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Contemporary Principles and Perspectives

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5.2 NON-GOVERNMENTAL ORGANIZATIONS: THE GROWING PLACE OF CIVIL SOCIETY IN INTERNATIONAL LAW

Non-governmental organizations (NGOs) are entities created under national law, with voluntary, private membership, to pursue a particular cause that may transcend national boundaries.[97] Familiar examples include Human Rights Watch, Amnesty International, the International Committee of the Red Cross (ICRC), and the International Campaign to Ban Landmines (ICBL). NGOs possess little if any international personality and often appear as a mere afterthought in studies of international law. In reality, they can have a profound impact on the practice and development of international law. The ICBL, a conglomeration of NGOs, is a Nobel Peace Prize Co-Laureate for its efforts in pushing for the drafting of the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997.

The ICRC has worked since 1863 to develop the law and practice of international humanitarian law and, unusually for an NGO, has been granted a mandate under the Geneva Conventions and their Additional Protocols for the protection of war victims and the amelioration of the effects of armed conflict.[98]

Indeed, the ICRC and the International Federation of Red Cross and Red Crescent Societies can be said to possess rights commonly granted to international organizations, such as headquarters and agreements concluded with states providing for privileges and immunities.[99] In fact, the work of the ICRC is considered so important that the ICTY Trial Chamber has held that there exists a customary international law norm that ICRC employees are immune from testifying about what they witnessed during their employment.[100] The structure of the Red Cross and Red Crescent Movement also points to the unique nature of this organization: the

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[97] Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *American Journal of International Law* 348, 350.

[98] The ICRC received the Nobel Peace Prize in 1917, 1944 and 1963.

[99] Menno Kamminga, 'The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?', in Philip Alston (ed.), *Non-State Actors and Human Rights*, above note 1, 93, 98–9; Menon, above note 8, 82.

[100] *Prosecutor v Simić* (Trial Chamber Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness) IT-95-9-PT (27 July 1999), [74]. But see Chapter 2 for criticism of the Chamber's methodology in finding the necessary *opinio juris*.

membership of the International Conference of the Red Cross and Red Crescent, its 'supreme deliberative body', is drawn from the National Societies of the Red Cross/Red Crescent, the ICRC, the Federation and the States Parties to the Geneva Conventions.[101] Nevertheless, what differentiates the Conference from the deliberative body of an international organization is that the Movement's Fundamental Principles stipulate its political independence as a private organization.[102]

NGOs have been instrumental in the drafting process of the new International Criminal Court (ICC).[103] They also have a powerful influence on the development and content of international law in the nascent area of climate change law. A group of NGOs, including Greenpeace and the World Wildlife Foundation, presented 'A Copenhagen Climate Treaty: Version 1.0' at the Copenhagen Climate Conference of 2009, amounting to a proposal for an amended Kyoto Protocol and a new Copenhagen Protocol by members of the NGO community. Although the Conference ultimately terminated without significant agreement between states, it exemplifies how NGOs with resources and determination can play an influential role on the world stage. Indeed, it is not only at international summits that NGOs can apply pressure to governments – even when state representatives return home from an international summit they will be confronted by intensive, and often highly effective, lobbying by NGOs in the domestic sphere.[104]

The oft-held misconception that NGOs are a relatively new phenomenon is belied by the longevity of the ICRC and early work of other private organizations pursuing international ends. In 1905, the Convention creating the International Institute of Agriculture (an international organization later superseded by the Food and Agriculture Organization) was the

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[101] Statutes of the International Red Cross and Red Crescent Movement, Art. 9(1) (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, as amended). See also Michael Meyer, 'The Importance of the International Conference of the Red Cross and Red Crescent to National Societies: Fundamental in Theory and in Practice' (2009) 91 (876) *International Review of the Red Cross* 713.

[102] Preamble to the International Red Cross and Red Crescent Movement Statutes, ibid.

[103] See Mahnoush Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *American Journal of International Law* 22, 23.

[104] See Nina Hall and Ros Taplin, 'Room for Climate Advocates in a Coal-focused Economy? NGO Influence on Australian Climate Policy' (2008) 43(3) *Australian Journal of Social Issues* 359; M. Guigni, D. McAdam and C. Tilly (eds), *How Social Movements Matter* (Minneapolis, MN; London: University of Minnesota Press, 1999).

first treaty to formally provide for NGO consultation.[105] As early as 1910, the Institut de Droit International and the International Law Association, pre-eminent NGOs dedicated to the development of international law, suggested that states should conclude a convention to grant legal personality to NGOs.[106] The modern foundations for the institutionalized participation of NGOs were laid when Article 71 was included in the UN Charter:

> The Economic and Social Council may make suitable arrangements for consultation with nongovernmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

There are currently over 3000 NGOs in consultative status with ECOSOC that regularly advocate for particular causes by bringing a diverse and progressive voice to debates.[107] NGOs also possess consultative status in other international organizations, such as the International Labour Organization, in which governments and representatives of employers and workers are equal participants.[108] They are also permitted to make submissions on an ad hoc basis at international conferences. Certain controls are in place to ensure that NGOs meet minimum standards: for instance, ECOSOC requires that, for an NGO to be granted consultative status, it must 'be of recognized standing within the particular field of its competence or of a representative character'.[109] From 1997, NGOs have also briefed representatives to the UN Security Council and, from 2004, have made direct submissions.[110]

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[105] Article 9(f) of the Convention on the International Institute of Agriculture 1905 compels the Institute to 'submit to the approval of the governments . . . measures for the protection of the common interests of farmers and for the improvement of their condition, after having utilized all the necessary sources of information, such as the wishes expressed by *international or other agricultural congresses or congresses of sciences applied to agriculture, agricultural societies*, [etc]' (emphasis added).

[106] Charnovitz, above note 97, 356.

[107] United Nations, 'NGO-related Frequently Asked Questions', available at http://www.un.org/esa/coordination/ngo/faq.htm (accessed 5 December 2010).

[108] Constitution of the International Labour Organisation, Art. 3(1).

[109] 'Consultative Relationship between the United Nations and Non-governmental Organizations', ESC Res. 1996/31 (1996), available at http://www.un.org/esa/coordination/ngo/Resolution_1996_31/index.htm (accessed 5 December 2010).

[110] Charnovitz, above note 97, 368.

