# AN APPRAISAL OF THE LEGITIMACY OF EXTRATERRITORIAL JURISDICTION IN CRIMINAL LAW AND ECONOMIC SANCTIONS

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## ABSTRACT

This thesis is concerned with aspects of the problem of extraterritorial jurisdiction in international law. A claim of extraterritorial jurisdiction gives rise to problems both of sovereignty and the principle of non-interference. The argument is that the justification of such jurisdiction is often unclear and requires analysis. By focussing upon (and comparing and contrasting) the two examples of extraterritorial economic sanctions and extraterritorial criminal law the thesis proposes tests which may appropriately distinguish acceptable extraterritorial measures from those which arguably should have no place in international law.

Through a theoretical discussion of the concept of legitimacy a reasonably clear distinction is suggested in the overall appraisal of extraterritorial jurisdiction. This is concerned with the so-called "substantial connection" test, which provides a means of reconciling problems of sovereignty with claims of extraterritorial jurisdiction. The discussion leads to the conclusion that some assertions of extraterritorial jurisdiction, particularly some of those concerned with economic sanctions, cannot be justified in international law and should be abandoned. Other assertions adhere to the normative framework of international law and are thus legitimate. The purpose of this study is to promote the use of the substantial connection test to re-engage jurisdictional assertions with the legitimate norms presented by international law.

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UN SC Resolution 883 1993

UN SC Resolution 1192 1999

## TABLE OF ABREVIATIONS

| | |
|---|---|
| ATCSA | Anti-Terrorism Crime and Security Act (UK) |
| ICC | International Criminal Court |
| ITCR | International Tribunal for Rwanda |
| ITCY | International Tribunal for the former Yugoslavia |
| BC | Before Christ-timeline |
| BverfG | Bunderfassungsgericht |
| CACR | Cuban Asset Control Regulations (US) |
| CEO | Chief Executive Officer |
| EC | European Community |
| ECGD | Export Credit Guarantee Department (US) |
| EU | European Union |
| F. 2d | Federal Reporter Second Series (US) |
| F. 3d | Federal Reporter Third Series (US) |
| F. Supp. | Federal Supplement (US) |
| F. Supp. 2d | Federal Supplement Second Series (US) |
| FBI | Federal Bureau of Investigations in the US |
| FCPA | Foreign Corrupt Practices Act 1977 (US) |
| FCSC | Foreign Claims Settlement Commission (US) |
| FDR | Federal Republic of Germany |
| FEMA | Foreign Extra-Territorial Measures Act (Canadian) |
| GA | General Assembly of the United Nations |
| GATT | General Agreement on Trade and Tariffs |
| ICJ | International Court of Justice |

| | |
|---|---|
| ICC | International Criminal Court |
| ICL | International Law Commission |
| NAFTA | North American Free Trade Agreement |
| NATO | North Atlantic Treaty Organisation |
| NGOs | Non Governmental Organisations |
| OAS | Organisation of American States |
| OECD | Organisation for Economic Co-operation and Development |
| PCIJ | Permanent Court of International Justice |
| PITA | Protection of Trading Interests Act |
| SC | Security Council of the United Nations |
| SIAC | Special Immigration Appeals Commission |
| SFOR | NATO led Stabilisation Force in the former Yugoslavia |
| TWEA | Trading with the Enemy Act (US) |
| UN | United Nations |
| UK | United Kingdom |
| US | United States of America |
| U.S. | United States Supreme Court Reports |
| USSR | Former Union of Soviet Republics |
| WTO | World Trade Organisation |
| WWII | World War Two |

## DECLARATION

An earlier version of Chapter three, Extraterritorial Economic Sanctions has been published in the *Journal of the Royal United Services Institute for Defence Studies* (RUSI Journal) October 2001 Vol. 146 No.5 p17-23. Elements of this chapter formed the basis for my LLM dissertation, graduated in 1997.

# CHAPTER ONE

# INTRODUCTION

## General Introduction and Aims

The study of jurisdiction is the acknowledgement of legal rights, obligations and the power to translate will into action. The nature of extraterritorial applications of domestic law outside its internationally recognised territory is the expression of the power and the will of the state as a whole. Individual states have long been concerned with activities outside the realm. This can range from the more extreme example of the use of force to gain absolute power over a territory to a more mild form of influence such as peaceful ownership or control of businesses in other states. Nevertheless, in the past, technology, geography and culture limited interactions between states as well as individuals. Interstate relations were an exception compared to present everyday occurrence. Indeed, the concept of the international community and the relevance of international law mirrored the growth of interstate relations.

The growth of positivism and the codification of international law contributed to the massive expansion of trans-national commercial activity due to the reliance on the legal system that would support this activity. The same can be said for criminal law actions. Once mostly the domain of a specified territory, it is now necessary to form bilateral and multilateral agreements on evidence gathering, the enforcement of warrants and prosecution in order to curtail the amount of international or trans-

national criminal activity. The jurisdiction of the state as a sovereign entity has become part of the international community of nations. International law, especially the customary principles have always played a part in any jurisdictional assertion made by a state outside its territory. The principles of jurisdiction on which an extraterritorial assertion should be based are not only functional but also act to support the framework of the international community in order to maintain cooperative relations between states. Thus, the principles of jurisdiction that are meant to guide extraterritorial assertions reflect the basic doctrine of international law.

One of the main themes of this thesis is the international law perspective of two divergent public law categories of extraterritorial measures; extraterritorial economic sanctions and extraterritorial criminal law. These two categories are normally perceived as diametrically opposed legal subjects that foster extremely different responses from the legal theorists, practitioners, other states as well as the international community. Generally, extraterritorial economic sanctions elicit a negative response while extraterritorial assertions to punish criminal offences are generally seen in a much more positive light. The justification argument is a sound and important part of the preliminary comparison of extraterritorial measures. This preliminary comparison recognises a fundamental certainty, the need to punish and deter criminal activity outside the confines of a state's territory. However, the preliminary comparison ignores the broader critical evaluation of the underlying principles these two categories present and the possibility of finding commonality

within the doctrine of jurisdiction that can be extrapolated to all extraterritorial assertions.

The reason for the choice of these two categories of extraterritorial measures goes beyond the divergent nature of the subject matter or the exceptional growth of both categories of measures over the past twenty years. It is also related to their future impact on the international law concepts and their relevance to the operation of the state. The theory of the state supremacy stemming from the post-Westphalian[1] era collides with the contrasting theory promoting the supremacy of international customary principles in the examination of extraterritoriality. This collision allows for a re-examination of the determinate factors essential for the harmonious continuance of the sometimes tenuous relationship between the power of the state in international law's attempt to restrict or broaden that power.

Through the main theme of the international law perspective of extraterritorial jurisdiction, the aim of the thesis is to identify a common doctrinal basis for assessing extraterritorial jurisdiction as well as a functional tool that can incorporate important elements of the doctrine of jurisdiction. This must include an evaluation of the specific measures involved in the comparison and analysis of the broader aspects of

[1]The Treaty of Westphalia 1648, the peace treaty after the end of the Thirty Years' War between the Holy Roman Empire and the King of France. The treaty was symbolic of the beginning of equality between states in the international community. It is a term normally linked with the horizontal view of international law where the nation states were the supreme power. Simpson, G. '*Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*', (Cambridge University Press, 2004) p52.

extending jurisdiction beyond the state. Thus, the nature of the concepts of sovereignty, sovereign equalities and the duty of non-intervention rank very highly throughout the analysis.

The methodology consistent with this type of appraisal allows for analytical evaluation of not only the cases and statutes relevant to the discussion on extraterritoriality, but also includes a critical approach to the doctrinal foundations of the interaction between jurisdictional principles, and international customary norms. The overall argumentation does not include a detailed discussion of other types of extraterritorial measures even though they may form part of the analysis. Specifically, antitrust examples of extraterritorial measures do not occupy a primary role because it is an example of private law, focusing on the individual and not the state as an entity. The analysis is centred around domestic common law and international decisions relevant to the central aims of the thesis in an attempt to procure recommendations suited to common law states. This is why the thesis does not need to include all the extensive examples of criminal cases that possess an extraterritorial element.

Furthermore extraterritorial economic sanctions are limited to the two most prevalent and recent examples that have elicited intense debate, The Helms-Burton Act and The Iran and Libyan Sanctions Act.[2] Emphasis is given to the Helms-Burton Act for two reasons. The possibility of the long-term application of this Act is stronger due to the domestic politics of the US, whereas the Iran and Libyan Sanctions Act has seen a

[2] The Cuban Liberty and Democratic Solidarity (Libertad ) Act 1996, to be referred to as Helms-Burton and the Iran and Libyan Sanctions Act 1996.

recent reduction in its application with the presidential removal of the sanctions against Libya.[3] This is not to say that the Act's application against Iran will be removed in the near future, on the contrary recent statements from the US administration appear to be very concerned with Iran.[4] There is also a general concern that another derivative of either these two Acts may be levied against other US perceived non-cooperative states in the future. The Helms-Burton Act not only sanctions third-party states that invest in the target state but also involves the issue of expropriated property. This is normally dealt with on a state-to-state level, instead of making commercial entities or individuals investing in the target state concerned with the rather dated expropriated property claims of another state.

Overall, it is true that traditional notions and principles of jurisdiction are straining to keep pace with the modern world. Electronic transfers of money, information and increased international travel have affected both, the world of commerce and the world of crime and, on occasion, the relationship between the two. This thesis focuses on the extraterritorial application of laws in these two worlds, namely extraterritorial economic sanctions that inhibit free and fair trade among states and the fight against

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[3] Presidential Determination No. 2004-30. Determination and Certification under section 8(b) of ILSA. www.whitehouse.gov/releases/2004/04/print/20040423-10.html.

[4] Hersh, S. 'The Coming Years'. *The New Yorker*. 24 January, 2005. Hersh claims information from high level Pentagon sources that US Special forces and commando units are in Iran on secret missions scouting for targets of nuclear capability and other dangerous weapons as part of the larger policy of the administration's 'war on terror'. He has quoted these sources as advised that Iran will be the next military target. If a true reflection of the US Administration's position it is unlikely that the ILSA will be removed. The ILSA was renewed for another five years in 2001 by the US Congress and signed by President George W Bush.

trans-national and international crime. Some proponents may argue that the fundamental principles of jurisdiction require expansion in order to meet the needs of the state and the international community as a whole. Although laws need to adapt and change, the extension of jurisdictional principles without consistency to the restrictions of international customary law norms would be chaotic, reactionary, and without a theoretical basis for future development or application.

**Outline of Chapters**

The next chapter is a necessary requirement of the study of extraterritorial jurisdiction. It lays the foundation for the basic definition and understanding of extraterritorial measures and the doctrine of jurisdiction. It includes description and examples of the five bases[5] of prescriptive jurisdiction and in the case of the territorial principle, its subsequent derivatives. The effects doctrine is such a derivative, which will play a significant part in the discussion because it has been commonly used to justify extraterritorial extensions of domestic law in public law examples even though it originated with antitrust cases. The analysis tracks the movement and possible 'manipulation' of all the principles relevant to extraterritorial measures in order to determine inconsistency with international customary law norms. One of the key questions for this chapter is the potential restriction of extraterritorial assertions by states that international law can affect. The main element

[5] The five traditional bases of jurisdiction are, the territorial principle, nationality principle, passive personality principle, protective principle and the universality principle. Discussed more fully in chapter 2 p28-41.

of this phase of the discussion is the perception of international law's reality and status from the perspective of an individual state contrasted with the overall emphasis of the chapter as the international law view of extraterritorial jurisdiction. This is the first step in the determination of the legitimacy of extraterritorial measures.

The analysis of extraterritorial economic sanctions in chapter three originates with their political motivation for development. In order to identify these measures as essentially coercive the nature of their origin and application is crucial. The discussion not only outlines the two relevant examples of extraterritorial economic sanctions but also identifies their specific extraterritorial components and their lack of solid adherence to one of the foundational principles of jurisdiction. Overall, the potential breaches of international customary law and international trade agreements should show the significance of the inherent detriment these types of sanctions can cause to the international community. This is a considerable detriment, as unilateral extraterritorial economic sanctions act as an instrument of hegemonic power. This extension of power tends to elicit a reactionary measure in the development of blocking statutes by individual states. The purpose and function of these blocking statutes will be evaluated in this chapter. It also includes an analysis of the particular responses of international law, examining the effectiveness of regional and international organisations.

Chapter four contains the other category for the comparison, the examination of extraterritorial assertions in criminal law. This chapter will critique the tendency of

individual states to use statutory extensions of jurisdiction for particular criminal acts drawing on the principles of territoriality and nationality. The rationale for the reliance on statutory extensions is linked to the historical perspective of asserting jurisdiction from a common law tradition. This tradition of relying on the completion of the event taking place in the territory asserting jurisdiction is an aspect of the foundation of criminal law theory. A key question for the chapter is the possibility of using a common law test in order to establish jurisdiction that would move beyond the last constituent event formula and yet not be dependent on statutory extension of jurisdiction. Other questions for the analysis include the differentiation of jurisdictional basis depending on the level of the offence and the reasoning behind dramatic extensions of jurisdiction for particular offences such as terrorism. The structure of the argument highlights the anomalies of jurisdictional assertions for various criminal acts and proposes the use of the substantial connection test for common law jurisdictions as a way of establishing a jurisdictional assertion regardless of the offence within the constraints of international customary norms. Another of the anomalies of jurisdiction for extraterritorial acts is represented in *Pinochet*[6], where issues surrounding the UK's reliance on domestic statutes incorporating customary norms are evaluated.

The chapter is divided into two parts. The first part focuses on what is normally deemed to be trans-national criminal activities, while the second part is an analysis of the jurisdiction as it applies to international criminal conduct. The reason for this

[6] *R* v *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 3)* [1999] 2 WLR 827.

division is twofold. Common law states have normally drawn a distinction between these two levels of criminal conduct in their jurisdictional analysis. Thus the chapter reflects this distinction but at the same time the main argument for consistency in jurisdictional decisions flows throughout both parts of the chapter. The second reason for the division is to allow for discussion of criminal conduct that is potentially based on other jurisdictional principles such as the universal principle, but has normally remain localised or linked to the forum state. Part two will also identify and discuss the dependence on the territorial and nationality principles with the various international and regional court structures developed to prosecute offenders of international crimes, such as the *ad hoc* tribunals and the International Criminal Court. Through this appraisal of international crimes one of the main themes is revisited, namely the international movement toward the codification of particular international crimes to the development of treaties and conventions and the inherent limitations this can mean for commonality of jurisdictional assertions. Recognising the importance of recent events, the chapter ends with a critique of the extraterritorial actions of the US in Guantanamo Bay. This is a poignant example of a state ignoring any link to the territory in order to establish jurisdiction. The overall aim of this chapter is to identify the necessity of a real and substantial link to the forum state regardless of the criminal conduct involved in the jurisdictional assertion because it is coherent with the underlying doctrine of jurisdiction.

Chapter five marks a turning point for the theoretical construction of the thesis locating the comparison of these two categories of extraterritorial measures within the

construct of legitimacy. The definition of legitimacy as having a normative relationship between a law and international customary principles was promoted by Franck.[7] His model included indicators of legitimacy, which when applied to extraterritorial economic sanctions reinforce any lack of coherence between the sanctions and international customary law and the indeterminacy created when there are conflicting rules. Using legitimacy as a tool for evaluating specific extraterritorial measures goes beyond the natural law premise of a 'moral right' in a measure or any argument promoting in its democratic birth. Initially, a distinction is drawn between the legality of the measure and its apparent legitimacy. Specific issues of legality were identified in the preceding chapters relevant to both categories of extraterritorial measure. Legitimacy is more than what the law ought to be. It is a reinforcement of what the law already is or, to put it another way, what the law ought to take into account. Considering the international law perspective toward jurisdictional decisions, domestic courts need to take into account the normative bounds that surround any extraterritorial assertion. The bounds of *jus cogens* are crucial to the operation of not only international law but also interstate relations. These norms have been previously discussed as constraints on extraterritorial extensions of jurisdiction provided by international law. Specific norms include are sovereignty and the equality of states, but not necessarily in their more formalistic interpretation. Indeed

[7] Franck, T. *The Power of Legitimacy Among Nations.* (Oxford University Press, 1990); Franck, T. 'The Emerging Right to Democratic Governance.' (1992) 86 *American Journal of International Law.* p46-91.

to the construct of legitimacy they are an open[8] or functional view of sovereignty and the existential equality of states.[9]

The sequence of this section begins with a discussion of the Westphalian view of sovereignty and nation state supremacy. If this view were to continue the influence on constraints of international law principles would be diminished. Certain aspects of German state theory are utilised in order to examine the literature identifying changes in the doctrinal basis surrounding sovereignty to include accepted normative influences outside the state. Through this analysis one aspect of the main theme of the thesis is supported with the view of open sovereignty for example sovereignty influenced by international customary principles. The other part of the main theme of the thesis is the protection from extraterritorial influences from other states that are coercive. This is developed through the analysis of sovereign equality and unilateral actions. Again the discussion moves away from the formalistic approach of this important international law norm and takes a realist stance on the equality of states, noting the development of sovereign equalities as more than a defence of a territory but a construct of relationships.[10] The dichotomy of the argument is maintained, opposing external control of other states while recognising the supremacy of international law. This theme of the thesis also acts as an identification of the reality of pluralism in the international community. Coinciding with pluralism is the duty of

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[8] Hobe, S. 'Statehood at the End of the Twentieth Century – The Model of the Open State.' (1997) 2 *Austrian Review of International and European Law*. p127.

[9] supra note 1.

[10] supra note 1.

non-interference, or the right to remain different.[11] The argument for the existential analysis of the equality of states also supports international comity or respect between states. Thus the international law view of legitimising extraterritorial measures is dependent on its normative bounds. The theoretical analysis of this chapter recognises the power asymmetry between states and the potential to manipulate the doctrine of jurisdiction for domestic policy purposes, as is evident in the next chapter.

The final chapter illustrates how legitimacy has not yet been realised because of the manipulation of jurisdictional assertions in certain circumstances and the refusal to incorporate international law principles by some domestic courts. This chapter draws together the two categories of criminal law and extraterritorial measures. The comparison finds new ground by using the *Sabzali*[12] case as a lens through which to view the nature of extraterritorial economic sanctions, the refusal of the doctrine of comity by the US courts and the limitations of the effects doctrine. *Sabzali* is the first criminal prosecution of a foreign individual in the US for trading with Cuba, a target state. The case exemplifies the realities of the political influence in judicial decision making as presented through the discussion on the importance of blocking statutes and the reliance of domestic courts on the intention of their legislative organs. The key questions for this chapter are the relevance and value of international comity in extraterritorial jurisdictional decisions and the reliance of US domestic courts on the effects doctrine when another alternative incorporates the essential meaning of the doctrine of jurisdiction. Comity forms the second half of the substantial connection

[11] ibid

[12] *US* v *Brodie, Brodie and Sabzali* 174 F. Supp. 2d 294; 2001 US Dist

test and it is through comity that the test remains coherent with the principles of international customary law. Analysis of the meaning of comity is important to discern whether it should be interpreted in the narrow sense merely as courtesy between states or the broader notion of the definition as an international duty to support the sovereign equality of states.

A closing assessment of jurisdiction is required in the final chapter in order to evaluate the main theme of the thesis, the necessity of a link with the forum state in order to assert jurisdiction. This originates with an argument for the substantial connection test over the effects doctrine because of its adherence to the fundamental principles of jurisdiction. The US case law in this area is useful in highlighting whether courts actually adhere to the reasonableness requirement when using the effects doctrine as a method for jurisdictional claim. It will be proposed that the substantial connection test offers a closer relationship with the territorial principle than the effects doctrine as well as a reinforcement of the normative bounds of international customary principles. This discussion continues through a more general territorial analysis where the construct of legitimacy should have been considered part of the essential analysis. Finally, universal jurisdiction is discussed in relation to a requirement for a link with the territory. A theme of the thesis has been to require any jurisdictional assertion to be coherent with international customary law and to represent a real and substantial link to the territory claiming jurisdiction. This continues with the distinction between absolute universal jurisdiction and conditional

universal jurisdiction.[13] Although the purpose of universal jurisdiction is to allow any state to prosecute any offender for a crime that is deemed to be against the whole of humanity, the practiced hesitancy in applying universal jurisdiction should be maintained. This hesitancy requires the forum state to have possession of the individual and a link between the state itself and some significant element of the offence. Otherwise states could indict individuals and proceed with trials *'in absentia'*, raising various due process issues in international customary law. The evaluation of the US domestic jurisprudence highlights the lack of legitimate jurisdictional claims and avoidance of the substantive interpretation of the rule of law.

Legitimising jurisdiction, in accordance with international customary law norms requires several elements to be satisfied. First, an adoption of the substantial connection test for common law jurisdictions includes the broad definition of the doctrine of comity. Second, insuring that state sovereignty as an open concept, is only open to the influence of international law and not the coercion of other states, reinforcing the substantive equality of states. Finally, any principle of jurisdiction should be interpreted in accordance with their doctrinal roots in order to maintain a valued link with the territory. The comparison of extraterritorial economic sanctions and extraterritorial assertions in criminal law will serve to identify relevant and important areas of growth in interstate relations. It will also serve to outline the reasoning and theory behind the method that needs to be utilised in the future as interaction within the international community continues to develop.

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[13] Cassese, A. *International Criminal Law*, (Oxford University Press, 2003). p286.

# CHAPTER TWO

# THE INTERNATIONAL LAW VIEW OF EXTRATERRITORIAL JURISDICTION

## Introduction

This chapter seeks to explore the understanding of extraterritorial jurisdictional assertions by states from the international law perspective. International law can act in a restrictive capacity to illegitimate extraterritorial measures through its normative bounds.[1] Without this restrictive function extraterritorial measures can raise serious international and cross-jurisdictional conflicts. This restriction represents not only the function of international customary law principles, but also the conceptual nature of a state, statehood, sovereignty and sovereign equalities of states. It is essential in the analysis of extraterritorial jurisdiction to identify international law as more than the regulator or arbiter of interstate relations. Its distinctiveness lies in the supremacy of the peremptory norms of international law or *jus cogens*.[2] From this perspective the supremacy of the nation-state is limited by international law and, as a result, its extraterritorial jurisdictional assertions are constrained.

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[1] See chapter 5 for full a discussion on legitimacy.

[2] Norms originate from customary international law and are generally deemed be binding on all states. *Jus cogens* are determined by the combination of state practice and *opinio juris* (the belief that a norm is required for a legal obligation in international law). It is a norm if it has been accepted and recognized by the international community and can only be replaced by a norm of the same character. Brownlie, I. *Principles of Public International Law*. (Oxford University Press, 6th ed., 2003) p6.; Rasazzi, M. *The Concept of International Obligations Erga Omnes*. (Clarendon Press, 2000) p42.

Defining extraterritorial jurisdiction and outlining examples of the same is an important first step in the jurisdictional discussion. The historical reality of extraterritorial measures or actions can be an indication of the power and authority exerted by individual states throughout time, as an individual state's power fluctuates, attempts are often made to control situations outside their physical territory and these initiatives can be highly questionable from a legal perspective. Still certain categories of extraterritorial assertions evoke a more positive response based on international need and the general consensus of states. Understanding the globalised and interrelated modern world can lead to understandable support for extraterritorial assertions whether they are economic in nature or an attempt to fight criminal behaviour. However, general extensions of jurisdictional assertions must be based on one of the fundamental principles of jurisdiction. These principles need to be evaluated in order to conclude whether extraterritorial jurisdictional assertions are necessary and legitimate.

Moving beyond jurisdictional principles, distinguishing between the prescribing and enforcement jurisdiction provides another view into the relationship between the state and international law. General assumptions that states are prohibited from legislating[3] and enforcing their own laws outside their physical territory may be a useful, formalistic view of the sovereign equality of states, but does not necessarily offer any functional dependability. An analysis of the bases or principles of jurisdiction provides an opportunity to view the way in which the traditional interpretations of the

[3] Unless permitted by one of the accepted basis of jurisdiction.

each principle have been altered somewhat by recent state practice. In certain examples, the different principles of jurisdiction have been utilised for extraterritorial measures that lack coherence with the principle's original interpretation or essential meaning. The problem with this adaptation is the possibility for further corruption of the principles by powerful or forceful states in future. These constraints in international customary law provide a series of norms that, if appropriately used when assessing jurisdiction, would reduce the frequency of ill-founded jurisdictional assertions and conflicts with other states. Avoiding the duty of non-interference whether in the criminal or economic sphere disturbs the true equality of states and devalues the protective ability of customary international law. The hegemonic perspective and actions of particular states requires a more vigorous defence of the normative bounds of international law. This chapter will construct an analysis focusing on the underlying traditional purpose of the doctrine of jurisdiction from an extraterritorial standpoint.

**Definition of Extraterritorial Measures**

Jurisdiction as an area of academic discussion has benefited from detailed examination, including the specific area of extraterritorial measures.[4] If jurisdiction

[4] Selected examples include: Jennings, R. and Watts, A. (eds.) *Oppenheim's International Law* (Longman, 9th ed., 1992); Olmstead, C. (ed.) *Extra-Territorial Application of Laws and Responses Thereto.* (ESC Publishing Ltd., 1984); Mann, F. 'The Doctrine of Jurisdiction in International Law' (1964) *Hague Recueil des Cours 1* p145.; 'The Doctrine of Jurisdiction Re-Visited after Twenty Years' (1984) 186 *Hague Recueil des Cours 9*; Capps, P. et al, *Asserting Jurisdiction: International and European Legal Perspectives.* (Hart Publishing, 2003). Lowe, V. 'The Problems of

has been commonly referred to as the limit of the legal competence[5] of a state, then an extraterritorial measure is one that is proposed by a state outside of its legal competence. This legal competence includes the right to derive, prescribe and enforce the laws or rules upon a select group of persons within a select territory. This definition assumes that the laws in question are derived from within the accepted procedures of the authority structures of the state. The general assumption that a state can legislate and enforce laws within its own territory is a common recognition and reinforcement of sovereignty. It is also commonly agreed that a state can apply its laws to its nationals outside the generally accepted territory. This power or right dates back to Roman times where the individual "*was subject to the jurisdiction of his sovereign wherever he travelled*".[6] More recently it can be seen as another reinforcement of the 19th century view of statehood. Since that time jurisdiction has undergone several significant changes, including greater conflicts of jurisdictional claims and the ability of international organisations to prescribe laws as well as states, bearing in mind the consensual nature of these organisations.

