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## Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine

Danielle Ireland-Piper\*

### INTRODUCTION

Jurisdiction was once primarily understood by reference to geographical borders. However, assertions of jurisdiction over extraterritorial conduct have become increasingly frequent in the twenty-first century. Assertions of extraterritorial jurisdiction sit at the crossroads of domestic and international law, and can be controversial. This is in part because states may enjoy competing claims to jurisdiction, but also because the rights of individuals can be compromised in prosecutions of extraterritorial conduct. Part I of this paper briefly explains the distinction between prescriptive, enforcement and adjudicative jurisdiction, sets out some of the historical developments of extraterritorial jurisdiction, and introduces the principles of extraterritorial jurisdiction. Part II then identifies some of the ways in which the rights of individuals can be undermined by assertions of extraterritorial criminal jurisdiction. Finally, Part III considers whether the abuse of rights doctrine might usefully regulate the relationship between a state's right to assert extraterritorial jurisdiction, and the rights of individuals.

### PART I

In international law, the term 'jurisdiction' describes the rights of states to regulate conduct, and the limit on those rights. Domestic law prescribes the extent to which states make use of those rights. Under customary international law, states exercise jurisdiction on three main bases: nationality, territoriality, and universality. Put simply, the nationality principle can provide a state with grounds for jurisdiction where a national is either a victim (passive nationality) or a perpetrator (active nationality). The territoriality principle may be invoked where conduct either takes place within a nation's borders (subjective territoriality), or the effects of the conduct are felt within the borders (objective territoriality). The universality principle is reserved for conduct constituting an international crime, such as piracy, genocide and crimes against humanity. International law also recognises a 'protective principle', wherein a state can assert jurisdiction over foreign conduct that threatens national security. There is also some support for an 'effects principle', which gives jurisdiction over extraterritorial conduct, the effects of which are felt by a state.

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## 1. The distinction between prescriptive, enforcement and adjudicative jurisdiction

As a preliminary point, a distinction is often made between prescriptive, enforcement and adjudicative jurisdiction.<sup>1</sup> Prescriptive extraterritorial jurisdiction refers to the capacity of a state to legislate in respect of persons and/or conduct.<sup>2</sup> Enforcement jurisdiction refers to the capacity, or otherwise, of that state to enforce compliance with those laws.<sup>3</sup> Adjudicative jurisdiction refers to the ability of courts to adjudicate and resolve disputes.<sup>4</sup> This paper is, at various points, concerned with all three. The distinction, however, is not necessarily determinative of the issues raised in Parts II and III. Therefore, for the purposes of this paper, the difference between the three is not laboured upon.

## 2. Historical context

### 2.1. Pre-twentieth century

Traditionally, the geographical boundaries of a nation state provided the foundation for jurisdictional queries. Territoriality was considered a defining pillar of international law. For example, in the 1600s, the Treaty of Westphalia conceptualized a nation's power as ending at its territorial borders.<sup>5</sup> In this way, regardless of economic or military disparities, each state possessed exclusive jurisdiction within its own territory.<sup>6</sup> However, the concept of extraterritorial jurisdiction was not unknown. For example, it existed in medieval Italy, sixteenth-century Brittany, and seventeenth-century Germany.<sup>7</sup> Further, during the nineteenth century some European jurisdictions began to claim jurisdiction over extraterritorial acts committed by non-citizens that threatened the security of the state.<sup>8</sup> Nonetheless, extraterritorial jurisdiction occurred as an exception, rather than as a rule.

### 2.2. Twentieth century

In 1927, the Permanent Court of International Justice (PCIJ) delivered judgment in the *Lotus*<sup>9</sup> case. This decision was a turning point in jurisdictional jurisprudence. The PCIJ considered whether Turkey, in instituting criminal proceedings against a French national over a collision on the high seas between a Turkish ship and a French ship resulting in the death of Turkish nationals, acted in conflict with international law.<sup>10</sup> The French Government submitted that the Turkish courts, in order to have jurisdiction, must be able to identify a specific title to jurisdiction given to Turkey in international law.<sup>11</sup> Conversely, the Turkish Government took the view that it inherently had jurisdiction, provided such jurisdiction did not come into conflict with a principle of international law.<sup>12</sup> The PCIJ stated:

‘International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the

1 See, e.g., B. Perrin, ‘Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the Criminal Code’, 2009 *Canadian Criminal Law Review* 13, no. 2, p. 175, p. 178; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, § 101; R. Liivoja, ‘The Criminal Jurisdiction of States: A Theoretical Primer’, 2010 *No Foundations: Journal for Extreme Legal Positivism* 7, p. 25.

2 R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2004 *Journal of International Criminal Justice* 2, no. 3, pp. 735-760, p. 736.

3 See, e.g., G.D. Triggs, *International Law: Contemporary Principles and Practices*, 2006, p. 344; D.J. Gerber, ‘Beyond Balancing: International Law Restraints on the Reach of National Laws’, 1984 *Yale Journal of International Law* 10, p. 189.

4 J.A. Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere From Six Regulatory Areas’ (Working Paper No. 59, Harvard Corporate Social Responsibility Initiative, 2010), p. 13.

5 A. Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’, 2008 *Vanderbilt Law Review* 61, no. 5, p. 1455, pp. 1463-1464, citing L. Gross, ‘The Peace of Westphalia, 1648-1948’, 1948 *American Journal of International Law* 42, p. 20, pp. 28-29.

6 *Ibid.*, p. 1464.

7 M. Akehurst, ‘Jurisdiction in International Law’, 1972-1973 *British Yearbook of International Law* 46, p. 145, p. 163.

8 *Ibid.*, pp. 157-158.

9 *The S.S. Lotus (France v Turkey)* (Judgment), [1927] PCIJ (ser. A) No. 10.

10 *The S.S. Lotus (France v Turkey)* (Judgment), [1927] PCIJ (ser. A) No. 10, p. 5.

11 *The S.S. Lotus (France v Turkey)* (Judgment), [1927] PCIJ (ser. A) No. 10, p. 18.

12 *Ibid.*

relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*<sup>13</sup>

And, while observing that ‘jurisdiction is certainly territorial’,<sup>14</sup> the PCIJ found:

‘It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international contained a general prohibition (...).’<sup>15</sup>

Finally, the Court concluded, in what has become a frequently cited passage and articulates what could be described as the ‘Lotus principle’,

‘(...) 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 to certain cases by prohibitive rules*; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.’<sup>16</sup>

In this way, the PCIJ established a presumption in favour of a nation’s extraterritorial jurisdiction, in the absence of a prohibitive rule. Some commentators attribute the development of the ‘effects test’ to the decision in *Lotus* having undermined ‘territoriality as a limiting constraint on legislative jurisdiction.’<sup>17</sup> Following the decision in *Lotus*, domestic courts began to grapple with the consequences of assertions of extraterritorial jurisdiction. Although some argue that jurisdiction based solely on territoriality well ‘served the goals of ‘predictability and efficiency’,<sup>18</sup> by the mid-1900s the ‘heyday’ of territorial jurisdiction had begun its demise.<sup>19</sup> As economies became increasingly interconnected there was an increased interest in regulating cross-border activities, such as transnational crime and the activities of multinational corporations.<sup>20</sup> In some cases, the interest in extraterritoriality became associated with attempts to enforce human and indigenous rights.<sup>21</sup>

The prosecution of war crimes after World War II was also pivotal in the development of extraterritorial jurisdiction. The adjudication of Nazi war crimes in the Nuremberg tribunals ‘transformed our understanding of jurisdiction.’<sup>22</sup> The trials are often described as an exercise of extraterritorial jurisdiction that sought to bring ‘accused war criminals to account on behalf of the entire world community of civilized nations.’<sup>23</sup> Although it has been argued by some commentators that the allied forces were in fact exercising territorial jurisdiction as sovereigns over occupied territory,<sup>24</sup> it is widely accepted that the Nuremberg trials were an exercise of extraterritorial jurisdiction based on the universality principle. Following Nuremberg, Israel’s prosecution of a member of the Gestapo for his involvement in administering the ‘final solution’ in *Attorney General of the Government of Israel v*

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13 Ibid. (emphasis added).

14 *The S.S. Lotus (France v Turkey)* (Judgment), [1927] PCIJ (ser. A) No. 10, p. 18.

15 Ibid., p. 19.

16 Ibid. (emphasis added).

17 Gerber, *supra* note 3, pp. 196-197.

18 Parrish, *supra* note 5, p. 1467.

19 Ibid.

20 Ibid., p. 1469.

21 Ibid., p. 1470.

22 H. Gluzman, ‘On Universal Jurisdiction – Birth, Life and a Near-Death Experience’, *Bocconi School of Law Papers*, Paper No. 2009-08/EN, p. 4, citing R. Teitel, ‘Nuremberg and its Legacy: Fifty Years Later’, in B. Cooper (ed.), *War Crimes: the Legacy of Nuremberg*, 1990, p. 50.

23 H. Gluzman, ‘On Universal Jurisdiction – Birth, Life and a Near-Death Experience’, *Bocconi School of Law Papers*, Paper No. 2009-08/EN, p. 4, citing W.B. Simons, ‘The Jurisdictional Bases of the International Military Tribunal at Nuremberg’, in G. Ginsburgs & V. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, 1990, p. 52.

24 M.C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 2001 *Virginia Journal of International Law* 42, p. 81, pp. 96-97.