Another function of NGOs on the international plane is their delivery of submissions to international courts and tribunals as *amici curiae*, or 'friends of the court'. Tribunals such as the ICTY and ICTR, and the ICC, have occasionally asked NGOs to make submissions,[111] but the World Court has been less open to their participation.[112] In 2004, the ICJ promulgated Practice Direction XII, permitting NGOs in advisory proceedings to make submissions on their own initiative.[113] Such submissions would not be part of the case file, but would be kept available for use by the parties in the same manner as publications in the public domain. Although this allows for greater NGO participation at the ICJ, it is not an ideal procedure. During the *Israeli Wall* case,[114] an NGO invoked Practice Direction XII of the Court to place a submission in the case file. However, as it was not part of the case file and no record of it was kept at the Registry of the Court, neither the contents of the document nor whether it was used by the parties will ever be known.[115] The WTO dispute settlement panels employ a more open process. In the *US – Shrimp* case,[116] the Appellate Body of the WTO allowed three groups of NGOs to submit *amicus curiae* briefs without a prior request by the panel.[117] However, under pressure from several Member States who considered that giving NGOs the right to make submissions was inconsistent with the nature of the WTO Agreement as a multilateral treaty, the Appellate Body has imposed stringent requirements for NGO submissions in subsequent cases.[118]

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[111] For a detailed discussion of this, see Gideon Boas, James L. Bischoff, Natalie L. Reid and B. Don Taylor III, *International Criminal Procedure* (Cambridge: Cambridge University Press, 2011), Chapter 5, section 5.6.

[112] Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611.

[113] The ICJ has the power to invite NGOs to make submissions under Article 96 of the ICJ Statute, but invitations have been only infrequently extended.

[114] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[115] Shelton, above note 112, 152.

[116] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* 1998, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, adopted November 1998, [186].

[117] Ibid., Part IIIA. Note that under Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO Agreement), the dispute resolution panels have the right to request information from 'any individual or body which it deems appropriate'.

[118] *EC – Asbestos*, Report of the Appellate Body, WTO Doc. WT/DS135/AB/R, adopted 5 April 2001, [51]–[57]; Gillian Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn) 758.

Given their transnational mobility and access to the most recent information, NGOs such as Human Rights Watch perform an important monitoring role to help compel state compliance with international law.[119] In very exceptional cases, NGOs have even been able to initiate claims in international fora, such as via Article 44 of the American Convention on Human Rights 1978, which provides:

> Any person or group of persons, or any nongovernmental entity legally recognized in one or more Member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Although NGOs have participated in the international system since the mid-nineteenth century, their influence and status is accelerating. The trend is very much for greater NGO participation and a growing acknowledgement of their importance in promoting the development and enforcement of international law. Zoe Pearson has suggested that the existing state-centric structures and processes of international law are inadequate to accommodate the 'diversity and fluidity' of emerging global civil society actors.[120] Currently, the very limited ability of NGOs to participate in international law depends on the willingness of states – mainly through international organizations – to allow such participation. If Pearson's suggestion for formal integration of NGOs into the fabric of international law eventually becomes reality, processes should be introduced (preferably by multilateral treaty) to further regulate what could become a potentially chaotic and congested international scene.[121]

5.3 INDIVIDUALS: THE RUPTURE OF STATE-CENTRIC INTERNATIONAL LAW?

It has been said that the debate over the position of the individual in international law goes to the heart of legal philosophy.[122] If law is ultimately for the benefit of human beings, it would seem a strange way to attain that end by conferring rights and duties solely on states, relegating the place of the individual to near invisibility. Yet this is precisely how the Westphalian system of international law, which continues to constitute

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119 Charnovitz, above note 97, 362.
120 Pearson, above note 2.
121 Ibid., 99–103; Charnovitz, above note 97, 364, 372.
122 D.P. O'Connell, *International Law* (London: Stevens, 1965), 116.

the basic foundation of modern international law, developed.[123] It is often overlooked that, prior to the emergence of the state-centric approach with its nineteenth-century positivist overlay, scholars such as Plutarch, Vitoria and Grotius considered international law to be grounded in natural law concepts of the common good, which included the recognition of individual rights.[124]

There is nothing inherent in international law that denies legal personality to individuals. The fact that states are empowered to develop international law as its primary participants, does not exclude the presence of other powerful forces on the international playing field. Indeed, if international organizations and other collectivities can develop a significant presence, then why not also those stakeholders for whom all laws are created and enforced – individuals? Indeed, such a consciousness has grown out of the post-Second World War United Nations model. The increased international personality of individuals in the second half of the twentieth century has seen something of a rupturing of the state-centric conception that has endured since the Peace of Westphalia. Even so, despite very significant developments in the rights (and obligations) of individuals as subjects and subject to international law, their participation remains very much dependent on the will of states. International law remains state-created law and what has been created can also be taken away. This section will explore just how significant the individual in international law has become and in what ways these developments reflect the future of the international legal system.

5.3.1 International Duties of Individuals

It has long been recognized that an individual caught engaging in piracy is punishable in the national courts of any state. This was the first international crime, in the sense that states had recognized extraterritorial jurisdiction under international law to try private individuals for committing robbery on the high seas. By definition, piracy could only be committed by private individuals and their capture and trial was an established exception to the freedom of the high seas, where no state could perform acts of

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[123] For a discussion of the historical development of international law, see Chapter 1, section 1.2.

[124] Hugo Grotius, *De Jure Praedae Commentarius* (1604), cited in Erica-Irene Daes, *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights: A Contribution to the Freedom of the Individual under International Law: A Study* (New York, NY: United Nations, 1983), 44.

sovereignty over foreign ships.[125] Slavery and violations of the laws and customs of war also entailed the extraterritorial application of national law, although today punishment is based on what has sometimes been referred to as 'universal jurisdiction' – that is, a state is under an obligation to prosecute or extradite an individual who has committed these most heinous of international crimes.[126] Hans Kelsen points out that, although it is an organ of the state that is bringing the pirate, the slave trafficker or war criminal to justice, the sanction is also being applied in the execution of a norm of international law.[127] In this way, individuals possess international duties and are thus cognizable under international law, even as long ago as the eighteenth and nineteenth centuries.