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Extraterritorial Jurisdiction.' 34 (1985) *International and Comparative Law Quarterly*; Meessen, (ed.) *Extraterritorial Jurisdiction in Theory and Practice*. (Kluwer Law International, 1996); Akehurst, M. 46 (1972-3) 'Jurisdiction in International Law.' *British Yearbook of International Law*. p145; Higgins, R. *Problems and Process: International Law and How We Use It*. (Clarendon Press, 1998) chapter 4. p56; Byers, M. *Custom, Power and the Power of Rules*. (Cambridge University Press, 1999) part 2, p53-124; Lowe, V. in Evans, M. (ed.) *International Law*. (Oxford University Press, 2003) part IV chapter 10, p329-354; Maier, H. 'Extraterritorial Jurisdiction at a Crossroads Between Public and Private International Law.' (April 1982) 76 2 *American Journal of International Law*. p280-320.

[5] ibid, *Oppenheim's International Law*. p456.

[6] Dam, K. 'Extraterritoriality and Conflicts of Jurisdiction' in Olmstead, C. (ed.) *Extra-Territorial Application of Laws and Responses Thereto*. (ESC Publishing LTD., 1984) p25.

Generally, the legal competence of the state has been guided by the more historic principles of territoriality and nationality. However, that does not necessarily mean that extraterritorial extensions of jurisdiction are only a recent phenomenon. The Treaty of Peace, Amity and Commerce 1844 gave the US various rights in China for the purposes of the maintenance of law and order, which was more a demonstration of colonial dominance, only removed in 1943.[7] Colonialism by various states and other forms of outside state control, such as mandates by the League of Nations for supposed 'civilised countries' to govern and organise less civilised countries, have impacted on the essential characteristics of statehood. Thus for states that lacked the primacy of power and control over their laws, peoples and territory, the notion of statehood, sovereignty and non-interference became not only a primary goal, but also a necessity. It is not difficult to see that this functional necessity also represents the doctrinal restriction of international law in order to maintain peace and security among nations.

Extraterritorial jurisdiction in a simplistic sense is defined as an attempt to apply laws and regulations outside their internationally recognised territory to individuals who are not nationals of their own state. However, this definition may ignore the broader and more holistic description of a state making a jurisdictional assertion, which may lack legal competence. In this sense the components of legal competence can include

[7] ibid. Another example was the extraterritorial extension of rights utilised by the US in Turkey as a result of the Treaty of Commerce and Navigation 1830. p25. Also see comments by Justice Frankfurter in *Reid* v *Covert* 345 US 1 (1957) at 58.

more than the general principles of jurisdiction,[8] it can include the required legitimacy and normative value of international law restrictions.[9] The more prominent examples of this extension of jurisdiction are antitrust law, extraterritorial economic sanctions and extended criminal law or international criminal law. The latter two are the focus of this thesis. Through these examples it is apparent that extending jurisdictions assertions can have a variety of purposes, which can affect their individual legitimacy. Nevertheless the common thread is the restrictive function and mechanism of international customary law.

Some theorists[10] prefer to deem extraterritorial assertions as a 'conflict of laws', which is undoubtedly a true depiction of their result on the international plane. However this label ignores the lack of validity that can be apparent in certain assertions of extraterritorial measures and removes the normative concerns involved

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[8] General principles of jurisdiction include; the territorial principle, nationality principle, passive personality principle, protective principle and the universality principle. These principles are outlined in any well-known international law textbook, for example Brownlie, I. *Principles of Public International Law* (Oxford University Press, 6th ed., 2003) p298-305.,or Shaw, M. *International Law.* (Cambridge University Press, 5th ed., 2003) p579-593. Not all principles are generally accepted by all nations as a valid means of establishing jurisdiction, the passive personality principle is especially contentious as a means of making individuals from other states liable for acts abroad if they cause harm in the state asserting jurisdiction. ibid Brownlie, p302.

[9] The construct of legitimacy and its normative relationship to international customary law principles is discussed fully in chapter five. Also there is a distinction between positivistic legality and the broader definition of legal competence that can include the legitimacy requirement, p191.

[10] supra note 6. p24. Present in US case law the term originated from antitrust disputes in what is generally deemed Private International Law. Black's Law Dictionary critics the use of the title of Private International Law as a misnomer, leaving the impression that it parallels Public International Law, when in fact is the domestic law of the state. Garner, B. (ed.) *Black's Law Dictionary.* (West Group Publishing, 7th ed., 1999) p822.

in the analysis. Referring to all extraterritorial measures as a 'conflict of laws' may be more "*neutral*"[11], nevertheless it reduces the influence of customary principles and *jus cogens*. This is part of the positivistic intention to minimalise the concern of the inherent exercise of power that can be present in the fundamental assessment of the act of claiming jurisdiction. Thus, any type of jurisdictional assertion that is extraterritorial in nature needs to be assessed for its potential disturbance in the power relations of states.

Maier describes this terminology applied to extraterritorial measures as a 'choice of law' perspective apparent in several US cases, where any analysis of the *"needs of the interstate system*" is fairly limited if acknowledged at all.[12] He draws a comparison between private and public law examples of extraterritorial measures that create this need for a 'choice of law' and critiques the relevant US jurisprudence as ignoring the distinction between interstate and trans-national cases. The fundamental difference is located in the type of measure (private or public) that is generalised to all measures. For instance, antitrust as private law examples of extensions of jurisdiction involve the relations between individuals within the relevant states while public law examples involve interactions with another state. *"Transnational choice-of-law cases in fact provide little special insight into the role played by systematic considerations in resolving transnational issues".*[13] It is true that antitrust cases also

[11] ibid.

[12] Maier, H. 'Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law.' (April 1982) 76 (2) *American Journal of International Law*. p288 Cases such as *Babcock* v *Jackson* 12 N.Y. 2d.473.

[13] ibid.p289.

raise issues of sovereignty and non-interference, however, the emphasis on the conflict of issues involved appears to remove the consideration of the other state as a whole instead perceiving the state as a location of the parties involved. This emphasis has a direct reflection on the importance given to international law principles and the comity[14] or respect among nations.

Therefore, it is essential to define extraterritorial measures as such measures that lack jurisdictional competence if they are not coherent with fundamental international customary law principles and the normative boundaries they protect.

**Jurisdiction to Prescribe and Enforce Extraterritorial Measures**

"*Customary International Law as a source does not lend itself well to the enunciation of positive allocative rules*".[15] Reducing conflicts between jurisdictional assertions is dependent on individual states interpreting not only the basis of jurisdictional principles but also the types of jurisdiction in a manner that is in keeping with the majority of states in the international legal system. The general distinction between prescriptive jurisdiction and enforcement jurisdiction revisits the essence of sovereignty and statehood in international law. Any state can prescribe laws and regulations through its own constitutional framework, over its territory and its nationals and potentially beyond this restriction if there is not a prohibititory rule as

[14] *Hilton* v *Guyot* 159 U.S. 113, 163-164. Having: *"due regard to both international duty and convenience to the rights of its own citizens or of others who are under the protection of its laws."*

[15] Qureshi, A. *International Economic Law*. (Sweet and Maxwell, 1999) p56.

discussed in the Permanent Court of Justice's (PCIJ) judgment in *Lotus*.[16] Overall the five principles of jurisdiction are components of prescriptive jurisdiction, or rather basis of prescriptive jurisdiction. Enforcement jurisdiction on the other hand is more problematic in its application. The reality of enforcing extraterritorial jurisdiction on another state can disturb the essential nature of international customary law and the relations between states. This is why Lowe describes the rules governing enforcement jurisdiction as "*clear and simple*",[17] no state can enforce measures in the territory of another state unless consent is given.[18]

The 'clear and simple' rule dictating that enforcement jurisdiction must be territorial originates with *Lotus*. "*The first and foremost restriction imposed by international law upon a state is that...failing the existence of a permissive rule to the contrary... it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territory; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention*".[19] This extension of power by a state is generally accepted as forbidden in international law reaffirming territorial integrity is an essential characteristic of statehood.

[16] *Lotus* case, (*France* v *Turkey)*, Judgment No.9, 1927, PCIJ, Ser A, No.10. p18-19.

[17] Lowe, V. 'Jurisdiction' in Evans, M. (ed.) *International Law*. (Oxford University Press, 2003) p351.

[18] ibid.

[19] ibid p334.

This does not appear to be the case for prescribing jurisdiction. *Lotus* appeared to reinforce the supremacy of nation-state sovereignty allowing for any assertion of jurisdiction unless there is an international rule prohibiting that assertion.

> *"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 or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable... in these circumstances, all that can be required of a state is it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty".*[20]

*Lotus* acknowledged the consensual nature of international law and reinforced the 19th century view of statehood and sovereignty by outlining that, *"restrictions upon the independence of states cannot therefore be presumed".*[21] In reality this would place the emphasis on the potentially offended state to show that a prohibititory rule of international law has been breached as opposed to the forum state justifying its jurisdictional basis for assertion. It has been generally agreed that this does not reflect the contemporary view of prescribing jurisdiction in international law or state

[20] supra note 16.

[21] ibid.

practice.[22] Clearly the view of the Court in *Lotus* is time and factually specific and perhaps it did not foresee the extent of extraterritorial assertions by states that is currently present and practiced. Lowe correctly summarises that in the past hundred years no offended state has had to rely on a prohibititory rule in order to challenge extraterritorial jurisdiction.[23] He also proposes that the starting presumption of the judgment, the consensual nature of international law and its freedom to the nation-state, is "*fallacious*".[24] It does not give the right to extend jurisdiction regardless of the sovereignty of other states.[25] This contemporary view fits with the definition of extraterritorial measures as those measures that must have legal competence in accordance with international customary law. Also, the judgment in *Lotus* is a formalistic and positivist perspective on the role of international law within interstate relations, avoiding the consideration of the coercive power individual states may wield in international relations.

The jurisdictional aspects of *Lotus* have been much debated, and the outcome of the case would have been different in the present day considering the Law of the Sea Convention 1982, allowing jurisdiction to the flag state for prosecution of individuals who have committed criminal offences.[26] However, the nature of jurisdiction would be less confused by *Lotus* if the jurisdictional justification for Turkey was based on

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[22] ibid and supra note 4, Higgins, R. *Problems and Process.* p77 and also Dixon, M. and McCorquodale, R. *Cases and Materials on International Law*. (Oxford University Press, 4th ed., 2003) p270.

[23] supra note 17. p335.

[24] ibid.

[25] ibid.

the offending ship in question representing Turkish soil. Still further, the jurisdiction in favour of Turkey could potentially be based on the passive personality principle, allowing for jurisdiction of the state if the victims are from the forum state. Overall, *Lotus* remains a starting point in any jurisdictional analysis, its importance rests with the rejection that prescriptive extraterritorial jurisdiction is justified unless it contravenes a rule of international law.

The Restatement (Third) of Foreign Relations Law of the US[27] outlines a more restrictive criteria for the jurisdiction to prescribe specifying that states can prescribe laws to conduct which are wholly or substantially within their territory,[28] persons in their territory,[29]or "*conduct outside that is intended to have substantial effects within its territory*".[30] The Restatement (Third) is not as authoritive as a case judgment but is a representation of the work of several American jurists reflecting the law from the US court's perspective. The Restatement (Third) also includes the right of the state to prescribe jurisdiction if it involves one of its nationals outside the state's territory,[31] and certain conduct by non-nationals outside the territory if the conduct somehow impacts on the security or national interests of the state.[32] Further to criteria mentioned above, the Restatement (Third) also limits prescriptive jurisdiction if it is unreasonable and details several factors, which can be used in the assessment of its

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[26] Article 92.

[27] 1987 (The American Law Institute Publishers, Washington) Volume 1. §402.

[28] ibid, § 402 1(a).

[29] ibid § 402 1(b).

[30] ibid § 402 1(c).

[31] ibid § 402 2.

reasonableness.[33] It is interesting to note for the purposes of this thesis, and the upcoming discussion of Helms-Burton Act,[34] that the Restatement (Third) considers a statute of the US to be unreasonable if it *"would bring it in conflict with the law of another state that has a clearly greater interest"*.[35]

The reasonableness requirement in prescriptive jurisdiction is indeed a preferable constraint compared with the blanket condonement highlighted in *Lotus*. In cases where prescriptive jurisdiction is not consented to by other states; reasonableness and international comity should play some part in order to maintain the sovereign equality of states and reduce jurisdictional conflicts. Although the Restatement (Third) originates from the US, one of the more active states prescribing anti trust legislation, it is a valuable reference where the factors of reasonableness can re-engage the restrictiveness of international customary principles on extraterritorial assertions.

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[32] ibid § 402 3.

[33] Section (2), "(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residents, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state."

[34] An extraterritorial economic sanction by the US, see chapter 3 for full analysis.

[35] ibid § 403 Comments Section (g) Interpreting United States Law to Avoid Unreasonableness or Conflict. p248.

**Basis of Jurisdiction for Extraterritorial Measures**

The five principles of jurisdiction include the territorial and nationality principle, the two most common and well accepted principles on which to base jurisdictional assertions. In fact *Woodpulp* identified that, *"the two undisputed basis on which state jurisdiction is founded under international law are territoriality and nationality".*[36] Other principles are more contentious such as the protective principle, passive personality principle and the universality principle. These principles stem from customary international law usually resulting from state practice and *opinion juris.* Although in the instance of these contentious principles they do not necessarily benefit from general acceptance.[37] Overall, the principles of jurisdiction represent the concept of state autonomy and the right to exercise jurisdiction, however, if it is extraterritorial it may penetrate the autonomy and territory of another state.

The territorial principle, as stated previously, allows a state to claim jurisdiction, prescribing and enforcing laws within its own territory. This is the least contestable principle of jurisdiction as it is the essence of the function of statehood. This jurisdictional right is exclusive to the state and is not generally restricted if it involves an individual who is not a national. In *Lockerbie,* Scotland was able to claim jurisdiction for the prosecution of the Libyan suspects because of the location of the

[36] Re Woodpulp Cartel: *A. Ahlstrom Oy and Others* v *EC Commission* [1998] 4 CMLR 901, at 920.

victims and evidence located in Lockerbie itself.[38] Situations may arise particularly in criminal law where conduct can span various autonomous states; (barring any agreement on jurisdiction in an international conventional or treaty), concurrent jurisdictional claims may result. In this instance claims to jurisdiction may include other principles, such as the nationality of the offender. Nevertheless, if there is a real and substantial link[39] to the territory the jurisdictional claim itself reinforces the territorial principle. Partial conduct located in the particular territory can give rise to either the objective territorial principle or the subjective territorial principle. The subjective territorial principle is fairly common in international law especially in criminal cases and involves a jurisdictional claim based on the beginning, or the initiation of the conduct involved which is generally concluded in another state. Traditionally, the UK had not adopted this approach but it is becoming more accepted.[40] The objective territorial principle is the opposite, where the offending conduct is completed in the territory of the state-claiming jurisdiction. It is well established in most common law states including the UK.[41] Both of these offshoots to the territorial principle would be served by the application of the 'substantial

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[37] The most often referenced work on jurisdictional principles is by F A Mann; Mann, F. 'The Doctrine of Jurisdiction in International Law' (1964) *Hague Recueil des Cours 1*; 'The Doctrine of Jurisdiction Re-visited after Twenty Years' (1984) 186 *Hague Recueil des Cours 9*.

[38] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahirya* v *United Kingdom*) Preliminary Objections, ICJ Reports, 1998/9.

[39] *R* v *Libman* [1985] 2 S.C.R. 178. The substantial connection test is discussed more fully in chapter 4 p127.

[40] See discussion in chapter 4 on the comparison between the initiatory and the terminatory approach to jurisdiction from *Treacy* v *Director of Public Prosecutions* [1971] A.C. 537 to *R* v *Manning* [1998] 4 All ER 878. p121-127.

connection test' in order to establish reasonable jurisdiction within the bounds of the territorial principle.

The most contentious derivative of the territorial principle is the effects doctrine. It has specifically been extended from the objective territorial principle and through this extension has lost a fundamental link with the territory, leaving only the effects of the conduct located in the state-claiming jurisdiction. There is an important distinction between physical and economic effects felt in the state. Physical effects such as assault or murder of an individual victim in the state or environmental effects have been confirmed by the tribunal, *"under the principles of international law, as well as law the United States, no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another".*[42] Nonetheless, the effects doctrine has been most utilised by the US in antitrust cases[43] claiming economic effects felt in the US. The problem with the jurisprudence in antitrust cases arising from the US is the manifestation of effects doctrine into a 'balancing test',[44] a more functional approach by the courts. This approach is intended to represent 'a jurisdictional rule of reason' that as a result led to decisions,

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[41] *DPP* v *Stonehouse* [1978] AC 55, 78.

[42] *Trail Smelter Arbitration.* 3 RIAA, 1938. 33 *American Journal of International Law.* 1939, p182.

[43] *US* v *Aluminium Co. of America*, 148 F.2d 416 (1945). A Canadian company was held to violate the US Sherman Act. *"Any state impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."* p443. This was confirmed in *US* v *The Watchmakers of Switzerland Information Center Inc.*, 133 F.Supp. 40 and 134 F. Supp. 710 (1963), 22ILR, p168.

[44] *Timberlane Lumber Co.* v *Bank of America* 549 F.2d 597, 615 (1976) and *Mannington Mills Inc.* v *Congoleum Corporation* 595 F. 2d 1287 (1979).

which do not consider either the reasonableness requirement of prescriptive jurisdiction or the influence of international law principles such as comity among nations. Comity as a doctrine can be applied to reduce conflicting jurisdictional claims with the forum state taking into account the sovereign laws of other states. The balancing test was criticised in *Laker Airways* v *Sabena*[45] which focused on US interests alone as opposed to taking into account the interests of other states. The court argued that attempting to balance interests of the US with other states would always be problematic and would not lead to an appropriate legal decision. This amounted to what some theorists have called the second approach by the US courts in asserting jurisdiction.[46] Finally, comity was again minimalised in the landmark case *Hartford Fire Insurance* Co. v *California*,[47] where the court held that an individual subject to laws from two sovereign states should try to comply with them both. In this particular case the US legislation was the Sherman Act, which extends jurisdiction outside of the US.[48]

Besides the reasonableness requirement for prescriptive jurisdiction from the US' own Restatement (Third),[49] it also restricts the recommended use of the effects

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[45] 731F.2d 909 (1984).

[46] Snell, S. 'Controlling Restricted Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness and Comity.' (1997) 33 *Stanford Journal of International Law*. p247.

[47] 113 S. Ct. 2891 (1993) at 2909 and 2911.

[48] The Sherman Antitrust Act of 1890 15 U.S.C. Justified extraterritorial jurisdiction based on the effects doctrine. Just after the *Timberlane* case the Foreign Antitrust Improvements Act was passed in 1982 15 U.S.C. limiting the application of the Sherman Act only where the effects in the US were 'direct, substantial and reasonable'. Also see Layton, A. and Parry A. Extraterritorial Jurisdiction-European Responses. (2004) 26 *Houston Journal of International Law*. p314.

[49] 1987 (The American Law Institute Publishers, Washington) Volume 1. § 402. p239 and § 403, p250.

doctrine to activity that is 'intended to have substantial effects' in the state claiming jurisdiction. The application of the effects doctrine in various antitrust cases in the US has resulted in a clear movement away from the essence of the territorial principle, leaving a more tenuous link to the territory that is not always guarded by reasonableness. Antitrust cases also represent the civil view of conflicts of laws, revisiting Maier's analysis of the court's perspective of the case demonstrating the concerns of individual parties as opposed to also raising issues between independent states as a whole. If this perspective was recognised it would undoubtedly mean a reconsideration of international comity.

Extraterritorial economic sanctions are another area where the effects doctrine has been used as a basis of jurisdiction. The relevant extraterritorial sanctions include the Helms-Burton Act and the Iran and Libyan Sanctions Act.[50] The US contends that other states trading with Cuba have a direct effect on its national interests due to the expropriated property formerly owned by US nationals. The same reasoning is used to justify sanctions against third-party states that invested in Iran and Libya[51] the investment would promote the assumed terrorist activity condoned by these two states. The use of the effects doctrine here is more political than economic. This is a problem as its application avoids the reasonableness restriction of prescriptive jurisdiction. A recent prosecution of a Canadian in a US Court for violating other

[50] These sanctions are analysed in chapter 3.

[51] The particular sections of ILSA regarding Libya were lifted as of April 2004. Presidential Determination No. 2004-30. Determination and Certification under section 8(b) of ILSA. www.whitehouse.gov/releases/2004/04/print/20040423-10.html. Relevant UN SC Resolutions include 731 (1992), 748 (1992) and 883 (1993).

economic sanctions and regulations by trading with Cuba[52] resulted in a political interpretation of the effects within the US.[53] The defendant through his trade activity with Cuba was said to commit violations that, "*benefit an economy and a regime that is deemed by the political branches of the government to threaten national interests*".[54] The rationale for these political effects was, apparently, based on the importance the courts placed on the intent of the US Congress.[55]

Overall the effects doctrine may have developed from the objective territorial principle but in its current application shows little regard for the fundamental purpose the principle represents. There is a distinct difference in establishing a substantial link to territory and adhering to the comity of nations compared to asserting jurisdiction based on the arguments used for extraterritorial economic sanctions.

The nationality principle has generally been recognised as a basis to assert jurisdiction over extraterritorial acts committed by nationals abroad. The Harvard Research Draft Convention of 1935[56] confirmed the jurisdiction of a state over its nationals' conduct wherever, as long as the prosecution for a single conduct is not duplicated in another state.[57] This principle is well accepted in international law and

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[52] The prosecution included charges under the Trading With the Enemy Act and the Cuban Asset Control Regulations, discussed in chapter 6, p224-225.

[53] *US* v *Brodie, Brodie and Sabzali* 174 F. Supp. 2d 294; 2001 US Dist.

[54] ibid p9 and also the reasoning in *US* v *Plummer*, 221 3d at 1309.

[55] ibid p1.

[56] (1935) 29 *American Journal of International Law*. Supp. p480-564. A non-binding persuasive collection of commentary on customary international law.

[57] Article 13.

has been generally practised by numerous states, more recently the principle has formed the basis for extending jurisdiction to particular criminal conduct in various statutes,[58]including the latest emphasis on terrorism. The ICJ judgment in *Nottebohm* found that nationality could be established for jurisdictional purposes if there is a genuine and close link between the individual and the state.[59] The jurisdictional basis may not be in question, however the practical prosecution of acts committed in other states can be difficult because of the location of evidence and witnesses. Also, statutory acknowledgements of criminal liability for conduct committed abroad are usually focused around one particular type of conduct, which can lead to other practical enforcement problems creating a piecemeal approach to the prosecution of nationals for crimes committed in other jurisdictions.[60]

In contrast, the passive personality principle has not been generally recognised by all states. This principle asserts jurisdiction based on the nationality or allegiance of the victim injured by the offence. This principle was prominently applied in *US* v *Yunis*[61] (No.2) where the only link to the territory was the nationality of the alleged victims. The case was very contentious due to the seizure of the Lebanese citizen in international waters, in the Mediterranean, by US FBI agents for his participation in

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[58] UK: Sexual Offences (Conspiracy and Incitement) Act 1996, The Sex Offenders Act 1997, Part I of the Criminal Justice Act 1993, The Merchant Shipping act 1995, The Taking of Hostages Act 1972, Criminal Justice (Terrorism and Security) Act 1998, The Terrorism Act 2000, Anti-Terrorism Crime and Security Act (ATCSA) 2001, Protection of United Nations Personnel Act 1997, The Computer Misuse Act 1990, The Offences Against the Person Act 1861and Explosive Substances Act 1883.

[59](*Leichtenstein* v *Guatemala*) ICJ Reports 1955, p4. (second phase judgment).

[60] These issues are addressed in chapter 4, p121-127.

[61] (No. 2) 681 F. Supp. 896. (1988); IRL 82. p344.

the hijacking of a Jordanian airliner. The court recognised the universal principle and the passive personality principle as a basis for jurisdiction acknowledging that the passive personality principle was the preferred basis for jurisdiction. On appeal the US court reaffirmed the conviction avoiding what they considered as the murky customary international law discussion by relying on the Congressional intent of the domestic legislation, namely the Hostage Taking Act and the Anti Hijacking Act. *"Our duty is to enforce the Constitution and the treaties of United States, not to conform the law of the land to norms of customary international law... to be sure courts should hesitate to give penal statutes extraterritorial effect absent a clear congressional directive".*[62] This could be a representation of the US hesitancy towards acknowledging the principle for fear it may be applied to US citizens and military personnel by other states in future.

Brownlie contends that the passive personality principle is the least justifiable of all the principles as a basis on which to assert jurisdiction,[63] though the acceptance of this principle has grown since *Cutting* in 1887.[64] The principle is also acknowledged in the International Convention Against the Taking of Hostages 1979[65], and in the Canadian statute, Crimes Against Humanity and War Crimes Act 2000.[66] The now

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[62] *US* v *Yunis* (No.3) US Court of Appeal, District of Colombia, Circuit. 1991 30 ILM 403.

[63] supra note 2. Brownlie, p302.

[64]Cutting Case (1886) U.S. ibid, Moore, J. *Digest of International Law*. Washington, 1906 vol. II, p228, as cited in supra note 8, p589.

[65] Article 9.

[66]The Canadian statute that incorporates its obligations under the Treaty of Rome 1998. Section 8.

famous case of *Pinochet*[67], originated with an extradition request from Spain for the torture and/or murder of several Spanish nationals in Chile. The pertinent international convention, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, allows a state to assert jurisdiction, "*when the victim is a national of that state if that state considers it appropriate*".[68] The Restatement (Third) substantiates the growing acceptance of the passive personality principle with regard to terrorist attacks or diplomatic assassinations.[69] It would appear that although individual states are guarded against the general acceptance of the passive personality principle because of the potential prosecutions against their nationals in foreign courts, international conventions and treaties are increasing the frequency of its recognition in a formalist sense.[70] The slow but steady momentum for this principle is practically constrained by the non-possession of the individual. Finally, although the principle is normally applied in a criminal situation it is imperative that it is not extended to economic issues or activities. Using the passive personality principle based on economic victims located in the state claiming jurisdiction would be manipulation of its overall intention.