*Eichmann*,<sup>25</sup> is also widely cited as an example of extraterritorial jurisdiction. Nonetheless, as late as 1990, the scholar Frederick Mann observed:

‘Normally no State is allowed to apply its legislation to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all over sovereign powers outside its own territory.’<sup>26</sup>

He was also of the view that ‘the nationality of the defendant is now probably an insufficient link to provide the courts of his home State with jurisdiction over him.’<sup>27</sup> However, by the end of the twentieth and beginning of the twenty-first centuries, a number of treaties called on states to assert extraterritorial jurisdiction. For example, the 1989 Convention on the Rights of the Child (CRC) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography together require parties to criminalise child prostitution whether or not the acts occur domestically or extraterritorially.<sup>28</sup> All but two countries of the world are now party to the CRC, making it one of the most universally ratified of all United Nations conventions.<sup>29</sup> Other examples include the international anti-corruption frameworks. The major international treaties on anti-corruption all either require or permit a degree of extraterritorial jurisdiction.<sup>30</sup> Similarly, international treaties relating to terrorism and torture also permit some assertions of extraterritorial jurisdiction. For example, the International Convention for the Suppression of Terrorist Bombings calls upon parties to assert jurisdiction on the basis of both passive and active nationality,<sup>31</sup> and the International Convention for the Suppression of the Financing of Terrorism calls upon parties to assert active nationality jurisdiction.<sup>32</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also permits states to exercise active nationality jurisdiction, and passive nationality, where a state deems it to be ‘appropriate.’<sup>33</sup>

### 2.3. Twenty-first century

Many states now have domestic legislation with extraterritorial reach. By way of example, states as diverse as Singapore,<sup>34</sup> Indonesia,<sup>35</sup> Zimbabwe,<sup>36</sup> Iraq,<sup>37</sup> Russia,<sup>38</sup> France,<sup>39</sup> the United Kingdom,<sup>40</sup> Mexico,<sup>41</sup>

25 (1961) 36 *International Law Reports* 5.

26 F.A. Mann, *Further Studies in International Law*, 1990, p. 5.

27 *Ibid.*

28 See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), Art. 1,3.

29 F. David, ‘Child Sex Tourism’, *Australian Institute of Criminology, Trends and issues in crime and criminal justice*, no. 156, June 2000.

30 See, e.g., Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions, OECD (21 November 1997); United Nations Convention Against Corruption, UNCAC (31 October 2003); Inter-American Convention Against Corruption, Organization of American States (29 March 1996); Criminal Law Convention on Corruption 1999 and its Additional Protocol, European Union (27 January 1999).

31 International Convention for the Suppression of Terrorist Bombings, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001), Art. 6.

32 International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002), Art. 7(1).

33 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), Art. 5.

34 For example, see Penal Code, (Singapore, cap. 224, 2008 rev. ed.), s. 3; Prevention of Corruption Act, (Singapore, cap. 241, 1993 rev. ed.), s. 37(1); and the decision in *Public Prosecutor v Tan Cheng Kong*, [1998] 2 SLR 410, [27]-[43].

35 For example, see Penal Code of Indonesia (1982), <<http://www.refworld.org/docid/3ffc09ae2.html>> (last visited 12 September 2013), Art. 4.

36 For example, see Criminal Law (Codification and Reform) Act (Zimbabwe) (2004), <<http://www.refworld.org/docid/4c45b64c2.html>> (last visited 12 September 2013), s. 5.

37 For example, see Criminal Code 1969 (Iraq), <[http://law.case.edu/saddamtrial/documents/Iraqi\\_Penal\\_Code\\_1969.pdf](http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf)> (last visited 12 September 2013), ss. 2-4.

38 For example, see Criminal Code of the Russian Federation (1996), <<http://www.russian-criminal-code.com/PartI/SectionI/Chapter2.html>> (last visited 12 September 2013), Art. 12.

39 For example, see *Code Pénal* [Penal Code] (France), <<http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>> (last visited 12 September 2013), Art. 113(6)-113(12).

40 For example, see Bribery Act 2010 (UK) c. 23, s. 12.

41 For example, see *Código Penal Federal* (Mexico) 1931, <[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=199697#LinkTarget\\_461](http://www.wipo.int/wipolex/en/text.jsp?file_id=199697#LinkTarget_461)>, (last visited 12 September 2013), Art. 4.

Canada,<sup>42</sup> the United States,<sup>43</sup> Japan,<sup>44</sup> Israel<sup>45</sup> and Thailand<sup>46</sup> have at least some legislative provisions with extraterritorial effect. Geographical conceptions of territory are 'becoming a less salient feature of the international legal landscape.'<sup>47</sup> States are acting on treaty obligations, reacting to world events, or seeking to achieve political objectives.<sup>48</sup> Undoubtedly, high-profile terrorist attacks such as the infamous events in the United States in September 2001, and Internet leaks such as those by the organization 'Wikileaks', have resulted in increased efforts by states to regulate extraterritorial conduct.

The Internet poses particular challenges for jurisdictional frameworks. As Okoniewski observes, 'because anyone can view information on the Internet, every nation has an interest in regulating it (...) and determining which nation has jurisdiction over a particular issue can have a significant impact on the outcome.'<sup>49</sup>

### **3. Principles of extraterritorial jurisdiction**

The principles of extraterritorial jurisdiction are now explored in further detail. Differential time and attention will be given to each principle, because some principles are less controversial than others and require less explanation. Nonetheless, the same three questions will be asked in relation to each principle:

1. What is the particular principle of jurisdiction under discussion?
2. What is an example of that principle?
3. Is there debate on the principle?

#### **3.1. The territoriality principle**

##### *3.1.1. What is the territorial principle of jurisdiction?*

The territoriality principle is the most common basis of jurisdiction<sup>50</sup> and is widely regarded as a manifestation of state sovereignty.<sup>51</sup> At its simplest, the territoriality principle denotes that a state has jurisdiction over conduct that occurs within territorial borders. However, it has both subjective and objective limbs. Subjective territoriality describes the jurisdiction of a state over conduct that occurs entirely within that state's borders. Objective territoriality refers to the jurisdiction of a state over conduct that only partially occurs in that state's territory. In particular, a territorial conception of jurisdiction is deeply rooted in common-law countries. One reason for this in English-speaking jurisdictions is the need for trial by jury, and original conceptions of the jury being part of the community in which the crime was committed.<sup>52</sup>

##### *3.1.2. What is an example of territorial jurisdiction?*

An example of subjective territorial jurisdiction is a murder committed in the physical territory of *State A*. The arrest, trial and imprisonment of the perpetrator in *State A* are on the basis of territorial jurisdiction. An example of objective territorial jurisdiction takes place on the border between two states, *State A*

42 For example, see Criminal Code, RSC 1985, c C-46, s 7(4.1), <<http://laws-lois.justice.gc.ca/eng/acts/C-46/page-3.html>> (last visited 12 September 2013).

43 For example, see Military Extraterritorial Jurisdiction Act of 2000, 18 USC § 3261(2000), <<http://www.pubklaw.com/hi/pl106-523.pdf>> (last visited 12 September 2013).

44 For example, see Penal Code (Japan) (1907), <<http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=penal+code&x=0&y=0&ky=&page=1>> (last visited 12 September 2013), Art. 3-5.

45 For example, see Penal Law of Israel (Israel) 199, <<http://www.refworld.org/docid/3ae6b60a4.html>> (last visited 12 September 2013), ss. 13-17.

46 For example, see Criminal Code (Thailand) (1956), <[http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_country=THA&p\\_classification=01.04&p\\_origin=COUNTRY&p\\_sortby=SORTBY\\_COUNTRY](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=THA&p_classification=01.04&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY)> (last visited 12 September 2013), s. 8.

47 M. Byers, 'Abuse of Rights: An Old Principle, A New Age', 2001-2002 *McGill Law Journal* 47, p. 424.

48 See generally the discussion in D. Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?', 2012 *Melbourne Journal of International Law* 13, no. 1, p. 122.

49 E.A. Okoniewski, 'Yahoo!, Inc. v. LICRA: The French Challenge to Free Expression on the Internet', 2002 *American University International Law Review* 18, no. 1, pp. 310-311.

50 Zerk, *supra* note 4, p. 18.

51 A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, 2010, p. 56.

52 Akehurst, *supra* note 7, p. 152.



and *State B*. A gun is fired across the border from *State A* into *State B*, where it causes injury. Although, the trigger was pulled in *State A*, the injury from the bullet occurred in *State B*. In that scenario, *State B* may assert jurisdiction on the basis of objective territorial jurisdiction. Another example of objective territorial jurisdiction is an offence relating to human trafficking. In order to take persons from *State A* into *State B*, preparations may be made in *State A*. The remaining parts of the conduct may occur in *State B*. This may also give rise to objective territorial jurisdiction. In both cases, if either the victim or the perpetrator is a national of a state other than *State A* or *State B*, that other state may also be able to assert jurisdiction based on the nationality principle. This is further discussed below in relation to the nationality principle.

### 3.1.3. *Is there debate on this principle?*

From a theoretical standpoint, it is uncontroversial and universally recognised that a state may assert jurisdiction over activities in its own territory.<sup>53</sup> It is commonly relied on. As Michael Akehurst has observed:

‘One of the main functions of a State is to maintain order within its own territory, so it is not surprising that the territorial principle is the most frequently invoked ground for criminal jurisdiction (...).’<sup>54</sup>

Nonetheless, objective territoriality may involve competing jurisdictional claims.<sup>55</sup> To use the human trafficking example above, although parts of the conduct will have taken place in *State A*, others were consummated in *State B*. If each of *State A* and *State B* wished to assert jurisdiction, this may give rise to a competing claim. International law does not clearly set out a hierarchy of jurisdictional claims, other than by reference to principles of jurisdictional restraint, such as comity or non-interference. These and other principles of jurisdictional restraint will be discussed in greater detail in Part III.