5.3.1.1 Individual criminal responsibility

The purpose of individual responsibility in international criminal law is to capture all of the methods and means by which an individual may contribute to the commission of a crime, or be held responsible for a crime under international law.[128] It is interesting that the idea of the individual's *responsibility* (duty) developed within the international law system before any structured protection of his or her human rights was to appear after the Second World War. One of the earlier and normatively important examples of the international community's consciousness of the responsibility of individuals for atrocity came in 1915, in the form of a joint declaration issued by the French, British and Russian governments, condemning the massive and widespread deportation and extermination of over one million Christian Armenians by the Ottoman government:

> In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the *Sublime Porte* that they will hold personally responsible [for] these crimes all members of the

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[125] *In re Piracy Jure Gentium* [1933–34] Ann Dig 7 (No. 89).

[126] *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) [2002] ICJ Rep 3 (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 75. For a discussion of jurisdiction, including universal jurisdiction, see Chapter 6.

[127] See Antonio Cassese, *International Criminal Law* (Oxford; New York: Oxford University Press, 2003), 12.

[128] See Gideon Boas, James L. Bischoff and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2007), Chapter 1. See examples of this expressed in case law: *Prosecutor v Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 11 September 2006, [459]–[460]; *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, 14 June 2004, [267]; *Prosecutor v Delalić, Mucić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998), [321], [331].

> Ottoman Government and those of their agents who are implicated in such massacres.[129]

Largely failed attempts at holding individuals criminally responsible after the First World War[130] were followed by the Nuremberg, Tokyo and other post-Second World War tribunals that, along with national trials held by Allied countries, tried many thousands of war criminals stretching over decades.[131]

Developments in international criminal law slowed during the Cold War and early plans for a code of crimes against the peace and security of mankind and an international criminal court were, for a long time, unattainable.[132] In 1993 the ICTY was established, under the Security Council's Chapter VII powers to maintain international peace and security, to try persons who had committed serious violations of international humanitarian law in the territory of the former Yugoslavia.[133] Similarly, the Security Council established the ICTR in 1994 to try perpetrators of the Rwandan genocide.[134] These ad hoc Tribunals have tried a number of war criminals,

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[129] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Developments of the Laws of War* (London: HMSO, 1948), 35. See also Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 187–8; Cassese, above note 127, 67; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp; New York: Intersentia, 2002), 458; Roger S. Clark, 'Crimes against Humanity at Nuremberg', in George Ginsburgs and V.N. Kudriavtzev (eds), *The Nuremberg Trials and International Law* (Dordrecht; Boston: M. Nijhoff, 1990); Egon Schwelb, 'Crimes Against Humanity' (1946) 23 *British Yearbook of International Law* 181.

[130] See Treaty of Versailles, Art. 228; C. Mullins, *The Leipzig Trials* (London: H.F. & G. Witherby, 1921). For a discussion of the abortive war crimes trials following the First World War, see Gideon Boas, James L. Bischoff and Natalie L. Reid, *Elements of Crimes in International Law* (Cambridge: Cambridge University Press, 2008), Chapter 2, section 2.1.1; Timothy L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague; London: Kluwer Law International, 1997).

[131] Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked', in McCormack and Simpson, ibid., 123.

[132] See William Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2007, 3rd edn), 8–11.

[133] SC Resolution 827 (1993).

[134] SC Resolution 955 (1994).

including the former President of Serbia, Slobodan Milošević, and the former Prime Minister of Rwanda, Jean Kambanda, and have laid down volumes of jurisprudence developing international criminal justice.[135] In 1998, the international community (but with the notable absence of Security Council members, the USA, China and Russia) finally concluded the Rome Statute of the International Criminal Court (ICC), establishing the world's first permanent international criminal tribunal. Sitting in The Hague, the ICC is tasked with delivering international justice in respect of the 'most serious crimes of concern to the international community as a whole': genocide, crimes against humanity, war crimes and (possibly) aggression.[136]

Finally, a number of 'hybrid' or 'internationalized' criminal tribunals have been established to apply a mixture of international and domestic law, the benches of which reflect this hybridity:

- the Special Court for Sierra Leone – to try war crimes and crimes against humanity committed since 1996;
- the Extraordinary Chambers in the Courts of Cambodia – to try senior leaders of the Khmer Rouge for genocide, war crimes and crimes against humanity and Cambodian criminal law, committed during 1975–79;
- the Special Tribunal for Lebanon – to prosecute those responsible for the assassination in 2005 of Rafik Hariri, President of Lebanon; and
- the Special Panels of the Dili District Court – created by the UN Transitional Administration in East Timor (UNTAET) to try crimes such as murder, rape and torture perpetrated during 1999.

The idea of individual criminal responsibility for the core international crimes (war crimes, crimes against humanity and genocide) is now indisputably accepted in international law.

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[135] Gideon Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (Cambridge: Cambridge University Press, 2007).

[136] Rome Statute of the International Criminal Court, Art. 5. See further Antonio Cassese, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford; New York: Oxford University Press, 2002).

5.3.2 International Rights of Individuals

While the duties of individuals under international law have developed considerably in some areas in recent years, so too have certain rights. However, despite the extraordinary growth of instruments and customary law, particularly in the area of international human rights, the character of such rights and the capacity of individuals to exercise them vis-à-vis states remains attenuated.

The traditional reticence to acknowledge that international law can bestow rights on individuals was expressed in the 1928 PCIJ decision in the *Danzig Railway Officials* case.[137] This early case involved consideration of the terms of a treaty between Germany and Poland providing for pecuniary claims to be made against the Polish Railways Administration by railway officials who had passed from German to Polish service. Although the Court confirmed that a treaty could provide for claims under the domestic law of the parties, a treaty, 'being an international agreement, cannot as such create direct rights and obligations for private individuals'.[138]

International law has since moved beyond this extreme state-centric interpretation of treaties that on their face confer individual rights. The *LaGrand* case[139] involved Germany's claim before the ICJ against the United States for an alleged breach of Article 36(1) of the Vienna Convention on Consular Relations. Germany claimed that the United States had denied a German national his rights under this sub-paragraph and had executed him despite provisional measures of protection ordered by the ICJ. In finding the United States in breach, the Court observed that Article 36, paragraph 1, *creates individual rights*, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national state of the detained person. These rights were violated in the present case.[140]