The protective principle, like the passive personality principle is a basis on which a state can claim jurisdiction over extraterritorial acts; however, in this case, the acts

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[67] *R* v *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3) [1999] 2 WLR 827. The judgment from the House of Lords allowed extradition of offences that were committed after the incorporation of the Convention.

[68] Article 5(1)(c).

[69] 1987 (The American Law Institute Publishers, Washington) Volume 1. § 402. p240 and 243.

have to be directed against the general security of the state or government. This would include acts of espionage, counterfeiting and plotting to overthrow governments among others. This principle is represented by the current allegations against colleagues of Mark Thatcher who were arrested for allegedly helping the plot to overthrow the government of Equatorial Guinea.[71] The protective principle is sometimes referred to as the security principle as it serves to protect serious national security interests of a state. This is apparent in the prosecution of the US citizen known as 'Lord Haw Haw' who broadcast Nazi propaganda during World War II after obtaining a UK passport.[72] There have been concerns over the potentially wide interpretation and application of this principle[73], which is probably the reason why the Restatement (Third) specifically outlines that the principle is not to be used in cases of political expression or dissension within a state.[74] More recently, the US has used the protective principle to establish jurisdiction over non-nationals on the high seas who were allegedly involved in narcotics trafficking.[75] The justification for the use of this principle for such a crime is based on the argument that narcotics have such a severe and fundamental impact on the US state as a whole, it qualified as a vital state interest. This particular situation is reminiscent of *Yunis*, but it makes use a

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[70] For example Canada's Crimes Against Humanity and War Crimes Act incorporating the Statute of the International Criminal Court, the Treaty of Rome 1998.

[71] Thatcher pleaded guilty to breaching a South African anti-mercenary law by financing a helicopter but denied knowledge of the plot. 'Relieved Sir Mark sets for US.' 14 January 2005. and 'Thatcher on Bail over Coup Plot.'25 August, 2004. bbc.co.uk

[72] *Joyce* v *DPP* [1946] AC 347.

[73] supra note 2. Brownlie, p303.

[74] 1987 (The American Law Institute Publishers, Washington) Volume 1. § 402. p240.

[75] *US* v *Gonzalez* 776 F.2d 931 (1985).

different principle as a basis for jurisdiction. Once again, traditional interpretations of relevant conduct applied to the principle have been expanded, at least in the case of the US. This highlights the problem of interpreting the language that surrounds the principle, states could seek to justify that a multitude of conducts as potentially damaging to national interests.

The final principle available to be used as a base for jurisdictional assertions is the universal principle. This principle allows jurisdiction to any state over any national for specific crimes that are deemed to be against the common good of mankind and by the very definition of this principle it can be applied to extraterritorial acts. The language of the Israeli Supreme Court's judgment in *Eichmann* confirmed the universal view of the Court, as it perceived itself to be a *"guardian of international law"*.[76] However, the problem remains that a general consensus is difficult to establish when determining the specific crimes to be included under this principle. They have generally been described as crimes that are a joint concern to all states. Traditionally, most theorists often quote piracy[77]and to a lesser degree slavery as crimes under the universal principle, though some now also include war crimes.[78] Recalling *Eichmann,* the conviction covered various war crimes and human rights violations stemming from the Geneva Conventions 1949.[79] The list of international

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[76] *Attorney General of the Government of Israel* v *Adolf Eichmann* (1962) 36 ILR. 5. Also see chapter 4 p152.

[77] supra note 8, Brownlie p303; and Shaw p593, supra note 4, Lowe, p351.

[78] ibid Shaw p593 and Cassel, D. 'Universal Criminal Jurisdiction.' Wtr (2004) 31 22 *Human Rights*, p22.

[79] Cassese, A. *International Criminal Law*. (Oxford University Press, 2003) p284 and ibid Cassel, p22.

conventions and treaties that allow for potential universal jurisdiction (or what Cassese refers to as conditional universal jurisdiction)[80] is numerous where contracting parties are to, "*take such measures as are necessary to establish jurisdiction over the offences... where the alleged offender is present in its territory*".[81] These extensions of jurisdiction are applicable to the contracting states, it cannot be said to exhibit true or 'absolute'[82] universal jurisdiction. Since universal jurisdiction is normally applied by domestic courts there is a concern that a state may make use of this principle for a criminal offence that is not generally accepted as such, for example, the more recent emphasis on fighting terrorism.[83] Recent events have also raised the prospect of universal jurisdiction being asserted without the presence of the individual in the territory. This might lead to trials '*in absentia*', which are highly questionable from the due process and customary law point of view.[84] Overall, states have been hesitant in applying universal jurisdiction unless there is some substantial link to the territory or the jurisdictional assertion is conditioned by an international convention or treaty.[85] This is not necessarily a

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[80] ibid Cassese, p285.

[81] The Hague Convention (Convention for the Suppression of Unlawful Seizure of Aircraft) 1970 article 4 (2), the Montréal Convention (Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation) 1971 5(2), The Convention Against Torture 1984 article 5(2), International Convention for the Suppression of Terrorist Bombings 1998 article 6(4), International Convention for the Suppression of the Financing of Terrorism 2000 article 7(4).

[82] supra note 79, Cassese, p284.

[83] See discussion disputing terrorism falls under the universality principle in customary international law in chapter 4 p141-147.

[84]Belgian Statute of 1996 and recent discussions over the Canadian Crimes Against Humanity and War Crimes Act 2000. See chapter 6 for a more complete analysis, p251-254.

[85] Even the *ad hoc* tribunals for the former Yugoslavia and Rwanda were specific to the territory in their jurisdiction. The International Criminal Court specifies jurisdiction on the territorial and

negative reality, as the use of absolute universal jurisdiction potentially breaches international customary law principles.[86]

The overall analysis of the five principles of jurisdiction represents the tensions between the jurisdictional requirements of a previous age and the current pull to adjust the interpretation of each principle to meet the modern needs of states and the international community. Certain needs, such as cooperation for a successful prosecution of certain criminal activities, have a high degree of international consensus. This consensus can lead to pressure to ignore the traditional territorial requirement of jurisdiction identifying it as an outmoded form on which to base all other principles. As Snell states, *"the maintenance of hostility to extraterritoriality on the basis of a monolithic theory of jurisdiction that all extraterritorial jurisdiction is bad is to maintain a charter of freedom for international criminals".*[87] Sornarajah acknowledges that antitrust extensions of jurisdiction do not benefit from general consensus, but where international consensus is present for certain crimes jurisdictional boundaries should be minimised.[88] This has certain elements of relevance considering the barrage of international treaties in conventions, mentioned previously. Nevertheless territoriality continues to serve several purposes. All of the jurisdictional principles, barring certain applications of the effects doctrine, have

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nationality basis in the first instance. ICTY article 8, ICTR article 7. The Roman Statute of the International Criminal Court 1998, article 12-19.

[86] See chapter 6, p251-260.

[87] supra note 46. p298.

[88] Sornarajah, M. 'Extraterritorial Criminal Jurisdiction: British, American and Commonwealth Perspectives.' (1998) 2 *Singapore Journal of International and Comparative Law*. p36.

some substantial form or a link with the territory of the forum state, for example the territorial principle functions to maintain sovereign sensibilities in interstate relations. Territoriality is also the common focus of international society, without which aggressive states could do more than disrupt the harmony between states but could even devalue any restrictions international law possesses.

**International Customary Law Constraints or Restrictions on Extraterritoriality**

Jurisdictional principles by their very nature tend to restrict state actions and assertions. The reason behind this is not only the maintenance of international order between nation states but also conformity with customary international law norms.[89] It is generally agreed that peremptory norms can apply to states without the requirement of consensus from an individual state due to their importance to the international system of states as a whole and furthermore remain binding even if there is a international instrument to the contrary.[90] Discussion remains fluid on the exact

[89] Norms originate from customary international law and are generally deemed to apply to all states. *Jus cogens* are a small category of norms that are considered to be the highest law within the hierarchy of international law. International customary law is usually determined by the combination of state practice and *opinio juris* (the belief that a norm is required for a legal obligation in international law.)

[90] Vienna Convention on the Law of Treaties, articles 53, "*"a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.*" Article 64: Emergence of a new peremptory norm of General international law (*jus cogens*). Also see *Nicaragua* v *US* 4 ICJ Reports (1986) p100. Chapter 5 p186.

norms to be included in this group,[91] but the modern common reference from the International Law Commission is that they are, *"so essential for the protection of fundamental interests of the international community"* that they would require adherence to avoid an offence against the international community.[92] The obligation to adhere to these norms, *erga omnes,* falls on all members of the international community as stated in *Barcelona Traction.*[93] This obligation also entails rights in order to ensure other members do not interfere with what Cassese refers to as *"community rights".*[94] It would be difficult to argue that interference in the sovereignty of another state is not fundamental to the nature of the international legal order. Sovereignty, sovereign equality,[95] and non-interference are the cornerstones of the operation of statehood in the international system of states.

Territoriality is normally perceived to have a functional quality whereas norms such as sovereignty, sovereign equality of states and noninterference are generally thought to be more abstract interpretive concepts. However, territoriality is more than a reflection of a world made up of nation states, it is a functional reality of an international legal system made up of sovereign rights. Or as Snell argues,*"In a*

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[91] supra note 79. Cassese, p200. and Kelly, J. 'The Twilight of Customary International Law.' (2000) 40 *Virginia Journal of International Law*. p450. Cassese notes the International Law Commission's reference made to aggression, apartheid, genocide, slavery, colonial domination and massive pollution. p202.

[92] supra note 79, Cassese, p202.

[93] Barcelona Traction, Light and Power Company Ltd (*Belgium* v *Spain*) ICJ Reports (1970) at 33.

[94] ibid p64.

[95] Charter of the United Nations, Article 2(1) and General Assembly Resolution 2625 (1970), as well as the articles of several international organizations.

*horizontal world system based on the fiction of equality of states, the rule... [territorial jurisdiction]... has served well to ensure harmony by confining competence over conduct on strictly territorial basis".*[96]

The problem with this particular statement is the horizontal view of the world community. Sovereign rights are an essential part of the normative framework of a vertical system where the peremptory norms of international customary law are superior to jurisdictional assertions of states outside of their territory. This is not to be confused with consensual arrangements between states to extend jurisdictional assertions through bilateral and multilateral treaties. Consensual extensions of jurisdictional assertions reinforce the sovereign rights of states. Any jurisdictional assertion outside the territory of a state that is not covered by a bilateral and multilateral agreement should be in conformity with the norms of international customary law.[97] This is the mechanism by which to evaluate a particular extraterritorial measure's legitimacy.[98] Legitimacy is the adherence of a particular extraterritorial measure to the normative aspects of international customary law.[99]

Sovereign rights and comity among nations reinforce the duty of non-interference with an individual state. Brilmayer states that non-interference or the 'right to be left alone' is a negative right, "*not swords but shields*".[100] It could be said that most rights

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[96] supra note 46, p298.

[97] supra note 91, Kelly, p451.

[98] Franck, T. *The Power of Legitimacy Among Nations.* (Oxford University Press, 1990).

[99] The theory of Legitimacy is discussed in chapter 5.

[100] Brilmayer, L. 'Rights, Fairness and Choice of Law.' (1989) 98 *Yale Law Journal.* p1295.

stemming from the norms of international customary law are indeed "*shields*" to protect against coercive power assertions. International customary law is constructed around the dual nature of rights and responsibilities. It may be simplistic to affirm that individual states cannot reject these duties or refrain from acknowledging these rights in an effort to accomplish domestic agendas, but it is part of what is commonly referred to as the shared value system of international law. However, the other part of the question is the possibility of these normative "shields" protecting the individual or corporation within the state from extensions of jurisdictional assertions of other states. Asserting extraterritorial jurisdiction in the majority of criminal situations does not disturb non-interference unless there is concurrent jurisdiction or lack of a link to the territory of the forum state. The real challenge to non-interference comes from the other category of extraterritorial measures, economic sanctions, which intend to change the policy direction and actual business practices of another state. Targeting an individual in another state through an economic sanction because of their investment or business practices disturbs the integrity of the right to structure commercial arrangements and the choice inherent in that right.[101] On a national level, Lowe has argued that each state possesses economic sovereignty that is the right to determine its individual functioning of economic structures and practices. This is one component of the sovereign rights of a state.[102] Extraterritorial economic sanctions therefore have a dual effect; as they impact on both the private conduct of the individuals of the state as well as the external policy relations of state as a whole.[103]

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[101] supra note 46, p298.

[102] supra note 4, Lowe, p745.

[103] supra note 46, p279.

This is an obvious interference with sovereign rights, and a challenge to the norms of international customary law.

As stated previously, sovereign rights originated with territoriality and the nature of statehood.[104] Nevertheless sovereign rights or sovereignty are not limited to the function of territory they can extend beyond physical limitations in certain cases. This is not meant to condone all extraterritorial assertions but to qualify them on the basis of a negative right, or a shield. Snell uses *Nuclear Test*[105] to support this argument. The use of the location in the South Pacific near Australia by France for nuclear testing raised issues of potential pollution and harm to Australia's environment. The case highlighted conflicting sovereign rights over territory, the right of France to make use of its territory as it wishes without interference and the rights of Australia to have its territory free of harm from the actions of other states. Before the statement by France stating their intention to cease any further testing, the court had discussed the issue of extraterritoriality. France's argument was based on its national interests and the jurisdictional view of sovereign rights over territory. While the majority reinforced France's traditional right of sovereignty over their territory, the dissenting opinion of the court accepted the legality of France's actions, but also recognised that the sovereignty of another state could be negated by the actions in another territory.[106] This is reminiscent of *Trail Smelter*,[107] which allowed effects in a state to be

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[104] ibid p288.

[105] *Australia* v *France*, 1974 ICJ 253. Judgment 20th December.

[106] supra note 46, p287.

[107] *Trail Smelter Arbitration (US/Canada)*, (1938-1941) 1 R.I.A.A. or 33 *American Journal of International Law*, 1939.

recognised as the basis of a jurisdictional assertion if they are physical and substantial. However, it is more than the physical effects of the harmed state that are important. It is the impairment to the sovereign right that is not legitimate and which violates international customary law, no matter the legality of the action that caused the harm.

Returning to Sornarajah's statement of the *"fiction of the equality of states"*, [108]from a realist point of view states can never be formally equal.[109] There will always be certain power dynamics between the economically dominant and those that are not. This does not reflect the norms of international customary law. Normative constraints are not meant to reinforce the power and symmetry between states; their purpose is the opposite. International customary law has evolved from the need for a set of preliminary rules to guide state interactions and regulate potential abusive behaviour. The equality of states should be seen as a substantive concept, the recognition of distributive power is the reason for normative bounds. Even when considering extensions of jurisdiction to fight consensually agreed criminal activity, the rights of another state not to participate, or not to be interfered with must remain a sovereign right. The equality of states may be perceived as a fiction within international relations theory; however, the theory recognises the need for 'realistic equality' without which the normative constraints of international customary law would not be able to support the international legal system.

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[108] supra note 88.

[109] Simpson, G. '*Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*', (Cambridge University Press, 2004) p52.

Kelly argues for a move away from customary international law as an effective source of jurisdictional principles because of the binding nature of *jus cogens*. This mirrors Sornarajah's contention that extraterritorial jurisdiction should be expanded for certain crimes based on consensual agreement. Kelly's premise, that international agreement should set aside the norms and standards of international law is surrounded by the notions of establishing a more 'democratic deliberative process', [110] identified by state practice. Desirable as any argument for a democratic process is, the reality of state power distribution could result in a state not consenting to a general duty not to intervene because of its own domestic policy goals. Interventions on an economic, criminal or military level are a clear breach of international customary law norms. Without these norms the true equality of states is in jeopardy.

Other normative constraints are representative of general principles of law. Fairness and justice are usually linked to due process discussions in national and international courts but also have a place in jurisdictional assertions. The ICJ commented on the relevance of the general principles of law and justice, *"this indirect evidence is admitted in all systems of law, and its use is recognised by international decisions...."*[111] These principles guide the reasonableness test in assessing jurisdiction, highlighted by the Restatement (Third) in previous discussions. The use of the effects doctrine and the balance of interest test by US courts can ignore the broader principles of fairness and justice on the international level. *"If fairness is to*

[110] supra note 91, Kelly, p449.

[111] *Corfu Channel Case* (*UK* v *Albania*) ICJ Reports 1949, p18.

*play a role in delimiting jurisdiction, at most it may supply a threshold test, forcing a court to focus upon normative concerns as well as upon state interests in determining whether exercise of jurisdiction would be appropriate".*[112] Thus, it is essential that domestic courts evaluate any extraterritorial assertion within the boundaries of the norms of international customary law considering the impact the assertion might have on international fairness and justice.

Customary international law provides various norms that restrict the assertions of extraterritorial measures. From a practical point of view domestic courts need to be considering these normative bounds when making a determination on an extraterritorial jurisdictional assertion. The problem may be that domestic courts usually operate on the consensual nature assumption of international law without recognising the supremacy of customary norms. These norms include the appropriate understanding and application of the sovereign right or state authority, the duty not to intervene and the reality of the equality of states. Domestic courts also need to consider general principles of law, for example, fairness and justice; ensuring reasonableness standard is applied in jurisdictional dilemmas. Maier observed that domestic courts normally focus on the more pressing short-term issues involved in a particular case as opposed to taking account of the larger international picture.[113] A better course of action would also include, *"attention to the need for developing "schematic criteria", designed to facilitate the workings of the international system*

[112] supra note 46, p298.

[113] Maier, H. ' Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law' (1982) 76 2 *American Journal of International Law*. p280.

*as a whole".*[114] The five basis of jurisdiction may be in a process of adaptation by domestic courts to suit the needs of the 21st Century, nevertheless, jurisdictional applications of domestic law outside the state should not be promoted by the 19th century view of nation state supremacy, but by a vertical view of international law.

**The Distinction and Comparison of the Categories of Extraterritorial Measures**

The distinction between the two different categories of extraterritorial measures, for the purposes of this thesis, is based on the rationale of their development and use, their legality and their adherence to the goals and norms of international customary law, or in other words, their legitimacy. Normally distinctions are drawn between criminal extraterritorial assertions and economic extraterritorial assertions on a public or private level using antitrust examples for the economic category. This is not the case in this particular comparison, although techniques used by US courts in antitrust cases were used in an economic sanctions case, *Sabzali.*[115] However, some of the issues highlighted by previous comparisons of extraterritorial antitrust measures and criminal measures are relevant to the present discussion.

Mann distinguishes between civil and criminal prescriptive jurisdiction reaffirming that the state has jurisdiction if the conduct is, *"so close, so substantial, so correct, so weighty that legislation in respect of them is in harmony with international law and its various aspects (including the practice of state, the principles of non-interference*

[114] supra note 4, Lowe, p731.

[115] supra note 53.

*and reciprocity and the demands of interdependence). A merely political, economic, or social interest does not in itself constitute a sufficient connection".*[116] Extraterritorial economic sanctions are politically and economically oriented which, in Mann's opinion, does not constitute a reasonable basis for jurisdiction. This is of primary concern for the overall analysis and purpose of jurisdiction. If jurisdiction is to be extended outside domestic territory the rationale behind such measures should establish a connection to the territory or state asserting jurisdiction. In short, the rationale behind the measures is as important as the content of the measures themselves. Lowe also distinguishes between the types or categories of extraterritorial measures based on their purpose.[117] He cites the allocation of maritime jurisdiction as an example, where jurisdiction can be allotted in certain zones for particular purpose but not for others.[118]

One of the principles of jurisdiction, the contentious effects doctrine, is utilised for economic sanctions when its clear heritage stems from cross-border criminal activity. *"[T]he effects doctrine as applied in the antitrust field has been developed by mistaken analogy with the doctrine on personal injury cases (the cases about pistols fired into a country from outside its borders). We follow for our part the classical objective territorial position. Our position implies that the pistol type cases...which are arguably about where the act takes place or is completed, rather than about effects, should be distinguished from those in the very different sphere of economic*

[116] Mann, III *Hague Recueil* (1964, I) p264, as cited in Harris, D. *Cases and Materials on International Law*. (Sweet and Maxwell, 6th ed., 2004) p292.

[117] supra note 4, Lowe, p733.

*activities".*[119] Again another distinction is drawn between the economic purpose and aim as opposed to the intention for extending jurisdiction on criminal activities.

This distinction is valuable but does not mean that extraterritorial criminal measures are automatically legal or legitimate because of their purpose. They too must adhere to the norms of international customary law. Still, as a generalisation, most examples do not embody the coercive nature of extraterritorial economic sanctions. At first glance, a comparison between these two categories of extraterritorial measures might lead to the assumption that only exceptional examples of questionable jurisdiction in criminal law need to be assessed, such as the US detention of individuals at Guantanamo Bay. This would be a false assumption; the purpose of a measure is an important component in its adherence to international customary law however, the purpose does not tell the entire story. Recalling Sornarajah's argument non-treaty based wholesale extensions of jurisdiction among consensual common law countries for criminal activity,[120] is the result of ignoring the function of the basis of jurisdiction. Disposing of or devaluing the basis of jurisdiction calls into question the power of international customary law. Without these basis of jurisdiction the individual state power will become more prevalent, leaving the weaker states open to increasing incursions of jurisdictional assertions by the more dominant states.

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[118] ibid.

[119] A speech made by UK Trade Minister Peter Rees at the Royal Institute of International Affairs 21 October 1982. Department of Trade Press Notice 470, p2, as cited in Lowe, V. 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty in The Search for a Solution.' (1985) 34 *International and Comparative Law Quarterly.* p733.

[120] supra note 88.

## Conclusion

The international law view of jurisdiction began with the definition of extraterritorial measures as jurisdictional competence that is in keeping with international customary law principles. This is the platform from which any jurisdictional right to prescribe extraterritorial measures must flow in order to counteract power abuses by individual states. The modern customary law approach and practice of prescriptive jurisdiction has moved away from *Lotus*[121] where the emphasis is on the state asserting the jurisdictional claim to justify that it is not contrary to international customary law principles.

An examination of the basis of jurisdiction highlights the contentious nature of certain principles as well as the problem with extending principles for different and possibly new assertions of jurisdiction that may not necessarily be coherent with their fundamental purpose. This is evident through the case examples of the effects doctrine and a protective principle. The application of any basis of jurisdiction needs to provide a real and substantial link with the territory in order to be consistent with the doctrine of jurisdiction. Another aspect of the discussion on the basis of jurisdiction is the distinction between the formalist quality and their substantive meaning. This meaning is the requirement of international customary law norms, such as comity and the requirement of reasonableness, for any state applying jurisdiction outside its recognised territory to legitimise the assertion. Thus, the

substantive meaning of jurisdictional basis should act as a restriction for unfounded jurisdictional assertions by states.

The acknowledgement of a state's sovereign rights reinforces the 'shield' effect of international customary law norms. This is in opposition to the argument for removing customary norms in favour of a consensual agreement between states on extraterritorial jurisdictional assertions. The consensual argument may promote a seemingly more democratic method of agreement on extraterritorial jurisdictional. However it indirectly supports a view of nation-state supremacy, which can have the effect of validating the power of asymmetry of states in the international community. The purpose of the doctrine of jurisdiction is linked to the concept of statehood and sovereign rights, reinforcing the duty of non-intervention even on an economic plane. This is the missing element of the consensual argument when considering extraterritorial jurisdiction. International customary norms, and the general principles of fairness and justice need to be considered in any jurisdictional assertion. This is not meant to promote a general fear of extraterritorial measures but a cautionary note to restrict or curtail extraterritorial measures that interfere with the sovereign rights of other states.

This chapter draws a distinction and a comparison between the two categories of extraterritorial measures, each with their own particular aspects as measures themselves and also the differing basis of jurisdiction used to justify their assertions.

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[121] supra note 16.

They are a reflection of the modern age, which has brought about significant changes in interstate commercial and criminal activity and jurisdiction, as the doctrine needs to keep pace with this development and change. Nevertheless, the doctrine of jurisdiction is well suited to encompassing the needs required by this modern reality without a rejection of international customary norms.

The next two chapters evaluate the two categories of extraterritorial measures independently. This is essential in order to draw conclusions on their legality, adherence to international customary law and thus legitimacy. In chapter three the analysis will focus on two more recent examples of extraterritorial economic sanctions, outlining the political background of their development and potential breaches of customary law jurisdictional principles, international trade agreements, and the subsequent effect on other states.

# CHAPTER THREE

# CONSIDERATIONS OF EXTRATERRITORIAL ECONOMIC SANCTIONS

## Introduction

An analysis of relevant examples of extraterritorial economic sanctions is the function of this chapter. The political background of this type of sanctions exemplifies an economic interventionist approach by a state to achieve foreign policy goals. The history of extraterritorial sanctions is usually representative of an intense or complete political breakdown of diplomatic relations that becomes transferred into an economic dispute. The Cold War ushered in an era of economic sanctions, which has since the advent of the 'new world order' and globalisation, become the tool of choice for nations which wish to either protest or effect a regime or policy change in an offending country or region. The problem is that too often sanctions represent the easiest option in the range of responses between standard condemnation and military intervention of another state. Whether they are instituted for humanitarian reasons, peace enforcement, or to protest against economic and political decisions of a particular government little consideration has been given to their effectiveness, which can impact on the consideration of their overall legitimacy.

Current debate has focused on the blanket nature of these devices and how they can have a negative impact on the innocent civilians involved, as in the sanctions levied against Iraq before the war in 2003. Justification of sanctions against countries can be linked to choice of government as in Cuba, Libya and Iran,

identification of 'rogue states' or complex trade issues such as disputes over fishing, oil and gas and other commodities.

Standard unilateral economic sanctions by the US have been reported to currently cover approximately 40% of the world's population.[1] The severity of the sanctions by the US can range from arms export control or prohibition of military assistance to the most extreme extraterritorial economic sanction, penalising other countries for trading with or even investing in the target state. These types of sanctions raise significant issues of interference with the sovereign rights of third party states and international law principles. The US has appeared to be the one state currently making use of these political tools with the Iran and Libya Sanctions Act (ILSA), and the Helms-Burton Act[2] as the prime examples.

The UN Security Council is in the process of discussing the development of guidelines for *"clearer definition and tighter targeting"* of UN sanctions.[3] Re-evaluation in certain countries has pre-empted the UN initiative as a reaction to

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[1] http://www.usaengage.org/literature/2002/2002sanctions/sanctions_country.html, Franssen, H. 'US Sanctions Against Libya.' (2002) XLV, No.8 *Middle East Economic Survey.* 25 February.