## 3.2. *The nationality principle*

### 3.2.1. *What is the nationality principle of jurisdiction?*

The nationality principle authorises extraterritorial jurisdiction by a state over its nationals, even where the conduct may have occurred extraterritorially. Like the territorial principle of jurisdiction, this principle also has two limbs. If jurisdiction is asserted over a national accused of being a perpetrator of extraterritorial conduct, this is described as ‘active nationality’. If the national is a victim of extraterritorial conduct, then jurisdiction over that national is termed ‘passive nationality’. Civil-law jurisdictions rely on the nationality principle to a ‘far greater extent’<sup>56</sup> than common-law countries. For example, countries such as the United States, Canada and Australia tend to assert nationality jurisdiction on an ad-hoc basis, and for specific offences. This means that not all criminal offences in those jurisdictions will have extraterritorial effect, and they are generally presumed not to unless otherwise specified. In contrast, European countries such as France and Switzerland have a broader range of offences with extraterritorial reach. For example, the French Penal Code provides:

‘French criminal law is applicable to any felony, as well as to any misdemeanour punishable by imprisonment, committed by a French national or by a foreigner outside the territory of the republic when the victim is of French nationality at the time of the offence.’<sup>57</sup>

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<sup>53</sup> Triggs, *supra* note 3; Chehtman, *supra* note 51, p. 56.

<sup>54</sup> Akehurst, *supra* note 7, p. 152.

<sup>55</sup> Gerber, *supra* note 3.

<sup>56</sup> Akehurst, *supra* note 7, p. 152.

<sup>57</sup> See French Penal Code (France), Art. 113-6, 113-7 (15 March 2013) <[http://195.83.177.9/upl/pdf/code\\_33.pdf](http://195.83.177.9/upl/pdf/code_33.pdf)> (last visited 12 September 2013).

This provision is an example of both active and passive personality jurisdiction. There is generally a connection between the prohibition on the extradition of nationals and the broad assertion of extraterritorial criminal jurisdiction over nationals.<sup>58</sup>

### 3.2.2. *What is an example of the nationality principle?*

Domestic child sexual offences with extraterritorial reach are an example of active nationality jurisdiction. *State A* may legislate to criminalise sexual activities between its nationals and children, regardless of where those activities take place. It may seek the extradition of the national or, if the activity is discovered on the national's return to *State A*, simply prosecute in much the same way as for a territorial offence. An example of passive nationality jurisdiction is *State A* legislating to make it an offence to recklessly or intentionally harm, kill or seriously injure a *State A* citizen or resident anywhere in the world.

### 3.2.3. *Is there debate on the nationality principle?*

States are described as having 'an unlimited right to base jurisdiction on the nationality of the accused.'<sup>59</sup> However, there is uncertainty as to how nationality is to be defined. Traditional models of citizenship and nationality have been altered by globalisation<sup>60</sup> and the increased mobility of persons. May articulates this difficulty when he asserts that it is a 'mistake to say that there are citizens and yet for it be unclear what political community these citizens are connected to.'<sup>61</sup>

International law is generally neutral toward a grant of nationality, provided the granting state does not breach certain international obligations, such as those under the Convention on the Reduction of Statelessness.<sup>62</sup> This means that determination as to who is a 'national' for the purpose of the nationality principle is a matter largely left to individual states. By way of example, Australia's child-sex tourism laws assert extraterritorial jurisdiction over citizens and residents, and persons and corporate entities.<sup>63</sup> Given that residents have no right to vote in parliamentary elections, this raises issues as to the legitimacy of assertions of authority over Australian residents overseas. It is also problematic in that residents are not always considered nationals in other aspects of the law, and, therefore, residents are not truly nationals under Australian law. In this way, assertions of jurisdiction over residents may be outside the nationality principle. For dual citizens, there is also the possibility of persons being subject to multiple, and potentially conflicting, legislative regimes. Rubenstein observes:

'Domestic laws about who is and who is not a citizen vary significantly, and laws relating to citizenship in each of the different states are also different. As a result, many people hold more than one nationality by fulfilling the formal requirements for citizenship in more than one domestic legal framework.'<sup>64</sup>

The idea that every individual may be subject to the laws of multiple states in all places, and at all times, is described as 'intolerable'.<sup>65</sup> Further, there is also debate on the scope of both the active and the passive limbs of the nationality principle.

### *Active nationality*

A report for the Harvard Corporate Social Responsibility Initiative suggests that states regard the active nationality principle as the strongest basis for direct extraterritorial jurisdiction.<sup>66</sup> However, some

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58 Z. Deen-Rascmany, 'Modernising the Nationality Exception: Is the Non-extradition of Residents a Better Rule?', 2006 *Nordic Journal of International Law* 30, p. 75.

59 Akehurst, *supra* note 7, p. 156.

60 K. Rubenstein, 'Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?', 2007 *Law in Context* 25, no. 1, p. 88.

61 L. May, *Global Justice and Due Process*, 2011, p. 198.

62 Triggs, *supra* note 3, p. 344.

63 See, Criminal Code Act 1995 (Cth), s. 272.6.

64 Rubenstein, *supra* note 60, pp. 90-91.

65 1928 *Law Quarterly Review* 44, pp. 154, 161 as cited in M. Akehurst, 'Jurisdiction in International Law', 1972-1973 *British Yearbook of International Law* 46, p. 165.

66 Zerk, *supra* note 4, p. 13.



commentators express concern as to the underlying philosophical justifications for the principle. For example, Chehtman claims that, ‘as a basis for criminal jurisdiction, the nationality principle is altogether unjustified at the bar of justice.’<sup>67</sup> He argues that ‘individuals in any given state lack an interest in having that state’s criminal laws enforced against them or their co-nationals (or co-residents) abroad.’<sup>68</sup> By way of example, and referring to assertions of extraterritorial jurisdiction by Spain, he argues:

‘Inhabitants of Spain may feel horrified by a particular crime committed outside its territory by a co-national, but their belief in the system of criminal laws under which they live being in force is not undermined by these offences.’<sup>69</sup>

In contrast, Arnell argues that the nationality principle is symbolic of an evolution from narrow, self-interested territorial interests to a broader collective interest in the conduct of nationals overseas.<sup>70</sup> He suggests that greater reliance on the nationality principle is justified on three grounds. First, he argues that given that the conduct of nationals overseas is already regulated on an ad-hoc basis, a standard framework should be developed to govern its use more broadly.<sup>71</sup> It is possible that this has merit; a standardised framework would allow for greater transparency and consistency in the employment of the nationality principle. Second, he argues that exercises of jurisdiction on the basis of nationality can be used to ensure that the accused receives a fair trial.<sup>72</sup> Arnell refers to the United Kingdom, where the rights to a fair trial, liberty and freedom from retrospective legislation are all part of municipal law, and therefore would be guaranteed to nationals being prosecuted for extraterritorial criminal conduct. While this assurance of basic human rights is certainly desirable, the reverse could equally be true. Nationals of states which do not guarantee those same human rights could equally assert jurisdiction over the conduct of their nationals overseas, thereby depriving a person of those rights. Finally, Arnell argues that the mobility of people has changed the relationship between citizen and state to the extent where territorial boundaries are less relevant, and so the relationship ought to be governed by the nationality principle.<sup>73</sup>

#### *Passive nationality*

The existence and use of the passive nationality principle is particularly controversial, perhaps because of the particular challenge it poses for territorial-based systems of regulation.<sup>74</sup> Of all the grounds discussed in this paper, it is the only one *not* included in the Draft Convention on Jurisdiction with Respect to Crime.<sup>75</sup> As a ground of criminal jurisdiction, it has been described as the ‘most contested in contemporary International Law.’<sup>76</sup> In his dissenting judgment in the *Lotus* case, Judge Moore expressed his reservation on the passive nationality principle thus:

‘[A]n inhabitant of a great commercial city (...) may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes (...) this (...) is at variance not only with the principle of exclusive jurisdiction of a State over its own territory, but also with the equally well settled principle that a person visiting a foreign country (...) falls under the dominion of the local law.’<sup>77</sup>

67 Chehtman, *supra* note 51, p. 66.

68 *Ibid.*, p. 67.

69 *Ibid.*, p. 61.

70 P. Arnell, ‘The Case for Nationality Based Jurisdiction’, 2001 *International and Comparative Law Quarterly* 50, no. 4, p. 961, cited in M.D. Evans (ed.), *International Law*, 2006.

71 *Ibid.*, p. 959.

72 *Ibid.*, p. 955.

73 *Ibid.*, p. 960.

74 Zerk, *supra* note 4, p. 20.

75 Text with comment, supplement to 1935 *American Journal of International Law* 29.

76 Chehtman, *supra* note 51, p. 67.

77 *S.S. Lotus (France v Turkey)* (Judgement), [1927] PCIJ (ser A) No 10, cited in G.D. Triggs, *International Law: Contemporary Principles and Practices*, 2006, p. 355.

In particular, the passive nationality principle has potential to create legal uncertainty. While persons are generally aware of their own nationality, they may not be aware of the nationality of the persons with whom they interact. For example, a person in *State A*, when he or she acts, may not be aware of the nationality of Citizen X, and therefore will not be in a position to assess the legal framework in which his or her conduct will be assessed.<sup>78</sup> Nonetheless, examples of state practice indicate the international community is increasingly willing to accept assertions of extraterritorial jurisdiction on the basis of the passive nationality principle.<sup>79</sup> This is particularly so where the conduct constitutes a serious crime such as terrorism, hijacking or hostage-taking.

