14 December 2005, 41 ILM 31 [hereinafter UN Corruption Convention]; Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organised Crime Article 1(2), entry into force 23 December 2003, 40 ILM 334; UN Convention Against Transnational Organised Crime Article 15(2)(a), entry into force 29 September 2003, S Treaty Doc 108-16; International Convention for the Suppression of Terrorist Bombings Article 6(2)(a), entry into force 23 May 2001, 37 ILM 251; Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organised Crime Article 1(2), 15 November 2000, A/AC254/4/Add2/Rev3; International Convention Against the Taking of Hostages Article 5(1)(d), 17 December 1979, 1316 UNTS.205. Regional treaties include: Council of Europe [hereinafter COE] Convention on the Prevention of Terrorism Articles 14(3) and 18, 16 May 2005; Organisation of African Unity Convention on the Prevention and Combating of Terrorism Article 6(2)(a), 14 July 1999, in M Cherif Bassiouni, *International Terrorism: Multilateral Conventions* (2001) 417; Organization of American States [hereinafter OAS] Inter-American Convention on Forced Disappearance of Persons Article IV, entry into force 28 March 1996, 33 ILM 1429; OAS Inter-American Convention to Prevent and Punish Torture Article 12(c), entry into force 28 February 1987; COE European Convention on the Suppression of Terrorism Articles 6(1) & 7, 27 January 1977.

number of states that have based legislation on the protective principle or otherwise provided for its exercise by national courts. Of the 27 states surveyed for this chapter, 22 have enacted legislation based on some form of the protective principle,[40] though how far this legislation has been relied on in practice is another matter. Over half of those states allow jurisdiction over any crime deemed to have been committed against a state's general, fundamental or economic interests, regardless of where the crime was committed.[41] Other crimes covered by some states' protective principle legislation include crimes involving national security, acts of war or arms offences;[42] counterfeiting the state's currency or seal and treason and/or interference with a state's democratic rule, constitution or independence;[43] arms control laws;[44] and perjury before consuls.[45]

US courts recently exercised protective principle jurisdiction to convict a Canadian national of attempting to blow up the Trans-Alaska oil pipeline, a crime found 'clearly [implicating] the fuel security and financial security of the United States'.[46] The court held that '[t]he protective principle applies where the defendant's conduct may have a "potentially adverse effect on the sovereign's security or its governmental functions"'.[47]

Universality principle

The fourth basis for extraterritorial criminal jurisdiction is the 'universality principle', also known by the terms 'universal jurisdiction'

40 Argentina, Australia, Bahrain, Brazil, China, Denmark, Egypt, Finland, France, Germany, Republic of Korea, Malaysia, Mexico, Netherlands, Norway, Poland, Russia, Spain, Sweden, UAE, United States and Venezuela. The reports from South Africa and Tajikistan did not address this point.

41 Argentina, Brazil, China, Denmark, Egypt, Finland, France, Republic of Korea, Mexico, Poland, Netherlands, Norway, Russia and Sweden. Over a third (nine out of 22) grant jurisdiction where the crime involves the state's government, public authorities, military or agents abroad: Brazil, Denmark, Egypt, Finland, France, Germany, Malaysia, Mexico and Spain.

42 Bahrain, Denmark, Egypt, Finland, Germany, Malaysia, UAE and Venezuela.

43 Argentina, Australia, Denmark, Egypt, Finland, Germany, Korea, Malaysia, Spain, Sweden, UAE and Venezuela.

44 Sweden: see eg, Swedish Supreme Court cases Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1987 s 473; Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1953 s 524; Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1950 s 140.

45 United States: 22 USCA.s4221 (2006); see also *United States v Rodriguez*, 182 F Supp 479 (SD Cal 1960).

46 *United States v Reumayr*, 530 F Supp 2d 1210, 1222 (DNM 2008).

47 *Ibid* (citing *United States v James-Robinson*, 515 F Supp 1340, 1344-45 (SD Fla 1981)).

or 'universal criminal jurisdiction'.[48] Although there is no uniformly-used definition of universal jurisdiction,[49] the term is used in various senses, and often refers to cases where a state asserts jurisdiction over certain crimes committed by foreigners against foreigners occurring outside the state's territory and having no other connection to or impact on the prosecuting state. Unlike the active personality, passive personality and protective principles, the universality principle is not based on a particular connection between the crime and the state seeking to exercise jurisdiction (although as noted below, many states attach conditions to the exercise of universal jurisdiction that involve connections such as the presence of the accused in the territory).

This section focuses on exercises of universal jurisdiction that cannot otherwise be supported on the basis of the active personality, passive personality or protective principles, which this chapter refers to as 'pure' universal jurisdiction.

The proper scope and application in certain instances or with regard to certain crimes of universal jurisdiction is controversial among states and among commentators.

There are two broad and intersecting rationales for the existence and exercise of universal jurisdiction. First is the idea that certain crimes, such as war crimes, crimes against humanity, aeroplane hijacking, genocide and torture, are so serious and reprehensible that any state may prosecute the offender regardless of the nationality of the offender or the victim/s,

48 This chapter does not address universal civil jurisdiction, which is addressed in *supra* Chapter 2: Tort.

49 Compare Cryer *supra* n 26 at 44 (defining universal jurisdiction based solely on the nature of the crime, irrespective of jurisdictional connections), Princeton Univ Program in Law & Pub Affairs, 'The Princeton Principles on Universal Jurisdiction' (2001) 28 princ 1 [hereinafter Princeton Principles] (same), M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Va J Int'l L* 81 (2001) (same), and Int'l Law Assoc, Comm on Int'l Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2000) at 2 [hereinafter ILA Report] (same), with *Jorgic v Germany*, ECtHR App No 74613/01 para 53 (2007), available at http://cmiskp.echr.coe.int [hereinafter ECtHR *Jorgic* case] (defining universal jurisdiction as 'jurisdiction for crimes committed outside the State's territory by non-nationals against non-nationals of that State and which are not directed against the State's own national interests, at least if the defendant was found to be present on its territory'), Amnesty International Report, *supra* n 3, Introduction at 1 (finding based on a survey of 125 states, that universal jurisdiction applies to crimes under international law, crimes under national law of international concern, and ordinary crimes under national law), and Special Rapporteur, Int'l Law Comm, Preliminary Report on the 'Obligation to Extradite or Prosecute ("aut dedere aut judicare")' (1 May-9 June & 3 July-11 August 2006) at para 19, A/CN.4/571, [hereinafter ILC Report] (defining universal jurisdiction as criminal jurisdiction where there is no link by territory, nationality or protection).

because the offender is, in essence, an 'enemy of mankind'.[50] Based on this rationale, universal jurisdiction may be exercised only for a certain limited number of crimes, being the most shocking crimes that represent crimes against all 'mankind'. Secondly and often closely related is the so-called 'no safe haven rationale', which emphasises the necessity of allowing prosecution to avoid the impunity that would result if the offenders were not prosecuted and punished for their crimes. This second rationale is particularly apt where the entire legal system of the state that would otherwise exercise territorial criminal jurisdiction has collapsed, with the territorial state being unable to investigate or prosecute the suspects, or where the courts of the territorial state are unable to conduct

50 See eg, *Demjanjuk v Petrovsky*, 776 F 2d 571, 583 (6th Cir 1985), cert denied, 475 US 1016 (1986) ('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. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.'); CA 336/41 *Eichmann v Attorney-General* [1962] IsrSC 16(3) 2033, reprinted in 36 ILM 277 ('Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.'); Human Rights Watch Report, *supra* n 3 at 31 ('Human Rights Watch urges that, in the context of crimes such as genocide, crimes against humanity and war crimes, the gravity of such crimes, their universal condemnation and the international community's commitment to repressing them should be considered when evaluating the "public interest" in pursuing such a prosecution.'); Jennings, *supra* n 8 at 156 (the universality principle 'is based on the idea that the suppression of crime is an interest common to all States and to all mankind. The pirate is the obvious example of the *hostis humani generis*, but the notion of general jurisdiction is also met with in relation to what may be called "international crimes", like traffic in women and children, or drugs.'); Judicial Monitor, 'Universal Jurisdiction', www.judicialmonitor.org/current/generalprinciples.html (last visited 16 June 2008).

fair trials that are not a sham.[51] While it has often been cited to reinforce claims of jurisdiction over conduct so serious as to constitute crimes under international law, in the view of some it may also support the exercise of universal jurisdiction for other serious crimes whose repression is seen as warranting transnational cooperation, including murder, rape, kidnapping, securities fraud, money laundering, drug trafficking, hijacking, attacks on aircraft, cutting undersea cables, damaging oil platforms, organised crime, and trafficking in women and children.

It is not clear whether either of the above rationales has been applied in practice by any state, either in its legislation or in its conduct in prosecuting offenders.

To the subcommittee's knowledge, there is no contemporary comprehensive study documenting the number of states providing for universal criminal jurisdiction in its various forms in national legislation.[52] A majority of the states surveyed for this chapter (25 out of 27) provide for some form of universal jurisdiction to be exercised by national courts.[53] Six of the 27 surveyed states have enacted legislation based on a broad

51 See eg, *Public Prosecutor v Djajić*, Bayerisches Oberstes Landesgericht [BayObLg] [Court of Appeals for Selected Matters in Bavaria] 23 May 1997, 3 Entscheidungen des Bayerischen Obersten Landesgerichts in Strafsachen [BayObLgSt] 20/96 ('Considerations of international law are important, but one should not overlook the fact that the prosecution of a foreigner for crimes committed abroad serves also an interest of the State of residence, viz not to become a refuge for offenders who have committed crimes against customary and conventional international law. Not to prosecute would undermine the trust of the German citizens in the national and international legal order (*Rechtsbewährungsprinzip*). Furthermore, since the ICTY and the competent territorial State do not wish to take over the proceedings, Germany has an interest not to be perceived by the international community as a haven for international criminals.'); African Legal Aid, 'Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African-Perspective (2002)' [hereinafter Cairo-Arusha Principles], reprinted in Edward Kwakwa, 'The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: Developing the Frontiers of the Principle of Universal Jurisdiction' (2002) 10 *African YB of Int'l L* 407, pmbl (referring to the need to 'avoid impunity'); Amnesty International Report, *supra* n 3, Introduction at 5; Human Rights Watch Report, *supra* n 3 at 31 ('the forum state's interest in not becoming a "safe haven" for perpetrators of such crimes could reasonably form part of the overall "public interest" in prosecuting such crimes [as genocide, crimes against humanity and war crimes]'); Redress 2004 Report, *supra* n 3 at 2 (discussing the need to end safe havens for those accused of perpetrating violations of human rights and international humanitarian law).

52 See *supra* n 3 for a discussion of existing state practice studies.

53 Argentina, Australia, Bahrain, Brazil, China, Denmark, Finland, France, Germany, India, Malaysia, Mexico, Netherlands, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Tajikistan, UAE, United Kingdom, United States and Venezuela. Note that under the Swedish and Norwegian constitutions officials must consult with the Foreign Ministry before making any decision that could impact upon international relations, which could include investigations and prosecutions based on extraterritorial criminal jurisdiction.

view of universal jurisdiction, granting such jurisdiction over any crimes or any crimes to which a specified minimum term of imprisonment applies when the suspect is found in its territory and extradition has been denied to another state.[54]

Around three-quarters of states surveyed recognise in legislation some form of jurisdiction based on treaties, such as the Geneva Convention, to which the states concerned are parties.[55] For example, the 'grave breaches provisions' of the Geneva Convention define certain violations of the treaty as grave breaches and require that parties 'search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and… bring such persons, regardless of their nationality, before [their] own courts'.[56] According to one view, this form of universal jurisdiction gives priority to prosecution over extradition (although states parties may extradite a suspect to any other state party if that party can make out a *prima facie* case) or surrendering the suspect to an international criminal court or tribunal. This form of universal jurisdiction must be distinguished from a treaty obligation to extradite or prosecute (*aut dedere aut judicare*) which, according to one view, gives priority to extradition over prosecution, and exists in numerous treaties concerning issues such as terrorism.[57] The Geneva Conventions provisions are admittedly broader than the more normal *aut dedere* approach of most

54 Bahrain (any crime), Denmark (sentence of at least one year's imprisonment), Finland (at least six months), France (at least five years), Poland (at least two years) and Sweden (at least four years). See also Criminal Code of Bosnia and Herzegovina Article 12(4) (at least five years); Serbia Criminal Code, Applicability of Criminal Legislation of Serbia to a Foreign Citizen Committing a Criminal Offence Abroad Article 9(2) (at least five years).

55 Argentina, Australia, Brazil, China, Denmark, Finland, France, Germany, Netherlands, Norway, Poland, Russia, South Africa, Spain, Sweden, Tajikistan, United Kingdom and Venezuela. For a list of potentially relevant treaties, see *supra* n 37.

56 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Article 49, entered into force 21October 1950, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Article 49, entered into force 21 October 1950, 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War Article 146, entered into force 21 October 1950, 75 UNTS 287 [collectively hereinafter Geneva Conventions]; Geneva Convention Relative to the Treatment of Prisoners of War Article 129, entered into force 21 October 1950, 75 UNTS 135.

57 Some authors, such as Bertrand Röling, contend that treaties with an *aut dedere aut judicare* obligation (whether formulated as a prosecute or extradite or as an extradite or prosecute obligation) do not require or authorise universal jurisdiction; others argue that such treaties necessarily require states parties to exercise universal jurisdiction when they decide not to extradite a foreigner suspected of committing a crime abroad against a foreigner. See Bertrand Röling, 'The Law of War and National Jurisdiction Since 1945' (1960) 100 *Recueil des Cours*.

international criminal treaties.

Treaty-based universal jurisdiction applies to crimes such as piracy (covered in national legislation in eight of the 27 surveyed states),[58] crimes against humanity (five states),[59] war crimes (eight states),[60] hijacking (five states),[61] terrorism (five states),[62] torture (four states),[63] human trafficking (three states)[64] and drug trafficking (three states).[65]

Some states also provide for universal jurisdiction over crimes under international law, and this jurisdiction may in certain circumstances be independent of any treaty obligation.[66] For example, Germany's Code of Crimes against International Law, enacted in 2002, enables German courts to exercise jurisdiction over genocide, crimes against humanity and war crimes, regardless of the location of the alleged crimes or the nationality of the persons involved in those actions.[67] The United States recently amended its legislation criminalising genocide to permit prosecutions under several circumstances, including when 'after the conduct required for the offense occurs, the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States' (potentially the universality principle when the alleged offender and victim are not US nationals).[68]

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58 Australia, Malaysia, New Zealand, Spain, UAE, United Kingdom, United States and Venezuela. Many states, such as the United Kingdom, have authorised their courts to exercise universal jurisdiction over piracy under customary international law.

59 Australia, Netherlands, New Zealand, Poland, South Africa, Tajikistan, United Kingdom and Venezuela.

60 Australia, Netherlands, New Zealand, Norway, Poland, South Africa, Tajikistan and United Kingdom.

61 Denmark, Spain, Tajikistan, United Kingdom and United States.

62 Finland, Malaysia, Netherlands, Spain and UAE.

63 Australia, Netherlands, Poland, and Tajikistan.

64 Finland, Germany and UAE.

65 Germany, Spain and UAE.

66 Legislation in Netherlands, New Zealand, Poland, South Africa, Tajikistan and United Kingdom provides for universal jurisdiction over genocide, crimes against humanity and war crimes; Senegal has similar legislation.

67 Gesetz zur Einführung des Völkerstrafgesetzbuches [VStGB] [Code of Crimes Against International Law] 26 June 2002, Bundesgesetzblatt [BGBl] I-42 2254, s 1, http://217.160.60.235/BGBL/bgbl1f/BGBl102042s2254.pdf. As discussed below, the European Court of Human Rights considered Germany's genocide/universal jurisdiction legislation in the ECtHR *Jorgic* case. See *infra* n 73 and accompanying text.

68 18 USC s 1091 (2007), as amended by the Genocide Accountability Act, 21 December 2007. Previously, prosecutions for genocide under US law were only permissible if the offence was committed within the United States (territorial jurisdiction) or if the alleged offender was a US national (active personality principle). The Genocide Convention does not itself authorise universal jurisdiction. See Convention on the Prevention and Punishment of the Crime of Genocide, entry into force 12 January 1951 [hereinafter Genocide Convention].

Universal jurisdiction appears to be less commonly available in the business crime area, at least in the context of bribery and corruption.[69]

Of course, statutory competence to investigate, prosecute and convict based on universal jurisdiction is not the same as actual investigations, prosecutions and convictions. Between the end of World War II and the mid-1990s, there were only a handful of criminal investigations and prosecutions based on universal jurisdiction. For example, there were prosecutions in Austria and in Germany based on universal jurisdiction over ordinary crimes[70]; in 1961, Israeli agents captured former high-ranking Nazi Adolf Eichmann in Argentina and brought him to Israel to stand trial for war crimes, crimes against humanity, and crimes against the Jewish people.[71] The basis of jurisdiction was the Nazis and Nazi Collaborators (Punishment) Law (1950), which gave the Israeli courts jurisdiction over perpetrators of 'crimes against the Jewish people' regardless of the nationality of the victim or perpetrator.[72] Some commentators have suggested that the Eichmann trial is an example of passive personality principle rather than the universal principle, but others regard this prosecution as one of the first modern examples of

69 See *infra* Chapter 4: Bribery and Corruption (referring to various treaties on bribery and corruption and concluding that no treaty 'contemplates that corruption offences give rise to universal jurisdiction as such, although mandatory jurisdiction based on the presence of the offender who is a non-national of the requested country could be considered a limited subclass of universality'); but see Cairo-Arusha Principles, *supra* n 49 at princs 2 &4 (proposing that universal jurisdiction should apply to legal entities as well as natural persons, and referring to crimes of an economic nature as potentially being covered by universal jurisdiction).

70 Oberste Gerichtshof [OGH] [Supreme Court] 29 May 1958, 29 Entscheidungen des österreichischen Obersten Gerichtshofes in Strafsachen [SSt] No 32 (Austria), edited version published in English in *Public Prosecutor v Milan T*, 28 ILR 341 (1963) (fraud in Yugoslavia); Bundesgerichtshof [BGH] [Federal Court of Justice] 20 October 1976, 27 Entscheidungen des Budesgerichtshof in Strafsachen 30, English translation published in *Public Prosecutor v Dost*, 74 ILR 166 (sale of drugs the Netherlands) (discussed in Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003) 98–99, 147).

71 *Attorney-General of Israel v Eichmann*, 36 ILR 277 (Sup Ct 1962) (Israel). See eg, Gary J Bass, 'The Adolf Eichmann Case: Universal and National Jurisdiction' in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Stephen Macedo ed, 2004) 77–90 [hereinafter Macedo].

72 Nazis and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154 (1950) (Israel) passed by the Knesset on the 18th Av 5710 (1 August 1950).

prosecution based at least in substantial part on universal jurisdiction.[73]

Since the mid-1990s, the exercise or attempted exercise of universal jurisdiction has become more common; some states have investigated, prosecuted and in some cases convicted individuals on the basis of universal jurisdiction. Annex 2,[74] sets out a detailed list of examples of the exercise of universal jurisdiction in 13 countries since 1994,[75] which include the following examples:

Some countries, including Austria, Belgium, Canada, Denmark, Finland, France, Germany, the Netherlands, Switzerland, Spain and Sweden, have investigated and in some cases prosecuted individuals for their involvement in genocide, crimes against humanity and war crimes in Rwanda and the former Yugoslavia in the mid-1990s. In July 2007, in the European Court of Human Rights *Jorgic* case, the ECtHR confirmed Germany's ability to convict a national of Bosnia and Herzegovina for genocide committed in the former Yugoslavia (note that the defendant had resided in Germany for more than 20 years, and the International Criminal Tribunal for the former Yugoslavia (ICTY) was not willing to take over the defendant's prosecution).[76] The ECtHR concluded that German courts had jurisdiction 'to try persons charged with genocide committed abroad, regardless of the defendant's and the victims' nationalities'.[77]

- *Belgium*: Belgium is a country often associated with universal jurisdiction, in light of its 1993 Act Concerning Punishment for Grave Breaches of International Humanitarian Law, which was amended in 1999 to include universal jurisdiction over crimes against humanity and genocide in addition to war crimes. In April 2003, the law was amended to remove the right of victims to initiate universal jurisdiction prosecutions and to introduce immunity provisions, and the Act was repealed altogether in August 2003. The Belgian Criminal Code was

73 See eg, Arrest Warrant of 11 April 2000 (*Congo v Belg*), 2002 ICJ 3, 23 (14 February) [hereinafter ICJ *Arrest Warrant* case]; Diane Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2003–2004) 92 *Geo LJ* 1057, 1073, n 93 [hereinafter Orentlicher] ('The Israeli courts justified their exercise of jurisdiction on the basis of the principle of passive personality and the protective principle as well as universal jurisdiction.'); Judicial Monitor, *Universal Jurisdiction*, www.judicialmonitor.org/current/generalprinciples.html (last visited 16 June 2008). Israel also tried John Demjanjuk for crimes committed during World War II, but his conviction was overturned on appeal: CrimA 347/88 *Israel v Demjanjuk* [1993] IsrSC 47(4) 221, reprinted in 36 ILR 18 (Israel).

74 See www.ibanet.org/images/downloads/etjtfcriminalannex2.pdf.

75 These examples are in addition to those indicated in Annex 1, www.ibanet.org/images/downloads/etjtfcriminalannex1.pdf.

76 ECtHR *Jorgic* case, *supra* n 47 at para 17.

77 *Ibid at* para 66.

then amended to include a limited form of universal jurisdiction.[78] Before this amendment in 2003, private complaints were filed in Belgium against current or former leaders of Chad, Cuba, the Democratic Republic of Congo (DRC), Iran, Iraq, Israel, the Ivory Coast, the Palestinian Authority, and the United States. A Belgian magistrate issued an arrest warrant for the then foreign minister of the DRC for war crimes and crimes against humanity, but the warrant was withdrawn after the International Court of Justice (ICJ) ruled that the accused was immune and that the issuing of the warrant was unlawful.[79]

- *France*: In June 2005, a French court convicted Ely Ould Dah, a Mauritanian soldier who was in France for military training, of torture committed in Mauritania during 1990 and 1991 and sentenced him to ten years' imprisonment.[80] In April 2008, the Cour de Cassation permitted an investigation into enforced disappearances of several hundred refugees who were returned to the Republic of the Congo (Congo) (the 'Brazzaville Beach' case).[81] This investigation prompted Congo to institute a case against France at the ICJ, in which Congo alleges, *inter alia*, that 'in attributing to itself universal jurisdiction in criminal matters and arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country', France violated 'the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations…exercise its authority on the territory of another State'.[82]
- *Netherlands*: In April 2004, the Rotterdam District Court convicted a

78 See Human Rights Watch Report, *supra* n 3 at 37–45; Redress 2004 Report, *supra* n 3 at 45–47.

79 ICJ *Arrest Warrant* case, *supra* n 71 at 29.

80 Cour d'assises [criminal courts of original and appellate jurisdiction] Nîmes , 30 June & 1 July 2005 (France) (discussed in UN Comm Against Torture, 'Report of the 35th–36th Sessions', at 33, UN Doc A/61/44 (May 2006), available at www.unhchr.ch/tbs/doc.nsf/0/c59f4f7ca89fb7a2c12572590040e7e3/$FILE/G0644596.doc).

81 Cour de cassation [highest court of ordinary jurisdiction], 9 April 2008 (France), available at www.fidh.org/IMG/pdf/ArretCCBeach9avril08_exp.pdf.

82 See 'Concerning Certain Criminal Proceedings in France (*Republic of Congo v France*)', 2003 ICJ 129 at 3 (11 April), www.icj-cij.org/docket/files/129/7067.pdf. In June 2003, the ICJ rejected Congo's request for provisional measures suspending the proceedings in France. See Order of 17 June 2003 on Request for the Indication of a Provisional Measure, 2003 ICJ 102.

national of the DRC of torture of other DRC nationals in the DRC.[83] In October 2005, the District Court of The Hague convicted two former Afghan generals in the Khad secret police during Communist rule of Afghanistan in the 1980s of war crimes and torture, committed in Afghanistan against Afghans.[84]

- *Senegal*: A trial in Senegal of the former president of Chad, Hissène Habré, for war crimes, crimes against humanity and torture, is due to begin at some point in 2008.[85] The African Union and the UN Committee Against Torture both insisted that Senegal try Habré, because Senegal had failed to extradite the former president.
- *Spain*: In September 2005, the Constitutional Court, the highest court in Spain, held that no link or connection to Spanish interest is necessary for triggering universal jurisdiction.[86] As a consequence, five arrest warrants and extradition requests were issued by an investigating judge in Madrid against alleged perpetrators of genocide, crimes against humanity and terrorism committed in Guatemala during the internal armed conflict (1961–1996), including a warrant for former President Efrain Ríos Montt.[87] In late 2007, the Supreme Court confirmed the conviction and sentence of Adolfo Francisco Scilingo, a former Argentine Navy officer, to 25 years in prison for crimes against humanity under international law.[88] In October 2007, the Constitutional Court confirmed the jurisdiction of Spain to investigate Jiang Zemin, China's former president, and others for alleged genocide and torture committed against Falun Gong members since 1990 in China; evidence

83 Prosecutor/N Arrondissementsrechtank (Rb.) (ordinary court of first instance), Rotterdam, 7 April 2005 (Netherlands), official translation in (2004) 51 *Neth Int'l L Rev* 439, 444–49; Marlise Simons, 'Congo Man Convicted of Torture', *NY Times*, 8 April 2004 at A1. See also Ward Ferdinandusse, 'Prosecutor v N Case No AO7178' (2005) 99 *Am J Int'l L* 686.

84 Openbaar Ministerie/Heshamuddin Hesam, Rechtbank's-Gravenhage [Rb] [ordinary court of first instance], The Hague, 14 October 2005, RvdW 09/751003-04 (Netherlands); Amin Tarzi, 'Afghanistan: Dutch Verdicts Could Reopen Old Wounds', Radio Free Europe, 19 October 2005, available at www.rferl.org/featuresarticle/2005/10/d3185711-2419-4fb5-b5f3-f4c613773c70.html.

85 See generally Adrienne Margolis, 'The Growing Dominion of Universal Jurisdiction', *IBA News*, April 2008 at 8–11; Stephen P Marks, 'The Hissène Habré Case: The Law and Politics of Universal Jurisdiction', in Macedo, *supra* n 69 at 131–67.

86 STC 237/2005, 26 September 2005, www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html (Spain).

87 See Simon Watts, 'Orden de arresto contra Ríos Montt', BBC Mundo, 7 July 2006, http://news.bbc.co.uk/hi/spanish/latin_america/newsid_5160000/5160136.stm.

88 STS 298/2007, 1 October 2007, www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html (Spain). See generally Richard J Wilson, 'ASIL Insight: Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity', 12(1) ASIL Insight, 30 January 2008 at 1.

is now being presented to the trial court.[89]

- *United Kingdom*: An English court convicted Faryadi Zardad, a former Afghan warlord who had relocated to the United Kingdom, of crimes of conspiracy to commit torture and hostage taking of Afghanis in Afghanistan.[90] (The *Pinochet* case is discussed in the context of extradition below in 'Extradition and competing jurisdictional claims'.)

There have also been some controversial instances of the exercise, or attempted exercise, of extraterritorial criminal jurisdiction, including:

- On two occasions, private parties have attempted to persuade a German prosecutor to indict several US officials, including former Defence Secretary Donald Rumsfeld, former Attorney-General Alberto Gonzales, and former CIA Director George Tenet, in German courts for torture and war crimes committed in Iraq, Afghanistan and Guantánamo Bay. These attempts were unsuccessful; in April 2007, the prosecutor dismissed the second complaint on the ground that 'there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint'.[91]
- In September 2005, a UK judge issued a sealed arrest warrant under the Geneva Conventions Act 1957 against retired Israeli General Doron Almog for his alleged participation in grave breaches of the Geneva Conventions in Israeli-occupied Gaza, where General Almog had been a commander.[92] Almog arrived at Heathrow Airport but did not disembark from his flight (reportedly after news of the confidential warrant was leaked to the Israeli government and Almog was ordered not to leave the plane), and returned to Israel before the warrant

89 STC 227/2007,22 October 2007, www.tribunalconstitucional.es/jurisprudencia/Stc2007/STC2007-227.html (Spain).

90 *R v Zardad* (2005) (unreported) (UK). See also CPS Press Release, 'CPS Secures Historic Torture Conviction' (18 July 2005), available at www.cps.gov.uk/news/pressreleases/archive/2005/135_05.html ('Farayadi Sawar Zardad, 41, has been convicted in London of conspiracy to commit torture and take hostages in Afghanistan between 1991 and 1996').

91 See Scott Lyons, 'German Criminal Complaint Against Donald Rumsfeld and Others', 10(33) *ASIL Insight*, 14 December 2006 at 1; Press Release, Center for Constitutional Rights, 'Other Human Rights Groups Ask German Court to Review Federal Prosecutor's Decision to Dismiss Rumsfeld Torture Case' (13 November 2007), available at www.ccrjustice.org; see also Kai Ambos, 'International Core Crimes, Universal Jurisdiction and s 153F of the German Criminal Procedure Code: A Commentary on the Decisions of the Federal Prosecutor General and the Stuttgart Higher Regional Court in the Abu Ghraib/Rumsfeld Case' (2007) 18 *Crim LF* 43 [hereinafter Ambos] (discussing earlier complaints which were also dismissed).

92 See Human Rights Watch Report, *supra* n 3 at 9.

could be executed.[93] It was reported that both the UK Prime Minister and Foreign Secretary apologised to their Israeli counterparts for this incident.[94] There has been speculation that the UK Government would seek to amend the Prosecution of Offences Act 1985 to preclude private parties from applying for arrest warrants in relation to international crimes, but this has not happened.[95]

Extradition and competing jurisdictional claims

By their nature, cases involving extraterritorial criminal jurisdiction usually involve at least two states: the state on whose territory the crime was committed and the state or states seeking to exercise extraterritorial criminal jurisdiction.[96] This raises questions about the priority that might or should be accorded between assertions of different types of jurisdiction (eg, territorial versus extraterritorial and active personality versus universal principles). This issue is framed by the fact that one state almost always has custody of the defendant, raising questions of whether that state should prosecute or extradite. Extradition treaties usually do not resolve the questions of how to prioritise competing jurisdictional claims by national courts or whether a state should prosecute or extradite (generally requiring states either to prosecute or extradite), and customary international law also does not answer this question.

This section considers how to resolve competing jurisdiction claims in the context of extradition, including definitions and basic principles, different approaches for resolving competing jurisdictional claims, and a brief discussion of state practice and practical illustrations of these issues.

Definitions and basic principles

Extradition is a criminal process by which an individual is sent from the state in which he or she is found (State A) to the state requesting his or her return (State B), pursuant to an official request in order to stand trial for crimes over which State B alleges jurisdiction or to serve a sentence of imprisonment in State B. In this chapter, the state asking for extradition

93 Jonny Paul, 'British Police Halted Almog Arrest', *Jerusalem Post*, 19 February 2008, available at www.jpost.com.

94 See Human Rights Watch Report, *supra* n 3 at 9.

95 See Vikram Dodd, 'UK Considers Curbing Citizens' Right to Arrest Alleged War Criminals', *The Guardian*, 3 February 2006, www.guardian.co.uk/uk/2006/feb/03/human-rights.foreignpolicy.

96 Two exceptions are for crimes committed in international waters or in airspace, thus committed outside the jurisdiction of any state, such as piracy on the high seas.

is referred to as the 'requesting state' and the state asked to extradite is referred to as the 'requested state' or the 'custodial state'. This section focuses on situations where a request for extradition has already been made.

As noted above, under some treaties, states have undertaken an obligation to extradite or prosecute offenders. When this *aut dedere aut judicare* obligation applies, and a request for extradition has been made, the requested state is required either to extradite the suspect to the requesting state or to exercise jurisdiction. However, in some treaties, the obligation to prosecute arises when the custodial state decides not to extradite *even if no request to extradite has been received.*[97] In some cases, where a state has an *aut dedere aut judicare* obligation, it must extradite, assuming the request meets the treaty's requirements, unless there is a valid recognised ground to refuse extradition, in which event the case must be submitted for prosecution. In other cases, the obligation to prosecute arises only if the requested state seeks such a prosecution and/or if the extradition request is denied on a specific basis, such as the nationality of the offender. Various types of obligations to extradite or prosecute are found in conventions concerning crimes of international concern, such as

97 See eg, J Hermann Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 137–138 ('[T]he mere fact that extradition does not take place, whether the reason is that no extradition request is made or that such a request is refused, is a sufficient basis for creating the obligation to submit the case to the prosecuting authorities of the State which has jurisdiction under article 5, paragraph 2.'); Michael C Wood, 'The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents' (1974) 23 *Int'l & Comp L Q* 791, 811. Generally in relation to state obligations to prosecute or extradite, see Cryer, *supra* n 26 at 58–61.

hijacking, hostage taking, terrorism and torture.[98]

Almost all recent bilateral extradition treaties require dual criminality, whereby offences are extraditable only if they are punishable under the laws of both countries in some particular manner listed in the treaty.[99] Some treaties provide for extradition for specified offences only, setting out a list or schedule of offences that are extraditable, typically specifying only the most serious crimes for which the penalty on conviction exceeds a certain threshold.[100] Such 'list' treaties have the benefit of clarity but are virtually guaranteed obsolescence. The modern trend is for treaties without a list, covering offences that are crimes under the laws of both states and that are (typically) subject to a certain minimum measure of punishment (eg, imprisonment for at least one year). These treaties are more flexible and adaptable, effectively 'self-amending' and keep pace with developments in criminal law, thus obviating the need to renegotiate extradition treaties frequently.[101] However, it has been suggested that these treaties can present problems of interpretation and lack of clarity.

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98 Examples of treaties imposing an *aut dedere aut judicare* obligation requiring states parties to exercise extraterritorial criminal jurisdiction in certain cases if they do not extradite a suspect include, for example, many of the treaties listed at *supra* n 37; see also International Convention against the Recruitment, Use, Financing and Training of Mercenaries, entered into force 20 October 2001, 29 ILM 91; International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, S Treaty Doc 106-49 [hereinafter Financing Terrorism Convention]; Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, 2242 UNTS 350 (attacks on aircraft); Convention on the Safety of UN and Associated Personnel, opened for signature 9 December 1994, 34 ILM 65; Convention on the Physical Protection of Nuclear Material, opened for signature 3 March 1980, 18 ILM 1419; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, entered into force 20 February 1977, 1035 UNTS 167, 13 ILM 41 (diplomats); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Article 88(1), entered into force 7 December 1978, 1125 UNTS 3; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 105 (aircraft hijacking). Regional treaties include: African Union Convention on Preventing and Combating Corruption Art 13(1)(c), 11 July 2003, 43 ILM 1; AU Convention for the Elimination of Mercenarism in Africa Articles 8 & 9, entered into force 22 April 1985, 1490 UNTS 89.

99 See eg, Argentina, Australia, Brazil, Finland, Germany, Netherlands, Russia, Spain, and Venezuela. Multilateral treaties also contain extradition requirements, which are similar in content to bilateral treaties, but can be more complicated due to the increased number of states with an interest in the outcome of extradition requests.

100 For example, 11 of the 27 states surveyed for this chapter allow extradition for crimes where the potential penalty for the offence is at least one year's imprisonment: Argentina, Australia, Brazil, Finland, France, Republic of Korea, Malaysia, Russia, Spain, United Kingdom and Venezuela.

101 See Thomas G Snow, 'The Investigation and Prosecution of White Collar Crime: International Challenges and the Legal Tools Available to Address Them' (2002) 11 *Wm & Mary Bill Rts J* 209, 214–15 [hereinafter Snow].

The European Arrest Warrant (EAW) scheme abolishes dual criminality requirements for 32 categories of crimes, some of which might be considered crimes of an international nature, although some have suggested that this is more like each state granting the others full faith and credit such as exists among US states,[102] rather than each state exercising universal jurisdiction.[103] EU countries can no longer refuse to surrender their own nationals, and the EAW scheme is 'based on the principle that EU citizens shall be responsible for their acts before national courts across the European Union'.[104] The EAW system replaces extradition between EU Member States. As set forth in the Council Framework Decision, the:

> '[O]bjective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.'[105]

Some bilateral extradition treaties specifically acknowledge that an extradition request may be based on extraterritorial jurisdiction. For example, the US-India Extradition Treaty provides that 'extradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed'.[106] In some bilateral treaties, extradition based on extraterritorial jurisdiction will be mandatory if

102 US Constitution Article IV, s 1.

103 See Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States Article 2(2), 13 June 2002, 2002/585/JHA, OJ 2002 L 190 [hereinafter European Arrest Warrant Council Decision] (listing offences not subject to the verification of double or dual criminality, including terrorism, trafficking in human beings, sexual exploitation of children and child pornography, fraud, counterfeiting, computer-related crime and murder).

104 European Commission, 'European Arrest Warrant Replaces Extradition Between EU Member States', http://ec.europa/eu/justice, at 3. The sending Member State, when surrendering the individual, may ask for their return on its territory to serve any sentence imposed. This approach has drawn criticism with respect to crimes lacking a clear definition, such as terrorism, which might be more properly addressed by a dual criminality provision. See Michael Plachta, 'European Arrest Warrant: Revolution in Extradition?' (2003) 11 *Eur J Crim L & Crim Just* 182, 185–86.

105 European Arrest Warrant Council Decision, *supra* n 100 at pmbl para 5.

106 See Extradition Treaty Article 2(4), US-India, 25 June 1997, S Treaty Doc 105–30.

the offence is subject to extraterritorial criminal jurisdiction in both the requesting and requested states, based on the dual criminality principle, but discretionary if the dual criminality element is not present. States often want to ensure that they are not obliged to extradite an individual for prosecution in another state on the basis of a jurisdictional reach not accepted by the requested state.[107]

The process of extradition is usually carried out via treaty arrangements,[108] and obviously any extradition request will be governed by the individual terms of the applicable treaty. There is no general obligation under customary international law to extradite or prosecute individuals for offences not covered by international agreements containing such an obligation, and indeed some states prohibit the exercise of extradition in the absence of any treaty.[109] Other states can extradite on the basis of statute alone.

Growing international opposition to the death penalty may also boost the likelihood of states without the death penalty, prosecuting on the basis of extraterritorial jurisdiction rather than extraditing to a state that has the death penalty for the offence in question.[110] However, in practice, it is likely that states would simply request assurances that capital punishment would neither be sought nor imposed.

Practical considerations will also feature in a state's decision whether to prosecute or extradite. It is usually much cheaper (and lower profile) to extradite than to prosecute, although in practice, the state with custody is far more likely to prosecute than extradite if it has the evidence and the

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107 See eg, Agreement on Extradition Article 4, US-EU, 3 June 2003, OJ 2003 L 181; Extradition Treaty Article 2(4), US-Phil, 13 November 1994, S Treaty Doc No 104–16.

108 Snow, *supra* n 98 at 214–15.

109 See eg, 18 USC s 3181b (2006); Extradition Act 2003 c 41, s 137(2) (UK); Christopher C Joyner, 'International Extradition and Global Terrorism: Bringing International Criminals to Justice' (2003) 25 *Loy LA Int'l & Comp L Rev* 493, 538.

110 Michael Kelly, 'Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty' (2003) 20 *Ariz J Int'l & Comp L* 491, 508; Princeton Principles, *supra* n 47, princ 10 (setting out grounds for refusal of extradition, including the likelihood of facing a death penalty sentence). Extradition requests from Europe to the United States are likely to be refused where the United States permits the death penalty for the crime in question and will not provide assurances that the death penalty will not be imposed, as the 'death row phenomenon' violates the European Convention on Human Rights and constitutes inhuman and degrading treatment. See *Soering v United Kingdom* (1989) 161 ECtHR (ser A) at para 93. See also European Arrest Warrant Council Decision, *supra* n 102, pmbl para 13 ('No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.').

crime is serious enough.

Other international bodies and jurists who have considered extradition in the context of extraterritorial criminal jurisdiction have reached the following conclusions.

(a) The Cairo-Arusha Principles on Universal Jurisdiction conclude that a 'State in whose territory a gross human rights offence suspect is found shall prosecute him or her in good faith or extradite or surrender him or her to any other State or international tribunal willing and able to prosecute such suspect. The absence of an extradition treaty or other enabling legislation shall not bar the extradition, surrender, or transfer of such a suspect to any State or international tribunal willing and able to prosecute the suspect.'[111]

(b) The Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat impunity provides: 'Persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country. Extradition should also be denied where there are substantial grounds for believing that the suspect would be in danger of being subjected to gross violations of human rights such as torture; enforced disappearance; or extra-legal, arbitrary or summary execution. If extradition is denied on these grounds, the requested State shall submit the case to its competent authorities for the purpose of prosecution.'[112]

(c) The Princeton Principles provide that a 'state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law…provided that it has established a *prima facie* case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings'.[113]

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111 Cairo-Arusha Principles, *supra* n 49, princ 19.

112 Independent Expert to UN Comm on Human Rights, 'Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity', princ 26(a), UN Doc E/CN4/2005/102/Add1 (8 February 2005) [hereinafter UN Impunity Principles] (restrictions on extradition).

113 Princeton Principles, *supra* n 47, princ 1(4).

It should also be noted that three judges in the ICJ *Arrest Warrant* case suggested that a state 'contemplating bringing criminal charges based on universal jurisdiction must first offer to the national state of the prospective accused person the opportunity itself to act upon the charges concerned'.[114] However, this approach has been criticised.

Resolving competing jurisdictional claims[115]

Although there is no customary international law rule for resolving or prioritising competing jurisdictional claims by national courts, states may agree on a particular approach as a matter of treaty law. For example, in some treaties, states agree to cooperate to determine the most appropriate state to exercise jurisdiction where more than one state claims or could claim jurisdiction.[116] Coordination in this context contemplates that at least one state may or perhaps should decide not to exercise jurisdiction. In other treaties, states agree to a particular priority for exercising jurisdiction. For example, 'status of forces' or 'status of mission' agreements, which are frequently entered into with respect to foreign military personnel in another state, often specify the circumstances in which the host or sending state (usually the state of nationality of a defendant) will have priority of criminal jurisdiction over certain offences.[117] Similarly, the European Convention on Extradition discusses prioritisation of claims where multiple states have jurisdiction.[118]

In the absence of a treaty provision or other agreement regarding how to resolve competing claims, there are two potential approaches for

114 ICJ *Arrest Warrant* case, *supra* n 71 at 81-82 (Joint Separate Op) (no authority was cited for this proposed requirement).

115 See also *infra* Chapter 4: Bribery and Corruption ('Approaches to resolving competing claims to jurisdiction').

116 See eg, UN Corruption Convention, *supra* n 37 at Article 42(5); COE Convention on Cybercrime Article 22(5), 23 November 2001, 41 ILM 282; Financing Terrorism Convention, *supra* n 95 at Article 7.

117 See eg, Status of Mission Agreement for the African Union Mission in Somalia (AMISOM), 6 March 2007, discussed in Carsten Stahn, *The Law and Practice of International Territorial Jurisdiction* (2008) 738; Agreement Between the Democratic Republic of East Timor and the United Nations Concerning the Status of the United Nations Mission of Support in East Timor, 20 May 2002, www.laohamutuk.org/reports/UN/02UNMISETSOMA.htm; Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea Article XV(8), 9 July 1966, 17 UST 1677, 674 UNTS 163. Such treaties have been criticised in recent years by states where the visiting forces are located on the ground that the sending states do not always investigate and prosecute cases involving their nationals.

118 European Convention on Extradition Article 17, 13 December 1957, 359 UNTS 273.

resolving competing jurisdictional claims: a balancing or reasonableness test and a subsidiarity approach. Neither approach is yet supported by sufficient state practice and *opinio juris* to reflect an established customary rule for resolving competing jurisdictional claims, and it is perhaps unreasonable to expect states to adopt a uniform standard for prioritising between national courts.

BALANCING OR REASONABLENESS TEST

Under the balancing or reasonableness test, national courts or prosecuting authorities, asked to exercise extraterritorial criminal jurisdiction engage in a 'balancing test', weighing multiple factors to determine whether asserting such jurisdiction is possible and/or appropriate in the particular case.[119] For example, the Restatement (Third) of Foreign Relations Law of the United States (Restatement) lists the following factors for an impartial tribunal to take into account in determining whether the exercise of jurisdiction is reasonable in any given case:[120]

(a) the link of the activity to the territory of the regulating state, ie, the extent to which the activity takes place within the territory, or has a 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 and the importance of the regulation to the international political, legal, or economic system; and
(e) the extent to which the regulation is consistent with the traditions of the international system, the extent to which another state may have

119 Neither civil nor common law systems appear to apply the doctrine of *forum non conveniens* or *lis alibi pendens* to criminal cases, and there is no clear authority that the doctrine of 'comity', which 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law', applies generally in the criminal context. See eg, *United States v Nippon Paper Indus Co, Ltd*, 190 F 3d 1, 8–9 (1st Cir 1997).