[2]ISLA: Public Law No.104-172, H.R. 3107 (5 August 1996), and The Cuban Liberty and Democratic Solidarity (Libertad ) Act 1996 Helms-Burton: Pub. L. No. 104-114, HR 927 (12 March 1996).

[3]UN GA Resolution 9654, *"...Assembly adopted a resolution on the need to end the embargo against Cuba, by which it again urges all states that applied laws and measures of an extraterritorial nature that affect the sovereignty of states and freedom of trade and navigation to repeal or invalidate them as soon as possible."* UN Press Release. Two countries voted against the resolution, the US and Israel.

Also GA Resolution 3945, calling for the US to end the embargo against Cuba and GA Resolution 9387 titled Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries. UN Security Council Press Release 6845, 4128th Meeting 17 April 2000.

the international condemnation from target states, multinational companies and international humanitarian groups. In various countries proposals have been made to limit sanctions by making them more specific to certain goods or activities and designing them in such a way that would require a review after a certain time period has elapsed.[4] On the international stage unilateral sanctions are identified as the most coercive and undesirable because of the lack of multi-state input before enactment and the absence of legitimacy provided an international organisation.

Significant trade associations and lobby groups have always argued that ILSA is an ineffective law that is unworkable, and serves to be a major irritant to close allies and trading partners.[5] In April, 2004, the White House announced that Libya had fulfilled its requirements under the ILSA and had complied with the UN Security Council resolutions concerning the Pam Am disaster,[6] and thus terminated the application of the Act with respect to Libya. Nevertheless Libya remains on the US 'state sponsors of terrorism list' and thus still suffers from certain trade restrictions upon such things as military items and direct air flights

[4]In the US, for example, the Sanctions Policy Reform Act introduced by Senator Lugar in 1999 meet with resistance when it attempted to require a set of procedural and informational requirements when designing unilateral sanctions. www.usaengage.com.

[5]Thirteen Trade Associations of American Business consisting of farming, manufacturing, and petroleum etc. along with the lobby group against sanctions, USA Engage, are currently urging Congress not to re-authorise the legislation as it negatively impacts on US industries more than Iran and Libya. ibid.

[6] Presidential Determination No. 2004-30. Determination and Certification under section 8(b) of ILSA. www.whitehouse.gov/releases/2004/04/print/20040423-10.html. Relevant UN SC Resolutions include 731 (1992), 748 (1992) and 883 (1993).

with the US. Moreover the assets of the Libyan government are still frozen.[7] Diplomatic relations have been restored for the first time in approximately twenty-four years and the good news for US businesses is that they can invest and promote the development of the rich oil reserves in the country, which may be considered convenient timing for those who are worried about the lack of energy sources for the US. Libya and the US have a variety of educational and investment programs being processed to further strengthen relations between the two countries. This is a direct result, not only, of the US's recognition of the Libyan agreement for nationals suspected in the Pam Am bombing to stand trial, but also the US view that there has been significant movement towards reducing or eliminating weapons of mass destruction.[8]

The situation with Iran is far from similar.[9] The current tension is focused on the US concern for Iran's nuclear programme and there has been much international discussion about the possibility of UN sanctions as a consequence of its uranium enrichment program. This programme is of concern to the International Atomic Energy Agency, which oversees the Nuclear Non-Proliferation Treaty. The ILSA is still in effect with regard to Iran,[10] another oil rich nation, causing Conoco, a US based company to withdraw from oil field development at the time of the

[7]Statement by the Press Secretary of the White House. 'U.S. Eases Economic Embargo Against Cuba.' 23 April 2004.

[8] ibid.

[9] See Hersh, S. article chapter 1 footnote 3.

[10] ILSA was renewed for another five years in 2001 by the US Congress and Signed by President George W Bush.

enactment of the statute,[11] and several other countries who have companies involved in oil production to become the focus of the US.[12]

The Helms-Burton Act is still having a devastating effect on the Cuban economy. Since its origins in 1996 there have been an increase in US attempts to keep their own citizens as well as citizens of other states away from tourism or investment in the island. This can be seen in the increased prosecutions of US nationals who do not have a specific dispensation to travel to Cuba,[13] and the first criminal prosecution of a foreigner in the US for trading with Cuba.[14] The *Sabzali*[15] prosecution resulted from a long and costly investigation by the US administration into a subsidiary of a US company, which was selling water purification chemicals to Cuban hospitals. The prosecution came under the Trading with the Enemy Act and the Cuban Assets Control Regulations because *Sabzali* had moved to the company's head office in the US from Canada. Although activities while living in the US are covered by US domestic law, several of the indictable accounts were for activities in Canada; these were the extraterritorial elements of the prosecution.

Even though both Acts containing extraterritorial elements were passed in 1996

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[11] Conoco had to withdraw from oil development in Iran. Energy Information Administration, official energy statistics from the US government. 'Global Energy Sanctions' June 2004. http://www.eia.doe.gov/emeu/cabs/sanction.html#iran.

[12] ibid. The Canadian company Sheer Energy has been under investigation since 2002 by the US for potential violation of ILSA after it received a contract for oil development.

[13] Berman, J. 'Vote to Lift Travel Ban Faces Veto From Bush', *The National Post*, August 3, 2002.

[14] *US* v *Brodie, Brodie and Sabzali* 174 F. Supp. 2d 294; 2001 US Dist.

[15] ibid

they still remain in force and raise issues of international law that are relevant today. This chapter will analyse the specific extraterritorial elements of each Act and then evaluate the lack of jurisdictional justification for their assertion. An international relations perspective is necessary to consider the dangers of unilateral sanctions. Disturbance in economic trade internationally will be highlighted by the potential violation of international trade agreements. The violations of these agreements represent another area of international law that is challenged by these extraterritorial acts. They may also lead to indeterminacy in the international legal order and result in problematic conflict between two laws when states develop blocking statutes to prohibit compliance with an extraterritorial measure.

**Extraterritorial Sanctions: Definition and Development**

> *"International security, once defined and preserved by military might, had suddenly been threatened by the uncertain availability of critical economic resources...Nations seemed in a position to struggle for dominance over one another by offering or refusing access to increasingly scarce primary resources".*[16]

Although economic sanctions supposedly date back to the fifth century BC when Athens imposed trade sanctions against Megara, a Spartan ally, which was a

[16] Paarlberg, R. *Food, Oil and Coercive Resource Power in International Security*. .3 No.2 (Fall 1978), p3, As quoted in Daoudi, M. and Dajani, M. *Economic Sanctions: Ideals and Experience.* (Routledge and Kegan Paul, 1983).

contributing factor in the prelude to the Peloponnesian war[17], it has only really been over the last century that they have been used with the greatest frequency. According to America's own statistics from the US President's Export Council over half of the sanctions applied for 'foreign policy concerns' have occurred in the last five years.[18] Although Senator Helms one of the sponsors of the Helms-Burton Act would disagree with this figure, citing only five new sanctions between 1993 and 1996.[19]

Boycotts[20] have generally been divided into two different types by analysts and theorists; these are primary and secondary boycotts. A primary boycott exists when a state or a combination of states makes a policy, law or resolution to block trade, investment and other business activities with a target state. A secondary boycott is when a state, having its own policy of boycotting a target state will force a choice on third state businesses to either halt or alter practices with the

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[17]Fagan, D. 'Boycott or Bust Time for US Once Again.' *The Globe and Mail.* 12 August 1996. Also mentioned in Hufbauer, G. et al. *Economic Sanctions Reconsidered* (Institute for International Economics, 2nd ed. 1990) p4.

[18] Eizenstat, S. Testimony before the House International Relations Committee. Washington DC, 3 June 1998. Figures do not include the sanctions applied at the state or local level in the US.

[19] Helms, J. 'What Sanctions Epidemic? U.S. Business' Curious Crusade.' (January/February 1999) *Foreign Affairs.* p3-4. Helms subdivided different measures into categories, such as barring aid and military assistance, reducing the total amount of actual sanctions.

[20] The terms boycott and sanctions are used interchangeably by economic theorists but there is a discernible difference; boycott: "*Organised refusal to deal with a person or body.*"
Sanction: "*Measure adopted by nations to coerce into acceptable course of action a state offending against international law.*" Curzon, L. *Dictionary of Law.* (Pitman Publishing, 1994.) Daoudi, M. and Dajoni, M. *Economic Sanctions.* (Routledge and Keegan Paul, 1983) p4-10.
Sanctions are usually punitive actions (coercion) to change policy of target, caution should be taken when using the terms 'primary or secondary boycotts', as it is not necessarily the most accurate term, however, for the purposes of this discussion they will be interchanged in accordance

target state or face punitive measures from the state having the policy of boycotting originally. This can be an extraterritorial measure. The Helms-Burton Act is slightly different from a standard secondary boycott as it does not prohibit the trade of goods with other countries.

One of the most documented cases of a secondary boycott was the Arab League's attempt to isolate Israel. Challenging the right to a Jewish homeland and its membership in the United Nations, the Arab League established a boycott office in Damascus to monitor the *"total ban on all Arab dealings with Israel of a commercial and personal nature"*.[21] However, the secondary boycott arose when trade with Arab nations by foreign firms became conditional on the firms severing their links with Israel, that is submitting to the boycott themselves. England, France, Canada and the US, among others, opposed this move by the Arab League as several of their corporations were banned from doing business within Arab Nations. Significantly, the Export Administration Amendment Act 1977 in the US provided the President with the powers to prohibit any American individual or company from having to comply with the dictates of the Arab League, a *"boycott fostered or imposed by a foreign states against a country which is friendly to the US"*.[22]

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with previous writings.

[21] Doxey, M. *Economic Sanctions and International Enforcement.* (Macmillan Press Ltd., 2nd ed., 1989), p20-23.

[22]Comments by D. Small, a State Department official to the panel on 'Policy Conflicts in Foreign Trade and Investment'. *American Society of International Law*, 72nd annual meeting, proceedings, April, 1978, p83, and see Doxey, M. *Economic Sanctions and International Enforcement.* (Macmillan Press Ltd., 2nd ed.,1989), p22.

The 1979 peace treaty between Israel and Egypt led to the end of these sanctions, which had caused economic hardships for Israel and repercussions with other foreign firms, as trade isolation had caused meant a disruption in planned investment and thus an alteration in the natural flow of trade markets. From the analyst's point of view this sanction might have been determined as reasonably successful. However, it was inconsistent with the elements of trade and international law, in that third party states that wished to trade with both Israel and the Arab League were targets of the sanctions.

This cannot be said of the secondary boycott applied by the US as a result of the USSR's influence in the imposition of martial law in Poland 1981-1982. Under President Reagan the US extended sanctions beyond the targets of the above named countries to foreign companies, and specifically refusing US licences for the production of equipment.[23] This could potentially have hurt many Western European Countries involved in the lucrative Yamal Pipeline deal which was an attempt to arrange independent non-Arab sources of energy. International reaction was strong, citing the unacceptable extraterritorial extension of US sanctions that violate a foreign nation's sovereignty. Italy France and West Germany all disregarded the US threat and directed their companies to fulfil all contracts and agreements. EC and NATO officials were sceptical about conforming to the sanction guidelines and as a result there was little international assistance and only minor compliance. The lifting of the sanctions took place in November 1982 when President Reagan attempted to hide their failure by announcing a new agreement with Western European countries. The agreement concerned the refusal of any

trade contract in which materials or products could be used for military purposes in the USSR.

In retrospect the successfulness of the sanction did not result in any of the goals the US had set as the rationale for their imposition, either in the politics of Poland or the stopping of the Soviet project itself.[24] Trade analyst Gary Hufbauer concluded the cost of the sanctions to the US was large while the economic health and political stability of the target (the USSR) remained strong. *"It is not too harsh to characterise the pipeline controls as perhaps the least effective and most costly controls in US history".*[25]

**The Helms-Burton and The Iran and Libya Sanctions Act**

Prior to 1996, and pursuant to the Trading with the Enemy Act, the Cuban Asset Control Regulations were meant to restrict US trade with Cuba. The problem is its applicability to Canadian companies that are subsidiaries of US companies.[26] In 1992, the Mack Amendment was passed, which became the Cuban Democracy Act prohibiting licences to US related firms in foreign countries. This Act brought

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[23] *The Washington Post*, 18 June, 1982 and supra note 17, Hufbauer.

[24] Estimates in lost business contracts for the US range from $800 million to 2.2 billion (US dollars), while the State Department estimated a loss of $122 million (US dollars), in exports due to the ban on US exports to the USSR, ibid Hufbaur p216.

[25] supra note 17, Hufbauer, p214.

[26]The CACRS are administered by the Treasury's Office Department of Foreign Asset Controls. Prohibited activity under the CACRS include: (1) prohibitions against the export of products, technology, and services from the United States to Cuba; (2) prohibitions against the import of goods or services of Cuban origin; (3) a total freeze on Cuban assets in the United States or in the possession or control of U.S. persons; and (4) a ban on travel by U.S. nationals to Cuba.

international criticism to the US for interfering with the trading of companies in other countries, as a disturbance to international law. Yet extraterritorial application of US domestic law with the intention of economically isolating Cuba had only just begun.

The Helms-Burton Act[27] was originally viewed by the Democratic White House as a potentially damaging law for global US interests[28] until two planes from the Brothers to the Rescue[29] organisation were shot down by the Cuban Air Force[30] on February 24th 1996. This had led to President Clinton taking a harsher view of the US embargo of Cuba, in place since the 1959 revolution, and he signed the Helms-Burton Act into law on March 12th 1996. Generally, the motivation for the change in the Clinton White House's support for the Republican sponsored bill has been generally accepted by political commentators as a move to "*placate the Cuban-American voters of Florida and New Jersey*".[31]

The purpose of the Helms-Burton Act was to isolate Cuba by applying economic sanctions beyond the thirty-eight-year-old blockade. Overall, it attempts to reduce

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[27] supra note 2. Pub. L. No. 104-114, 110 Stat.785 ( 12 March 1996 )

[28]Lowenfeld, A. 'The Cuban Liberty and Democratic and Solidarity (Libertad) Act.' (1996) 90 *The American Journal of International Law*. p419-434.

[29]Cuban - American organisation consisting of and supported by Cubans fleeing Castro's regime. Founded by Jose Basolto, the purpose of the flights is to drop anti Castro leaflets and generally annoy the Government. Reports have circulated emanating from Eloy Gutlerrez Menoyo that Brothers to the Rescue were antagonising the Cuban defence aircraft in the hope that a confrontation would occur galvanising international condemnation of the Cuban Government. Nicoll, R. 'Flights that Fuel Cuba's Flames.' *The Observer*. 3 March 1996, p21.

[30] Four pilots were killed over the Straits of Florida

[31] *The Economist*, 20 July 1996, p18. Florida is a key electoral State in the Presidential Elections, a

foreign trade and investment in Cuba and to deny the positive effects of any influx of foreign currency ultimately undermining the stability of Castro's control over his people. This tactic has been questioned, even by the US State Department, as a misguided vindictive technique to intimidate foreign investors who have made numerous investments in Cuba, investments that were previously dominated by US companies, prior to the revolution.

The Helms-Burton Act is specific in its attempt to prescribe democracy from a US standpoint. Title II states that Cuba must have a "*transitional government*"[32] that meets fairly strict criteria before any significant changes to the Act can be made. This would include approval by the Congress and the President because of its codification. Section 206(6) explicitly names Fidel and Raul Castro as unacceptable members of any new US approved government.

The Act also opposes Cuban membership of international financial institutions, such as the International Monetary Fund and the World Bank[33] in order to further economic isolation. Most importantly, in Title III the Act allows those who have certified claims in expropriated property filed with the US Foreign Claims Settlement Commission[34] to have rights of action in US courts in order to gain compensation from either entities of the Cuban government or foreign individuals and/or companies that engage in transactions involving these properties. If the

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State which Bill Clinton lost during the elections in 1992 to George Bush (Senior).

[32] Helms-Burton Act. Title II section 205.

[33] ibid Title I section 104 (b)(c).

[34] The FCSC was established prior to the Helms-Burton Act and operates a certification program for claims of confiscated property.

offender continues to "traffic" in these expropriated properties after notification of a claim filed in the US, he or she may become liable for punitive compensation at treble the market value of the property.[35] This is the essence of an economic sanction that is applied extraterritorially, the punishment of companies and citizens of third party states if they trade with a target state. Significantly, the US once referred to this type of sanction as an unacceptable breach of international law when targeted by the Arab league for trading with Israel in the mid 1970's.

Since its passage President Clinton, and now President Bush, have suspended the effective date of Title III of the Act in order to lessen the grievances of the US trading partners,[36] but there is no power to suspend the use of Title IV. This Title prohibits company directors, major shareholders and CEOs along with their spouses and minor children from entering the US if they continue to deal with expropriated property after notification by the Secretary of State.[37] The US State Department has established a task force to constantly monitor any current or new investments by non-Cuban individuals in Cuba who may qualify for visa refusals.[38]

The change of policy direction by the US Administration has also altered the

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[35] Helms-Burton Act. Title III section 302 (3)(c).

[36] Fact Sheet on the President's Decision. Washington File. 17 July 1996. US Embassy in London.

[37] Helms-Burton. Title IV section 401.

[38] Top executives of the Canadian Sherritt Corporation and their families were the first to be barred from entering the US, followed by six Grupo Domos executives. Cray D. 'Canada Bill denies Recognition to the Helms-Burton Act.' *Salt Lake Tribune*. 17 September 1996. Associated Press. 'Mexico Defends Business in Cuba.' *The Globe and Mail*. 22 August 1996. McKenna, B. 'Bush to Continue Waiver on Cuba Law.' *The Globe and Mail*, 17 July 2001.

marriage of foreign policy and domestic law. Since the Cuban revolution, previous administrations have gone through periods of either tightening or relaxing the specifics of the embargo with a certain amount of technical ease. However, Helms-Burton has made foreign policy on Cuba the law of the land. This Act is not simply a Presidential directive, but a codification of the embargo. Any significant changes would not only have to be approved by Congress but would be dependent on the requirement of a transitional government specifically outlined in section 205 of the Act.

A further change in policy direction is also apparent in another piece of US legislation, the ILSA 1996.[39] The Act is a result of anti-terrorism concern in the US with politicians reacting to this national sentiment fashioning the legislation to gain maximum electoral advantage.

Flanked by the relatives who lost loved ones on Pan-Am flight 103 and the TWA flight 800, President Clinton announced that "*Iran and Libya are two of the most dangerous sponsors of terrorism in the World*", and asserted the "*right of the US to take economic and military measures against any state it believes sponsors terrorists*".[40] Here was yet another example of US legislation affecting the rights of a third party by imposing economic sanctions with extraterritorial measures established as a very large part of the bill itself.

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[39] Although this Act will not constitute a major part of this discussion it is important to include it in the overall analysis in order to display the current trend in legislation. Public Law No.104-172, H.R. 3107. It was signed by President Clinton. 5 August 1996.

[40] Walker, M. et al. 'Clinton Casts Aside EU Anger to Enact Anti-Terror Laws.' *The Guardian.* August 1996.

US frustration with the lack of multilateral action against these countries led to the signing of this Act. The initial aim of the legislation was to sanction foreign companies that trade with Iran and Libya limiting the revenues from the foreign investments that might be used to finance terrorism or weapons of mass destruction in both countries. Another part of the reason to sanction Libya was to force them to no longer shelter the alleged bombers of the Pam Am flight 103, The US specifically wanted to; *"seek full compliance by Libya with its obligations under Resolution 731,748 and 883 of the United Nations Security Council".*[41]

The legislation is structured in such a way that the President has the ability to chose to impose two or more of the listed sanctions if an individual or company has invested $40,000,000 US, or more[42] that *"directly and significantly contribute to the enhancement of Iran's ability to develop petroleum resources".*[43] Prohibited transactions with respect to Libya include investments in its petroleum industry, aviation capabilities and chemical, biological and nuclear weapons capabilities.

Sanctions that are available to the President consist of: denial of export-import bank assistance, denial of export licences for exports by the violating company,

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[41] Security Council Resolution 731 (1992) of 21 January, 748 (1992) of 31 March, and 883 (1993) of 11 November and 1192 (1998) of 27 August. Press Release SC/6566 1998, also see Fact-sheet: The Iran and Libya Sanctions Act 1996. Washington File. 7 August 1996.

[42] 40 Million US or any combination of investments of at least 10 million US each that exceeds 40 million US. supra note 2 section 5. The ILSA Extension Act was passed in 2001 reducing the size of the required investment to $20,000,000 for Libya. This sanction was removed from Libya in 2004. supra note 6.

[43] Iran and Libya Sanctions Act 1996. Section 5 (f)

prohibition on loans or credits from the US financial institutions of over ten million dollars (US) in any twelve month period prohibition on designation as a primary dealer for US government debt instruments, prohibition on serving as an agent of the United States or as a repository for US government funds, denial of government procurement opportunities (consistent with the World Trade Organisation's obligations), and finally a ban on all or some imports of the violating company.[44]

Notably the President has considerable discretion in the administration of the Act. Initially, the President is the one who determines whether a company has 'knowingly' violated the Act. He can waive sanctions that potentially violate international trade obligations; he can also terminate sanctions if 'triggering activities' have stopped. Discretion is also allowed in the removal of any nationals from the Act's provisions, for example, if the country has "*agreed to undertake substantial measures, including economic sanctions that will inhibit Iran's efforts,*" toward terrorism and weapons development.[45]

The ILSA's secondary boycott exists in the option of sanctions open to the President to apply to foreign companies who must meet an investment limit of 40 million (US dollars) annually in either target nation. Similar to the sanctions in the situation between the US and the USSR, the possible denial of export licences is one of several sanctions that are aimed at a third party in order to coerce

[44] Iran and Libya Sanctions Act 1996. Section 6 (1)-(6). Fact-sheet, Washington File August 7 1996.

[45] Iran and Libya Sanctions Act 1996 Sections 5(f), 5(a)(1), 4(c) 1,8(a) 1 respectively.

compliance with the sender nation against the target.

There was a general expectation that there might be a possibility of amending this boycott since Libya's negotiated hand-over of the two suspects in the bombing of Pam Am flight 103 in March 1999, however, a press release on 3rd January 2000 from President Clinton outlined the continued declaration of a 'national emergency' between the two countries that has existed since 1986. This declaration rationalises the maintenance of this Act. The UN Security Council's suspension of certain UN sanctions[46] against Libya had left the US in the familiar position of imposing a unilateral sanction, which were not terminated against Libya until April 2003.[47]

As there is no wish to promote terrorism on the international stage, most countries that are potential victims of the ILSA supported the UN Security Council Resolutions against Libya mentioned earlier. Libya and Iran still remain on the list of countries that sponsor terrorism.[48] However, the point must be stressed that a political crowd-pleasing gesture, such as the signing of this legislation, does little to protect against terrorism. Also, these laws do little to support the necessary compilation of evidence and due process of law that would need to occur in order

[46]UN Press Release SC/6662, Report of the Secretary-General on Arrival in the Netherlands of The two suspects charged with Pan Am Flight 103 Bombings, suspending Security Councils Resolutions 748 and 883, 5 April 1999. Also see the Statement by the President of the Security Council recalling Resolutions 731, 748, 883 and 1192, 8 April 1999.

[47] supra note 6. UN SC Resolution 1506 Sept 12 2003, lifted all sanctions against Libya.

[48]US Department of State list from 30 April 2001 still lists Libya even after the Presidential Determination No. 2004-30, removing Libya from ILSA. 23 April 2004. The list includes Iran,

to secure convictions for terrorist activity.

At first glance it may appear that there are few similarities between Helms-Burton and ILSA, however both push US extraterritorial authority farther than previously apparent. The thought that this authority rests with the US determination as a 'World Leader' in economic policing is a matter for concern. Promoting democracy may be an altruistic goal but imposing foreign policy on other countries and citizens, and their companies at the threat of litigation and exclusion, (Helms-Burton) or imposing trade penalties on those who do not agree with such tactics, (ILSA), amounts to a violation of fundamental principles of international customary law, such as sovereign equality of states, and freedom of trade and enterprise, both fundamental cornerstones in the ideal of democracy.

**The Dangers of Unilateral Sanctions**

According to the definition of sanctions, their use enables the punishment of individuals or nations who do not subscribe to accepted norms or rules of behaviour. The use of this type of implement to coerce the foreign policy goals of other nations is different from punitive action against the unlawful. These coercive motivations, among others, may affect co-operation and assistance.

Successful multilateral sanctions have been well documented since the end of World War II. International support for sanctions against South Africa was

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Libya, Cuba, North Korea, Syria, Sudan and Iraq. See US State Department website www.state.gov.

extensive with most nations outwardly opposed that government's policy of apartheid. After several countries had imposed their own sanction against the South African government, the UN passed a French backed resolution. This included bans on new investment, limitation of certain exports, demand for the lifting of the state of emergency that existed at the time and the release of all political prisoners, including Nelson Mandela.[49] The economic isolation of the target did contribute to slow political changes that factored into the abolition of, not only apartheid, but also dominant, minority white rule of the government. When this case is compared to the sanction dispute between the US and the USSR (regarding the pipeline), it is dramatic that the initiator country of a specific sanction stands a much greater chance of effecting policy changes when significant support by other countries joining the sanctions is present.

It is one thing to coerce a target through sanctions to alter behaviour: it is quite another to use these laws as a threat to other third party countries, disregarding the issue of an independent state's sovereignty, in order to force multilateral agreement on the sanction.

This is the danger of unilateral sanctions. They may lead to further extraterritorial measures and increased hostilities among nations, which can be reflected in the lack of adherence to trade agreements, mutual understanding and respect for international law. The UN Charter prohibits the use of force and in article 2(4), this is commonly regarded as military interventions; however, the Charter specifies that states, "*refrain in their international relations from the threat or use*

[49] supra note 17, Hufbauer p223.

*of force against the territorial integrity or political independence of any state*".[50] The purpose of this article of the Charter is to ensure the sovereign equality of states even on an economic basis realising that economic freedom of choice is a necessity for any state.

Multilateral agreements are often difficult to attain and most countries would like to see a more positive approach to supporting the movements toward democracy in Cuba. Indeed they trade and invest in a country devastated from its lack of former Soviet assistance, and find the Cuban Government anxious to encourage enterprise with a developing tourist trade and rich natural resources.