### **3.3. The universality principle**

#### **3.3.1. What is the universality principle?**

The universality principle refers to the right of states to assert jurisdiction over serious international crimes regardless of where the conduct occurs, or the nationality of the perpetrator(s).<sup>80</sup> The theory is that some crimes are so offensive to international peace and security that all states are regarded as having a legitimate interest in their proscription and punishment.<sup>81</sup> Unlike other grounds of extraterritorial jurisdiction, which demand some connection with the regulating state (such as the nationality of the perpetrator or the victim), this principle provides every state with a basis to prosecute certain international crimes. The scope of universal jurisdiction is conceived of in two different ways: conditional and absolute. A conditional conception of universal jurisdiction requires the presence of the accused in the prosecuting state.<sup>82</sup> An absolute conception, in contrast, does not require the presence of the accused.<sup>83</sup> This is sometimes described as ‘universal jurisdiction in absentia’. The latter is far more controversial, and is not widely accepted as a sound basis for jurisdiction.<sup>84</sup>

#### **3.3.2. What is an example of universal jurisdiction?**

In earlier times, the reach of extraterritorial jurisdiction on the basis of universality was limited to piracy and the slave trade.<sup>85</sup> For example, international law grants every state the authority to assert jurisdiction over piracy and slave trading because those crimes are ‘prototypal offences that (...) have long been considered the enemies of humanity’.<sup>86</sup> It has expanded since World War II, to the extent that there is now no firm consensus as to what crimes are subject to universal jurisdiction.<sup>87</sup> Prosecutions over war crimes and crimes against humanity in the post-World War II era also relied heavily on the universality principle.<sup>88</sup> As noted earlier, the prosecution of war crimes in the Nuremberg tribunals and Israel’s prosecution in *Eichmann* are considered examples of universal jurisdiction. The court before which Eichmann was tried in Israel found that:<sup>89</sup>

‘The[se] abhorrent crimes (...) are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself. Therefore, far from international law negating or limiting the jurisdiction of countries with respect to such crimes (...) the international law is in need of the judicial and legislative authorities of every country to give effect to its penal injunctions and bring criminals to trial. The jurisdiction to try crimes under international law is universal.’

78 Zerk, *supra* note 4, p. 20.

79 Triggs, *supra* note 3, pp. 355, 356.

80 Zerk, *supra* note 4, p. 20.

81 *Ibid.*

82 H. Gluzman, ‘On Universal Jurisdiction – Birth, Life and a Near-Death Experience’, *Bocconi School of Law Papers*, Paper No. 2009-08/EN, p. 4.

83 *Ibid.*

84 See, for example, the discussion in O’Keefe, *supra* note 2, pp. 748-750.

85 D.F. Orentlicher, ‘Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles’, in T.J. Biersteker et al. (eds.), *International Law and International Relations*, 2007, p. 205.

86 K.C. Randall, ‘Universal Jurisdiction Under International Law’, 1988 *Texas Law Review* 66, p. 785, p. 788, citing O. Schachter, *International Law in Theory and Practice*, 1985), pp. 240-265.

87 Orentlicher, *supra* note 85, p. 205.

88 Randall, *supra* note 86, p. 788.

89 36 ILR 5, [12].

### 3.3.3. *Is there debate on the universality principle?*

There is little to no debate on the *existence* of the universality principle. However, there is some debate as to its scope. Critics of universal jurisdiction argue that the courts and prosecutors ‘are completely unaccountable to the citizens of the nation whose fate they are relying upon.’<sup>90</sup> Since absolute universal jurisdiction allows prosecution by any country at any time, there are also concerns as to due process. For example, Fletcher warns that universal jurisdiction may result in ‘hounding an accused in one court after another until the victims are satisfied that justice has been done.’<sup>91</sup>

The response to Belgian assertions of universal jurisdiction indicates that states are still resistant to a broad conception of universal jurisdiction. Criminal prosecutions were instituted in Belgian courts against current and former leaders of Chad, the Democratic Republic of Congo, Iran, Iraq, Israel, Cote d’Ivoire, the Palestinian Authority, the United States, and others.<sup>92</sup> Individuals such as the then United States Secretary of State, Colin Powell, were named. There was a strong reaction, particularly from the United States and Israel. Israel withdrew its ambassador. The United States warned that Belgium risked losing its status as the headquarters of NATO, and that US officials would stop visiting Belgium if it did not further restrict its laws on universal jurisdiction.<sup>93</sup> Consequently, Belgium bowed to this pressure, and amended its laws, ‘leaving scant scope for universal jurisdiction.’<sup>94</sup>

## 3.4. *The protective principle*

### 3.4.1. *What is the protective principle?*

The protective principle is invoked to justify claims of extraterritorial jurisdiction by a regulating state for offences against its national interest. This might include the security, integrity, sovereignty or government functions of that state.<sup>95</sup> In particular, a state may rely on the protective principle because acts that threaten its security or national interest may not be illegal in the state where they are being performed.<sup>96</sup>

### 3.4.2. *What is an example of protective principle jurisdiction?*

The protective principle has been used to prosecute extraterritorial offences relating to counterfeiting currency, desecration of flags, economic crimes, forgery of official documents such as passports and visas, and political offences (such as treason).<sup>97</sup> For example, in *Joyce v DPP*,<sup>98</sup> an American citizen gained a British passport by fraudulent means and worked for German radio during World War II. It was argued on behalf of the accused that the United Kingdom did not have jurisdiction to try a non-national for a crime committed outside British territory. The Court rejected this argument on the basis that:

‘No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws.’<sup>99</sup>

### 3.4.3. *Is there debate on the protective principle?*

Given uncertainties as to what constitutes a sufficient threat to ‘national interest’, the protective principle is open to abuse. While jurisdiction over counterfeiting of state documents is unobjectionable, some states have made far wider claims. For example, in the 1960s and 1970s, companies which purchased goods

90 J. Goldsmith & S.D. Krasner, *The Limits of Idealism*, 2003, p. 51.

91 G.P. Fletcher, ‘Against Universal Jurisdiction’, 2003 *Journal of International Criminal Justice* 1, no. 3, p. 580, p. 582.

92 Orentlicher, *supra* note 85, p. 205.

93 *Ibid.*

94 *Ibid.*

95 Triggs, *supra* note 3; Zerk, *supra* note 4, p. 19; and generally, M.B. Krizek, ‘The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice’, 1988 *Boston University International Law Journal* 6, p. 337.

96 Akehurst, *supra* note 7, p. 169.

97 Triggs, *supra* note 3, pp. 356-357; Zerk, *supra* note 4, p. 19; and generally, Krizek, *supra* note 95.

98 *Joyce v DPP*, [1946] AC 347.

99 *Ibid.*, 372.

from the United States and undertook not to sell on those goods to communist countries were liable for prosecution in the United States if they breached that undertaking.<sup>100</sup> The Hungarian Criminal Code once spoke sweepingly of offences against 'a fundamental interest relating to the democratic, political and economic order.'<sup>101</sup> Notoriously, Nazi Germany prosecuted extraterritorial acts that threatened the racial purity of the nation.<sup>102</sup> As Akehurst has stated,<sup>103</sup>

'A State is entitled to impose its ideology on its nationals and on all persons present in its territory; it is also entitled to oblige both categories of persons to take its side in its struggles against other States. But it is not entitled to make such demands on aliens living in foreign countries.'

Nonetheless, most commentators accept the legitimacy of the protective principle. For example, Chehtman accepts that individuals within a given state have a collective interest in the security of their state being protected.<sup>104</sup> He argues that 'the fact that a given state can abuse a right it has is hardly a conclusive argument against it initially holding that right.'<sup>105</sup> Similarly, Triggs notes that the protective principle is open to abuse, but observes that reliance on the principle is generally limited to exceptional cases and particular categories of offences.<sup>106</sup> She also suggests that concerns about terrorism have led to a growing acceptance by the community of assertions of extraterritoriality on the basis of the protective principle.<sup>107</sup>

### **3.5. The effects principle**

#### *3.5.1. What is the effects principle?*

Commentators on extraterritoriality often refer to the effects principle as an additional basis for asserting extraterritorial jurisdiction. The effects principle allows states to assert jurisdiction over conduct occurring extraterritoriality if that conduct has an effect on their territory. The effects principle is easily confused with objective territoriality. However, it differs from objective territoriality in that no constituent element of the offence takes place within the territory of the asserting state.<sup>108</sup>

#### *3.5.2. What is an example of effects principle jurisdiction?*

Legislation drafted as applying in *State A* to 'conduct both within or having an effect within the territory'<sup>109</sup> of *State A*, would be an assertion of extraterritorial jurisdiction on the basis of the effects principle. Jurisdiction on the basis of offences that merely produced effects in their territory has been claimed by various states including the United States, Argentina, Mexico, China, Cuba and Italy.<sup>110</sup>

#### *3.5.3. Is there debate on the effects principle?*

The scope of the effects principle is controversial, particularly regarding the proposition that a purely economic effect would suffice.<sup>111</sup> In expanding the jurisdiction of the regulating state, the effects principle fails to provide an effective framework for protecting the interests of other states which might be affected by this expansion. Parrish is also of the view that the effects principle has expanded the potential for jurisdictional conflict between states. He describes it as the 'beginning of the end to meaningful territorial

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100 Akehurst, *supra* note 7, p. 158.

101 *Ibid.*, p. 159

102 *Ibid.*

103 *Ibid.*

104 Chehtman, *supra* note 51, pp. 71-21.

105 *Ibid.*, p. 73.

106 *Ibid.*, p. 358.

107 *Ibid.*, p. 358.

108 O'Keefe, *supra* note 2, p. 739.

109 See, for example, *Restatement (Second) of the Foreign Relations Law of the United States* 38 (1965).

110 Akehurst, *supra* note 7, p. 153.

111 Zerk, *supra* note 4, p. 19.

limits to legislative jurisdiction,<sup>112</sup> and as ‘problematic for both conceptual and pragmatic reasons.’<sup>113</sup> He argues that it is ‘unconstrainable’<sup>114</sup> and gives ‘license to near universal jurisdiction.’<sup>115</sup>

Akehurst also sees the effects principle as a ‘slippery slope’ towards universal jurisdiction.<sup>116</sup> He cites the example of a person committing arson and destroying a factory, and, as a result, the company owning the factory becomes insolvent, the effects of which could be felt all over the world.<sup>117</sup> In his view, the effects principle is only workable if jurisdiction is limited to the state where the primary effect is felt, and even then only where the effect is substantial.<sup>118</sup>

In summary, the effects principle is one of the most highly contentious bases on which to assert extraterritorial jurisdiction. Its scope is not well articulated, and it is prone to abuse. In a globalised world, one thing can affect many others, and therefore the effects principle should not be considered a legitimate basis upon which to assert extraterritorial jurisdiction. It is also superfluous in the sense that it is hard to imagine a state having a legitimate jurisdictional interest in a conduct that would not otherwise be covered by the objective territoriality or protective principles, or by other less contentious bases of extraterritorial jurisdiction.