120 Restatement, *supra* n 27, ss 402–3.

an interest in regulating the activity, and the likelihood of conflict with regulation by another state.[121]

The Restatement further provides that where it would not be unreasonable for two or more states to exercise jurisdiction, but their laws are in conflict, 'each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction' and should 'defer to the other state if that state's interest is clearly greater'.[122] This rule does not apply where the laws of each state are not in conflict. Following the 'reasonableness' approach, the extraterritorial criminal jurisdiction bases identified above (with the possible exception of universality) are necessary but not sufficient conditions for a state to have jurisdiction in a particular case. Where it would be unreasonable for a national court to assert jurisdiction, no such jurisdiction exists.[123]

The Restatement claims that the reasonableness test not only reflects US law, but has also emerged as a principle of international law,[124] though this claim is subject to debate.[125] The Canadian Supreme Court has established a largely similar 'real and substantial connection test' for

121 *Ibid* s 403(2). These principles, including the requirement of reasonableness, 'apply to criminal as well as to civil regulation'. See *ibid* s 403, cmt f. These principles may not apply to the universal principle.

122 *Ibid* s 403(3).

123 See eg, *United States v Vasquez-Velasco*, 15 F 3d 833, 840 (9th Cir 1994) ('an exercise of jurisdiction on one of these bases still violates international principles if it is "unreasonable"'); *United States v Frank*, 2007 WL 1406849, *5 (SD Fla 2007) ('International law, moreover, generally allows a country to exert extraterritorial jurisdiction over its own citizens, as long as the exercise of such jurisdiction is not unreasonable.').

124 *Ibid* s 403, cmt a. The Restatement reflects the opinion of the American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law. A similar 'balancing test' approach is set forth in the Princeton Principles, *supra* n 47 at princ 8 (resolution of competing national jurisdictions). Some scholars contend that some sort of reasonable connection in one formulation or another (eg, nexus, effective link, *sinnvolle anknüpfungspunk*) is in fact required for the exercise of extraterritorial criminal jurisdiction. According to this view, in their proper application, each of the main recognised bases of criminal jurisdiction (with the exception of universal jurisdiction) contains such a linkage.

125 See eg, Cynthia Day Wallace, *The Multinational Enterprise and Legal Control* (2002) 731; Meesen, 'Conflicts of Jurisdiction under the New Restatement' (Summer 1987) 50 *L Contemp Probs* 47–69.

determining whether criminal jurisdiction exists.[126] A similar test appears to be applied under the EAW system.[127] However, in Spain, there is no 'balancing or reasonableness' test, because the only condition for the exercise of jurisdiction is that the state of the *locus commissi delicti* is not already investigating and prosecuting the case effectively.[128]

As with all balancing tests, the reasonableness test has the advantage of flexibility, but risks indeterminacy, inconsistency and an appearance of subjectivity.[129] This approach has not been supported by some human rights organisations and victims' lawyers on the basis that it imposes an undue burden on prosecutors, investigating judges and representatives of victims to demonstrate that the test is met and that inadequate guidance is provided about how competing considerations should be weighed.[130]

Chapter 4: Bribery and corruption, *infra* concludes that a reasonableness or weighing of factors test should be adopted to govern the exercise of concurrent jurisdiction under the OECD Antibribery Convention:

> '[P]rosecutorial authorities should not have unlimited discretion to initiate multiple proceedings against the same person seeking to sanction the same conduct. While exclusivity of jurisdiction may not be

126 *R v Hape* [2007] 2 SCR.292, 2007 SCC 26, para 62 (Canada), available at scc.lexum.umontreal.ca/en/2007/2007scc26/2007scc26.html (quoting earlier Canadian Supreme Court jurisprudence, 'Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question…Where two or more states have a legal claim to jurisdiction, comity dictates that a state ought to assume jurisdiction only if it has a real and substantial link to the event…[W]hat constitutes a "real and substantial link" justifying jurisdiction may be "coterminous with the requirements of international comity".'); *R v Ouellette* [1998] 126 CCC (3d) 219 at para 26 (Canada) ('the notion of a "real and substantial link" constitutes a test of varying content which is assessed in relation to the circumstances and, in particular, the importance of the elements of the offence linked to Canada, the relevant facts which arose in Canada and the harmful consequences which were caused, or which could have been caused, in Canada.'); *R v Libman* [1985] 2 SCR 178 (Canada).

127 European Arrest Warrant Council Decision, *supra* n 102 at Article 16 (decision in the event of multiple requests: 'if two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order').

128 STC 237/2005, 26 September 2005, www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html (Spain).

129 Donald Francis Donovan & Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *Am J Int'l L* 142, 159 & n 113.

130 See eg, Amnesty International Report, *supra* n 3 at 8.

desirable, especially at this time when enforcement in many countries is still limited, greater coordination and an effort to concentrate prosecutions in the most efficient jurisdiction should be encouraged. In identifying the most efficient jurisdiction, authorities should take into account the strength of the target's connection to the prosecuting jurisdiction, the location of witnesses and evidence, the cost of multiple proceedings to the company, the demonstrated harm to the prosecuting jurisdiction, and other relevant factors.'[131]

SUBSIDIARITY APPROACH

Another approach to resolving competing jurisdictional claims is to adopt a 'subsidiarity approach',[132] pursuant to which states with traditional connections to a crime (such as, for example, territoriality and possibly nationality under the active personality and passive personality principles) have *primary* jurisdiction, while states with jurisdiction on other bases (such as the protective or universal principles) may only act where the states with primary jurisdiction are unwilling or unable to prosecute. Under this approach, the existence or exercise of certain forms of jurisdiction are subsidiary to others.[133]

For example, if the crime occurred on the territory of State A, and if State A is willing and able to prosecute the suspected perpetrators, then no other state should exercise extraterritorial criminal jurisdiction. Similarly, if the crime occurred on the territory of State A by a national of State B against a national of State C, State D could exercise universal jurisdiction only where State A (exercising territorial jurisdiction), State B (exercising active personality jurisdiction) and State C (exercising passive personality jurisdiction) were unwilling or unable to prosecute the crime.

A similar notion of subsidiary jurisdiction arises in multiple areas in international law. For example, the Rome Statute for the International Criminal Court (ICC) establishes the principle of complementarity, which gives national courts the first opportunity to investigate and prosecute

131 *Infra* Chapter 4: Bribery and Corruption.

132 This term is different from the term used in context of the European Union.

133 See eg, Human Rights Watch Report, *supra* n 3 at 32-33 (universal jurisdiction is a reserve tool, to be applied where the justice system of the territorial state is unable or unwilling to do so, and courts in the territorial state have priority in exercising jurisdiction over the crimes); Georges Abi-Saab, 'The Proper Role of Universal Jurisdiction' (2003) 1 *J Int'l Crim Just* 596, 599 (universal jurisdiction is a 'jurisdiction of last resort, a fail-safe solution called for by urgency and necessity'); Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *J Int'l Crim Just* 589, 593–94 (territoriality and nationality are primary jurisdictional claims and universal jurisdiction is secondary).

alleged offenders, with ICC prosecution only available where those states are 'unwilling or unable genuinely to proceed'.[134]

Legislatures and national courts in at least three states have recently built notions of subsidiarity into their legislation or case law. For example, Spanish courts recognise universal jurisdiction but have declared it subsidiary to the jurisdiction of the territorial state.[135] However, there are exceptions to this principle. As summarised by Human Rights Watch:

> '[I]n a 2000 decision, the Spanish National Court held that Spanish courts could not exercise jurisdiction over crimes against humanity allegedly committed in Guatemala because there was a chance that Guatemalan courts would investigate the complaint in the future. Yet the crimes alleged in the complaint were committed in the early 1980s, and no judicial process had been initiated in Guatemala since that time. In 2005, Spain's Constitutional Court reversed this ruling, holding that Spanish courts could exercise universal jurisdiction if the complainant could submit reasonable evidence of legal inactivity by authorities in the territorial state, attributable to a lack of ability or will to effectively investigate and prosecute the crimes alleged.'[136]

In Germany, prosecutors must generally prosecute all offences capable of prosecution, but may decline to investigate a case where a prosecution has begun in a country that has jurisdiction based on territoriality or nationality of the victim or suspect.[137] In the decision in the complaint brought against US Defence Secretary Donald Rumsfeld, the German Federal Prosecutor determined that the subsidiarity principle precluded German courts from exercising jurisdiction over the allegations against Rumsfeld, because certain related allegations were already under investigation in the United States.[138] The German Prosecutor stated:

> 'In what order and with what means the state with [primary] jurisdiction carries out an investigation of individuals in the framework of a whole complex must be left up to this state according to the

134 Rome Statute of the International Criminal Court Article 75(2), entered into force 1 July 2002, 2187 UNTS 90 [hereinafter ICC Statute]. See also *ibid* at Article 17(1)(a), (b) (ICC cannot exercise jurisdiction where a state has investigated but, in good faith, decided not to prosecute) & pmbl (ICC jurisdiction complementary to national criminal jurisdictions).

135 See eg, STC 237/2005, 26 September 2005 at 4, www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html (Spain).

136 Human Rights Watch Report, *supra* n 3 at 32.

137 See Interview with German officials (12 December 2005), cited in Human Rights Watch Report, *supra* n 3 at 65; Commentary to the CCAIL, Bundestag Drucksache 14/8542, at 37–38, 13 March 2002; see also Ambos, *supra* n 88 (discussing the German provisions and the role of the prosecutor thereunder).

138 Human Rights Watch Report, *supra* n 3 at 32–33.

principle of subsidiarity. An alternative only obtains if the investigation is being carried out only for the sake of appearances of without a serious intent to prosecute'.[139]

In Belgium, a prosecutor must request the magistrate to investigate a complaint unless the interests of justice or international obligations require the matter be brought before an international tribunal or tribunal of another state, provided that the alternative tribunal is competent, independent, impartial and fair.[140]

Some concerns have been raised regarding the burden of proof under the subsidiarity approach. In particular, it may be difficult for victims, the prosecutor or the investigating judge to demonstrate that a foreign jurisdiction is unable or unwilling genuinely to investigate and prosecute crimes under international law in a particular case, when the territorial state or suspect's state possesses all the relevant information.[141] In addition, the forum court may be reluctant to determine that a foreign court is unable or unwilling genuinely to investigate or prosecute, even if the foreign state does not intervene.[142]

State practice and illustrations[143]

States refuse requests for extradition on many grounds, perhaps most often because those requests fail to meet the requisite evidentiary requirements specified in the relevant treaty. Based on the state practice survey conducted for this chapter, other common grounds for refusing an extradition request (and thus for exercising extraterritorial jurisdiction)

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139 Unofficial translation provided in Human Rights Watch Report, *supra* n 3 at 33; the original decision is available through www.ccr-ny.org (last visited 11 April 2008).

140 Loi Relative aux Violations Graves du Droit Humanitaire, Article 16 (5 August 2003) (Belgium) (amending the Code of Criminal Procedure at Title I, Article 10).

141 Human Rights Watch Report, *supra* n 3 at 33 ('This [subsidiarity] approach leaves a very wide margin of discretion to authorities in the territorial state, and may mean that the *specific* crime alleged against a *specific suspect* by a complainant or victim could remain uninvestigated in the territorial state, but no prosecution could be brought under… universal jurisdiction laws. A better approach would be to assess whether the specific crime and specific suspect about which the victim complaints has been effectively investigated and prosecuted in the state where the alleged crime took place.').

142 Another approach to resolving competing jurisdictional claims, advocated by Amnesty International, is to give presumptive priority to a state with custody seeking to exercise jurisdiction based on universality, based on the idea that the presence of the suspect outside the territory of other states with traditional connections creates a presumption that those states are unwilling or unable to prosecute, particularly when they have made no extradition requests. See Amnesty International Report, *supra* n 3 at 9.

143 See also *infra* Chapter 4: Bribery and Corruption (discussing the extradition proceedings regarding the former president of Peru, Alberto Fujimori).

include:

- the extradition request is for a national of the requested state (particularly for civil law systems);[144]
- criminal proceedings in respect of the offence have already been concluded in the requested state or another state (the double jeopardy rule – discussed further below in '*Ne bis in idem*, the rule against double jeopardy');[145]
- a limitation period for the offence has expired;[146]
- the requesting state applies capital punishment as a penalty for the offence and does not guarantee non-imposition of that penalty in the particular case;[147]
- there is a risk that the defendant may be subject to inhuman treatment in the requesting state;[148]
- the defendant is under the age of criminal responsibility in the requested state;[149]
- the extradition is unreasonable due to the personal circumstances (eg, medical condition) of the defendant;[150]
- the defendant has been granted asylum in the requested state;[151]
- the offence is of a political[152] or military[153] nature; or there is a risk that extradition is sought to persecute the defendant for their political beliefs, nationality, race or similar discrimination.[154]

An example of an extradition request based on extraterritorial criminal jurisdiction is the well-known *Pinochet* case, where Spain requested the extradition of former Chilean leader Augusto Pinochet from the United Kingdom, for his participation in certain offences committed in Chile in

144 See eg, Argentina, Brazil, China, Finland, France, Germany, Republic of Korea, Norway, Poland, Russia, Spain and Venezuela. However, this rule is not absolute and there are exceptions, such as where the state has incorporated the EC Framework Decision 2002, the Nordic states' Agreement on Extradition, or where the state is a party to an Agreement on Surrender to the International Criminal Court.

145 See eg, Argentina, Brazil, China, Finland, France, Republic of Korea, Poland, Russia, Spain and the United Kingdom.

146 See eg, Poland and the United Kingdom.

147 See eg, Poland. See also Princeton Principles, *supra* n 47, princ 10.

148 See eg, *Soering v United Kingdom* [1989] 161 ECtHR (s A).

149 See eg, France, Spain and the United Kingdom.

150 See eg, China, Finland and the United Kingdom.

151 See eg, China and Spain.

152 See eg, Argentina, Australia, Brazil, China, Finland, France, Republic of Korea, Malaysia, Poland, Spain and Venezuela.

153 See eg, Argentina, Australia, China, Finland, France and Spain.

154 See eg, Argentina, China, Finland, France, Malaysia, Russia, Spain and United Kingdom.

the 1970s.[155] In 1996, Spanish prosecutors filed criminal charges against Pinochet and other Chilean military leaders on behalf of seven victims of Spanish descent or dual Spanish-Chilean nationals who had been killed or disappeared in Chile.[156] The case thus initially relied on passive personality jurisdiction, but claims were later filed relating to victims possessing Chilean nationality only, and these claims were based on the universality principle.[157] Spain's Organic Law of the Judicial Branch, enacted in 1985, authorises Spanish courts to exercise criminal jurisdiction over offences 'committed by Spaniards or foreigners outside of the national territory and capable of being proven under Spanish criminal law, such as some of the following crimes: (a) Genocide [,] (b) Terrorism… (i) and any other [crime] which, under international treaties or conventions, should be pursued in Spain'.[158] In November 1998, judges of the National Court Criminal Division in Plenary Session held that Spain could try crimes of terrorism and genocide pursuant to the principle of universal jurisdiction.[159]

On 16 October 1998, the presiding Spanish judge, Judge Garzón, issued an international warrant of arrest against Pinochet.[160] At approximately 9 pm that evening, a London magistrate issued a provisional warrant for Pinochet's arrest, which was executed later that same evening at a London clinic where Pinochet was recovering from surgery. On 22 October 1998, a second provisional warrant was issued, upon application by the Spanish

155 See generally Richard A Falk, 'Assessing the Pinochet Litigation: Whither Universal Jurisdiction?' in Macedo, *supra* n 69 at 97–120 [hereinafter Falk]; Eamon C Merrigan, 'The General and His Shield: The Extradition Process Against General Pinochet Ugarte' (2001) 15 *Temp Int'l & Comp LJ* 101; Orentlicher, *supra* n 71 at 1072; Robert C Power, 'Pinochet and the Uncertain Globalization of Criminal Law' (2007) 39 *Geo Wash Int'l L Rev* 89, 112 [hereinafter Power]; Colin Warbrick, 'Extradition Law Aspects of Pinochet 3' (1999) 48 *Int'l & Comp LQ* 958, 960.

156 Denuncia Inicial de la Union Progresista de Fiscales de España, Caso Pinochet (1 July 1996), available at www.elclarin.cl/fpa/pdf/p_010796.pdf.

157 See Orentlicher, *supra* n 71 at 1074–75 (noting that the Spanish court 'kept one foot planted firmly on the comparatively secure ground of passive personality jurisdiction while it advanced onto the more contested terrain of universal jurisdiction').

158 LOPJ (1985, 6), Article 23.4 (Spain), available at http://constitucion.rediris.es/legis/1985/lo06-1985-1.html#l1t1.

159 Auto de la Sala de lo Penal de la Audiencia Nacional, RA 173/98, s 1, Sum 1/98 (5 November 1998) (Spain), available at www.derechos.org/nizkor/chile/juicio/audi.html. Auto de la Sala de lo Penal de la Audiencia Nacional, RA 84/98, s 3, Sum 19/97 (4 November 1998) (Spain), available at www.derechos.org/nizkor/arg/espana/audi.html (last visited June 16, 2008); discussed in Orentlicher, *supra* n 71 at 1074.

160 Auto de Sr D Baltasar Garzón Real, Magistrado-Juez del Juzgado Central de Instrucción Número Cinco de la Audiencia Nacional, Sum 19/97 (16 October 1998) (Spain), available at www.derechos.org/nizkor/chile/juicio/captura.html.

Government.[161]

On 28 October 1998, both warrants were quashed by the Divisional Court of the Queen's Bench Division, partly on a finding that Pinochet had continuing immunity from criminal process in respect of his official acts.[162] While the case was on appeal to the House of Lords, the United Kingdom authorised extradition of General Pinochet, but not for the crime of genocide because the crime charged against Pinochet did not satisfy the definition of genocide under British law.[163] The crime of terrorism was not mentioned in the authorisation of extradition, presumably because there is no parallel crime under British law.[164]

Ultimately, the House of Lords held that at least one of the charges submitted by Spain (which now included conspiracy to torture, conspiracy to take hostages, conspiracy to torture in furtherance of which murder was committed in various countries, torture, conspiracy to murder in Spain, attempted murder in Italy, and torture on various occasions) constituted an extradition crime under British law, at least with respect to alleged extraterritorial torture occurring after the United Kingdom ratified the Convention Against Torture. The House of Lords thus found that Pinochet could be extradited to Spain to answer charges of extraterritorial torture, and that he was not entitled to immunity in respect of such charges.[165] One commentator has described this ruling as 'legal history in a case that had scant connection to England save the fortuitous visit of a foreign official… Through its consideration of extradition issues, the law lords indirectly affirmed universal jurisdiction, albeit under narrowly circumscribed conditions'.[166]

In the so-called 'NatWest Three case', three individuals were extradited to the United States from the United Kingdom for offences in connection with the Enron scandal.[167] Partly in response to this extradition, the UK

161 Orentlicher, *supra* n 71 at 1075.

162 *In the Matter of an Application for a Writ of Habeas Corpus ad Subjicendum (Re: Augusto Pinochet Duarte)* (1998) High Court of Justice, QBD DC, reprinted in 38 ILM 68, 70 (1999).

163 Mr Straw – Senator Pinochet, HC Deb 9 December 1998 c 213–7, available at www.publications.parliament.uk/pa/cm199899/cmhansrd/vo981209/text/81209w08.htm#81209w08.html_sbhd2; discussed in Orentlicher, *supra* n 71 at 1077.

164 See Orentlicher, *supra* n 71 at 1077.

165 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 (HL 1999) (UK); discussed in Orentlicher, *supra* n 71.

166 Orentlicher, *supra* n 71 at 1077. In an interesting postscript, the UK Home Secretary later terminated the extradition proceedings due to Pinochet's health and potential inability to stand trial. Chilean courts later ruled that Pinochet was suffering from such a severe form of dementia that he was unable to stand trial. See Power, *supra* n 152 at 112; Falk, *supra* n 152 at 99.

167 See *R (on the application of Bermingham & Ors) v Director of the Serious Fraud Office* [2006] EWHC (Admin) 200 (UK).

Government considered introducing a 'forum protection provision' into UK extradition law, which would have enabled an extradition defendant to argue that their extradition was barred by reason of forum, if a significant part of the alleged conduct took place in the United Kingdom and it was in the interests of justice for the case to be tried in the United Kingdom and not the requesting state.[168] This proposed amendment was not adopted in the United Kingdom, but other countries have a form of forum protection provision in their extradition laws, and many states have a constitutional prohibition on extraditing their own citizens.[169]

Another recent illustration of extradition practice involving the United States and the United Kingdom is *Norris v United States of America*, which involved a potential extradition from the United Kingdom to the United States for price fixing and obstruction of justice.[170] Under US law, price fixing has been a criminal offence since 1890, but a statutory offence of price fixing was only introduced in the United Kingdom in 2002; the relevant events occurred before 2002. US prosecutors sought to rely on the English common law offence of conspiracy to defraud in order to meet the requirements of dual criminality. The High Court held that the requirement of dual criminality had been met, notwithstanding that price-fixing conduct had never previously been prosecuted, or understood to be an offence, in England and Wales. The House of Lords, the highest UK court of appeal, ruled that mere price fixing was not a criminal offence in the United Kingdom and quashed the US Department of Justice's ('DOJ') attempt to re-characterise price-fixing as a conspiracy to defraud to make it an extraditable offence. The House of Lords, however, also ruled that the obstruction of justice charge brought against the appellant remained an extraditable offence in principle and referred this element of the case to the district court. The House of Lords' decision in *Norris v United States* is a major judgment on both US/UK extraditions and on the UK competition law regime. Had the DOJ attempt been successful, it would have paved the way for additional future extraditions, and exposed UK business to potential retrospective price-fixing prosecutions for conduct in the period when it had not been a crime.

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168 Police and Justice Act 2006 c 48, Schedule 13 (UK).

169 Some EU Member States (Portugal, Slovenia) with a constitutional prohibition on extraditing their own nationals have modified their constitutions in relation to the European Arrest Warrant Scheme; others (Poland, Germany, Cyprus) have restricted the transposition of the framework decision. See Jane O'Mahony, 'Bringing Process Back In: Investigating the Formulation, Negotiation and Implementation of the European Arrest Warrant from a Policy Analysis Perspective', EUSA 10th Biennial Conference 27–29 (17–19 May 2007).

170 *Norris v United States of America* [2007] EWHC (Admin) 71; [2008] All ER (D) 158 (UK).

In a very recent criminal cartel case involving marine equipment,[171] US and UK prosecutors agreed to a deal in which three British citizens, the so-called 'Marine Hose Three', pleaded guilty to cartel/price-fixing conduct in the United States but were allowed to return to the United Kingdom where they were charged with similar cartel conduct occurring within the jurisdiction of the English courts. The US plea agreement provided that if the three individuals serve a sentence of the same length as that imposed by the US courts, they will not be required to return to the United States. This novel response to the problem of prosecutions of criminal conduct occurring in more than one state avoided lengthy extradition proceedings, and enabled both states to prosecute the conduct that occurred in their jurisdiction. It also allowed the defendants to agree to a plea in the knowledge that there was a very high probability that they would not serve any time in a foreign prison.

States should be encouraged to cooperate with each other in resolving competing jurisdictional claims. For example, in January 2007, the UK and US Attorneys-General jointly issued a report entitled 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and United States'.[172] This provides for a system of early contact between UK and US prosecutors in cases involving concurrent jurisdiction ie, criminal conduct that has occurred in both the United Kingdom and United States, which could be tried in either jurisdiction, with greater information sharing and early consultation between UK and US prosecutors. The report only relates to the 'most serious, sensitive or complex criminal cases'. The report clearly states that it does not create any rights for a third party (which includes a defendant) to object to or otherwise seek review of a decision by UK or US authorities regarding the investigation or prosecution of a case or related issues. The stated test for a decision to initiate contact with the other country is straightforward: 'does it appear that there is a real possibility that a prosecutor in the other country may have an interest in prosecuting the case? Such a case would usually have significant links with the other country'.[173]

Similarly, the 2005 EC green paper, 'On Conflicts of Jurisdiction

171 See generally, OFT Press Release, 'Three Imprisoned in First OFT Criminal Prosecution for Bid Rigging' (11 June 2008), available at www.oft.gov.uk/news/press/2008/72-08. See also *supra* Chapter 1: Antitrust.

172 See Attorney General's Office, 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the UK and US' (18 January 2007), available at www.attorney-general.gov.uk/attachments/AG_Guidance_for_Handling_Criminal_Cases_and_the_USA.pdf. This document is discussed in Kate Brookson-Morris, 'Conflicts of Criminal Jurisdiction' (2007) 56 ICLQ 659.

173 Guidance, *supra* n 169, para 2.

and the Principle of *ne bis in idem* in Criminal Proceedings', proposes a tripartite procedure to choose the most appropriate jurisdiction amongst interested EU Member States where concurrent jurisdiction issues arise.[174]

Other means of increased cooperation are discussed further below (possible solutions to problems in extraterritorial criminal investigations and prosecutions).

Issues in the exercise of extraterritorial criminal jurisdiction

This section addresses issues that arise in the exercise of extraterritorial criminal jurisdiction, including the initiation of investigations by police and prosecutions of extraterritorial jurisdiction cases both by prosecuting authorities and private parties (such as victims), difficulties that may arise in investigations and prosecutions and possible solutions and due process issues.

For the purposes of this chapter, 'prosecuting authorities' include professional prosecutors such as the Director of Public Prosecutions and political officials such as the Attorney-General and/or the Minister of Justice; 'authority to investigate' means the authority to collect evidence and make inquiries as to the possibility of laying criminal charges against an individual; and 'authority to prosecute' means the authority to lay charges and bring the individual to trial.

Initiation of investigations and prosecutions

GENERALLY

In a number of common law states and in some civil law states, the police and/or the prosecuting authorities may initiate an investigation without the approval of a prosecutor or judge. In extraterritorial criminal jurisdiction cases, the relevant acts occurred by definition in a foreign country, sometimes many years earlier. As these cases may be unlikely to come to the attention of prosecuting authorities in a traditional way, such as by a complaint to the local police station, a number of countries have taken measures to enhance procedures for the notification and initiation of cases involving extraterritorial criminal jurisdiction. For example, the prosecuting authorities in Canada, Denmark, the Netherlands, Norway and the United Kingdom communicate closely with their immigration

174 Commission Green Paper on Criminal Proceedings: Conflicts of Jurisdiction and the *ne bis in idem* Principle Paper, COM (2005) 696 final, available at http://europa.eu/scadplus/leg/en/lvb/l16011.htm (last visited 30 June 2008).

authorities, where staff are trained to identify and report individuals who may have been involved in the commission of extraterritorial crimes, both for immigration and criminal investigation purposes.[175]

Once a case has been notified to the prosecuting authorities, in most common law states these authorities have the discretion to determine whether the investigation should proceed and, in due course, whether prosecution should be initiated. In most civil law states, the investigating judge determines whether the action should proceed. In some states, legislation or prosecutorial guidelines set out the parameters for determining whether the investigation and/or prosecution should proceed, such as the reasonable likelihood that the crime occurred, whether the investigation serves the public interest and whether there is reasonable prospect of conviction.[176] However, in some states, no criteria are provided, making it difficult to assess the reasons for the decision or refusal to investigate or prosecute.[177]

It should be noted that extraterritorial investigations generally require permission from other states, and such investigations without permission are generally prohibited. In other words, investigators from State A (the state asserting extraterritorial jurisdiction) cannot simply conduct an investigation in State B without the permission of the relevant authorities from State B.

THE INTERESTS OF VICTIMS

In most common law states, the interests of the victim are only one factor in the decision as to whether to initiate an investigation or prosecution.[178] Some common law states, such as South Africa, England and Wales and Uganda also allow for private prosecutions, initiated by the victim,

175 Human Rights Watch Report, *supra* n 3 at 5–6 (noting that in these countries, immigration authorities have created a specialised department to review asylum and visa applicants whose applications contain information suggesting involvement in international crimes, and maintain a list of suspects according to certain criteria, including previous employment, and cross-check the information with a list of suspects issued by international tribunals).

176 See eg, Crown Prosecution Service, 'The Code for Crown Prosecutors (2004)' (UK), available at www.cps.gov.uk/publications/docs/code2004english.pdf; Crown Prosecution Service, 'The Decision to Prosecute', available at www.cps.gov.uk/victims_witnesses/prosecution.html#01 (last visited 16 June 2008).

177 See Redress 1999 Report *supra* n 3 at 27. Trinidad and Tobago is a typical example in a common law country where no criteria are provided (see International Criminal Court Act 2006, s 13(1), available at www.ttparliament.org/bills/acts/2006/a2006-04.pdf).

178 See 'The Decision to Prosecute', *supra* n 173; National Prosecution Policy 1999, s 4(c) (South Africa).

although the prosecuting authorities are authorised to take over such cases.[179] Victims must cover the costs of the investigation, lawyers and witnesses, and therefore, private prosecutions are rarely initiated. The United Kingdom permits private individuals to request an arrest warrant directly from a magistrate where the police fail to investigate an allegation that a crime had been committed.[180]

Many civil law states enable victims to play a much more prominent role in the initiation of investigations by making a complaint directly to an investigative judge, through provision in national law for *constitution partie civile* or *acción popular*.[181] Victims in civil law countries then become parties to the case, and the case may be maintained even in the face of objections by the prosecution authorities. Initiation of cases by victims (or by NGOs) represents the main way cases based on universal and extraterritorial criminal jurisdiction have arisen in Belgium, France and Spain.

Where the decision to investigate or prosecute is discretionary, victims may wish to seek judicial or administrative review of this decision, although such review is not always available,[182] particularly if foreign policy or political issues are involved.

Difficulties in investigations and prosecutions and possible solutions

Several treaties require states to cooperate in the investigation of international crimes, such as the First Additional Protocol to the Geneva

179 See eg, Criminal Procedure Act 51 of 1977 ss 7–17 (South Africa); Prosecution of Offences Act 1981 c 23, s 6(1) (UK).

180 Human Rights Watch Report, *supra* n 3 at 9.

181 See Human Rights Watch Report, *supra* n 3 at 7–10, discussing the systems in France and Belgium; see also Article 125 of the Spanish Constitution. As noted above, in 2003, Belgium revised its universal jurisdiction laws, responding to concerns that private practitioners were misusing the procedure to make political claims, and curtailed the right of *parties civiles* to complain directly to an investigative judge. The proposed French law implementing the ICC Statute also limits the right of *parties civiles* to file complaints concerning international crimes. See *ibid*.

182 See eg, *R v DPP ex parte Manning and Melbourne* [2000] 3 WLR 263 (emphasising that 'the power of review is one to be exercised sparingly'). In South Africa, a decision *not* to prosecute can be judicially reviewed, but decisions to prosecute or continue a prosecution cannot be subject to judicial review. See Promotion of Administrative Justice Act 3 of 2000 ss 6, 1(ff), www.info.gov.za/gazette/acts/2000/a3-00.pdf. In Belgium and the Netherlands, victims can request judicial review of the decision not to investigate or prosecute but cannot take part in the hearing. See Judgment No 62 (23 March 2005) of the Cour d'Arbitrage (Belgium); Wetboek van Strafvordering [Code of Criminal Procedure] Articles 12 &13 (Netherlands).

Conventions and the Convention Against Torture,[183] but such cooperation is not always forthcoming. Indeed, once the case has been initiated, and assuming that the prosecution authorities decide to proceed with the case, certain difficulties may occur in any investigation and/or prosecution based on extraterritorial criminal jurisdiction (some of which implicate due process concerns, discussed further below).[184] These difficulties include:

(a) a lack of cooperation in, or diplomatic opposition to, the attempted exercise of jurisdiction, for example for regulatory crimes and political crimes;
(b) lack of statutory authority for police or prosecutors to share investigative information with one another;
(c) lack or inadequacy of extraditions and other procedures to bring the defendant before the court;
(d) cumbersome procedures governing international judicial assistance and mutual legal assistance, meaning both judicial assistance and direct police or prosecutorial contacts. The exercise of extraterritorial criminal jurisdiction may be hampered by the lack of any criminal counterpart to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Mutual Legal Assistance Treaties may fill this gap, but these exist on a case-by-case basis, and there are often lengthy delays in responses to requests for information and assistance under these treaties.[185] There is a limited number of multilateral and bilateral treaties regarding evidence for criminal

183 Convention Against Torture Article 9(1) ('States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Article 88(1), entered into force 7 December 1978, 1125 UNTS 3 ('The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.').

184 See also Cryer, *supra* n 26 at 51–52 ('universal jurisdiction's practical problems'), 69–70 ('practical obstacles to national prosecutions'), ch 5 (state cooperation with respect to national proceedings); Amnesty International Report, *supra* n 3 at ch 14 (overcoming obstacles to implementing universal jurisdiction); Human Rights Watch Report, *supra* n 3 at 10 (noting that prosecutions under universal jurisdiction 'may seem daunting and resource-intensive for a variety of reasons: they involve not only criminal offences with which domestic prosecutors have little experience, but also the prospects of extraterritorial investigations, language barriers, the need to understand the historical and political context in which the alleged crimes occurred, and the gathering of evidence to prove elements of crimes that may be of a type never adjudicated in a country's domestic courts.').

185 See Human Rights Watch Report, *supra* n 3 at 15.

matters, and many states require a treaty to permit cooperation. Even where cooperation treaties do exist, they usually provide many grounds for refusing cooperation in any given case;

(e) the overall difficulty of obtaining evidence from abroad, including the particular problem of producing evidence located abroad in a form usable by the prosecuting country and the risk that evidence outside the control of the courts in the prosecuting country will be destroyed;

(f) the requirements in some jurisdictions to maintain secrecy during the preliminary investigative stages;

(g) the risk that the accused might flee a country sympathetic to the interests of a prosecuting country to another that is not;

(h) potential conflict between criminalisation and other methods of dealing with unlawful actions particularly for cases involving the exercise of universal jurisdiction.[186]

Some of these difficulties are illustrated by the recent Canadian case of *R v Hape*, where a search was performed pursuant to a criminal investigation by Canadian authorities in a foreign country. The Canadian Supreme Court held that the Canadian constitutional prohibition on unreasonable searches and seizures did not apply extraterritorially to investigations conducted abroad by Canadian officials. The Court reasoned that Canadian law, including the Canadian Charter on Rights and Freedoms could not be enforced in another state without that state's consent to Canadian investigators conducting the investigation and to Canadian enforcement jurisdiction within its territory.[187]

The ICJ recently analysed a mutual legal assistance treaty between France and the Republic of Djibouti (Djibouti) in the context of a criminal investigation relating to the death of a French national, Judge Bernard Borrel, in Djibouti in 1995.[188] Judge Borrel had been

186 For example, South Africa, in the post-apartheid period, has attempted to use the Truth and Reconciliation process as an alternative to, or a complement of, criminal prosecution, but this has been criticised as an inappropriate model for transitional practice. See eg, Centre for the Study of Violence & Reconciliation & the Khulumani Support Group, 'Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report', available at www.csvr.org.za/wits/papers/pap-khul.htm (last visited 16 June 2008); Clint van der Walt et al, 'The South African Truth and Reconciliation Commission: "Race", Historical Compromise and Transitional Democracy' (March 2003) *Int'l J of Intercultural Relat* 251–267.

187 *R v Hape* [2007] 2 SCR 292, 2007 SCC 26 (Canada), available at http://scc.lexum.umontreal.ca/en/2007/2007scc26/2007scc26.html.

188 Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v France*), (not yet published), 4 June 2008, available at www.icj-cij.org/docket/files/136/14550.pdf?PHPSESSID=72daaf7aa4806194f416ecfad5efdaa0.

seconded as Technical Adviser to the Djibouti Ministry of Justice.[189] Djibouti originally ruled that Judge Borrel's death was a suicide, but France later conducted its own investigation and concluded that Judge Borrel had been murdered.[190] By international letter rogatory, Djibouti requested the records of France's investigation into the murder; France refused to comply, on the basis that the file contained secrets that could compromise state security.[191] Before the ICJ, Djibouti alleged that this refusal constituted a breach of France's obligations under certain treaties, including the Convention on Mutual Assistance on Criminal Matters between France and Djibouti, dated 27 September 1986 (1986 Convention). In *Djibouti v France (Case Concerning Certain Questions of Mutual Assistance in Criminal Matters)*, the ICJ found that France failed to comply with its obligation under the 1986 Convention in failing to give Djibouti the reasons for its refusal to execute Djibouti's letter rogatory, but rejected Djibouti's other claims (including claims related to alleged violations of the obligation to prevent attacks on the person).[192] The Court concluded that this finding of non-compliance constituted appropriate satisfaction, and did not award reparations.[193] This case illustrates the potentially sensitive nature of negotiations relating to mutual legal assistance in criminal investigations.

There are no easy or quick solutions to the difficulties in investigations and prosecutions identified in this section, most of which are not exclusive to extraterritorial criminal jurisdiction but are likely to arise with greater severity and frequency in such cases. States must be aware of these problems and, where possible, develop solutions; keep the channels of communication open; and consider entering into comprehensive extradition and mutual assistance regimes to overcome these issues. Most major multilateral criminal law treaties contain provisions obligating states parties to provide mutual legal assistance in respect to covered crimes. However, some have suggested that the way to make progress in this area may be to draft a new treaty for mutual legal assistance in cases involving extraterritorial criminal jurisdiction, to include all crimes not already

189 *Ibid* para 20.
190 *Ibid* paras 20–21.
191 *Ibid* para 26.
192 *Ibid* paras 154–57.
193 *Ibid* para 204.

covered by other treaties.[194]

An example of increasing cooperation between prosecuting authorities is the paper discussed above, jointly issued by the UK and US Attorneys-General in January 2007 called 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States'.[195] Although not binding, the report demonstrates an increasing awareness of the need for governmental cooperation in criminal cases involving competing jurisdiction claims and for cases involving extraterritorial criminal jurisdiction.

The European Union recently increased cooperation among Member States in the investigation and prosecution of international crimes in two major ways. First, in 2002, the EU Council created a 'Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes', intended to increase cooperation in the investigation and prosecution of international crimes.[196] This network has met five times since its creation in 2002.[197] Secondly, in 2003, the EU Council urged members to set up specialist units and to meet at regular intervals to exchange information about experiences, practices and methods.[198] Denmark, the Netherlands, Norway, Sweden and to a lesser extent the United Kingdom and Belgium, have recently adopted this approach (as has Canada, although it is obviously not bound by the EU Council), and created specialised units of prosecutors and police (sometimes along with translators, military analysts, historians and anthropologists), specialising in the investigation and prosecution

194 See eg, Amnesty International, 'Universal Jurisdiction Improving the Effectiveness of State Cooperation', AI Index: IOR 53/006/2007, 13 June 2007, available at www.amnesty.org/en/library/asset/IOR53/006/2007/en/dom-IOR530062007en.pdf (recommending that Interpol 'convene a special meeting of the Experts on Genocide, War Crimes and Crimes against Humanity or the Working Group, to identify, in consultation with civil society, the essential components of an international treaty on extradition and mutual legal assistance for crimes under international law and discuss this proposal at the fourth regular session').

195 See *supra* n 169. See also *R (on the application of Bermingham & Ors) v Director of the Serious Fraud Office* [2006] EWHC (Admin) 200 (UK); *supra* n 169 and accompanying text.

196 EU Council Decision, 13 June 2002, 2002/494/JHA.

197 Human Rights Watch Report, *supra* n 3 at 22. The Network's most recent meeting was in The Hague on 17–18 March 2008. 'UNRIC Activities' (March 2008) UN Regional Info Ctr Mag for W Eurp, available at http://march2008.unric.org/index.php?option=com_content&task=blogcategory&id=37&Itemid=60.

198 EU Council Decision Article 4, 8 May 2003, 2003/335/JHA (decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, urging EU Member States to consider the need to set up or designate specialist units with particular responsibility for investigating and prosecuting the crimes in question).

of transnational crimes.[199] According to a recent study by Human Rights Watch, prosecutions are more frequent and more likely to succeed when they are based on the work of such specialised units.[200]

The International Criminal Police Organisation (Interpol), established in 1923 with 184 member countries,[201] has also increased cooperation on the investigation and prosecution of international crimes, including crimes based on extraterritorial criminal jurisdiction. In 2004, Interpol organised expert meetings on international crimes, with delegates from over 90 countries meeting to improve coordination and information sharing, with a smaller working group also meeting to discuss these issues.[202] Interpol facilitated the extradition of Ricardo Cavallo first to Spain, and then to Mexico.[203] Interpol is also in the process of setting up a database with information on past and present investigations of international crimes in different countries to avoid duplicating investigation efforts and to further streamline the investigation process.[204] Similar communications efforts are under way within the European Police Office (Europol) and the EU Judicial Cooperation Unit (Eurojust), both created within the European Union.

States parties to the OECD Antibribery Convention are required to participate in a working group on bribery, which meets periodically and provides a forum for discussion and resolution of issues of concurrent jurisdiction.[205]

Protecting the due process rights of the accused

Any prosecution, whether based on territorial or extraterritorial criminal jurisdiction, must protect the due process rights of the accused, in order

199 Human Rights Watch Report, *supra* n 3 at 10–13.

200 *Ibid.*

201 Cryer, *supra* n 26 at 73.

202 Interpol, 'Resolution on the Support for the Investigation and Prosecution of Genocide, War Crimes and Crimes Against Humanity' (7 October 2004) AG-2004-Pres-17; Human Rights Watch Report, *supra* n 3 at 22.

203 Interpol investigated Cavallo's alleged role as a torturer under Argentina's 1976–1983 military junta. The agency arrested Cavallo in Mexico in 2000, facilitated his extradition to Spain in 2003, and then helped return him to Argentina to face charges. See Al Goodman, 'War Criminal' Sent Home By Spain', CNN.com, 14 March 2008, available at www.cnn.com/2008/WORLD/europe/03/14/spain.argentina/index.html; Virginie Ladisch, 'Argentine Military Officer Extradited to Spain on Genocide Charges', Crimes of War Project, available at www.crimesofwar.org/onnews/news-argentina.html (last visited 16 June 2008); Tim Weiner and Ginger Thompson, 'Wide Net in Argentine Torture Case', *NY Times*, 11 September 2000 at A6.

204 Human Rights Watch Report, *supra* n 3 at 22.

205 *Infra* Chapter 4: Bribery and Corruption.

to protect the individual's rights and to enhance the perceived legitimacy of the prosecution. The issue of due process rights for criminal accused has been discussed extensively elsewhere.[206] This chapter focuses on four issues more likely to arise in prosecutions based on extraterritorial criminal jurisdiction: trials and investigations *in absentia*; access to translation and interpretation, consular notification, and access to evidence and legal aid; *ne bis in idem* or the rule against double jeopardy; and the principle of legality, meaning no crime without law.

TRIALS AND INVESTIGATIONS *IN ABSENTIA*

For the purposes of this chapter, trials *in absentia* means prosecution in national courts of an individual, on the basis of extraterritorial criminal jurisdiction, when the individual is not present before the national court to defend himself or herself.[207]

The International Covenant on Civil and Political Rights (ICCPR) entitles an individual charged with any criminal offence to be tried in his presence, but it has not been interpreted as an absolute prohibition

206 See eg, Amnesty Int'l, 'Fair Trials Manual', AI Index: POL 30/02/98 (1998); Human Rights Watch Report, *supra* n 3 at 17–19; Princeton Principles, *supra* n 47, at princ 1(4) (noting the need for states exercising universal jurisdiction to observe 'international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary'); Cristian Defrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 *Va L Rev* 1381. See also *infra* Chapter 4: Bribery and Corruption (discussing substantial latitude in implementation of treaty standards at the national level, which 'produced limited harmonization not only with regard to the substantive conduct the implementing legislation in different countries prohibits, but also with regard to many other significant features, including jurisdictional requirements, subject persons (in particular, whether there is corporate criminal liability), penalties, statutes of limitations, exceptions and defenses, and others. This limited harmonization also complicates the application of rules against double jeopardy, thereby increasing the risk and potential unfairness of multiple prosecutions for the same conduct').

