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Jurisdiction of States

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A. Notion and Different Usages of the Term

1. General Concept

1 In its broadest sense, the jurisdiction of a → *State* may refer to its lawful power to act and hence to its power to decide whether and, if so, how to act, whether by legislative, executive, or judicial means. In this sense, jurisdiction denominates primarily, but not exclusively, the lawful power to make and enforce rules. The principles of → *international law* regarding jurisdiction of States reflect both sovereign independence (→ *Sovereignty*) and the sovereign equality of States (→ *States, Sovereign Equality*), and increasingly the → *human rights* of the affected individuals (→ *Individuals in International Law*). While the power to take action derives from sovereign independence, the scope and exercise of this power is circumscribed with regard to matters that affect other States or restrict individual human rights. Some jurisdictional limitations may affect the exercise of collective authority. For example, the → *United Nations (UN)* generally may not intervene in matters essentially within the domestic jurisdiction of a State according to Art. 2 (7) → *United Nations Charter* ([adopted 26 June 1945, entered into force 24 October 1945] 145 BSP 805; see also → *Domaine réservé*).

2. Municipal Competence Distinguished

2 The power of an organ or subdivision of a State to act is defined by its municipal law. International law normally addresses the allocation of powers by the municipal law of a State only to the extent that the exercise of those powers, or failure to exercise them, violates the duties of the State under international law or agreement, eg Art. 2 (3) (a) → *International Covenant on Civil and Political Rights (1966)*. Rarely does international law address the question of which organ or subdivision of a particular State is competent to act (see also → *Heads of Governments and other Senior Officials*; → *Heads of State*; → *Representatives of States in International Relations*). However, particularly within a regional context, instruments sometimes provide for the competence of a certain body for a specific purpose (see Arts 32 (1), 37 (1), 40 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [Lugano Convention of 1998]; see also → *Recognition and Enforcement of Foreign Judgments*).

3. Types of Jurisdiction

3 The term jurisdiction is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons. A State exercises its jurisdiction by establishing rules, sometimes called the exercise of legislative jurisdiction or prescriptive competence; by establishing procedures for identifying breaches of the rules and the precise consequences thereof, sometimes called judicial jurisdiction or adjudicative competence; and by forcibly imposing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules, sometimes called enforcement jurisdiction or competence.

4 These distinctions can be important in determining the limits of jurisdiction. The requisite contacts with a State necessary to support the exercise of jurisdiction differ depending on the nature of the jurisdiction being exercised. Even when there is legislative jurisdiction, an attempt to exercise enforcement or judicial jurisdiction in the territory of a foreign State raises issues of → *consent* of the latter State.

5 It is widely assumed that a State may not enforce its rules unless it has jurisdiction to prescribe those rules. But one must bear in mind which rules are being enforced in this regard. A court may, and in civil cases often does, apply foreign law, or compel the production of evidence in aid of foreign judicial proceedings. One State may arrest a person

for → *extradition* to another State, even though the former may lack legislative jurisdiction over the conduct for which the person will be tried by the latter.

6 These distinctions also may be misleading. The mere enactment of a statute or delivery of a summons may give rise to international → *protest* because enforcement is implicitly threatened. In criminal, administrative, and tax cases, judicial jurisdiction is rarely exercised in the absence of legislative jurisdiction by the same State, because courts rarely apply the administrative, criminal, or tax laws of other States (see also → *Recognition of Foreign Legislative and Administrative Acts*). In civil cases, although foreign law may be applied to determine significant issues, the exercise of judicial jurisdiction nevertheless implicates the legislative jurisdiction of the forum to prescribe the applicable procedural, evidence, and choice of law rules. Moreover, the very exercise of judicial jurisdiction involves important aspects of enforcement.

4. Public Law and Private Law

7 It is sometimes asserted that international law deals only with the criminal, administrative, and fiscal jurisdiction of a State, ie with obligations owed to the State itself, and not with its jurisdiction to define, adjudicate, and enforce the obligations of private persons to each other. The latter jurisdiction is said to belong to the field of → *private international law* or conflict of laws, a matter regulated in principle by the municipal law of each State (→ *International Law and Domestic [Municipal] Law*). This analysis is conceptually rooted in the distinction between private law and public law in certain municipal legal systems; international law is regarded as a part of public law from that perspective.