According to the Court, the debate is no longer about whether a norm of international law can confer individual rights, but whether the correct interpretation of a particular norm compels this conclusion.[141] As the *LaGrand* case implies, however, the fact that an individual has rights under international law does not necessarily mean that he or she has the capacity to enforce those rights.[142] Indeed, under the ICJ Statute, only states may

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137 *Danzig Railway Officials* (Advisory Opinion) [1928] PCIJ (Ser. B) No. 15).
138 Ibid., 17, 287.
139 *LaGrand* (*Germany v United States*) [2001] ICJ Rep 466.
140 Ibid., 494 (emphasis added).
141 Walter, above note 89, 5.
142 See also *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*The Peter Pázmány University v The State of Czechoslovakia*)

bring claims before the ICJ.[143] Some hold the view that a right without a remedy is no right at all.[144] However, besides being contrary to modern jurisprudence, this view would be destabilizing in a decentralized system like international law, where enforcement normally occurs through voluntary compliance rather than through what nineteenth-century positivists called an 'effective sanction'.[145]

To deny recognition of the individual's substantive right would hamstring the later development of an individual enforcement mechanism. Historically, the fear of a slippery slope leading to the enforcement of human rights is what caused oppressive regimes, such as the former Soviet Union, to oppose the development of human rights jurisprudence, especially in its early years.[146] As a prominent Soviet jurist explained in 1990:

> [T]he reserved attitude of the Soviet Union in the past towards control mechanisms in the area of human rights protection, the neurotic reaction to the slightest criticism . . . was not only the result of ideological dogmatism but also testified to the fact that in the area of human rights there are things to hide in our country.[147]

5.3.2.1 Human rights

Although individual rights have developed in other areas, such as consular relations and diplomatic protection, it is in the field of human rights that the most far-reaching development of individual rights in international law has taken place. The UN Charter calls upon states to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, equal rights for men and women . . . and to promote social progress and better standards of life in larger freedom'.[148] The broad statements in the Charter were not intended to be a source of rights

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(1933) PCIJ (Ser. A/B) No. 61, 231, in which the PCIJ stated: 'It is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.'

[143] Statute of the International Court of Justice, Art. 34(1).

[144] See, e.g., Kelsen, above note 42, 234.

[145] Higgins, above note 7, 53.

[146] Cassese, above note 11, 75.

[147] Rein Mullerson, 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) 1 *European Journal of International Law* 33, 43.

[148] Preamble, Charter of the United Nations. Note that the guarantee of human rights became a major war aim of the Allies: see the *Atlantic Charter* (21 August 1941) as adopted by most of the Allies by 1 January 1942 (1942) 36 *American Journal of International Law*, Supp. 191.

and obligations,[149] but they changed the spirit of international discourse. The Universal Declaration of Human Rights 1948 – the touchstone for later developments – was similarly non-binding, being in the nature of a General Assembly recommendation. It was with the numerous subsequently concluded human rights treaties that states undertook direct obligations to guarantee fundamental rights. The major treaties include the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD), the Convention on the Elimination of Discrimination against Women 1979 (CEDAW) and the Convention on the Rights of the Child 1989 (CRC). It has been subsequently recognized that if a state engages in a consistent pattern of gross violations of human rights, or if a violation amounts to one of the core crimes under international law (such as crimes against humanity or genocide), the state will have breached customary international law independent of these treaties.[150]

Usually, an individual does not have procedural capacity to initiate a claim to vindicate his or her human rights. The protection afforded by human rights law is therefore quite narrow, given that it is often the individual's own state that is violating his or her rights and that governments on good terms with the state concerned are unlikely to bring such an international claim against it. It is also unlikely that the domestic law of the state directly incorporates the international law of human rights – even in monist countries human rights law may be declared by the courts to be non-self-executing.[151] In practice, a right of individual petition to an international body is the best way of maximizing vigilance over state action.[152] Thus, under Optional Protocol 1 to the ICCPR:

> a State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.[153]

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[149] Kelsen, above note 42, 226.

[150] *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Institute, 1987) Vol. 2, 165. Note that serious violations of such human rights give rise to obligations *erga omnes* – i.e. any state may sue: ibid.; see Chapter 2.

[151] Mullerson, above note 147, 37. See Chapter 3.

[152] Lowe, above note 5, 16.

[153] Optional Protocol to the International Covenant on Civil and Political Rights, Art. 1.

However, before this provision becomes operational in respect of a particular state, that state must have ratified Optional Protocol 1 and the individual must have first exhausted all available domestic remedies.[154] Furthermore, decisions of the Human Rights Committee are in the nature of non-binding 'views' rather than judgments proper. An example of such a communication was *A v Australia*,[155] a case in which a Cambodian refugee claimed that his continuing four-year immigration detention amounted to arbitrary detention under Article 9(1) of the ICCPR and that his right to judicial review was denied by a clause in the Migration Act 1958 (Cth), contrary to Article 9(4) of the ICCPR. Australia, having ratified Optional Protocol 1, enabled the complaint to be brought directly to the HRC. Although the Human Rights Committee found for the author, its view was not implemented by Australia (in contrast to a previous communication in *Toonen v Australia*[156]).

The individual complaints processes in other human rights treaties follow a similar pattern. A notable exception is the European Convention on Human Rights (1950), where the obligation to allow individual petition is not dependent on the state accepting a further optional protocol, and decisions of the European Court of Human Rights are legally binding at international law.[157] Although human rights law offers only limited practical protection to individuals and its enforcement relies on the goodwill and political interests of states, it is not necessarily less effective than many other modes of compliance with international law.[158]

5.4 CORPORATIONS

Although transnational or multinational corporations (those operating across state boundaries) have had precursors dating back at least to the Hanseatic League of trading cities in the late Middle Ages, it is in the past half century that private corporations have started to play an enormously influential role in world affairs. They were the major drivers of the

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[154] International Covenant on Civil and Political Rights, Art. 41(1).

[155] *A v Australia*, UN Human Rights Committee, Communication No. 560/1993 (adopted 3 April 1997).

[156] *Toonen v Australia*, UN Human Rights Committee, Communication No. 488/1992 (adopted 4 April 1994). See also Chapter 3, section 3.3.

[157] European Convention on Human Rights, Arts 34 and 46; Lowe, above note 5, 17; Cassese, above note 11, 101–2. The African Court on Human and Peoples' Rights now has similar powers.