207 This term should not be confused with the phrase 'universal jurisdiction *in absentia*', which has at least three different meanings: (1) the possibility of initiating investigations and proceedings in the absence of a suspect (allowing for international arrest warrants to be issued to secure an accused's presence to stand trial); (2) the practice of using extraterritorial enforcement means such as abductions; and (3) trials *in absentia*. See Mohamed M El Zeidy, 'Universal Jurisdiction in Absentia: Is It a Legal Valid Option for Repressing Heinous Crimes?' (2003) 37 *Int'l L* 835, 837.

on trials *in absentia*.[208] In most jurisdictions (common law and civil law), trials *in absentia* are permitted when the accused is being disruptive of the proceedings.[209]

Most common law states prohibit trials *in absentia* because such trials are deemed to be a denial of the right to a fair trial and due process. Based on this view, trials *in absentia* are inconsistent with the right to examine the prosecution's case in full, may undermine the legitimacy of the proceedings and the reputation of the prosecuting state, and place an undue burden on victims and witnesses who may be asked to testify twice (once at the *in absentia* proceedings, and again in any cases initiated after an accused is arrested).[210] Thus, most countries require that the suspect be physically present in the territory of the state before the prosecution is initiated.[211]

However, many civil law systems permit trials *in absentia*, and such trials are not infrequently carried out in the context of extraterritorial criminal jurisdiction. For example, under French law, trials *in absentia* are possible

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208 Compare International Covenant on Civil and Political Rights Article 14(3)(d), 19 December 1966, 999 UNTS 171, with Human Rights Committee, 'Mbenge v Zaire, Views', Communication No 16/1977, para14(1), 25 March 1983 (noting that while proceedings *in absentia* would normally violate the ICCPR, 'proceedings *in absentia* are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his [or her] right to be present) permissible in the interest of the proper administration of justice').

209 See eg, Transitional Rules of Criminal Procedure for East Timor, UNTAET/REG/2000/30, at para 48.2 (25 September 2000); ICC Statute, *supra* n 131 at Article 63(2) (allowing *in absentia* trials for disruptive persons 'in exceptional circumstances' and with safeguards). But see, eg, Statute of the International Criminal Tribunal for Rwanda Article 20(4)(d), 8 November 1994, 33 ILM 1598 [hereinafter ICTR Statute] (requiring the presence of the accused); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia GA Res 827, Article 21(4)(d), UN Doc S/RES/827 (25 May 1993).

210 Amnesty Int'l, 'The International Criminal Court: Making the Right Choices – Part II: Organizing the Court and Guaranteeing a Fair Trial', s IVC2, IOR 40/11/97, July 1997; George Fletcher, 'Against Universal Jurisdiction' (2003) 1 *J Int'l Crim Just* 580, 581–82; Ryan Rabinovitch, 'Universal Jurisdiction in absentia' (2004-2005) 28 *Fordham Int'l L J* 500. But see International Crimes and International Court Act 2000, s 8(1)(c)(iii) (NZ), available at http://interim.legislation.govt.nz/act/public/2000/0026/latest/whole.html#DLM64144 (proceedings may be brought regardless of whether the accused was in New Zealand at the time of the offence or at the time of charging).

211 Human Rights Watch Report, *supra* n 3 at 28 (noting that presence in the prosecuting state is a requirement triggering the discretion of national authorities in Denmark, France and the Netherlands; in the United Kingdom, an arrest warrant cannot be issued unless a suspect is present or likely to be present in the territory; Norway requires that a suspect be present before he or she can be charged); see also Princeton Principles, *supra* n 47 princ 1(2) (universal jurisdiction may be exercised by a competent and ordinary judicial body of any state, 'provided the person is present before such judicial body').

based on territorial and passive personality – not universal – jurisdiction, provided that the accused was present on French territory before the prosecution was commenced.[212] Spain does not require presence of the defendant to open an investigation or charge a suspect.[213]

Under the EAW system, where the warrant has been issued for the purposes of executing a sentence or a detention order imposed after a trial *in absentia,* without notice to the defendant, 'surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment'.[214]

State practice is split in relation to the investigation (as opposed to actual prosecution) of a suspect who is not present in the jurisdiction (sometimes called 'investigations *in absentia*'), based on extraterritorial criminal jurisdiction.[215]

In absentia issues in the context of universal jurisdiction were addressed by some of the judges in separate and dissenting opinions in the ICJ *Arrest Warrant Case* though the Court split on the permissibility of such

212 C Pén Articles 113–117 (France).

213 Human Rights Watch Report, *supra* n 3 at 28.

214 European Arrest Warrant Council Decision, *supra* n 102 at Article 5(1).

215 Human Rights Watch Report, *supra* n 3 at 28; see also C Pr Pén Article 689 (France) (requiring an accused's presence on French territory before a criminal investigation can be launched); International Crimes Act, 19 June 2003 (Netherlands), available at www.nottingham.ac.uk/shared/shared_hrlcicju/Netherlands/International_Crimes_Act__English_.doc (requiring the suspect's presence in the Netherlands for authorities to start an investigation based on extraterritorial criminal jurisdiction); Article 23.4 of Organic Law 6/1985 (BOE 1985, 157) (Spain); STC 237/2005, 26 September 2005, www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html (Spain) (physical presence of the suspect is not required to initiate an investigation based on universal jurisdiction). The Danish Special International Crimes Office requires a suspect to be present before an investigation is opened, and if a suspect flees while the investigation is ongoing, the investigation will be closed. German law does not require the presence of the suspect, but the prosecutor has the discretion to refuse to open an investigation if the suspect's presence cannot be anticipated. Human Rights Watch Report, *supra* n 3 at 28, n 113.

actions.[216]

RIGHTS TO TRANSLATION AND INTERPRETATION, CONSULAR NOTIFICATION AND ACCESS TO EVIDENCE AND LEGAL AID

In the international context, where many prosecutions involve multiple languages, the defendant has the right to effective translation and interpretation during every stage of the proceedings, from questioning as a suspect to the trial (and appeal, if any), to ensure that the defendant has a fair opportunity to prepare and present a defence. These rights are recognised in several important multilateral conventions and other international instruments, such as statutes of international criminal courts[217] and in many national laws.[218] A recent study by Human Rights Watch found that the 'credibility of witnesses' is a 'paramount concern for some investigators [in universal jurisdiction cases], and several practitioners with experience in extraterritorial investigations noted that translation problems hampered their ability to assess the reliability of a potential witness's statement'.[219]

Where a defendant is a foreign national, consular notification may be required. Article 36(1) of the Vienna Convention on Consular Relations gives foreign nationals who have been detained or arrested the right to contact and communicate with their state's consular officials, while consular officials have the right to visit the detainee and arrange for legal

216 Compare ICJ *Arrest Warrant* case, *supra* n 71, para 16, at 44 (Guillaume, Pres, separate opinion) ('Universal jurisdiction *in absentia* is unknown to international law'), *ibid* at 58–59 (Ranjeva, J, declaration) (the exercise of universal jurisdiction under customary international law requires the presence of the accused), *ibid* para 9, at 58–59 & para 6, at 92 (Rezek, J, separate opinion) (same), and *ibid* para 74, at 124 (Bula-Bula, J, separate opinion) (same), with *ibid* at 45, 54, 59 & 60 (Higgins, Kooijmans and Buergenthal, JJ, joint separate opinion) (customary international law presently offers no definitive guidelines for the exercise of 'universal jurisdiction *in absentia*', but offering some guidelines for its use), *ibid* para 58 (Van den Wyngaert, J, dissenting opinion) (universal jurisdiction *in absentia* is permitted because it is not prohibited).

217 See eg, American Convention on Human Rights Article 8(2)(b), entered into force 18 July 1978, 1144 UNTS 123 (an accused is entitled to 'prior notification in detail… of the charges against him'); International Covenant on Civil and Political Rights Article 14(3)(a), entered into force 23 March 1976, 999 UNTS171 (everyone shall be entitled 'to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him'); Convention for the Protection of Human Rights and Fundamental Freedoms Article 6(3)(a), 4 November 1950, Europ TS No 005.

218 Under international law, see eg, ICC Statute, *supra* n 131 at Article 67; ICTR Statute, *supra* n 206 at Article 20. Under national law, see eg, CP Articles 384, 520, 688–739 (Spain).

219 Human Rights Watch Report, *supra* n 3 at 16.

representation.[220] A failure to provide consular notification could, in some circumstances, result in a denial of due process, and has been held by the ICJ to require review and reconsideration of the convictions and sentences in the cases before it.[221]

The fact that much of the necessary evidence in extraterritorial criminal jurisdiction cases lies abroad may pose difficulties for a defendant wishing to gather the evidence necessary to mount a defence.[222] To deal with this problem, states often have rules on the collection of evidence that aim to protect the due process rights of the accused. For example, in Belgium, Germany and Norway, the police or investigative judge must search for both inculpatory and exculpatory evidence, while in Denmark, the defendant can ask the court to order investigators to look for further exculpating evidence.[223] In adversarial common law systems, such as the United Kingdom and the United States, the defendant is primarily responsible for the collection of exculpatory evidence, but the prosecution must disclose such evidence if it arises and may also be required to determine whether the government possesses such information.[224]

Access to legal aid is particularly important in extraterritorial jurisdiction cases due to the expense of conducting extraterritorial investigations. However, legal aid generally does not cover the costs of allowing defence lawyers to be present during extraterritorial investigations.[225] Some countries are making moves to overcome these

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220 Vienna Convention on Consular Relations Article 36, 24 April 1963, 596 UNTS 262.

221 Article 36 has recently been assessed by both the ICJ and the US Supreme Court. In *Avena and Other Mexican Nationals (Mexico v US)*, 2004 ICJ 88 (31 March), the ICJ held that US notification was insufficient, although it read Article 36 to require information about consular access be given 'as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national', but not necessarily 'immediately upon arrest'). Mexico has recently asked for – and been granted oral arguments to support – an interpretation of the scope of the remedies in the 2004 decision. Request for Interpretation of the Judgment of 31 March 2004 in the case concerning Avena and Other Mexican Nationals (*Mexico v US*), 2008 ICJ (13 June). In *Medellin v Texas,* 552 US ___ (2008), the US Supreme Court ruled 6-3 that the President does not have the authority to order states to bypass their procedural rules and comply with a ruling from the ICJ. Even apart from the President's powers, the Court held that Texas is not obligated to give Mr Medellin an additional hearing because the Protocol governing the Vienna Convention on Consular Relations is not 'self-executing' and would require an act of Congress to make it binding on the states.

222 Human Rights Watch Report, *supra* n 3 at 17; cf ICCPR, *supra* n 214 at Article 14(3)(b) (everyone has the right 'to have adequate time and facilities to the preparation of his defence').

223 Human Rights Watch Report, *supra* n 3 at 45, 54 & 69.

224 *Ibid* at 100.

225 *Ibid.*

legal aid problems. For example, in the *Zardad* case, legal aid in the United Kingdom covered the cost of sending the defendant's lawyer to Afghanistan with the prosecutor to supervise identifications and to conduct investigations.[226] In the Netherlands, legal aid does not automatically cover extraterritorial investigations, but the defence can ask the courts for additional funding to do so.[227]

NE BIS IN IDEM – THE RULE AGAINST DOUBLE JEOPARDY[228]

The maxim *ne bis in idem*, meaning that an individual should not be tried for the same crime twice, is an established principle of international law.[229] This principle is embedded in many extradition treaties and is also enshrined in the common law rule against 'double jeopardy', adopted by many states.[230] However, this principle only precludes repeat prosecutions within a single jurisdiction, and does not preclude prosecution in State A, followed by prosecution in State B (or prosecution in an international

226 *Ibid* at 17.

227 *Ibid* at 78.

228 For a discussion of the double jeopardy principle in the context of bribery and corruption, see *infra* Chapter 4: Bribery and Corruption. Further in relation to the rule against double jeopardy, see, eg, Cryer, *supra* n 26 at 67–69 & 76–77; Princeton Principles, *supra* n 47 at princ 9.

229 See eg, ICCPR, *supra* n 214 at Article 14(7); ICC Statute, *supra* n 131 at Article 20; *Prosecutor v Tadić*, Case No IT-94-1, Decision on the Defense Motion on the Principle of Non-bis-in-idem, para 9 (14 November 1995).

230 See eg, Kenya: Sexual Offences Act (2006) Cap 3 s41(2) (a person may not be convicted of an offence contemplated in 41(1), relating to sexual offences committed outside Kenya, 'if such a person has been acquitted or convicted in the country where that offence was committed'); Russia: Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] Article 50; Spain: LOPJ Article 23.5 ('Organic Law of the Judicial Power'); UAE: Federal Penal Code Article 23, pt 2, ch 2; Venezuela: Código Penal Venezolano Article 4(9), publicado en Gaceta Oficial No 5.768 Extraordinario del 13 de Abril de 2005 ('Venezuelan Criminal Code, published in the Special Official Gazette No 5.768 of 13 April 2005').

criminal court or tribunal).[231]

A second prosecution is more likely when the courts involved in the first proceeding did not function independently and impartially, or when the proceedings were designed to shield the defendant from international criminal responsibility.[232] If a second prosecution does occur, any time served in a foreign state's prison should be taken into account. Although a second prosecution is possible, state practice on this issue is limited if not non-existent, at least in relation to individuals.

In relation to criminal sanctions against companies, it is reasonably common for a company to be subject to criminal prosecution in State A, and then to be prosecuted in State B for the same or similar acts.[233] Fines imposed in State A are usually but not always taken into account in State

231 See *AP v Italy*, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, No 204/1986, UN Doc CCPR/C/OP/2 (1987) at para 7.3 (Human Rights Committee concluded that ICCPR Article 14 (7) 'does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State'); *Prosecutor v Tadić*, Case No IT-94-1, Decision on the Defense Motion on the Principle of Non-bis-in-idem, at para 9 (14 November 1995) ('The principle of *non-bis-in-idem*, appears in some form as part of the international legal code of many nations. Whether characterized as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14 (7) of the [ICCPR] as a standard of fair trial, but it is generally applied so as to cover only double prosecution in the same State.'); Marc J Bossuyt, *Guide to the 'Travaux préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht 1987) 316-318 (noting that the drafters of Article 14(7) reached the same conclusion).

232 See eg, ICTR Statute, *supra* n 206 at Article 9(2)(b); Updated Statute for the Criminal Tribunal for the Former Yugoslavia Article 10(2)(b), 25 May 1993, as amended February 2006, GA Res 827, UN Doc S/RES/827; ICC Statute, *supra* n 131, Article 20(3); see also UN Impunity Principles, *supra* n 109 at princ 26(b) ('The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'); Cairo-Arusha Principles, *supra* n 49 at princ 13 ('A person who has been tried and convicted or acquitted of a gross human rights offence under international law before a national court may not be tried again, except where the prior proceedings shielded the person from justice.').

233 See *infra* Chapter 4: Bribery and Corruption (discussing the examples of the Norwegian oil company, Statoil, fined in Norway and then again in the United States. for bribes paid to a government official in Iran; the German company Siemens, subject to proceedings in Switzerland, Italy, Greece, the United States and Germany, for bribes paid to government officials in Russia, Nigeria and Libya; and other multiple proceedings relating to TSKJ and the Lesotho Highlands Water Project cases in Africa).

B. Chapter 4: Bribery and corruption, *infra* discusses in detail the fact that the 'international treaty regime [regarding bribery and corruption] currently does little to limit the ability of multiple states to prosecute the same conduct'.[234] Chapter 4 concludes that states should consider adopting a 'soft' form of double jeopardy to take into account criminal and functionally equivalent civil liability for corporations and individuals in the bribery and corruption context.[235]

It is also possible for both companies and individuals to be subject to criminal prosecution followed by civil prosecution for the same or similar acts.[236]

THE PRINCIPLE OF LEGALITY – NO CRIME WITHOUT LAW[237]

Pursuant to the principle of legality, there can be no crime without law (*nullum crimen sine lege praevia poenali*). This principle requires both that the act be criminal at the time it was committed, and that the law be sufficiently clear and precise to enable an individual to know that the act is criminal at the time it was committed.[238]

This principle is recognised in the Universal Declaration of Human Rights, the Geneva Conventions and their Additional Protocols, and numerous human rights treaties, including the ICCPR, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the American Convention on Human Rights and the African Charter on Human and

234 *Ibid.*

235 *Ibid.*

236 See *supra* Chapter 2: Tort, and references therein to the Alien Tort Statute.

237 In relation to particular issues that arise with regard to bribery and corruption, see *infra* Chapter 4: Bribery and Corruption ('The limits of functional equivalence: substantive disparities in corruption offences and their effects on concurrent jurisdiction').

238 In *Streletz, Kessler & Krenz v Germany*, 2001-II ECtHR 230, the ECtHR unanimously held that criminal prosecution of the leaders of the German Democratic Republic (GDR) for ordering to kill people fleeing the GDR is compatible with the principle of *nullum crimen sine lege*. The Court affirmed in a companion judgment, *K-H W v Germany*, 2001-II ECtHR 229, that this holding applied to the criminal responsibility of a low-ranking soldier.

Peoples' Rights.[239]

Retroactive laws are generally considered to violate the principle of legality. However, in some circumstances, an individual may be prosecuted for an act that, at the time of commission, was criminal under general principles of international law, even if the act was not criminal under national law at that time. For example, the ICCPR states: '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 recognised by the community of nations'.[240] This principle was also applied in the Nuremburg trials, where the International Military Tribunal permitted prosecutions for war crimes and crimes against humanity because the conduct was prohibited by customary international law, even if the treaty permitting the trials was adopted after the conduct occurred.[241] The application of the principle in individual cases is problematic, and states frequently encounter differences in relation to the definition of crimes and the prosecution and penalisation of crimes.[242]

239 See African Charter on Human and Peoples' Rights Article 7(2), 27 June 1981, 21 ILM 58; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) Article 2 (c), entered into force 7 December 1979, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Article 6(c), entered into force 7 December 1979, 125 UNTS 609; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) Article 99, entered into force 21 October 1950, 75 UNTS 135; Universal Declaration on Human Rights, GA Res 217A at Article 11(2), UN GAOR, 3d Sess 1st plen Mtg, UN Doc A/810 (12 December 1948); American Convention on Human Rights, *supra* n 214 at Article 9; ICCPR, *supra* n 214 at Article 15; European Convention on Human Rights, *supra* n 214 at Article 7.

240 ICCPR, *supra* n 214 at Article 15(2); see also Universal Declaration, *supra* n 236 at Article 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 when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'); M J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrect 1987) 332 (the ICCPR travaux préparatoires indicate that Article 15(2) was included to confirm and strengthen the principles of the Nuremberg and Tokyo Tribunals 'and would ensure that if in the future crimes should be perpetrated similar to those punished at Nuremberg, they would be punished in accordance with the same principles'); Eric S Kobrick, 'Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes' (1987) 87 *Colum L Rev* 1515, 1529 [hereinafter Kobrick].

241 See Kobrick, *supra* n 237 at 1532.

242 Cryer, *supra* n 26 at 66; Gabriel Bottini, 'Universal Jurisdiction after the Creation of the International Criminal Court' (2004) 36 *NYU J Int'l L & Pol* 503, 551. For a discussion of the implications of this principle in the context of extradition, see *supra* 'Extradition and competing jurisdictional claims' and the discussion of the *Norris* case.

An argument based on the *nullum crimen* principle was recently dismissed by the ECtHR in *Jorgic v Germany*. In that case, the Court concluded that the German courts' interpretation of the crime of genocide under German law, notably of the genocidal 'intent to destroy', so as to cover the defendant's acts committed in the course of ethnic cleansing in Bosnia and Herzegovina, was 'consistent with the essence of that offence [genocide] and could reasonably be foreseen by the [defendant] at the material time'.[243]

Recommendations[244]

(1) When reviewing legislation regulating the existence, scope and exercise of territorial jurisdiction, states should be aware of the recent trend to expand the scope of territorial jurisdiction.
(2) When considering or reviewing legislative, administrative, judicial and/or executive rules, guidelines and policies regulating the existence, scope and exercise of extraterritorial jurisdiction, states should:
   (a) consider how far the legislation is or should be validly based on the four bases of extraterritorial criminal jurisdiction identified in this chapter (active personality, passive personality, protective, universal);
   (b) ensure adequate and effective definitions of crimes, principles of criminal responsibility and defences and consistency of definitions with international law, while preserving domestic legal traditions;
   (c) ensure that statutes of limitations do not apply to acts that were criminal according to the general principles of law recognised by the community of nations at the time they were committed;
   (d) permit extradition of, and provide for extradition requests for, individuals being sought for trial based on extraterritorial criminal jurisdiction, subject to compliance with international legal standards for the transfer of suspects;
   (e) enable input from victims in the initiation of investigations and in the conduct of prosecutions; and
   (f) ensure due process rights of the suspect and the accused, including but not limited to:
      (i) prohibiting trials *in absentia*, absent exceptional circumstances

243 ECtHR *Jorgic* case, *supra* n 47, paras 103–15.
244 See also Human Rights Watch Report, *supra* n 3 at 28, 35–36 (setting out certain recommendations to the EU Council, EU Presidency, EU Member States and other national governments).

such as a disruptive accused; the prohibition does not apply to the situation where a defendant absconds after trial has begun or jeopardy has attached;

(ii) permitting investigations when the suspect is not present (or even known), at least where there is a likely or anticipated presence of the suspect within the territory of the investigating state;

(iii) ensuring that the defendant has the right to effective translation and interpretation during every stage of the proceedings, from questioning as a suspect to trial (and appeal, if any);

(iv) notifying consular authorities if required;

(v) ensuring access to adequate legal aid; and

(vi) ensuring that there is no crime without law and avoiding retroactive legislation, while recognising that retroactivity is not implicated where the act is criminal according to the general principles of law recognised by the community of nations when committed.

(3) When reviewing investigation and prosecution mechanisms, instruments, guidelines and policies on extraterritorial criminal jurisdiction, states should:

(a) ensure adequate knowledge and training in international law, the bases of extraterritorial criminal jurisdiction, extradition and due process issues that may arise in these cases;

(b) be aware of potential difficulties in obtaining evidence abroad and develop mechanisms for prosecutors to obtain such evidence in an admissible form, consistent with due process and international law;

(c) consider establishing a special investigation and prosecution unit or units for crimes with an extraterritorial component, with translators, military analysts, historians and anthropologists if needed;

(d) consider establishing a special department within the immigration authorities to review asylum and visa applicants whose applications contain information suggesting involvement in crimes against peace, war crimes, crimes against humanity or any acts contrary to the purposes and principles of the United Nations, cross-checking the names with lists of suspects issued by international tribunals, and distributing pamphlets among asylum seekers

explaining where and with whom they can file a complaint if they are the victim of an international crime or have knowledge of a perpetrator in the proposed country of residence;

(e) promote cooperation between immigration authorities and prosecution authorities in order to ensure that suspected perpetrators of international crimes who are visa or refugee applicants are referred to the appropriate law enforcement authority;

(f) consider permitting criminal complaints to be lodged by private parties (commonly done in civil law jurisdictions, less so in common law jurisdictions), with sufficient safeguards to ensure the process is not abused for political purposes, recognising that not all legal systems permit such mechanisms;

(g) enhance mutual legal assistance regimes, including treaties and agreements, and commit to providing prompt responses to requests for information from other states relating to cases involving extraterritorial criminal jurisdiction;

(h) minimise the risk of political interference with decisions regarding the exercise of extraterritorial criminal jurisdiction, including but not limited to decisions regarding extradition;[245]

(i) promulgate clear, publicly-available guidelines for prosecuting authorities to apply in deciding whether to exercise extraterritorial criminal jurisdiction and/or whether to extradite, while preserving prosecutorial independence as far as possible;

(j) consider whether the custodial state should be permitted to prosecute where:
   (i) the state of nationality or territoriality has prosecuted and acquitted;
   (ii) the state with the closest connection to the crime/defendant/victim has pardoned, amnestied or otherwise forgiven the crime; and/or
   (iii) a past prosecution is deemed to be a sham or ineffective, based on defined criteria.

(k) consider removing nationality of the offender as a ground for refusing extradition; and

(l) ensure due process rights of the suspect and the accused, taking into account the particular challenges faced in extraterritorial jurisdiction, including but not limited to the issues set forth in

245 See also Cairo-Arusha Principles, *supra* n 49 at princ 8 (prosecuting authorities shall 'avoid bias and selectivity' and 'the application of the principle of universal jurisdiction shall not be used as a pretext to pursue politically motivated prosecutions').

Recommendation 2(f).

(4) Consider cooperating with intergovernment organisations and networks such as Interpol, Europol and the European Network of Contact Points on issues relating to extraterritorial criminal jurisdiction, including the identification of suspects, the arrest and detention of individuals, evidence gathering, extradition requests, and prosecutions, and for these organisations to meet on a timely and regular basis.

(5) Consider establishing regional investigation units to coordinate national investigations, for example for the European Union, the Americas, and South East Asia.

(6) Consider developing internationally-accepted principles, rules and/or instruments on extraterritorial criminal jurisdiction, including the bases of such jurisdiction, initiation of investigations and prosecutions, due process issues, resolving competing jurisdictional claims[246] and extradition requests based on extraterritorial jurisdiction.

246 In relation to resolving competing jurisdictional claims in the context of bribery and corruption offenses, see *infra* Chapter 4: Bribery and Corruption (setting out recommendations regarding how issues of concurrent jurisdiction should be approached).

CHAPTER 4

Bribery and Corruption

Bribery and Corruption Committee

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Introduction and scope

Virtually every country has laws criminalising bribery and corruption, especially of public officials. Some of these laws are 'demand' side laws that focus on the person who requests or receives a bribe.[1] Others are 'supply' side laws that focus on the person who offers, promises, authorises or pays the bribe.[2] Some cover both the supply and the demand side.[3] Some countries have legislation targeting other actors as well, such as persons who are engaged in 'trading in influence' and intermediaries.[4]

Historically anti-corruption legislation has focused on acts of corruption that are domestic (national) in scope. With the adoption of the US Foreign Corrupt Practices Act ('FCPA') in 1977,[5] transnational bribery, or the bribery of foreign public officials, came to be prohibited in the United States. Although the FCPA was the sole statute of its type until the late 1990s, as the result of the development of international anti-corruption standards in the last decade dozens of countries now have statutes criminalising the bribery of foreign public officials ('transnational official bribery' or 'TNB') or, where their laws do not contemplate

1 This is frequently referred to as 'passive' bribery. For example, Article 222 of the Federal Criminal Code of Mexico provides that: 'The crime of bribery is committed when: I. a public servant, or a person acting on their [*sic*] behalf, improperly requests or receives, for themselves or on behalf of another person, money or any other gift, or accepts a promise for doing or omitting to do something legal or illegal in relation to their duties.': Penal Federal [CPF] [Federal Criminal Code], Artículo 222, 16 de Junio de 2008 (Mexico) (English translation theirs).

2 This is frequently referred to as 'active' bribery. An example of this can be found, again, in Article 222 of the Federal Criminal Code of Mexico, Part II, which further defines the crime of bribery as occurring when '[a] person spontaneously gives or offers money or any other gift to the persons mentioned in the foregoing paragraph, in order that a public servant might do or omit to do something legal or illegal related to their duties'.

3 These may include conspiracy statutes, aiding and abetting statutes, accounting offences, and the like.

4 See eg, Law No 2000-595 of 30 June 2000, *Journal Officiel de la République Française* [JO] [Official Gazette of France], 1 July 2000, Article 433-1 (active trading in influence); *ibid* Article 433-2 (passive trading in influence).

5 Foreign Corrupt Practices Act, 15 USC ss 78dd1, 78dd-2, 78dd-3, 78g, 78m (1998) (hereinafter 'FCPA').

corporate criminal liability, imposing comparable civil sanctions. Of particular significance in this regard is the Organisation for Economic Cooperation and Development Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention'), a targeted instrument that focuses exclusively on the issue of transnational official bribery from the supply side.[6] Other international treaties, broader in scope in that they focus both on domestic and transnational bribery and corruption, also require criminalisation of transnational official bribery.[7]

While some countries have moved to criminalise transnational official bribery, others have expanded and updated their domestic bribery laws, pursuant to treaties or simply due to an enhanced focus on combating corruption, particularly in the public sector. These developments are by no means exclusively in the criminal or penal arena; corruption is also a focus of civil and administrative measures at the national and international levels, including in the areas of accounting standards,[8] eligibility for government benefits (such as contracts or public financing),[9] tax laws (generally affecting the availability of tax benefits

6 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, 37 ILM 1 [hereinafter 'OECD Convention'].

7 United Nations Convention Against Corruption, 31 October 2003, 58 UNTS, 422 [hereinafter 'UN Convention']; Inter-American Convention Against Corruption, 29 March 1996, 35 ILM 724 [hereinafter 'OAE Convention']; Criminal Law Convention on Corruption, 27 January 1999, Europ TS 173 [hereinafter 'COE Convention'].

8 OECD Convention, Article 8, for instance, requires states parties to take steps within the frameworks of their own systems to prohibit slush funds, off-book accounts, and similar accounting devices, and to establish effective, proportionate and dissuasive civil, administrative or criminal penalties for accounting offences. Other anti-corruption conventions have similar provisions.

9 For an initiative affecting government supported export credits, see OECD, 'Recommendation to Deter Bribery in Officially Supported Export Credits', TD/ECG (2006)24 (20 December 2006) available at www.oecd.org/document/62/0,3343,en_2649_34177_37858750_1_1_1_1,00.html. For new anti-corruption rules in international financial institutions, see World Bank, 'Guidelines: Selection and Employment of Consultants by World Bank Borrowers: May 2004' (revised October 2006), available at http://web.worldbank.org/website/external/Projects/procurement; Press Release, Inter-American Development Bank, 'IDB Strengthens Procurement Policies' (29 January 1998); Eur Bank for Reconstruction and Dev, 'A Set of Guidelines: Sound Business Standards and Corporate Practices' (1997), available at www.ebrd.com/pubs/legal/standards.pdf.

such as deductions),[10] and others.[11]

The result has been a plethora of new laws, many pursuant to an international treaty network that has developed and attracted wide adherence over the last decade. International treaties have no direct effect in the area of criminalisation,[12] but prescribe minimum standards for implementation at the national level, allowing for substantial latitude in such implementation. This approach – called 'functional equivalence' in the OECD Convention context – produces only limited harmonisation not only with regard to the substantive conduct the implementing legislation in different countries prohibits, but also with regard to many other significant features, including jurisdictional requirements, subject persons (in particular, whether there is corporate criminal liability), penalties, statutes of limitations, exceptions and defences, and others. This limited harmonisation complicates the application of rules against double jeopardy, thereby increasing the risk and potential unfairness of multiple prosecutions for the same conduct.

From the perspective of the individual citizen operating locally, the implications of these developments may not be as significant as they are for international or multinational businesses and their personnel. The expansion of transnational laws, coupled with the expansion of domestic laws, makes for a much more complex compliance and enforcement environment than was true even ten years ago. Moreover, there is much greater risk that multiple laws will be applicable to given conduct, giving rise potentially to concurrent or conflicting exercises of jurisdiction, conflicts of laws, and other issues. A European company investing in China, for example, will likely be subject to Chinese laws, its home country laws, and possibly laws of other countries or regimes, such as the rules of any international financial institution ('IFI') financing the project

10 Pursuant to the OECD 1997 'Revised Recommendation of the Council on Combating Bribery in International Business Transactions' (23 May 1997) (available at www.oecd.org/document/32/0,2340,en_2649_33725_2048160_1_1_1_1,00.html) which also urges prompt implementation of its 'Recommendation on Tax Deductibility of Bribes to Foreign Public Officials', virtually all OECD Member States have eliminated the tax deductibility of bribes. Other international conventions also call for the elimination of tax deductibility: see eg, UN Convention, *supra* n 7, Article 12(4).

11 US export controls applicable to military goods and technology, require the reporting, inter alia, of fee commissions paid to intermediates: see 22 CFR s 130.9 (2007). A number of countries prohibit altogether the use of intermediaries in certain types of procurement eg, the defence arena: see, eg, Royal Decree No M/12 dated 21/1/1398H (Saudi Arabia).

12 As discussed in 'Provisions of major anti-corruption treaties regarding concurrent jurisdiction or conflicts of jurisdiction', *infra*, they do have direct effect with regard to certain aspects of investigation and enforcement, particularly mutual legal assistance and extradition.

or transaction.

This report focuses on the issue of extraterritorial jurisdiction in the enforcement of anti-corruption laws, both domestic and transnational, of both a civil/administrative and criminal nature with respect to international business activities, for it is here that potential conflicts of jurisdiction are most likely to arise.

Assertions of jurisdiction over domestic corruption have historically been based first on territoriality, and secondly on nationality and other principles. TNB laws such as the FCPA[13] have also relied on territoriality, albeit in many cases broadly defined to require only a limited territorial nexus to the improper activity. The combination of domestic anti-corruption laws and an expanding universe of TNB laws and civil and administrative regimes, coupled with broad jurisdictional bases and globalised business activity, are increasingly resulting in cases of concurrent jurisdiction of multiple countries for primarily extraterritorial acts. The international treaty regime currently does little to limit the ability of multiple states to prosecute the same conduct, and provides precious little guidance to states in determining when to exercise concurrent jurisdiction over a matter, and when not to do so.

Some would say this is the wrong problem to focus on, and that the most important challenge today is eliminating impunity for corrupt practices and ensuring there is broad-based and effective enforcement.[14] There is no question that the enforcement picture today is uneven and in need of significant improvement. Insufficient political will, a lack of capacity or resources, or other defects may contribute to such lack of enforcement, both of domestic anti-corruption laws and of transnational

13 See FCPA, *supra* n 5. One of the principal territorial jurisdiction provisions of the FCPA, drawn from other US federal anti-fraud laws, requires only the 'use of the mails or other instrumentality of interstate or foreign commerce in furtherance of' the improper activity.

14 Organisations such as Transparency International have taken the lead in calling for increased and across-the-board enforcement by states parties to the OECD Convention. The committee also appreciates the constructive input of the IBA Anti-Corruption Committee, whose comments have likewise focused on the importance of promoting widespread enforcement. The committee does not disagree with this goal, and has given extensive thought to how to approach the issue of jurisdictional priorities in cases of concurrent jurisdiction so as not to deter or hinder enforcement. For example, as discussed in more detail in 'Determining priorities among supply side jurisdiction – how much deference should be given to the home state?', *infra,* the committee considered and rejected any rule of rigid deference to the home country of a company for precisely this reason. The committee has also considered the need to develop rules that will not cut off the ability of countries to investigate and share the fruits of that investigation with other countries.

bribery laws.[15] Such enforcement is important to the goals of securing accountability for corrupt practices and a level playing field for international business. However, this report considers these goals not to be necessarily mutually exclusive, provided such issues are addressed in a way that does not hinder enforcement. Although the current system is characterised by wide variations in levels of enforcement activity among countries, even under these circumstances, cases of multiple investigations and prosecutions are already surfacing. It is not too soon in our view to begin to consider how issues of concurrent jurisdiction should be addressed. The following are four cases implicating bribery or anti-corruption laws that raise difficult questions of concurrent jurisdiction:

(1) The *Statoil* case. In mid-2003, it was revealed that the Norwegian oil company Statoil had indirectly paid large commissions to a government official in Iran in connection with its earlier pursuit of oil concessions in that country. Several high-ranking officers of the company resigned in the wake of the public disclosure of these payments. The Norwegian authorities commenced an investigation, which resulted in the prosecution and conviction of one executive for trading in influence, and the company's payment of criminal fines totalling US$3 million to the government.[16] As Statoil was also listed in the United States, the US authorities also commenced an investigation. The US Securities and Exchange Commission ('SEC') and the US Department of Justice ('DOJ') both prosecuted the company.[17] The US case was ultimately resolved by a settlement in late 2006, in which the company agreed to pay a fine of US$21 million to the US authorities, against which it received credit for the fine paid to the Norwegian authorities.[18]

a. Should the US authorities have deferred to Statoil's home country

15 Civil society organisations such as, eg, Transparency International have for several years issued progress reports on enforcement of the OECD Convention, criticising many of the OECD Convention countries for the absence or inadequacy of their enforcement efforts. At a high-level conference in Rome in November 2007, marking the tenth anniversary of the OECD Convention, the OECD Secretary-General called on Member States to increase their enforcement efforts: see Angel Gurría, Secretary-General, OECD, 'Address at the Tenth Anniversary of the OECD Anti-Bribery Convention: Its Impact and Its Achievements' (21 November 2007).

16 The executive paid fines of approximately US$30,000: see Order Instituting Cease-and-Desist Proceedings, Securities Exchange Act Release No 54599 (13 October 2006).

17 The SEC's prosecution under the FCPA's accounting provisions was based on the fact that Statoil was an 'issuer', while the DOJ and the SEC bribery prosecutions were based on the fact that payments to the agent had been wire-transferred through the company's New York bank account.

18 See US DOJ Press Release 'Order Instituting Cease-and-Desist Proceedings', *supra* n 16.

authorities and declined to prosecute? According to informal comments made by US prosecutors, their exercise of prosecutorial discretion was triggered by a judgment that Norway had not been as aggressive in prosecuting Statoil as they deemed appropriate.[19] The basis of the home country prosecution, Norway's trading-in-influence legislation, carried lower penalties than its TNB legislation.[20] While the credit accorded for home country penalties gave some effect to the Norwegian proceedings, the company was still subjected to multiple investigations and proceedings. Moreover, the resolution of the DOJ prosecution included a three-year deferred prosecution agreement, under which the company was subject to a number of ongoing obligations, including cooperation with the authorities, and the appointment of a compliance monitor to oversee its activities and report findings of

19 See Mark Mendelsohn, Deputy Chief, Fraud Section, Criminal Div, US DOJ, 'Address at PLI FCPA Conference' (May 2007). An OECD Working Group on Bribery report also discusses this case, albeit without identifying the company or the executive, and refers to concerns raised by other Working Group members: see OECD Working Group on Bribery, Norway Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations (15 March 2007), available at www.oecd.org/dataoecd/35/26/38284036.pdf.

20 Norway's legislation implementing the OECD Bribery Convention is found in Article 128 of its penal code. Under this article, unlimited fines may be imposed, companies may lose the right to do business, and individuals may be sentenced to prison terms: see OECD Working Group on Bribery, Norway Phase 2: Report on the Application of the Convention on Combating Bribery (12 April 2004), available at www.oecd.org/dataoecd/3/28/31568595.pdf. Its trading-in-influence legislation under which Statoil and its former executive were prosecuted is Article 276c of the penal code, which carries no prison term and lower fines.

its reviews to the government.[21]

(2) The *Siemens AG* case. Still in the early stages, Siemens AG ('Siemens') is currently involved in proceedings in numerous countries, including Switzerland, Italy and the United States, in addition to investigations of the company and company officials in the company's home country of Germany. The World Bank is also reported to be investigating the company.[22] The Siemens bribery scandal broke in November 2006, when it was alleged that Siemens managers had illegally transferred approximately €420 million into secret accounts over a seven-year period to be used for bribes to win contracts in foreign countries. In October 2007, the Munich district court imposed a fine of €201

21 A more deferential approach was taken in the recent prosecution of the Dutch company Akzo-Nobel, which like Statoil is an 'issuer' with publicly-traded stock in the United States, in connection with the Oil-for-Food scandal. Akzo Nobel settled with the SEC in late 2007 without admitting or denying the allegations in the SEC complaint, by consenting to the entry of a final judgment permanently enjoining it from future violations of the accounting provisions of the FCPA and by agreeing to pay almost US$3 million in penalties, prejudgment interest and disgorgement of profits. Most interestingly, the company also entered into a non-prosecution agreement with the DOJ, pursuant to which it agreed to pay a fine of US$800,000 if one of its former subsidiaries did not within six months enter into a criminal disposition with the Dutch Public Prosecutor pursuant to which it would pay a lesser fine. Pursuant to the agreement with the DOJ, Akzo Nobel acknowledged responsibility for the actions of two of its subsidiaries whose employees and agents made improper payments to the Iraqi government in order to obtain contracts with Iraqi ministries. According to the agreement, between 2000 and 2002, the two subsidiaries, NV Organon and Intervet International BV, sold by Akzo Nobel earlier in 2007, paid a total of approximately US$280,000 to the Iraqi government by inflating the price of contracts, usually by adding ten per cent before submitting the contracts to the United Nations for approval, and concealing from the United Nations the fact that the prices contained a kickback to the Iraqi government.
According to the agreement reached with the DOJ, within 180 days of the US settlement, NV Organon was expected to reach a resolution with the Dutch National Public Prosecutor's Office for Financial, Economic and Environmental Offences regarding its conduct under the Oil-for-Food Programme, wherein it would pay a criminal fine of approximately €381,000 in the Netherlands. If NV Organon failed to reach a timely resolution with the Dutch Public Prosecutor, Akzo Nobel would pay US$800,000 to the US Treasury: see US DOJ Press Release, 'Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Department of Justice' (20 December 2007); Brief for Secs and Exch Comm'n, *Secs and Exch Comm'n v Akzo Nobel NV*, No 1:07-cv-02293 (DDC 20 December 2007). At the time of writing, it is believed such a resolution with the Dutch authorities was reached, but documentation is not available.

22 There has been extensive press coverage of this case since it broke publicly in late 2006. See eg, Rhys Blakely, 'Siemens Widens Corruption Inquiry', Times Online, 13 August 2007, available at http://business.timesonline.co.uk/tol/business/industry_sectors/engineering/article2251762.ece (reporting that ń1 billion in questionable payments had now come under investigation).

million on Siemens.[23]

According to the court's decision, a former manager of the company committed bribery of foreign public officials in Russia, Nigeria and Libya in 77 cases during the 2001–2004 period for the purpose of obtaining contracts on behalf of the German company. In determining the fine, the court based its decision on unlawfully-obtained economic advantages in the amount of at least €200 million which Siemens derived from illegal acts of the former employee, to which an additional fine in the amount of €1 million was added. Investigations in connection with the above are also ongoing in the United States, Switzerland, Italy and Greece.[24] The scope of the reported corruption has escalated sharply since the scandal first broke, and the matter appears to be likely to go on for years in various fora.

(3) The *TSKJ* case. Another example of an ongoing case involves TSKJ, a consortium comprised of former US subsidiary Halliburton, Kellogg, Brown & Root ('Halliburton/KBR'), the French company Technip, the Italian company Snamprogetti, and the Japanese company JGC, which together were pursuing a multibillion dollar natural gas liquefaction complex and related facilities at Bonny Island in Rivers State, Nigeria. The allegations, which were first disclosed in May 2004, are that the consortium, through an affiliate based in Madeira, a tax haven, paid US$180 million to a company in Gibraltar in connection with the securing of contracts for the project. In addition, there are allegations that officials at Halliburton/KBR paid US$2.4 million to a Nigerian tax official to obtain favourable tax treatment in connection with the project.

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23 See eg, Klaus Brune, 'Siemens Pays Eur 210 Million Fine for Communications Unit', Dow Jones Newswires, 4 October 2007, available at www.cellular_news.com/story/26486_2.php.

24 Siemens AG was also the protagonist of another multijurisdictional bribery scandal which broke in 2003 in connection with bribes paid by former Siemens AG employees to former employees of the Italian company Enel in connection with the award of Enel contracts. In Italy, legal proceedings against two former employees of the German company and the corporation itself ended in 2006 with plea agreements by the charged employees and by the corporation. Pursuant to these agreements, Siemens AG agreed to pay a fine of €500,000 (reduced in consideration of the fact that Siemens AG had already paid €180 million to the damaged party). An amount equal to the bribe paid (€6 million) had been previously seized by the Italian judge. In relation to the same facts, in May 2007 the German court sentenced two former employees of the company to imprisonment, suspended on probation. The corporation was ordered by the German court to disgorge a further €38 million of profits. See eg, Roland Gribben, 'Siemens Faces Italy Contracts Ban', *Daily Telegraph*, 29 April 2004, available at www.telegraph.co.uk/money/main.jhtml?xml=/money/2004/04/29/cnitaly29.xml.

Investigations involving the consortium's activities have been proceeding in the United States, France, Switzerland, the United Kingdom (where a principal of the intermediary was located) and Nigeria.[25] In the United States, the SEC is conducting a formal investigation, and the DOJ is conducting a related criminal investigation. Halliburton/KBR disclosed the payments to US authorities, and has said that it is cooperating with them, and that it plans to ensure that the foreign subsidiary repays all applicable taxes to Nigeria, possibly as much as US$5 million. The company conducted an internal investigation and fired several employees as a result. In September 2004, Halliburton/KBR disclosed that its internal investigation had revealed evidence that its employees discussed bribing Nigerian officials. In October 2004, representatives of TSKJ, testified before Nigerian courts. In February 2005, TSKJ representatives notified the US DOJ that TSKJ would acquiesce to efforts to transfer money held in Swiss bank deposits to Nigeria so that the legal ownership of those funds could be determined in Nigerian courts. TSKJ suspended receipt of services from and payments to Tristar Investments, the Gibraltar contractor. At the time of writing, the proceedings are ongoing and it is not known what the outcome for any of the parties under investigation will be.