8 In reality, it is often difficult to distinguish between the two, as in the application of antitrust laws that permit either the State or a private citizen to bring a law suit or in the practice of assessing punitive damages against a defendant in a civil action (see also → *Antitrust or Competition Law, International*). Moreover, efforts by the courts of one State to compel foreigners to appear or produce evidence in some civil cases have led to protests from other States on grounds of violation of their sovereignty. States are increasingly entering into → *treaties* with each other defining their rights and obligations with respect to private international law matters, in particular through the → *Hague Conventions on Private International Law and on International Civil Procedure* and in regional arrangements such as those adopted by the European Community (→ *European [Economic] Community*) and members of the → *Organization of American States (OAS)*.

B. Bases of Jurisdiction

1. Objectives

9 There are some 193 States on the planet. International law determines which State has jurisdiction in which respects. In this regard, four fundamental objectives should be borne in mind. The first is to establish limits of jurisdiction that protect the independence and sovereign equality of States by balancing each State's interest in exercising jurisdiction to advance its own policies with each State's interest in avoiding interference with its policies resulting from the exercise of jurisdiction by foreign States. The second is to recognize the → *interdependence* of States by ensuring that effective jurisdiction exists to achieve certain common objectives of States. The third is to harmonize the rights of two or more States when they have concurrent jurisdiction, ie when each of them has jurisdiction over the same matter. The fourth is to protect individuals from unreasonable exercises of jurisdiction

either by a single State or by two or more States seeking to impose conflicting or compounding obligations on the same person.

2. Concept of Bases of Jurisdiction

10 It is unclear whether a State may exercise jurisdiction only where there is a recognized basis for its exercise or, as asserted in *The Case of the SS 'Lotus' (France v Turkey)* ('*The Lotus Case*'; → *Lotus, The*), in the absence of any prohibition on its exercise. Whatever the underlying conceptual approach, a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction. In this regard, various bases of legislative jurisdiction have been identified, particularly in the context of criminal law (see eg the Draft Convention on Jurisdiction with Respect to Crime in Harvard Research in International Law 'Jurisdiction with Respect to Crime' [1935] 29 AJIL Supp 439–42; see also → *Criminal Jurisdiction of States under International Law*). These are alternatives. A State may have more than one basis for the exercise of jurisdiction in a matter and more than one State may have a basis for the exercise of jurisdiction over the same matter.

3. Territory and Nationality

(a) Concept of the State

11 The fundamental bases for the exercise of jurisdiction by a State are rooted in two aspects of the modern concept of the State itself: defined territory and permanent population. In principle, a State has jurisdiction over all persons, property and activities in its territory; a State also has jurisdiction over its nationals wherever they may be. The emergence of additional bases of jurisdiction can be viewed as a response to the problems that would arise if jurisdiction were confined only to the two traditional bases.

(b) European Union

12 Substantial competences—particularly with regard to legislative jurisdiction—have been transferred by the Member States of the European Union ('EU'), especially to the EC and its organs (→ *European Community and Union Law and Domestic [Municipal] Law*). Although it is not a State as such, the same principles regarding jurisdiction also apply to the competences exercised by the EU that affect non-members and their nationals.

(c) Scope of Territorial Jurisdiction

13 Since territorial jurisdiction is the basis of jurisdiction most often invoked by States, the geographical scope of that jurisdiction is of considerable importance. In addition to its land territory, the territorial sovereignty of a State extends to its → *internal waters*, to the → *territorial sea* adjacent to its coast, to → *archipelagic waters* in the case of an archipelagic State (see also → *Law of the Sea*), and to the air space above its territory, including internal waters, archipelagic waters, and the territorial sea (see also → *Airspace*; → *Air Law*).

14 The coastal State has sovereign rights and jurisdiction over certain activities beyond its territory, notably with respect to the exploration and exploitation of natural resources in the → *exclusive economic zone* and on the → *continental shelf* adjacent to its territorial sea. This jurisdiction is not strictly territorial: the areas are outside the territory of the State, and the jurisdiction is not plenary, but rather applies only to certain activities. It is analogous to territorial jurisdiction in that it embraces legislative and enforcement competence, applies to foreigners within a defined area, and is exercised by one State.