[158] Cassese, ibid., 103.

phenomenon of 'globalization', whereby the planet is becoming increasingly interconnected economically and socially. The economic power of many multinational corporations has come to eclipse that of some smaller states.[159] This ability to make a significant difference to the economies of developing states means that economic power often entails political power – that is, sufficient leverage to effect political change. However, the practical importance of corporations in world affairs has not been matched by a commensurate articulation of international rights and duties. Although there is much scholarly debate around the desirability of enlisting corporations in the service of international law to promote and protect global public goods, such as human rights and the environment,[160] corporations remain mostly unregulated on the international scene. Furthermore, they are, by definition, primarily self-interested – with any apparent altruism reflecting more a marketing objective than anything like a *raison d'être*. In this important way, corporations are quite different from international organizations and other non-state actors.

The international personality of corporations derives from two sources. First, states have concluded treaties among themselves, such as the ICSID Convention, which gives corporations the ability to bring claims in international fora, in this case the International Centre for Settlement of Investment Disputes. Secondly, corporations have been ever active in protecting their overseas interests by concluding long-term concession contracts with foreign governments for the construction and exploitation of mines, oil wells and other resources. These are a fusion of treaty and domestic commercial contracts, in that they may be subject to international law.[161] Whether international law is applicable depends on the intention of the parties to the international commercial contract – that is whether, 'for the purposes of interpretation and performance of the con-

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[159] Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations towards a Rebuttable Presumption of Normative Responsibilities', Paper presented to the ESIL Research Forum on International Law: Contemporary Issues Graduate Institute of International Studies, May 2005; 1–3; available at http://www.esil-sedi.eu/fichiers/en/Nowrot_513.pdf (accessed 9 December 2010).

[160] David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931; Rebecca Wallace and Olga Martin-Ortega, *International Law* (London: Sweet & Maxwell, 2009, 6th edn) 98; Nowrot, ibid.

[161] Lowe, above note 5, 16; *Amoco International Finance Corp v Iran* (1987) 15 Iran-US CTR 189. See also George Aldrich, *The Jurisprudence of the Iran-US Claims Tribunal* (Oxford: Clarendon Press, 1996), 188ff.

tract, it should be recognized that a private contracting party has specific international capacities'.[162] Multinational corporations have promised to adhere to certain codes of conduct, such as the UN Global Compact of 26 July 2000, through which corporations undertake, among other things, to support and respect human rights and take a precautionary approach to environmental challenges. These codes are not binding and may be freely revoked by the corporations that have accepted them. They are more in the nature of 'soft law'.[163]

There have been some suggestions that corporations may be accountable under international criminal law for complicity in international crimes.[164] The recent controversial United States Court of Appeals for the Second Circuit judgment in *Khulumani v Barclay National Bank*[165] found that the dozens of defendant corporations were complicit in aiding and abetting the apartheid regime in South Africa.[166] Only Judge Katzmann decided so on the basis of customary international law, via the gateway of the US Alien Tort Claims Act.[167] Judge Korman dissented, stating the orthodox view that an 'artificial entity' cannot be vicariously liable for international crimes, 'because the relevant norms of international law at issue plainly do not recognize such liability'.[168] He also raised the issue of non-retrospectivity, finding that '[t]he only sources of customary law that suggest some movement toward the recognition of corporate liability post-date the collapse of the apartheid regime'.[169] Judge Korman's dissent is strong, given that Judge Katzmann based his conclusion on the customary law basis of corporate criminal liability in international criminal tribunal statutes (the ICC Statute, for example), which contemplate only individual

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[162] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (1977) 53 ILR 389, 457.

[163] Triggs, above note 118, 244.

[164] Andrew Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6(5) *Journal of International Criminal Justice* 899.

[165] *Khulumani v Barclay National Bank Ltd; Ntsebeza v Daimler Chrysler Corp*, 504 F.3d 254 (2d Cir 2007).

[166] See Chapter 2 for discussion on the *jus cogens* nature of the international crime of apartheid. See also Kristen Hutchens, 'International Law in American Courts – Khulumani v Barclay National Bank Ltd: The Decision Heard "Round the Corporate World"' (2008) 9(5) *German Law Journal* 639.

[167] The other majority judge, Judge Hall, thought that domestic law was applicable under the Alien Tort Claims Act in that case.

[168] *Khulumani v Barclay National Bank Ltd; Ntsebeza v Daimler Chrysler Corp*, above note 165, Dissenting Opinion of Korman J.

[169] *Khulumani v Barclay National Bank Ltd; Ntsebeza v Daimler Chrysler Corp*, ibid., Dissenting Opinion of Korman J.

complicity in international crimes. The issue appears unsettled at present, although the advantages to holding companies liable for facilitating the most heinous of crimes would seem to be appropriate.

Although corporations do not as yet possess significant international duties, the devastating Deepwater Horizon oil spill of 2010, which flowed for three months and caused untold damage to the Gulf of Mexico and the human economy dependent on it, is likely to strengthen the argument that corporations should be made more internationally accountable. Similarly, recent years have seen the rise of the privatized military industry, where states increasingly turn to a market of mercenaries supplied by private military companies.[170] Although little used since the Napoleonic Wars,[171] mercenaries are making a comeback, with potentially destabilizing consequences to regional and international public order.[172] The few, and often poorly ratified, international conventions prohibiting mercenary use define 'mercenaries' too narrowly to be of much practical use against modern private military firms.[173] Not being accountable under international law as legal persons means private military companies can potentially commit abuses without fear of being hurt other than via their hip pockets. A recent example is the fatal shooting of seventeen Iraqis by Blackwater (now Xe Services) operatives in 2007.[174] There is also a need to regulate the flipside to mercenary use: the protection of the interests of mercenaries themselves, as indicated by the beating, killing and subsequent public burning of four Blackwater employees in March 2004 by Fallujah insurgents.

Of course, if corporations undertake international law obligations, this may signal another shift in the state-centric conception of international law, in the sense that other subjects within the milieu of international law will play a role in the application and possibly the development of international human rights in practical and important global contexts.

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[170] Peter Singer, 'Corporate Warriors: The Rise of the Private Military Industry and its Ramifications for International Security' (2001) 26(3) *International Security* 186; Deborah Avant, 'Mercenaries' (Jul/Aug 2004) Issue 143 *Foreign Policy*.