(4) The *Lesotho Highlands Water Project* cases. Following a change of government in Lesotho in the mid-1990s and the institution of civil proceedings against a former project official, the Lesotho government learned that the official had offshore bank accounts. A review of those accounts showed payments from project contractors and intermediaries, leading to criminal prosecution of the official and a number of the contractors in Lesotho. These contractors included a number of prominent multinational consulting engineering firms from various countries, including Acres International Ltd of Canada, Lahmeyer International GmbH of Germany and Impregilo of Italy. Prosecution for transnational official bribery was difficult, however, as the actions in question preceded their home countries' adoption of legislation implementing the OECD Convention. The World Bank, however, which had financed part of the project, instituted debarment proceedings against them under its new anti-corruption rules. Although the initial proceedings failed for lack of evidence, reopened proceedings following the companies' criminal convictions in Lesotho resulted in debarment sanctions being imposed against all three

25 SEC Form 10-Q Quarterly Report for Halliburton Co, File No 1-3492 (31 October 2005); SEC Form S-1 Registration Statement for KBR, Inc (14 April 2006).

companies. Lahmeyer has also been subject to cross-debarment by the European Bank for Reconstruction and Development.[26]

As this brief review illustrates, the types of corruption cases giving rise to concurrent proceedings involve both relatively discrete transactions (in the case of Statoil, the third-party relationship entered into for the purpose of assisting in the securing of business in Iran), to allegations of more systemic practices (in the case of Siemens). TSKJ represents yet a third variant, where there are several unrelated actors who have worked together over a period of time in pursuit of a particular opportunity, and the *Lesotho* cases involve corruption by multiple actors acting independently in a particular project.

The Bribery and Corruption Committee ('committee') was formed in 2006 to examine the issues raised by cases such as those just described, which are the product of the new world of international anti-corruption standards and enforcement. Committee members were drawn from a variety of jurisdictions and from the ranks of corporate counsel, private firms, and academia with knowledge of and experience in the area. The committee also benefited from the input of several experts and outside bodies, identified earlier in this chapter. The committee met numerous times in 2007 to identify the issues to be addressed and to discuss process, findings and recommendations. Different committee members took responsibility for preparing initial drafts of sections of this Report.

This Report begins by reviewing the jurisdictional bases for bribery and corruption offences under international conventions and in implementing legislation at the national level. It then analyses the extent to which treaty provisions minimise conflicts of jurisdiction (eg, by harmonising jurisdictional standards and defining substantive offences as well as collateral elements), and the extent to which treaty provisions contribute to concurrent jurisdiction. In so doing, we also examine provisions of anti-corruption treaties promoting cooperation in mutual legal assistance and extradition. We also discuss the role and effect of monitoring mechanisms, such as the OECD Working Group on Bribery, in addressing issues of conflicting or concurrent jurisdiction, as well as the effect of the absence of such mechanisms.

The discussion then moves from jurisdiction to the relationship of local law to transnational law, as well as conflicts of law both of a horizontal (transnational versus transnational) and a vertical (local versus transnational) nature. In the latter regard, we consider in particular different approaches to the criminalisation of 'grand' versus 'petty'

26 For press reports, see Lesotho Dam: Bribery, Prosecutions and Black-listing, www.against-corruption.org/briberycase.asp?id=720 (last visited 20 June 2008).

corruption (eg, facilitating payments exceptions) and the relevance of this issue (or other substantively divergent national laws) to the issues of conflicting and concurrent jurisdiction.

Finally, we consider the extent to which the treaty network affects prosecutorial discretion at the national level, national security considerations, and the issue of official immunities. Those issues, as well as more general weaknesses in legal systems and a lack of political will, rather than inadequate jurisdictional authorities, appear to be the primary sources today for insufficient or ineffective enforcement.

We conclude by calling for the development of a set of principles governing the exercise of concurrent jurisdiction under the OECD Convention, especially with respect to supply side national legislation. While the process of investigating possible offences may implicate multiple jurisdictions, prosecutorial authorities should not have unlimited discretion to initiate multiple proceedings against the same person seeking to sanction the same conduct. While exclusivity of jurisdiction may not be desirable, especially at this time when enforcement in many countries is still limited, greater coordination and an effort to concentrate prosecutions in the most efficient jurisdiction should be encouraged. In identifying the most efficient jurisdiction, authorities should take into account the strength of the target's connection to the prosecuting jurisdiction, the location of witnesses and evidence, the cost of multiple proceedings to the company, the demonstrated harm to the prosecuting jurisdiction, and other relevant factors.

As set out in 'Recommendations' below we recommend consideration of the development of a protocol to the OECD Convention that would spell out the relevant factors that countries should take into account in their consultations regarding the most efficient jurisdiction. Consideration should also be given to adopting a 'soft' form of double jeopardy, or *ne bis in idem*, in this context, that takes into account not just criminal liability, but functionally equivalent civil liability for corporations and individuals. Greater harmonisation of key aspects of national laws beyond the 'functional equivalence' standard of the OECD Convention is also recommended, as such harmonisation will reduce pressure for concurrent prosecutions based on differences in national laws. These key aspects include statutes of limitations, penalties, and the core definition of the transnational bribery offence.

Jurisdiction

Pre-international treaty national legislation, both domestic and transnational

DOMESTIC ANTI-BRIBERY LEGISLATION

Virtually all countries have historically had some type of anti-bribery legislation. One may say that bribery involving public officials is universally recognised as unlawful conduct, typically sanctioned by penal laws. Bribery and corrupt practices may also give rise to civil or administrative sanctions. Bribery in transactions between private parties, not involving public officials or funds, has historically been less universally sanctioned (although the trend is towards criminalisation of commercial bribery).

This Report does not intend to catalogue the history of anti-bribery legislation or even to define what constitutes bribery, an issue that many commentators have struggled with. Below are a few examples of the substantive prohibitions of domestic legislation in force in civil and common law jurisdictions.

Italy: The Italian criminal code distinguishes between different kinds of corruption: 'improper corruption', which occurs whenever a public official (or a person charged with a public service) receives, for himself or for a third person, an undue compensation, in the form of money or other benefits in order to perform an act in the scope of his duty; and 'proper corruption' which occurs whenever a public official (or a person charged with a public service) receives, for himself or for a third person, money or other benefits in order to leave out or to delay, or for having left out or delayed, an act in the scope of his duty, or for having performed an act contrary to his duties. The criminal code extends criminal liability to the private party that gives or promises the utilities to the public officials.[27]

The United Kingdom: Until the 1990s, corruption and bribery law in England was contained in the Public Bodies Corrupt Practices Act 1889 ('PBCA'). The PBCA deals with bribery of public officials. Under the PBCA, it is an offence for any person to give or offer any gift, loan, fee, reward or advantage to any person, for his own benefit or for another's, as an inducement or reward to any servant, member or officer of a

27 See Codice penale (Cp) Articles 318-319 (Italy). Italian law distinguishes corruption from the different crime of 'concussion' (Article 317 of the criminal code), which occurs whenever it is the public official or the person charged with a public service who, abusing of his capacity or of his powers, forces or persuades somebody to give or to promise unduly, to himself or to a third person, money or other benefits.

public body, for doing or forebearing to do anything with respect to any matter or transaction in which such public body is concerned. It is also an offence to corruptly receive or agree to accept such an advantage or consideration.

Another relevant piece of UK legislation is the Prevention of Corruption Act 1906 ('PCA06'). The PCA06 deals with bribery of public officials and commercial agents. Under the PCA06, it is an offence for any person to corruptly give or offer any gift or consideration to any agent as an inducement or reward for his doing or forebearing to do any act in relation to his principal's affairs or business. It is also an offence to corruptly receive or agree to accept such an advantage or consideration.

A third statute, the Prevention of Corruption Act 1916 ('PCA16'), imposed a rebuttable presumption of corruption, as follows:

'Where, in any proceedings against a person for an offence under the PBCA or the PCA06, it is proved that any money, gift or other consideration had been paid or given to or received by a person in the employment of Her Majesty or any Government Department or public body by or from a person, or agent of a person, holding or seeking to obtain a contract from Her Majesty or any Government Department or public body, it will be deemed to be corrupt unless proven otherwise.'

Finally, the common law provided a definition of bribery, as the receiving or offering of any undue reward by or to a person in public office in order to influence his behaviour in office and incline him to act

contrary to the known rules of honesty and integrity.[28]

As can be seen, the typical formulation is a *quid pro quo* bribery statute – ie, a statute that requires on the active or supply side, that a payment or other transfer of value be made for the purpose of securing some action, inaction, benefit, or advantage, from the public official in return. However, countries also had (and have) anti-gratuity statutes and other types of anti-corruption legislation.[29]

Historically, such anti-bribery legislation has had various jurisdictional

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28 The position remained largely unchanged until the end of the 1990s. The law, as it existed, was restricted to bribery and corruption which took place within UK territory. Where bribery took place outside the United Kingdom (even where the person making the bribe was a UK resident) or the principal act forming the offence occurred outside the United Kingdom (eg, an offer or a bribe) the court could decide that it did not have jurisdiction. Any proceedings would have to be brought in the country where the act of bribery took place. To enable the relevant country to assume jurisdiction in such a case, the UK courts were prepared to consider extradition of the accused. However, this was not satisfactory, as many countries would not seek extradition of the individuals involved in the bribery.

The Criminal Law Act 1977 ('CLA'), as amended by the Criminal Justice (Terrorism and Conspiracy) Act 1998 ('CJTCA'), and the Anti-Terrorism, Crime and Security Act 2001 ('ATCS') changed the jurisdictional position. Whilst the CJTCA was driven by the government's attempt to remedy perceived deficiencies in the criminal law against overseas terrorism, the ATCS was introduced in response to the OECD Convention which came into force in the United Kingdom in 1999. The CLA introduced the offence of conspiracy, while the CJTCA amended the CLA so that conspiracies to commit offences outside the United Kingdom are triable under English criminal law provided the following conditions are satisfied:

(1) that the pursuit of the agreed course of conduct would at some stage involve an act by one or more of the parties, or the happening of some other event, intended to take place in a country or territory outside the United Kingdom;
(2) that the act or event constitutes an offence under the law in force in that country or territory;
(3) that the agreement would fall within s 1(1) of the CJA as an agreement relating to the commission of an offence but for the fact that the offence would not be an offence triable in England and Wales if committed in accordance with the parties' intention; and
(4) that there is sufficient connection with the United Kingdom.

There will be sufficient connection with the UK if a party does something in the United Kingdom in relation to the conspiracy before its formation, or a party joins the conspiracy in the United Kingdom, or the party does or omits to do anything in the United Kingdom as part of the conspiracy.

ATCS gives extraterritorial effect to corruption offences and applies if any UK national or UK company does anything in a country or territory outside the United Kingdom that would, if done in the United Kingdom, constitute an offence at common law or under PBCA or PCA.

29 An example is Indonesian law, which prohibits any *gratifikasi* (gratifications or gifts) made to certain government officials by virtue of their position: see Regarding the Eradication of Criminal Acts of Corruption, Law no 31/1999 Article 12(b) (16 August 1999), as amended by Law no 20/2001 (21 November 2001).

bases, with the primary basis being territoriality.[30] In France, for example, jurisdiction can be based on territoriality even if only one of the constituent elements of the crime has been committed on French territory.[31]

Given the primacy of the territorial basis of jurisdiction, conflicts of jurisdiction arising from such legislation were historically few and far between. Enforcement of such legislation was also erratic in many countries, especially those suffering from a weak rule of law or institutions.

Transnational anti-bribery legislation: the FCPA

The enactment of the FCPA in the United States in 1977 represented the first attempt to criminalise transnational bribery in international business.[32] The FCPA focused on the bribery of foreign public officials (defined according to its autonomous standard) and certain other categories of specified recipients.[33] The statute's prohibitions applied to companies and natural persons and, since 1988, the government has been permitted to prosecute corporate employees without regard to prosecution of their employer.[34]

Although broad, the FCPA did not cover all acts of overseas corruption. A supply side statute, it only focused on those offering, promising, making, authorising, or furthering an improper payment, not those

30 Territoriality is the jurisdictional basis of the Italian anti-corruption law, for example. Under Italian law, crimes are deemed to have been committed in the territory of Italy when the criminal action (ie, the offering or giving of the undue advantage) was performed in Italy or when the damages resulting from the criminal action were suffered in Italy: see Codice penale (Cp) Article 6 (Italy).

31 Code pénal, (C pén) Article 113-2 (France). In addition, jurisdiction based on the nationality of the victim is always given (insofar as it is possible to identify a victim of bribery) and jurisdiction based on the nationality of the violator is also possible if the act is considered as criminal under the legislation of the state where it has been committed: see *ibid* Article 113-6. See OECD France Phase 1: Review of Implementation of the Convention and 1997 Recommendations 16–18 (December 2000), available at www.oecd.org/dataoecd/24/50/2076560.pdf.

32 Previously, the United States had eliminated the tax deductibility of bribes, including foreign bribes: IRC s 162(c) (2000).

33 These are political parties, party officials, candidates for political office, persons 'acting in an official capacity'. The 1998 amendments added officials of public international organisations.

34 Pub L No 100-418, 102 Stat 1107 (1988) (eliminating the so-called 'Eckhardt amendment'). See HR Rep No 100-576, at 923-24 (1988).

receiving, soliciting, or agreeing to receive one.[35] Moreover, through its exception for so-called 'facilitating payments', the drafters made clear their intention to focus on grand, not petty, corruption.[36] A 1988 amendment to the statute, creating an affirmative defence for payments legal under the written laws of the host country, also signalled some deference to host country standards of conduct.[37]

Despite these limitations on its reach *rationae materiae*, the FCPA anti-bribery provisions represented a unilateral assertion of jurisdiction over extraterritorial conduct. And for so-called 'issuers' – companies with a class of listed securities subject to the federal securities laws – the FCPA included not only a prohibition on bribery, but also positive accounting requirements, including standards for the maintenance of books and records and internal accounting controls.[38] Although the FCPA anti-bribery provisions – unlike some other highly extraterritorial laws and regulations from that same period – did not treat foreign subsidiaries as persons subject to US jurisdiction,[39] the anti-bribery provisions nonetheless had significant effects on the compliance practices of US multinational companies. Moreover, by making parent companies strictly responsible for compliance by all of their majority-owned subsidiaries, US and foreign, and establishing certain responsibilities even with respect to minority-owned affiliates,[40] the accounting provisions have had even more profound extraterritorial implications for multinational companies that

35 The FCPA left prosecution of the demand side to local law, an understandable choice especially since those on the demand side were foreign public officials, as to whom the attempted exercise of jurisdiction would raise numerous issues.

36 The exception is for payments to secure 'routine governmental action': 15 USC ss 78dd-1(b), 78dd-2(b), 78dd-3(b) (1988). This exception has created conflicts with both host country domestic laws, and, more recently, other TNB laws, most of which treat such payments as bribes.

37 15 USC ss 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1988). This defence is only available for payments permitted under the written laws of the host country. Local custom or practice does not qualify for this defence.

38 15 USC s 78dd-1 (1988) (anti-bribery prohibition for issuers); 15 USC s 78m (1988). These provisions are subject to civil and administrative enforcement by the SEC and criminal enforcement (for wilful violations) by the DOJ. The term 'issuers' is not limited to US companies but includes foreign companies that qualify as issuers as well. All the provisions of the FCPA applicable to 'issuers' are part of the federal securities laws. The accounting provisions are not limited in scope to transactions implicating the anti-bribery provisions, but apply to all transactions and record keeping of the issuer.

39 Compare 15 USC ss 78dd-2(h)(1)(A), 78dd-2(h)(1)(B) (1988) (FCPA definition of 'domestic concern') with 15 CFR s 760.1(b)(1) (2007) (anti-boycott regulations' definition of 'US person').

40 The internal control provisions of the FCPA require 'issuers' to use good faith efforts to cause minority-owned affiliates to comply with the accounting requirements. 15 USC s 78m(b)(6) (1988).

qualify as 'issuers'.

The jurisdictional provisions of the FCPA were originally strictly territorial, requiring 'use of the mails or other instrumentality of interstate or foreign commerce in furtherance of' the improper payment. This provision, similar to that found in other federal anti-fraud statutes,[41] provided an expansive jurisdictional basis that permitted prosecutions to take place simply on the basis of telephone calls or e-mail transmissions with a US nexus, or use of the US banking system. In other words, it was not necessary for the entirety of the conduct to take place in the United States; a single act in furtherance would suffice.

Nonetheless, this jurisdictional provision proved limiting in some contexts. Upon US adherence to the OECD Convention, discussed in 'Provisions of major anti-corruption treaties regarding concurrent jurisdiction or conflicts of jurisdiction' below, US enforcement authorities sought – ultimately successfully – to expand the jurisdictional provisions of the FCPA. In particular, the 1998 amendments to the statute, while retaining the territorial bases of jurisdiction described above, significantly augmented the jurisdictional reach of the statute by:

- authorising nationality jurisdiction over 'US persons' (a defined term including US citizens and permanent resident aliens, as well as all forms of business enterprises organised under US law) as an alternative to territorial jurisdiction;
- establishing a new territorially-based anti-bribery prohibition, 15 USC s 78dd-3, which prohibits corrupt practices by 'any person' (effectively non-US persons) based on an act in furtherance of the improper payment 'while in the territory of the United States'; and
- eliminating the requirement that for penalties to be imposed on officers, directors, shareholders, employees and agents of domestic concerns or issuers that they be 'otherwise subject to the jurisdiction of the United States' – thereby permitting personal jurisdiction to be asserted over foreign nationals based, for example, on transitory connections to US territory.[42]

The FCPA has never and does not today assert universal jurisdiction over foreign bribery, nor has its enforcement been based, with perhaps one

41 18 USC ss 1341, 1343 (2008) (mail and wire fraud).

42 See Lucinda A Low & Timothy P Trenkle, 'U.S. Antibribery Law Goes Global: Standards Tightening Up' (July/August 1999) *Bus L Today*.

exception, on 'effects' jurisdiction.[43] Nor has passive personality been the basis for jurisdiction.[44] Several courts have considered whether the FCPA confers private rights of action; although the issue has not been addressed by the US Supreme Court, all lower courts that have considered the question have concluded that it does not.[45] Thus, any private rights of action must be based on other statutory or common law authorities.

The adoption of the FCPA enlarged the possibilities for concurrent jurisdiction over corrupt practices. Bribe perpetrators subject to the FCPA could be criminally prosecuted by the DOJ for violations of the anti-bribery provisions or willful violations of the accounting provisions, and by the SEC (in the case of issuers) for civil or administrative violations of the statute, as well as by the host country. However, it has only been in the last ten years, with the emergence of international norms against corruption, that cases of concurrent jurisdiction have increasingly come to the fore.

Provisions of major anti-corruption treaties regarding concurrent jurisdiction or conflicts of jurisdiction

Beginning in the mid-1990s, the international community was moved to collective action against corruption. The result has been dramatic, including the negotiation, rapid entry into force, and broad acceptance of anti-corruption treaties resulting in a host of new civil and criminal anti-corruption measures at the national level, the creation of a new architecture of cooperation for investigations and enforcement at the international level, the development of new rules in international financial institutions, the elimination of tax deductibility of bribes in many countries, and the promulgation as 'soft law' of compliance standards, new civil liability provisions. A prohibition on corruption can thus be

43 In that case, the SEC and the DOJ jointly prosecuted the Indonesian affiliate of KPMG, and one of its named partners, Sonny Harsono, for actions taken in Indonesia which were, the government argued, intended to induce action by officials of a client company in the United States: *SEC and Department of Justice File First-Ever Joint Civil Action Against KPMG Siddhartha Siddhartha & Harsono and Its Partner Sonny Harsono For Authorizing the Payment of a Bribe in Indonesia*, Litig Rel No 17127 (12 September 2001) available at www.sec.gov/litigation/litreleases/lr17127.htm. The case was settled by the company, Baker Hughes (see Order Instituting Public Proceedings Pursuant to Section 21C, Securities Exchange Release No 44784 (12 September 2001)), so the government's theory of jurisdiction (which may have been based on a case outside the FCPA context but in the context of other federal securities laws) was not tested judicially.

44 Thus, the fact that a US person is a victim of foreign bribery, for example by a competitor, does not provide a basis for US jurisdiction.

45 See eg, *Lamb v Phillip Morris, Inc*, 915 F2d 1024 (6th Cir 1990); *McLean v Int'l Harvester Co*, 817 F2d 1214 (5th Cir 1987).

seen as an emerging international public policy norm in various contexts – civil, criminal, and administrative. Moreover, the FCPA no longer stands alone as the sole example of a criminal prohibition on transnational official bribery; today, dozens of countries have roughly similar laws. While enforcement is still uneven, the proliferation of norms and legislation has made concurrent jurisdiction an increasingly commonplace event.

This section analyses the permissive and mandatory jurisdictional bases for criminal anti-corruption provisions, and the mechanism, if any, for addressing conflicts of jurisdiction and concurrent jurisdiction contained in six major anti-corruption treaties. The treaties are:

- The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated 21 November 1997 ('OECD Convention');
- The Inter-American Convention Against Corruption dated 29 March 1996 ('OAS Convention');
- The Criminal Law Convention on Corruption dated 27 January 1999 ('COE Criminal Law Convention') and its Additional Protocol[46];
- The European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States dated 26 May 1997 ('EU Convention');
- The African Union Convention on Preventing and Combating Corruption dated 11 July 2003 ('AU Convention'); and
- The United Nations Convention against Corruption dated 31 October 2003 ('UN Convention' or 'UNCAC').[47]

It should be noted at the outset that the scope of these treaties is not uniform, and ranges from narrow to sweeping. At one end of the spectrum, the OECD Convention focuses narrowly on the measures to combat TNB, primarily but not exclusively through criminalisation.[48]

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46 Criminal Law Convention on Corruption, opened for signature 27 January 1999, Europ TS 191.

47 For citations to the OECD, OAS, COE, and UN conventions, see *supra* nn 6, 7. For the EU Convention see European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States, OJ 1997 C 195 (EC), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:HTML. For the AU Convention, see African Union Convention on Preventing and Combating Corruption, adopted 11 July 2003 available at www.africa-union.org/root/au/Documents/Treaties /Text/Convention%20on%20Combating%20Corruption.pdf.

48 The OECD Convention contains additional provisions designed to harness anti-money laundering laws for the prosecution of corruption, and accounting requirements (primarily civil). See OECD Convention, *supra* n 6, Articles 7, 8. Related OECD initiatives have focused on the elimination of tax deductibility of bribes and measures to combat bribery in officially supported export credits: see sources cited *supra* nn 9, 10.

At the other end of the spectrum, the UN Convention encompasses prevention and sanction – through civil, criminal and other means – of a wide range of practices, not just TNB, as well as establishing a new set of mechanisms for international asset recovery. The regional treaties are closer to the UN Convention in their scope (although only AU Convention, Article 16 includes provisions on asset recovery). The Council of Europe has an entire, separate treaty on civil liability.[49] All of the treaties, however, contain provisions for international cooperation in investigations and enforcement at the criminal level. The latter provisions are generally directly effective, while other provisions require implementation at the national level, within the parameters of the state party's domestic criminal justice system.

All of the treaties require states parties to criminalise TNB from the supply side (like the FCPA).[50] Other acts of corruption are subject to either mandatory or permissive criminalisation requirements, depending on the treaty. These include:

- domestic official bribery, both active and passive (UN, OAS, COE, AU, EU);
- private sector bribery (COE, UN, AU)[51];
- trading in influence (COE, UN, AU);
- money laundering based on corruption as a predicate offence (OECD, UN, COE);
- illicit enrichment of public officials (OAS, COE, UN, AU); and
- conspiracy, aiding and abetting (OAS, OECD, COE, UN, AU).[52]

49 Civil Law Convention on Corruption, opened for signature 4 November 1999, Europ TS No 174, available at www.conventions.coe.int/Treaty/EN/Treaties/Html/174.htm.

50 The UN Convention is the only treaty to address the demand, or passive, side of TNB, permitting but not requiring states parties to make the solicitation or acceptance of a bribe in a transnational context a criminal offence: see UN Convention, *supra* n 7, Article 16(2).

51 Although the EU Convention only addresses public corruption, other EU instruments focus on private-sector corruption. See, eg, Council Framework Decision 2003/568/JHA, OJ 2003 L 192/54-56.

52 The OAS Convention also includes among its 'acts of corruption', fraudulent use/concealment of property (which is broader but could include money laundering); improper acts or omissions by public officials; improper use of state information or property by public officials; and diversion of state property for personal benefit: see OAS Convention, *supra* n 7, Articles VI(1), XI. The UN Convention defines a wide range of acts of corruption in its Chapter 3, including embezzlement, misappropriation or other division of property by a public official (Article 17), abuse of functions (Article 19), concealment (Article 24), and obstruction of justice (Article 25). See UN Convention, *supra* n 7. The COE Convention requires the adoption of accounting offences: see COE Convention, *supra* n 7, Article 14. The AU Convention treats as 'acts of corruption' abuses of authority, division of property for personal benefit, and concealment of proceeds: see Convention, *supra* n 7, Article 4(c)–(d), (h).

In discussing the treaties' jurisdictional provisions, it should be borne in mind that in most of the treaties these provisions are not specifically tied to particular corruption offences but are general jurisdictional provisions. (The exception is the OECD Convention, which as indicated earlier is focused on TNB). Some jurisdictional provisions may be less apposite for particular offences than others. Moreover, some jurisdictional provisions in the treaties are mandatory, while others are permissive.

JURISDICTIONAL PROVISIONS OF THE SIX CONVENTIONS[53]

- *General approach.* Territoriality retains its primacy in these conventions as a jurisdictional basis of anti-corruption measures. Each of the conventions examined contains provisions for territorial jurisdiction[54] and some degree of jurisdiction based on nationality[55] over corruption offences. The approach of these treaties is parallel in the sense that all of them call for states parties to the convention in question to adopt measures in their national legislation that implement the standards set forth in the convention. Where the underlying convention language is mandatory ('shall'), these bases of jurisdiction must be adopted; in other cases it will be permissive ('may'). However, virtually all the treaties adopt a 'floor' approach, whereby a country may adopt more extensive bases of jurisdiction than those required by the treaty.
- *Territorial jurisdiction provisions.* Most of the treaties require that national legislation establish jurisdiction over bribery offences where the offence is committed 'in whole or in part' in its territory.[56] However, two of the treaties – the OAS Convention and the UN Convention – omit the 'or in part' language, requiring that jurisdiction be established when 'the offence is committed in' the territory of the state party.[57] Because

53 See Annex 1 (www.ibanet.org/images/downloads/etjtfbriberyannex1.pdf), for a chart setting out the jurisdictional provisions of these conventions.

54 See OECD Convention, *supra* n 6, Article 4(1); OAS Convention, *supra* n 7, Article V para 2; COE Convention, *supra* n 7, Article 17(1)(a); EU Convention, *supra* n 47, Article 7(1)(a); UN Convention, *supra* n 7, Article 42(1)(a); AU Convention, *supra* n 47, Article 13(1)(a).

55 OECD Convention, *supra* n 6, Article 4(2) (to the extent the state concerned has jurisdiction to prosecute its nationals for offences committed abroad); OAS Convention, *supra* n 7, Article V para 2 (permits, but does not mandate, states to establish nationality jurisdiction over corruption offences); COE Convention, *supra* n 7, Article 17(1)(b); EU Convention, *supra* n 47, Article 7(1)(b); UN Convention, *supra* n 7, Article 42(2)(a) (subject to the principles of the territorial sovereignty of other states); AU Convention, *supra* n 47, Article 13(1)(b).

56 OECD Convention, *supra* n 6, Article 4(1); CoE Convention, *supra* n 7, Article 17(1)(a); EU Convention, *supra* n 47, Article 7(1)(a); AU Convention, *supra* n 47, Article 13(1)(a).

57 OAS Convention, *supra* n 7, Article V para 1; UN Convention, *supra* n 7, Article 42(1)(a).

corruption offences are typically complex offences, with multiple elements, the latter may permit states parties to establish a narrow basis for territorial jurisdiction that is ill-suited to the prosecution of transnational bribery in particular. The former, in contrast, permits territorial jurisdiction to be established in a much wider array of circumstances, and will result in a higher incidence of concurrent jurisdiction (assuming conduct occurs in a variety of jurisdictions).

- *Nationality jurisdiction.* A horizontal examination of the treaty provisions reveals differences as well with regard to their approach to nationality jurisdiction. Three of the treaties require the establishment of jurisdiction over offences committed by their nationals.[58] One treaty requires it only of states parties that already exercise nationality jurisdiction.[59] Two of the treaties make it permissive but not mandatory to do so.[60] This variety may reflect the fact that nationality is a less well-established basis of jurisdiction in criminal law systems generally.[61] However, the availability of nationality jurisdiction in the context of prosecution for international business activities makes the likelihood of extraterritorial application virtually certain.
- *Other mandatory bases of jurisdiction.* Other mandatory bases of jurisdiction found in some of the conventions include: (1) where the offender is present in the territory of a country and extradition is refused on the basis of nationality;[62] (2) where the offence involves a public official of a country who is a national;[63] and (3) where the offence is committed on a vessel or aircraft of the country.[64] The third may be seen as an extension of territoriality, while the second could be an extension of nationality (either active or passive, depending on what 'involve' means), or protective.

No treaty contemplates that corruption offences give rise to universal jurisdiction as such, although mandatory jurisdiction based on the presence of the offender who is a non-national of the requested country could be considered a limited subclass of universality. Only the AU

58 COE Convention, *supra* n 7, Article 17 (1)(b); EU Convention, *supra* n 47, Article 7(1)(b); AU Convention, *supra* n 47, Article 13(1)(b).

59 OECD Convention, *supra* n 6, Article 4(2).

60 OAS Convention, *supra* n 7, Article V para 2; UN Convention, *supra* n 7, Article 42(2)(a).

61 Introduction.

62 OAS Convention, *supra* n 7, Article V(3); COE Convention, *supra* n 7, Article 17(3); UN Convention, *supra* n 7, Article 42(4) (not limited to nationals); AU Convention, *supra* n 47, Article 13(1)(c).

63 COE Convention, *supra* n 7, Article 17(1)(c); EU Convention, AU Convention, *supra* n 47, Article 7(1)(c).

64 UN Convention, *supra* n 7, Article 42(1)(b).

Convention provides for 'effects' jurisdiction,[65] although the other conventions do not preclude it. In keeping with the 'floor' approach taken by these treaties, and the fact that implementation occurs in the context of the existing national criminal justice systems, other jurisdictional bases may exist as well. No grounds are prohibited or considered excessive in these treaties. Indeed, the concern runs the other way. The OECD Convention, for example, expresses concern with the effectiveness of a country's basis for jurisdiction over TNB, requiring states parties to review this issue and, if they find it is not effective, to take remedial steps.[66]

Concurrent jurisdiction

Concurrent jurisdiction under the legal principles described by these conventions is possible, inter alia, from the overlap of supply and demand side legislation, from use of multiple bases of jurisdiction, especially territorial and nationality jurisdiction, and as a result of broad territorial nexus requirements, to name just the most common issues.

The conventions only deal with the issue of concurrent jurisdiction in a limited way, if at all. Where provisions adding this issue are found, they generally prescribe consultation or cooperation among the affected states to resolve any conflicts.[67] However, the language of the OECD and EU Conventions suggests that multiple prosecutions should be avoided and that a single jurisdiction should be identified as the 'most appropriate' jurisdiction where possible, while the UN Convention seems to accept multiple prosecutions, requiring coordination among states. None of these provisions establish any priorities or criteria for determining which states should have priority. Nor does international law in general address how issues of concurrent jurisdiction should be resolved; the limited number of other instruments in this area establish a framework and a requirement for cooperation and consultation, but their substantive

65 AU Convention, *supra* n 47, Article 13(1)(d) ('[W]hen the offence, although committed outside its jurisdiction affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.').

66 See OECD Convention, *supra* n 6, Article 4(4).

67 See OECD Convention, *supra* n 6, Article 4(3) (consultation with 'a view to determining the most appropriate jurisdiction for prosecution'); EU Convention, *supra* n 47, Article 9(2) (cooperation as to which states shall prosecute the offender 'with a view to centralising the prosecution in a single member state where possible'); UN Convention, *supra* n 7, Article 42(5) (consultation 'with a view to coordinating their actions'). The OAS Convention, the AU Convention, and the COE Convention do not contain provisions discussing concurrent jurisdiction.

prescriptions are very general.[68]

States parties to the OECD Convention are required to participate in a Working Group on Bribery, which meets periodically and carries out the Convention's self and mutual evaluation mechanism.[69] This working group provides a potential forum for discussion and resolution of issues of concurrent jurisdiction. Although a number of the other institutions sponsoring anti-corruption treaties also have monitoring mechanisms,[70] the OECD mechanism is of the greatest potential relevance, as it brings together 'supply side' countries which may most likely be in the position of having concurrent supply side jurisdiction over TNB.

EXTRADITION

Other provisions in the conventions that affect the conflict of jurisdiction and concurrent jurisdiction issues include the extradition provisions. All of the conventions contain directly-effective provisions designed to enhance cooperation among states parties in the areas of mutual legal assistance (MLA) and extradition.[71] These provisions are designed to promote enforcement. The MLA provisions oblige a requested state to assist a state that has commenced proceedings on the basis of its jurisdictional competence. And as mentioned earlier, under each of the conventions, reflecting the principle of *aut dedere aut judicare*, a state that

68 The UK Attorney-General recently published a document: 'Attorney-General, Guidance for Handling Criminal Cases With Concurrent Jurisdiction Between the United Kingdom and the United States of America, 2007', available at www.attorneygeneral.gov.uk/attachments/AG_Guidance_for_Handling_Criminal_Cases_and_the_USA.pdf. The European Union has been reviewing the issues associated with conflicts of jurisdiction and double jeopardy: see Green Paper on Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings, COM (2005) 696 final (23 December 2005). The OECD Working Group on Bribery has also begun to consider ways to strengthen international coordination and cooperation. See Mark Pieth & Juliette Lelieur, 'Strengthening International Coordination and Cooperation' (21 November 2007) (OECD Convention expert meeting document), available at www.oecd.org/dataoecd/18/56/39691044.pdf.

69 See OECD, Anti-Bribery Convention: Procedure of Self- and Mutual Evaluation – Country Monitoring Principles, available at www.oecd.org/document/12/0,3343,en_2649_34859_35692940_1_1_1_1,00.html.

70 The Council of Europe has a group called GRECO (Group of States Against Corruption); however, it is open to non-members of the COE Convention and thus functions quite differently. The OAS has established a monitoring mechanism for the OAS Convention. The UN is considering establishing a mechanism. The AU Convention calls for an advisory board on corruption within the African Union.

71 See OECD Convention, *supra* n 6, Articles 9(1), 10(1); OAS Convention, *supra* n 7, Articles XIV para 1, XIII para 2; COE Convention, *supra* n 7, Articles 26(1), 27(1); UN Convention, *supra* n 7, Articles 44, 46; AU Convention, *supra* n 47, Articles 15, 18; EU Convention, *supra* n 47, Articles 8, 9(1) (mutual legal assistance).

declines a request to extradite a person to another state that is a member of the applicable convention for corruption offences on the grounds that the person is its national must submit the case to the competent national authorities for the purpose of prosecution.[72] These provisions, of course, do not guarantee prosecution but they do imply a priority of nationality jurisdiction when coupled with physical presence over other bases of jurisdiction. Of course, extradition is only relevant for natural persons, not juridical persons such as companies.

DOUBLE JEOPARDY – *NE BIS IN IDEM*

The principle: The only anti-corruption conventions to contain double jeopardy (*ne bis in idem*) provisions are the EU and AU Conventions.[73] Under Article 10 of the EU Convention, an accused whose trial has been finally disposed of in a Member State cannot be prosecuted on the same set of facts in another Member State, provided that any penalty imposed has actually been enforced (or its ability to be enforced has expired). States can, however, by notification or declaration, opt out of this provision or limit it to cases based on particular bases of jurisdiction. The EU Convention has not entered into force (the entry into force is subject to ratification by all Member States). However, some countries, such as France, have ratified and adopted it (without having opted out of Article 10).

AU Convention Article 13(3) is simpler, and states only that a person shall not be tried twice for the same offence. This principle implies another rule for resolving conflicts of jurisdiction – 'first past the post'.

Corruption offences may, however, be covered by the double jeopardy provisions of more general treaties dealing with the criminal law in

72 See OECD Convention, *supra* n 6, Article 10(3); OAS Convention, *supra* n 7, Article XIII para 6; COE Convention, *supra* n 7, Article 27(5); EU Convention, *supra* n 47, Article 8(2); UN Convention, *supra* n 7, Article 44(11); AU Convention, *supra* n 47, Article 15(6). Note that not all of these provisions are limited to nationals; under the OAS and COE Conventions eg, the obligation to prosecute extends to situations where the refusal to extradite is based on the requested state's assertion of jurisdiction over the crime.

73 On 31 March 2003, the United Kingdom and the United States signed a treaty to make it easier to extradite people between the two countries. The treaty was ratified by the United Kingdom in the Extradition Act 2003: see Extradition Act 2003 c 41. It has recently been ratified by the United States, and entered into force 26 April 2007: US Dep't of State, Treaties in Force 294 (2007) available at www.state.gov/documents/organization/83046.pdf. Corruption offences fall within the Extradition Act and the treaty. However, under the Extradition Act, a person's extradition may be barred by reason of the rule against double jeopardy if he has previously been acquitted of the extradition offence by a UK court.

general. This is the case, for example, with Article 54 of the Schengen Convention, which is binding on all EU Member States. Article 54 of the Convention provides that:

> 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'[74]

Challenges in applying ne bis in idem *in the corruption context*: There are several hurdles to the effective application of the *ne bis in idem* principle to extraterritorial corruption offences. First, the contours of an international *ne bis in idem* rule have not been shaped and would have to be construed very broadly in order to be effective given the lack of harmonisation of states' anti-corruption laws. Additionally, as the principle applies only to criminal prosecutions, it could fail to apply to actions against corporations in states that do not recognise corporate criminal liability.

States and international organisations frequently exercise civil and administrative enforcement authority over persons subject to their jurisdiction. Such jurisdiction often flows from a company's availment of certain benefits offered by the state or other party. These may include, for example, the benefit of access to a securities exchange, financing benefits, eligibility for government contracts, tax benefits, or the like.[75] As a condition of eligibility for such benefits, states or other parties may adopt rules prohibiting certain practices considered corrupt in connection with the transactions or projects financed by the party or for which benefits are provided. A failure to comply with such rules may lead to loss of benefits eg, debarment, fines, or other penalties.

While such jurisdiction is not extraterritorial, in that it derives from the deliberate availment of the party subject to the rules of the benefits provided by the state or other party, the rules may – and in this context often do – affect conduct of foreign parties or conduct that occurs in other jurisdictions. Such jurisdiction may contribute to the problem of concurrent jurisdiction, directly or indirectly: directly in that it may lead to additional proceedings; indirectly in that such authorities may refer the

74 Schengen Convention, entered into force 28 September 1995, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF.

75 An international example of these are the World Bank's anti-corruption rules, a breach of which can give rise to debarment: see Guidelines: Procurement under IBRD Loans and IDA Credits, *supra* n 9.

case to other authorities for prosecution or other proceedings.[76]

Civil and administrative jurisdiction is also the only basis of jurisdiction in countries that do not recognise corporate criminal liability (see 'Corporate versus individual liability' below). In addition, it may be used residually. In Italy, for example, there are no provisions of law recognising the *ne bis in idem* principle in an international context as a general rule. However, Article 4 of Italian Law 231/2001 (on the administrative liability of corporations) states that Law 231 applies to offences committed in Italy and abroad provided that no prosecution against the corporation has been initiated in the state in which the relevant crime was committed.

The limits of functional equivalence: substantive disparities in corruption offences and their effects on concurrent jurisdiction

In addition to jurisdictional bases that give rise to extraterritorial authority, the substantive offences prescribed by these statutes are varied. Virtually all anti-corruption treaties discussed in the preceding section set threshold standards that states must meet (for mandatory requirements) in implementing legislation, but leave it to the state party to implement the provisions within the framework of their existing regime and to enact more stringent provisions if they see fit. In the OECD Convention context, this approach is termed 'functional equivalence'.[77] However, comparisons of national legislation reveal many differences in terms of who may be subject to enforcement jurisdiction (particularly, corporations versus individuals), elements of the offence, exceptions and defences, limitation periods, penalties, and the like. These differences may make it more likely that multiple proceedings will arise out of the same set of facts since a country will be less likely to defer to prosecution by another country whose laws may be substantially different. This section focuses on the TNB offence both horizontally and vertically – horizontally across TNB offences, principally under OECD Convention countries' legislation, and vertically in terms of a TNB versus domestic bribery offence. The particular issues on which the discussion will focus will be differences in

76 The World Bank, for example, refers cases to national criminal authorities of its Member States. There may be cross-referrals to tax, securities, criminal, or other national authorities, or regional authorities.

77 See OECD, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions para 2 (21 November 1997) [hereinafter 'OECD Convention Official Commentaries'], available at www.oecd.org/dataoecd/4/18/38028044.pdf. See also *The OECD Convention on Bribery: A Commentary* (Mark Pieth, Peter Cullen & Lucinda Low eds 2007) Ch 2, s III.2 [hereinafter 'OECD Commentary'].

the substantive offences, particularly the facilitating payments exception, corporate versus individual liability, and the relevance of local law.

Corporate versus individual liability

The anti-corruption treaties call for the criminalisation of bribery of foreign officials. However, they do not resolve the potential conflicts that can arise from disparate treatment of the liability of natural persons as opposed to legal persons such as corporations. Because many countries, especially those with a civil law tradition,[78] continue to follow the historical rule that legal persons cannot be criminally liable, the odds of a corporation being held criminally liable in one country but not another, and of a natural person being found liable in both countries, are high.[79]

This risk is mitigated for individuals by the ability of states to refuse extradition of their nationals or in the other circumstances discussed above. For obvious reasons, extradition does not work for juridical persons, however. With multiple jurisdictions potentially asserting jurisdiction over the same conduct, some of which recognise corporate criminal liability and some of which do not, the question arises of how to treat defendants, especially corporate defendants, fairly and equitably while effectively combating bribery and corruption.

In addition to the issue of fairness as between individual and corporate offenders, there is also room for differences to arise between jurisdictions in relation to the question of corporate culpability and deterrence of future misconduct by corporations. When the consequences of corporate misconduct are borne exclusively by individual officers, directors or managers, one might question whether the punishment provides sufficient deterrence at the institutional level in the context of corporate cultures that institutionally tolerate or even encourage misconduct that enhances economic returns. In these circumstances, one can easily envision conflicts arising between two or more countries that are able to assert jurisdiction over a transnational bribery matter, where one country

78 Even in countries where corporate liability for corruption does exist, eg, in the United Kingdom, it can be difficult to prove. Under UK law, the prosecution must prove that the company officer involved had the necessary status and authority to make his acts the acts of the company. Those involved in the offence must be acting 'as the company' and not merely as the company's servants or agents.

79 See William Meade Fletcher et al, *Fletcher Cyclopedia of the Law of Private Corporations* (perm ed, rev vol 2006) s 4942; Markus Wagner, 'Corporate Criminal Liability: National and International Responses' (1999) (unpublished background paper for the International Society for the Reform of Criminal Law, 13th International Conference July 1999). For a discussion of the effectiveness of corporate versus individual liability, see Eric Colvin, 'Corporate Personality and Criminal Liability' (1995) 6 *Crim LF* 1.

is of the view that the enforcement actions (or even the laws themselves) of another country are inadequate. Particularly where the allegedly inadequate enforcement is by a country that is also the home country of the offending corporation, there is a risk that the under-enforcement will be viewed as motivated by a preference for 'national champions'. Subsequent enforcement action may provoke a response to the home country objecting to the assertion of jurisdiction by a country with more limited ties to the offender and the subject matter of the offence. Although it is too early to determine whether, and in what manner, such conflicts are likely to manifest themselves, it can be expected that increasing levels of enforcement will give rise to increasing incidence of overlapping jurisdiction and differences of opinion as to the adequacy of enforcement by particular countries.

With a view to rectifying this disparity, the OECD Convention states that each signatory shall, in accordance with that party's legal principles, take the necessary measures to establish the liability of legal persons for bribery of foreign public officials.[80] The Convention does not require states parties to establish legal persons' criminal liability.[81] Rather, it calls for the establishment of commensurate civil sanctions.[82]

Fines are the most common form of corporate sanction.[83] Moreover, since a fine has the same financial impact on a corporation whether it is imposed as a result of criminal or civil process, it is arguable that the absence of corporate criminal liability in a particular jurisdiction should not be a cause for concern so long as the fines that can be imposed are equivalent to those that would be applicable in a comparable criminal context. That, however, raises the question of whether fine levels and the sentencing practices of specific countries are likely to secure an adequate penalty for transnational corruption. Some also question the effectiveness of corporate fines as a deterrent, particularly whether they are simply

80 OECD Convention, *supra* n 6, Article 2. See OECD Commentary, *supra* n 77.

81 See Günter Heine, 'Corporate Liability Rules in Civil Law Jurisdictions' (25 September 2000), available at www.coe.int/t/dg1/greco/evaluations/seminar2002/HeineOLIS.pdf.