15 Jurisdiction analogous to territorial jurisdiction also may be exercised over areas leased by a State in accordance with the terms of the lease (→ *Territory, Lease*) or, for limited purposes, over areas subject to military occupation (see also → *Occupation, Belligerent*; → *Occupation, Pacific*).

16 The exercise of territorial jurisdiction does not require that all of the acts or omissions constituting elements of an offence occur in the territory of the State. For example, by means of the mails or modern electronic communications, a fraud can easily be committed by a person located in one country against residents of another country, who may be induced to send their money to yet another country. In these cases, territorial jurisdiction may be exercised at the place where the offence was initiated and where it was executed (see *Libman v The Queen* [1985] paras 57-59).

17 There is some controversy over the extent to which a foreign company may be subject to the territorial jurisdiction of a State with respect to matters unrelated to the company's activities in that State's territory or with respect to the activities in that State of a separate corporate affiliate (see also → *Corporations in International Law*).

(d) Scope of Nationality

18 Another basis of jurisdiction is the nationality of a natural or juridical person to whom a rule is to be applied. A State may regulate its nationals' activities whether at home or abroad. Several States have legislation that enables them to prosecute their nationals in their own courts even for offences committed in the territory of another State. A State's tax laws may apply to its nationals even if they live abroad or do business abroad or receive income from foreign investments.

19 The municipal law of a State determines whether natural or juridical persons have the → *nationality* of that State. However, international law determines whether a claim of nationality by one State must be accepted by another. The requirement of a 'genuine link' with the State, first articulated with respect to a natural person (*Nottebohm Case [Liechtenstein v Guatemala] [Second Phase]* 23; → *Nottebohm Case*), has now been applied to ships and appears to be accepted as a general rule (Art. 5 Convention on the High Seas; Art. 91 United Nations Convention on the Law of the Sea).

20 Issues may arise from conflicting assertions of jurisdiction over dual nationals or over a company organized, or a ship registered, under the laws of one State that is controlled by a company organized under the laws of another State. While dual citizenship can be advantageous to the individual in some respects, problems may arise, for example, with regard to military service and → *diplomatic protection* (see Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality [with Annex] [adopted 6 May 1963, entered into force 28 March 1968] 634 UNTS 221; → *Multiple Nationality*). Dual nationality is effectively prohibited for ships: if they sail under more than one flag on the → *high seas* they are assimilated to ships without nationality (see also → *Flags of Convenience*). Jurisdiction over companies may be asserted by the State of incorporation, as in many common law countries; by the State in which the company has its seat, as in many civil law countries; or for some purposes even by the State in which the controlling persons or interests are located. But it would appear that for purposes of diplomatic protection, the last of these contacts is generally inadequate: the → *International Court of Justice (ICJ)* denied the Belgian government *ius standi* in a dispute involving a company incorporated in Canada and doing business in Spain, although most shareholders

were Belgian nationals (*Case concerning the Barcelona Traction, Light and Power Co Ltd [New Application: 1962] [Belgium v Spain] [Second Phase]; → Barcelona Traction Case*).

(e) Domicile

21 Domicile or residence is sometimes used instead of nationality as a basis of jurisdiction, particularly in private law and tax law and with respect to immigrants (see also → *Aliens*). The Member States of the EU regard the defendant's domicile as the usual place of suit in civil and commercial matters (Art. 2 Council Regulation [EC] 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters).

2. Effects Doctrine

22 The most common problem posed by a system of territorial jurisdiction arises when an act committed in State A causes injury in the territory of State B. The conflict of laws principles applied by most States in private cases have long recognized the propriety of State B applying its own substantive law to determine whether any → *compensation* must be paid by a person whose act or omission in State A injures a person in State B.