Regarding Iran, the US should reconsider the ILSA based on the assumption of terrorist links. Any link between Iranian citizens or residents and terrorist activities, is factually questionable. Protection against terrorism can be functionally realistic by increasing security controls and awareness. It is doubtful that the ILSA will have any significant long-term impact on the overall fight against terrorism. Also, it could be argued that the hand over of the two suspects in the bombing of Pan Am fight 103 over Lockerbie Scotland was a result of significant multilateral UN sanctions.[51]

It is important for US policy makers to understand that there are a variety of reasons why the international community has not responded to their pleas for support. Not all reluctance is based on the protectionist attitude of a particular

[50] UN Charter Article 2, para.4.

[51] Relevant UN SC Resolutions include 731 (1992), 748 (1992) and 883 (1993). supra note 46.

nation's trade. Economics usually plays a part but is not a fundamental determinant in the lack of the support for sanctions that, in Cuba's case, will almost certainly lead to further political polarisation.

**Lack of Jurisdictional Basis in International Law for Extraterritorial Economic Sanctions**

Accepted sources of international law include treaties and conventions, international customs and general principles.[52] The clarity of treaty law compared with the source of customary law reflects the lack of rigidity on interpretative jurisdiction. However, there is a practical limitation on states attempting to exercise jurisdiction over matters in which that state has no "*substantial interest or connection*".[53] The individual state's interpretation of this phrase has led to varied contentions on their right to exercise jurisdiction beyond their border and peoples. The question of which national laws can be applied to the international stage has to be analysed through the recognised principles that form the basis for rights of jurisdiction of states.

By enacting the Helms-Burton and ILSA Acts, the US has been accused of using extraterritorial measures to control the right of free trade between independent nations, thus challenging the sovereignty of these nations. This is not necessarily a new avenue for the US, as extraterritorial measures have been applied through its

[52] The Statute of the International Court of Justice, Article 38(1).

[53] *R* v *Libman* [1985] 2 S.C.R. 178, 21.

antitrust laws in the past,[54] although the scope of certain sections of the measures are without precedent.

### *(1) The Territorial Principle*

This principle is based on the acceptance that states have the right to legislate and regulate person or goods within their territory. The two fundamental corollaries of the independence and sovereignty of states are the prima facie jurisdiction over the territory and its residents and the duty of non-intervention by one state over the *"exclusive jurisdiction of other states"*.[55]

The Helms-Burton Act Title III provides for liability for nationals outside its territory, that is third party nationals, who are deemed to have "trafficked in confiscated property". The ILSA attributes liability to third party nationals who invest or trade with Libya and Iran to a certain level specified by the Act. Thus, the US violates the territorial principle of international law by applying these laws for which it lacks jurisdiction. Nevertheless, the subjective territorial principle permits jurisdiction by states over individuals who have committed offences that commenced within their territory but were later completed in the territory of another state.

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[54]Leigh, M. 'The Long Arm of Uncle Sam – US Controls as Applied to Foreign Persons and Transactions.' In Olmstead, C.J. (ed.) *Extraterritorial Applications of Laws and Responses Thereto*. (ESC Publishing Ltd., 1984) p47.

[55] Brownlie, I. *Principles of Public International Law*. (Oxford University Press, 6th ed., 2003) p287, and see Stewart, A.D. 'New World Ordered: The Asserted Extraterritorial Jurisdiction of

Subjective territoriality does not provide any basis for the US jurisdiction in these two extraterritorial Acts because trade agreements, investments and business arrangements have been made outside its territory or in Cuba, Libya or Iran. Some arguments may be made for subsidiaries of multi-national corporations that have operations in the United States falling under this principle if the initial dealing was instigated inside the boundaries of the US. However, it is difficult to believe that such a scenario could occur due to the present US law that bans all US businesses from activities in Cuba, even those which are non-profit oriented.

The objective territorial principle prescribes jurisdiction to states when an offence is commenced in another state, which results in *"producing gravely harmful consequences to the social or economic order inside their territory"*.[56] The common example of this principle supposes an individual of one state shooting across the border and killing the national of another, thus causing a gravely harmful consequence to that state without commencing or completing the act while in its territory.

The US position may base jurisdiction on this principle if it were to convince the international community that property loss due to a revolution and subsequent governmental nationalisation, as in the case of Cuba, qualified as a gravely harmful consequence. Knowing that this is highly unlikely, the other potential contention of the US may lie in the terrorist actions of Iranian nationals causing property damage and loss of life. However, even this is not the basis of the articles

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the Cuban Democracy Act of 1992.' (1992-93) 53 *Louisiana Law Review*. p1393.

[56] Shearer, I. *Starke's International Law*, (Butterworths 11th ed. 1994), p187.

of the ILSA itself. It does not target terrorists, assuming evidence and due process allowed the assurance of a conviction; the Act is aimed at current and potential trading partners and/or foreign investors. The causal link that these trading partners are, in some fashion, financing or silently promoting, conspiring or aiding the effects of terrorism in the US is in fact a tremendous assumption or leap of faith. Therefore without fulfilling a real or substantial link it does not provide any basis for jurisdiction. This remains true when reflecting on the US legal opinions of the past. The Restatement (Third) of the Foreign Relations Law of the US requires at least one element of an offence must occur within a state that relies on it for jurisdiction.[57]

***(2) The Effects Doctrine***

This doctrine has been utilised as a US claim to jurisdiction during controversy over its antitrust laws mentioned previously. It extends the objective territorial principle by allowing a state a basis of jurisdiction if the action committed by a national of another state, in another state has "*effects in the primary state*".[58] The action or conduct in question should have 'foreseeable and substantial effects,' in order to constitute reasonable jurisdiction.[59] Shaw argues that 'reasonable' is contingent on the primary states minimising conflicts of overlapping jurisdictions of other states. Since the effects doctrine has been used by the US in a variety of previous antitrust cases, courts should be implementing the reasonable approach

[57] Restatement (Third) of Foreign Relations Law of the United States 1987.(The American Law Institute Publishers, 1987) § 103.

[58] Shaw, M. *International Law*. (Cambridge University Press, 5th ed., 2003) p613.

when determining whether the effects caused outweigh the rights and interests of the other state.[60]

Relating this to the laws in question a strict approach would, at first glance, not permit a claim for jurisdiction on this doctrine. The act of trafficking in confiscated property under Helms-Burton has no present effect on the nationals or state since the so-called confiscation occurred over thirty years ago. If indeed it was interpreted that the loss of compensation was having some effect on US nationals who could prove a claim to previous ownership of said property, it would be an extreme adaptation and, arguably, a corruption of the basic intention of the doctrine. Attributing liability to third party nationals because they legitimately enter into agreements with a country for investment purposes has no effect and needless to say no substantial effect on those whose claims to property have been in limbo for such a long time period. Third party nationals and their corporations have had no discernible impact on individuals, primarily living in Florida who apparently suffered a hardship in 1959-1960.

The same can be said for the ILSA. The nationals of the US have experienced no effects, either direct or indirect, from the countries that trade with Iran, except potential loss of profits due to the US government's prohibition of domestic trade with these countries. In this case, it is clear that countries that assume this trade cannot be held liable for lost investment revenue because of a state's decision to

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[59] supra note 57, § 402,p.239 and §403, p250. See supra note 54, p424.

[60] A balancing test or jurisdictional rule of reason. *Mannington Mills Inc.* v *Congoleum Corporation* 595 F. 2d 1287 (1979), See chapter 6, p233.

limit its own investors.

### *(3) The Passive Personality Principle*

The use of the passive personality principle allows a state to claim jurisdiction over illegal conduct committed abroad against its own nationals. There is some leeway for the argument that the confiscation of a US national's property in Cuba qualifies as an illegal act against the US national. However, the Cuban Government, not investors, committed the act of confiscation thirty-nine years ago. If an interpretation that the principle could extend to third party nationals who traffic in this property arose, it would be inconsistent with the intent of the principle, which is the act was committed against these individuals because of their nationality. This is obviously not the case in either legislation concerned here, if investors in Iran or Cuba do not conduct business with the intent of harming US nationals. "*The overall opinion has been that the passive personality principle is a rather dubious ground upon which to base a claim to jurisdiction under international law and it has been strenuously opposed by the US and Britain although a number of states apply it*".[61]

The lack of clarity of customary international law has led to different interpretations by individual states, however the question of which national laws can be applied on the international stage has to be analysed through the recognised principles that form the basis for state rights of jurisdiction.

**Property Rights and Legitimate Compensation of US Nationals**

The US has been opposing the Cuban nationalisation of property since it occurred, immediately after the revolution when Castro took power. It has been their contention that on the one hand, the US embargo of Cuba is not subject to the analysis of international law because it falls into the catchall section of an issue of US national interests, or security. International law is based on respect for 'the state' and the concept of sovereignty through the protection of self-determination, including property, as long as adequate compensation is offered to foreign owners and investors. The multilateral sanctions against South Africa did not violate international law, although the government policy of apartheid was an obvious and extensive human rights violation. The logic behind the US position in this matter fails to form any convincing, or even tenable legal argument, indeed, with the passage of time the US position on nationalised property has intensified. Whatever the motivation, the question of US national's property rights and the demand for compensation has been contentious for US officials, an example of which is *Sabbatino.*[62] The case was based on the confusion of ownership during Cuba's nationalism decree in 1960. A shipment of sugar had left Cuba at the same time the nationalisation degree had been signed, thus a dispute arose as to whether the cargo belonged to the Cuban National Bank or the individual who was the receiver of the goods representing the predominantly American owned company which had purchased them. The judgment focused on the issue of vested rights, the right of an individual over the private property when the state attempts to

[61] supra note 58, p590.

[62] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964).

'interfere' without adequate compensation. Interference can include assuming the title to the goods or property, as in this instance. Since the company had title it became an elementary conclusion that the vested right lay with them to, not only make any transactions concerning the goods, but also have the right of compensation if the title was removed.[63] Story, remarks that the court *"conceptualised the seizure as a 'takings' question, ignoring and/or summarily dismissing the clear language of the Cuban nationalisation decree that it was expropriating US property interests because of Cuba's fears for its future economic well-being and independence".*[64]

However, this decision was overturned on the basis of state doctrine's supremacy over property rights. Helms-Burton addresses this potential position; *"no court of the United States shall decline, based upon the acts of state doctrine, to make a determination on the merits in an action brought under...".*[65] This section of the Act reflects the Congressional amendment, which extrapolated on this point in 1994,[66] as a result of the Supreme Court's ruling in this case. It concluded that state doctrine could not be used because it could lead to *"(a) frustrating the application of international law and thus hindering its progressive development by U.S. courts; (b) denying litigants their day in court even when they have properly invoked the courts jurisdiction; and (c) frustrating the effective*

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[63] ibid.p7.

[64] Story, A. 'Property in International Law: Need Cuba Compensate US Titleholders for Nationalising Their Property? (1998) 6 3 *The Journal of Political Philosophy*. p328.

[65] Helms-Burton Act section 302(6).

Clagett, B. 'Title III of the Helms-Burton Act is Consistent with International Law.' (1996) 90*The American Journal of International Law*. p439.

[66]22 U.S.C. Section 2370(e)(2) (1994). ibid, p439.

*application of other U.S. laws".*[67] Once again the US judiciary and Congress have taken steps to avoid confronting the issue at hand, by regulating or influencing the US court's ability to rule freely on the conflict between vested rights and state doctrine with regards to the procedure of nationalisation of property. The US position on this question states its interpretation under international law as any taking of US property must be non-discriminatory and for a public purpose which would include the receipt of prompt, adequate and effective compensation as a result of expropriation.[68]

The vested rights of foreigners to property was addressed by the United Nations General Assembly Resolution in 1974[69], where it declared that every state had *"full territorial sovereignty over its land and resources"* and had the undisputed right to do with them whatever they wished. However this still left the problem of compensation to be determined. Story analysing the US response to confiscation of its citizens property in Mexico and Peru, where they disputed the loss of title to the property in the first place and then comparing it with the change in US policy concerning Cuba. Allowing the state's right to take property for public purposes but insisting on compensation, led Story to the conclusion that vested rights, as such is used in a convenient political sense as opposed to a legal definition.[70] Thus it does not have any impact or significance to the property in Cuba and so must be set aside.

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[67] ibid.p440.

[68] US Department of State. Statement on Foreign Investment and Nationalisation of 30 December 1975, p4.

[69] Article 1 of the Charter of Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR. Supp. (no.31) 50, U.N. Doc.A/9631 (1974). p8.

In the judgment of the Inter-American Committee of the Organisation of American States, following the rules of international law applicable to diplomatic protection, state responsibility and minimum rights of aliens regarding the protection of property rights of nationals the OAS found that Cuba has the right to expropriate or nationalise property owned by foreign nationals as long as it is for a public purpose, non-discriminatory and adequate compensation is granted to the party allowing 'effective administration or judicial review of the measures and quantum of compensation.' If Cuba failed to comply with these rules they would entail liability and responsibility. Aware of the absence of compensation to foreign nationals, the committee stated that in accordance with the generally accepted rules of international law, a claim must be made through an official 'state to state' mechanism. *"It is a condition for such espousal that from the time of the occurrence of the injury until the settlement of the claim the holder thereof must without interruption have been a national of the claimant state and not have the nationality of the expropriating state".*[71] Following the committee's judgement, this would exclude former Cuban nationals who held property rights but have since fled to the U.S. and become naturalised U.S. citizens. The committee reiterates that domestic courts of a claimant state are not an appropriate forum to hear or judge what is fundamentally a state-to-state claim.

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[70] supra note 64, p312.

[71] Opinion of the Inter-American Juridical Committee on Resolution AG/Doc.3375/96. "Freedom of Trade and Investment in the Hemisphere", General Secretariat of the OAS. Washington D.C. 20006. August 27 1996. p6.

**Responses to Extraterritorial Economic Sanctions: Blocking Statutes**

The most significant retaliatory measure against extraterritorial economic sanctions proposed by affected states is the adoption or amending of blocking legislation. The genesis of these types of law came as a result of demands for the removal of information and business documents for disclosure purposes in antitrust cases in foreign courts.[72] Since that time, they have evolved to become more of a countermeasure in prohibiting nationals and corporations from the obligation to comply with foreign laws. More recently introducing a provision that allows for recovery of a determined amount of damages paid in a judgement as a result of the ruling in a foreign court. These are the three main functions of modern blocking legislation that is the focus in this discussion relevant to issues brought about by the advent of Helms-Burton.

The Protection of Trading Interests Act 1980, (PTIA)[73] was considered by UK law makers as fresh legal ground as it was the UK's first attempt to provide legal protection to its nationals from 'requirements, prohibitions and judgements' imposed by foreign laws that would affect the trading or other interests of UK individuals.

The Act, specifically aimed at the US and its previous attempts to exercise

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[72] April, S. 'Blocking Statutes as a Response to the Extraterritorial Application of Law.' in Olmsted, G.J. (ed.) *Extraterritorial Application of Laws and Responses Thereto.* (ESC Publishing Ltd., 1984) p225.

[73] Protection of Trading Interests Act 1980, 20 March C.11.

The PTIA extensively updated the 1964 British Shipping Contracts and Commercial Documents

extraterritorial jurisdiction, provided the Secretary of State with the ability to use discretion in the determination of when and if to prohibit compliance with foreign demands for documentation.[74] Another significant section of the Act outlines the ability to make an order for British courts not to enforce judgments from foreign courts that may disturb British trade.[75] The Secretary of State has three conditions, which allow for the making of such an order. There must be:

> *"(i) Measures, or potential measures, by an overseas country for regulating or controlling international trade;*
> *(ii) Potential extraterritorial application of those measures to things done by persons carrying on business in the United Kingdom;*
> *(iii) As a result of such applications, damage, or potential damage, to the trading interests of the United Kingdom".*[76]

The significance of the language of the Act exhibits a determination to protect the sovereignty of economic affairs as well as an opposition to the US violation of international law by its barrage of antitrust laws at that time in 1979-80.

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Act by deleting limitations on carriage of goods of persons by sea.

[74] Sections 1 and 2 of the PTIA Act 1980.

[75] supra note 73 section 5.

[76] supra note 73 § (1)

Finally, the clawback provision,[77] expands on the prohibition of judgments for punitive damages in section 5, giving a right for certain UK individuals or companies to recover the non-compensatory amount that has been satisfied in a foreign court. Even though the clawback only allows for the noncompensatory amount to be recovered, the definition's impact means that the whole of the foreign judgement is probably unenforceable in the UK. "*The effect of this is that even a judgement purely for compensation, but based on a foreign antitrust rule would be unenforceable...*".[78] According to the report of the Select Committee in the Foreign Boycott Bill[79] the Act does not only have relevance to antitrust laws, but also can quite obviously be applied to economic sanctions and boycott regulations.

The Canadian version of such antidote legislation was passed into law in 1985, titled the Foreign Extraterritorial Measures Act (FEMA). Similar to the PTIA 1980 the Canadian Act prohibits or restricts the disclosure of records and documentation of individuals or business to foreign tribunals based on the "*orders of the Attorney General*".[80] Once again discretion is apparent for the Attorney General to formulate an order if; "*a foreign state or foreign tribunal has taken...measures affecting international trade or commerce involving business carried out in whole or part in Canada or that otherwise has infringed or is likely*

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[77] supra note 73 section 6.

[78] Collins, L. 'Blocking and Clawback Statutes: The United Kingdom Approach II.' November (1986) *Journal of Business Law*. p462.

[79] H.L., 1978, paper 265 as cited in Current Law Statutes. Annotated. 1980 Vol. Ch 11.

[80] Foreign Extraterritorial Measures Act, R.S.C., Ch F 29 (1985) section 2.

*to infringe Canadian sovereignty...".*[81]

The order by the Attorney General "*with the concurrence of the Minister of Foreign Affairs*",[82] is not limited to nondisclosure but includes compliance with foreign directions, instructions or other communications and the requirement of "*any person in Canada*"[83] to give notice of such to the Department of External and International Trade. The Act creates substantial liability for persons who do not report the communications of foreign administrations, courts or tribunals. Thus, they may be found guilty of an indictable or summary offence and may receive a fine or imprisonment.[84]

In response to the Helms-Burton Act specifically, the Canadian Government introduced amendments to the FEMA on September 16 1996, allowing a blocking order to prevent judgements under Helms-Burton from being enforced in Canada and clearly outlined the notification procedure and regulations to be followed by persons or business in Canada who invest or trade with Cuba.[85]

The clawback provision, entitled 'Recovery of Damages' extends the previous

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[81] ibid section 5(1).

[82] ibid section 2(1).

[83] ibid section 5(1) a.

[84] ibid. FEMA 1985 section 7(1). Fine of $10,000 Canadian maximum or imprisonment for a term not exceeding five years or to both, or is guilty...on summary conviction and liable to a fine of $5,000 or imprisonment of two years maximum or both.

[85] An order requiring persons in Canada to give notice of communications relating to, and prohibiting such persons from complying with, an extraterritorial measure of the US that adversely affects trade or commerce between Canada and Cuba. (as amended) Department of Justice, Canada. Press release.

section of the Act that reflects enforceability of "*foreign judgements*",[86] to allow for a suit in a Canadian court and potential recovery of "*any amount obtained from that party*" or "*any amount...that is in excess of the amount to which the judgment is deemed to be reduced*".[87]

Recovery can include seizure and sale of shares of any corporation that has a 'direct or indirect beneficial interest' as rendered by the judgment, which operates in Canada whether the shares of that company are located inside Canada or not.[88] Although this provision has never been used in the Canadian judicial system it is a move beyond the UK clawback in its allowing redress to targets of extraterritorial US laws and begs the question raised by US international law theorists, does it simply add a new weapon to the jurisdictional "*arms race*"[89] or successfully act as a defence to such.

Jurisdictional disputes in the past have brought about these legal 'antidotes' and it is fairly transparent that the course of action embarked upon by Mexico and the EU are responses in kind. The Mexican blocking Statute was approved on October 1 1996, and reflects similar elements to the FEMA, fining companies that allow themselves to be sanctioned by Helms-Burton, and fines [90] for any failure to

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[86] Those that are deemed by the Attorney General to infringe Canadian Sovereignty, and affects interests in trade and commerce internationally. FEMA, 1985, section 8.

[87] FEMA section 9(1)a(i) and (1)b(i).

[88] FEMA 1985, section 9(2).

[89] Danaher, as cited in April, S. 'Blocking Statutes as a Response to the Extraterritorial Application of Law.' Olmsted, G.J. (ed.) *Extraterritorial Application of Laws and Responses Thereto.* (ESC Publishing Ltd., 1984) p 233.

[90] Fines include; 100,000 days of minimum wage for submitting to any sanctions, approximately

inform the Mexican Foreign Ministry that they have received warnings through the US law. Although the Mexican legislation specifically mentioned the Helms-Burton Act, it does not restrict itself to this particular case, and may be applied to any foreign country.

The EU's blocking legislation[91] is a Council Regulation that is directly effective in every member state. It specifically prohibits compliance with the extraterritorial measures of the CACR's, the Helms-Burton Act and the ILSA.[92] The regulation defines a broad scope of people to be covered by the prohibition of compliance.[93] It also contains a version of the notorious clawback provision.[94]

The advent of the Mexican and EU instruments reflects the fact that the reaction to the origin of the need of these types of statutes has fallen on deaf ears in Washington. Arguably, without further jurisdictional attempts to force foreign policy compliance on other nations, the US would not be criticising clawback provisions as a "*posture of economic protectionism*".[95]

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$150,000 (US) for providing information to U.S. courts, and approximately $3,000 (US) for failing to inform Foreign Ministry about targeting under sanctions.

Mexican Congress Approves Anti-Helms-Burton Law. Wednesday 2 October 1996. Reuters Limited.

[91] Council Regulation (EC) 2271/96, Art.1. (1996) O.J. L309 (22 Nov.)

[92] ibid. Article 1 and Annex.

[93] ibid. Article 11(1) legal persons incorporated in the EU, (2) national of the EU member states who are residents of the EU, (3) nationals of third-countries that reside in the European Union, (4) All national persons present in the community in a professional capacity.

[94] Mather, I. 'U.S. Shaken by Old Worlds Smoke Signals of Battle.' (October – November 1996) 21 6 *The European*. p6.

[95]Lowenfeld, A. 75 630 'Sovereignty, Jurisdiction and Reasonableness: A Reply to A.V. Lowe.' (1981) 75 *American Journal International Law*. p233.

The hypocrisy of this statement negates its legitimacy as a response to the question posed earlier concerning the escalation of the jurisdictional arms race. To some degree it is impossible to say since they have not been used. The mere existence of blocking statutes does not indicate their effectiveness as a weapon of choice. On the contrary, in the UK and Canada their function has mainly been that of a deterrent used in conjunction with a variety of political responses, in the hope that the US would end extraterritorial application of national laws. From the analyst's point of view there may be an argument for certain clawback provisions having extraterritorial effect. However, the judicious use of the legislation on the whole especially from the respondents side would be politically selective as opposed to wide ranging, active implementation from the US with regard to the two Acts in question. It is true that inadequate redress of an individual country's violation of international law has brought about a fundamental change in the way nations challenge such a violation. Although the blocking statute is rarely used, its significance cannot be understated. The passing and promotion of an act that has extraterritorial effect in its claw-back[96] provision in response to another state's Act that has extraterritorial effect, may seem to negate the fundamental argument against it in the first place. Frustration appears to have left a 'tit for tat' approach to disputes where legal remedies are involved, instead of negotiated or diplomatic resolutions.

[96] Allows an individual of one state to claim for damages in their domestic court that may have been lost in a previous action in another state when enforcing an extraterritorial act, thus constituting an extraterritorial measure as well.

Another notable point concerning blocking legislation is the required reporting element in the Canadian, Mexican and EU statutes. This requirement gives the individual state a certain amount of control on the exact effect the offending law has on its people and companies. It is used as part of a monitoring procedure in Canada, as well as a deterrent aimed at companies who may alter trading patterns as a result of the US laws. Canadian officials have expressed some level of difficulty in its intended effectiveness *"how...would one prove an action constitutes an affinity for the US embargo of Cuba rather than simply a sound business decision".*[97]

The legality of blocking statutes was considered and dismissed by the US District Court in Pennsylvania[98] during the trial of the Canadian Sabzali. He was indicted on several accounts when he was in Canada and covered by the FEMA, which prohibits compliance with an extraterritorial measure. However, the court found that there was no real possibility of punitive measures being applied to the individual under the blocking statute and that Congress had intended the extraterritorial legislation to apply to individuals outside of the US and thus the individual should have been aware of the US sanction and acted accordingly.[99]

Considering that lack of use of blocking statutes and inherent difficulties that arise in this implementation it is not accurate to describe them as a new arsenal in the arms race, rather they are an attempt to show a missile with a faulty firing

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[97]Feschuk, S. 'Ottawa Acts on Helms-Burton.' *The Globe and Mail.* 17 September 1996.

[98] supra note 14.

[99] ibid, p4,5.

mechanism to an opponent whose superior weapons have already been launched.

**Legal Opinion: Organisation of American States**

Cuba was suspended from a Washington based and heavily US funded organisation, the Organisation of American States[100] in 1962. However, in 1975 the organisation opted to remove economic and political sanctions from Cuba, the after effects being the development of cordial relations between the several signatory countries and Cuba. On June 4th 1996, thirty-three out of thirty four members supported a resolution, led by Canada and Mexico, to have a legal panel analyse Helms-Burton under international law.

Pursuant to Articles 10 and 34 of the Charter of the OAS, every American State has the duty to respect the rights of other states under international law and refrain from policies and actions that have serious adverse effects on the development of other member states. Article 98 allows the ten members of the Inter American Juridical Committee to issue an opinion[101], though it does not have any binding affects on member states. The committee divided their legal analysis in two areas, the protection of protected rights of nationals and the extraterritorial effects of jurisdiction. On August 23 1996 the committee unanimously declared that Helms-

[100] The World's oldest regional organisation dating back 1889/1890. The charter entered into force in 1951. Its basic purpose is stated as establishing a free trade area of the America's, promote representative democracy with due respect for the principle of non-intervention, seek the solution of political, juridical and economic problems, effective limitation of conventional weapons so as to devote resources to economic and social development of member states. It currently has 35 member states. The OAS and the Inter-American system.