82 See OECD Convention, *supra* n 6, Article 3(2) (calling 'effective, proportionate and dissuasive' non-criminal sanctions in the absence of corporate criminal liability). See OECD Commentary, *supra* n 77.

83 For example, Italian law on the administrative liability of corporations provides as sanctions, together with monetary fines, the seizure of the profits resulting from the offence, the publication of the decision and disqualifying sanctions (so-called blacklisting): see Legislative Decree no 231/2001, Article 9 (June 2001). In the case of the Siemens AG bribery scandal, Siemens was condemned to a one-year blacklisting with the Italian public authority as a precautionary measure: see Trib Milano, 27 April 2004 (Court of Milan decision of 27 April 2004), *Societa,* 2004, at p 1275.

treated by companies as a cost of doing business.[84] Japan's anti-bribery law, for example, limits fines to approximately US$2.44 million and the confiscation of funds up to the amount of bribes paid.[85] This means that Japanese companies can pay bribes with the knowledge that, as long as the gains realised by virtue of the payment of those bribes are greater than the aggregate of the bribe and US$2.44 million, those bribes will be economically profitable regardless of any risk of enforcement.[86] Although increasing fine levels may be one solution, other remedies to the problem of inadequate penalties are available. For example, suspension of some of a corporation's rights, prohibition of certain activities, and imposing governance controls on the corporation's organisational structure have all been proposed as potentially more effective deterrents than fines.[87] In the absence of agreed penalty standards in the anti-corruption context, there will continue to be differences of view and potential conflicts between enforcement jurisdictions with respect to the adequacy of both potential and actual penalties imposed by national regimes.

It is possible, however, to minimise conflicts and promote adequate enforcement coverage and deterrence through cooperation among enforcing agencies. Provided that the investigative and prosecutorial efforts of the enforcing jurisdictions are sufficiently coordinated, the risk of duplicative or inefficient allocation of investigative and defence resources, inadequate or excessive penalties, and duplicative or conflicting proceedings, may be reduced or even eliminated entirely. Indeed, greater cooperation among enforcing jurisdictions may even lead to efficiencies

84 See David L Heifetz, 'Japan's Implementation of the OECD Anti-Bribery Convention: Weaker and Less Effective Than the US Foreign Corrupt Practices Act' (2002) 11 *Pac Rim L & Pol'y J* 209, 224. Other countries with largely toothless penalties on legal persons include Austria, Mexico, the Slovak Republic, Spain and Sweden. See Christopher K Carlberg, 'A Truly Level Playing Field for International Business: Improving the OECD Convention on Combating Bribery Using Clear Standards' (2003) 26 *BC Int'l & Comp L Rev* 95, 107. For a discussion of the effectiveness of corporate criminal liability versus individual criminal liability, see Steven P Croley, 'Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness' (1996) 69 *S Cal L Rev* 1705.

85 See Heifetz, *supra* n 84, at 226.

86 *Ibid* at 229.

87 *Ibid*.

in the allocation of investigative resources and settlement negotiations.[88]

In the ongoing matter involving Siemens discussed in 'Introduction and scope' *supra*, there are multiple investigations in different jurisdictions, each with a slightly different focus. For example, since German law (Siemens' home country law) does not recognise corporate criminal liability, the criminal investigation in that country is aimed at individuals in management and others who may be held personally accountable for the company's alleged misconduct. However, there have been civil proceedings in Germany focused on the corporation, which have already resulted in the imposition of fines in excess of €200 million as discussed earlier. At least some of the investigations outside Germany, such as those in the United States and the World Bank, are concentrated on the alleged misconduct of the corporation.[89] Depending on how this matter unfolds, there is potential for mutually-enhancing precedents to be developed. Such an outcome, however, will depend on individual enforcement agencies choosing a policy of active cooperation and seeking out opportunities to coordinate activities. Although the various TNB conventions contain provisions that promote enforcement cooperation and mutual assistance (including extradition) at a general level, as discussed earlier, the practical challenges to pursuing cooperation are real and substantial.[90]

In part due to differences in the underlying systems of criminal justice in which national implementing laws must operate, anti-corruption conventions only go so far to prevent or address major differences

88 While coordination among enforcement agencies is potentially valuable in promoting the objective of combating corruption, the absence of agreed protocols and procedures to govern such cooperation also raises a risk of over-enforcement and the displacement of procedural rights. To the extent that enforcement authorities are able and inclined to leverage the potential exposure of defendants in certain jurisdictions to circumvent procedural or evidentiary burdens in other jurisdictions, there is a risk that the pursuit of more effective enforcement may actually undermine respect for the rule of law. International enforcement cooperation should not be used to circumvent fundamental rights in relation to matters such as evidentiary burdens and the right against self-incrimination.

89 The United States, as noted earlier, focuses on both corporate and individual liability; it is not known at the time of writing whether the United States is focused on individuals in this case.

90 See the discussion in Chapter 3: the Criminal Law Committee's report; Pieth & Lelieur, *supra* n 68 (regarding the evolution of enforcement cooperation in that field beginning with parochial concerns with the possibility of compromising national jurisdiction and independence and a reluctance to share information and cooperate, leading to ever greater information sharing and coordinated investigations involving multiple antitrust agencies around the world). At present, simultaneous execution of search warrants, 'dawn raids' and grand jury subpoenas is more the rule than the exception in international cartel investigations.

between the anti-bribery and anti-corruption laws of their signatories. The limited framework for enforcement coordination and cooperation means that enforcing jurisdictions will still be inclined to proceed on their own in many cases. As a result, there is a continuing risk that individuals and corporations can be prosecuted many times in different jurisdictions for the same alleged crimes, as well as a risk of disparate prosecution of individuals and corporations in some jurisdictions. In a world of uneven enforcement among jurisdictions, it is likely that the most vigorous prosecutorial jurisdictions (particularly those that recognise both corporate and individual criminal liability) will set the practical standard for anti-corruption enforcement. The United States, for example, combines a low jurisdictional threshold with a reputation as the most vigorous prosecutor. This, together with the fact that the US capital markets are widely used by foreign corporations and that it is also a major trading nation, means that the United States will continue to set the enforcement benchmark internationally, including the liability of both natural and legal persons.[91]

Relevance of local law and enforcement to the prosecution of TNB

Another important issue that affects concurrent or conflicting risks of liability is the relationship between local law and enforcement and transnational law and enforcement. For example, if compliance with local law provided a complete defence to the ability of a country to prosecute violations of transnational bribery law, the risk of multiple prosecutions would be lessened. However, this does not appear to be broadly the case. There are, nonetheless, some national laws that permit local law compliance to be an affirmative defence under the transnational bribery law. The US FCPA operates in this fashion, as do the laws of some other OECD Convention countries.[92]

The OECD Convention does not contain such a defence or exception. However, the official commentaries to the Convention explicitly permit such an exception: 'It is not an offence, however, if the advantage [alias, payment] was permitted or required by the written law or regulation of the foreign public official's country, including case law.'[93] The principle stated by the commentaries is in line with the purpose of the OECD

91 Geoffrey R Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 *Yale J Int'l L* 41, 41–42.

92 Canada has a similar provision in its OECD implementing legislation: see Corruption of Foreign Public Officials, SC 8 c 34 (1998) (Canada). Australia does too: Criminal Code 1995 Amendments s 70.3(1), 1999.

93 See OECD Convention Official Commentaries, *supra* n 77 at 13.

Convention, which is to preclude improper payments that induce foreign officials to violate their duties by abusing their official powers.[94] In this context, the fact that the country where the public official operates considers the payment/or advantage to be lawful excludes the violation of any duty on the part of the public official and, as a consequence, the illegitimacy of his conduct and of the conduct of the person who pays or gives the advantage.

The above-mentioned principle is also in line with the spirit of the OECD Convention where it considers the bribery as a phenomenon which 'distorts international competitive conditions' [95] and thus sanctions the conduct of the payer who induces the public official to misuse his official position in order to wrongfully direct business to the payer or provide him with undue benefits. Insofar as the payments or advantages are proper under the foreign official's legal system, the payer does not receive any unfair advantage *vis-à-vis* his competitors who can still theoretically compete on an equal basis and freely engage in the same conduct.

Thus, a local law defence or exception makes a good deal of policy sense. Even in the United States, however, where this defence has been codified since 1988, there have been no cases construing the scope of the defence and many questions remain unresolved. These include: what types of measures qualify as local law; whose law governs the determination of whether a measure qualifies as local law – the host country or the country whose transnational law may be applied; what the relationship is between written law and practice or enforcement policy; whether local law must mandate a particular action or whether it suffices for local law to permit it; and whether this analysis is affected by the legal system of the host country, especially whether it is a civil, or common, law system.

The issue may come to the fore in some countries in connection with the Oil-for-Food Programme scandal. For example, several Italian companies are at present under investigation for alleged international

94 Article 1(1) of the OECD Convention clearly states that the convention was intended to deter the conduct of the public officials who 'act or refrain from acting in relation to the performance of official duties': OECD Convention, *supra* n 6, Article 1(1).

95 See OECD Convention, *supra* n 6, pmbl.

bribery crimes in relation to that[96] scandal. Milanese prosecutors are investigating bribes allegedly paid to Iraqi officials in relation to the sale of humanitarian goods under the Oil-for-Food Programme. According to the prosecutors, the Italian companies under investigation overcharged by ten per cent of the contract price for the products, with the aim of diverting the surplus into private bank accounts and to other Iraqi regime officials. In this context, it is very likely that the local law affirmative defence will be asserted by the Italian companies, as it would appear from Iraqi government documents that these overcharges were imposed by the Iraqi government authorities with the power to issue orders upon every company participating in the Oil-for-Food Programme. All the proceedings are currently in the preliminary investigation phase, so the argument has not yet been judicially tested.

It is worth noting that the same arguments were supported favourably

96 The Oil-for-Food Programme was established by the UN through UN Security Council Resolution No 986 with the aim of allowing Iraq to sell oil on the market in exchange for food, medicine, and other humanitarian needs for Iraqi citizens without allowing Iraq to rebuild its military. The sanctions were discontinued in 2003 after the US invasion of Iraq. In 2004, the UN Security Council launched a full independent investigation into corruption in the Oil-for-Food Programme and appointed for this purpose an independent inquiry commission, the Volcker Commission. The definitive report prepared by the commission was presented to the Security Council on 7 September 2005. According to the report's findings, contracts to sell Iraqi humanitarian goods through the Oil-for-Food Programme were given to companies and individuals based on their willingness to kick back ten per cent of the contract profits to Iraqi officials.

in Australia by the findings of the Australian Cole Commission.[97] A lack of consistency on the part of countries with TNB laws in the extent to which compliance with local laws is a defence to a violation of the TNB law could contribute to the exercise of concurrent jurisdiction.

Facilitating payments (grand versus petty corruption)

TNB statutes also differ on the extent to which they focus on grand versus petty corruption.

Grand corruption usually involves a substantial amount of money and participation by high-level officials to obtain an advantage beyond what can be expected or a routine service. It can involve kickbacks, pay-offs to influence policies to benefit specific business interests, and commissions awarding large-scale public procurement contracts.[98] Grand corruption encompasses circumstances where influential people at the head of powerful financial-industrial groups buy off politicians to shape the

97 The Australian Cole Commission is a Royal Commission which was set up in 2005 by the Australian government to inquire into certain Australian companies in relation to the Oil-for-Food Programme, investigating whether actions, conducts or payments by Australian companies mentioned in the Volcker Report breached any federal, state or territory law. The Commission's five-volume report is available online: see Australian Cole Commission, Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme (2006), available at www.ag.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report. The Commission evidenced that: 'The fees were akin to a tariff imposed by the Iraqi government on all goods imported under the Oil-for-Food Programme. It is open to conclude from this that the payments were lawful, or at least not unlawful, as a matter of Iraqi law. The lawfulness of the impost, as a matter of Iraqi law, amounts to more than "custom" or "official tolerance", these being matters that must be disregarded in working out whether a benefit was not legitimately due. In these circumstances, the only way in which it could be asserted that the benefits were not legitimately due to the Iraqis was that they were contrary to United Nations sanctions. It is however, questionable whether payments that are not unlawful in a country as a matter of domestic law could be held to be "not legitimately due" solely by reason of actions taken by the United Nations.' *Ibid*, vol 5, app 26 at 347.

There have been several prosecutions of US companies for payments made under the Oil-for-Food Programme. However, these cases have focused on the accounting provisions of the FCPA, not its anti-bribery provisions, and consequently the local law affirmative defence has not been implicated: see eg, *SEC Files Settled Books and Records and Internal Controls Charges Against Akzo Nobel NV For Improper Payments to Iraq Under the UN Oil for Food Program – Company Agrees to Pay Over $2.9 Million*, Litig Rel No 20410 (20 December 2007); *SEC Files Settled Books and Records and Internal Controls Charges Against Chevron Corporation For Improper Payments to Iraq Under the UN Oil for Food Program – Company Agrees to Pay a Total of $30 Million*, Litig Rel No 20363 (14 November 2007).

98 See Narayan Manandhar, 'Corruption: Grand vs. Petty, eKantipur.com' (26 March 2006), available at www.kantipuronline.com/kolnews.php?&nid=69454.

country's legal and regulatory framework to their own advantage.[99]

Petty corruption involves smaller sums and typically more junior officials. Facilitation payments have also been called 'street-level' or 'low-level' corruption.[100] People pay officials to get essential public services, such as drinking water, electricity, telephone service, health services and education.[101] An example of petty corruption is the hapless owner of a small shop who faces a seemingly endless procession of visits by official inspectors (eg, fire, tax, health), each demanding a payment to overlook infractions or to stop additional visits.

The distinction between grand and petty corruption is often blurred. Petty corruption may be linked to grand corruption when corruption flows from the top to the bottom in government bureaucracy. Multiple isolated incidences of petty corruption may add up to dramatic consequences when viewing the total picture, and it is feasible that both types of corruption may be involved in facilitating particular illegal activities.[102]

Some TNB statutes, most notably the FCPA, distinguish between acts classified as grand corruption and those identified as 'facilitating payments'.[103] The end result is that grand corruption is a penal offence while facilitating payments are not.[104] Facilitating payments (as defined by the FCPA and similar statutes) are permissible payments that facilitate or expedite performance of a routine government action.[105] Some examples include: obtaining permits and licences; processing government papers, such as visas and work orders; providing phone, power and water services;

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99 An excellent illustration is that of Liu Zhihua, the ex-vice-mayor of Beijing and the Olympic official. Mr Zhihua, who oversaw the construction of the sporting venues that will be used for the Olympic games, was dismissed as the vice-mayor and is under investigation for allegedly accepting payment from developers and sexual favours in exchange for the assignment of contracts that would ordinarily be the subject of competitive bidding: see Jonathan Watts, 'Beijing Olympic official sacked over corruption', *The Guardian* (13 June 2006) available at www.guardian.co.uk/world/2006/jun/13/china.sport.

100 See Manandhar, *supra* n 98.

101 *Ibid.*

102 See eg, Jarmila Lajcakova, 'Violation of Human Rights Through State Tolerance of Street-Level Bribery: Case Study, Slovakia' (2003) 9 *Buff Hum Rts L Rev* 111 (discussing the negative impact of petty corruption in Slovakia).

103 See n 35, *supra.* Australia and Canada take a similar approach: Commonwealth Criminal Code (Australia), section 70.4; Corruption of Foreign Public Officials Act (Canada), SC 1998 c 34, section 3(4).

104 Although the FCPA anti-bribery provisions contain an exception for 'payments to secure routine governmental action', there is no corresponding exception under the accounting provisions of the statute. However, enforcement of these provisions is primarily civil and administrative rather than penal.

105 15 USC ss 78dd-1(b), 78dd-2(b), 78dd-3(b) (1988).

police protection; and scheduling inspections associated with contract performance.[106] The key distinction here is that 'grand' corruption – a bribe – does not exist where the government action or service would be provided in any event. Facilitating payments are distinguished from a 'bribe' under the FCPA not because they occur without any corrupt intent, but because they are not made to distort official decision making.

The recent Dow Chemical FCPA case in India illustrates that the cumulative effect of petty corruption can be significant. Dow Chemical's own investigation admitted that in order to expedite registration of its pesticides in India between 1996 and 2001, its senior management in India approved and made 'irregular payments' to government officials.[107] In essence, the government official would refuse or delay registration unless he received financial payments. Some of the payments were paid indirectly through Dow contractors who developed an improper payment practice by creating fictitious charges on their bills. Dow would pay the contractor per the bill and the contractor would pay money received from the fictitious charge to city officials. Most of the bribes were petty amounts, well under US$100, but the cumulative amount was US$87,400 over the five-year period covered by the investigation. Dow voluntarily reported its findings to the SEC and was fined US$325,000.[108]

A study presented at the 2000 Annual Bank Conference on Development Economics (ABCDE) revealed that even among transitional economies there can be a wide degree of variance in the amount of petty corruption.[109] The amount of petty corruption seems to be connected to a broad base of facilitating factors often built into the functioning government and social structure. These facilitating factors that foster corruption can be direct or indirect. Directly, petty corruption may be facilitated by rules and regulations, taxation regimes, procurement spending and the need to finance political party operations. On the other hand, factors such as the quality of the bureaucracy, the power that the individual citizen's voice has in society and politics, the level of public sector wages, rules of ethical behaviour, and lack of transparency of rules,

106 *Ibid.*

107 See Sonu Jain, 'Dow to US Watchdog: We Bribed Indian Officials for Clearances', Indian Express, 24 February 2007, available at www.indianexpress.com/story/24122.html.

108 *Ibid.*

109 Joel S Hellman, Geraint Jones & Daniel Kaufmann, 'Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition', World Bank Pol'y Research, Working Paper No 2444, 2000, available at www.worldbank.org/wbi/governance/pdf/seize_synth.pdf.

laws and processes seem to have an indirect effect.[110] These indirect factors can be as essential to acceptance of petty corruption as the direct factors, because they allow for the social acceptance of administrative corruption.

Given the inherent extraterritorial reach of TNB statutes, their drafters may consider it justified to focus only on grand corruption. It can be a legitimate policy decision for a country to concentrate its resources on preventing grand corruption on the part of persons subject to its jurisdiction, leaving it to the host country to address issues of petty corruption. Indeed, it is worth observing that most domestic anti-bribery laws do not contain exceptions for facilitating payments but treat such payments from both the supply and the demand side as improper.[111] Moreover, an increasing number of TNB laws do not contain exceptions for facilitating payments, even if such exceptions are permitted by the relevant international convention.[112]

This is a conflicts-of-law situation reflecting different policy decisions by different countries, both in horizontal and vertical relationships, regarding the scope of their anti-corruption prohibitions. Although such differences may create compliance challenges for companies, they may not raise problems of concurrent jurisdiction to the same extent as instances of grand corruption.

Other important issues

In addition to the areas just discussed, other aspects of the national enforcement regime may provide incentives for concurrent jurisdiction. These may include:

- material differences in the scope of an offence (for example, the FCPA applies to payments to political parties, party officials, and candidates for political office, as well as foreign officials, making it broader than other national TNB laws);
- other material differences in the elements of the offence, including standards of responsibility for the acts of third parties, principles of vicarious liability for corporations, and the like;

110 *Ibid.*

111 There are some more nuanced approaches, however: Article 12B of the Indonesian Corruption Law of 1999 shifts the burden of proof depending on the amount of the payment, making it more difficult to convict parties making small payments: see Law no 31/1999, *supra* n 29.

112 The OECD Convention eg, permits such exceptions: see OECD Convention Official Commentaries, *supra* n 77, no 9 at 13. Most of the OECD countries, however, do not have such an exception.

- material differences in limitation (prescription) periods; and
- material differences in penalty levels.

While a detailed discussion of these is beyond the scope of this Report, we will return to some of them in 'Approaches to resolving competing claims to jurisdiction' *infra*.

Enforcement policy

Cooperation among authorities of different jurisdictions constitutes a major challenge in the context of the fight against corruption in international business transactions. Although many countries have enacted TNB laws implementing internationally-agreed standards, the actual will of governments in pursuing this goal is tested when corruption cases must be investigated and prosecuted.

The independence, resources and professionalism of prosecutors and judges, as well as the checks and balances established by national constitutions and laws, are key elements to ensure the proper investigation and prosecution of official corruption. These institutional issues are equally important in developed and developing countries. Even in jurisdictions that have well-developed traditions of prosecutorial and judicial independence, there remain challenges with respect to corruption cases involving prominent domestic corporations and their executives. The challenges are particularly acute when prosecutions in either developed or developing countries involve high-ranking executives of multinational corporations and assistance is sought from the authorities of a home corporation's country. Similar issues can arise in cases involving the prosecution and extradition of former presidents or ministers accused of corruption offences.

The impact of domestic political considerations

One of the hallmarks of the rule of law is that political considerations should play no part in judicial determinations regarding official corruption. One would also expect that political (or at least partisan) considerations would not play any part in the exercise of prosecutorial discretion. Indeed, in the context of TNB, OECD Convention Article 5 expressly states that investigations and prosecutions 'shall not be influenced by… the identity of the natural or legal persons involved'.[113]

113 OECD Convention, *supra* n 6, Article 5. Presumably, the reference to the 'identity' of a natural person implicitly includes the issue of whether or not the person is a political or other public figure.

As a practical matter, however, national prosecutors enjoy a measure of prosecutorial discretion to pursue specific cases that is not displaced by Article 5. Article 5 merely states that to the extent that the discretion is exercised, it must not be influenced by improper considerations, including the fact that the alleged offender is a political figure or otherwise politically influential (factors flowing from the person's identity).

Nevertheless, domestic considerations, including political factors, do appear to influence enforcement activity in both developed and developing countries, as illustrated by the following examples. Perhaps not surprisingly, vigorous media coverage of a matter can also serve as a counterweight to political reluctance to enforce.

The Skanska affair in Argentina is a good example of a TNB matter that potentially illustrates the weakness of political will to enforce in both the developing and developed countries involved.[114] The matter involves the local branch of a Swedish multinational corporation that is alleged to have paid bribes to government officials in connection with the awarding of infrastructure contracts. In the course of a tax evasion investigation, an Argentinean judge focused on fake invoices issued to Skanska by several companies with the alleged purpose of covering up bribes paid to public officials. Skanska's internal auditor acknowledged in a report that several local managers had admitted having paid unlawful commissions. The investigations revealed payment of US$4.3 million, apparently in bribes, by seven Skanska executives, who were subsequently dismissed. Skanska then fired its Latin American CEO and closed its operations in Argentina, because the local branch 'did not comply with its standards of transparency worldwide'. The company's former finance director in Latin America contended that the company's senior management in Stockholm were aware of the unlawful payments. Before closing its Argentine operations, Skanska paid US$3.3 million in penalties and tax return readjustments to the tax authorities.

One of the spin-offs of the Skanska tax evasion affair was a complaint by two opposition members of Congress to the Federal Criminal Court requesting an investigation of public officials of the gas watchdog authority (*Ente Nacional Regulador del Gas* ('ENARGAS'), a trust established

114 The case is currently being prosecuted in the Argentinean First Instance Federal Criminal Courts. In the context of a government plan to improve the gas transport system in Argentina, the Ministry for Planning proposed that several private companies enter into a bidding process for the construction of gas pipelines, one in the northern area of the country and a second one in the Patagonia. This proposal was launched in 2005. The works were paid by a trust with funds contributed by companies of this industry. The government decides which projects to finance and administers the trust.

by the executive branch of the Argentine government, and the Ministry for Planning, to determine if the monies were actually paid to them. The judge hearing the tax evasion case obtained copies of telephone conversations between Skanska's internal auditor and its general manager in Argentina at the time the bribes were paid. These recorded conversations confirmed the involvement of the president of the trust and the ENARGAS main officer.

In May 2007, the same judge indicted the president of ENARGAS and the president of the trust, both of whom were appointed by the then-President of Argentina, Néstor Kirchner. On the same day, both officials were removed from their positions by executive order of the President.

Although it appears that the Argentine government has taken enforcement steps in this matter, its enforcement actions (including disciplinary measures against officials) have been purely reactive – responding to media and opposition pressure – rather than proactive. Indeed, the government appears to have taken steps to put pressure on the investigating judge. As the Skanska affair became a political problem for the government, the judge who unveiled the illegal activities was accused by the government of not fulfilling his duties. The government's allegations and request for impeachment were ultimately dismissed by the *Consejo de la Magistratura* (Council of the Judiciary).[115]

The Skanska affair also potentially sheds some light on domestic considerations in a developed host country. Despite the extensive and detailed information regarding the alleged activities of a Swedish company operating in Argentina, to date there does not appear to be any indication of enforcement activities by the Swedish government pursuant to its international obligations under the OECD Convention and other international commitments.

The role of the media and public opinion in promoting enforcement in spite of domestic political considerations that might otherwise have urged non-enforcement should not be underestimated. Media and public opinion clearly appear to have played an important role in the Skanska affair, as they did in a recent matter in Brazil where several senior executives of Cisco Systems Inc were arrested by Brazilian police

115 See 'Skanska CEO Says Argentine Scandal Smears Company Name', Reuters, 30 May 2007, available at www.reuters.com/article/ companyNewsAndPR/ idUSN3041141920070530; 'Company Statement, Skanska, Summary of Occurrences in Argentina', 25 May 2007, available at www.skanska.com/upload/News_Press/070525_ Summary_of_occurrences_in_Argentina. pdf.

in October 2007[116] in a tax fraud investigation. Cisco was accused of importing US$500 million worth of telecommunications and network equipment over five years without properly paying import duties. In addition to alleging that Cisco's Brazilian unit used companies based in tax havens to avoid paying import taxes in Brazil, the Brazilian investigation is producing evidence that Cisco donated US$250,000 to the government's political party in exchange for preferences in public bids.[117]

National security

Prosecution should not be hindered by a national security exception. The recent assertion of national security grounds by the UK government in the BAE case[118] to justify its non-pursuit of allegations of foreign bribery in connection with business of BAE in Saudi Arabia creates a dangerous loophole and an undesirable precedent. Indeed, given the inherent opaqueness of defence and security activities, it seems even more important that corrupt activities in these areas should be subject to the full weight of investigation and enforcement where officials stray from their legitimate mandates. The potential application of anti-corruption law in this area is an important check and balance in a context where some activity and decision making must, of necessity, be done in a non-public and non-transparent manner.

In the absence of agreed and clearly spelled-out criteria, a national security exception is a dangerous precedent since a determination of which, if any, interests would justify suspending the ordinary application of the rule of law would undermine or even annul much of the consensus that Member States were able to reach with the OECD Convention and other international anti-corruption conventions. In any event, this does not seem to be the intention of the drafters of the OECD Convention. Article 5 of the Convention clearly states that the investigation and prosecution of the bribery of a foreign public official shall not be influenced by considerations of national economic interest, the potential

116 See Romina Nicaretta & Vivek Shankar, 'Cisco Systems Says Authorities Raid Its Brazil Office (Update 2), Bloomberg, 16 October 2007, available at www.bloomberg.com/apps/news?pid=20601086&sid=a2Qv25gNZd6s&refer=latin_america.

117 Background information on this case can be found at Raymond Colitt, 'Two Swiss Banks Accused in Brazil Remittance Fraud', Reuters, 7 November 2007, available at www.reuters.com/article/bankingFinancial/idUSN0753708720071107.

118 David Robertson, 'US seeks to pursue BAE over claims company paid bribes', *The Times*, 2 May 2007, available at http://business.timesonline.co.uk/tol/business/industry_sectors/engineering/article1733903.ece; OECD Press Release, 'OECD to Conduct a Further Examination of UK Efforts Against Bribery' 14 March 2007), available at www.oecd.org/document/12/0,3343,en_2649_201185_38251148_1_1_1_1,00.html.

effect upon relations with another state or the identity of the natural or legal persons involved. The Convention does not make any reference to national security, nor do the official commentaries. Although the commentaries recognise prosecutorial discretion under national legal regimes, they emphasise that such discretion must be exercised for professional, not political, motives.[119]

In any case, the determination of what would be an issue of national security in the sphere of anti-bribery matters would have to follow objective criteria and should not be left to the subjective interpretation by the domestic authorities of a state.

Official immunities

Official immunity is an affirmative defence that protects government employees from personal liability with respect to conduct engaged in during the otherwise legitimate exercise of their authority. Immunity must clearly stay within the boundaries of (1) performance of discretionary duties; (2) the scope of the employee's authority; and (3) acts in good faith. To allow the application of a doctrine of official immunity in a situation where these criteria (particularly the second and third) do not prevail would undermine much of the rationale for anti-corruption laws in the first place.

The argument has been made that official immunity is a function of local cultural norms that must be respected. This argument undermines the very basis for international consensus on anti-corruption standards.

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119 See Susan Rose-Ackerman & Benjamin Billa, 'Treaties and National Security', NYU *J Int'l L & Pol* (forthcoming 2008) (arguing that there is no basis for an implicit exception). On 10 April 2008, the UK High Court of Justice, Queen's Bench Division Administrative Court issued a judgment holding that the director of the UK Serious Fraud Office (SFO) failed to exercise his legal responsibilities when he decided to terminate the investigation. While finding that the SFO had broad discretion, entitling it to take into account risk to life and national security in choosing whether to continue an investigation, the court held that the SFO must also take into account the integrity of the criminal justice system in exercising its discretion, and that its exercise of discretion in this regard was reviewable and ultimately improper. The court went on to find that the evidence showed that the SFO had submitted to a threat of the Saudi authorities without adequate efforts to determine that there was no reasonable alternative course of action. Regarding Article 5 of the OECD Convention, the court stated *obiter dicta* that national security considerations could be taken into account consistent with that Article only in circumstances satisfying the doctrine of necessity. It deferred to the OECD Working Group on Bribery to interpret Article 5 in regard to this issue. The decision is under appeal at this writing: *The Queen on the Application of Corner House Research and Campaign Against Arms Trade v The Director of the Serious Fraud Office* [2008] EWHC 704 (Admin).

The recent example of extradition proceedings involving the former president of Peru, Alberto Fujimori, provides a good illustration of the evolution of judicial attitudes towards official immunity. In 2000, Fujimori became engulfed in a bribery scandal and fled to Japan, where he remained in self-imposed exile to avoid being criminally charged and prosecuted. Japan repeatedly refused efforts by the Peruvian government to extradite him on charges that included directing death squads, illegal phone tapping and corruption.[120] Five years later, Fujimori travelled to Chile and, in a failed attempt to return to Peru to run in the 2006 presidential elections, was detained by the Chilean authorities. The Peruvian government formally requested his extradition to face two human rights charges and ten corruption charges. Although the petition was rejected in the first instance, the Supreme Court ultimately allowed the appeal and ordered Fujimori's extradition on human rights and corruption charges. Fujimori was extradited to Peru on 22 September 2007.

During the hearings in the extradition proceeding, Fujimori argued that in his capacity as former president of Peru he was immune from extradition. The Chilean Supreme Court decided that this immunity rule was only applicable to actions of diplomatic representatives with duties in foreign countries, criteria that Fujimori clearly did not satisfy.[121] In doing so, the Chilean Supreme Court appears to have recognised that a blanket acknowledgment of immunity for senior public officials is inconsistent with the rule of law.

Excessive grants of immunities may, moreover, prevent cases from being adjudicated in the most efficient manner. Although such immunities typically apply to public officials and therefore relate to the demand side of bribery, not the supply side, such immunities may encourage other countries to attempt to prosecute the conduct at issue. Abuses of immunities may also have other deleterious consequences, including indirectly encouraging corruption by creating a culture of non-accountability. Although addressing the problem of abuse of immunities is beyond the scope of this committee's work, we note it as a significant ancillary issue which current anti-corruption treaties do not address. Perceived abuses of immunities may create pressures for the expansion of jurisdictional authorities by countries other than the state recognising

120 Mr Fujimori also held dual (Peruvian and Japanese) citizenship, which provided an alternative basis for immunity from extradition.

121 The Chilean Supreme Court ultimately ordered Mr Fujimori's extradition on charges of embezzlement of public monies, telephone interceptions, kidnapping, aggravated homicide and bribery of public officials.

the immunity that may not in fact be in the best position to investigate or prosecute the conduct at issue.

Enforcement cooperation and enforcement policy

Divergent enforcement policies toward official corruption can lead to conflicts between countries whose interests are potentially implicated. For example, the host country whose officials are alleged to have been bribed, the briber's home country, and third countries that may have an interest either because their territory was used in conjunction with the bribery or because their companies were injured as a consequence of the bribery, can all have a significant interest in the conduct of enforcement proceedings. In circumstances where those interests do not align, differences can be played out as political and diplomatic conflicts or in the legal arena.

One way to minimise the occurrence of conflicts can be to establish more robust mechanisms for promoting enforcement cooperation and coordination. Thus, while the existing TNB treaties call for countries to provide mutual legal assistance and extradition in appropriate circumstances, they do not generally spell out in detail the modalities by which such enforcement cooperation is to take place. Moreover, commitments to mutual legal assistance in enforcement of TNB laws are not the same thing as commitments to enforcement coordination.

It is possible to argue that enforcement cooperation and coordination cannot occur in the absence of political will on the part of the governments involved. While that is clearly true to a considerable extent, the mere existence of robust mechanisms for enforcement cooperation and coordination can itself be a catalyst for prosecutorial independence, and may even lead to a situation where the international enforcement community becomes a 'stakeholder' whose views must also be given some weight by enforcement authorities in exercising their discretion. More robust mechanisms for enforcement cooperation can also lead to closer ties and cross-fertilisation between enforcement authorities, potentially reinforcing their commitment to act more vigorously in the fulfilment of their country's international obligations, and acting as a counterweight to contrary domestic political considerations and pressure from domestic stakeholders.

Finally, the elaboration of mechanisms for enforcement cooperation may also provide channels to mitigate potential conflicts that may arise between the interests of different jurisdictions. Such mechanisms might include a specialised forum to bring together anti-corruption officials

similar to the International Competition Network for competition authorities,[122] or the Financial Action Task Force in the anti-money laundering context.[123] They might also include non-binding 'modalities' to provide guidance as to the manner in which enforcement cooperation might take place and acknowledged channels for requests for assistance, both formal and informal. Official recognition of the enforcement authorities' shared responsibilities to promote collaboration and communication among one another can be expected to build channels of communication and better-aligned common interests that could prove valuable for mitigating conflicts in particular situations.

National enforcement of TNB laws is in an early stage of evolution in most countries. Although the OECD and OAS Conventions have just completed their first decade of existence, national prosecutions are few outside of the United States, which has had a TNB statute since the 1970s. As such, it is probably premature to expect the establishment of robust and binding international enforcement cooperation mechanisms in the near to medium term. Nevertheless, the preliminary steps taken by the various TNB treaties to encourage international cooperation are important. What is now required is a regular forum for enforcement officials to meet and begin sharing perspectives, experience, investigative and prosecutorial methodologies, and other practical information at the operational level.

At the present time, the only forum that regularly brings together officials from different countries in the TNB area is the OECD Working Group on Bribery.[124] This group includes representatives of the most important capital-exporting countries and is therefore an excellent forum to begin to establish the kind of cross-jurisdictional contacts discussed above. Moreover, the OECD has a long history of acting as a meeting-place for enforcement officials to discuss potential cooperation.

For example, in the competition/antitrust field, the OECD Competition Law and Policy Committee ('CLP Committee') was for many decades the only forum where competition officials from different

122 See 'International Competition Network Homepage', www.internationalcompetition-network.org/ (last visited 24 June 2008).

123 See 'Financial Action Task Force Homepage', www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html (last visited 24 June 2008).

124 There are other relevant bodies, not exclusively focused on the bribery area, that may provide a relevant forum. One such body is Eurojust, a new EU body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime: see 'Eurojust Homepage', http://eurojust.europa.eu (last visited 24 June 2008). Although it is an EU body, some non-EU countries have observer status.

jurisdictions could meet on a regular basis. In the early years from the 1960s through the 1980s, much of the 'cooperation' was from the standpoint of finding ways to mitigate the extraterritorial application of US antitrust laws on the important interests of other OECD members. Successive OECD recommendations in the competition field in 1967, 1973, 1979 and 1986 emphasised notification of investigations and other enforcement action to other countries when the subject matter of the investigation could impact the interests of those other countries. Although these early OECD recommendations also contained some limited exhortations to enforcement cooperation, the emphasis of the CLP Committee's work was on defensive and educational activities. Over the years, as other OECD member countries began to adopt and enforce competition laws more vigorously, the work of the CLP Committee began to shift increasingly toward more robust enforcement cooperation and information sharing. Even more importantly, national delegations at the CLP Committee were increasingly represented by competition enforcement officials from the home countries rather than primarily policy and foreign affairs officials. Indeed, today, the lead roles at the CLP Committee are clearly played by the heads of the national competition authorities and their deputies.

The shift in the CLP Committee's pro-enforcement orientation became more formally recognised with the adoption of the 1995 OECD Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade. This recommendation clearly put a far greater emphasis on enforcement cooperation and coordination than did its predecessors. This development has continued with the adoption of additional recommendations in this field in 1998, 2001 and 2005. The 1995 OECD Recommendation on Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations is focused exclusively on advancing enforcement interests.

The OECD experience in the competition law field potentially serves as a useful example for further development of cooperation in the TNB area. Since the OECD includes most of the capital-exporting countries who have made binding commitments to adopt TNB laws, it would be useful to promote ever closer and regular contacts among national enforcement officials at the OECD. With respect to the issue of overlapping jurisdiction and potential conflicts, the OECD may be the best available forum for developing a protocol to guide member countries in their enforcement activities in matters where two or more OECD members may have an interest. The evolution of successive OECD

recommendations in the competition law area may serve as a useful model for promoting continuous contacts, cooperation and information sharing both bilaterally (through a notification procedure) and multilaterally (through the regularisation of meetings among enforcement officials). Moreover, the OECD's extensive contacts with development countries through its Development Co-operation Directorate would provide a useful point of contact with those countries that are not yet members of the OECD or the OECD Convention.

Approaches to resolving competing claims to jurisdiction

As noted earlier, the OECD and EU Conventions exhort states parties to work toward a single prosecuting jurisdiction, while the UN Convention seeks to have states coordinate their actions but does not push them towards centralised prosecution. The OECD Convention, it should be recalled, only deals with the supply side of TNB and its membership is limited to capital-exporting countries. The EU Convention deals with both supply and demand issues in the context of states that are in a common market that have moved progressively towards significant harmonisation of their legal regimes. Even if the provisions of the OECD and EU Conventions are used to create a centralised prosecution, such a prosecution would not likely eliminate the possibility of other states having jurisdiction. Under the OECD Convention, the host state would likely also have jurisdiction, as could third states not party to the convention. Under the EU Convention, concurrent jurisdiction could be in the host state and third, non-EU, states as well. Both conventions' membership thus represent relatively limited, and arguably more homogeneous, states parties than, say, the parties to the UN Convention. The latter is a global convention that seeks to attract capital importers as well as exporters, developed and developing states, and states from a wide geographic array, and applies to both supply and demand side corruption.

In considering whether a system of priorities could usefully be devised to deal with situations of concurrent jurisdiction, it is important to take into account these various dimensions of anti-corruption laws: domestic versus transnational, supply versus demand-focused, and individual versus corporate responsibility. It is also important to take into account the diverse interests that states or other actors (such as IFIs) may have in the issue, including: integrity in the public sector, fair competition in the global market, the integrity of a state's own nationals doing business abroad, and the integrity and proper use of its funds (in the case of financing) or other facilities, including banking systems.

By the same token, both individual and natural persons have interests at stake, particularly the interest in not being subjected to multiple prosecutions for the same underlying conduct, and in avoiding multiple investigations, particularly by states or other actors whose interest may be relatively attenuated.

In developing its recommendations, the committee also considered it important to take into account that international standards are relatively recent, and many states, even on the capital-exporting side, have not committed fully to robust enforcement or are still developing their enforcement capacity.

Having considered all of these factors, the committee has developed the following conclusions and recommendations regarding how issues of concurrent jurisdiction should be approached:

Host state jurisdiction to be unaffected

Where corruption occurs in the context of foreign investment, trade or financing activity – ie, where it is transnational – there will be, as posited earlier, at least two states with jurisdiction over the matter: the state of the supply side of the transaction, and the state of the demand side of the transaction. This will be true whether the corruption occurs in the public or the private sector. In either event, the host state has significant interests that, in our view, the international system should recognise as providing a strong basis for exercising jurisdiction. This jurisdiction obviously extends to those on the demand side of the transactions – the officials or private sector actors who solicit or receive an improper payment or benefits. However, in our view, any effort to curb its ability to assert jurisdiction on the supply side would also be inappropriate as the state also has strong interests in ensuring that those foreign parties given access to its markets conduct themselves properly.

Thus, as long as no 'excessive' jurisdictional bases are asserted,[125] we treat host state jurisdiction as a given and focus primarily on the question of whether there should be priorities of jurisdiction among 'supply side' states. The host state could in its discretion decline to prosecute, especially if another state for jurisdictional or other reasons is in a better position to do so and that should be encouraged in the interest of minimising

125 The concept of 'excessive' jurisdiction exists in other areas of the law (eg, the EU Conventions on the Recognition and Enforcement of Judgments), but not in criminal law generally or in anti-corruption laws. Indeed, one of the most active areas of debate in criminal law involves the circumstances in which universal jurisdiction may be recognised. The term 'excessive' is used here to signify bases of jurisdiction that are not generally accepted in criminal law, and in anti-corruption treaties in particular.

multiple proceedings. We do believe, however, that where the laws of the host state authorise or permit the conduct in question, supply side states should not substitute their policy judgments for that of the host state. We also believe that any good-faith host state policy decision should provide a conclusive defence in any supply side proceedings.[126]

Determining priorities among supply side jurisdiction – how much deference should be given to the home state?

The committee debated the merits of giving primacy to the home country jurisdiction of the supply side actor, versus giving priority to the country that is first to prosecute. While recognising that the home country jurisdiction will generally have strong interests in prosecution, as well as potential efficiencies (location of witnesses, evidence etc), the committee members felt that it would be inappropriate at this stage of development of international anti-corruption standards to give too much deference to home state interests. The principal reason for this is the varying commitment and capacity of supply side states to enforcement. Any rule that rigidly prevented supply side states other than the home state to prosecute corrupt practices could undermine international standards, by permitting states not to prosecute or to prosecute inadequately.[127]

Having said that, the committee believes that non-home states with supply side jurisdiction should not be too quick to judge a home state prosecution as inadequate. Many members of the committee were troubled by the US decision to prosecute (especially criminally) in the *Statoil* case discussed earlier in this Report. While recognising the SEC's interest in enforcing uniform standards of conduct by companies, domestic or foreign, that enjoy the benefits of access to US capital markets, having the United States also criminally prosecute the company out of concerns for the (perceived) inadequacy of the home country prosecution suggests a lack of comity and regard for the other country's decision, notwithstanding the penalty credit US criminal authorities granted.

Some committee members also expressed concern that US prosecution

126 This flows from the principle of comity, an important concept in international law.

127 The BAE case, discussed in 'National security', *supra*, is an example in point, although perhaps not a strong one since many believe that the UK authorities have invoked an impermissible reason (national security) for non-prosecution. However, the UK authorities could just as readily have declined to prosecute for other, perhaps less questionable, reasons. In our view, where refusal is based on valid reasons – such as a lack of evidence – such a decision should be afforded as much deference as prosecution. An inability to prosecute, on the other hand, would not be respected as it is not voluntary.

could actually function over the longer term to undermine efforts to prosecute by other countries, either because they would perceive that the United States would prosecute in any event, or that they would be subjecting themselves to US criticism for inadequate efforts. Thus, although we do not favour a rule that would rigidly defer to home country prosecutions, we believe that it is important for countries not to be too quick to judge the adequacy of those prosecutions and that, where the home country has prosecuted, other countries should only institute their own criminal prosecutions in cases of very clear inadequacy based on a failure to comply with international standards.

First past the post

Another approach to determining supply-side jurisdictional priorities would be to give no deference to the home country of the offeror or payor of a bribe, and simply to give priority to the first country to prosecute a case to final judgment. This priority is effectively given if a double jeopardy rule (*ne bis in idem*) governs, since the operation of such a rule prevents other countries from prosecuting the same person for the same underlying conduct. This might give an incentive to prosecute, and to the extent prosecutions are linked to the presence of strong state interests and the availability of evidence and jurisdiction, would perhaps allocate jurisdiction in a way that is appropriate from a policy and efficiency standpoint.

Home countries might or might not be in a position to be first past the post, and such a rule might also be criticised for giving those countries with greater prosecutorial capacity the ability to foreclose the interests of a home country or another country with perhaps greater overall interests. On the other hand, such an approach may be more conducive to promoting a higher level of overall enforcement. Assuming (consistent with double jeopardy principles generally) foreclosure only arose upon a final disposition of the case, such a rule would not preclude multiple investigations or even prosecutions – in fact, it might lead to competition between countries to be first.