23 Where the criminal law is concerned, *The Lotus Case* specifically recognizes the right of State B to try and punish under its own laws a person whose behaviour outside its territory causes injury inside its territory. The underlying principle is called the objective territorial principle or the effects doctrine. Jurisdiction is grounded in the fact that the injurious effect, although not the act or omission itself, occurred in the territory of the State. In *The Lotus Case*, the → *Permanent Court of International Justice (PCIJ)* emphasized that the injurious effect itself was a constituent element of the offence (at 23); not all municipal courts have adhered strictly to this limitation by requiring proof of such an effect.

24 While *The Lotus Case* itself involved negligent rather than intentional misconduct, the PCIJ did not discuss the problem of extending criminal jurisdiction to a person who neither knew nor should have known that his acts or omissions would cause effects in a particular foreign State prohibited by its criminal laws. This may explain in part why the strict holding of the case with respect to → *collisions at sea* was not codified (see Art. 11 Convention on the High Seas; Art. 97 United Nations Convention on the Law of the Sea).

25 Moreover, in *The Lotus Case* the PCIJ addressed a situation in which the effects were physical. Most of the controversy surrounding the principle involves its application to economic effects because economic activity in one State may have effects in many States. The same is true of speech and dissemination of information.

26 In limited circumstances the effects doctrine may be reflected in special rules regarding jurisdiction at sea, eg with respect to non-economic installations, illicit broadcasting (→ *Pirate Broadcasting*), and pollution from ships (Arts 60 (l) (c), 109, 220 (6), 221 UN Convention on the Law of the Sea; → *Marine Pollution from Ships, Prevention of and Responses to*).

5. Protective Principle

27 Another basis of jurisdiction that has emerged relates to the need of the State to protect its own governmental functions. The so-called protective principle allows a State to exercise jurisdiction over foreigners outside its territory who, for example, engage in counterfeiting its currency or official documents, submit false statements to its officials, or attack its diplomats (see Art. 3 (1) (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; → *International Criminal Jurisdiction, Protective Principle*). A meaningful objective contact may be required between the offender and the prosecuting State, such as a fraudulently

obtained passport of the prosecuting State (*see Joyce v Director of Public Prosecutions* [United Kingdom House of Lords]).

28 While the protective principle is not often invoked explicitly in connection with the extension of jurisdiction over terrorists (see also → *Terrorism*) and their supporters by treaty and otherwise, the fact that the object of many terrorist acts is to coerce → *governments* may help to explain the willingness of States to accept both a broadening of the bases of jurisdiction over such activity and a strengthening of obligations to suppress such activity. Thus, for example, while the extension of jurisdiction over hostage-takers to the State of nationality of the hostage may in form be an example of application of the passive personality principle (discussed below at paras 34–36), in fact in many instances the real object of hostage-taking is to coerce the government of that State and perhaps other governments (see also → *Hostages*). This perspective on the nature and object of terrorist activity may help to explain the co-operative and collective action of States in this field, including the decision of the UN Security Council ('UNSC'; → *United Nations, Security Council*), in the execution of its responsibilities for international → *security*, to mandate and monitor a heightened level of law enforcement activity by States in response to the challenge of international terrorism.

6. Ships, Aircraft, and Spacecraft

29 Ships, aircraft, and spacecraft (see also → *Spacecraft, Satellites, and Space Objects*) pose special jurisdictional problems. They move, and might from time to time be within the territory or territorial airspace of different States, or on or over the high seas or in → *outer space*, and therefore outside the territorial jurisdiction of any State. Persons or owners of property on board might be nationals of different States.

30 In response to these problems, the principle emerged that a ship has the nationality of the State in which it is registered, and that the ship and all persons and property on board are subject to the jurisdiction of the State of nationality of the ship (→ *Flag of Ships*). With the advent of modern technology, the principle of the jurisdiction of the State of registry has now been extended to aircraft and spacecraft (Art. 8 Outer Space Treaty). Special jurisdictional arrangements were negotiated with respect to the International Space Station (see Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station).

7. Internet

31 New questions have arisen with regard to → *internet* activities, such as a State's jurisdiction over the author, disseminator, or user of online information. Ubiquitous access to internet content creates potential contact with a large number of States whose attempts to exercise jurisdiction may overlap or conflict. While some scholars argue in favour of considering the internet as a separate space, in practice existing laws are being applied and new laws have been created on the basis of traditional theories of jurisdiction. A State may regulate the internet activities of its own nationals under the nationality principle, and internet activities of foreign nationals in its territory under the territoriality principle, eg with regard to what may be uploaded to or downloaded from the internet, including content that is deemed morally or culturally offensive by a State or prejudicial to its security and stability.