[171] Deborah Avant, 'From Mercenary to Citizen Armies: Explaining Change in the Practice of War' (2000) 54(1) *International Organization* 41.

[172] Anna Leander, 'The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies' (2005) 42(5) *Journal of Peace Research* 605.

[173] See Additional Protocol I; International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), Art. 47; Sabelo Gumedze, 'Towards the Revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa' (2007) 16(4) *African Security Review* 22.

[174] See, e.g., 'Testimony of Jeremy Scahill before the Senate Democratic Policy Committee' *The Nation*, 21 September 2007.

5.5 SOME OTHER NON-STATE ACTORS

Some significant 'others' in international law include insurgents, terrorists and national liberation movements.[175] These groups have challenged and continue to challenge the statist legal order of international law. Since liberation movements like the Palestinian Liberation Organization have gained prominence in the international community, participating in the United Nations and other international fora, complexities as to their ultimate status and effect on the international legal order have arisen, and persist. Terrorism after 11 September 2001 has changed the international political and legal landscape, spawning Security Council Resolutions, radical national legislative activity and war.[176] Even so, the international community has been unable to agree on a definition of what terrorism in international law might be.

There are also some atypical subjects of international law.[177] The Sovereign Order of Malta[178] is an entity that has controlled no territory since the British occupation of Malta, yet maintains diplomatic relations with over 93 states.[179] In confirming the continuing international personality of this mainly humanitarian entity, the Italian Court of Cassation stated: 'The modern theory of the subjects of international law recognizes a number of collective units whose composition is independent of the nationality of their constituent members and whose scope transcends by virtue of their universal character the territorial confines of any single State.'[180]

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[175] See Cassese, above note 11, 94–5; Robert Fisher, 'Following in Another's Footsteps: The Acquisition of International Legal Standing by the Palestine Liberation Organization' (1975) 3 *Syracuse Journal of International Law & Commerce* 221, 228–32, 251–2; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12; W. Michael Reisman, 'An International Farce: The Sad Case of the PLO Mission' (1989) 14 *Yale Journal of International Law* 412.

[176] See, e.g., Michael Bothe, 'Terrorism and the Legality of Pre-emptive Force' (2003) 14(2) *European Journal of International Law* 227; Miriam Sapiro, 'Iraq: The Shifting Sands of Pre-emptive Self-Defense' (2003) 97 *American Journal of International Law* 599.

[177] Walter, above note 89, 3.

[178] The Order's official title is the Sovereign Military Order of St John of Jerusalem, of Rhodes and of Malta.

[179] Harris, above note 57, 143.

[180] *Nanni v Pace and the Sovereign Order of Malta* (1935–37) 8 AD 2 (Italian Court of Cassation); see also Brownlie, above note 12, 64.

5.6 CONCLUSIONS

The explosion of non-state actors in international law has brought its own challenges to the international order. With the growth in influence of international organizations, corporations and non-governmental organizations, the international stage is becoming increasingly cluttered with voices seeking to make claims across state boundaries. These voices also have a tendency to rise in volume independently of any specific legitimation, as the 'mission creep' of many international organizations has indicated.[181] International courts and tribunals have often pronounced on the extremely broad potential for non-state actors to have a say on the international stage. There is even a sense that individual states are losing control of the momentum of change, given the expectations created by an increasingly pluralistic and connected world order. The recent Wikileaks scandal, where thousands of US diplomatic cables were leaked and posted on the internet without states having the capability to stem the tide, is a graphic illustration of the modern clash between the traditional state-centric system and the rise in importance of global civil society. The scandal is a sharp reminder that, while states still ultimately hold the keys to international law-making, they themselves need to evolve and adapt towards sharing the international system with other actors with different interests.

The participation of NGOs at the Copenhagen Climate Conference – to the extent of drafting a proposed convention on this cutting-edge area of international law – further indicates the insistent way in which non-state actors have sought to influence international power relations. To the extent that these global changes have redirected the focus on what was, until the second half of the twentieth century, considered the 'internal affairs of states', it has given international law unprecedented reach. M.L. Schweitz has argued:

> We need to find some intelligent way to deal with these challenges, to discover principles upon which to found claims of legitimacy or illegitimacy. . . . This is the story of humanity assuming responsibility for its own future, through increasingly representative forms of political organisation and through a fully engaged civil society. From the perspective of world order, it is about finding the proper level (local through supranational) at which to make different sorts of decisions, and who (among government, business and the so-called 'third

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[181] David Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Reinner Publishers, 2004), 1–115; Jessica Einhorn, 'The World Bank's Mission Creep' (Sept/Oct 2001) *Foreign Affairs*.

> sector') should make them. It is the story of promoting the unity of humankind while at the same time cherishing its diversity.[182]

The more non-state actors, and especially individuals, gain rights and obligations under international law, the more the system resembles a domestic legal system. Indeed, international law already has criminal courts for the punishment of individuals and civil courts where companies and individuals can bring international claims. In the context of human rights, Hans Kelsen has identified an inherent paradox that may produce a destabilizing effect on the international order. The international human rights of individuals in a particular state depend on that state for their implementation and observance, yet if the state refuses to do so, current international enforcement measures are of a collective character, which may result in severe economic sanctions and war – measures which are themselves immensely destructive of human rights.[183] If, however, the international order develops a centralized legal authority with comprehensive mechanisms for enforcement within a state, without ultimate recourse to war, we have not 'the transformation of international law but the disappearance of this law through the replacement of the present system of states by a world state' – it would be 'indistinguishable from the structure and technique of municipal law'.[184] Whether or not the international order is in the process of developing into an integrated supranational empire, presumably with a world government such as a significantly enhanced and democratized UN, the trend is certainly towards increasing participation of non-state actors in international affairs and the governance challenges that this new reality brings.

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[182] M.L. Schweitz, 'NGO Participation in International Governance: The Question of Legitimacy' (1995) *American Society of International Law Proceedings* 413, 417.

[183] Kelsen, above note 42, 241.

[184] Ibid., 242.