As discussed below, we think that a clear implication of some greater allocation of jurisdictional priorities is to oblige non-priority states in possession of witnesses, evidence, or targets, to provide the greatest possible cooperation in mutual legal assistance, extradition, and the like. Without derogating from the importance of these concepts, it does seem to us that in a 'first past the post' system, it would be important for countries conducting competing investigations or proceedings to be

obliged seriously to consider what actions they could take to minimise multiple burdens on parties under investigation for the same conduct in several jurisdictions and to stay their own proceedings once a proceeding commenced in a country with stronger interests or connections than their own. At the same time, we recognise that there may be a need for multiple investigations in TNB cases where evidence is often dispersed.

Multiple supply side actors

Where multiple actors are involved on the supply side, the issue of jurisdictional priorities becomes more complex. In that case, the interests of additional jurisdictions may come into play, eliminating the possibility of there being a single home country. Such actors may include parent companies, subsidiaries located in third countries, partners or members of consortia, agents, consultants or other third parties. In that case it will be important to try to minimise the number of investigations and for leadership in prosecution to come from the jurisdiction(s) with the strongest connections to the parties and the conduct at issue. To the extent other jurisdictions have connections or interests, there should be coordination between the authorities concerned to maximise efficiencies. Prosecutors should in effect consider where the 'centre of gravity' is for the supply side conduct and try to proceed accordingly.

The effect of a lack of harmonisation

There is a close interplay between the goal of reducing or eliminating the number of investigations and prosecutions and harmonisation of substantive standards. The greater the divergence in the latter, the more countries will have interests in pursuing prosecution, since other states' prosecutions may not address their interests. This makes it particularly important for there to be consistency as regards who may be targets of prosecution. For example, one must ensure that countries are aligned in relation to the potential for both corporate and individual liability, statutes of limitation, penalties, the major elements of an offence and defences to liability. While there may still be room for different policy choices (such as in the area of petty corruption), major divergences in the governing legal regimes will act as a disincentive to the most efficient focus of prosecutorial activity.

The absence of such harmonisation, if that is the case, would also need to be taken into account in devising any double jeopardy rule that might be developed for use in this context. The scope given to the term '*idem*'

could greatly help or, conversely, greatly hinder, the use of *ne bis in idem* in corruption cases. One of the major debates by scholars regarding *ne bis in idem* is whether *idem* applies only to the legal offences as defined in each state's penal code (which would thereby narrow the application due to the lack of harmonisation for many crimes) or the material facts that are the basis of the prosecution (which would allow for a broader application of the principle). If the latter definition were used, *ne bis in idem* could be applied to the prosecution of corruption-related offences, because the facts and circumstances giving rise to multiple prosecutions would not change, even though the laws are not exactly alike.

Another way to determine whether the corruption offences in two states are the same for *ne bis in idem* purposes is to look to provisions contained in the various anti-corruption treaties. For example, the 'functional equivalence' test from the OECD Convention could allow for a broader conception of *idem* to include any corruption-related offence that would satisfy the functional equivalence standard. In this way, the lack of harmonisation between states' laws would not hinder the *ne bis in idem* doctrine.

Implications for mutual legal assistance and extradition

Any movement towards a priority jurisdiction, whether grounded in principles of 'centre of gravity', 'first past the post' or home country interests, implies a need for other countries where evidence or targets may be located to make efforts to support the process of the primary jurisdiction. This may imply some strengthening of the current international rules for mutual legal assistance and extradition.

Implications for jurisdiction

As the jurisdictional rules in international anti-corruption conventions are broad, the committee sees no need for significant revision of these rules in order to move towards the system of priorities envisioned in this Report. It is critical that territorial jurisdiction standards of supply side actors' countries permit the assertion of jurisdiction when only part of the relevant conduct occurs in their territory, rather than all of it. Nationality jurisdiction may also be helpful in allowing the 'centre of gravity' supply side state to take the lead in prosecution. The challenges can be expected to arise when there are multiple supply side actors, as illustrated by the *Halliburton* case discussed earlier. In that case, it may not be easy, even with a broad definition of the actions that may support territorial

jurisdiction, for a single jurisdiction to be able to encompass all of the relevant actors. It may be that over time some broadening of jurisdiction will be appropriate to deal with these issues, but this should only occur in our view to support a centre of gravity, not to promote further instances of concurrent jurisdiction, and it should be subject to fundamental due process limitations.

Civil versus criminal proceedings

As we have seen, corporations face the greatest risks of multiple prosecutions. They cannot use extradition laws as a shield, as individuals can, and multinational companies by their very nature will have contacts in multiple jurisdictions all of which may satisfy the necessary jurisdictional nexus. In addition, because many countries still do not recognise corporate criminal liability, prosecutions may take the form of civil or administrative rather than criminal proceedings.

The *ne bis in idem* rule only applies to criminal prosecutions, not civil ones. Thus, civil or administrative enforcement of corruption laws would not be considered under this rule in deciding whether an individual was previously in jeopardy. While this is a problem natural persons would face, the bigger impact would be on corporations, due to the lack of criminal liability for corporations in many states. Even if the *ne bis in idem* rule were to apply to all corruption-related offences, corporations would likely not be able to benefit because many enforcement actions would be civil in nature. It could be proposed that, like the definition of *idem* proposed above, the rule of *ne bis in idem* should apply to all enforcement actions taken under an anti-corruption convention. Thus, a civil statute that is the 'functional equivalent' of prohibited behaviour under the OECD Convention would preclude any further enforcement actions against the corporation. Alternatively, the scope of *ne bis in idem* could be broadened from only criminal proceedings to any proceedings that are retributive in nature, even though the prosecuting state does not regard the action as criminal. In this manner, civil and administrative actions that are designed to punish extraterritorial corruption would be included in the *ne bis in idem* principle and therefore legal persons, such as corporations, would be covered by the principle.

International financial institutions

IFIs, as we have seen, contribute to the problem of multiple proceedings, both directly, by virtue of their own investigations and sanctions proceedings and indirectly, due to the referrals they make to authorities of their Member States. It is difficult to argue, however, that they should not be able to impose requirements on contractors and consultants as a condition of eligibility for participation in IFI-financed projects. Nor does it seem inappropriate for them to make referrals to their Member States. Should the Member States receive referrals, their handling of those referrals can be addressed by the same protocols as are being contemplated for multiple proceedings as discussed earlier.

Concerns are raised when the IFIs use their own investigations to secure evidence that may then be shared with Member States and used in criminal prosecutions which, if sought directly by the Member State, would be subject to due process and other protections in the prosecuting state; and when they conduct investigations at a time when criminal prosecutions are pending, instead of deferring such investigations until after the criminal investigation is concluded. In our view, the interests of fairness and efficiency suggest that the IFIs should not proceed with their investigations and sanctions proceedings until national criminal proceedings (or functionally equivalent civil proceedings) have been completed, at least at the level of first instance when the facts have been developed. This minimises problems of self-incrimination and due process in the IFI proceedings and ensures that the IFI proceedings can take advantage of the facts developed in the national proceeding.

Monitoring mechanisms

Monitoring mechanisms, especially within the OECD Working Group, provide a potential vehicle for addressing situations of concurrent jurisdiction, assuming the participants in such mechanism have the proper capacity and authority to address them. The issue with reliance solely on such mechanisms, however, is that they are not transparent or accessible to the affected persons or to civil society, so accountability for decision making on a consistent basis under established criteria will be missing unless the process is subject to defined criteria. It is to how that may be accomplished that we now turn.

Recommendations

Based on the foregoing, the committee recommends that a protocol be developed under the auspices of the OECD governing the exercise of supply side jurisdiction over transnational bribery by states parties to the OECD Convention. Key features of such a protocol would be as follows:

- It should have as its purpose guiding the implementation of Article 5 of the OECD Convention, providing criteria and processes for supply side countries to consult, with a view to determining the most appropriate jurisdiction for prosecution, while at the same time recognising that in an era of uneven enforcement, flexibility in the system needs to be maintained in order to promote prosecution.
- It should reinforce the goal of identifying a single jurisdiction as the most appropriate jurisdiction wherever possible.
- It should call for consultations at the outset of a matter, and continuing consultations periodically as the matter progresses, via the OECD Working Group and by appropriate authorities.
- It should recognise no principle of deference to home country interests in designating the most appropriate jurisdiction.
- It should elaborate criteria for identifying the most appropriate jurisdiction, including the location of evidence, the availability of prosecutorial resources, possession of jurisdiction (especially in cases involving multiple parties) over a substantial number of the relevant actors, or at a minimum the most key actors, the suitability of domestic legislation (in terms of issues such as corporate liability and statutes of limitation) to cover the conduct at issue, the availability of mutual legal assistance and extradition tools, and the like.
- It should cover both criminal proceedings and functionally equivalent civil proceedings.
- It should call on countries which are not identified as the most appropriate jurisdiction, but which nevertheless may possess relevant evidence or jurisdiction, to cooperate closely with the jurisdiction identified as most appropriate to ensure maximum fairness and efficiency in investigations and prosecution.
- The results of such consultations should be publicly released, subject to redaction of identifying information, so that third parties understand the criteria that are being applied.
- It should include a double jeopardy component with the '*idem*' being based on conduct prosecuted under functionally equivalent legislation, triggered by final action in the most appropriate jurisdiction.

The OECD should develop relationships with other 'supply side' jurisdictions that may not be part of the OECD Convention and encourage them to agree to similar approaches to situations of concurrent jurisdiction. Likewise, the OECD should work with the World Bank and 'demand side' countries towards an approach that will minimise multiple proceedings and ensure that the procedural and constitutional rights of accused firms are protected, as detailed in 'Approaches to resolving competing claims to jurisdiction', *supra*. Ultimately, additional protocols may need to be developed for other anti-corruption treaties. Given the OECD Convention's supply side membership and focus, and its attention to the issue of concurrent jurisdiction in Article 5, it offers the best starting point for further development of the necessary instruments to address the issues discussed in this Report.

CHAPTER 5

Securities

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Introduction and theoretical overview

Introduction

Cross-border regulation of the global securities markets is at an historic crossroads. There is a profound consensus among regulators, academics, financial institutions and others that the regulatory framework of the international financial markets needs to undergo a fundamental change to address the diminished influence of national and regional securities regulators over cross-border financial activities. Regulators in the United States and the European Union are formulating a variety of proposals concerning how to govern internationally mobile financial intermediaries, issuers and investors.[1] While it is still less clear what changes should be made and in what order, all market participants agree that as key structural policy decisions today will have a major impact on the growth and development of the global securities market, it is critically important that the regulators 'get it right'. It is also clear, indeed clearer now than a year ago, that the regulation of the securities offering markets, including the regulation of broker-dealers, banks and other financial institutions, is no longer a national affair. Regulatory lapses in one major financial centre impact other financial centres as well as the underlying economies

1 See US Dep't of the Treas, 'Blueprint for a Modernized Financial Regulatory Structure (2008)', available at www.treas.gov/press/releases/reports/Blueprint.pdf; Henry M Paulson, Jr, 'US Dep't of the Treas, Policy Statement on Financial Market Developments (2008)', available at www.ustreas.gov/press/releases/reports/pwgpolicystatemktturmoil_03122008.pdf; Press Release, US Dep't of the Treas, 'Remarks by Secretary Henry M Paulson, Jr on Blueprint for Regulatory Reform (31 March 2008), available at www.ustreas.gov/press/releases/hp897.htm; SEC Press Release, 'SEC Announces Next Steps for Implementation of Mutual Recognition Concept' (24 March 2008), available at www.sec.gov/news/press/2008/2008-49.htm; SEC Press Release, 'Statement of the European Commission and the U.S. Securities and Exchange Commission on Mutual Recognition in Securities Markets' (1 February 2008), available at www.sec.gov/news/press/2008/2008-9.htm; Comm. of European Sec Regulators [CESR], 'A Proposed Evolution of E.U. Securities Supervision Beyond 2007' (2007), available at www.cesr.E.U./; CESR, 2006 'Report on Supervisory Convergence in the Field of Securities Markets (2006)', available at www.cesr.E.U./.

in both the developed and the developing world.[2] In addition, the potential for costs savings is huge. Even limited progress could lead to major costs savings for investors and financial institutions. For example, a recent Deutsche Bank study concludes that integration of the EU-US trading markets could lead to savings of US$48 billion a year in trading alone.[3] This report focuses on a limited part of that broader debate, namely, on the extraterritorial impact of the securities offering or capital formation process.[4] As a result, our recommendations are targeted almost entirely at improvements in that area. We note, however, that during the time that we have worked on this report, the need for international coordination in financial regulation has moved from academic journals and legal conferences to the front pages of the world's newspapers.

The Securities Law Committee of the LPD Task Force on Extraterritorial Jurisdiction is composed of a diverse group of capital markets lawyers at law firms and financial intermediaries and academics who practise, write and conduct research in the securities offerings area.[5] Many of us work daily in cross-border securities transactions with rules and regulations that were designed for a previous era and that no longer function in today's realities. We are deeply encouraged that a broad range of private and public actors have become actively engaged in working

2 See Fin Stability Forum [FSF], 'Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (2008)', available at www.fsforum.org/publications/FSF_Report_to_G7_11_April.pdf; Senior Supervisors Group, 'Observations on Risk Management Practices during the Recent Market Turbulence (2008)', available at www.newyorkfed.org/newsevents/news/banking/2008/SSG_Risk_Mgt_doc_final.pdf.

3 Deutsche Bank Research, 'EU-US Financial Market Integration – A Work in Progress' (4 June 2008), at 8.

4 The committee has also not studied the impact of the global derivatives markets, including credit default swaps, nor the role of ratings agencies.

5 The committee's members are listed *supra*. The committee has also benefited from the comments and suggestions of certain 'Friends of the Committee' and Officers of the Securities Law Committee, whom we acknowledge *supra*. Any errors are our own.

to address this issue.[6] We also acknowledge the important work that academics, financial institutions and trade associations have contributed, and continue to contribute, in this general area.[7]

This report sets forth the committee's recommendations for the principles that ought to guide the reform of international securities offering regulation.[8]

National capital markets have changed dramatically in recent years, shifting rapidly from purely domestically based transactions into an international marketplace. Until very recently, fragmented national regulation of who could sell or trade debt, equity and other financial instruments to whom and under what conditions was adequate. As capital became more global and investors and financial intermediaries began to invest and do business more regularly across borders, the unilateral extraterritorial application of national securities regulation became more of a hindrance to the development of the global market for securities offerings. The extraterritorial application of national securities regulation was justified by the view that any conduct by a foreign entity that took

6 See eg, European Parliament Final Report on Fin Serv Pol'y, Eur Parl Doc A6-0248/2007 (27 June 2007); Letter from David Schraa, Inst of Int'l Fin [IIF] & David Strongin, Sec Indus and Fin Mkt Ass'n [SIFMA], to Michel Prada, Chairman, Autorité des Marchés Financiers [AMF] & the Technical Committee of the International Organisation of Securities Commissions [IOSCO] (15 October 2007); Letter from Jukka Ruuska, President, Fed'n of European Sec Exch [FESE], to Christopher Cox, Chairman, US Sec & Exch Comm'n [SEC] (17 August 2007), available at www.fese.be/en/?inc=news; Communique, 32d Annual Conference of the International Organisation of Securities Commissions, Mumbai (12 April 2007), available at www.fsa.go.jp/sesc/news/c_2007/2007/20070424.pdf. For examples of the SEC's recent interest in exploring mutual recognition, see Christopher Cox, Chairman, SEC, 'Address to the Securities Traders Association 11th Annual Washing Conference' (9 May 2007); Ethiopis Tafara & Robert J Peterson, 'A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework' (2007) 48 *Harv Int'l LJ* 31; SEC Roundtable Discussion on Mutual Recognition (12 June 2007), unofficial transcript available at www.sec.gov/news/openmeetings/2007/openmtg_trans061207.pdf; Edward F Greene, 'Beyond Borders: Time to Tear Down the Barriers to Global Investing' (2007) 48 *Harv Int'l LJ* 85; Howell E Jackson, 'A System of Selective Substitute Compliance' (2007) *Harv Int'l LJ* 105, available at www.harvardilj.org/attach.php?id=77; George W Madison & Stewart P Greene, 'TIAA-CREFF Response to A Blueprint for Cross-Border Access to U.S. Investors: A New International Framework' (2007) 48 *Harv Int'l LJ* 99. For examples of the US Treasury Department's interest in mutual recognition, see 'Request for Comments, Review by the Treasury Department of the Regulatory Structure Associated with Financial Institutions' (17 October 2007) 72 Fed Reg 58,939; Press Release, US Dep't of Treas, 'Paulson Announces Next Steps to Bolster US Markets' Global Competitiveness' (27 June 2007), available at www.ustreas.gov/press/releases/hp476.htm.

7 In this respect, the committee acknowledges the work of SIFMA, the Institute of International Finance [IIF], Morgan Stanley and Goldman Sachs, all of whom are preparing papers in this area.

8 See 'Recommendations', *infra*, for the committee's recommendations.

place in the territory of a particular country or had an effect on the country's market should be regulated by that country.[9] Likewise it was thought that an issuer or financial intermediary that conducted some of its activities in a host country or directed selling efforts to investors and customers located in the host country had implicitly consented to being subject to all of the rules and regulations of that country.

National regulators in the developed economies responded to early concerns about extraterritorial application of securities offering regulation by providing safe harbours and exemptions to national rules to accommodate various foreign transactions or sophisticated actors active in the international markets. While initially conceived as limited exceptions to national law, these safe harbours and exemptions quickly became the norm for global capital market offerings. The demand for these transactions continued to accelerate with the creation of a pan-European equity market, the rapid development of the emerging economies in Asia, availability of lower-cost and faster information technology systems and growing investor appetite for foreign investment opportunities. Today, the regulatory framework consisting of generally independent national regulatory systems no longer matches the reality of global capital flows as transactions involving foreign issuers, financial intermediaries and investors become more the norm than the exception.[10]

What had been purely national regulation has, by accident, lack of political will[11] or even intention, become unilaterally extraterritorial, in many cases in a manner that does not achieve policy goals and results in

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9 The US courts takes a broad view of their possible jurisdiction: see, eg, *Leasco Data Processing Equipment Corp v Maxwell*, 468 F 2d 1326, 1335 (2d Cir 1972) (stating that the court could 'see no reason why, for purposes of jurisdiction to impose a rule, making telephone calls and sending mail to the United States should not be deemed to constitute conduct within it'). Under the principle of 'jurisdictional means' the required nexus, even between the United States and foreign jurisdictions, can be established simply by showing that the entity sent a fax, made a phone call, or otherwise used the mails in the United States: see, eg, *Continental Grain (Australia) Pty, Ltd v Pacific Oilseeds, Inc*, 592 F 2d 409, 420 (8th Cir 1979) (finding subject matter jurisdiction where '[d]efendants' conduct in the United States consisted of letters and telephone calls').

10 See Ranald C Mitchie, 'The Global Securities Market: A History' (2006). The movement towards international regulation began in Basel in 1987, when tentative first steps were taken to regulate bank capital adequacy: see Basel Accord (1988).

11 While we might expect that reforms of controversial and complex areas of the law, such as class actions, would encounter considerable resistance and inertia in the political process, this delay is less understandable in the arena of archaic, administrative rules such as mode of delivery requirements: 7 CFR s 240, Rule 14d-9. For example, the US requirement that certain documents be physically delivered or mailed in a takeover context imposes costs on companies, and hence investors, without advancing any clear policy aim: *ibid.*

inefficient regulation or regulation that distorts incentives.[12] And yet, in the securities area, where capital is global, to conceptualise traditional unilateral extraterritoriality as a governing concept for the future or even as a problem that might be solved by its elimination at the margins (as some regulators have attempted to do through limited safe harbours and exemptions) is insufficient given the need to cope with cross-border investors, companies, financial intermediaries and capital flows on a cross-border and multinational basis. As a result, the future of securities regulation is one where the unilateral extraterritorial impact, whether accidental or intentional, is in the process of changing into a mixture of standardisation, exemptions and agreed unilateral or multinational recognition. Thus, in many cases, the task of reform over the next few years will be twofold: there will be both an internal domestic task as well as an international one.

If we assume that the goals of effective regulation of securities offerings are to balance investor protection against the benefits of capital formation, then the costs of uncertain and outmoded regulation can be seen in a number of ways.[13] Retail investors are guided by a desire to invest in a diversified portfolio of securities, yet most national systems make it burdensome and costly for retail investors to invest in foreign securities.[14] Issuers face additional costs in complying with different rules in different jurisdictions, which sometimes conflict with each other.[15] Global financial intermediaries cope with a range of contrasting regulations that serve no coherent policy impact, with the consequent problems creating a burden on management time, incoherent efforts to promote similar policies leading to different demands on firms, lack of market clarity, increased difficulty of enforcement cooperation, the creation of compliance traps, the need to multiply systems, and confusion of personnel and danger of inadvertent violations.

The current challenge for national securities regulators and national legislators is how to reshape and modernise their national securities

12 By 'extraterritorial' in this context, we mean a unilateral capital markets rule or regulation that has an unbalanced and inappropriate impact on a capital market operation, issuer or intermediary that is primarily located and doing business in another country. Some extraterritorial impacts are accidental while others are intentional.

13 See IIF, 'Proposal for a Strategic Dialogue on Effective Regulation' (2006) [hereinafter Proposal For A Strategic Dialogue], available at www.iif.com/download.php?id=syfGSVG0giw=.

14 See Greene, *supra* n 6.

15 A recent Deutsche Bank study estimates that total cost savings in securities trading of more than US$48 billion per year could be achieved by integrating the US-EU securities markets. Deutsche Bank Research, 'EU-US Financial Market Integration – A Work in Progress' (4 June 2008).

regulatory systems, which were conceived at a time when markets were primarily local, to be helpful to investors (both retail and institutional) and regulated actors already functioning on a global level. Moreover, this challenge occurs at a time when there is fierce competition among both established and up-and-coming global financial centres in the United States, Europe, Asia and the Middle East.

Given the intense debate over the last year, it is hard to believe that, until relatively recently very little attention had been paid to the development of securities regulation on an international level or the relationships between national regulators. The only intergovernmental body to take up this task, the International Organisation of Securities Commissions ('IOSCO') has, until very recently, toiled away in relative obscurity. Happily, more and more actors are recognising the importance of the work done by IOSCO and others such as the Committee of European Securities Regulators ('CESR').[16]

The European Union was the first major developed region to grapple with these issues as it moved, via its Financial Services Action Plan, into the still incomplete creation of an EU-wide system of securities regulation and enforcement in order to create a 'single market'. But even in the European Union, where the removal of barriers to cross-border activity was the focus of intergovernmental discussion in the early 1970s, the core concepts of an EU-wide securities regulatory system have only recently gained traction and begun to be implemented. Indeed, even today an EU-wide enforcement authority remains politically fraught, and enforcement as well as interpretive power remains at the national level.

Until very recently, US lawmakers had been indifferent to multinational regulation of securities markets, and the US Securities and Exchange Commission ('SEC') has been only slightly interested in this issue, primarily at the level of enforcement and investor protection. However, the recent spectre of a loss of US capital markets competitiveness and the lessons learned from the inward-looking Sarbanes-Oxley Act have

16 See Christopher Cox, Chairman, SEC, Address to the IOSCO 33rd Annual Conference (28 May 2008), available at www.sec.gov/news/speech/2008/spch052808cc.htm; Michel Prada, Chairman, AMF, Address to the IOSCO 33rd Annual Conference (28 May 2008), available at www.amf-france.org/documents/general/8316_1.pdf.

created an entirely new atmosphere.[17] For the first time, the United States has expressed a serious willingness to explore alternatives to a nationally based securities regulatory regime in favour of greater coordination with foreign regulators and even acceptance of certain foreign rules and standards.

At the same time, the emerging markets of Asia, such as China and India, are seeing the growth of their own capital markets and are having to build securities regulatory regimes that deal with both the emerging nature of their internal securities markets and the fact that their national markets are developing at a time when global securities markets are already international in scope.

Convergence or standardisation, exemption and recognition

The crucial changes in international securities regulation, interpretation and enforcement will not come about through the abolition of existing national regulations and the adoption of a comprehensive set of international regulations. Rather, we believe they should evolve by synchronising the existing national and regional regulations. This synchronisation could be achieved by the use of a variety of different approaches, namely:

- *Convergence or standardisation*: developing common approaches or international standards to reduce incremental costs of compliance with multiple national rules;
- *Exemption*: providing exemptions from national rules to foreign firms or issuers where imposing those rules would be disproportionately burdensome;
- *Recognition*: accepting compliance by a foreign firm or issuer with its home country standards through unilateral or mutual recognition.

This report considers these three different approaches and makes preliminary recommendations for the areas where priority attention is needed.

Mutual recognition, in combination with regulatory harmonisation of

17 City of New York, Office of the Mayor & The US Senate, 'Sustaining New York's and the US's Global Financial Services Leadership' (2007), available at www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf; The Fin Servs Roundtable, 'Blueprint for US Financial Competitiveness' (2007), available at www.fsround.org/cec/pdfs/FINALCompetitivenessReport.pdf; Comm'n on the Regulation of the US Capital Mkts in the 21st Century, 'Report and Recommendations (2007)' [hereinafter Regulation Report], available at www.capitalmarketscommission.com/portal/capmarkets/default.htm; Fin Servs Forum 2007, 'Global Capital Markets Survey (2007)', available at www.financialservicesforum.org.

minimum standards and home-country control and supervision, is the basis of the EU 'passport'. Under the EU passport, cross-border securities market activity takes place on the basis of approvals and authorisations obtained in the home Member State, while a host Member State can only impose limited (if any) additional requirements. With the passport, a regulated entity can provide services or conduct activities across the European Union by meeting only a single country's regulatory requirements.

Other than with the Canadian regulatory agencies, mutual or any other type of recognition[18] was not on the SEC regulatory agenda despite years of lobbying in Washington by various EU officials as recently as two years ago. Since April 2007, however, and as part of a larger US agenda of regulatory modernisation caused by a number of factors discussed above, mutual recognition has suddenly become a topic high on the discussion agenda of US regulatory and administration officials.[19]

Like many concepts that suddenly come into wide use among those who work in an area, mutual recognition and harmonisation mean different things to different people who use the terms. To some in the European Union, mutual recognition implies that the United States should, at the same time, mutually recognise all EU Member States' securities regulations.[20] To others, there is a problem with such a blanket mutual recognition, especially since the EU system is only partly built. Indeed, the most seriously considered proposals in the United States to date have been limited to trading screens of foreign exchanges or to a mutual recognition that starts with only the largest and most liquid global companies.[21] There are also those who viewed mutual recognition as a nice but distant goal at the outset of the dialogue on international convergence and harmonisation and initially took the view that, in light

18 Mutual recognition is also sometimes referred to as 'substituted compliance', although this phrase can carry different meanings: see Tafara & Peterson, *supra* n 6; Jackson, *supra* n 6; ('mini-mutual recognition'); Margaret E Tahyar, 'A Brave New World' (2007) *Intl Fin L Rev.*

19 See *supra* n 6; see also 'Framework for Advancing Transatlantic Economic Integration between the European Union and the United States of America, US–EU' (30 April 2007), available at www.whitehouse.gov/news/releases/2007/04/20070430-4.html; G7 Finance Ministers, Statement at G8 Summit 2007 (10 February 2007), available at www.g7.utoronto.ca/finance/fm070210.pdf; Cox, *supra* n 6; Tahyar, *supra* n 17.

20 See Letter from Jukka Ruuska to Christopher Cox, *supra* n 6.

21 See Joint Press Release, SEC and Canadian Sec Adm'rs, 'Schedule Announced for Completion of US–Canadian Mutual Recognition Process Agreement' (29 May 2008), available at www.sec.gov/news/press/2008/2008-98.htm; SEC Press Release, 'SEC Chairman Cox, Prime Minister Rudd Meet Amid US–Australia Mutual Recognition Talks' (29 March 2008), available at www.sec.gov/news/press/2008/2008-52.htm.

of the consideration that mutual recognition was unattainable at the time, 'informal mutual recognition' should be sought, essentially meaning that regulators would do what they could to recognise and avoid duplication of other regulators' efforts without the formal superstructure of accords or treaties.[22]

At the same time, there are a number of efforts at harmonisation of capital markets rules outside of the European Union, including IOSCO's work on the harmonisation of disclosure and principles for regulators. Of these efforts, the best known and the most critical has been the effort to harmonise accounting principles in accordance with International Financial Reporting Standards ('IFRS'). The history and early application of the convergence of international accounting standards suggest that international harmonisation is a difficult process even when it is successful and widely applied. That said, the SEC's recent decision to eliminate the US Generally Accepted Accounting Principles ('GAAP') reconciliation requirement for non-US companies that list in the United States, applying IFRS as issued by the International Accounting Standards Board ('IASB') is, finally, an important step in the right direction.[23] More recently, a group of securities industry trade associations has written to IOSCO suggesting as a critical path item the harmonisation of a number of back office compliance standards faced by international financial intermediaries in areas where the high cost of different rules does not justify the policy goals of regulators. For many years, IOSCO has been working on the harmonisation of disclosure and prohibitions on insider trading, as well as other principles for regulators.[24] Critiques of harmonisation note that its implementation is difficult and that, drawing on the experience of converging accounting standards, the time it would take to put into place would be too long.[25]

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22 See 'Proposal for a Strategic Dialogue on Effective Regulation, Institute of International Finance', *supra* n 13.

23 The longstanding US reconciliation to the US GAAP requirement is a good example of an originally useful but long outlived rule that has become a costly and unnecessary burden. Market feedback consistently indicates that investors neither use nor rely on this rule. Recently, the SEC partially replaced this rule and now accepts financial statements from foreign private issuers prepared in accordance with IFRS as issued by the IASB: see 'Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to U.S. GAAP', 73 Fed Reg 985 (4 January 2008) (to be codified at 17 CFR pts 210, 230, 239 and 249).

24 Letter from David Schraa & David Strongin to Michel Prada & the IOSCO Technical Committee, *supra* n 6; Letter from Sally Scutt, Int'l Banking Fed'n et al to Michel Prada, Chairman, AMF & the IOSCO Technical Committee (4 April 2007).

25 See Greene, *supra* n 6; Madison & Greene, *supra* n 6.

The European experience, however, suggests that it is important to view mutual recognition and harmonisation as entwined issues. For a period, the EU passport operated on the basis of mutual recognition and minimum harmonisation, but by the mid 1990s, it had become apparent that this system was not working successfully. Problems were that large areas of activity were not subject to harmonised rules, leading to host Member State control in those areas. Even in areas that were harmonised, the harmonised rules were often subject to derogations that undermined their usefulness. The quite detailed level of maximum harmonisation together with stronger home Member State control in the most recent EU legislation, is a deliberate policy choice taken in response to this record of under-achievement.

On the other hand, the EU experience illustrates that having the same rules does not guarantee consistency because of the practical problem of different interpretations by different national regulators within a harmonised system. This problem can be mitigated only to some extent by clear drafting, but it cannot be completely eliminated because drafting has to be sufficiently open-textured to accommodate changing market circumstances and to enable adaptations to be made for particular local conditions. For example, the level of detail that characterises much of the new EU laws has to be viewed in the context of the bigger European single market agenda and the large institutional and legal structure that has evolved around it; that degree of prescriptiveness would simply not work at the international level.

A call for technical advice on the Capital Requirements Directive by the European Commission (the 'EC')[26] to the Committee of European Banking Supervisors offers an example of how mutual recognition is being questioned. In considering the extent to which further harmonisation can be achieved, the European Banking Committee is reported to have agreed that mutual recognition of national discretions is not necessarily 'an optimum or definitive solution' because it could lead to 'embedding national discretions in Community legislation' or even, in some cases, 'regulatory arbitrage'.[27]

Both mutual recognition and harmonisation create a number of challenges in the building of a cross-border regulatory system. In a world in which some countries host strong financial centres with a heavy international aspect, such as London and New York, while other countries

26 See 'Call for Technical Advice (No. 10) from the Committee of European Banking Supervisors' (20 April 2007), available at www.c-ebs.org/Advice/documents/CFA10on-nationaldiscretions16052007.pdf.

27 See *ibid.*

host local capital markets where systems are unlikely to be standard setters, how does one create an integrated system? Will the inevitable competition in a world of several financial centres create a regulatory race to the bottom? Or will it result in the export of overregulation from the dominant international centres to the more local markets? Another aspect of the problem for small markets is the fact that regulators in the smaller markets could easily find themselves with large responsibilities but low leverage over international financial actors.[28]

28 New Zealand and Australia provide an interesting example of the challenges in the building of cross-border regulatory systems, and the necessity and possible inevitability of harmonisation and mutual recognition in smaller regional markets. For over 20 years, successive governments in New Zealand and Australia have entered into agreements in an effort to harmonise the two countries' business laws: see 'Memorandum of Understanding between the Government of Australia and the Government of New Zealand on Harmonization of Business Law' (1 July 1988), available at www.dfat.gov.au/geo/new_zealand/anz_cer/259.pdf; 'Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law' (31 August 2000), available at www.dfat.gov.au/GEO/new_zealand/anz_cer/memorandum_of_understanding_business_law.html; 'Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law' (22 February 2006), available at www.treasury.gov.au/documents/1073/PDF/Business_law_MOU.pdf. The current version of the agreement recognises the challenges of harmonisation. For example, it no longer refers to the 'harmonisation' of business laws; instead it refers to the 'co-ordination' of business laws: *ibid.* As part of this process, each country entered into an agreement for the mutual recognition of securities offerings in February 2006: see 'Agreement between the Government of Australia and the Government of New Zealand in relation to Mutual Recognition of Securities Offerings' (22 February 2006), available at www.med.govt.nz/upload/31106/text-of-agreement.pdf. This agreement took effect in June 2008, when each country promulgated regulations for the mutual recognition of securities offerings in the other country: see Securities (Mutual Recognition of Securities Offerings-Australia) Regulations 2008 (SR 2008/153), available at www.legislation.govt.nz/regulation/public/2008/0153/latest/whole.html#DLM1339201; Corporations Regulations 2001, F2008C00289 (SR 2001 No.193), available at www.comlaw.gov.au/ComLaw/legislation/legislativeinstrumentcompilation1.nsf/0/4DBE380F933B7137CA25746B001D9C65/$file/Corporations2001Vol3.pdf. See also Joint Press Release, Minister of Commerce the Hon Lianne Dalziel and Minister for Superannuation and Corporate Law Senator the Hon Nick Sherry, 'World First in Comprehensive Mutual Recognition of Securities Offerings' (13 June 2008), available at www.seccom.govt.nz/new/commerce-minister/2008/130608.shtml. The so-called 'trans-Tasman mutual recognition' scheme allows an issuer to offer securities, or interests in collective or managed investment schemes, in both countries using one disclosure document prepared under regulation in its home country: see 'New Zealand Securities Comm'n & Australian Securities and Investment Comm'n, Offering Securities in New Zealand and Australia under Mutual Recognition' (13 June 2008), available at www.seccom.govt.nz/publications/documents/nz-aus/. An issuer that wishes to operate under the scheme is able to comply with minimal entry and ongoing requirements that both countries have agreed to and which is prescribed in each country's law. Securities regulators in both countries have established processes for cooperatively administering this scheme: see *ibid.*

Two additional challenges, each of which is so important that we have given it its own section (see 'Cross-border regulation and transparency' and Regulatory intensity and enforcement', *infra*), are how to build such a system in a transparent manner and how to link mutual recognition or harmonisation to the differences in regulatory intensity and enforcement that, as a matter of national political economy and policy, vary widely across markets.

At the same time, it must not be forgotten that there must be a policy space to discuss 'optimum' regulation ie, regulation that achieves legitimate regulatory goals but with an eye toward efficiency and minimising the burdens on and obstacles to an efficiently functioning global securities market. Indeed, both harmonisation and recognition are, in essence, procedural mechanisms to achieve the goals of optimal and effective regulation through rough consistency in legal rules. The goal should be to avoid a 'race to the bottom' or 'lowest common denominator' while also avoiding the unnecessary costs, burdens, and procedural obstacles that would result from cobbling together 'a highest common denominator' of existing regulations.

However, not all areas of securities regulation are amenable to timely standardisation or even convergence. In addition, there may still be significant barriers to access to markets even if national rules are similar or even identical. In these cases, regulators should consider whether it is disproportionately burdensome to impose their rules on foreign firms and foreign securities and whether it is appropriate to exempt foreign firms or securities from compliance with all aspects of the national rules in question, taking into account factors such as those mentioned in the IOSCO Technical Committee's February 2004 paper on the Regulation of Remote Cross-Border Financial Intermediaries: the nature of the investor (retail versus institutional); the nature of the access to a foreign market or entity (directly or through a local intermediary); and the type of the security traded (derivative or common stock of a large, well-known seasoned issuer).

For example, local authorisation requirements create significant barriers to cross-border business, as frequently the only way to obtain authorisation locally is to establish a local branch or subsidiary. The model schedule forming part of the Global Securities Industry World Trade Organisation ('WTO') Initiative to Liberalise Trade in Capital Markets-Related Services[29] sets out a proposed framework under which WTO members would provide exemptions to allow capital markets

29 See Global Sec Indus, 'WTO Initiative to Liberalize Capital Markets-Related Services' (2005).

intermediaries to conduct cross-border business with local institutional and other 'qualified investors' without being subject to local authorisation requirements. National regulatory regimes should facilitate the cross-border provision of services by exempting firms from local authorisation requirements where investors are sufficiently expert to protect their own interests.

It is the consensus of this committee that the appropriate responses to cross-border regulatory issues are likely to occur on a spectrum from harmonisation to the various types of recognition of another system (mutual or unilateral), depending upon the policy goals implicated. There are many paths to the deepening and broadening of an international community of like-minded regulators. While different measures may be suitable for different areas of regulation, and while some, such as exemption or unilateral recognition, may have the virtue of being able to be implemented on a relatively quick time frame because of the absence of a need for international negotiation, it should be stressed that any move to adopt any of these measures will be progress in the direction of the creation of a broadly consistent global securities regulatory culture and, indeed, any step toward standardisation and any particular authority's decision to undertake exemption or unilateral recognition will be a milestone in that process. Thus, for the moment, all possibilities of synchronisation, including exemption, standardisation and mutual recognition, should be considered. The practical recommendations and priorities set forth later in this chapter draw on the concepts of mutual recognition, exemption and harmonisation because, in the view of this committee, there should be a push in all these areas.

Cross-border regulation and transparency

The movement from national to international regulation raises the question of how the principles of mutual regulation, exemption or harmonisation should be chosen, by whom and who should set the regulatory agenda. In many countries with highly developed capital markets, changes in rules and regulations are accompanied by formal and informal consultation among the regulators, companies, the regulated and investors, as well as the various organisations that represent them.

Currently, a number of intra-regulator fora exist or are developing. The development of IOSCO, modelled in part on the Basel Committee, with its intra-regulator discussions and principles, has created a forum in which securities regulators around the world are able to work together on technical issues and agree on principles for regulation. Within the

European Union, CESR has been established.[30] There have also been ad hoc creative responses by regulators to the problems raised by cross-border securities exchanges such as the College of Euronext Regulators[31] and the memorandum of understanding signed in connection with the New York Stock Exchange-Euronext merger.[32]

The developments of CESR and IOSCO have been important first steps in normalising dialogue and consultation among national securities regulators. A key challenge for each of these fora (and other fora that are likely to be developed) will be to move from a stage where national regulators speak largely to other national regulators in a quasi-private format, to a state of greater transparency in their workings as well as greater openness to working with the financial intermediaries and investors in the development of policies, rules and regulations. This issue is particularly acute given that basic principles and regulations are, in the future, more and more likely to be worked out by the supranational organisations before being presented in a national regulatory environment.[33] For smaller or developing financial markets in particular, who may find themselves essentially forced to implement with only minor variation principles that have been worked out by the larger and more developed markets in the international forum, this transparency will be

30 CESR seeks to improve coordination among securities regulators within the European Economic Area and to promote consistent supervision and enforcement. CESR, CESR in Short, www.cesr-eu.org/index.php?page=cesrinshort&mac=0&id= (last visited 30 June 2008). Its activities include developing non-legally binding common standards to promote supervisory convergence, conducting peer reviews, facilitating and sharing best practices and experiences between members, and establishing a mediation mechanism: *ibid.* CESR also endeavours to both promote dialogue between members on practical issues such as employee movement among members and to develop joint training initiatives: see 'Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities, CESR/05-335' (26 January 1999), available at www.cesr-eu.org/data/document/05_335.pdf.

31 When the multinational exchange Euronext was created in 2000 and further expanded in the years thereafter, securities regulatory authorities of the Netherlands, France, Belgium, Portugal and the United Kingdom joined to form the College of Euronext Regulators to jointly oversee the Exchange's activities: Euronext, Regulation, www.euronext.com/landing/regulation-12602-EN.html (last visited 30 June 2008).

32 The SEC and the College of Euronext Regulators signed a non-binding memorandum of understanding to facilitate cooperation in market oversight: see 'Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight' (25 January 2007), available at www.sec.gov/news/press.shtml.

33 For example, in the area of banking regulation and capital adequacy, the Basel Committee now has a 20-year track record of creating regulatory principles, such as consolidated and comprehensive supervision of the entire superstructure of bank capital adequacy regulation. These principles have been implemented, albeit with some variations, on a virtually global basis.

important.

It is the view of this committee that draft texts of policies, principles, rules and regulations should be made available to the public for comment to the supranational bodies well before they are adopted. Meetings of regulators and legislative bodies voting on such texts should be open to the public and, where possible, webcast.

In particular, all open meetings of CESR, IOSCO and other supranational securities regulators should, like the SEC meetings, also be webcast, so that they can be heard or watched by interested persons who are unable to physically attend. In light of the cross-border and transnational interest in financial regulation, it is the committee's view that an open meeting that is available only to those random few who can make the physical trip is not as truly open as it should be. Given the low transaction costs of webcasts, they should be considered by all financial regulators for meetings that are already public.

The other key challenge for the developing supranational organisations will be to become much more open to industry-generated solutions than has been the case in the past.

The practise of the international securities markets evolves rapidly and expertise in some specialised market areas of practice is not widely dispersed in the public sector. The design of industry-generated rules is based on deep knowledge of business and operational constraints and objectives. Such rules are more likely to be workable and to achieve regulatory objectives in a manner that reduces the cost of compliance. For these reasons, they are more likely to command a higher level of acceptance and thus promote a culture of compliance. Industry-generated rules already play a significant role in the international capital markets. Moreover, reliance on industry guidance indirectly alleviates problems of extraterritoriality as the solutions proposed or practices developed can be rolled out in a global manner.

In particular, we note that securities regulators in the financial markets should hire talented people from the private sector who might work within the financial regulator for a short period of time (as secondees or interns) or for a space of years. There are real expertise benefits from a revolving door between regulatory positions and private sector positions in this area. Those countries with a closed civil service might consider creative ways to bring private sector expertise into their agencies. Cross-border secondments among regulators should also be considered.

Regulatory intensity and enforcement

One of the key challenges of coordinating capital markets regulation across national boundaries stems from the different ways in which countries organise and support their systems of financial regulation. Furthermore, countries also employ quite different regulatory structures, support those structures with different levels of resources, and enforce their legal requirements with different degrees of intensity.[34] In addition, the availability of private remedies, whether class action litigation of the sort familiar to US practitioners or other mechanisms for resolving private disputes including ombudsmen and arbitration proceedings, differs considerably from jurisdiction to jurisdiction.[35]

As we move toward a system of global financial oversight based on mutual recognition and coordinated supervision, one question to be confronted is what standards other jurisdictions should meet over and above the adoption of appropriate legal rules to qualify for participation in these collaborative arrangements for supervising international financial markets.[36] In some areas, national differences may be of little practical significance. For example, academic research to date has found little difference in the quality of financial market oversight in jurisdictions that have consolidated their financial regulation into unitary agencies, such as the UK Financial Services Authority, as compared to the more traditional divisions of authority found in the United States.[37]

On the other hand, other studies have determined that the staffing and budget levels of financial regulators differ significantly from jurisdiction to jurisdiction, and also suggest that higher levels of staffing and budgets are

34 A 2004 IBA cross-jurisdictional survey found that enforcement remained the key area where harmonisation was lacking: Margaret E Tahyar & Jake S Tyshow, Draft Paper, 'Results of IBA Committee Q Survey on Transparency and Enforcement (2004)' (on file with authors).

35 There is an active movement in Europe to bring some form of class or mass action into the various EU Member States. It has also become clear that international investors have no qualms about renting the US private action system when it suits their purposes. At the same time, there is a strong movement in the United States, the birthplace of class actions, to limit their applicability in securities actions.