32 A number of States go beyond regulation of internet access within their territory. Although the protective principle could be invoked where internet espionage or sabotage threatens the security of a State, the more evident tendency is to employ variations of the effects doctrine as a basis for applying domestic law to foreign authors or distributors of internet content of foreign origin. The difficulty is that the internet is a global medium whose content potentially affects every State. Notwithstanding the problems that could arise if each State suppresses uses of that medium abroad that other States permit or even encourage, some courts tend to apply the effects doctrine rather broadly to internet-related matters, assuming jurisdiction over a wide range of cases affecting their territory, thereby potentially infringing the right of other States to implement their own policies with respect to the regulation and use of the internet as well as the rights of users. A French court ordered a United States of America ('US') company to take steps to prevent the sale of Nazi merchandise through its auction service, although its servers were located in the US and the service was aimed primarily at internet users located in the US (*La Ligue Contre Le Racisme et L'Antisemitisme v Yahoo!, Inc* Tribunal de grande instance [TGI] [court of original jurisdiction] Paris, 20 November 2000). Similar judgments have been reported from Italy (Corte di Cassazione [Italian court of final appeal in civil and criminal matters] [17 November 2000] 4741/2000). By contrast, US courts will generally look for activity that is targeted at the forum (see *IMO Industries, Inc v Kiekert AG* United States Court of Appeals [3rd Cir, 3 September 1998] 155 F 3d 254, 265-6).

8. Armed Forces

33 Since a State has understandable reasons for subjecting its → *armed forces* to its jurisdiction and at least in some respects for insulating them from the jurisdiction of other States, there are numerous status of forces agreements that deal with jurisdiction over members of the armed forces of one State stationed in the territory of another (→ *Military Forces Abroad*; → *Status of Armed Forces on Foreign Territory Agreements [SOFA]*). Some of these agreements are notable for their express treatment of cases of concurrent jurisdiction. UN forces engaged in → *peacekeeping* missions are deployed with the consent of the host State, which generally grants the → *peacekeeping forces* some measure of immunity in civil and criminal matters by agreement (see also → *State Immunity*). The existence of these agreements manifests, in some measure, a desire for a greater degree of precision and predictability than may be available under → *customary international law* in this field.

9. Passive Personality Principle

34 A sometimes problematic basis of jurisdiction employed by an increasing number of States is the nationality of the victim, the so-called 'passive personality'. These States assert the right to try a foreigner for injuring a national of the State outside the territory of that State. This so-called passive personality principle has been criticized on the grounds that it may intrude on the right of another State to prescribe and enforce applicable standards of conduct in its territory or to its nationals, and on the rights of individuals who cannot be expected to know the criminal laws of every State whose nationals travel abroad, or even to suspect that they are subject to arrest and prosecution by a foreign State. In terms that echo the facts of *The Lotus Case*, one might imagine a collision between an automobile driven by an inebriated local citizen and a taxi carrying a foreign tourist.

35 Indeed, the passive personality principle was the basis in Turkish law for the exercise of jurisdiction by Turkey in *The Lotus Case*; its use was challenged by France, but the PCIJ declined to address its permissibility. Interestingly, France now applies the passive personality principle to serious offences (Art. 113-7 French Penal Code; 'The French Penal Code of 1994 as amended as of January 1, 1999' in EA Tomlinson [tr] *The American Series of Foreign Penal Codes* [Rothman Littleton 1999] vol 31). Section 7 (1) German Penal Code

(‘The German Penal Code as amended as of December 19, 2001’ in S Thaman [tr] *The American Series of Foreign Penal Codes* [Rothman Littleton 2002] vol 32) stipulates that German criminal law applies to criminal offences that are committed abroad against a German national, provided that the offence is punishable under the law of the place where the offence was committed if that place is subject to the penal jurisdiction of another State. The requirement of dual criminality avoids some of the problems posed by the passive personality principle. Potentially more reassuring is the fact that the passive personality principle is rarely used for common crimes, especially those that the territorial State is able and willing to address itself.