[101] President of the Committee was an American jurist, Keith Highet.

Burton was 'not in conformity with international law.' Mexico's Foreign Minister Jose Angel Gurria called it a victory for Cuba's trading partners and helpful in potential litigation.[102] Following the purpose established in article 2(e) of its Charter, to seek solutions of "*political, juridical and economic problems that may arise among member states,*" under Article III it reaffirms the respect for sovereignty and independence of states and fulfilment of obligations from treaties and international law, including a variety of sources. Ministers of Foreign Affairs representing the Rio Group[103] stated at the General Assembly that the resolution was a necessity in order to examine Helms-Burton's extraterritorial effects to "*obstruct international trade and investment of other countries*".[104]

**Helms-Burton and International Trade Agreements:**

***(1) Helms-Burton and The North American Free Trade Agreement (NAFTA)***

In early June 1996, Canadian Foreign Affairs Minister, Lloyd Axworthy, stated that Canada would request a ministerial level meeting of the North American Free Trade Agreement (NAFTA) Commission.[105] His intention was to engage the preliminary meeting before any request for a dispute panel could be made.

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[102] Associated Press. 'OAS rules against anti-Cuban Bill.' *The Globe and Mail.* 23 August 1996. The opinion of the committee was obtained directly from the OAS, as a result of a conversation with Dora Terez.

[103] A sub-regional organisation of fourteen Latin American and Caribbean countries.

[104] Resolution: Free Trade and Investment in the Hemisphere. 4 June 1996 No. 103.

[105]Government Announces Measures to Oppose U.S. Helms-Burton Act. 17 June 1996. Department of Foreign Affairs and International Trade. Release no.115.

NAFTA, the agreement that allows a free trade zone between Canada, the United States and Mexico is specifically referred to in section 110 of Helms-Burton under the heading Importation Safeguard against Certain Cuban Products. The section provides that *"...Nothing in NAFTA would operate to override this prohibition."* Thus the legislation contends that NAFTA does not "*alter or modify*" the US sanctions against Cuba. This is an attempt by the US to have a domestic piece of legislation interpret a multilateral treaty. Article 309(3) of NAFTA already acknowledges an exception to ensure that any "*Cuban products or goods made from Cuban materials*" should not be allowed into the US even if the goods flow through Mexico or Canada.

US trade representative Mickey Kantor has defended the legislation as consistent with NAFTA, and objects to any arbitration panel through the dispute mechanism under Chapter 20 of the agreement on the grounds that it does not qualify as a trade dispute but is an issue with US foreign policy concerns.[106]With this argument, Helms-Burton may fit into the exceptions to the treaty under the heading of a *"national security interest"*.

When questioned concerning Helms-Burton's Title IV and its violation of Article 1603 (1) of NAFTA[107], the obligation of the three states to allow business people from other NAFTA states temporary entry into their country, Kantor stated that it fell under the US right to protect its security interests. Specifically, the US

[106]Stevenson, R.W. 'Canada, Backed by Mexico, Protests to U.S. on Cuba Sanctions.' *New York Times*. 14 March 1996.

[107] The Granting of temporary entry for business people.

defence of this apparent violation lies in the reserved right to ban entry of people who have committed crimes of 'moral turpitude' under US laws.[108] It seems curious that senior business people from Canada and Mexico and with the EU, along with their spouses and dependent children qualify as individuals who have committed crimes of 'moral turpitude' simply because the organisation they work for has investments or business dealings with Cuba. Although it has generally been accepted that states are able to have a certain margin of appreciation on what constitutes adequate protection of "national security interests", Article 2102 outlines the exceptions under this category to include "*the traffic of arms, and other activity relating to implements of war.*"

Contradicting criticisms of the controversial Title III of Helms-Burton with other Articles of NAFTA also exist with regard to treatment of individual nations. Under Articles 1103 and 1203, service providers, investors and traders must receive "*no less favourable treatment*" than is provided to those of other countries.[109] Investors, service providers and traders that are seen to violate Article III of the Helms-Burton are liable for prosecution in US Courts. NAFTA goes on to state a requirement of non-discriminatory treatment with regard to the above-mentioned articles.[110] Also notable are Articles 1105 and 1205 where a minimum standard of treatment is defined as "*treatment in accordance with international law, including equitable treatment and full protection and security.*"

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[108] ibid.

[109] NAFTA Articles 1103 and 1203: With respect to the establishment, acquisition, expansion, management, conduct, operation and sale of other disposition of investments.

Undoubtedly the position of the US would be that these Articles do not apply to criminals who traffic in stolen property, but that reasoning lacks fundamental adherence to obligations the US has already committed itself to in the signing of the agreement. It is not up to a signatory state subjectively to interpret the obvious intention of the Articles. The Canadian application for consultations, as the first part of the dispute mechanism, was supported by the Mexican Government. However, bowing to pressure from business leaders and investors to avoid escalation of the already strained trade relations Canadian officials did not launch a challenge in NAFTA.[111]

### *(2) Helms-Burton and Potential Violations of the General Agreements on Tariffs and Trade 1994 and the World Trade Organisation*

The World Trade Organisation (WTO) was established in 1995 and is the successor to the General Agreement on Tariffs and Trade (GATT) [112] signed at the end of the Second World War, as the major entity overseeing international trade. The Uruguay round of negotiations ending in 1994 expanded GATT and set the base for the creation of the WTO. Unlike GATT, which was applied on a provisional basis, the WTO is an international organisation with legal personality whose decisions are legally binding, including the twenty-eight agreements on international trade. Some of its essential functions include resolving the trade disputes of its members and overseeing national trade policies among the

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[110] NAFTA Articles 1104 and 1204.

[111] Feschuk, S. 'Ottawa acts on Helms-Burton. Liberals Unveil Legislation But Plans No Challenge under NAFTA Before U.S. Election.' *The Globe and Mail*. 17 September 1996.

administration and its implementation of trade agreements. GATT has now become one of the 'pillars' of the new overall organisation and potential violations of its Articles will now be explored.[113]

The European Union made a complaint in 1996 concerning the US Helms-Burton Act and requested consultations. In late October of that year, a panel was petitioned, (the next phase in the dispute mechanism) and finally following the rules of dispute resolution a panel was announced on November 20 later that year.[114] The EU alleged that the American legislation is inconsistent with its obligations under GATT in two areas, (1) prohibiting goods of Cuban origin to enter the US and, (2) the refusal of visas to business people who trade with Cuba. These two areas demonstrate the US implementation of trade restrictions and are similar to the obligations in NAFTA outlined earlier.

Article 1, General Most-Favoured-Nation Treatment, outlines the requirement that all members, the US for example, should give no less favourable treatment to business of other states, be they members to the agreement or non-members. While section 2 (c) does not require the elimination of any preferential treatment between the US and Cuba, there is no exception for foreign nation's products or services that would be affected by Title III. In other words, prohibiting trade of a foreign nation with Cuba violates this Article.

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[112] Hereafter referred to as GATT.

[113] Qureshi, A. *The World Trade Organisation, Implementing International Trade Norms.* (Manchester University Press, 1996) p9.

[114] WTO DS38 Complaint brought by EC against the Cuban Liberty and Democratic Solidarity Act (Helms-Burton), 13 May 1996.

The EU contended that the above Article as well as three others are potential violations of GATT by the US law. The first one is Article V, the Freedom of Transit. *"There shall be freedom of transit through the territory of each contracting party"*, (section 2), as long as proper customs and duties are obeyed. GATT allows that any charges, for example changes in duty and or regulations imposed on goods in transit *"shall be reasonable, having regard to the conditions of traffic"*.[115] Similar to NAFTA, the sanctions imposed on third party nations in Title III of Helms-Burton would violate this Article, because they are beyond the limitation of the treaty articles.

Article XI, General Elimination of Quantitative Restrictions, and Article XIII non-discriminatory Administration of Quantitative Restrictions, both deal with the obligation not to prohibit or restrict (other than duties and taxes) the product of any contracting party (even if the destination is another contracting party) unless *"the importation of a like product of all third countries is prohibited or restricted."* This again violates the rights of contracting parties who trade with Cuba.

The American response to the accusations of violating GATT revisits the NAFTA defence of 'national security interests', which again removes it as a trade issue, thus potentially evading the binding authority of the WTO. Under Article XXI, Security Exceptions, the US claims *"nothing in this agreement shall be constructed to prevent any contracting party from taking any action which it*

*considers necessary for the protection of its essential security interests."* However, if the panel is to examine the Article closely that statement is expanded upon in three subsections (i) relating to fissionable materials (ii) relating to traffic in arms and (iii) taken in time of war or other emergency in international relations. These subsections help to define what was the intention of the quoted section and none has any relation to any reasonable defence of Helms-Burton.

Other parts of the Security Exceptions Article relate to the disclosure of potentially confidential information of a state and the prevention of a state from taking action that would violate its obligations under the United Nations Charter. There is no basis upon which any sections of this Article could possibly be used to defend Helms-Burton; there is no questionable material (fissionable, military oriented or otherwise) that the sanctions are aimed towards. The Act was not taken at a time of war; there is no threat of a disclosure of sensitive US materials by trading with Cuba, only sensitive US businesses that have lost profits on investments. This Article is not applicable, thus it makes Helms-Burton once again a trade issue and as such it has violated several articles under GATT.

Moreover, if the WTO panel did find an occasion where the security interest defence could be used it would set a dangerous precedent for other nations to enact projectionist extraterritorial laws that affect trade without repercussions.

The generally accepted principles of treaty interpretation are not necessarily clear, but follow a usable pattern. The Vienna Convention stipulates that when

[115] GATT, Article V section 4.

confusion between the parties arises the "*object or purpose of the treaty*" should be referenced.[116] In the case of both NAFTA and GATT it is difficult to rationalise the use of security exceptions with the objective of free trade between the parties of the treaty. The US is not a party to the Vienna Convention but it has been generally recognised as part of customary law.[117] Other principles include The Permanent Court of International Justice's requirement that the interpretation based on the treaty's most appropriate 'effectiveness', for example, what the treaty is intended to do.[118] Furthermore, using the 'reasonableness and consistency' approach, interpreting the reasonable meaning of the words will again be little help to the US' use of security exceptions[119]as a potential violation of the treaty articles since the usual way in which they are detailed are related to acts of war or aggression.

The political side to the dispute can be found in the US' intention to let the WTO know that the US Congress stands firmly behind the belief that it can interpret what 'national security interests' means. If the WTO chooses to interpret the way it is written the Congress may take offence at the apparent invalidation of its legislation and oppose any attempts of an international agency to force American lawmakers to consider the position of other states prior to formulating and passing a bill. With this in mind, US officials plan to pressure the WTO panel investigating the legislation and offer a veiled threat that a negative response

[116] Vienna Convention Article 31 paragraph 2. supra note 54, p436.

[117] Cassese, A. *International Law*. (Oxford University Press, 2nd ed., 2005) p171, and supra note 58, p835.

[118] supra note 116 and 54. p437.

[119] supra note 116 and 54. p436.

would enrage Congress and lead to a further deterioration of trade relations and potential disruption of the WTO authority.[120] The WTO does not have the power to overturn the legislation of the US Congress, but it can authorise affected countries to take counter measures in the form of actions against these restrictions.

**US Agreement with the EU**

The most serious after-effect of Helms-Burton and the ILSA occurred on the 18 May 1998 when the EU and US released a joint statement as a result of a trade summit, Transatlantic Partnership Agreement and Understanding with Respect to the Disciplines for Strengthening of Investment Protection.[121] This accord was originally sparked by the EU's complaint at the WTO against the potential breach of GATT articles by the US.[122] The Agreement followed negotiations covering the EU's concerns about the two examples of extraterritorial legislation Helms-Burton and the ILSA.[123]

The EU suspended the complaint at the WTO in return for the removal of the threat of retaliatory action against foreign firms doing business in Cuba (waiver of

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[120] Cook, P. 'Real Threat of U.S.- Cuba Policy.' *The Globe and Mail*. 21 October, 1996.

[121] Bulletin EU 5-1998 Council conclusions on the EU-USA Summit.

[122] The EU lodged a complaint with the WTO in 1997 and a panel was petitioned, the complaint was based on the prohibition of Cuban goods and the refusals of visas for business people who trade with Cuba. Article 1 Most Favoured Nation Treatment, Article V The Freedom of Transit, Article XI General Elimination of Quantitative Restrictions and Article XIII Non Discriminatory Quantitative restrictions.

[123] See EU statement 1997,
http://europa.eu.int/comm/external_relations/us/extraterritoriality/statement_15_12_97.htm.

Title IV of Helms-Burton),[124]as long as the waiver of Title III remains in effect. The third part of the understanding is that the US shall take no action under the ILSA against any EU company or individual. This is why there have been several waivers granted to EU companies involved in the development of the oil fields in Iran but none for a Canadian company.[125] The EU would in turn prohibit governments from giving financial aid to companies that are deemed to violate the US law.

The overall purpose of this EU statement is to uphold and observe the "*International Law standards*"[126], specifically those that deal with expropriation. This is an interesting development in procedure of how this issue has been commonly dealt with in the past. The custom of solving disputes over expropriated property has been on the state-to-state level, as with the settlement of all US claims with the communist government of China in 1979 for over eighty million dollars.[127] However, Cuba is apparently different, even though Castro's government has already stated it would be receptive to entering into negotiations similar to those claims it has previously settled with the UK and Canada.[128] Besides indirect support for the US precedent on Helms-Burton, the EU could potentially help turn a unilateral sanction into a multilateral one, pushing aside the

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[124] As described in section 11.4 of the Understanding.

[125] In May 1998, a group of companies, TotalFinaElf (France), Gazprom (Russia), and Petronas (Malaysia), who were involved in the South Pars gas field, were granted a waiver under Section 9(c) of ILSA by the United States. 'Global Energy Sanctions' June 2004. http://www.eia.doe.gov/emeu/cabs/sanction.html#iran.

[126] Agreement dated 11May 1979: (1980) 18 I.L.M.551.

[127] ibid, and see Lowe, V. 'US Extraterritorial Jurisdiction.' (1997) 46 2 *International and Comparative Law Quarterly*, p383.

issues of international law that they so fervently raised previously. It would appear that economic interests are superior to any concern for the operation of law and jurisdiction.

The Understanding also raises issues of favourable treatment from a non-EU perspective. If a state was not a clear threat similar to the EU's complaint at the WTO there is less of a need to be placed on required waivers or special agreements. This is a clear representation of the coerciveness of extraterritorial economic sanctions. It is interesting to note that this understanding has commonly been referred to as a positive comity agreement. Comity is generally defined as courtesy and respect of the laws of other nations laws and the equality of states. In reality it is less about the restriction of extraterritorial legislation and more about the power of the EU to gain exceptions for its companies and individuals. The official US response for the waiver of EU and Russian companies under the ILSA was, *"because of the enhanced cooperation achieved between the United States, the EU, and Russia in accomplishing ILSA's primary objective of inhibiting Iran's ability to develop weapons of mass destruction and support of terrorism".*[129]

[128] ibid. p383.

[129] 'Global Energy Sanctions' June 2004. http://www.eia.doe.gov/emeu/cabs/sanction.html#iran. Statement by then Secretary of State Madeliene Albright.

**The Effects of Extraterritorial Economic Sanctions**

A former Director of the US National Security Council, General Brent Scowcroft, stated that *"unilateral sanctions have an unblemished record; they never succeeded"*.[130] This is generally true from any analyst perspective. The effects of ILSA seem to be more devastating to the US than their trading partners. Initial fears of dramatic change in US allies' trade and investment policies have eased. Total SA of France signed a 600 million (US) deal in 1995, to develop Iran's offshore fields replacing Conoco, an American Company, which was forced to give up the agreement by the US administration. Agip of Italy has been involved in a gas pipeline for Libya and Turkey's deal, as of August 12 1996, to burn natural gas from Iran is considered a 'slap in the face to the US'.[131] Many European countries involved in lucrative agreements with Iran protest the American Act and report that it will not factor into considerations on future dealing with these countries. Japan recently signed an agreement in 2004 worth $2 billion (US) to develop the Azadegan oil fields and Russia is currently making bids on Iranian oil blocks.[132] Iran has embarked on a diplomatic campaign to secure plans for natural gas sales to Europe and has had positive responses in possible future investment regardless of its position that it not be ruled by the economic sanctions of another country.[133] Originally there was an economic

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[130]supra note 1. Franssen, H. 'US Sanctions Against Libya.' (2002) XLV, 8 *Middle East Economic Survey.* 25 February.

[131] 'Total War.' *The Economist.* 10 August 1996 p33-34.

[132] 'Global Energy Sanctions' June 2004. http://www.eia.doe.gov/emeu/cabs/sanction.html#iran.

[133] Mohammad Jowad Zarif, Iran's Deputy Foreign Minister, as quoted in Bahree, B. Iran Markets

concern that if investment in these countries were significantly reduced by the fear of ILSA, oil and natural gas supply would diminish, raising the price and negatively affecting the global trade and investment of these commodities.

However, it would appear that the effectiveness of the ILSA has been fairly limited with the Congressional Research Service reporting an estimate of 10.5 billion (US) in foreign investment in oil and gas since the law was enacted.[134] It is paradoxical that the sanction removes the possibility of the US purchasing any of Iran's vast oil reserves during a period of domestic energy crisis. Previous agricultural exports from the US to Iran are now subject to strict licensing requirements, which have hurt the US farming industry. This has also been the reason for calls against Helms-Burton as Cuba imports 320 million (US) in feed grains from Canada and the EU. [135] Thus, the US has allowed the exception for the sale of food and agriculture products to Cuba since 2000,[136]as an administrator of the USDA's Foreign Agriculture Service reported that the Cuban government has purchased $500 million (US) worth of agriculture goods from the US alone. It would appear that another danger of unilateral sanctions is the detrimental economic effect on the US industries as opposed to those of third party states. This allowance was a financial domestic concern for US industries,[137] not a measure to aid or help Cuba. It is interesting that an exception can be made for US

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Natural Gas in Bold Counteroffensive. *The Globe and Mail*. 14 August 1996.

[134] Figures are from 1997 and include countries such as the UK, France, Canada and Japan. USA Engage www.useengage.org/resources/isla_oppose_renewal.

[135] Negotiations between the House and Senate occurred on October 2000 to attempt to finalise legislation that would allow US food and medicine imports to Cuba.

[136] http://havanajournal.com/politics_comments/A2666_0_5_0_M/

[137] supra note 19.

farmers but not a company that sells water purification chemicals to Cuban hospitals.[138]

**Conclusion**

Why do these extraterritorial economic sanctions from 1996 warrant consideration today? Because the future American policy on Cuba and Iran is uncertain at this point, especially since the 2004 Presidential election has resulted in a Republican controlled House of Congress, Senate and White House leaving the possibility of a harsh line on foreign policy regarding these two countries. Most importantly, it is not just a Cuban or Iranian problem; it is a problem for the defence and adherence to the rule of law.

The scale of these sanctions, particularly Helms-Burton, is astounding. The advent of the law has prompted one US trade analyst to question the appropriateness of the measures, "*A secondary boycott is a powerful instrument. But we're shooting mice with an elephant gun*".[139] The UN General Assembly has urged the repeal of 'unilateral extraterritorial laws that impose sanctions' as they have a negative impact on the flow of trade, international law principles and could become a precedent for other countries.[140] The only two countries that voted against the measure were Israel and the US.

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[138] The prosecution of Purolite managers. supra note 14.

[139] supra note 17. Fagan, also mentioned in Hufbauer, p4.

Certain American policy makers would like to believe that economic sanctions are the new 'smart bombs'. No longer is it necessary to use expensive military force to coerce smaller and poorer states to agree with policy goals, trade or lack there of, sanctions are far more persuasive. However, the reality remains that they are not 'smart' sanctions, either for the US or the target state economically. Iran can gain needed imports and development contracts from other sources leaving American industries the loser in this scenario, especially since the ILSA is difficult to enforce. As for Cuba the economic reality of the embargo is far harsher, but the sanctions do not appear to be having an effect on the governmental situation in the country, which was their supposed purpose. Castro has so far outlasted nine US Presidents. It is considered fairly normal for harsh sanctions on a country to cause a rise in nationalism as a result. The major impact is focused on the living standards for the average Cuban. It would appear that the American insistence on the issue of expropriated property is more of an excuse for the sanctions than any legitimate concern, as highlighted by Story.[141] Overall, the sanctions are ineffective from the US point of view, which is why several US industries are calling for their removal or amendment.[142]

Why sidestep trade treaties, and fundamental principles of law, for a politically motivated sanction that is fruitless unless there is a desire to control the movement towards 'free trade' as well as internal politics of states. When the US defends the abuse of international standards and free trade agreements by supposedly holding

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[140]supra note 3. UN Press Release GA/9486. Notably, 67 countries abstained from the vote. 26 October 1998.

[141] supra note 64.

themselves as the nation who puts global concerns ahead of trade agreements, the reaction might lead to suspicion of the US high ethical standard. This is not consistent with their policy on trading with countries who have a worse record on human rights abuses, such as Guatemala, Nicaragua and China, for example or those who may have had links with terrorist groups, namely the IRA in Northern Ireland. Thus the portrayal of the ethical big brother is not accurate or universal. Instead the foreign policy, which enacts these legislative tools, is orientated towards domestic political gratification and selective punitive action.

International awareness and pressure are required to reverse these two laws. The ILSA was renewed in 2001 for five years and Helms-Burton continues. There needs to be a reaffirmation of the basic principles in international law including individual state sovereignty and equality and the freedom to govern without interference as well as an acknowledgement of true 'free trade' in this era of globalisation. International comity among nations should be fully recognised in the representation of the blocking statutes by the third party states affected by these sanctions. Therefore extraterritorial economic sanctions are not legitimate under international customary law or trade agreements. Overall, the use of extraterritorial sanctions have become more than an academic debate of the challenges to international law, but a real problem for all those affected by American foreign policy.

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[142] supra note 1.

The next chapter will focus on the other category of extraterritorial measures, those apparent in criminal law. This will be necessary to complete the comparison and contribute to the discussion on the theory of legitimacy and the normative requirement of extraterritorial measures.

# CHAPTER FOUR

# JURISDICTIONAL ISSUES IN EXTRATERRITORIAL CRIMINAL LAW

## General Introduction

This chapter seeks to explore the practice of the courts when presented with extraterritorial criminal acts, with particular emphasis on UK standards, statutes and precedents. The purpose of this chapter is to use a public law example to compare with extraterritorial economic sanctions in an attempt to illustrate that extending jurisdiction can be legitimised, within reasonable limits, and using a functional test as long as it is in keeping with the fundamental principles of international law. The extension of jurisdiction for prosecution of international or trans-national crime is helpful to the comity and solidarity of the states and has gained general acceptance since the reality of modern crime is no longer, as historically thought, territorially based. The first part of the chapter focuses on the need to move beyond the sometimes incoherent and piecemeal statutory approach to extending jurisdiction within a particular area of conduct. Not only is this approach inhibiting and complex it also ignores a fairly simple common law test that could be used for various modes of conduct and, perhaps most importantly, it reaffirms the positivist view of domestic and international legal principles. Instead of a reflex reaction to increasing extraterritorial jurisdiction by Parliament through statutory examples to combat trans-national crime, a reflection on the normative framework of developing jurisdictional competence is preferable.

The second part of the chapter deals with the generally accepted 'international crimes', acknowledging the extension of jurisdiction through various treaties and conventions and the limited use of customary norms. Again the positivist view of international law dominates the development of jurisdictional competence through these different instruments. While this is helpful, especially in the example of the International Criminal Court, the peremptory norms of international customary law are minimised or ignored in domestic courts and legislatures. Two such illustrations can be found in the significant extension of terrorism legislation in the UK and also in the famous case of *Pinochet 3*[1]. Furthermore peremptory norms do not appear to be a factor in the conduct of certain states, namely the use of Guantanamo Bay by the US for detention of 'illegal combantants'. The premise of this section is similar to the first part; extraterritorial jurisdiction in any form must have a consensual and firm basis in international customary law in order to be legitimate in its assertion of competence.

## PART 1: Trans-national Crime

### Introduction and Homogenisation

Prior to the 20th century the majority of criminal acts would usually be tied to one particular country or territory. It was only with the substantial growth in overseas travel and mass mobility, multinational corporations, and technological advancements in communication that trans-national criminal activities became a common phenomenon. The law has been slow to keep pace with criminals who

[1] *R* v *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3) [1999] 2 WLR 827.

have extended their activities to the international plane, as apparent in statute and common law attempts to combat this problem.

Another aspect inhibiting the frequency of successful prosecutions is the complexity of extradition laws and regulations in certain states, coupled with issues of state sovereignty and the adherence to the double criminality rule.[2] Historically, when jurisdiction is tied to the occurrence of an offence within a territory, it is practically as well as theoretically based on state sovereignty. Practically because prosecutions are constrained by the trial cost, logistical problems with evidence and potential witnesses in other often-distant countries.[3] Bribery, intricate fraud scenarios, sexual tourism, football hooligans, murder, terrorism, piracy, and even genocide are more difficult to bring to trial because of the limitations of the customary principles of jurisdiction interpreted and applied by a state. In the UK particular statutes have extended jurisdiction because of the nature of the subject matter and the probability of some aspect of their occurrence having an international scope, such as the Computer Misuse Act 1990, the Sexual Offences (Conspiracy and Incitement) Act 1996[4] and among sections of other acts[5]. Notably, after Buxton LJ's comments in *R* v *Manning*[6] the enactment of

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[2] Where extradition of an individual is permitted on the condition that the criminal act is deemed to a crime in both states.

[3] See Criminal Justice Act 1988 sub section 23 and 24, the sections permit the admission of documentary hearsay and can potentially have an effect on evidence given from abroad for prosecution in England.

[4] Sections 6 and 7 of the Computer Misuse Act 1990 and section 1and 2 of the Sexual Offences Act 1996.

[5] The Immigration Act 1971, section 25A and 25 B. The Merchant Shipping Act 1995, section 281 and 282, among other sections. Both these statutes contain sections allowing criminal jurisdiction to acts committed by British individuals outside the UK.

Part 1 of the Criminal Justice Act 1993 would have made a trans-national fraud conviction possible but the commencement order did not happen until 1999[7] and even then it was problematic. In short, these examples do not cover the ambit of criminal activities that occur and result in a piecemeal attempt to solve particular problems ignoring the issues of jurisdiction as a whole. Never before has the need for clarity and accuracy of criminal jurisdiction been as crucial in international law.