36 See Jackson, *supra* n 6.

37 See Martin Cihák & Richard Podpiera, 'Is One Watchdog Better Than Three? International Experience with Integrated Financial Sector Supervision' (International Monetary Fund, Working Paper No WP/06/57, 2006), available at www.imf.org/external/pubs/ft/wp/2006/wp0657.pdf. For a comparison of the organisation of capital market regulation in eight leading jurisdictions, see Stavros Gkantinis & Howell E Jackson, 'Markets as Regulators: A Survey' (September 2007) 80 *S Cal L Rev* 1239; see also Eddy Wymeersch, 'The Structure of Financial Supervision in Europe: About Single, Twin Peaks and Multiple Financial Supervisors' (2006), available at http://ssrn.com/abstract=946695.

associated with more robust capital markets.[38] For example, the United Kingdom spends US$65.5 thousand per billion of GDP, while Germany, a comparably-sized economy, dedicates less than half that amount, or US$22.2 thousand per billion of GDP.[39] These studies have also found that countries with common law origins tend to allocate greater public resources to financial regulation than countries with civil law origins. There are likely even greater differences in the extent to which public authorities use formal enforcement actions to ensure compliance with capital market regulations,[40] and at least some evidence suggests that enforcement activities are associated with better performing capital markets.[41] However, other industry observers contend that enforcement activities in some jurisdictions – particularly the United States where private litigation is especially prominent – can be counterproductive and that in certain jurisdictions other less formal mechanisms for encouraging public compliance can be equally effective in supporting robust and efficient capital markets, arguably at lower cost.[42] The role of institutional investors in policing issuers and other market participants may also vary from jurisdiction to jurisdiction and, perhaps, even in different market segments within particular jurisdictions.

While future academic research may eventually shed more light on the exact relationship between the organisation of public enforcement and the development of efficient capital markets, regulatory officials, especially those from the more developed markets, can be expected to pay close attention to the structure of financial regulation in other jurisdictions as they move towards systems of mutual regulation and coordinated supervision. It seems unlikely that current securities regulators in major financial markets will cede their oversight and

38 See Howell E Jackson, 'Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications' (2007) 24 *Yale J on Reg* 101; see also Howell E Jackson & Mark J Roe, 'Public Enforcement of Securities Laws: Preliminary Evidence' (2007), available at http://ssrn.com/abstract=1003177.

39 Jackson & Roe, *supra* n 38 at 10.

40 See Jackson, *supra* n 6; see also Howell E Jackson, 'Regulatory Intensity in the Regulation of Capital Markets: A Preliminary Comparison of Canadian and US Approaches' (2006) available at www.tfmsl.ca/docs/V6(2)%20Jackson.pdf.

41 See Laura Nyantung Beny, 'Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence' (2005) 7 *Am L & Econ Rev* 144, 161; see also Utpal Bhattacharya & Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 *J Fin* 75.

42 Comm on Capital Mkts Regulation, 'Interim Report of the Committee on Capital Markets Regulation 71–92' (2006) available at www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (suggesting that the high level of regulatory intensity in the United States disadvantages US markets). But see John C Coffee, Jr, 'Law and the Market: The Impact of Enforcement' (2007) 156 *U Pa L Rev* 229 (interpreting enforcement intensity as the hidden variable that explains the success of US markets).

enforcement power to systems that, in their view, under-enforce investor protections, even if the language of the relevant regulations is harmonised.

At a minimum, countries should evaluate the adequacy of staffing and budgetary levels for financial regulatory bodies in other jurisdictions, consider how those resources are deployed, and assess the mechanisms of enforcement (whether public or private, formal or informal) that are employed in each country. Also helpful as a source of independent and objective validation on regulatory efficacy would be the collection of data on the technical aspects of capital market performance (bid-ask spreads, price synchronicity, speed of impounding new information into prices, cost of capital etc) to evaluate the overall efficacy of market oversight. The consideration of these and related factors is likely to be an important element of a meaningful assessment of the adequacy of capital market oversight in other jurisdictions.

Differences in the domestic political economy behind enforcement or regulatory intensity could mean that convergence becomes a theoretical exercise or that there are barriers to recognition of another system's rules. Finding an accommodation on regulatory intensity and enforcement will be a key task in building the new institutional infrastructure.

Urgent need for reform and modernisation to become regulatory priority, especially in the United States, China, India and the Middle East

It is the view of the committee that both the national legislators and the appropriate regulatory bodies in the key and emerging financial centres should make the reform of cross-border and extraterritorial elements of capital markets and market regulation a key priority for their regulatory agendas. Although EU-US dialogue is the most important, the committee believes that increased participation of China, India and the emerging Middle Eastern financial centres in the debate is critical for success in achieving an international regulatory system that supports the goals of market integrity and investor protection. There is a lively and helpful domestic debate in the United States at the moment with respect to the modernisation and reform of the US system.[43] The committee believes that reform of the US regulatory system, which still represents the largest and most liquid market in the world, is a critical component of a more effective global system but that, in and of itself it will not be sufficient to

43 The fundamental structures of the US system, rooted in the reforms of the 1930s that are 'closer in time to the Civil War than to today', are unlikely to meet the needs of the 21st century: see 'Regulation Report', *supra* n 17; Paulson, *supra* n 1.

create such a system. Instead, all of the major financial centres, including the European Union, the United States, China, India and the emerging financial centres of the Middle East, need to take part now, rather than later, in the debate that is ongoing in this area.[44]

Recommendations

As part of the process of developing an agenda or blueprint for change, the Securities Law Committee of the LPD Task Force on Extraterritorial Jurisdiction makes the following recommendations with respect to topics to be considered in the priority areas.

Securities offering disclosure

RECOMMENDATION 1

Differences in disclosure obligations, distribution requirements and registration or approval procedures across jurisdictions impede cross-

44 China has recently taken steps to secure effective cross-border regulatory cooperation. In 2007, the China Securities Regulatory Comm'n (CSRC) became a signatory to the IOSCO Memorandum of Understanding, joining India, Hong Kong, Malaysia, Singapore and Thailand: see 'SEC, IOSCO Membership and Market Development toward International Standards', www.sec.or.th/sec/Content_0000000625.jsp?categoryID=CAT0000431&lang=en (last updated 21 May 2008) (listing the date that CSRC became a signatory). Further, in April 2007, the CSRC and Hong Kong's Securities and Futures Comm'n exchanged side-letters designed to enhance cooperation in cross-border investigations: see 'Side Letters to MoU on Regulatory Cooperation between CSRC and SFC', www.csrc.gov.cn/n575458/n4001948/n4002030/4058832.html (last updated 21 May 2008) (describing the type of cooperation established by the side letters). These developments are welcome steps towards building the foundations of cross-border securities regulations. It remains to be seen, however, how effective they will be in practice. New Zealand and Australia are increasingly building the foundations of cross-border securities regulation: see *supra* n 28. The Securities Comm'n in New Zealand and the Australian Securities and Investments Comm'n have a notably close and effective relationship: see Jane Diplock, Chairman, New Zealand Securities Comm'n, Address to the ALRAC Conference (15 April 2004), available at www.seccom.govt.nz/speeches/2004/jds150404.shtml; Jane Diplock, Chairman, 'Trans-Tasman Relations: A Securities Regulator's View' (14 September 2006), available at http://seccom.govt.nz/speeches/2006/jds131106.shtml. The SEC and the Securities and Exchange Board of India (SEBI) recently elaborated the framework for their ongoing discussions on securities regulation: see SEC Press Release, 'SEC, SEBI Announce Increased Cooperation and Collaboration of Capacity Building Events in India' (8 January 2008), available at www.sec.gov/news/press/2008/2008-3.htm. India has also recently made purely domestic changes which align its system more with international norms for follow-on offerings: 'SEBI Introduces Fast Track Issuance of Securities' (24 August 2007), available at www.sebi.gov.in/press/2007/24220007.html; see also 'Amendments to SEBI (Disclosure and Investor Protection) Guidelines, 2000', SEBI Circular No SEBI/CFD/DIL/DIP/28/2007/29/11 (29 November 2007).

border primary capital raising. Issuers should be able to raise capital around the world using the same disclosure document. Distribution and registration or approval mechanics in any particular jurisdiction also should not present burdensome obstacles to raising capital.

Commentary: IOSCO's efforts to achieve disclosure convergence are welcome, and accounting convergence initiatives are also strongly encouraged. However, any incompatibilities in required disclosure beyond accounting and any areas not covered by IOSCO principles should be targeted as well. Procedural aspects of distribution and registration or approval also can present significant impediments to efficient cross-border capital raising. For example, if one country's rules provide for efficient capital raising through a shelf-type mechanism but another country's do not, the acceptance of common disclosure would prove of little practical benefit. Another example involves the review of disclosure by local regulators or stock exchanges. If the regulators in different jurisdictions can take drastically different approaches to evaluating compliance with disclosure prepared according to common standards, including different review timetables and definitions of materiality, any benefits from common disclosure standards would likely be lost. Differences in ongoing disclosure engendered by differing periodic reporting obligations should also be taken into account in this context. Stark differences in ongoing reporting might, for example, prevent harmonisation of approach in relation to shelf type offerings. Liability exposures for inaccurate disclosure differ in each country, as do enforcement practices. These considerations also shape decisions as to where to raise capital. All of these factors, in addition to threshold requirements regarding disclosure content, need to be considered when trying to maximise the efficiency of capital raising.

Choices could also be made to narrow the circumstances in which the above approaches are taken, at least initially. The chosen approach could, for example, be limited to particular classes of issuers with an emphasis on beginning with the largest and most liquid global companies which presumably also represent the vast majority of cross-border capital raising. Or the cut could be made along the institutional versus retail investor line, although that may prove difficult to define. Product-specific lines could be drawn. Simplification of capital raising initiatives might be limited to lower risk, diversified instruments such as mutual funds or exchange-traded funds, and not extended, at least initially, to single company securities. On the debt side, the approach might be limited to investment grade debt. A decision also could be taken to treat domestic and foreign issuers differently, though fairness issues would of course need to be

considered. The treatment of sovereign issuers should also be taken into account in this process.

Accounting convergence

Recommendation 2

Competent authorities should continue to pursue convergence of US GAAP and IFRS.[45]

Recommendation 3

Competent authorities should adopt rules under which financial statements of a foreign private issuer, prepared in accordance with IFRS as issued by the IASB, would be accepted by such authority without the need for reconciliation to local GAAP.

Recommendation 4

Competent authorities should introduce rules permitting domestic issuers to provide financial statements in accordance with IASB IFRS.

Recommendation 5

The EC should work towards eliminating the distinctions between IFRS as adopted by the IASB and as adopted in the European Union.

Recommendation 6

Competent authorities should pursue an agenda of greater international dialogue to reduce unnecessary regulatory burdens on global accounting firms in the context of developing high quality professional standards for

45 As of January of this year, the SEC now accepts financial statements from foreign private issuers without reconciliation to US GAAP, provided that the statements are prepared in accordance with the English language version of IFRS as issued by the IASB: see 'Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to US GAAP', 73 Fed Reg 985 (4 January 2008) (to be codified at 17 CFR pts 210, 230, 239 and 249). This rule is a significant step towards both reducing the disparity between the accounting and disclosure practices of the United States and other countries as well as developing a single set of high-quality, understandable and globally accepted accounting standards.

auditing.[46]

The internet and offers to purchase securities

RECOMMENDATION 7

Regulators and legislators should not qualify the posting of information on the internet as a prohibited offer of securities in their jurisdiction if the disclosure of such information is required in another jurisdiction.

RECOMMENDATION 8

Issuers and other offerors of securities should be able to rely on the representation of an investor as to its nationality, where such information is relevant, to prevent violations of securities laws in jurisdictions where the offer may not be made or is subject to restrictions. They should not be liable for any misrepresentation of an investor, absent fraud or gross negligence on the part of the issuer or offeror.

RECOMMENDATION 9

In an online environment, regulators and legislators should regulate the actual sale of securities, rather than the offering thereof.

- *Commentary: Regulatory information not to constitute an offer of securities*: an increasing number of jurisdictions allow or even require the use of the internet to disclose information that an issuer is required to provide to investors pursuant to national securities and transparency laws. Regulators and legislators should not qualify the posting of such information on the internet as a prohibited offer of securities in their jurisdiction if the disclosure of such information is required in another jurisdiction.
- *Issuers not liable for misrepresentations by investors*: in most jurisdictions,

46 The International Forum of Independent Audit Regulators (IFIR) was established in September 2006 and involves 18 independent audit regulatory organisations: IFIR, www.ifiar.org (last visited 30 June 2008). The Forum aims to promote collaboration in regulatory activity and provide a focus for contacts with other international organisations that have an interest in audit quality: *ibid.* The US Public Company Accounting Oversight Board (PCAOB), established under Sarbanes-Oxley, has held discussions with the European Commission about cooperating to improve auditor oversight and auditing practices. PCAOB Press Release, 'PCAOB Chairman Mark Olson and EU Commissioner Charlie McCreevy Meet to Discuss Furthering Cooperation in the Oversight of Audit Firms', (6 March 2007), available at www.pcaobus.org/News_and_Events/News/2007/03-06.aspx.

the nationality of an investor is often a relevant factor in determining whether an offer is made in that jurisdiction or not. In an online environment, it is difficult to positively ascertain the nationality of a person accessing a website. Offerors of securities should be able to rely on the representation of (potential) investors and should not be required to conduct their own investigation into the nationality of the investor. As regards the consequence of any misrepresentation by a (potential) investor, national securities laws should provide that any violation thereof, which would not have occurred if the representation were true, will not be enforced.

- *Regulation of sales and transfers, instead of offerings*: many of the current regulatory difficulties offerors of securities face when using the internet are caused by the fact that many jurisdictions prohibit or restrict the offering of securities within their jurisdiction (or, in some cases, even beyond). Due to the nature of the internet, a generic offer of securities on the internet is not and cannot be restricted to only certain jurisdictions (other than through the use of click-through barriers or disclaimers, which are not always effective or sufficient). Legislators and regulators are therefore encouraged to provide that a generic and passive offer of securities by means of a website would not constitute a violation of any securities offering rules. This would only apply to 'passive' offers, consisting only of a web page containing the offer without any supporting marketing activities in that jurisdiction, such as advertisements, direct e-mail, or banners on other websites, which are known to generate traffic from nationals of the relevant jurisdiction.

Instead, these jurisdictions would be encouraged to regulate the actual sale and transfer of such securities. At the discretion of each individual jurisdiction, such transfer and sale can then be made subject to any applicable investor protection rules in that jurisdiction, such as a prospectus requirement, or conduct of business rules.

Sophisticated person definition

RECOMMENDATION 10

Competent authorities should adopt and accept a common definition of 'sophisticated person' as a basis for a multijurisdictional wholesale market

governed by mutual recognition principles.[47]

Commentary: Recognising that acceptance of mutual recognition principles should be consistent with the goals of investor protection, this committee believes that mutual recognition first should be applied to a wholesale market consisting of sophisticated persons for whom investor protection rules are least relevant. These sophisticated persons should be permitted to purchase and trade securities of foreign issuers, or to retain services of foreign investment service providers that are regulated solely by their home jurisdiction.

This proposal builds upon current regulatory practice in the United States, the European Union and other developed capital markets, to exempt from certain host country regulation issuers and financial service providers that conduct business with sophisticated persons. This committee recommends that competent authorities should adopt a common definition of sophisticated person to provide qualified entities and natural persons access to a multijurisdictional wholesale market.

An entity or natural person should be considered sophisticated if it can demonstrate knowledge of, or have the ability to collect and evaluate relevant information about, a foreign issuer and the marketplace in which the relevant securities will be traded. Such person also must have the ability to understand, evaluate and manage the risks associated with purchasing foreign securities.[48]

US and EU securities laws define sophisticated persons as certain legal entities or natural persons that have investment experience and/or a substantial amount of financial resources. Under the EU Prospectus Directive,[49] a full prospectus is not required for offers of securities to 'qualified investors'. The Prospectus Directive defines qualified investors to include both legal entities authorised or regulated to operate in the financial markets and natural persons who have carried out significant transactions on the securities markets at least ten times in the past 12

47 We invite readers to review SIFMA's excellent work in this area. SIFMA persuasively documents the hodgepodge of national rules which no longer serve any rational purpose or define who is a sophisticated investor: see SIFMA, 'New Developments in the Regulation of Cross-border Capital Markets' (11 June 2008), http://events.sifma.org/2008/631/event.aspx?id=4104 (listing supporting conference papers); Notice, 72 Fed Reg 58,939 (17 October 2007); Nicolas Grabar, 'Achieving More Efficient Capital Markets Regulation', *in Foreign Issuers & the US Securities Laws 2008: Strategies for the Changing Regulatory Environment* (2008).

48 See Michael Mann, Comment, 'Between Markets, Competition is All', *Fin Times*, 12 June 2007.

49 Comm'n Directive 2003/71/EC, OJ 2003 L 345/64, available at http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=OJ:L:2003:345:0064:0089:EN:PDF.

months, have a securities portfolio greater than €0.5 million and/or have at least one year of professional experience in the financial sector.[50] A corresponding definition is used in the EU Markets in Financial Instruments Directive ('MiFID').[51] The MiFID exempts financial service providers from certain business conduct, best execution and order handling rules when providing services to 'professional clients'[52] or

50 Qualified investors include (i) legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities; (ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations; (iii) other legal entities which do not meet two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding €43 million and an annual net turnover not exceeding €50 million; and (iv) certain natural persons; subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered as qualified investors if these persons meet at least two of the following three criteria: having carried out significant transactions on the securities markets at least ten times in the past 12 months, having a securities portfolio greater than €0.5 million and/or having at least one year of professional experience in the financial sector: *ibid* at 69.

51 Comm'n Directive 2004/39/EC, OJ 2004 L 145/1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:145:0001:0044:EN:PDF; Comm'n Directive 2006/73/EC, OJ 2006 L 241/26, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:241:0026:0058:EN:PDF.

52 Under MiFID, professional clients include (i) entities which are required to be authorised or regulated to operate in the financial markets, such as credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and management companies of such schemes, pension funds and management companies of such funds, commodity and commodity derivatives dealers, 'locals' (a specific kind of derivatives dealer) and other institutional investors; (ii) large undertakings meeting at least two of the following size requirements on a company basis: a balance sheet total of at least €20 million, a net turnover of at least €40 million and ownership of funds in the amount of at least €2 million; (iii) national and regional governments, public bodies that manage public debt, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations; and (iv) other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions: Comm'n Directive 2004/39/EC, OJ 2004 L 145/43.

'eligible counterparties'.[53] Professional clients are defined in a way substantially similar to qualified investors.

Under US securities law, a sophisticated person is defined by the terms 'accredited investor', as defined in Regulation D under the Securities Act of 1933, 'qualified institutional buyer', as defined in Rule 144A under the Securities Act of 1933, and 'qualified investor', as defined in the Securities Exchange Act of 1934. The US definitions provide specific financial tests that must be met by legal entities and natural persons.

This committee believes the common definition should follow EU and US practice and set forth a list of qualified legal entities and certain objective requirements for natural persons, including investment transaction experience, amount of available investment assets and/or professional qualifications. Consistent with the principles of mutual recognition, host jurisdictions should not limit the sale of foreign securities to such sophisticated persons, nor should a jurisdiction prevent such sophisticated persons from participating in a marketplace to trade securities.

Priorities for harmonisation: IIF-SIFMA list

The committee notes the recommendations proposed by the Securities Industry and Financial Markets Association ('SIFMA') and the Institute of International Finance ('IIF') in their recent draft paper prepared for IOSCO[54] on harmonising national securities regulations and modernising cross-border regulatory structures. To this end, this committee adopts and promotes the IIF-SIFMA recommendations described below as building blocks for ongoing progress toward the goal of developing more modern and efficient cross-border regulation.

RECOMMENDATION 11

Direct access to institutional clients: national regulatory standards should

53 Eligible counterparties include investment firms, credit institutions, insurance companies, UCITS and their management companies, pension funds and their management companies, other financial institutions authorised or regulated under EU legislation or the national law of a Member State, certain commodity and derivatives traders dealing on their own account, national governments and their corresponding offices including public bodies that deal with public debt, central banks and supranational organizations: Comm'n Directive 2006/73/EC, OJ 2006 L 241/56.

54 Letter from David Schraa & David Strongin to Michel Prada & the IOSCO Technical Committee, *supra* n 6; Nicolas Grabar, 'Achieving More Efficient Capital Markets Regulation', in *Foreign Issuers & the US Securities Laws 2008: Strategies for the Changing Regulatory Environment* (2008).

be modernised to allow firms to deal directly with institutional clients in cross-border transactions, allowing institutional clients to benefit from the integration of capital markets. Financial institutions should not be required to have and act through a locally regulated branch or subsidiary when dealing with local institutional investors as this practice increases the cost of products and services to these investors.

Recommendation 12

Consistency in defined terms: consistency in defined terms enhances the efficiency of working across jurisdictions. There is a need to standardise the definitions of institutional and retail investors to facilitate the application of various exemptions, such as private placement exemptions from offering restrictions for certain products or services, and exemptions from conduct of business requirements for regulated firms and licensing requirements for firms operating domestically and internationally.

Recommendation 13

Standardisation of national rules on large shareholdings: there is a need for national regulators to achieve greater standardisation of the method of calculating and reporting large shareholdings. Consistency in these requirements decreases the chance of compliance error and the regulatory risk for financial institutions, and ultimately benefits international investors in their cross-border transactions by providing similar signals in different markets.

Recommendation 14

Standardisation and recognition of national reporting standards: firms should not be required to submit different reports in each country where they seek to transact. This practice drains significant resources and proves very costly. By standardising national reporting standards, firms could submit similar reports to national regulators worldwide, reducing both cost and the incidence of financial crime. A related IIF-SIFMA proposal is for national regulators worldwide to mutually recognise each other's reporting standards and to allow financial institutions to comply with their reporting obligations in one country by submitting reports that were prepared for a different regulator.

RECOMMENDATION 15

Uniformity of custody systems: there is a need to decrease operational difficulties for financial institutions by standardising the requirements for segregating client assets in appropriate cases, which further facilitates the development of coherent and efficient custody systems across jurisdictions. National regulation governing the segregation of assets still varies significantly, creating an obstacle for firms seeking to engage in high quality cross-border transactions.

In developing an agenda to converge and harmonise national regulatory standards and to enhance the efficiency and effectiveness of cross-border regulation, this committee believes that it is vital to support recommendations, such as the IIF-SIFMA recommendations described above, that are capable of being easily translated into national rules and implemented in both developed and developing markets.

Streamlining cross-border enforcement

RECOMMENDATION 16

Members of IOSCO should continue to build on the excellent progress they have made in relation to cooperation between regulatory enforcement agencies in the investigation of matters in which they have mutual interest.

RECOMMENDATION 17

IOSCO members should work towards standardising the form of requests for information made to regulated firms and, in particular, developing a common terminology and sharing of best practice.

RECOMMENDATION 18

IOSCO members should establish a protocol for identifying a lead regulator who will be responsible for running an investigation; in particular, this process would avoid duplication of information requests and interviews by regulators.

RECOMMENDATION 19

As a priority IOSCO should find workable solutions to conflicts that can arise between investigatory powers in one jurisdiction and rights and

freedoms in another – for example, conflicts between powers to compel evidence and the right not to self-incriminate, being unable to maintain legal privilege over information passed between regulators and the inability to control the dissemination of information passed overseas to prosecutors or disclosure in civil proceedings.[55]

Commentary: On the basis that the interests intended to be protected through the taking of regulatory action can be adequately protected by enforcement action being taken in only one jurisdiction, governments should agree upon a framework that provides for one jurisdiction to be the appropriate jurisdiction in which enforcement action will be taken in relation to any particular misconduct – a form of cross-jurisdictional rule against 'double jeopardy'. As an interim measure, individual governments should ensure that enforcement agencies in their own jurisdiction can take into account enforcement action taken in another jurisdiction in determining whether to take action. In particular, strict obligations to refer all matters relating to the securities market that may compromise a criminal offence to public prosecutors should be removed.

In coordination with work on mutual recognition, governments should work towards a standardisation of what constitutes misconduct by participants in the securities market and what sanctions should be imposed.

55 See Bradley J Gans, 'The Paradigm' (October 2006) *Intl Fin L Rev.*

CHAPTER 6

Insolvency

Insolvency Law Committee

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R3

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'Bankruptcy law has become a prominent part
of the effort to bring coherence
to the management of a global economic system
that operates through multinational enterprises
but must function in a world of sovereign states.'

Professor Jay Lawrence Westbrook
'Locating the Eye of the Financial Storm' (2007) 32 *Brook J Int'l L* 1019

Introduction and scope of report

The Task Force on Extraterritorial Jurisdiction of the Legal Practice Division (LPD) of the IBA determined during the course of the project to introduce insolvency as an additional substantive topic for review in pertinent part because it exemplifies an area of the law where international efforts to identify, articulate, analyse, recommend and actually legislate responses to the challenges posed by extraterritoriality have been undertaken for more than 20 years, are highly evolved, and currently are being tested.

Indeed, the IBA has been at the forefront of this journey. The IBA was the first international organisation (government or non-government) to undertake an assessment on a multinational level, leading to the development of the first model cross-border insolvency law, the IBA Model International Insolvency Cooperation Act (MIICA),[1] and the first model for multijurisdictional court-to-court communication and cooperation, the IBA Cross-Border Insolvency Concordat.[2] The result of years of examination and debate, MIICA and the Concordat have formed the foundation upon which national, regional and international guidelines, 'best practices' and legislation since have been, and continue to be, built.

Consideration of the challenges presented by extraterritoriality in the insolvency arena expanded in concert with increased globalisation of

1 Model Int'l Insolvency Cooperation Act (MIICA) (1996).

2 See Anne Nielsen, Mike Sigal & Karen Wagner, 'The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies' (1996) 70 *Am Bankr LJ* 533.

financial transactions, and of financial crises. Extensive efforts to discern and address the complications posed by transnational insolvency have been pursued for a quarter of a century by individual scholars, national, regional and international non-government think tanks, trade associations and other organisations, and national, regional and international government and quasi-government institutions.

This report offers a summary of what has transpired to date in this expansive and still evolving area. The labours of the past two decades have spawned an extensive laudable and vibrant body of literature, thought, dialogue, debate, policy making, legislation and case law, including that set forth in the Annexes[3] to this report.

What follows for the reader's assistance is a brief overview of past and present efforts to address and resolve the challenges presented by transnational insolvencies, the current state of the law and practice of extraterritorial jurisdiction in insolvency cases, and some suggestions for further consideration and action.

The challenges posed by extraterritorial insolvency

Extraterritorial jurisdiction raises fundamental questions of when a state may regulate persons or property located outside of its borders and how potential conflicts of law between two or more states may be resolved. It is profoundly implicated in cases commenced by or against companies facing financial challenge and having creditors or assets located in more than one nation.

The complexities of transnational insolvency[4] cases are exacerbated by the fact that the insolvency laws of nations differ widely, both substantively and procedurally. Some countries' laws expressly purport to extend to interests and creditors of the debtor wherever they are located throughout the globe. Other nations' laws tightly 'ring fence' local assets, afford preferential status and treatment to local creditors, or otherwise impede, or refuse to recognise, another nation's exercise of extraterritorial

3 See Annex 1: www.ibanet.org/images/downloads/etjtfinsolvencyannex1.pdf; Annex 2: www.ibanet.org/images/downloads/etjtfinsolvencyannex2.pdf; Annex 3: www.ibanet.org/images/downloads/etjtfinsolvencyannex3.pdf; Annex 4: www.ibanet.org/images/downloads/etjtfinsolvencyannex4.pdf.

4 The term 'insolvency' has different meanings in different countries. As does what might constitute an 'insolvency proceeding'. At the international level, and for purposes of this report, the terms 'insolvency cases', 'insolvency proceedings', and 'insolvency laws' refer to the full array of laws and proceedings (voluntary or involuntary) related to resolving, adjusting or restructuring indebtedness of a debtor, whether or not that debtor is legally insolvent, including through liquidation, reorganisation or other forms of proceedings.

jurisdiction.

When such laws conflict, the resultant chaos threatens the international financial marketplace, whose systemic vitality requires certainty and predictability in the conduct and outcome of commercial transactions.

Commercial parties enter into transactions with a certain set of expectations. These include presumptions about how their rights and interests will be impacted and protected in the event the other party to the transaction is unable to perform. These anticipated outcomes may be predicated solely on the relevant law governing such transactions and relationships. They further may be agreed through contractual undertakings between the parties.

Such contracts typically reflect not only the bargain struck between the parties, but also the respective rights and obligations the parties have agreed to accept in the event one of the parties is unable to perform or the transaction otherwise fails. In many instances, the relevant law under which the contract is governed may dictate a result different from that which the parties have agreed in the event of default.

At bottom, however, is a set of expectations that the parties have actively sought or accepted or, at the least, resigned themselves to live with. The sense that realising such expectations is both predictable and certain, and that the risk of the alternative is minimal, drives and enables the conduct of international commerce. The result bargained for at the front end of a transaction if the transaction goes into default, however, may be turned on its head by unintended, unforeseen or unappreciated practical and legal consequences if an insolvency proceeding is commenced by or against one of the parties in an unanticipated jurisdiction and the law originally governing, designed to govern, or otherwise expected to govern the transaction is not recognised and applied, or the applied law is inapposite.

In such a case, any number of expectations may be thwarted. Among other things, security interests and secured status may not be recognised or enforced at all or in the manner intended. The creditor's claim may not be paid or in the amount or priority it could have been paid under the intended governing law. Certain claims of equity security holders may be treated *pari passu* with those of general creditors, reducing a creditor's *pro rata* share of recoverable value. The debtor, its employees, officers and directors may not receive the protections anticipated in the event of financial distress. And even notice that one's rights and interests are put at risk or otherwise might be impacted may not be timely forthcoming or even required.

These and other issues take on expansive complexity when competing proceedings are commenced with respect to the same entity in multiple

countries. Which country's laws will take precedence? How will this be determined? Will it matter which proceeding was 'first in time'? Or will some other criterion be operative? Who decides this? Will the other countries accept any of these determinations? Even if they do not accept them, will their systems allow them otherwise to recognise and grant relief in aid of a proceeding filed in any other jurisdiction? What if the laws of that jurisdiction are vastly different from, or indeed contrary to, their own?

Additional conundrums arise when the entity that is the subject of an insolvency proceeding is a parent, subsidiary or other affiliate in a multinational corporate group. Here again, countries differ on whether the assets or creditors of such affiliates may be implicated in the domestic insolvency proceeding. They also diverge over whether they will recognise and aid the enforcement of laws that are diametrically opposed to their own.

The bases of extraterritorial insolvency jurisdiction

Transnational insolvency cases run the gamut from the simple situation of an insolvency proceeding commenced in one country regarding a company having creditors located in at least one other country, to multiple proceedings commenced by or against the same entity in more than one country (a 'multinational' insolvency). Further complicating the landscape is the situation where one or more components of a multinational corporate group are the subject of insolvency proceedings.

The manner in which different countries address these situations varies widely. While virtually every nation has enacted, or is in the process of enacting, some domestic law governing the resolution of distressed indebtedness within its borders, to date relatively few have enacted laws, or signed on to and incorporated into their laws proposed harmonising modifications, specifically addressing the challenges posed by transnational and multinational insolvency proceedings. Even fewer have express legislation directing which nation's laws should apply under any particular circumstances.

The existing insolvency laws of most nations appear to reflect, and in some instances are purposefully shaped by, one of three policy constructs of international law: (1) 'territorialism' or 'territoriality'; (2) 'universalism' or 'universality'; and (3) 'modified universalism' or 'modified universality'. The policy underpinning the laws that a nation adopts impacts the extent to which the nation will determine to exercise extraterritorial jurisdiction in insolvency cases and the extent to which it

likely will be receptive to accepting and enabling the attempted exercise of extraterritorial jurisdiction by another nation.

Beginning in the 1980s, growing awareness of the challenges posed by transnational insolvency and extraterritorial insolvency jurisdiction spawned interest in exploring these jurisprudential policy frameworks, particularly amongst academics. The result was not only the meaningful contribution of a growing body of literature on the subject, but a raging debate as well.

That debate continues. It highlights the range of issues that still must be resolved, and the political, economic and societal sensitivities that must be accommodated, to achieve the certainty and predictability so greatly needed by the global financial marketplace.[5]

Territorialism

Territorialism most frequently is used to describe a nation's purported exercise of exclusive jurisdiction over the assets and parties within its borders. To its detractors in the insolvency world, territorialism often is referred to as the 'grab rule', as it allows each nation to 'grab' the assets within its jurisdiction and distribute them according to its own insolvency laws, often to the preferential benefit of creditors located within its realm.[6]

5 See eg, Samuel L Bufford, 'Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice' (2007) 27 *Nw J Int'l L & Bus* 351, 353; Samuel L Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki' (2005) 79 *Am Bankr LJ* 105; John J Chung, 'The New Chapter 15 of the Bankruptcy Code: A Step Toward the Erosion of National Sovereignty' (2006) 27 *Nw J Int'l & Bus* 89; Andrew T Guzman, 'International Bankruptcy: In Defense of Universalism' (2000), 98 *Mich L Rev* 2177; Edward J Janger, 'Universal Proceduralism' (2007) 32 *Brook J Int'l L* 819; Lynn M LoPucki, 'Universalism Unravels' (2005) 79 *Am Bankr LJ* 143; Lynn M LoPucki, 'Global and Out of Control' (2005) 79 *Am Bankr LJ* 79; Lynn M LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 *Mich L Rev* 2216; Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 *Cornell L Rev* 696; John Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy' (2005) 45 *Va J Int'l L* 935; John Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency' (2007) 32 *Brook J Int'l L* 785; Robert K Rasmussen, 'Where Are All the Transnational Bankruptcies? The Puzzling Case for Universalism' (2007) 32 *Brook J Int'l L* 983; Frederick Tung, 'Fear of Commitment in International Bankruptcy' (2001) 33 *Geo Wash Int'l L Rev* 555; Lore Unt, 'International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue' (1997) 28 *Law & Pol'y Int'l Bus* 1037; Jay L Westbrook, 'Locating the Eye of the Financial Storm' (2007) 32 *Brook J Int'l L* 1029; Jay L Westbrook, 'Multinational Enterprises in General Default: Chapter15, the ALI Principles, and the EU Insolvency Regulation' (2002) 76 *Am Bankr LJ* 1 (2002); Jay L Westbrook, 'A Global Solution to International Default' (2002) 98 *Mich L Rev* 2276.

6 See Guzman, *supra* n 4 at 2179.

In a multinational bankruptcy conducted under the territorialist approach each country would decide under its own laws how the debtor's assets located within that country's territory would be treated in light of creditor claims, without deference to any foreign proceedings involving the same debtor. Assets located abroad would have to be administered in cases opened in the countries where those assets are located. A major criticism of this approach is that it provides little regard for the enterprise as a whole.[7] Rather, it focuses almost exclusively on the portion of the enterprise that holds assets in its jurisdiction and administers those domestic assets under domestic law for the benefit of domestic creditors.[8]

Universalism

In contrast, universalism envisions a single court having worldwide jurisdiction over an entire multinational bankruptcy case. A single bankruptcy proceeding occurs in the debtor's 'home country', and the presiding court can order a unified distribution of assets to creditors worldwide through liquidation or reorganisation.[9]

According to its insolvency world supporters, universalism offers greater predictability for debtors and creditors because it allows them to know in advance what country's insolvency laws will apply and, in turn, predictability fosters growth and economic efficiency. Despite the trend toward universalism, however, critics argue that its flaws are numerous and far worse than the inefficiencies of territorialism.

Commentators often divide 'modern' universalism into two forms: pure universalism and modified universalism.

Pure universalism requires a country to defer to a foreign legal proceeding, even with regard to assets within its own borders.[10] Under such a regime, one main insolvency case would administer all of the debtor's assets worldwide.[11] That court would manage the case, locate the assets, implement a reorganisation or liquidation, and oversee repayment of creditors.[12] A single legal regime would govern the substantive and

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7 *In re Bd of Dirs of Multicanal SA*, 314 BR 486, 522 (Bankr SDNY 2004) (describing traditional territorialism).

8 See Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4 at 113.

9 See Guzman, *supra* n 4 at 2179.

10 See Tung, *supra* n 4 at 569.

11 See Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4, at 110.

12 *Ibid* (citing Westbrook, 'A Global Solution to International Default', *supra* n 4 at 2292–93).

procedural rights of all parties in interest, eliminating potential conflicts of laws that could vary the rights of the creditors or the debtor.[13]

Critics assert that pure universalism is 'idealistic' and 'impractical in a world with differing legal regimes, differing political and economic systems, differing court systems, and differing levels of adherence to the rule of law'.[14] These criticisms have contributed to the development of modified versions.

Modified universalism

In modified universalism, just as in pure universalism, a single main case for a transnational business is opened in the business's home country. In addition, however, the home country court may recognise secondary proceedings opened in foreign courts that supplement the main proceeding.[15] Under some versions of modified universalism, a local court may be authorised to commence a secondary case to liquidate local assets and protect local creditors in a particular country.[16] Under that theory, secondary cases, for the most part, would be territorial.

The touted benefits of a pure or modified universalist approach typically include more efficient allocation of capital, reduced costs, facilitated reorganisations, increased reorganisation or liquidation value, and greater clarity and certainty for all parties of interest.[17] Supporters of universalism argue its ultimate benefit is enhanced global efficiency and economic activity. In addition, according to one commentator, 'the majority view, at least among academic circles, is that universalism is normatively superior as an efficient and fair model to resolve cross-border defaults, notwithstanding the ongoing preference for territorialism among many country's policymakers'.[18]

Territorialism, on the other hand, is criticised because the costs of a transnational bankruptcy are greatly multiplied by having to have a parallel insolvency case in each country in which assets of the debtor are located, making reorganisation in particular inherently more difficult.[19] Moreover, conflicts between jurisdictions can easily develop

13 See Westbrook, *supra* n 4 at 2292–93.
14 Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4 at 110.
15 *Ibid* at 108–09, 112.
16 *Ibid* at 113.
17 See Guzman, *supra* n 4 at 2179.
18 Pottow, *supra* n 4 at 951.
19 See Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4 at 113.

and distribution results can be uneven with the effect of treating similar creditors differently (violating a fundamental bankruptcy principle in many countries of treating similarly situated creditors the same).[20] Likewise, under territorialism, creditors may be less likely to anticipate which laws will apply in the event of insolvency, possibly leading to a less efficient allocation of capital.[21] In light of these drawbacks, many recently developed laws have adopted a modified universalist approach.

For example, in the recent UK House of Lords decision of *McGrath and Others v Riddell*[22] dealing with the collapse of an Australian insurers group known as HIH, Lord Hoffman noted that 'the primary rule of private international law which seemed to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century'.[23]

Similarly, the Privy Council decision in *Cambridge Gas and Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings*[24] continued this trend with Lord Hoffman endorsing the views of the Isle of Man court in recognising and giving effect to a US Chapter 11 proceedings under a scheme of arrangement without requiring the creditors to go to the trouble of instituting parallel insolvency proceedings in the Isle of Man.

Competing jurisdictional claims: the quest for international solutions

As commerce became increasingly global during the last quarter of the 20th century, it quickly became apparent that, given the vastly disparate insolvency laws and policies among nations, greater certainty and predictability, and mechanisms to ensure them, were sorely needed in the inevitable event that a party to a transaction transcending national boundaries became financially incapable of performing.

This need for effective mechanisms was particularly acute as few or no treaties addressing insolvency existed between nations, let alone

20 See Unt, *supra* n 4 at 1043.

21 See Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4 at 114.

22 *McGrath and Others v Riddell* [2008] UKHL 21 (UK).

23 *Supra* n 21 at para 30. Even though Lord Hoffman's view on modified universalism was not adopted by the majority of the five judges, the UK House of Lords ruled that the English assets of four companies in liquidation in Australia and ancillary provisional liquidation in England must be remitted to Australia for distribution under Australian insolvency law.

24 *Cambridge Gas and Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26 (UK).

globally. The concept most frequently invoked was that of comity. But the uncertainty of the invocation, interpretation and application of comity rendered it short of a holistically effective mechanism to foster and ensure certainty and predictability in transnational financial transactions.

In the 1980s, the international insolvency community, spearheaded by the IBA Committee on Insolvency and Creditors' Rights (former IBA 'Committee J', now the IBA Section on Insolvency, Restructuring and Creditors' Rights, or 'SIRC'), began to identify and analyse issues raised by transnational insolvency cases and to work towards developing viable mechanisms to resolve and, if possible, pre-empt them. In 1986, IBA Committee J formally embarked upon a multicountry effort to draft what became known as MIICA, which ultimately was adopted for recommendation to member nations by the IBA. MIICA was followed in the early 1990s by the Committee J Concordat, which set the framework for modern cross-border court-to-court protocols which, in the absence of treaties or global compacts, were formulae for the conduct of the cross-border aspects of multinational insolvency proceedings developed by the parties for sanction by all courts involved.

The financial crises of the mid-1990s that plagued emerging markets in Asia, Latin America and Eastern Europe further spotlighted the need to timely establish mechanisms for remedial action and inspired the international banking community, including the World Bank, the International Monetary Fund, the Asian Development Bank, and others, to actively seek to foster the development of effective domestic insolvency systems.[25] The goal at that juncture, however, was not to create a single uniform domestic insolvency law, as most international groups and insolvency practitioners asserted that a single uniform law was neither practical nor feasible.[26] Rather, these groups aimed to provide guidelines or 'best practices' along with the information, education, and training needed to reform insolvency systems as part of a global effort to foster compatible, if not harmonised, legal frameworks. If and when a global solution to multijurisdictional insolvencies were possible and in force, its viability would require modern and responsive domestic laws and judicial infrastructure designed to ensure the vitality of both the domestic economy and multinational trade.

The financial crises of the mid-1990s also reinforced the recognition that the world comprised symbiotic economies and inspired both government and non-governmental organisations to more determinedly pursue efforts begun in the early 1990s to fashion mechanisms to solve

25 See generally, *Group of Thirty, Reducing the Risks of International Insolvency* (2000).
26 *Ibid* at 6.

and prevent the problems presented by transnational insolvencies, including guidelines for extraterritorial jurisdiction in insolvency cases. The two most significant achievements to emerge from these efforts to date are discussed in greater detail below – the development by the United Nations Commission on International Trade Law ('UNCITRAL') of a Model Law on Cross-Border Insolvency (the 'UNCITRAL Model Law')[27] and recommendation by the United Nations that it be adopted by all member nations, and the development and ultimate enactment of the European Union Regulation on Insolvency Proceedings ('EU Regulation').[28] Other efforts have been undertaken at both the international and regional levels, including the drafting of 'Principles of Cooperation in Transnational Insolvency Cases' by representatives of the signatory nations to the North American Free Trade Agreement (NAFTA), Canada, Mexico and the United States.[29]

The UNCITRAL Model Law on Cross-Border Insolvency

The IBA multicountry development of MIICA in the latter half of the 1980s, the IBA development of the Concordat in 1990, and responses – including the development of cross-border protocols in the significant multijurisdiction insolvency cases that began to be filed in the early 1990s – were all laudable attempts to fashion mechanisms to resolve cross-border insolvency challenges. The cross-border protocols, however, were case specific, court specific and even judge specific and not institutionalised as a matter of statutory law. They thus did not assure certainty and predictability for future insolvency proceedings touching those shores. And MIICA and the Concordat, while the product of extensive investigation and analysis by consummate professionals in the field, were not legislative mandates by policymakers.

All involved in the effort to effectuate viable solutions to the challenges posed by extraterritoriality and multinational insolvencies recognised that the force of government and adoption of statutory law were key. Accordingly, in April 1994, at the request, and with the assistance, of

27 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997) [hereinafter UNCITRAL Model Law].

28 Council Regulation 1346/2000, OJ 2000 L 160/1 (EC).

29 Transnational Insolvency Project: Principles of Cooperation in Transnational Insolvency Cases among the Members of the North American Free Trade Agreement (ALI 2003). These principles are not discussed in this report because they have not yet been adopted.

INSOL International, the UN Commission on International Trade Law[30] held a colloquium in Vienna, where UNCITRAL is headquartered, at which prominent insolvency practitioners, judges and academics from around the world met to discuss the challenges posed by transnational insolvencies and to examine whether, and how, the UN, and UNCITRAL in particular, might foster a global legislative resolution.

As a result of this meeting, UNCITRAL voted to form UNCITRAL Working Group V to study the issue of cooperation in international bankruptcies and, if feasible, to produce recommendations for adoption by UN Member States. UNCITRAL Working Group V consists of delegates from approximately 30 countries in the rotating membership of UNCITRAL, with observers from interested UN Member States and interested international organisations, including the IBA.