36 Although the basis for the passive personality principle in customary international law may be uncertain, it has received increasing recognition with respect to offences defined in international agreements, especially those dealing with the control of terrorism (eg Art. 5 (1) (d) International Convention against the Taking of Hostages) and is invoked in the legislation of an increasing number of States in response to the problem of terrorism. To the extent that the offences to which the principle applies are defined by treaty and related → *State practice*, concerns regarding the effect of the principle on other States and on individual rights are in some measure alleviated.

10. Universal Jurisdiction

37 States generally do not have jurisdiction to define and punish crimes committed abroad by and against foreign nationals. However, any State has the right to try a person with regard to certain internationally defined crimes (→ *International Criminal Law*).

38 Originally, this universal jurisdiction was recognized only with respect to → *piracy* on the high seas. In response to piracy’s challenge to → *international public order*, enforcement as well as legislative and judicial jurisdiction was extended by giving any State the right to board a ship on reasonable suspicion of piracy, and to arrest the pirate ship and try and punish the pirates (*Re Piracy Jure Gentium* [1934] AC 586).

39 As the → *human rights* content of international law expanded, universal adjudicative jurisdiction also expanded to embrace universally condemned crimes and may now apply to → *slavery*, → *genocide*, torture (→ *Torture, Prohibition of*), and → *war crimes*. Universal jurisdiction to try these offences is not limited to situations in which they are committed on the high seas or in other areas outside the territory of any State, but generally confers no enforcement power to enter foreign territory or board a foreign ship without consent. Although the laws of each State define the offences over which its courts may exercise universal jurisdiction, the scope of legislative jurisdiction is limited by the fact that the offences subject to universal jurisdiction are determined by treaty and international law.

40 The concept of universal jurisdiction has been the subject of extensive academic discussion. In 2001 a group of international experts published a set of guidelines as the ‘Princeton Principles on Universal Jurisdiction’. These guidelines envisage a broad scope for universal jurisdiction over certain serious → *crimes against humanity* and war crimes, and emphasize adherence to principles of due process in exercising jurisdiction (see also → *Fair Trial, Right to, International Protection*).

41 Most States restrict their assertions of universal jurisdiction to the implementation of specific provisions of international conventions, or by requiring the presence of the defendant in their territory to establish judicial jurisdiction, or both. The position that universal jurisdiction except for acts of investigation and requests for extradition may not be exercised against defendants in absentia is supported by the 2005 Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes of the → *Institut de Droit international* (at Art. 3 (b)). In addition,

Art. 3 (c) of the Resolution suggests that preference be given to trial by the State where the offence was committed or the State of nationality of the offender if willing and able to do so.

42 Some States are more expansive. Belgium conferred extensive universal jurisdiction on its courts, but then yielded to diplomatic pressure to restrict that grant of authority. In a case involving a dispute over an international arrest warrant issued by Belgian authorities against the then Congolese foreign minister alleging crimes against humanity, the ICJ refrained from ruling on whether Belgium could validly exercise universal jurisdiction in this matter, holding instead that the Congolese foreign minister enjoyed immunity from prosecution during his term of office (*Case concerning the Arrest Warrant of 11 April 2000 [Democratic Republic of the Congo v Belgium]*; → *Arrest Warrant Case [Democratic Republic of the Congo v Belgium]* ; → *Immunities*).

43 A number of international agreements, including those designed to protect human rights or suppress terrorist activity, come close to establishing a system of universal jurisdiction. Pursuant to those agreements, a State is required either to try or to extradite a suspect found within its territory (→ *Aut dedere aut iudicare*). Arts 4 to 7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, oblige States Parties to ensure that acts of torture are offences under domestic criminal law and to extradite or prosecute offenders. Similar provisions are found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the → *Geneva Conventions I-IV (1949)*, the 1979 International Convention against the Taking of Hostages, and other widely ratified treaties. The jurisdiction of a State to prosecute foreign ships visiting its → *ports* for violating international environmental standards while at sea may also, with some qualifications, be viewed as analogous to universal jurisdiction (see Art. 218 UN Convention on the Law of the Sea; → *Environment, International Protection*).