### *3.6. Preliminary conclusions on the principles of jurisdiction in international law*

Extraterritorial jurisdiction is useful in seeking to regulate transnational crime, such as child-sex tourism, money laundering, drug trafficking, human trafficking and migrant smuggling. These activities are not confined to territorial borders, and therefore, neither should the relevant legal frameworks be. However, reliance on extraterritorial jurisdiction may have the following consequences:

- Given that a country other than the country in which an offence occurred may assert jurisdiction and seek to prosecute, a government’s promise of amnesties are undermined;
- an accused person may be subject to multiple prosecutions for the same conduct, with no foreseeable end point; and
- persons may be unable to know or ascertain each and every law in each and every state that may have grounds for jurisdiction over their conduct, thereby creating legal uncertainty.

These consequences could be greatly mitigated by extraterritorial jurisdiction being permitted only over crimes that are the subject of international treaties, and by the development of a multilateral procedural framework setting out model laws on prosecutorial discretion, and due process. Such a framework is beyond the scope of this paper. However, this paper will provide examples of ways in which individual rights may be undermined by assertions of extraterritorial jurisdiction, and then consider whether the abuse of rights doctrine is helpful in regulating extraterritoriality.

## PART II

This Part provides examples of the some of the problems that can arise in domestic prosecutions of extraterritorial conduct, and undermine the ability of an individual to enjoy a fair trial. In particular, it considers: the lack of consistency in domestic conceptions of ‘*ne bis in idem*’ or ‘double jeopardy’; extradition and mutual assistance frameworks; and the inconsistent application of constitutional protections to persons accused of extraterritorial criminal conduct.

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112 Parrish, *supra* note 5, p. 1470.

113 *Ibid.*

114 *Ibid.*, p. 1478.

115 *Ibid.*

116 Akehurst, *supra* note 7, p. 154.

117 *Ibid.*

118 *Ibid.*, pp. 154-155.

## 1. The lack of a consistent transnational principle of *ne bis in idem*

The principle that a person should not be prosecuted more than once for the same conduct is expressed in the maxim *ne bis in idem* ('*ne bis*').<sup>119</sup> In the common-law world, the *ne bis* principle is more commonly referred to as 'double jeopardy'.<sup>120</sup> Although some may argue that there are differences between the two concepts, both are premised on 'similar considerations of fairness, just treatment, and respect for an individual's dignity'.<sup>121</sup> For ease of reference, the term 'double jeopardy' will be used, and, unless stated otherwise, is taken to encompass both. The principle has a long history dating back to ancient Greece and Rome,<sup>122</sup> and derives from the Roman Law principle, *nemo debet bis vexari pro una et eadem causa*.<sup>123</sup> Despite this long history, the principle does not necessarily exist at the transnational level. For example, the protection granted by Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) is limited to multiple prosecutions in one state, and not as between states.<sup>124</sup> This leaves a person accused of an extraterritorial crime, for which more than one state asserts jurisdiction, in a regulatory void. While Article 20 of the Rome Statute of the International Criminal Court also provides some protection against double jeopardy, this protection only applies to persons prosecuted for genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>125</sup> Therefore, it is generally not relevant to prosecutions of other kinds of transnational crime such as money laundering, migrant smuggling, human trafficking, child sex tourism, cybercrime or other criminal offences.

The Model Law on Extradition provides: '[e]xtradition may be refused, if there has been a final judgment rendered and enforced against the person sought in [the country adopting the law] [or in a third state] in respect of the offence for which extradition is requested'.<sup>126</sup> However, the language is discretionary and, as a model law, merely aspirational. For example, in the United States, the prevailing view is the 'dual sovereignty' doctrine. The effect of this doctrine is to allow each sovereign state to prosecute criminal conduct regardless of previous action in relation to the same conduct by other sovereign states.<sup>127</sup> This doctrine is 'inequitable and ineffective at protecting the rights of criminal defendants'.<sup>128</sup> For example, consider the prosecution of Gabe Watson in the United States for conduct that had already been the subject of a conviction and subsequent term of imprisonment in Australia. Watson, a citizen of the United States, served 18 months' imprisonment in Australia for the manslaughter of his wife on a diving trip in Australia in 2003.<sup>129</sup> Dissatisfied with the lenient sentence, an Alabama court indicted Watson for murder for money and kidnap by trick,<sup>130</sup> and was successful in seeking his extradition from Australia.<sup>131</sup>

119 G. Conway, 'Ne Bis in Idem in International Law', 2003 *International Criminal Law Review* 3, no. 3, p. 217.

120 See generally, L. Finlay, 'Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute', 2009 *UC Davis Journal of International Law & Policy* 15, no. 2, p. 221.

121 D.E. Lopez, 'Not Twice for the Same: How the Dual Sovereignty Doctrine is Used to Circumvent Non Bis In Idem', 2000 *Vanderbilt Journal of Transnational Law* 33.

122 A.J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory', 2008 *Washington University Law Review* 86, no. 4, p. 778.

123 See, Conway, *supra* note 119, p. 221; Finlay, *supra* note 120, p. 223; Lopez, *supra* note 121, p. 1267.

124 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Art. 49.

125 See Art. 5 of the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9\* (entered into force 1 July 2002). Note that Art. 20 of this Statute provides as follows:

'1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) 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 which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'

126 UNODC, 2004, <[http://www.unodc.org/pdf/model\\_law\\_extradition.pdf](http://www.unodc.org/pdf/model_law_extradition.pdf)> (last visited 13 September 2013).

127 Lopez, *supra* note 121, p. 1266.

128 *Ibid.*

129 See *R v Watson; Ex parte A-G*, [2009] QCA 279.

130 T. Thompson, 'California Governor Arnold Schwarzenegger Signs Extradition Order on Gabe Watson', *The Courier Mail* (online), 15 November 2010, <<http://www.couriermail.com.au/news/queensland/california-governor-arnold-schwarzenegger-signs-extradition-order-on-gabe-watson/story-e6freoof-1225953440198>> (last visited 13 September 2013).

131 Note, the State of California also sought extradition from Australia, and ordered Watson's extradition to Alabama.



Under Australian law, there is an ‘extradition objection’ if a person has undergone punishment under the law of Australia in respect of the extradition offence, *or* another offence constituted by the same conduct as the extradition offence.<sup>132</sup> Therefore, although the offences for which Watson was indicted in the United States were technically different from those in Australia, the conduct in question was the same conduct and should have been caught by Section 7(e). It is unclear as to why the Australian Government was not prevented by its own legislation from extraditing Watson. Nonetheless, he was extradited. Ultimately, the case against Watson was dismissed on the basis of insufficient evidence.<sup>133</sup> However, if the case had gone to trial, he may have been tried, convicted and punished in two different jurisdictions. By contrast, in January 2012 a court in Mexico refused to extradite Sandra Ávila-Beltrán to the United States for drug charges, on the basis that the charges related to conduct that had already been the subject of a prosecution in Mexico.<sup>134</sup> Perhaps the key difference between Ávila-Beltrán and Watson is that the former is a citizen of Mexico, whereas Watson was not a citizen of Australia. Perhaps Australia would have gone further to protect its own citizen from another trial arising out of the same conduct. If so, that in itself is problematic, as it creates uncertainties and is inconsistent with the notion that all persons are equal before the law. Notably, international law does not obligate a sovereign state to enforce another state’s penal judgments.<sup>135</sup>

The double jeopardy principle is recognised in many constitutions of the world. As at 1993, some form of protection from double jeopardy is included in the constitutions of over 50 countries.<sup>136</sup> However, constitutionalisation of the double jeopardy principle does not necessarily mean greater protection. For example, the principle appears in Singapore’s Constitution, but the protection can be expressly waived by a superior court quashing a conviction, an acquittal, or the ordering of a retrial.<sup>137</sup> In some countries, the protection afforded is not constitutionally protected at all, although it may form part of the common law or be provided for in legislation.<sup>138</sup> The variances between domestic double jeopardy protections create uncertainty for persons accused of extraterritorial crimes, where more than one state may have claim to jurisdiction. This is problematic because states are increasingly asserting extraterritorial criminal jurisdiction and so are more likely to share concurrent jurisdiction over the same accused persons.

## 2. Extradition and mutual legal assistance

The ability for individuals to receive fair treatment under extradition and mutual legal assistance frameworks is also limited. The removal of Julian Moti from the Solomon Islands to Australia is an example of government officials cutting corners and undermining due process in order to secure the presence of an accused person.

In December 2007, Mr Moti was deported from the Solomon Islands and, on arrival in Australia, prosecuted under Australian law for child sexual offences.<sup>139</sup> The charges referred to a time when Mr Moti was a resident of Vanuatu, and were asserted on the basis of the active nationality principle (Mr Moti has Australian citizenship). The Moti case has been a high-profile one, as Mr Moti was the Attorney-General

132 Section 7(e) of the Extradition Act 1988 (Cth).

133 J. Cogle, ‘Gabe Watson murder trial thrown out’, *ABC News* (online), 24 February 2012, <<http://www.abc.net.au/news/2012-02-24/gabe-watson-murder-trial-thrown-out/3849836?section=qld>> (last visited 13 September 2013).