This ever-increasing global problem is a challenge to the traditional notions of jurisdiction and has lead to the proliferation of what some believe to be the solution, homogenisation between jurisdictions and the expansion in the number of conventions, treaties and statutes. An example of which is the Organisation for Economic Co-operation and Development (hereafter OECD) sponsored Anti-Corruption Convention[8] by making bribery of foreign public officials a criminal offence in each of the 34 signatory countries[9]. "*This Convention seeks to assure a functional equivalence among the measures taken by the parties to sanction*

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[6] [1998] 4 ALL ER 878. The appellant was a marine insurance broker who was charged under the Theft Act 1968, section 20(2) for deception of Greek shipping companies in payments to his business in the east of England, but the court found that the act was outside the jurisdiction of England.

[7] June 1 1999, Commencement No. 10, SI 1999 No.1189. This Order did not include sections 5(3), (4) or (5) which had to be included in Order SI 1999 No. 1499.

[8] The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1998. The Convention was the culmination of a series of written Recommendations of 1994, 1996, and 1997 on the issue. OECD website.
www.oecd.org//subject/MCM/1998/priority.htm.

[9] Originally signed in 1997 and entered into force on the 15 February 1999. Twenty of the thirty-four signatory countries have ratified the convention into domestic law. OECD Anti-Corruption Unit web site, April/00. www.oecd.org//daf/nocorruption.htm.

*bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a party's legal system".*[10] This issue of corruption of public officials, mostly in the third world, by first world companies and multinationals had been the focus of working groups and recommendations at the OECD for some time. *"The Convention was born out of the conviction that bribery of foreign governmental officials in international business transactions is a serious threat to the development and preservation of democratic institutions. Not only does it undermine development but it also distorts international competition by seriously misdirecting resources".*[11]

Its historical origins stem from the US Foreign Corrupt Practices Act 1977.[12] This particular piece of US legislation was born as a result of an internal political scandal, the Watergate affair during the Nixon Presidency. It sparked an investigation into the issue of illegal campaign contributions, which was later widened. The Securities and Exchange Commission[13] found that more than four hundred US companies admitted to involvement in dubious payments to government officials of foreign countries. Payments were made to secure certain business contracts, or to ensure the smooth operation of particular government

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[10]Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions. OECD website. www.oecd.org//daf/nocorruption/20nov2e.htm.

[11]OECD Anti-Corruption Unit, Most Frequently Asked Questions, website. www.oecd.org//daf/nocorruption/faq.htm.

[12]Amended since the ratification of the Convention to the International Anti-Bribery and Fair Competition Act of 1998 15 U.S.C. §§ 78m, 78dd-2, and 78ff.

[13] Securities and Exchange Commission's investigation into US companies' "slush funds" which were used to pay 'public officials' domestically and in Japan, Italy, and Mexico. US Government website, International Anti-bribery Act of 1988, Legislative History. www.usdoj.gov/criminal/fraud/fcpa/leghist.htm.

activities, so-called 'grease payments'.[14] The new Act, (FCPA 1977), restricted US nationals and/or residents and their business concerns[15] from making 'unlawful payments' (directly or indirectly) to any public officials, parties or candidates in order to either cause that person to take an action or refrain from taking an action with relation to business agreements.

Since the time of the implementation of the Act the US administration, with the avid backing of Congress, especially since 1988,[16] has been lobbying trading partners to enact similar legislative controls and reduce the amount of US business losses[17]and the fear of criminal sanctions. The US position on the issue of criminalizing bribery internationally finally found fruit in the OECD's Convention with the belief that bribery unnaturally distorts 'fair trade' and with the US' understandable push for the convention to be formed, it has become a recent example of a criminal offence indictable in each state regardless, to a certain degree, of where the act is committed. The FCPA was amended by the International and Anti-Bribery and Fair Compensation Act 1998 to give US courts more flexibility in establishing jurisdiction. It covers activities of any person, as

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[14] At the time of the investigation the amounts of these payments was in excess of 300 million (US dollars). The Foreign Corrupt Practices Act. 'Anti-Bribery Provisions, a Summary', US Department of Justice and Department of Commerce, US Government website. www.usdoj.gov/criminal/fraud/fcapa/dojdoc.htm

[15] "issuers" and "domestic concerns," namely any corporation, partnership, association, joint stock company, business trust, unincorporated organisation and sole trader which has principle place of business in the US. FCPA § 78DD-1.

[16] In 1988 the Congress directed the Administration to "seek to level the playing field". supra note 10.

long as some element of the crime occurred within the US. This has shifted the traditional emphasis on the 'where' to the conduct itself, the 'what'. However, the question remains whether or not this will become the permanent accepted result.

The Convention provides a broad definition of what constitutes a 'foreign public official' to cover all persons exercising a public function, not just those in a governmental position. It may also include those who work for international relief and aid organisations.[18] It ends the common practice of tax deductibility of bribes or "grease payments" by companies to either obtain, retain or ensure the smooth running of business contracts in a foreign country. *"In the UK, internal government consultations have confirmed that the scope of existing laws allows the UK to meet the requirements of the convention, thus the convention was ratified by a statutory instrument on the 14 December 1998".*[19]

Nevertheless much pressure was placed on the UK government to incorporate the Convention from various sources including the OECD itself. The Anti-Terrorism

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[17] Valuation of US business losses is impossible, however the Commerce Department had received allegations since 1994 of lost contracts due to bribery by foreign firms in approximately 80 billion (US dollars) worth of dollars. ibid.

[18] OECD Convention Article 1 § 4. "Any person holding a legislative, administrative or judicial office of a foreign country...any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."

[19] The Foreign Secretary signed a formal declaration, which qualified as the instrument of ratification. Working paper. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD), Evaluation and Implementation by the UK. www.transparency.org/working-paper/oecd.

Crime and Security Act 2001[20] included acts of bribery of foreign public officials section 108(1): *"For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom."* The effect of statute is limited under section 109, if the individual making the bribe concerned is not a resident of the UK or of the company is not incorporated under the law of the UK, but at least it does extend the common law offence of bribery outside the territory.[21] However motivated the UK government may be to implement the Convention it does not negate the fact that practical enforcement remains vague and criticisms of the lack of a monitoring mechanism are valid. If the World Bank investigates a company that does not mean that there is a greater chance of a successful prosecution in the UK, or even a prohibition on gaining export credits from the ECGD.[22] Only a conviction can lead to refusal of credits as the policy of the government agency stands at the moment. Thirty-six of the seventy-one corporations currently barred from World Bank contracts due to corruption or fraud are British.[23] The overall effectiveness of the legislative restrictions remains to be seen.

Canada passed the Corruption of Foreign Public Officials Act in December 1998.[24] Nevertheless, one of the first challenges to the Act did not reflect much

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[20] Part 12, which came into effect on the 14th February 2002. Specifically sections 108-110.

[21] *R* v *Whitaker* [1914] 3 KB 1283

[22] Export Credit Guarantee Department

[23] Press Release September 1, 2002 World Development Movement.
http://www.wdm.org.uk/presrel/current/wssd_corruption.htm

[24] Bill S-21 Royal Assent 10 December 1998.

adherence to the spirit of the convention. A Canadian engineering company, Acres International, was involved in a multi-million dollar dam project in Lesotho (inside South Africa). Mr Sole the CEO of the development scheme, Lesotho Highlands Water Project, was charged with taking two million dollars (US) from the Canadian company.[25] Acres deny they made the payments and have not been charged. When Lesotho and the South African governments requested, in accordance with the OECD Convention, *"prompt and effective legal assistance...for the purpose of Criminal investigation",*[26] the response from one Foreign Affairs spokesman[27] was that the anti-corruption law had limited applicability outside Canada and would only apply to the bribery of foreign officials inside Canadian territory. In Switzerland, by contrast, the highest court ordered an investigation into the bank accounts of Mr Sole and found that 12 companies had made payments to him and other third parties.[28] The Canadian Foreign Affairs spokesman outlined that the necessity of the act occurring in Canadian territory did not apply to crimes such as war crimes, air piracy and the protection of nuclear material, which obviously were not the facts involved in the incident. These crimes against humanity as a whole are argued to give Canada jurisdiction for prosecution under the universal principle. The spokesman's response reveals the actuality of individual state's political response to the intention of the convention.

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[25] Adams, P. 'Foreign Aid Corruption case Puts Canada on Trial'. *Financial Post*, 20 August 1999.

[26] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. 1998, Art 8.

[27] Sean Rowan. supra note 25.

[28] ibid

The convention commits signatories to interpret 'territorial'[29] jurisdiction in as broad a manner as possible and to establish 'nationality' jurisdiction if this is in accord with their legal systems. The Canadian Government in this case refuted the idea behind the intention of the convention that the 'where' of the occurrence of the act should not necessarily dictate or limit jurisdiction. Overall, these are the two of the more common traditional bases for jurisdiction in international law. Most states may prosecute an offender if the act has occurred inside the state's geographic territory. Canada tends to prefer this jurisdictional ground to the nationality principle often used by the US.[30] An example of the nationality principle is the prosecution of an offender in the state where they are a national even if the act occurred in another state, for example, the UK Sexual Offences (Conspiracy and Incitement) Act 1996,[31] where there is liability for conspiring or inciting the commission of sexual offences outside the UK against those who are deemed children.[32] Also The Sexual Offenders Act 1997, section 7,[33] extends

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[29] OECD Convention Article 4. Interpretation of paragraph 1 of this article adopted by the Negotiating Conference on 21 November 1997 stated, *" Territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required."* And with regards to Nationality principle, Article 4 paragraph 2, the Conference outlined that it should be used as a basis for jurisdiction according to the, *"general principles and conditions in the legal system of each party...such matters such as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different statute."* supra note 8.

[30] A series of prosecutions under the FCPA of US nationals involved with bribery in foreign jurisdictions. See Martin, T. 'Canadian Law on Corruption of Foreign Public Officials'. (June 1999) 10 2 *National Journal of Constitutional Law*. p 190.

[31] Sexual Offences (Conspiracy and Incitement) Act 1996 SI 1996 No. 2262 (C.57). This act was the first that created an offence outside of the territory.

[32]Alldridge, P. 'The Sexual Offences (Conspiracy and Incitement) Act 1996.' 1997 *Criminal Law Review January*. p30.

criminal jurisdiction for sexual acts with children outside of the territory of the UK for its nationals. Both statutes are responses to international pressure to restrict the sexual conduct of UK nationals with children mostly in Asian countries.

The main problem for the OECD Anti-Corruption Convention is symbolic for all areas of international criminal law. The attempt to homogenise laws between states is usually fostered by the political agenda of one state and is dependant on each state's interpretation of the fundamental basis of jurisdiction, the determination of the level and or type of the crime and the interaction between doctrine, domestic statutes and international treaty obligations. Any attempt to solve the confusion must take place on two fronts, the theoretical and the practical.

**The Common law Approach to Trans-national Criminal Acts**

Civil law countries such as France, Germany and Sweden tend to approach crimes committed by their nationals outside of their territory very differently from common law countries through the use of the active personality principle. Due to the difference in evidentiary requirements, rules on hearsay, and other procedural matters civil law states have fewer problems prosecuting their nationals for crimes committed in other countries. There is a certain logic in not extraditing nationals

[33] (1) Subject to subsection (2) below, any act done by a person in a country or territory outside of United Kingdom which (a) constituted an offence under the law in force in that country or

to a state where they may never have been, as in the situation of a conspiracy charge, sitting through unfamiliar proceedings possibly in a foreign language. Previously, UK courts have exercised criminal jurisdiction on a territorial basis, the locus of the crime, either where the offence is commenced or completed referring to the established principles known as 'subjective' or 'objective' theories of territorial jurisdiction. Williams had further defined these as 'initiatory' and 'terminatory' theories,[34] where the potential criminal activity began or where it was concluded, with the UK case law reflecting a preference for the terminatory theory or the 'last constituent element' reflected in a significant body of case law starting with *Ellis* and *Harden*[35] and followed much later by *Manning*.[36] In the first two cases, the court identified what it deemed to be the '*gist and kernel*' or '*gravaman*' of the offence in the determination of the jurisdiction. In *Harden,* cheques were procured from Jersey, and in *Ellis,* goods were obtained on credit fraudulently. Traditionally this basis would greatly limit the number of triable cases in a jurisdiction simply because of the 'last act' requirement. However, Williams argued that the initiatory theory should be adopted, which was reflected in preliminary considerations and proposals for legislative provision by the Law Commission in 1970. *"It should be enacted that where any act or omission or any event constituting an element of an offence occurs in England and Wales, that offence shall be deemed to have been committed in England and Wales even if*

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territory; (b) will constitute a sexual offence to which the section applies if it had been done in England and Wales, or in Northern Ireland.

[34] Williams, G. 'Venue and Ambit of Criminal law.' (1965) 81 276 *Law Quarterly Review*. p518.

[35] *R* v *Ellis* [1899] 1 Q.B. 230, *R* v *Harden* [1963] 1 Q.B. 8. , *R* v *Rush* [1969] 1 W.L.R. 165. All cases involved false pretences.

[36] *R* v *Manning* [1998] 4 ALL ER 878

*other elements of the offence take place outside England and Wales*".[37] This is similar to the New Zealand Crimes Act 1961 section 7.[38] Thus both Williams and the Law Commission believed the terminatory approach to be insufficient in the fight against trans-national crime. However, adopting the initiatory theory was thought to create a multiplicity of jurisdiction and possibly expand or challenge the English common law view that all crime must be territorially linked.

The well-known case of *Treacy* v *Director of Public Prosecutions*[39] allowed Lord Diplock to confirm jurisdiction in England for a charge of blackmail under section 21 of the Theft Act 1968 when the accused had mailed a threatening letter from Isle of Wight to Frankfurt Germany. Three of the Law Lords felt that the offence was not completed until the letter had been received in Germany, nevertheless, Lords Hodson and Guest stated that the offence was complete when the letter was posted and the subsequent communication was immaterial. "*We are willing to assume...that the last constituent element does determine the place where the offence is committed. Where then is the offence of making a demand completed?...The demand is not made when the threatening letter is written,*

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[37] Published Working Paper No. 29 p51. Also reiterated in the Law Com. No.91,1978. Report on the territorial and Extraterritorial Extent of the Criminal Law. para.5, p2. This comment came as a result of considerations of *"where a crime has to have some connection with a territory...how closely connected with that territory proscribed conduct must be before it constitutes an offence in English law"*. The Law Commission noted recent cases at that time that supported this view, *R* v *Markus* [1976] A.C. 35, 61 per Lord Diplock and *R* v *Treacy* [1970] 55Cr AppR113 p564 . *Treacy* v *DPP* [1971] AC 537.

[38] Section 7 *"For the purposes of jurisdiction, where any act or omission forming part of an offence, or any event necessary to the completion of an offence occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission or event."*

*because it may never be sent...But once the letter is posted, the demand is completed, and the offence of blackmail is committed".*[40] Lord Diplock agreed but felt that the court should consider the intention of Parliament in the creation of the Theft Act and deemed that Parliament did not intend to be limited by geographic locations. There is not *"any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the UK physical acts which have had harmful consequences upon victims in England."*[41]

Hirst has interpreted Diplock's comments to be a realist view of the *actus reas* of blackmail itself, as outlined by the Theft Act 1968,[42] where the offence is completed on the making of the monetary demand payment irregardless of the target becoming aware of the demand.[43] Thus jurisdiction should be allowed where the act took place, or where the consequences of that act had effect, which is akin to the 'effects doctrine' as basis for jurisdiction, as we have seen in a multitude of antitrust cases[44] from the US. Far from the previous use and potential abuse of this doctrine to penalise foreign companies for financial repercussions in the US, Lord Diplock's view has the potential to move beyond the terminatory theory, but just how far can it be applied? This doctrine is not mentioned in

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[39] [1971] A.C. 537.

[40] Stephenson, John J. *R* v *Treacy* p543B. Also quoted in *R* v *Manning* p6.

[41] Diplock, Lord. *R* v *Treacy* p562.

[42] Section 21

[43] Hirst, M. *Jurisdiction and the Ambit of the Criminal Law*. (Oxford University Press, 2003) p115.

[44] One of the earliest case examples, *US* v *Aluminium Co of America* 148 F 2nd 416 (1945).

criminal case law in the UK, and the Protection of Trading Interests Act 1980[45] has been a prominent antidote to its attempted application in the past.

Sir Gerald Gordon[46] divided crimes into two categories, conduct crimes and result crimes; 'conduct' crimes are where the behaviour may amount to the offence being committed sometimes even before the contact with the victim, which was the reasoning in *Treacy*, where Lord Diplock stated the offence was completed on mailing the demand. A 'result' crime requires the victim to receive the demand or incur the injury before it can be considered to be completed. The distinction between conduct and result crimes have been noted in several trans-national criminal cases mentioned earlier,[47] however it lacks helpfulness in the analysis of basic jurisdictional problems. Hirst[48] highlights that the House of Lords overturned the Court of Appeal in *R* v *Berry,*[49] due to a difference in statutory interpretation as opposed to a jurisdictional analysis. In this case the appellant was convicted under the Explosive Substances Act 1883 because of his participation in the creation of electrical devices for bombs in the Middle East. The court specified that the offence was a conduct crime with the guilty conduct in the making of the devices.[50] Courts in several cases have chosen to rely on this distinction of criminal action, as opposed to the subjective/objective territorial theories or the initiatory/terminatory approach to asserting jurisdiction without a

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[45] See chapter 3 for further discussion.

[46] *The Criminal Law of Scotland*, 2nd ed. (Scottish Universities Law Institute, 1967.)

[47] See *Secretary of State for Trade* v *Markus* and *DPP* v *Stonehouse* [1978] AC 55.supra note 37.

[48] supra note 43, p120.

[49] [1985] A.C. 246

[50] Section 4 (1) as quoted in Hirst, supra note 43, p119.

sound basis, merely labelling the theories "esoteric".[51] The distinction may be useful as to the identification and classification of what courts do in their analysis of criminal conduct, but it can create a minefield when determining certain modes of complex scenarios that either are attempted, planned and developed in England or are connected to England, unless covered by statute.[52] The practice of the courts has been to support a problematic stance of practicality by using the unhelpful 'conduct and result crimes' labels without considering that change to the view of the principle of territoriality could enable them to be more realistic in future prosecutions.

Lord Diplock was alone in his identification of the offence in *Treacy* as a conduct crime. It is easy to observe the preference in evaluating these offences on a jurisdictional principle analysis for two reasons; it brings England in line with other Commonwealth jurisdictions and it creates a series of case law that is easier to follow in more diverse cases in the future. How courts make decisions on jurisdictional assertions is paramount to the progression of the theoretical analysis of trans-national crime and the clear understanding of jurisdiction.

Proceeding from the terminatory approach, the most obvious choice is the objective territorial principle where a state can claim jurisdiction based on the crime having produced gravely harmful consequences inside the state. In reality, the courts in England have been historically conservative about claiming jurisdiction when an offence is trans-national unless it has been "completed" in

[51] *DPP* v *Stonehouse* [1978] AC 55, 78.

[52] See Sexual Offences Act 1996.

England, however if expanding jurisdictional claims are to become more commonplace they must have a clearly understandable and functional basis relying on a theoretical principle as mentioned earlier. *"It goes without saying that a wide application of the ubiquity and effects doctrines may in fact be tantamount to an extraterritorial application of criminal laws under the guise of the principle of territoriality."*[53] The inevitable dialogue remains, can a state expand jurisdiction for trans-national crimes and avoid assuming extraterritorial jurisdiction?

Expanding the basis for jurisdiction of an offence should not be confused with a fragile link to a territory, in cases where perhaps only one insignificant element of an offence takes place, for example the UK claiming jurisdiction of a US national posting a letter at Heathrow in between flights intending to be aimed at a French national in France. Although a single element should be able to constitute jurisdiction, it must be restrained by a functional test that can be applied regardless of state and level of crime. The substantial connection test provides that a state can establish jurisdiction if it establishes a 'real and substantial link' between the offence and the state regardless of where the *actus reus* is completed.

**Substantial Connection Test**

This test is not new in the common law and certain aspects of international law; it has been commonly used when assessing the enforcements of foreign judgments

[53] Extraterritorial Criminal Jurisdiction, Council of Europe, 1990 p24.

as in the Canadian case of *Beals* v *Saldanha,*[54] where the court upheld the award by a jury in Florida for fraud. The substantial connection test was based on three assessments; that the allegations were new and not subject to prior adjudication, the fact that the foreign procedure was coherent with Canada's concept of 'natural justice,' and the judgment did not go against the public policy in Canada. Here the court referred to *Morguard Investments Ltd.* v *De Savoye.*[55] This decision transformed the view of "*...the common law regarding the recognition and enforcement of foreign judgments is anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century*".[56] The court realised that in a global financially interdependent world, enforcements of foreign judgments should be dependant on the need for 'order and fairness' and comity as a necessity underlying a court's assumption of jurisdiction, plus the existence of a 'real and substantial connection' between the court exercising jurisdiction and either the subject matter of the action or the defendant.

It has also been used to solve the problem of protection for those who are dual nationals.[57] Yet again in private law, such as tort cases, for example where a child suffered from birth defects as a result of the mother taking a medication made from distillers in the UK, which contained thalidomide originating from a German manufacturer.[58] Lord Pearson outlined several theories that the court might follow when determining the *situs* of a tort, one highlighted the substantial connection

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[54] *Beals* v *Saldanha*, 2003 SCC 72.

[55] [1990] 3 S.C.R.1077.

[56] ibid p1078.

[57] *Nottebohm* (*Leichtenstein* v *Guatemala*) ICJ Rep 1955 p4. (second phase judgment).

[58] *Distillers Co. (Biochemicals) Ltd* v *Thomson* [1971] A.C. 458.

test; "*the last event might happen in a particular case to be the determining factor on its own merits, by reason of its inherent importance, but not because it is the last event...the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor*".[59] This was followed by Judge Dickson in *Moran* v *Pyle National (Can) Ltd.*,[60] another case involving personal injury by a product originating outside the jurisdiction. The test was also considered in the preliminary draft of the Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters 1999,[61] which seeks to simplify the rules governing jurisdiction in disputes of commercial matters. Notably, the test was applied by the House of Lords to establish vicarious liability of the sexual abuse of caretakers in *Lister and Others* v *Hesley Hall Ltd.*[62] The House of Lords had adopted the test from the Canadian case of *Bazley* v *Curry.*[63] It has also been utilised in several family law cases where the custody issue crosses jurisdictional lines, although it has not been commonly applied in criminal cases in the UK. [64]

Probably the most relevant case where the substantial connection test was not limited to enforcement of a foreign judgment but used to establish criminal

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[59] ibid p699. Also see a similar test in *Cordova Land Co. Ltd* v *Victor Bros. Inc.*; *Cordova Land Co.* v *Black Diamond SS. Corpn.* [1966] 1 W.L.R. 793.

[60] [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, 1 N.R.122,[1975] 1 S.C.R. 393.

[61] Adopted October 30 1999. Hague Conference on Private International Law. Article 18.

[62] *Lister and Others* v *Hesley Hall Ltd* [2002] 1 AC 215; 1999 WL 808994 (CA)

[63] *Bazley* v *Curry* [1999] 2 SCR 534.

[64] Also see employment law cases where tribunals have used it to allow claims from employees who may not be traditionally connected to UK companies, *Jackson* v *Ghost* ILRL [2003] 824, although the employees did not ordinarily work in Great Britain, still had a sufficient and substantial connection with Great Britain.

jurisdiction (extraterritorial application of the conspiracy provisions of the Criminal Code subsection 465(3)), was the Canadian case of *R* v *Libman.*[65] Murry Libman had been charged with seven counts of fraud and one count of conspiracy to fraud after it was found that he had organised a group of telephone personnel in Canada to contact US residents in order to induce investments in Central America which he would collect there and return to Canada.[66] The jurisdictional dilemma arose when the accused argued that a portion of the activities on which the charges were based occurred outside Canada. Libman relied on *R* v *Brixton Prison Governor, Ex parte Rush*[67] where the 'last constituent element' test was applied in the decision as to whether a crime was committed in England, since the essential element or 'graveman' of the fraud and depravation of the victims occurred outside Canadian territory. The accused's response to the conspiracy charge[68]was to rely on *Board of Trade* v *Owen,*[69] where a conspiracy in England to commit a wrongful act somewhere else would not result in a conviction in England. He also argued that the section of the Criminal Code dealing with the conspiracy charge was restricted to criminal offences within Canada. However, the prosecution submitted that the location of the planning and organisation meant that the offences were *substantially* committed in Canada and relied on another Canadian case which allowed jurisdiction for prosecution because the proceeds

[65] [1985] 2 S.C.R. 178.

[66] Material misrepresentations were made in order to sell shares in Hebilla Mining Corporation and Claravella Corporation who were supposed to be mining gold in Costa Rica. ibid p2.

[67] [1969] 1 ALL E.R. 316. a case involving false pretences.

[68] Criminal Code R.S.C. 1970, c. C-34 s. 423 (1)(d).

[69] [1957] A.C. 602.

where received in Canada.[70] The use of the substantial connection test to link the offence with the territory was imperative to overcome the restriction of the Code, which states that no person *"shall be convicted in Canada for an offence committed outside of Canada"*.[71] Judge La Forest reasoned that since the wording in the Code did not specifically outline the necessity that criminal law would be confined to Canadian territory, the Code was expressing the principle's overall purpose, not its rigid application.[72] The court found that the offences were triable in Canada and granted jurisdiction on the grounds that a significant portion of the offences occurred within the territory.

The second part of the two-stage test developed to evaluate the basis for jurisdiction was the court's analysis of any potential offence of international comity, generally defined as respect of one state's jurisdiction and laws by another. [73] Judge La Forest noted Lord Wilberforce's comment on the evolution of comity in *DPP* v *Doot*[74] as a basis for justification in *Libman*, *"the rules of International comity are not static and I do not believe that in the modern world nations are nearly as sensitive about exclusive jurisdiction over crime as they may have been formerly"*. [75]

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[70] *Re Chapman* (1970), 5 C.C.C.46.

[71] S 5 (2) of the Canadian Criminal Code 1985 as quoted by Judge La Forest in para. 66.

[72] *R* v *Libman* [1985] 2 S.C.R. 178, para.65, 66.