44 While the exercise of universal jurisdiction in the case of piracy as a practical matter often devolved upon maritime powers with an independent interest in avoiding unreasonable intrusions on the high seas freedoms of any State, its extension to other offences creates the spectre of trials by the State of the victim or some other State with particular grievances against the defendant. From that perspective, universal jurisdiction shares both the advantages and dangers of the passive personality principle, namely substantial pressure to prosecute, convict, and punish untempered by any particular interest in the well-being of the defendant. It may be noted in this connection that trial of → *prisoners of war* during an ongoing armed conflict may pose special problems.

45 Prosecution by an international tribunal can avoid some of the difficulties attendant upon the exercise of universal jurisdiction by municipal courts (see also → *International Criminal Courts and Tribunals, Complementarity and Jurisdiction*). The war crimes trials after World War II are cited as precedent in this regard (→ *International Military Tribunals*). In 1993 and 1994, the UNSC established international criminal courts to deal with war crimes and crimes against humanity arising from conflicts in the former Yugoslavia (→ *International Criminal Tribunal for the Former Yugoslavia [ICTY]*; see also → *Yugoslavia, Dissolution of*) and → *Rwanda* (→ *International Criminal Tribunal for Rwanda [ICTR]*). In 1998 the first permanent → *International Criminal Court (ICC)* was established. Interestingly, the jurisdiction of the ICC is linked in some respects to the jurisdiction of a State party under the territorial and nationality principles (Art. 12 (2) Rome Statute of the International Criminal Court).

C. Limitations on Jurisdiction

46 The classic exception to jurisdiction is the immunity enjoyed in certain circumstances by each State, its ships (→ *State Ships*) and other State property, and its diplomatic and consular representatives from at least the enforcement and judicial jurisdiction of any other State (→ *Immunity, Diplomatic*; see also → *United Nations Convention on Jurisdictional Immunities of States and Their Property* [2004]).

47 Another important exception is that a State may not send its agents to arrest or restrain a person or property, or perform a governmental act, in the territory of another State without the latter's consent (→ *Governmental Activities on Foreign Territory*). Nevertheless, several cases of abduction have been reported (see also → *Eichmann Case*). In these cases a person was seized within the territory of another State, sometimes bypassing the process of extradition available under an applicable treaty. Some municipal courts will not necessarily refuse to allow criminal proceedings against persons seized in violation of the territorial sovereignty of a foreign State, leaving the matter instead to the discretion of the political authorities. The question of whether detention and removal of the accused without the consent of the territorial sovereign precludes the exercise of judicial jurisdiction is unresolved; the French Cour de Cassation, the Israeli Supreme Court, and the US Supreme Court have held that jurisdiction to try is not precluded, but these decisions have been criticized.

48 There are also limitations on territorial and coastal State jurisdiction designed to protect international communications rights, such as navigation in the territorial sea and exclusive economic zone (→ *Navigation, Freedom of*), and, by treaty or → *comity*, use of → *canals, rivers* (→ *International Watercourses*), ports, railways (→ *Railway Transport, International Regulation*), airways, airports, etc. Also, in the absence of a request from the master, States generally do not exercise jurisdiction aboard a foreign ship in port unless the consequences of conduct on board extend beyond the ship. There is doubt as to the extent to which exercise of judicial jurisdiction over a person in transit through a State (→ *Transit Passage*), solely on the grounds of his physical presence and for acts or omissions not otherwise subject to such jurisdiction, is consistent with international law.

49 As the content and enforcement of international human rights law expands, the traditional analytical emphasis on the jurisdictional rights of States *vis-à-vis* each other has been expanded to include an inquiry into the content of the right of an individual to be free from unreasonable assertions of coercive power by a State. A parallel may be found in the significant human rights content of the analysis by the US Supreme Court of the jurisdiction of the states of the US over each others' citizens under the 'due process' clause of the Fourteenth Amendment to the US Constitution ([declared 13 June 1866] in GH Flanz [ed] *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies* [Oceana Dobbs Ferry] vol 9 [at 96-2] 16-18). Many recent multilateral treaties that expand the jurisdiction of States, or require them to prosecute persons within their jurisdiction, contain substantial human rights protections, including precise definitions of offences and restrictions on multiple prosecutions for the same offence (see also → *Ne bis in idem*).