6. Jurisdiction privileges and immunities

State sovereignty and equality are the foundational principles of international law and protect each state's jurisdictional powers from interference by other states.[1] To what extent, however, does international law recognize and protect the exercise of jurisdiction by states, and to what extent are limitations imposed on the power of states by virtue of their interaction and participation in the international system? It is a logical corollary of the nature of a system of sovereign equals that the legally recognized jurisdiction of one state cannot be superior to that of another. Hence, only in very particular circumstances may states exercise power within the territory of another state.[2] Further, state agents and senior government officials are generally considered to be personally immune from the exercise of jurisdiction by foreign powers, at least while acting in an official capacity. Failure to accord such immunities may amount to an internationally wrongful act.[3] The breadth and nature of the exercise of power by states through their domestic law and the limits imposed upon them by international law form the subject of this chapter.

The International Court of Justice in the *Arrest Warrant* case considered the ability of a Belgian judge to exercise criminal jurisdiction by issuing an international arrest warrant against the then Minister for Foreign Affairs of the Democratic Republic of the Congo (DRC) for alleged war crimes and crimes against humanity.[4] The acts in question did not occur in Belgium, nor was any Belgian national a victim. The DRC argued that Belgium had no jurisdiction to issue the warrant, as there was no connection between the alleged acts and that state, and that even if

[1] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 289.

[2] Malcolm N. Shaw, *International Law* (Cambridge; New York: Cambridge University Press, 2008, 6th edn), 647.

[3] Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn), 469.

[4] *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 3.

there were jurisdiction Foreign Minister Yerodia was protected by diplomatic immunity. This case has become something of a modern symbol of the tension between the limits on jurisdiction designed to protect a sovereign state from external interference (what might be considered the 'old' international law) on the one hand, and the extent to which jurisdiction might extend across sovereign borders to punish heinous international crimes by state agents and officials (the 'new' international law) on the other.[5]

This chapter considers the traditionally accepted grounds for the exercise of jurisdiction by states, both internally and internationally. This requires consideration of the prescriptive and enforcement forms of jurisdiction asserted by states, and the grounds on which they are permitted in international law to exercise their authority. The territorial and nationality principles are undisputed as grounds for the exercise of power, while others are more contentious. Protective jurisdiction, relating to the state's right to impose jurisdiction where its security is threatened, is exercised particularly by Western countries, but is the subject of dispute. Passive personality, which purports to grant a state jurisdiction where its nationals are victims of acts outside of its territory, has been exercised (most notably by the US), but is also considered to be controversial. Universal jurisdiction especially has been challenged, partly owing to the authority it gives states to extend their jurisdiction far beyond control of their territory and nationals, and partly because there is much dispute and misunderstanding as to what falls within the meaning of this form of jurisdiction. The process usually associated with extradition and extraterritorial enforcement mechanisms are also addressed.

The classical exceptions to those rules in the form of immunities from jurisdiction will then be considered. While it may seem obvious that immunities can only be understood by reference to the jurisdictional power of states, because they are immune from the exercise of jurisdiction, this goes precisely to one of the criticisms of the International Court of Justice in the *Arrest Warrant* case. This area of law remains unsettled with regard to the acceptance of a test for determining the nature of acts as acts *jure imperii* (acts done in a public capacity) which attract immunity both for states and their officials, and acts *jure gestionis* (acts done in a private or commercial capacity) which do not attract immunity. These issues will be considered in light of contemporary practice and possible future development.

[5] Triggs, above note 3, 467.

6.1 TYPES OF JURISDICTION: PRESCRIPTION AND ENFORCEMENT

There are two key aspects of state jurisdiction: jurisdiction to prescribe and jurisdiction to enforce. It is also possible to talk of a subsidiary form of prescriptive jurisdiction, being the jurisdiction to adjudicate, although in truth adjudication does not form – and is not usefully spoken of – as a distinct head of jurisdiction. Prescriptive and enforcement jurisdiction reflect the legislative, judicial and executive branches of government.

6.1.1 Prescriptive Jurisdiction

Prescriptive, or legislative, jurisdiction describes the competence of states to create norms, recognized as valid by international law. This power is binding within a state's territory and, under certain circumstances, beyond. National law may cover any subject matter, but in certain areas a state has exclusive jurisdiction that may not be interfered with by other states. A state may not attempt to alter the legislative, judicial or administrative framework of a foreign state by so legislating.[6] While this would be ineffective, as the legislating state would have no way to enforce its 'reforms', the mere act of legislating would amount to an interference with the subject state's sovereignty.[7]

This principle extends to other sovereign prerogatives, being those rights available only to the state and not private individuals, such as the levying of taxes. These powers are validly recognized by international law when exercised in relation to local and foreign nationals, where there is a 'real link' to the territorial state. This link could be the nationality or state of domicile of the taxpayer, or the location or subject of the transaction. However, in other contexts, what suffices to establish this connection may differ.[8] For example, the mere presence of tourists within the state's territory for a few days might represent a sufficient connection to support a requirement to register with police, but not to allow them to be conscripted

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[6] *The Island of Palmas* case (*or Miangas*) (*United States of America v Netherlands*) (1928) 2 RIAA 829 (hereafter '*Island of Palmas* case'); *Imperial Tobacco Co. of India v Commissioner of Income Tax* (1958) 27 ILR 103 (hereafter '*Imperial Tobacco* case').

[7] Michael Akehurst, 'Jurisdiction in International Law' (1972–3) 46 *British Yearbook of International Law* 145, 179.

[8] F.A. Mann, 'Jurisdiction in International Law' (1964) 111 *Hague Recueil des Cours*, 109.

for military service.[9] Equally, an Indian company, domiciled in India may not be taxed by Pakistan for profits from transactions occurring in India, as there is no connection with the prescribing state.[10] Further, states may legislate to nationalize property within their territory or held by nationals abroad. In the latter case enforcement will depend on the willingness of the foreign court to enforce the prescribing state's law, but this does not alter that state's prescriptive jurisdictional competence.[11]

Legislation may provide for criminal sanctions to be imposed on people with a sufficient connection with the legislating state. This requires the exercise of the jurisdiction to adjudicate to determine guilt, and enforcement jurisdiction to impose the penalty. The prescriptive jurisdiction, in this case, is used to define the offence, penalty, procedure for trial, and so on. While exercised most frequently within the state's territory, it can also be used to bind a state with regard to acts committed abroad.[12] Foreign nationals, outside the jurisdiction, who commit acts damaging to the regulating state, may also be subjected to this jurisdiction under the protective principle.[13]