134 H. Nelson Goodson, ‘Mexican Federal Judge Cited Double Jeopardy To Prevent Female Druglord Extradition To The U.S.’, on H. Nelson Goodson, *Hispanic News Network USA Blog*, 12 January 2012, <<http://hngwiusa.wordpress.com/2012/01/13/mexican-federal-judge-cited-double-jeopardy-to-prevent-female-druglord-extradition-to-the-u-s/>> (last visited 13 September 2013).

135 L. Ballard, ‘The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts’, 1997 *Columbia Human Rights Law Review* 29, no. 1, p. 173.

136 M.C. Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’, 1993 *Duke Journal of Comparative & International Law* 3, no. 2, p. 289; Finlay, *supra* note 120, p. 224.

137 Art. 11(2) of the Constitution of the Republic of Singapore (Singapore, 9 August 1965) provides, ‘A person who has been convicted or acquitted of an offence shall not be tried again for the same offence *except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was convicted or acquitted.*’ (emphasis added)

138 For example, in Australia the principle of double jeopardy is not protected by the Constitution, and is instead determined by common law and subject to variance by statute. See, e.g., in South Australia, the Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008(SA); in New South Wales, the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 No 69 (NSW); in Tasmania, ss. 392-4 of the Criminal Code Act 1924 (Tas.); in Victoria, ss. 327(H), 327 (M) of the Criminal Procedure Act 2009I (Vic.).

139 *R v Moti*, [2009] 235 FLR 320.

of the Solomon Islands. Three days before his deportation to Australia, it was officially published in the *Solomon Island Gazette* that Moti had been removed from appointment as Attorney-General.<sup>140</sup> Not surprisingly, then, the case has been the subject of media attention and speculation as to the potential political motives of the Australian Government in pursuing the case. For example, Purcell suggests that the exercise of extraterritorial jurisdiction in the case was really about asserting Australia's foreign policy objectives, rather than the alleged conduct at issue.<sup>141</sup> Purcell asks:

[W]as the Crimes (Child Sex Tourism) Act passed with the intention of enabling the Australian prosecution authorities to launch a prosecution against a person who resided in Vanuatu and the Solomons and who happened to take out Australian citizenship but had not lived in Australia since student days and is currently living in the Solomons, to be tried in Australia for offences allegedly committed when he was a citizen of Vanuatu?<sup>142</sup>

The political agenda in Moti's case was not denied by the Australian Government. In the written argument, the Crown conceded that:

[T]he Australian High Commissioner to the Solomon Islands, Mr Cole, on a number of occasions requested the AFP to investigate the applicant, and that *the motivation was largely to prevent the applicant from becoming the Attorney-General in the Solomon Islands.*<sup>143</sup>

Ultimately, the case went on appeal all the way to the High Court of Australia, where it was stayed as an abuse of process. This case illustrates the 'enormous discretion'<sup>144</sup> given to prosecutors in deciding whether to prosecute an extraterritorial crime, and the need for the development of prosecutorial guidelines in relation to extraterritorial offences. It also demonstrates that extradition and mutual assistance procedures and proceedings can be fraught with political tensions, and influenced by broader foreign policy objectives.

Another example of abnormalities or illegalities in the extradition process is the Ker-Frisbie doctrine in the United States. In essence the doctrine provides that anomalies or illegalities in the extradition process will not bar prosecution in United States courts. In *Ker v Illinois*,<sup>145</sup> the US Supreme Court held that 'such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.'<sup>146</sup> This was again upheld in *Frisbie v Collins*.<sup>147</sup>

An accused person may also find it difficult to obtain foreign evidence.<sup>148</sup> It is much easier for prosecutors to access mutual legal assistance mechanisms than it is for an individual accused person. For example, the mutual legal assistance treaties to which the US is party 'regularize foreign evidence gathering for prosecutors and explicitly prevent their use by criminal defendants.'<sup>149</sup> This is concerning, because 'when the ability to compel evidence is unequal, accuracy and fairness norms (...) can be illusory'.<sup>150</sup>

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140 Ibid., [13].

141 F.J. Purnell SC, 'The Julian Moti Affair and Double Jeopardy', (25 October 2006) Civil Liberties Australia, <<http://www.cla.asn.au/Articles/Moti%20Affair%20-%20Purnell061024.pdf>> (last visited 13 September 2013).

142 Ibid.

143 Commonwealth Director of Public Prosecutions, 'Respondent's Summary of Argument', *Julian Ronald Moti v R*, (No. 47 of 2010) 3 (emphasis added).

144 E.S. Podger, 'Defensive Territoriality: A New Paradigm for the Prosecution of Extraterritorial Business Crimes', 2002 *Georgia Journal of International and Comparative Law* 31, no. 1, p. 24.

145 119 U.S. 436 (U.S. 1886)

146 Ibid.

147 342 U.S. 519 (U.S. 1952).

148 L.S. Richardson, 'Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem', 2008 *Berkeley Journal of International Law* 26, no. 1, p. 62, p. 64.

149 Ibid.

150 Ibid., p. 67.

### 3. Constitutional guarantees

Many states grant some form of due process rights to persons subject to legal proceedings in that jurisdiction. However, due process rights may be applied differently to prosecutions of territorial conduct than to prosecutions of extraterritorial conduct. For example, in *R v Hape* the Supreme Court of Canada found that Section 8 of the Canadian Charter of Rights and Freedoms, which guarantees a right against ‘unreasonable search or seizure’, does not apply extraterritorially to investigations conducted overseas by Canadian officials.<sup>151</sup> The Court held that because Canada was required to respect the sovereignty of other states, ‘extraterritorial enforcement is not possible’<sup>152</sup> and, therefore, given that ‘enforcement is necessary for the Charter to apply, extraterritorial application of the Charter is impossible’.<sup>153</sup> Pierre-Huges Verdier argues that the decision in *R v Hape* departs from the previous line of authority that Charter rights apply to criminal investigations conducted abroad, provided they did not generate ‘objectionable extraterritorial effects’.<sup>154</sup> In *R v Klassen*,<sup>155</sup> the Court confirmed *R v Hape* as authority for the proposition that the Canadian Charter of Rights does not apply outside of Canada.<sup>156</sup>

While this is just one example in one country, it is illustrative of the way in which the ability of an individual to enjoy a fair trial may be compromised in prosecutions of extraterritorial criminal conduct. A comprehensive analysis of the ingredients of a fair trial is beyond the scope of this paper. However, for current purposes a fair trial is taken to be a trial that provides certainty, equality, and review of executive and administrative action. For example, Article 7 of the Universal Declaration of Human Rights (UDHR) provides that ‘all are equal before the law and are entitled without any discrimination to equal protection of the law’.<sup>157</sup> This could be argued to prohibit differential treatment of persons accused of extraterritorial, as opposed to territorial, offences. Article 10 is also relevant. It states: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’<sup>158</sup> Further, Article 14(1) of the ICCPR provides: ‘All persons shall be equal before the courts and tribunals,’ and that in ‘the determination of any criminal charge (...) everyone shall be entitled to a fair (...) hearing by a competent, independent and impartial tribunal established by law’.<sup>159</sup>

The requirement that all persons be equal before the courts would arguably require states to provide the same procedural and substantive rights to persons accused of extraterritorial offences as to those accused of domestic offences. As shown above, the lack of a transnational principle of double jeopardy creates uncertainty; and the ability of an individual to utilize extradition and mutual assistance frameworks creates inequality, as does the potential for a state to preclude constitutional guarantees from applying extraterritorially.

## PART III

As set out in Part I, there are several bases on which states have a right to assert extraterritorial jurisdiction. However, as suggested in Part II, this right to assert jurisdiction may compromise the rights of individuals, particularly with respect to fair trial rights. In that connection, Part III now considers whether the ‘abuse of rights’ doctrine might be helpful in seeking to maintain an appropriate balance between the rights of states, and the rights of individuals.

151 See the discussion of *R v Hape* [2007] SCC 26 in Ireland-Piper, *supra* note 48.

152 *R v Hape* [2007] SCC 26.

153 *Ibid.*

154 P.-H. Verdier, ‘R v Hape 2007 SCC 26’, 2008 *American Journal of International Law* 102, no. 1, p. 143, p. 145.

155 *R v Klassen* [2008] BCSC 1762.

156 *Ibid.*

157 Universal Declaration of Human Rights (December 10, 1948), available online at <<http://www.un.org/en/documents/udhr/>> (last visited 13 September 2013).

158 *Ibid.*, Art. 10.

159 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

## 1. Abuse of rights

In international law, the doctrine of abuse of rights prohibits states from making use of their rights if to do so impedes the enjoyment by other states of their own rights, or to achieve an end which is different from that for which the right was created, to the injury of another state.<sup>160</sup> The abuse of rights doctrine appears in arbitral,<sup>161</sup> and judicial, decision making in the International Court of Justice (ICJ), the Permanent Court of International Justice (PCIJ),<sup>162</sup> and in the appellate body of the World Trade Organisation.<sup>163</sup> It also appears in treaties. For example, the United Nations Convention on the Law of the Sea requires Member States to 'exercise the rights, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right'.<sup>164</sup>

One of the obvious difficulties with the proposition that the abuse of rights doctrine may be helpful in regulating exercises of extraterritorial criminal jurisdiction is that in international law the doctrine is generally understood in the context of rights between states, and not with rights as between an individual and a state. However, as Lauterpacht has advocated, '[t]here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused'.<sup>165</sup> Further, international law extensively recognises the rights of individuals, as is evidenced by the existence of the ICCPR, the UDHR and other human rights treaties. It is not such a great leap to suggest that a state that exercises its jurisdictional rights over an individual in a manner inconsistent with the rule of law, abuses its rights. The abuse of rights doctrine can be understood as an 'omnibus term to describe certain ways of exercising a power which are legally reprehensible'.<sup>166</sup>

The abuse of rights doctrine may also be more willingly embraced by the domestic courts, rather than other principles of jurisdictional restraint that are predominately creatures of international law (such as the principle of non-interference). This is because there are principles and doctrines analogous to the international abuse of rights doctrine in the domestic law of many civil-law and common-law countries. Such principles may exist in a private law context such as in tort or property law, and others in a public law context, such as in administrative law. Either way, there are doctrines and principles prohibiting the exercise of rights by legal persons in a manner that is detrimental to the rights and interests of other legal persons.<sup>167</sup>

For example, a number of civil-law codes have provisions that prohibit the use of a right for a purpose other than for which it is intended. Article 226 of the German Civil Code prohibits the exercise of a right if the only purpose of such exercise is to cause damage to another.<sup>168</sup> Other codes only recognise an abuse of a right where an element of intent is present. For example, Article 1912 of the Mexican Civil Code reads: 'When damage is caused to another by the exercise of a right, there is only an obligation to make it good if it was proved that the right was exercised only to cause the damage.' Similarly, Article 833 of the Italian Civil Code prohibits the exercise of a right if the purpose is to harm or inconvenience others.<sup>169</sup> Japan further requires an element of unreasonableness in order to establish an abuse of rights.<sup>170</sup>

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160 A. Kiss, 'Abuse of Rights', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1, 1992, p. 4.