D. Conflicts and Solutions

50 It is apparent that more than one State may assert jurisdiction over any given act or omission in any given place. This poses little or no problem when, as in the case of piracy on the high seas, the jurisdictional principles are agreed, the offence is universally condemned and internationally defined, there is little evidence of aggressive use of the jurisdiction in a manner that would interfere with the interests of other States, and there appears to be little

concern about the relative fairness of the adjudicative procedures employed by different States. The problem becomes more serious when one or more of these factors is missing.

51 Both the nationality principle and the effects doctrine inevitably raise the problem of concurrent jurisdiction with the State in whose territory the act or omission occurred. What if one State prohibits an act that the other permits or, worse still, requires? This has led to arguments that, in general, territorial jurisdiction is primary and that extraterritorial jurisdiction must be restrained in deference to the policies of the State where the act or omission occurs (→ *Extraterritoriality*).

52 The problem has proved to be most severe where transnational economic activity is concerned. Various governments reacted negatively to efforts by the US government to control the activities of foreign subsidiaries and licensees of American companies in order to enforce restrictions on exports to third countries; to create causes of action enforceable in US courts against foreign companies using expropriated property abroad; and to apply its antitrust and securities laws to activities of foreign nationals outside the US that affect the US market. Due to protests by European and Latin American States, the execution of some of these laws was suspended. Some States have not only protested against these actions but have enacted so-called blocking statutes prohibiting their nationals from co-operating in the enforcement of foreign laws, or so-called claw back statutes allowing for a right of recovery in that State's courts of any sum of money paid in satisfaction of a foreign judgment deemed to exceed jurisdictional limits of international law.

53 Although European States previously criticized the extensive application by the US of the effects doctrine to economic activity based abroad, the EC has gradually expanded the application of EC regulations to foreign nationals outside the EC. The European Court of Justice adopted an approach similar to the effects doctrine and held that EC competition law applies to anti-competitive agreements concluded in a foreign State but implemented within the EC (see Case T-102/96 *Gencor Ltd. v Commission* at 90; see also → *European Communities, Court of Justice [ECJ] and Court of First Instance [CFI]*). This development in turn prompted the formulation of co-operative understandings between US and EC authorities regarding the scope of their enforcement of antitrust and competition laws with respect to international business. However, the reality remains, for example, that a major merger significantly affecting the markets of both will probably be subject to scrutiny and possible objection by the enforcement authorities of either.

54 In the field of taxation one finds considerable sensitivity to the interests of the person subject to the jurisdiction of two or more States. Numerous treaties have been concluded for the purpose of avoiding → *double taxation*, perhaps because it is most evident in such cases that the concurrent exercise of jurisdiction could result in cumulative burdens that impede desirable transnational economic activity.

55 In 1992 the → *Hague Conference on Private International Law* launched an ambitious project to draft a world-wide convention on jurisdiction and enforcement of judgments of municipal courts in civil and commercial matters, modelled on Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. However, differences regarding the jurisdiction of courts, the types of judgments to be enforced, and the treatment of new technologies resulted in 2005 in a drastic limitation of the scope of the convention to enforcement of judgments in which jurisdiction is based on choice of forum agreements.

56 The solution to the problem of concurrent jurisdiction lies either in narrowing the limits of the different bases of jurisdiction so as to reduce the number of instances in which conflicting or cumulative assertions of concurrent jurisdiction may arise, or in agreeing on the substantive rules and human rights safeguards to be applied by the different States that may assert concurrent jurisdiction, or in developing rules of comity, ie principles of priority and practices of co-operation and restraint, designed to minimize the friction and unfairness that can result from conflicting or cumulative assertions of concurrent jurisdiction (eg The American Law Institute 'Restatement of the Law, Third: The Foreign Relations Law of the United States' [American Law Institute St Paul 1987] vol 1, 244-54).

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