6.1.2 Enforcement Jurisdiction

Enforcement, or executive, jurisdiction describes a state's authority to act coercively to enforce its law.[14] This form of jurisdiction may be freely exercised only on the territory of the enforcing state because of its coercive nature. Employment of enforcement jurisdiction on the territory of another state without consent or under some other 'permissive rule' of international law is prohibited as interference in the sovereignty of another state.[15]

A classic example of this is the abduction by Israeli agents of Adolf Eichmann from Argentina in 1960. While this clearly overreached Israel's enforcement jurisdiction, being undertaken in secret and without Argentina's consent, the Supreme Court of Israel ruled that the invalidity

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[9] Ibid.; *Polites v Cth* [1945] 70 CLR 60, 208.
[10] *Imperial Tobacco* case, above note 6.
[11] Akehurst, above note 7, 251–2.
[12] See, e.g., the Australian Criminal Code (Cth), Division 272, Subdivision B, which prohibits certain sexual offences committed by Australian citizens or residents in other states.
[13] See below, section 6.3.3.
[14] Akehurst, above note 7, 147.
[15] *SS 'Lotus'* (*France v Turkey*) (1927) PCIJ (Ser. A) No.10, 18 (hereafter 'the *Lotus* case').

of the arrest under international law did not vitiate its jurisdiction to try him under Israeli law[16] (a position consistently maintained in contemporary national and international law).[17] However, the UN Security Council considered the interference with Argentinian sovereignty a danger to international peace and security, and ordered Israel to pay reparations.[18] The prohibition on such interference with the 'domestic jurisdiction by any state' is implicit in the principle of the sovereign equality of states and is reflected in Article 2(7) of the Charter of the United Nations.

6.2 CIVIL AND CRIMINAL JURISDICTION

The question of whether international law treats civil as opposed to criminal jurisdiction differently, in cases involving an international element, is a matter of dispute.[19] It is clear that diplomatic protest is more frequently raised with regard to the excessive exercise of criminal jurisdiction.[20] Civil jurisdiction, on the other hand, is frequently exercised in cases that have limited connection with the forum state, and only limited diplomatic objections are raised. Indeed, where objection is taken, it almost always relates not to the exercise of jurisdiction but to some ancillary issue. If the absence of protest is taken to reflect the permissive nature of international law in the area, then significant limitations on the exercise of civil jurisdiction are not apparent.[21] Yet state practice also discloses a number of limitations based on the practicalities of enforcing judgments against people and property outside the jurisdiction.

Common law courts premise civil jurisdiction on the proper service of legal process, which necessitates either the defendant's presence in the territory of the forum, or the defendant's voluntary submission to the court's jurisdiction.[22] The duration of stay in the territory is not relevant, so long as service is affected within that period.[23] While courts may stay proceedings where their continuation would be unjust, the fact that a defendant

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16 *A-G of the Govt. of Israel v Adolf Eichmann* (1961) 36 ILR 5 (hereafter 'the *Eichmann* case').

17 See discussion below in section 6.3.5.4.

18 SC Res. 138, UN SCOR, 15th sess., 868th mtg, UN Doc. S/4349.

19 Akehurst, above note 7, 170.

20 *LaGrand* (*Germany v United States of America*) [2001] ICJ 466.

21 But see Brownlie, above note 1, 300.

22 See, e.g., Rules of the High Court (Hong Kong), Cap 4A, s. 10; Supreme Court (General Civil Procedure) Rules 2005 (Vic), Orders 6 and 7; Federal Rules of Civil Procedure 2010 (USA) rl 4.

23 Akehurst, above note 7, 171.

is a foreign national only temporarily within the jurisdiction is not per se a source of injustice.[24] In the United States, this has been extended to include use of the notion of 'transaction of business' within the forum territory, such that a person sending a letter through the jurisdiction, flying over it, or having previously held a meeting in it, may be subject to a US court's jurisdiction.[25]

In contrast, courts in civil law systems often base their jurisdiction on the place of habitual domicile of the defendant. Other states base jurisdiction on the defendant's ownership of property located within the territory, with some (such as the Netherlands and South Africa) limiting jurisdiction to the value of those assets.[26] In spite of these differences, diplomatic protest is rarely raised at the exercise of civil jurisdiction against foreign nationals, even when the link to the forum jurisdiction is tenuous. This is in contrast to the strong reaction to the exercise of criminal jurisdiction in the same context, and the attendant infrequency and caution with which it is exercised.[27]

Criminal, like civil, jurisdiction is primarily based on territory. It may be exercised over foreign nationals who are within the forum territory with regard to acts committed there. Nationals of the forum state may be subject to adjudicatory jurisdiction while within the territory for acts done, both at home and abroad.[28] However, unilateral enforcement may only be conducted when the offender returns home. Any exercise of official jurisdiction on the territory of another sovereign state, without its consent, amounts to interference with that state's sovereignty and is prohibited by international law.[29] Exercising enforcement and adjudication jurisdiction over foreign nationals for acts committed abroad is permitted only

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[24] *Baroda* (*Maharaneee of*) *v Wildenstein* [1972] 2 QB 283.

[25] Foreign Sovereign Immunities Act, 28 USC §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611; *Louis Marx & Co Inc v Fuji Seiko Co. Ltd*, 453 F Supp 385 (SDNY 1978); *Unidex Systems Corp. v Butz Engineering Corp.*, 406 F Supp 899 (DDC 1976).

[26] Akehurst, above note 7, 171; David F. Cavers, 'Contemporary Conflicts Law in American Perspective' (1970) 131 *The Hague Recueil des Courses* 75, 295.

[27] Akehurst, above note 7, 170; Brownlie, above note 1, 300–301; But see *LaGrand*, above note 20.

[28] See, e.g., Commonwealth Criminal Code 1995 (Cth), ss 273.5 and 273.6 for child pornography offences committed outside Australia; Sexual Offences Act 2003 (UK), s. 72; *Strafgesetzbuch* ('*StGB*') [Penal Code] (Germany), § 5.

[29] Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, GA Res. 2625(XXV), UN GAOR, 25th sess., 1883rd plen. mtg, Agenda Item 85, UN Doc. A/RES/2625(XXV) (24 October 1970); *Lotus* case, above note 15.