161 Byers, *supra* note 47, p. 400.

162 *Ibid.*, p. 399.

163 *Ibid.*, p. 401.

164 Art. 300 United Nations Convention on the Law of the Sea, 10 December 1982, <[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/part16.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/part16.htm)> (last visited 13 September 2013).

165 H. Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 164.

166 G.D.S. Taylor, 'The Content of the Rule Against Abuse of Rights in International Law', 1972-1973 *British Yearbook of International Law* 46, p. 325.

167 Byers, *supra* note 47, p. 392.

168 Art. 266 of the German Civil Code, <[http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html)> (last visited 13 September 2013) (Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I, p. 42, 2909; 2003 I, p. 738), last amended by Art. 1 of the Statute of 27 July 2011 (Federal Law Gazette I, p. 1600)).

169 Art. 833 of the Italian Civil Code (G. Alpa & V. Zeno-Zencovich, *Italian Private Law*, 2007, <[http://shr.receptidocs.ru/docs/4/3577/conv\\_1/file1.pdf](http://shr.receptidocs.ru/docs/4/3577/conv_1/file1.pdf)> (last visited 13 September 2013)); see also Art. 1295(2) of the Austrian Civil Code (R. Schnopfhausen et al., *Intellectual Property Law in Austria*, 2011, p. 439).

170 See, for example, the decision of the Japanese Supreme Court in *Mitamura v Suzuki*, 1067 Sup. Ct., 27 June 1972.

It is true that the principle is less known in common-law systems, and, therefore more likely to meet with strong resistance from the common-law world. There are, however, analogous legal concepts. For example, it is suggested that the notion of abuse of rights is the basis on which tort law developed.<sup>171</sup> For example, the tort of ‘abuse of process’ in Australia has been described as ‘the clearest illustration in Australian law of what civil lawyers call an “abuse of right”’.<sup>172</sup> The High Court of Australia has also drawn upon notions of ‘abuse of process’ in considering the propriety of a criminal prosecution.<sup>173</sup> In the United Kingdom, the ‘abuse of discretion’ doctrine in English administrative law, and the notion of malicious prosecutions in criminal law are both somewhat analogous.<sup>174</sup> Further, the concept of abuse of rights has been raised by a UK Judge in the context of piercing the corporate veil.<sup>175</sup> Therefore, although it might be labelled differently, the basic principle underlying the abuse of rights doctrine does exist in the common law world. This paper adopts in generality the view expressed by Rick Bigwood in his discussion of abuse of rights in Anglo-Australian law:<sup>176</sup>

‘I am untroubled by the particular label that one chooses to capture what seems to be a common idea in relation to a universal legal problem. What one prefers as “unconscionability”, another will favour as “abuse of rights” or “bad faith” (...) Acceptance of, or at least familiarity with, the idea behind the label is more important here than the label itself. Although it is true that no general “doctrine” of abuse of rights or good faith exists in Anglo-Australian law (...) there can be no denying that, in one guise or another, [such] notions (...) pervade discrete doctrines, rules and principles, and exceptions (...) throughout (...) common law and equity.’

Bigwood’s point is that while there may be no general ‘abuse of rights’ doctrine in common-law countries, the concept is inherent in a variety of common law and equitable principles. Similarly, although the doctrine varies throughout civil-law countries, one would not suggest that it does not exist in those jurisdictions. A variation in language or form is no argument against the existence of a substantive principle, that the right of one party should not be exercised to abuse the rights of the other.

Therefore, the abuse of rights doctrine may provide a useful paradigm through which to regulate assertions of extraterritorial criminal jurisdiction. However, the Draft Articles on State Responsibility make no reference to abuse of rights, and some may be of the view that it is too imprecise to be of any use.<sup>177</sup> For example, Schwarzenberger queries whether an abuse of rights can be distinguished from a harsh, but an otherwise justified exercise of rights.<sup>178</sup> In response, this paper suggests that a ‘harsh but justified’ exercise of a jurisdictional right would be consistent with fair trial rights, whereas an abuse of right would not. Alternatively, it is suggested that a harsh but justified exercise of a jurisdictional right would be consistent with a substantive conception of the rule of law, whereas an abuse of right would not. This then begs the question: what is the content of the rule of law?

A.V. Dicey is sometimes credited with introducing the term ‘rule of law’.<sup>179</sup> However, the concept of the rule of law has a far longer history. Fred D. Miller describes a Greek document from the fifth century B.C., the Gortyn Law Code. At its outset, the Code stated: ‘If anyone wishes to contest the status of a free man or a slave, he is not to seize him before a trial.’<sup>180</sup> Another author traced the idea back to Aristotle.<sup>181</sup> Examples of adherence to, or aspiration towards, the rule of law can be found throughout the

171 Byers, *supra* note 47, p. 396.

172 J.G. Fleming, *The Law of Torts*, 1992, p. 623.

173 D. Ireland-Piper, ‘Abuse of Process in Cross Border Cases: *Moti v The Queen*’, 2012 *QUT Law & Justice Journal* 12, no. 2.

174 G.D.S. Taylor, ‘The Content of the Rule Against Abuse of Rights in International Law’, 1972-1973 *British Year Book of International Law* 46, p. 324.

175 *Prest v Petrodel Resources Limited and others*, [2013] UKSC 34, at [68(i)] per Lord Neuberger.

176 R. Bigwood, ‘Throwing the baby out with the bathwater? Four questions on the demise of lawful-act duress in New South Wales’, 2008 *The University of Queensland Law Journal* 27, no. 2, p. 41, p. 65.

177 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)> (last visited 13 September 2013).

178 G. Schwarzenberger & E.D. Brown, *A Manual of International Law*, 1976, p. 84.

179 T. Bingham, *The Rule of Law*, 2010, p. 3.

180 F.D. Miller, ‘The Rule of Law in Ancient Greek Thought’, in M. Sellers & T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, 2010, pp. 11-18.

181 Bingham, *supra* note 179.



world, and at various points in human history. Academics and philosophers have debated the concept for generations. Geoffrey Walker may be correct when he suggests the rule of law 'is not easy to define with precision, because in part it manifests itself more as an absence than a presence.'<sup>182</sup> Nonetheless, Fred Miller describes the rule of law as 'a normative principle that political power may not be exercised except according to procedures and constraints prescribed by laws which are publicly known.'<sup>183</sup> James Harrington writes of an 'empire of laws and not of men.'<sup>184</sup> And Friedrich Hayek offered what Brian Tamanaha describes as a 'highly influential definition of the rule of law.'<sup>185</sup> Hayek posits,

'Stripped of all technicalities, this means that government in all its action is bound by rules fixed and announced before-hand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.'<sup>186</sup>

Some may argue that the content of the rule of law is subject to cultural relativism. Mortimer Sellers concedes this point: '[t]he social, historical, geographical and other circumstances in different societies will always differ, limiting what is appropriate, prudent and possible in practice.'<sup>187</sup> However, this paper adopts his view that 'certain standards and basic institutions will be shared by every society that aspires to attain the government of laws and not of men.'<sup>188</sup> As Brian Z. Tamanaha has observed, 'support for the rule of law is not exclusive to the West.'<sup>189</sup> In his view,

'The reasons they articulate for supporting the rule of law might differ, some in the interest of freedom, some in the preservation of order, many in the furtherance of economic development, but all identify it as essential.'<sup>190</sup>

There is also some contest between neutral and substantive conceptions of the rule of law. A neutral conception may be seen simply as the requirement for all to follow the law, regardless of its content or morality. By contrast, a substantive conception has content, such as an inherent right to a fair trial, or to equality before the law. These are sometimes referred to as 'thin' and 'thick' conceptions. This paper advocates a 'thick' or 'substantive' conception of the rule of law. As George Fletcher states, '[w]hatever philosophers may argue, we know that the rule of law means more than the law of rules.'<sup>191</sup>

Further, the importance of the rule of law is widely recognised both in domestic and international frameworks. It is inherently linked with human rights. For example, the preamble to the UDHR describes it as essential that 'human rights should be protected by the Rule of Law.'<sup>192</sup> The European Convention on Human Rights speaks of a 'common heritage of political traditions, ideals, freedom and the rule of law (...)'<sup>193</sup> The American Convention on Human Rights does not specifically use the term 'rule of law', but Article 8 confers the right to a fair trial, and Article 9 provides protection against retrospective laws.<sup>194</sup> Similarly, the African Charter on Human and Peoples Rights confers rights relating to fair trial,<sup>195</sup>

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182 G. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, 1988, p. 3.