Beginning in late 1994, UNCITRAL Working Group V met twice annually as a whole, with a smaller drafting group, prominently including representatives of IBA Committee J, meeting frequently throughout the ensuing two years plus. Ultimately, these efforts resulted in the promulgation of the Model Law on Cross-Border Insolvency that was adopted by UNCITRAL at its Thirtieth Session on 12–30 May 1997. Thereafter the UN General Assembly approved the UNCITRAL Model Law and recommended it for adoption by its Member States by resolution 15 December 1997.[31]

The UNCITRAL Model Law on Cross-Border Insolvency was designed 'to assist states to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively instances of cross-border insolvency'.[32] The overall objective of the UNCITRAL Model Law is to improve transnational insolvency resolution by promoting: (1) cooperation between the courts and other competent authorities of differing states; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies; (4) protection and maximisation of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses, thereby

30 UNCITRAL was established by the UN General Assembly in 1966 as the mechanism through which the UN could assist in reducing or removing obstacles to the flow of international trade created by disparities in national laws by, among other things, furthering the progressive harmonisation and unification of the law of international trade: see GA Res 2205 (XXI), pmbl, UN Doc A/6396 (17 December 1966). UNCITRAL is composed of 60 UN Member States, representative of the various geographic regions, economies and legal systems throughout the world, elected by the General Assembly for a term of six years: Origin, Mandate and Composition of UNCITRAL, www.uncitral.org/uncitral/en/about/origin.html (last visited 9 June 2008).

31 See GA Res 52/158, at paras 3–4, UN Doc A/RES/52/158 (30 January 1998).

32 UNCITRAL Model Law pt II para 1.

protecting investment and preserving employment.[33]

In several important respects, the operation of the UNCITRAL Model Law impacts the extraterritorial effect, and thus jurisdiction, of a nation's insolvency laws. It is both a sword and a shield in that regard, in some ways facilitating and in other ways impeding extraterritorial jurisdiction.

Legislation based on the UNCITRAL Model Law has been adopted by a number of countries to date including, by year of adoption: Eritrea (2000), Japan (2000), Mexico (2000), South Africa (2000), Montenegro (2002), Poland (2003), Romania (2003), Serbia (2004), the British Virgin Islands (2005), the United States (2005), Colombia (2006), Great Britain (2006), and New Zealand (2006).[34] Legislation incorporating the Model Law is currently pending or in the process of being proposed in several other nations.

The first known court order implementing a nation's law incorporating the UNCITRAL Model Law was entered in December 2002 by Mexico's Fourth District Court for Civil Matters in a very important, heavily contested case which ultimately was appealed to the Mexican Supreme Court of Justice.[35] In November 2005, the Mexican Supreme Court rendered a unanimous judgment ruling, inter alia, that the UNCITRAL Model Law as incorporated into the Mexican Insolvency Act was not against the Mexican Federal Constitution and thus was lawful.[36]

The practical operation and effect of the UNCITRAL Model Law is most often demonstrated by its adoption and application in the United States. A brief examination of the US version of the UNCITRAL Model Law is thus instructive.

In order to encourage cooperation between the United States

33 *Ibid* pt I pmbl.

34 Status of the Model Law on Cross-Border Insolvency, www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited 9 June 2008).

35 'Incident for the recognition of foreign proceedings for insolvency and international collaboration', issued by the Fourth District Court for Civil Matter, 19 December 2002, File Number 29/2001, published in the Official Gazette on 7 February 2003. Mexican court was asked to recognise and order relief in aid of a decision by a US bankruptcy court granting a petition filed by Mexican banks asking the US court to place into bankruptcy involuntarily borrowers who were Mexican citizens then residing in the United States. The US bankruptcy court decision was appealed and affirmed first by the US district court and thereafter by the US appellate court. It was further appealed to the US Supreme Court, which declined to hear the case. For an excellent, in-depth examination of these important decisions, see Oscós Coria, 'The Most Important International Insolvency Cases of the Century: The Xacur Case' (Int'l Insolvency Institute, 2008), available at www.iiiglobal.org/committees/committee_f/Xacur_Case.pdf.

36 Nacional Supreme Court of Justice, Mexico, DF, 'Amparo under Review 1588/2004. Claimant: Jacobo Xacur Eljure, et al. Ninth Period'.

and foreign countries with respect to transnational insolvency cases, the United States incorporated the UNCITRAL Model Law into its bankruptcy code effective 17 October 2005.[37] In doing so, the United States took the highly unusual step of creating an entire new chapter of the US Bankruptcy Code for this purpose: Chapter 15.[38] Recognising the increasing incidence of cross-border insolvencies that stem from continuing globalisation of trade and investment, the United States adopted Chapter 15 as a way to address the need for domestic insolvency laws that deal predictably with cross-border cases.[39]

Through its adoption of the UNCITRAL Model Law, the US Congress made clear that universalism was the express foundation of US international bankruptcy policy. Chapter 15, considered long overdue by its proponents, was expressly adopted to demonstrate the United States' commitment to the UNCITRAL Model Law and to cooperation and universalism generally.[40] Its objectives are virtually identical to those outlined in the UNCITRAL Model Law itself.[41]

Under Chapter 15, a duly authorised representative of a proceeding properly commenced and pending in a foreign jurisdiction may seek from a US bankruptcy court US recognition and relief in aid, including injunctive relief, for that proceeding. The grant of the requested relief by the US court effectively extends and effectuates the extraterritorial jurisdiction of the laws of the country in which the foreign proceeding is pending.

Not all foreign proceedings are eligible for recognition and relief under Chapter 15. And the relief the US bankruptcy court is empowered to grant in aid of the foreign proceeding depends *ab initio* on whether the foreign proceeding *is* eligible for recognition and relief *and* where that proceeding is pending.

To be eligible for recognition under Chapter 15, the foreign proceeding must be pending either in a country where the foreign debtor has its 'centre of main interest' (commonly referred to as 'COMI') or in a country where the foreign debtor has an 'establishment'. 'Centre of main interest' is not a defined term or phrase in the US Bankruptcy Code. Rather, Chapter 15 merely provides that, 'absent evidence to the contrary', the debtor's registered office or place of incorporation

37 11 USC ss 1501–1532.

38 See *Collier on Bankruptcy* (Alan N Resnick & Henry J Sommer, eds, Matthew Bender 15th ed, rev 2006) 8, para 1501.01.

39 See *ibid*.

40 See *ibid* para 1501.02.

41 See *ibid*.

is 'presumed' to be the centre of its main interests.[42] Chapter 15 does include an express definition of the term 'establishment', which is defined as 'any place of operations where the debtor carries out a non-transitory economic activity'.[43]

If the foreign proceeding is pending in a country where the debtor has a mere presence, such as assets, but in which the debtor does not conduct any non-transitory economic operation, that foreign proceeding is not eligible for recognition or relief from the United States under the terms of Chapter 15.

Eligibility for assistance through Chapter 15 is of significant consequence to the issue of extraterritorial jurisdiction. A nation whose laws purport to have extraterritorial reach can effectuate that ambit through Chapter 15. In addition, laws of a nation which are not intended to have extraterritorial reach can be granted such range through Chapter 15.

Chapter 15 effectively is an 'entry visa' prerequisite for the reach of another country's extraterritorial jurisdiction in the insolvency area. The representative of a foreign debtor must commence a case under Chapter 15 and obtain recognition of the foreign proceeding before it may receive any relief from any US court, state or federal, respecting the foreign proceeding or debtor with one exception, discussed below. Accordingly, another country's assertion of extraterritorial jurisdiction of its insolvency-related law may be an empty, ineffective gesture within the United States absent Chapter 15 recognition of that country's foreign proceeding and licence to even attempt to seek enforcement via a US court.[44]

The one instance where a Chapter 15 recognition order is not a requisite entry visa is where the representative of a foreign insolvency proceeding seeks the assistance of a US court to collect or recover 'a claim' which is the property of the foreign debtor. Chapter 15 provides that the foreign representative may obtain such relief without first commencing a case and obtaining an order of recognition of the foreign

42 11 USC s 1516(c).

43 11 USC s 1502(2).

44 Courts in the United States recently have clarified that the representative of a foreign proceeding or debtor only needs to first obtain an order of recognition under Chapter 15 if it is seeking relief from a *court* in the United States in order to assert, enforce or protect the interests of the foreign estate, and that a Chapter 15 order is not a prerequisite where the representative of the foreign estate seeks to take an action that does not require the comity or cooperation of a US court: see *In re Iida*, 377 BR 243 (BAP 9th Cir 2007) (representative of foreign bankruptcy granted right to exercise authority over debtor did not have to seek Chapter 15 order as prerequisite to changing corporation's officers and directors in Hawaii); *In re Loy*, 2007 WL 4532092 (Bankr ED Va 2007) (filing notice of *lis pendens* not an act requiring comity or cooperation of a US court).

proceeding under Chapter 15.[45] The term 'claim', however, *is* a defined term under the US Bankruptcy Code,[46] and that definition applies to Chapter 15.[47]

For purposes of the US Bankruptcy Code, a 'claim' means a right to payment, or a right to an equitable remedy for breach of performance *if* such breach gives rise to a right of payment. 'Payment' is not a defined term under the Bankruptcy Code. Accordingly, absent recognition and relief under Chapter 15, a foreign representative may be incapable of, for example, recovering non-monetary property of the foreign debtor located in the United States rightfully or wrongfully in the possession of a third party. And if the foreign proceeding is pending in a country where the debtor has neither the COMI nor an 'establishment', the representative of that foreign proceeding will be incapable of obtaining a Chapter 15 recognition order enabling it to recover such property.

Moreover, a 'claim' for purposes of the US Bankruptcy Code is a *right* to payment – not a *potential* right to payment. Thus, if the claim sought to be enforced has not been reduced to a judgment or as otherwise agreed, the representative of the foreign proceeding would first have to seek Chapter 15 recognition and relief to collect it.

If a foreign proceeding meets the eligibility requirements for recognition under Chapter 15, the foreign representative will be able to seek certain relief in aid of the foreign proceeding. If the foreign proceeding is pending where the debtor has its COMI, the proceeding will be found to be a foreign 'main' proceeding and certain relief obtains automatically, including injunctive relief.[48] Essentially, the US court is instructed to defer to the determinations of the foreign court, and the extraterritorial reach of the law in the jurisdiction where the foreign debtor has its COMI.

Statutorily, the US bankruptcy court has no discretion to deny the automatic relief that obtains upon recognition of a foreign 'main' proceeding unless it determines that to grant such relief would be 'manifestly contrary to the public policy of the United States'.[49] This public policy 'out' similarly would apply to enable the US bankruptcy court to deny discretionary relief in either a foreign 'main' or 'non-main' proceeding (one pending where the foreign debtor does not have its COMI, but has an 'establishment'). The public policy exception,

45 11 USC s 1509(f).
46 11 USC s 101(5).
47 11 USC s 103(a).
48 11 USC ss 1502(4), 1520.
49 11 USC s 1506.

therefore, may serve as a sword against the exercise within the United States of another country's extraterritorial insolvency law jurisdiction.

The European Union Regulation on Insolvency Proceedings

Discussed more fully below, the EU Regulation became effective 31 May 2002. It applies to all transnational insolvency proceedings involving two or more EU countries (other than Denmark, which exercised its right under its EU accession treaty to opt out of the regulation).[50] Annexes A and B to the EU Regulation identify the national laws of the Member States for 'insolvency proceedings' and 'winding up proceedings' that are subject to the EU Convention.[51] Annex C identifies the liquidators under the laws of the various EU countries that qualify for the regulation.[52] The EU Regulation is based on trust, and its success depends on EU Member States respecting their sister countries' insolvency laws and court procedures.[53]

Centre of Main Interests (COMI)

Both the UNCITRAL Model Law and the EU Regulation rely on a modified universalist approach. They effectively give primacy to a case opened by a debtor in its 'home country'. Only that case can be a main case, with all of the attendant benefits thereof. And that case and the laws applicable to it are entitled to recognition as such in other countries where the UNCITRAL Model Law or EU Regulation is in force. Any cases opened in other countries would be considered secondary to the main case.

Under both regimes, the 'home country' is deemed to be the country where the debtor's COMI is located.[54] The operative laws provide that the COMI is where the main case proceeding should be opened, and the law governing the insolvency case, for the most part, is the law of the country where the COMI is located. The UNCITRAL Model Law, the EU Regulation, and the NAFTA principles all appear to rely on this concept, as do the laws of many of the countries which have incorporated the

50 Council Regulation 1346/2000 (Annex A).

51 *Ibid* (Annex A–B).

52 *Ibid* (Annex C).

53 See *ibid* pmbl; Case C-143/20, *In re Eurofood IFSC Ltd*, 2006 ECR; Bob Wessels, 'International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies 14–15' (Int'l Insolvency Institute, 2003) available at www.iiiglobal.org/country/european_union/InternJurisdictionCompanies.pdf.

54 Council Regulation 1346/2000 Article 3(1).

UNCITRAL Model Law, such as Chapter 15 in the United States.

COMI, therefore, is central to the reach of extraterritorial jurisdiction in insolvency proceedings internationally. However, it is particularly challenging jurisdictionally to determine where the COMI of a corporate entity is located. It is not surprising, then, that COMI has spawned the greatest controversy and dispute in the implementation of cross-border insolvency laws.

The UNCITRAL Model Law provides that '[i]n the absence of proof to the contrary, the debtor's registered office… is presumed to be the centre of the debtor's main interests'.[55] The EU Regulation likewise provides that 'in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of main interests in the absence of proof to the contrary'.[56]

The UNCITRAL Model Law – and Chapter 15 which incorporates it – does not go further than setting forth the rebuttable presumption of where an entity's COMI lies. In contrast, the preamble to the EU Regulation offers some guidance for interpretation. The EU Regulation expressly provides that '[t]he "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.[57] It also sets forth two considerations in determining the location of a debtor's COMI. First, a court must consider where the debtor conducts 'the administration of its interests on a regular basis, which essentially means the place where it administers its commercial, industrial, professional, and general economic activities'.[58] Secondly, a court must consider where third parties, especially creditors, objectively view a company's COMI to sit.[59]

This second consideration takes into account the 'insolvency risk' parties anticipated when originally entering into transactions with the now-debtor. In requiring this consideration, the EU Regulation acknowledges that commercial parties view their counterparts' inability to perform, including through insolvency, as a foreseeable risk and fashion the terms of their agreements, especially default terms, based on the expectation that a particular set of laws will apply to the determination

55 UNCITRAL Model Law Article 16(3).

56 *Supra* n 53.

57 Council Regulation 1346/2000 pmbl.

58 Miguel Virgos & Etienne Schmit, 'Report on the Convention on Insolvency Proceedings (2002)' reprinted in *The EC Regulation on Insolvency Proceedings and Annotated Guide* (Gabriel Moss, Stuart Isaacs & Ian Fletcher, eds, OUP 2003) 75.

59 *Supra* n 53.

of their rights and interests.[60] Thus, the certainty and predictability in cross-border transactions required by the international financial markets depends on a determination that the jurisdiction of an international insolvency proceeding lies in a 'predictable' forum.

The UNCITRAL Model Law and the EU Regulation share other similarities with respect to determining COMI. Under both authorities, a company can have only one COMI and one main proceeding.[61] Similarly, both authorities require that the COMI analysis be made for each separate legal entity.[62]

Under the EU Regulation, when a main proceeding is opened, the proceeding is governed by the laws of the country where the case was filed.[63] A judgment opening a main proceeding is to be automatically recognised as valid by the other member countries with no further formalities.[64] In addition, the administrator in the main proceeding may exercise his or her powers in every member country, including repatriating assets, registering the judgment and publishing notice in member countries.[65] Further, the main proceeding country's laws affecting matters such as the automatic stays or other moratorium, are to apply to all creditors in every EU country.[66]

The EU Regulation allows for the opening of a secondary proceeding only in countries where the debtor has an 'establishment', defined as 'any place of business where the debtor carries on a non-transitory economic activity with human means and goods'.[67] Secondary proceedings are to assist and support the main proceeding and to protect local creditors in certain respects.[68] Secondary proceedings are territorial in nature. The law of the local country where the secondary case is opened applies, not the law of the forum country for the main proceeding.[69] In this and other respects, the EU Regulation does not attempt to reconcile the differences in insolvency laws among the various EU countries.[70]

The UNCITRAL Model Law – and Chapter 15 which incorporates it

60 *Supra* note 57 at 75.

61 Andre J Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 *Tul J Int'l & Comp L* 309, 355.

62 See Bob Wessels, *European Union Regulation of Insolvency Proceedings: An Introductory Analysis* (Am Bankr Inst 2003) 18–20.

63 Council Regulation 1346/2000 Article 4.

64 *Ibid* Article 16.

65 *Ibid* Articles 18(1), 21–22.

66 *Ibid* Article 4.

67 *Ibid* Article 3(2).

68 *Ibid*.

69 *Ibid* Article 28.

70 *Ibid* pmbl.

– allow for recognition of a foreign proceeding filed in a jurisdiction that is not the debtor's COMI so long as the debtor has an 'establishment' in that jurisdiction. Termed a 'non-main proceeding', there is no automatic relief upon recognition as with a 'main proceeding'. Post-recognition relief is wholly discretionary.

Determining COMI

Not surprisingly, determining COMI for purposes of deciding whether a foreign proceeding is a 'main' versus 'non-main' or secondary proceeding already has led to significant litigation, both under the EU Regulation and national versions of the UNCITRAL Model Law.

A prime example under the EU Regulation is the case of *Eurofood IFSC Ltd.*[71] Eurofood was a wholly-owned subsidiary of the Italian conglomerate Parmalat whose main objective was to provide financing facilities for other companies in the Parmalat group.[72] Eurofood was incorporated and registered in Ireland.[73]

In late 2003, Parmalat fell into financial crisis.[74] In response, the Italian government commenced extraordinary administration proceedings, and an administrator was later appointed.[75] Separately, in early 2004, Bank of America – the bank managing the day-to-day administration of Eurofood under an administration agreement – filed a petition in Ireland's courts to wind up Eurofood because Eurofood was insolvent and owed Bank of America over US$3.5 million.[76] The Irish court appointed a provisional liquidator to oversee Eurofood.[77]

Thereafter, both the Italian and Irish courts sought to resolve, among other questions, where Eurofood's COMI was, which proceeding constituted the main proceeding, and which was secondary. The case ultimately was referred to the Court of Justice of the European Communities ('ECJ'). The ECJ concluded, inter alia, that (1) the winding-up petition in Ireland constituted a judgment opening insolvency proceedings; (2) because the Irish proceedings were opened in the court where Eurofood's office was established and where it conducted its regular business, other EU Member States (in this case, Italy) did not

71 See generally 'Opinion of Advocate General Jacobs, C-341/04' (27 September 2005) available at www.globalturnaround.com/cases/Eurofood.pdf.
72 See *ibid* at I-6.
73 See *ibid*.
74 *See ibid* at I-7.
75 See *ibid*.
76 See *ibid*.
77 See *ibid* at I-6, I-7.

have jurisdiction to open main insolvency proceedings; (3) Parmalat's corporate ownership and control of Eurofood did not alter the analysis for determining Eurofood's COMI, which, based on Eurofood's regular business and office location, was in Ireland; and (4) Ireland did not need to recognise the decision of the Italian courts with respect to insolvency which, under the circumstances, were against its public policy.[78]

There have been no Irish cases on the substantive COMI test since *Eurofood*. However, since *Eurofood* there has been consideration of the interplay between the EU Insolvency Regulation and the Judgments Regulation.[79] In the case of *Mazur Media Ltd*,[80] the English courts held that a German liquidator was not entitled to stay an application for the enforcement of a judgment in the English courts simply because the claim in question could be made within the German insolvency process. In essence, the court held that the application for enforcement could stand apart from the foreign insolvency proceedings without effecting its integrity. This decision was effectively endorsed by the Irish courts in the case of *Flightlease Ireland Ltd*.[81]

The complex issues involving COMI and corporate groups presented in *Eurofood* are not unique. Similar difficulties arose among English, French and German interests in the insolvency proceedings involving the Daisytek corporate group.[82] And in the *Yukos* case, a US bankruptcy judge granted the interim receiver of a Russian company Chapter 15 recognition and relief that would enable the Russian receiver to control a sale pending in court proceedings in Amsterdam of assets located in Lithuania owned by a Netherlands affiliate of the Russian company – relief that had already been denied the Russian receiver by the Netherlands courts.[83]

These cases highlight the challenges posed to extraterritorial jurisdiction in international insolvency cases generally and, in particular, the challenges that corporate groups present for determining a company's COMI.

The COMI debate took a particularly interesting and important turn in the United States beginning in the latter half of 2007, exhibited most

78 See *ibid* at I-32.

79 Council Regulation 44/2001, OJ 2001 L 12/1 (EC).

80 *Mazur Media Ltd v Mazur Media GmbH* [2005] 1 BCLC 305 (UK).

81 *Flightlease Ireland Ltd* [2005] IEHC 274 (UK).

82 *In re Daisytek-ISA Ltd* (2003) BCC.562, (Ch Leeds) (UK); *Sony Elecs Inc v Daisytek,Inc (In re Daisytek Inc)*, 2004 WL 1698284 (ND Tex 2004).

83 *In re Yukos Oil Co (Yukos II)*, No 06-B-10775-RDD (Bankr SDNY 26 May 2006), www.nysb.uscourts.gov.

notably by two significant cases[84] filed in the Bankruptcy Court for the Southern District of New York that were decided differently by bankruptcy judges sitting virtually down the hall from each other.[85] Both cases sought relief in the United States via Chapter 15 in aid of insolvency proceedings pending in the Cayman Islands respecting offshore hedge funds.

These cases essentially addressed two pivotal issues:

- First whether, out of perceived practical necessity, a US bankruptcy judge can recognise and grant relief in aid of a foreign insolvency proceeding pending in a jurisdiction where the foreign debtor has *neither* its COMI nor an establishment, despite the express provisions of US Chapter 15 to the contrary.
- Secondly whether, for the purpose of determining that the court has jurisdiction to entertain a Chapter 15 petition for recognition and relief in aid of a foreign 'main' proceeding, a US bankruptcy judge, absent objection filed by any party in interest, has an independent obligation to determine whether a foreign proceeding filed in the place where the debtor has its registered office or place of incorporation indeed is pending where that debtor has its COMI, and thus is entitled to treasured non-discretionary automatic relief in aid of the proceeding, including injunctive relief.

In a broadly criticised opinion,[86] the *SPhinX* court held that it could, for pragmatic reasons, recognise and grant relief in aid of a foreign insolvency proceeding pending in a jurisdiction where the foreign debtor has *neither* its COMI nor an establishment, despite Chapter 15's express jurisdictional predicates to the contrary.[87] At least one commentator has posited that in so ruling the *SPhinX* court 'carries the flexible interpretation of COMI to an extreme… virtually eliminat[ing] predictability in determining COMI, consigning each case to the unrestrained discretion of the judge'.[88]

In subsequent Chapter 15 cases filed in aid of the Caymen Islands provisional liquidation of certain hedge funds operated by Bear Stearns, Judge Burton R Lifland, one of the authors of the UNCITRAL Model

84 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd,* 374 BR 122 (Bankr SDNY 2007), aff'd 2008 WL 2198272 (SDNY 2008); *In re SPhinX Ltd*, 351 BR 103 (Bankr SDNY 2006), aff'd sub nom, *Krys v Official Comm. of Unsecured Creditors of Refco Inc (In re SPhinX Ltd)*, 371 BR 10 (SDNY 2007).

85 The bankruptcy courts in the United States are federal courts charged with applying US federal law. However, a decision by one US bankruptcy judge is not binding precedent on another US bankruptcy judge even if they sit in the same courthouse.

86 See eg, Daniel M Glosband, 'SPhinX Chapter 15 Opinion Misses the Mark' (2007) 25 *Am Bankr Inst J* 44; Jay Lawrence Westbrook, 'Locating the Eye of the Financial Storm' (2007) 32 *Brook J Int'l L* 1019.

87 See *SPhinX, supra* n 83.

88 Westbrook, *supra* n 85 at 1024.

Law and of Chapter 15, rejected the petitioning provisional liquidators' contention that because no objections were filed to the petition seeking recognition as a foreign main proceeding and the funds' registered offices were in the Cayman Islands that the US Bankruptcy Court should, without more, accept that the funds' COMI was in the Cayman Islands and therefore recognise the Cayman proceedings as foreign main proceedings with all attendant broad and automatic, non-discretionary relief. Noting that a determination that a pending proceeding is a main proceeding carries with it a range of important consequences, the court effectively found that Chapter 15 provides that the presumption that a debtor's COMI is the site of the debtor's registered office obtains only in the absence of evidence to the contrary and the petitioning foreign representative has the burden of proving that no such evidence to the contrary exists.

Moreover, the *Bear Stearns* judge expressly rejected as improper 'rubber stamp approval' of the opinion of his colleague in *SPhinX* that it would have found the COMI of the debtors in that case to have been the Cayman Islands based on the registered office presumption without requiring any further evidentiary support solely on the grounds that no party had objected to that assertion and no other proceeding had been commenced respecting that debtor anywhere else.[89] In doing so, the *Bear Stearns* judge effectively rejected the contention that COMI could be actively or passively 'agreed' by the parties.

Finally, the bankruptcy court in *Bear Stearns* further found that it could not grant recognition at all to the Cayman Islands proceedings because they were neither 'main' nor 'non-main' foreign proceedings, rendering them ineligible for any recognition under Chapter 15 and thus providing the court no jurisdictional basis for granting relief in aid of those proceedings.[90] The court found that the Cayman Islands proceedings did not qualify as even 'non-main' proceedings in aid of which the court had discretion to grant relief because the funds lacked an 'establishment' in the Cayman Islands and, indeed, as 'exempted companies' under Cayman law[91] they were statutorily prohibited from engaging in business in the Cayman Islands other than in furtherance of business they carried on outside of the Cayman Islands. The court confirmed that Chapter 15 imposes a 'rigid procedural structure for recognition of foreign proceedings as either main or non-main' to be entitled to jurisdictional

89 See *SPhinX, supra* n 83 117.

90 See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, supra* n 83.

91 'Companies Law of the Cayman Islands s 193 (2004)' (Cayman Is) available at www.investcayman.ky/laws.cfm.

recognition and thereafter judicial consideration of requests for relief in aid of the foreign proceeding.

On appeal, the District Court for the Southern District of New York affirmed the decision of the *Bear Stearns* bankruptcy court in its entirety.[92] The appellants' principal argument on appeal had been that the bankruptcy court should have considered principles of comity and cooperation, not merely COMI and the existence of an 'establishment', in determining whether or not to grant recognition of the Cayman proceedings. The district court judge disagreed, finding that Chapter 15 requires *recognition* as a *condition* to granting comity. In doing so, the district court noted: 'By establishing a simple, objective eligibility requirement for recognition, Chapter 15 promotes predictability and reliability. The considerations for post-recognition relief remain flexible and pragmatic in order to foster comity and cooperation in appropriate cases.'[93]

The district court further instructed that:

> 'The objective criteria for recognition reflect the legislative decision by UNCITRAL and [the US] Congress that a foreign proceeding should not be entitled direct access to or assistance from the host country courts unless the debtor had a sufficient pre-petition economic presence in the country of the foreign proceeding.'[94]

A third bankruptcy judge in the Southern District of New York in a Chapter 15 case respecting offshore hedge funds refused to make a summary determination that the COMI of the debtor was where its registered office is located solely because of the presumption to that effect contained in Chapter 15 and the failure of any stakeholder to object.[95] The *Basis Yield* court ruled that:

> '… a court engaging in a recognition determination under section 1517 is not bound by parties' failures to object; may, if it is so advised, consider any and all relevant facts (including facts not yet presumed); and that the circumstances here make further factual inquiry necessary and appropriate'.

Indeed, by a prior order issued earlier in the case, the court expressly ordered that the hearing on recognition of the foreign proceeding was to be an evidentiary hearing, set forth in detail the factual findings the court needed to make in order to determine the *situs* of the debtor's COMI,

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92 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*, 2008 WL 2198272 (SDNY 2008).

93 *Ibid* at 7.

94 *Ibid* (citing HR Rep No 109-31 at 110 (2005), reprinted in 2005 USCCAN 88, 172).

95 See *In re Basis Yield Alpha Fund*, 381 BR 37 (Bankr SDNY 2007).

and requested that the petitioners provide the court at a minimum with sufficient evidence to enable it to make such findings.[96]

Challenges and criticisms of current laws

The development of mechanisms such as the UNCITRAL Model Law and the EU Regulation aimed at resolving the cross-border insolvency dilemma and ensuring greater certainty and predictability for international commerce has not quelled the debate. In the view of some, the 'fixes' to date not only have fallen short of attaining their goals but have exacerbated the problems.

Among significant criticisms of solutions enacted so far are that they foster inappropriate forum shopping and in their simplicity fail to effectively achieve their goals by ignoring the complexities posed when insolvency occurs within a corporate group.

For example, recent judicial interpretations of key aspects of Chapter 15, including those described above, have spurred some to complain that, by its express terms, Chapter 15 and, by implication, the UNCITRAL Model Law, erects 'rigid barriers to relief' that disable it from achieving its intended purpose,[97] and others to bemoan virtually the opposite, that if US courts impose a 'pragmatic approach' to implementing Chapter 15, the hoped-for certainty and predictability the UNCITRAL Model Law which it incorporates sought to provide in aid of international commerce in the face of competing jurisdictional assertions will continue to remain beyond reach.[98]

Some even warn that, taken to extremes, the 'flexible nature' of Chapter 15 and other embodiments of the UNCITRAL Model Law in fact is so open-ended that it may lead (and according to some, has led) to results which, intended or not, effectuate almost political results, taking 'extraterritorial' to the brink of 'imperialism'.[99]

96 See *supra* n 94 at 56.

97 See eg, Ken Coleman and Daniel Guyder, 'US Bankruptcy Court Denies Recognition of Cayman Liquidation Proceedings' (December 2007) 25 Bankr Strategist 1.

98 See eg, Glosband, *supra* n 85.

99 See eg, Shinjiro Takagi, 'Japanese Comments on the Extraterritorial Effects of US Chapter 15' (June 2007) 16 *Int'l Insolvency Rev* 95 (June 2007). See also Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency', *supra* n 4; John Pottow, 'Cutting Chapter 15's Teeth: The Yukos Advenure' (May 2006) (presentation paper to INSOL 2006 Academic Conference).

Forum shopping

Universalism, the EU Regulation and the UNCITRAL Model Law are criticised as encouraging forum shopping and manipulation of venue.[100] A fundamental premise of the universalist approach is that the debtor has a home country or COMI. That premise is designed to ensure that the debtor will have a sufficient nexus with the venue in which an insolvency proceeding respecting the debtor is filed and to allow potential creditors to reasonably predict in advance the law that will apply.

Critics contend that the intended certainty and predictability are at risk because modern multinational companies do not have 'home countries' in any meaningful sense.[101] Moreover, even those multinational companies that have true home countries can change them.[102] This indeterminacy, some argue, not only impairs certainty and predictability, it enables activist forum shopping, court competition[103] and, by implication, law competition.

The concern is that when transnational companies determine to seek insolvency relief, they may be eligible to file a proceeding in more than one country. As such, they are capable of choosing which forum to file in and consequently, which country may be able to affect extraterritorial jurisdiction.[104] Even worse, if they don't get the desired result in one country, they can try for a 'second bite of the apple' by filing proceedings in another country.[105]

With billions of dollars of business at stake for bankruptcy professionals, at least one critic argues that home courts lack the objectivity to fairly determine whether they are the home country of multinationals that choose to file there.[106] Critics further maintain that there are no mechanisms for resolving the problems of forum shopping, and that international institutions are not strong enough to impose solutions.[107]

The threshold question remains: when the principal assets, operations, headquarters and place of incorporation are in different countries, which

100 See generally Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency', *supra* n 4.

101 See LoPucki, 'Universalism Unravels', *supra* n 4.

102 See LoPucki, 'Global and Out of Control', *supra* n 4.

103 *Ibid.*

104 *Ibid.*

105 See Pottow, 'The Myth (and Realities) of Forum Shopping in Transnational Insolvency', *supra* n 4 at 807 n 89 (describing the Chapter 15 *Yukos* case as one 'in which unhappy litigants in quasi-territorialist Russian proceedings tried to get a US stay to stymie unwelcome legal developments both in and outside of Russia'.).

106 *Ibid.*

107 *Ibid.*

is the 'home country'?[108] Leading universalists respond that, in the vast majority of cases, the home country will be obvious and the remaining cases are so few that they are insignificant.[109]

Even in those few cases however, critics maintain that the potential for harm resulting from international forum shopping is much greater than what would result from domestic shopping within a country having multiple venues, such as the United States.[110] Forum shopping for a different bankruptcy court within the United States results at most in a different interpretation of the same statute, the US Bankruptcy Code.[111] In contrast, forum shopping among different countries could result in the application of an entirely different set of available remedies, priority schemes for creditors, avoidance powers, and an invalidation of security interests, among other potential issues.[112]

Critics further argue that the ability of corporations to quickly and easily relocate, coupled with the inherent ambiguity of the COMI standard, make forum shopping easy in a universalist regime.[113]

Of course, such concerns and attacks are predicated on the view that forum shopping is a pejorative phrase and concept. Such a view is not universally held. Some maintain that under certain circumstances forum shopping may actually be a necessity. For example, critical assets of a debtor may be located in country X. The ability of the debtor to successfully recover and satisfy or restructure its debts may depend on those assets being administered as part of its main insolvency proceeding. The debtor may be entitled to commence an insolvency proceeding in a number of jurisdictions, including the country that traditionally would be considered most likely to host the debtor's COMI. However, an insolvency proceeding commenced in that country may have difficulty being recognised and granted assistance by the courts in country X.

Corporate groups

A second recurring criticism of universalism is its failure to adequately resolve venue when corporate groups are involved. Nearly all multinational corporate empires today include corporate groups (not

108 See LoPucki, 'The Case for Cooperative Territoriality in International Bankruptcy', *supra* n 4 at 2217.
109 See Guzman, *supra* n 4 at 2207.
110 See Chung, *supra* n 4 at 89.
111 See LoPucki, 'Global and Out of Control', *supra* n 4.
112 *Ibid* at 79.
113 *Ibid* at 101.

just single corporations) and many separate legal entities.[114] Yet neither the UNCITRAL Model Law nor the EU Regulation addresses the problem of determining COMI for corporate groups.[115] Rather, each is drafted on the assumption that every legal entity must be evaluated separately to determine where its COMI is located.[116] The result is that a different court potentially could control the insolvency of each separate entity in the corporate group, leaving no single court with the power to effect a worldwide reorganisation.[117] Critics argue that this approach is unsatisfactory because a corporate group that operates as an integrated economic unit can only be reorganised effectively if it is done collectively for the entire group.[118] The reach of extraterritorial jurisdiction obviously comes centrally into play in this debate as well.

The UNCITRAL Working Group V is currently investigating and attempting to develop mechanisms to address the issue of insolvency and corporate groups.[119] The preliminary reports of its sessions may be reviewed on the UNCITRAL website www.uncitral.org.

Framing the future

Given the foregoing, the quest for viable and sustainable global mechanisms affording certainty and predictability in the face of cross-border distress carries on. The 'holy grail' continues to remain out of reach. And, in the view of some, is pure myth.

So how, if at all, should the quest proceed? Have we been asking the wrong or insufficiently effective questions? Have we been asking the right sources? Have we ignored practical realities? Have we so pigeon-holed ourselves in theoretical boxes it is difficult to think outside of them?

For the past quarter century, the quest map has been drawn and redrawn on the back of the relatively unvarying debate over whether a territorial versus a universalist legal regime is the best means by which to meet the challenges which follow the failure of business enterprises. However, global commerce is anything but static. It not only is dynamic, it is evolving today at an ever increasing pace. As a consequence, those

114 *Ibid* at 92.

115 See Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4 at 136.

116 See Wessels, *supra* n 52 at 18–20.

117 See LoPucki, 'Universalism Unravels', *supra* n 4 at 152–53.

118 See Bufford, 'Global Venue Controls are Coming: A Reply to Professor LoPucki', *supra* n 4 at 136.

119 The preliminary reports of its sessions may be reviewed on the UNCITRAL website at www.uncitral.org/uncitral/en/commission/working_groups.html.

addressing its challenges need to be forward-thinking – just to keep up, let alone to get out ahead. It thus is important, indeed perhaps critical, to ensure that the dialogue not be constrained by perceptions of the issues which become outdated as time passes.

Shaping the next analytical framework

Fortunately, fresh insights are constantly arising, and untested potential methodologies remain on the drawing board. All of these, at the least, warrant consideration. Some may become part of, or contribute to, the next generation toolkit.

In addition, the IBA and other major international government and non-government organisations concerned with insolvency law and practice continue to seek to resolve the issues discussed above. They are attempting to improve on and further mechanisms now in place or available for adoption, such as the EU Regulation and the UNCITRAL Model Law, and they are beginning to focus on aspects of the transnational insolvency challenges not addressed by existing legislation and proposals.

NEW THEORETICAL CONSTRUCTS

In 2007, a well-respected scholar weighed in with his opinion that the raging debate between universalists and territorialists over divergent insolvency legal regimes had grown overheated and perhaps was even rendered moot because it appeared increasingly likely that creditor control of insolvency proceedings inevitably will lead to a *market* solution to the problem of coordinating the cross-border aspects of such proceedings.[120] Another prominent scholar has characterised this iconoclastic thesis as 'deserving of serious attention' yet subject to question given its apparent rejection of the importance of universalism and territorialism in the equation.[121] Its proponent himself has acknowledged that his anecdotal observations and nascent theory are not yet underpinned by statistically valid empirical evidence. Nevertheless, this premise and others well illustrate the danger of allowing the dialogue on this topic to grow rusty or constrained by the need to categorise and cubbyhole, as opposed to staying at the cutting-edge.

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120 See Rasmussen, *supra* n 4.

121 Westbrook, 'Locating the Eye of the Financial Storm', *supra* n 4 at 1019 n 2.

ASSESSING WHERE WE ARE

Progress at the national level differs country by country. The LPD Extraterritorial Jurisdiction Task Force Insolvency Law Subcommittee ('Insolvency Subcommittee') began a process to attempt to ascertain the current state and impact of the actual exercise of extraterritorial jurisdiction in insolvency proceedings under the laws of various nations.

Preliminarily, the Insolvency Subcommittee reviewed the most recent available data and narrative reports addressing national treatment of cross-border insolvency issues contained in the vast literature available and compiled by continuing research projects including, among others, Law Business Research Ltd's 'Restructuring & Insolvency 2008'[122] and the World Bank annual 'Doing Business Report'.

Based on these analyses, the Insolvency Subcommittee determined that, for the purpose of realising its objectives, further data and narrative were required which more directly ascertained the exercise and impact of inbound and outbound extraterritorial jurisdiction in various nations and regions. Given the timing and resource constraints of the project, it decided to develop and distribute an initial preliminary questionnaire as a first step, hopefully to be followed by enhanced and more in-depth

122 *Getting the Deal Through: Restructuring & Insolvency 2008*, Law Business Research Ltd is an annual compilation of responses by practitioners in 52 countries to 40 questions addressing the law and practice in each country related to both domestic and cross-border insolvency. Countries represented in the 2008 edition were, by region: *Africa*: Ghana, Nigeria, South Africa; *Americas*: Argentina, Brazil, Canada, Mexico, United States, Venezuela; *Asia-Pacific*: Australia, China, Indonesia, Japan, Korea, New Zealand, Thailand, Vietnam; *Europe*: Austria, Belgium, Cyprus, Czech Republic, Denmark, England and Wales, Estonia, European Union, France, Germany, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Russia, Scotland, Slovakia, Spain, Sweden, Switzerland, Turkey; '*offshore*': Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominican Republic, Gibraltar, Guernsey, Hong Kong, Panama.

The relevant Law Business Research Ltd cross-border insolvency survey questions were: Question 37: 'Is the adoption of the UNCITRAL Model Law on Cross-Border Insolvency under consideration in your country? If so, what is the present status of this consideration?'; Question 38: 'What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?'; Question 39: 'In cross-border cases, have the courts in your country entered into cross-border protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?'; Question 40: 'Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?'

exploration of the questions presented including interviews with respondents.

The Insolvency Subcommittee preliminary questionnaire was distributed by the IBA Section on Insolvency, Restructuring and Creditors' Rights ('SIRC') to insolvency practitioners in IBA member countries and by the Insolvency Subcommittee to others in the international insolvency community. The preliminary questionnaire solicited responses to the following specific inquiries:

(1) do your country's insolvency laws currently provide for extraterritorial jurisdiction and in what instances?;
(2) what problems or issues have arisen within your country because of assertions of extraterritorial jurisdiction through your country's insolvency laws?;
(3) what problems or issues have arisen within your country because of extraterritorial jurisdiction asserted by other countries' laws?;
(4) what changes to the laws of your country would help to resolve or prevent the issues or problems presented by extraterritorial jurisdiction described in the responses to questions (2) and (3) above?

For purposes of these inquiries, the following definitions were specified:

- 'Extraterritorial jurisdiction' as used in this questionnaire refers to the situation where a particular law in a country either says that it applies, or is viewed as applying, beyond the borders of that country, such that the jurisdiction of the relevant court in that country to apply and enforce that law is considered to extend beyond the borders of that country. For example, the US Bankruptcy Code defines the 'estate' of a debtor in a bankruptcy or reorganisation proceeding to include all property in which the debtor holds a legal or equitable interest *wherever that property is located*. Accordingly, the jurisdiction of a US bankruptcy court with respect to such property purports to extend beyond the jurisdiction of the United States.
- 'Insolvency law' or 'insolvency proceeding' as used in this questionnaire refers to any law or court proceeding related to the insolvency of a debtor or to the resolution of a debtor's indebtedness to all of its creditors whether the debtor is or is not legally insolvent.

Responses to the preliminary questionnaire were received thus far from respondents in 20 countries: Austria, Belgium, Canada, Denmark, England, Finland, Germany, Ireland, Italy, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Singapore, Spain, Switzerland, the United Arab Emirates, and the United States.

Several of the respondent countries are EU Member States and, as such, their national insolvency laws have been impacted by the EU

Insolvency Regulation and related directives. In some instances, a form of all or a portion of the UNCITRAL Model Law has been incorporated into the country's insolvency law. The practical application and impact of these new laws, however, has not yet been fully tested. Accordingly, their complete interpretation and implementation, and the extent to which they are sufficient to rectify perceived inequities, have yet to be determined.

In all instances, further and broader exploration of the evolving state of the law on the domestic, regional and international levels is necessary before more fulsome recommendations for improvements going forward might be developed that take into account continuing challenges and constraints.

NEW SETS OF EYES

Sections within the Legal Practice Division of the IBA conduct annual scholarship competitions open to young lawyers who otherwise would not be able to attend an IBA conference and become more actively involved in the international discourse and contacts offered through the IBA. In furtherance of the Extraterritorial Jurisdiction Task Force project, the 2008 scholarship competition of the SIRC invited young lawyers to submit papers discussing the problem of the exercise of extraterritorial jurisdiction in cross-border insolvency proceedings, with particular emphasis on the recognition and enforcement of foreign proceedings by nations which have *not* adopted the UNCITRAL Model Law.

It is hoped that, in addition to offering young lawyers a unique opportunity, the 2008 competition will yield significant contribution to the identification of laws throughout the world which regulate inbound and outbound cross-border insolvency proceedings and related jurisprudence and the articulation of a fuller understanding of the practical problems which various legal regimes have presented and portend in this area.

Recommended action items

(1) Broaden the debate: foster the identification and development of innovative slants on the issues by, among other things, encouraging and enabling the conduct of empirical research to validate or refute them, so as to ensure that the debate remains timely, relevant, and productive.

Encourage legislators, NGOs, and practitioners to be receptive to the consideration of diverse appraisals of the issues implicated in the

exercise of extraterritorial jurisdiction in insolvency cases, and to be amenable to embracing fresh approaches to problem solving.

(2) Expand the roster of participants: find mechanisms through which to more significantly involve and invest the stakeholders in multinational financial transactions.

(3) Continue and enhance data collection and assessment: bring all of this to bear on the gathering of intelligence and fresh articulation of the issues with a precision informed by the practical realities of the international commercial marketplace and predicated upon factual and empirical foundations.

(4) Reform the law reforms: based on the foregoing, conceive and advocate responsive, innovative vehicles and reforms through which difficulties confronted to date, generally and in implementing first-cut efforts, might be ameliorated and future obstacles might be anticipated and pre-empted.

Towards these ends, the IBA in particular, through its thousands of members in almost 200 nations, is uniquely positioned to continue to make the kinds of important contributions it has fostered since the mid-1980s. The SIRC is a broad-based treasure of expertise, experience and insight in this area. The SIRC should be encouraged and enfranchised, among other things, to pursue the information gathering project identified by the Insolvency Subcommittee, continue its invaluable participation in the law reform efforts of UNCITRAL and other government and non-governmental institutions and organisations, develop and enable the development and realisation of innovative concepts and perspectives, and bring into the process, and together, those with the greatest stake and insight.

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