183 Miller, *supra* note 180.

184 J. Harrington, *The Commonwealth of Oceana* (1656), ed. J.G.A. Pocock, 1992, p. 20.

185 B. Tamanaha, *Law as a Means to an End, Threat to the Rule of Law*, 2006, p. 227.

186 F.A. Hayek, *The Road to Serfdom*, 1994, p. 80.

187 M. Sellers, 'An Introduction to the Rule of Law in Comparative Perspective', in M. Sellers & T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, 2010, p. 5.

188 *Ibid.*

189 Tamanaha, *supra* note 185, p. 2.

190 Tamanaha, *supra* note 185, pp. 2-3.

191 Byers, *supra* note 47, p. 413, citing G. Fletcher (footnote omitted).

192 Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, <<http://www.un.org/en/documents/udhr/>> (last visited 13 September 2013), Preamble.

193 The European Convention on Human Rights (4 November, 1950), Preamble, <<http://www.hri.org/docs/ECHR50.html#C.Preamble>> (last visited 13 September 2013).

194 American Convention on Human Rights, Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, <<http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>> (last visited 13 September 2013).

195 Art. 7 of the African Charter on Human and Peoples Rights (27 June 1981), <<http://www.hrcr.org/docs/Banjul/afhr3.html>> (last visited 13 September 2013).



equality and equal protection before the law,<sup>196</sup> and states '[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law'.<sup>197</sup> International organisations have also formally acknowledged the importance of the rule of law. For example, in 2005, the Organisation for Economic Cooperation and Development (OECD) prepared an 'Issues Brief' entitled *Equal Access to Justice and the Rule of Law*.<sup>198</sup> Among other things, the brief asserts '[t]he rule of law and access to justice are crucial to the immediate upholding of law and order, and to human security imperatives, stability and development'.<sup>199</sup>

While this paper does not seek to provide an exhaustive definition of the rule of law, if the concept is to be used as a benchmark by which to evaluate whether an assertion of extraterritorial criminal jurisdiction constitutes an abuse of rights, it is necessary to establish substantive content. Therefore, the rule of law is taken to refer to the following principles.

*Principle 1: The law must be both readily known and available, and certain and clear*

This principle requires legal certainty. James Maxeiner has described legal certainty as 'a central tenet of the rule of law as understood around the world'.<sup>200</sup> Given the various bases on which extraterritorial criminal jurisdiction can be asserted, some prosecutions of extraterritorial criminal offences may undermine this principle. For example, if a national of *State W* interacts with a national of *State X* in the territory of *State Y*, in a manner that may affect the security interests of *State Z*, then *States W, X, Y* and *Z* all have a basis on which to assert extraterritorial jurisdiction. Is it fair to assume that each national is familiar with the nationality of each person with whom they interact? And if so, is it also fair to assume each knows their legal obligations under the laws of that nation? As Tom Bingham has said,

'(...) if you and I are liable to be prosecuted, fined, and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty.'<sup>201</sup>

In reality, it is unreasonable to demand that every citizen of the world be familiar with the laws of each nation. Yet, the rule of law demands that the content of the law should be accessible to the public.<sup>202</sup> It cannot be assumed that all laws of all nations are 'knowable'. Therefore, if the laws of a state are to apply extraterritorially, then a precondition of prosecution for extraterritorial criminal offences must be that the law is ascertainable. In turn, this suggests that extraterritorial jurisdiction should only be asserted for widely recognised crimes, such as those forming the subject of international agreements and treaties.

*Principle 2: The law should be applied to all people equally, and operate uniformly in circumstances which are not materially different*

Article 7 of the UDHR provides that, 'all are equal before the law and are entitled without any discrimination to equal protection of the law'.<sup>203</sup> As Walker has asserted, 'the rule of law implies the precept that similar cases be treated similarly'.<sup>204</sup> The problem with extraterritorial jurisdiction is that persons who have committed extraterritorial crimes may be treated differently than those who commit territorial crimes. For example, as noted above, in *R v Hape*<sup>205</sup> and *R v Klassen*,<sup>206</sup> the Supreme Court

196 *Ibid.*, Art. 3.

197 *Ibid.*, Art. 6.

198 OECD Development Assistance Committee, 'Issues Brief: Equal Access to Justice and the Rule of Law', 2005, <<http://www.oecd.org/development/conflictandfragility/35785584.pdf>> (last visited 13 September 2013).

199 *Ibid.*

200 J.R. Maxeiner, 'Some Realism About Legal Certainty in the Globalization of the Rule of Law', in M. Sellers & T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, 2010, p. 41.

201 Bingham, *supra* note 179, p. 37.

202 M. Gleeson, 'Courts and the Rule of Law', Melbourne University, 7 November 2001.

203 Art. 7, Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, <<http://www.un.org/en/documents/udhr/>> (last visited 13 September 2013).

204 Walker, *supra* note 182, p. 19.

205 [2007] SCC 26.

206 [2008] BCS 1762

of Canada held the Charter of Rights and Freedoms is limited to Canadian provinces and territories, and does not apply extraterritorially to searches and seizures outside of Canada. Further, as was also discussed above, a person accused of extraterritorial crimes do not enjoy the same level of protection against double jeopardy as a person accused of territorial crime.

*Principle 3: All people are entitled to a fair trial*

The right to a fair trial is described as the ‘minimum content’ of the rule of law.<sup>207</sup> Thom Brooks argues that it is the very importance of fairness to a trial that justifies the existence of a ‘right’ to a fair trial.<sup>208</sup> In his view, ‘[f]airness further entails that trial procedural rules apply to all parties equally without clear disadvantage to one over the other.’<sup>209</sup> As noted above, persons accused of extraterritorial crime can be treated differently to those accused of territorial crime, and this diminishes their opportunity for a fair trial. For example, as discussed above in *Ker v Illinois*,<sup>210</sup> the United States Supreme Court held that forcible abduction presents no valid objection to a criminal trial. Article 14(7) of the ICCPR provides: ‘No-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.’<sup>211</sup> However, the Human Rights Committee has interpreted this principle to only apply to trials within a single jurisdiction, as opposed to trials in several different countries.<sup>212</sup> This means a person who is accused of committing a crime over which several states may have a jurisdictional claim is not protected from multiple prosecutions and may be brought to trial again and again, thereby increasing the chance of conviction. This raises questions as to whether persons accused of extraterritorial crimes are able to receive a fair trial.

*Principle 4: There must be some capacity for judicial review of administrative action and the executive arm of government should be subject to the law and any action undertaken by the executive should be authorised by law.*

It has been said that the ‘single greatest advance towards the rule of law occurs when judges secure their independence from executive and legislative power.’<sup>213</sup> Regarding assertions of extraterritorial jurisdiction, courts should play a role in considering whether prosecutions of extraterritorial conduct are consistent with the rule of law, or whether they are an abuse of process. Extradition arrangements and the exercise of prosecutorial discretion are often matters for the executive, and states may try and hide behind the ‘act of state’ doctrine. However, courts should play a role in ensuring the act of state doctrine is not an impenetrable veil. For example, in *Moti v The Queen*,<sup>214</sup> the High Court of Australia considered whether proceedings could be maintained against a person who had not properly been brought within the jurisdiction by regular means, or whether such proceedings were an abuse of process. In so doing, a majority of six to one concluded that the act of state doctrine does not preclude findings as to the legality of the conduct of a foreign government, where those conclusions are a necessary step in determining a question within the competency of the Court.

It is suggested that these four principles together constitute a substantive conception of the rule of law. In turn, a substantive conception of the rule of law provides content to the abuse of rights doctrine. In summary, this paper suggests that if a state exercises extraterritorial criminal jurisdiction in a manner that is inconsistent with the four principles set out above, it has abused its jurisdictional rights.

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207 Walker, *supra* note 182, p. 5.

208 T. Brookes (ed.), *The Right to a Fair Trial*, 2009, p. xii.

209 *Ibid.*

210 119 U.S. 436 (U.S. 1886).

211 Art. 14(7) International Covenant on Civil and Political Rights, UN GA Res 2200 A (XXI), 16 December 1966, <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> (last visited 16 September 2013).

212 See *AP v Italy*, no. 204/1986, 2 *Selected Decisions of the Human Rights Committee Under the Optional Protocol*, 76 UN Doc CCPR/C/OP/2, UN Sales No E89 XIV 1 (1990).

213 Sellers, *supra* note 187, p. 8.

214 *Moti v The Queen*, (2012) 283 ALR 393.

## CONCLUSION

There are various bases on which a state may have a right to assert jurisdiction over conduct occurring extraterritorially. However, this right is not unyielding to the rights of individuals. Nonetheless, as this paper has shown, an exercise by a state of its jurisdictional rights may cause injustice to a person accused of an extraterritorial crime. In particular, the lack of a transnational principle of double jeopardy, the fact that states have better access to mutual legal assistance than individuals, and the ability of states to preclude constitutional guarantees from applying extraterritorially, are problematic.

To that end, the abuse of rights doctrine may be a useful tool in regulating the relationship between a state's jurisdictional rights, and the rights of individuals. In turn, the content of the abuse of rights doctrine can be found in a substantive conception of the rule of law. A substantive conception of the rule of law consists of certainty, equality, fair trial rights, and judicial review of administrative and executive action. Petty arguments over the label of a particular legal doctrine are not enough to mask the existence of a legal principle which provides that one party's rights are not absolute in relation to the rights of another. This is particularly important when considering the relationship between the rights of an individual and the rights of states in criminal law. The ways in which criminal justice is administered goes to the core of the legitimacy of the relationship between the state and an individual. Indeed, the 'field of battle in which democracy and human rights are tested is the administration of criminal justice, which encompasses all processes and practices by which a state effects, curtails, or removes basic rights.'<sup>215</sup> Therefore, a state that asserts extraterritorial criminal jurisdiction in such a way as to deprive an individual of legal certainty, equality before the law, fair trial rights, or so as to preclude judicial review, is a state that abuses its rights. ¶

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215 Bassiouni, *supra* note 136, p. 236.