[73] *Treacy* v *DPP* [1971], page 834. And Garner, B. A. *Black's Law Dictionary*, (West Group Publishing, 7th ed, 1999). *"Each sovereign state should refrain from punishing persons for their conduct within the territorial of another sovereign state, where the conduct has had no harmful consequences within the territory which imposes the punishment."* *R* v *Manning* [1998] 4 ALL ER 878, p12.

[74] [1973] AC 807.

[75] Wilberforce, Lord.[1973]A.C. 807.

Comity, *comitas gentium*, itself can be a movable feast according to Brownlie, who identified its four broadest uses,[76] *"(1) as a synonym for international law, (2) as an equivalent to private international law (concept of laws), (3) as a policy basis for, and source of, particular rules of conflict of laws; and (4) as the reason for and source of a rule of international law".*[77] The definition of comity most relevant to the appropriate understanding and application of substantial connection test would be closely aligned with the last of the interpretations, however this is not complete. Oppenheim specifies comity in terms similar to La Forest; *"rules of politeness, convenience and goodwill observed by states in their mutual intercourse without being legally bound by them".*[78] Even though certain theorists have concluded that comity is essentially indefinable, the often quoted 1895 US case of *Hilton* v *Guyot* added to the understanding of the definition of comity in its reference to comity as *"...due regard to both international duty and convenience to the rights of its own citizens or of others who are under the protection of its laws".*[79] In the past, the majority of references and theoretical discussions of comity have been linked to the recognition of foreign judgments, similar to the popular use of the substantial connection test in this area. If comity is to be used appropriately as part of the substantial connection test for evaluating jurisdiction, its parameters must be clarified.

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[76] Brownlie, I. *Principles of Public International Law.* (Oxford University Press, 6th ed., 2003). p28.

[77] ibid

[78] ibid

[79] 159 U.S. 113, 163-164.

Comity as a doctrine must have at its very core two elements; the reinforcement of the sovereign equality of states and adherence to *jus cogens* in international customary law. While the first element may appear to be an obvious part of comity the second is equally important, not only because of the customary origin of comity, but also due to the necessity of its coherence with the normative framework of jurisdiction and inter-state relations. This substantial connection test may be an innovative technique to link crimes back to the territory for courts seeking a functional test, however its potential misuse is grave unless the particular interpretation of comity is in keeping with *jus cogens*.

The evolution of comity has moved beyond the simplistic interpretation of it as practices by states that are solely motivated by courtesy, such as "*saluting the flags of foreign warships at sea*".[80] The mature view of comity as a non-binding rule relies on the approach of reasonableness applied with assessing the jurisdictional assertion. The court must factor into its analysis a reasonable consideration of whether there is anything in the particular principle of jurisdiction to be used that offends respect to another jurisdiction. Similar to the Supreme Court of Canada's analysis in *Beals* v *Saldanha*[81] the foreign judgment could be applied in Canada, as it was consistent with natural justice and public policy of the country. These are normative value considerations and therefore must be linked with *jus cogens*.

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[80] Shaw, M. *International Law*. (Cambridge University Press, 5th ed, 2003) p2.

[81] [2003] SCC 72.

Returning to the first element of the substantial connection test, this part relates to 'real and substantial' link between the offence and state-claiming jurisdiction. Modern evaluation of *Libman* has stressed the fairly limited standard of the Supreme Court when defining the test, *"... all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada".*[82] Confusion may arise over the evaluation of what constitutes a 'significant portion' of the activities of an offence, and whether the test can be used to link an offence to the territory when only one, albeit important, element is present. Brownlie is broader in his specification of when a state can claim jurisdiction over extraterritorial actions by not limiting the connection to significant portion as long as the link is present and substantial.[83] A similarity can be drawn between the substantial connection test and the effects doctrine promoted by the Restatement (Third) of Foreign Relations Laws, reaffirming the US view that jurisdiction can be asserted if the intended effects of the offence are substantial.[84] The one caveat noted by the Restatement (Third) is that there must be reasonableness in the assertion of jurisdiction in order to avoid conflicts with other states. However, this similarity of language cannot be used to justify either the controversial effects doctrine itself or its previous use in antitrust cases. The substantial connection test is a method of linking criminal offences to the territory best able or most willing to proceed with the prosecution and it is representative of the norms of international customary law. Finally, the purpose of the test, along with the doctrine of comity and the application of

[82] [1985] 2 S.C.R. 178 para. 74.

[83] supra note 76, p309

reasonableness generate the inherent legitimacy required for any assertion of jurisdiction of an extraterritorial action.

Theoretical support for such a test has been argued to be a holistic and less technical approach to the problem of extraterritorial crime. Arnell proposes the use of, what he aptly describes as an "*objective methodology... allocating jurisdiction to the state most closely and genuinely connected with the alleged crime*", as part of the proper law approach.[85] Without a doubt the substantial connection test leans toward an objective methodology, but in order to achieve such a standard and for it to be a coherent alternative to the thematic approach preferred by certain states its appropriate application requires the understanding and adherence of comity, reasonableness and *jus cogens*.

**Why Distinguish Jurisdiction on The Level of Offence?**

The extension of jurisdiction by statute was the overall point of the majority of the Court of Appeal in *R v Manning*[86] in the UK in 1998. Manning, the owner of a maritime insurance business in the UK, collected premiums on ships and either failed to place the insurance or placed lesser amounts and was charged with a variety of offences under of the Theft Act 1968. Most of the cheques were issued in Greece on the basis of false cover notes sent to Greece by Manning. The court

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[84] The Restatement (Third) of the Foreign Relations Law of the US. (The American Law Institute Publishers, Washington, 1987) Volume 1, § 402 and § 403.

[85] Arnell, P. 'The Proper Law of the Crime in International Law Revisited.' (2000) 9 1 *Nottingham Law Journal*. p41.

[86] [1998] 4 ALL ER 878.

dealt with two problems of jurisdiction, those for substantive offences and those for charges of conspiracy, assuming that they should be treated differently because of their separation in Part I of the Criminal Justice Act 1993.[87] The judgment upheld substantive charges but quashed the conspiracy charges. *"Our courts have no power to try a charge of entering into a conspiracy in England and Wales to commit a crime abroad.... By contrast our courts do have jurisdiction to try a conspiracy entered into abroad that is intended to result in the commission of a crime in England and Wales".*[88]

Although their analysis of the case law was extensive, in the judgment the substantial connection test was ignored even when *Libman* was discussed in the context of both substantive and inchoate offences qualifying for jurisdiction and being triable. The reason for this can be found in the final page of the judgment where Lord Buxton calls for the defects in the law to be put right by Parliament through the enactment of Part I of the Criminal Justice Act 1993 without delay. Part I of the Act would allow jurisdiction to the courts of England and Wales over cases of international fraud and other property offences that had a connection with this country but which were not necessarily completed here, including conspiracy, attempt and incitement charges. This significant development in the extension of jurisdiction for "conspiracy" charges regardless of where they occur brought about by the Act had already been outlined in two previous cases where

[87] This section came in force after *Manning* on June 1, 1999.

[88] Buxton, LJ, *R* v *Manning* [1998] 4 ALL ER 878 p7, see *R* v *Cox* [1968] 1 WLR, and also *R* v *Atakpu* [1994] QB 69.

jurisdiction had been extended, *DPP* v *Stonehouse*[89] and *Liangsiriprasert* v *United States Government.*[90] In these cases conspiracies abroad to commit fraudulent acts in the UK without any explicit acts having taken place was sufficient to allow jurisdiction for prosecution, however the court did not follow these cases in the decision in *Manning.* Here the court did not agree there was no difference in jurisdiction between conspiracy and obtaining by deception offences.[91] Although they would agreed with the Privy Council in *Harden*, "*...Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England*".[92]

In *Liangsiriprasert* Lord Griffiths relied on the reasoning in *Libman,* "*the English courts have decisively begun to move away from the definition or obsessiveness and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed.*"[93] He felt the courts were examining "*where a substantial measure of the activities constituting a crime take place,*"[94] restricted only by comity and reasonableness if it should be dealt with in another state. The principle in *Liangsiriprasert*[95] outlined that if a substantive offence is punishable under English Law then an inchoate offence can

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[89] [1978] AC 55.

[90] [1991] 1 AC 225.

[91] *R* v *Manning* [1998] 4 ALL ER 878 p19.

[92] ibid, p17. As quoted from *R* v *Harden* 92 Cr App R90.

[93] *R* v *Libman* [1985] 2 S.C.R. 178, para 42.

[94] ibid

be as well, regardless of where it took place. In *Manning,* the distinction between the level of offence with respect to jurisdiction was based on the distinction in the development of the *'line of authority'* for substantive and inchoate offences. Returning to *Harden*, The Privy Council noted the need for the common law to face a new reality when it came to the prosecution of crime on the trans-national scale. This new reality is the essential requirement that conspiracy and attempt charges have the same jurisdictional basis as substantive charges, not only to improve the number of successful prosecutions, but also because the basis of the crime and criminal theory as a whole. The distinction was originally developed due to restrictions on evidentiary requirements and not a fundamental principled analysis. Overall *Manning* was a missed opportunity, spurred on by the court's determination to put pressure on Parliament and the reliance on domestic legislation to answer the problems of jurisdiction in trans-national criminal law.

Striking similarities also exist between the substantial connection test and the process of determining jurisdiction in Part I of the Criminal Justice Act 1993, which requires an offence to have a *"relevant event"*[96] occur in the UK. The conservative nature of the courts and their tendency to hold onto the terminatory approach, may lead to a restrictive interpretation of what constitutes a 'relevant event.' The Law Commission Report recommended that, *"...jurisdiction should be asserted by the courts of this country only if an element to be proved for*

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[95] [1991] 1 AC 225.

[96] Part I s2 (1), pertaining to any Group A offences such as fraud, obtaining a money transfer, false statements, blackmail, handling stolen goods, and forgery etc.; excluding Group B offences such as conspiracy, attempting and incitement to commit a Group A offence.

*conviction takes place here*".[97] Otherwise the Commission felt there would be a weak case for jurisdiction if the court considered only a "*preparatory or incidental act*".[98]

Since *Manning,* Part 1 of the Criminal Justice Act has been brought into force in 1999.[99] It is significant in its treatment of jurisdiction and attempts to solve the problem of the distinction in the level of the crime allowing inchoate offences to be treated the same as substantive charges when it comes to the assertion of jurisdiction. Indeed section 2 (3)(2) states, *"For the purposes of determining whether or not a particular event is a relevant event in relation to a Group A offence, any question as to where it occurred is to be disregarded".* Group A offences are substantive charges of fraud and dishonesty.[100] This is a tremendous change from the previous requirement of the completion of the act under English law. Nationality of the accused is no longer relevant to the courts determination of an offence under the act.[101] Although Part 1 of the act brings clarity in jurisdiction there is also a certain amount of hesitation due to the interpretation of the 'relevant event' that is required.

Another example of this distinction in the level of offences exists in those linked to the potential harm to the person. Attempts to cause actual or grievous bodily

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[97] Law Commission No. 180 2.27.

[98] ibid 2.28

[99] SI1999 No. 1189 and 1149.

[100] All offences under Group A are now: Offences under The Theft Act 1968 (sections 1, 15, 15A, 16, 17, 19, 20(2), 21, 22, 24A) and The Theft Act 1978 (sections 1 and 2) ; offences under The Forgery and Counterfeiting Act 1981 (sections 1 to 5).

harm to persons outside the UK are not deemed to lead to jurisdiction in the UK, while attempted murder and murder are.[102] It appears to be ironic that conspiracy in property offences allows for extended jurisdiction while conspiracy to injure a person does not. Similarly, the OECD Anti-Bribery Convention, the UK's use of limited statute extension of jurisdiction allows for discrepancies in the law and inhibits the understanding and application of common law principles in the UK with wider implications to the general principle of territoriality in the determination of jurisdiction in international law. The use of the substantial connection test could solve certain elements of confusion in the complexity of offences and provide a standardisation of the application of the principle.

The test was misunderstood in Canada's application for extradition of a UK national, *Reyat* [103], who in 1989 was implicated in the placing of bombs in the baggage on an Air India plane that exploded while being unloaded in Japan, killing two baggage handlers. Canada requested jurisdiction for the manslaughter charges on the basis that the offence was planned and the bombs were planted on Canadian soil in Vancouver, thus substantially linked to the territory. In the extradition hearing the UK court seemed to focus on the determination of the question if the offence was committed in the UK by a UK national would the law allow for jurisdiction based on the nationality principle which would satisfy the double criminality requirement for the extradition proceedings. The decision was

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[101] Section 3(10) (a).

[102] Criminal Law Act 1977, see Smith and Hogan, *Criminal Law*. (Butterworths, 10th ed., 2002) p353. *"By section 9 of the Offences Against the Person Act. 1861 and s 3 of the British Nationality Act 1948"* Offences Against the Person Act 1861 section 10, for murder and manslaughter.

[103] Inderjit Singh. *Re Reyat* Queens Bench Division 1989 Unreported.

that the offence would be against the Offences Against the Persons Act 1861 section 9 if it occurred in the UK. The UK court felt if it was not for this section, UK jurisdiction would be doubtful using this narrow analysis for the double criminality rule. [104]

Interestingly enough, *Reyat* was convicted on other charges for the bombing of Air India's flight 182 that exploded over the Atlantic in 1985 killing 329 people, he was arrested after his release in June 2001 once he had served his sentence for manslaughter from a Canadian prison.[105] Canada originally wanted the UK to waive the normal extradition hearing, under a high priority request so it could fix a trial date with two other defendants, Ripudaman Singh and Ajaib Singh Bargri.[106] The Home Secretary at the time, Jack Straw, had allowed Reyat to make legal representations in the extradition hearing, thus causing a delay in the proceedings in Canada and the Canadian Crown had to sever the prosecution of the defendants as a result. He was convicted after a plea bargain with the Crown.

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[104] Mullen, G. 'The Concept of Double Criminality', January (1997) *Criminal Law Review*. p25.

[105] Matas, R. 'Wrench Thrown into Legal Plan.' *The Globe and Mail*, March 1 2001.

[106] ibid.

**The Extended Jurisdiction of UK Legislation Concerning Terrorism: Justifying Jurisdiction**

It should not be a revelation that another myriad of statutes govern this area of potential criminal offences.[107] Most are specific attempts to address the limitations of previous instruments[108] and many have numerous deficiencies in their particular definition and application. Notably it is their extension of jurisdiction that is the most surprising and in certain instances concerning. From an international perspective, European states, particularly the UK have passed several statutes with extraterritorial jurisdiction beyond the more traditional offences linked with universal principle, (stated previously), to include hijacking,[109] paedophile groups and terrorism.

The Suppression of Terrorism Act 1978 from the European Convention of the same name[110] focused on the extradition of suspects between states. Originally devised to dissuade suspects who hide from prosecution in states other than the one the act took place, is probably best known for requiring states to remove the 'political' consideration for the purposes of extradition.[111] This Act came about as

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[107] Some examples include: Internationally Protected Persons Act 1978; The Suppression of Terrorism Act 1978; The Terrorism Act 2000; the Anti-Terrorism Crime and Security Act 2001 and the somewhat dated Explosive Substances Act 1883.

[108] Conspiracy provisions of the Sexual Offences (Conspiracy and Incitement) Act 1996 have been supplanted by a section of the Criminal Justice (Terrorism and Security) Act 1998.

[109] The Taking of Hostages Act 1972, section (1): extends jurisdiction regardless of nationality

[110] ETS No. 90 (1977); Cmnd. 7031

[111] Article 1; includes various acts which often pose a collective danger to human life, liberty or safety. It applies to substantive and inchoate offences. Article 2(2) covers crimes against property if the act involves a collective danger for persons.

a reaction to a multitude of aeroplane hijackings with explosive devices in the 1970s. The Convention does not imply that extradition is immediate; any request between states must adhere to the constitutional principles and statutory regime of that state. Section 4[112] allows nationals of Convention member states to be prosecuted under UK law with the permission of the Attorney General even if the act occurred in a non-convention state. Hirst examined the ambit of section 4 with regard to the lack of distinction in definition between terrorism and non-terrorist offences; leaving open the possibility of prosecution under the act for non terrorist offences. Such as the example of a conviction in the UK of an Indian national who kills his Indian wife within the territory of India,[113] however, unlikely UK authorities would proceed with such a charge.

The Terrorism Act 2000 is yet another example of the same. Due to the extremely broad definition of terrorism in the Act[114] it can be argued that the Act may apply to general protest groups and/or civil libertarian groups who voiced support for resistance movements against repressive regimes in other countries. Direct action groups such as those against GM crops may find their activity falling under the definition of the act and prosecuted for terrorist activities. Section 62 extends jurisdiction for acts that are for "the purposes of terrorism", *"(1) If (a) a person*

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[112] *"(1) If a person, whether a citizen of United Kingdom and colonies or not, does in the Convention country in the act which, if he had done it in a part of United Kingdom, would have made him guilty in that part of United Kingdom... of the offence or offences aforesaid of which the act would have made him guilty if he had done it there."*

[113] supra note 43, p259.

[114] Section 1, defines terrorism as a threat of serious violence endangerment of life, or serious damage to property; or actions that create serious risk to health and safety of the public or a section

*does anything outside the United Kingdom as an act of terrorism or for the purposes of terrorism and (b) his action would have constituted the commission of one of the offences listed in subsection (2) if it had been done in the United Kingdom, he shall be guilty of the offence."* Regardless of nationality an individual can be prosecuted in the UK for the offence of fund raising for terrorist activities.[115] The UN Convention for the Suppression of Financing Terrorism 1999 encouraged signatory states to extend jurisdiction because of the reality of terrorist funding activities in various states.[116] The reality remains that individuals who financially support or are involved in revolutionary activity, such as the Shi'ites or Kurds in Iraq under Saddam Hussein at that time, could be prosecuted in the UK, along with those who give financing to Al-Qaeda groups. A clearer definition is essential to avoid political prosecutions by the UK government, let alone other signatory governments who have political agendas, or use similar statutes to silence critical pressure groups within a country or elsewhere.

The fear of offences using chemical or biological agents, as well as nuclear weapons are covered in the Anti-Terrorism Crime and Security Act (ATCSA) 2001. Similar to the Sexual Offences Act 1996, viewed from a jurisdictional analysis, UK nationals who are involved in related activities can be prosecuted in the UK for acts committed elsewhere as long as two conditions are met. The first

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of the public in the UK or elsewhere, or actions are designed seriously to interfere with or seriously to disrupt any electronic system.

[115] Part III section 15, 16 and 18. Jurisdiction section 63.

[116] Article 7. Listing numerous situations where states may claim jurisdiction beyond the location of the event or nationality of the offender, so that states will, (4)"*take sure measures as may be*

requires the conduct to have a *"political, religious or ideological cause,"* and secondly the act is "*done to*" a UK resident, national, or protected person.[117] The Act also allows for the detention of foreign nationals by the Home Secretary under the fiercely contested Part 4 section 23 (1), *"whether temporarily or indefinitely"*, where they are suspected of involvement in international terrorism but cannot be immediately removed from the UK. The use of indefinite detention by the Home Secretary has led to much criticism from civil rights campaigners and pressure groups, however, the Special Immigration Appeals Commission (SIAC) upheld the government's right to treat foreign nationals inconsistently from UK nationals and keep ten persons detained without charge or trial under the Act.[118] It is for these reasons Amnesty International among other civil rights groups argue that the ATCSA is inherently discriminatory. Notably the individuals were not suspected of involvement with terrorism, but suspected of links with suspected terrorist groups. Even more surprising was the Court of Appeal's decision to allow evidence against the detainees, obtained by torture in another state, to be admissible in a court in the UK.[119] The Court dismissed all the grounds on which the appeals from the SIAC hearing had been based. The UK Parliament Joint Committee on Human Rights agreed with the recommendation of the Privy Council for an urgent appeal of ATCSA powers after review of the Act

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*necessary to establish jurisdiction over the person."* Article 8 details the freezing of funds of groups used to commit offences under the Convention.

[117] Section 113 sections (1), (2) and (3).

[118] October 28, 2003.

[119] *A, B, C, D, E, F, G, H Mahmoud Abu Rideh Jamal Ajouaou* v *Secretary for State for the Home Department* [2004] EWCA 1123. The case is currently before the House of Lords for a definitive decision on the admissibility of torture and other evidence; *A and others (FC) and others* v *Secretary of State for the Home Department*. Hearing 18 May 2005.

in December 2003. Dungravel detention centre currently holds 150 failed asylum seekers and other immigration detainees. Post September 11th anti-terrorism legislation in the UK has not only extended jurisdiction for several offences but also focused on increased police and governmental powers in a bid to highlight security and protection measures exposing issues of liberty for UK and non-UK nationals.

Fortunately, a recent House of Lords decision[120] has found the treatment of foreign nationals to be inherently discriminatory and from a jurisdictional point of view, has cautioned the legislature that any measure has to be proportional to the objective it was designed to meet.[121] This could have ramifications on the reliance the courts have previously placed on legislative intent of statutory extensions of jurisdiction, somewhat similar to the reasonableness standard of the substantial connection test in assessing jurisdictional assertions.

Overall, several other Acts have extended jurisdiction for the specific purpose of prosecuting the Taking of Hostages Act,[122] and the Protection of United Nations Personnel Act.[123] The list can be lengthened to include section 2 of the Explosive Substances Act 1883 and others. Over the past thirty years Parliament, with

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[120] *A (FC) and Others* v *Secretary of State for the Home Department, X* (FC) *and Another* v *Secretary of State for the Home Department*. [2004] UKHL 56, para.30.

[121] ibid.

[122] The Taking of Hostages Act 1982, section (1): extends jurisdiction regardless of nationality.

[123] United Nations Personnel Act 1997, section (1) *" if a person does outside United Kingdom any act to or are in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of any offences sinners mentioned in subsection 2, he shall in that part of United Kingdom be guilty of that offence."*

increasing regularity, has responded to its international commitments in treaties and conventions with an attempt to stem the threat of terrorist actions that transcend territorial restrictions with a plethora of Acts and statutory instruments. These Acts contain a variety of overlapping provisions and sections updating previous Acts, each with their own limitations and idiosyncrasies creating a complex and problematic outlook for successful prosecutions and the true understanding of the principles of jurisdiction. Using specific statutory extensions of jurisdiction ignores the customary law commentary on allocating competencies and avoids adherence to a normative system to administer such on an international plane. Instead of reflex reactions to international incidents through legislative instruments, acknowledging the customary test of evaluating a substantial link to the territory that is bound by two doctrinal factors, reasonableness and comity, can potentially help to create a case law that is more in keeping with peremptory norms of international customary law. Is universal jurisdiction appropriate and necessary for certain statutes relating to terrorism in the UK? The conclusion must be not in its present state; as it does not conform to the restriction of reasonableness in its extent and comity among nations and without a limited definition it will criminalise inoffensive acts as acts of terrorism.

The pre-20th century view of piracy and the slave trade as the only international crimes to have universal jurisdiction in customary international law because they were "*a joint concern of all states*," is obviously dated but accurate. Since that time ratification of the Geneva Conventions and various government policy documents have reinforced the accepted belief that a total of six serious crimes

now fall under universal jurisdiction.[124] Evaluating the case of *Yunis*,[125] the Court of Appeal discussed the individual crimes that were of 'universal concern' to all states noting the usual categories and hijacking and even including certain acts of terrorism in their list disregarding any special connection between the state and the offence.[126] Clearly, terrorist activity can fall under one of the many international conventions, mentioned previously, that have been ratified by numerous states into domestic law, older conventions concerned hijacking and hostage taking and the more recent UN International Convention for the Prevention of Terrorist Bombings and the International Convention on the Suppression of the Financing of Terrorism.[127] These conventions extend jurisdiction between contracting parties and promote smooth extradition for increased prosecutions. However, there is limited acceptance of the crime of terrorism having universality in international customary law and unless the specific conduct is identified and agreed, the definitional weakness remains a threat by criminalising potentially non-terrorist political activity.

The UK's use of the universal principle in certain anti-terrorism legislation is questionable at best. Not only because of the potential civil rights abuses by the

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[124]Besides the first two mentioned they are: War crimes, crimes against humanity, genocide and torture. See *The Princeton Principles on Universal Jurisdiction*. Program in Law and Public Affairs, 2001 p29.

[125] *US* v *Yunis* (No.3) 30 ILM, 1991. p403.

[126] The court did not specify that highjacking, certain acts of terrorism and also particular acts of drug trafficking can give rise to universal jurisdiction under existing treaties.

[127] Respectively, in force from May 2001 and in force as of August 2002. supra note 116 for the articles on jurisdiction for the Convention on the Suppression of Financing Terrorism and articles 6 and 7 for the Convention for the Prevention of Terrorist Bombings. These articles are similar in nature and content.

power of the state, but also because it elevates terrorist offences to the level previously reserved for those crimes that affect or threaten certain interests common to all states. Actions by individuals could potentially become terrorists offences even if they were clearly not, because of the definition of the conduct could fall under the relevant Act. There is no dispute that the crime of terrorism is damaging to individuals and states. The reality of such organisations that commit terrorist actions is usually trans-national, much like fraud and conspiracy charges, but should terrorist charges be removed from any requirement of a link to the territory? The post September 11th perception of terrorism has become an emotive call to arms to bypass jurisdictional norms instead of treating it as another type of criminal offence. The allocation of competencies is derived from customary international law and in order to assert the universal principle there must be a certain level of justification or legitimacy to cohere with the principles of international law.[128]

**Summary**

The current UK approach breeds a certain amount of bewilderment with the interaction of statute and common law as well as doctrinal confusion of the territorial principle. The use of the substantial connection test would fit within the three benefits of the initiatory approach to jurisdiction argued by Williams: the ease of establishing a link to the territory where the offence began as opposed to a discussion of the completion of the *actus reas* for the terminatory approach.[129]

[128] Legitimacy to be discussed further in chapter 5.

[129] Williams, G. 'Venue and Ambit of Criminal Law.' (1965) 81 276 *Law Quarterly Review*. p519.

Secondly, the initiatory approach avoids the "legal fiction" that the accused can follow the act to another territory in the legal analysis of the court and finally, potential complications of extradition.[130] Moreover beyond the attractiveness of the substantial connection test in terms of clarity and practice, the main justification for its use is the reinforcement of acceptable customary norms in international law.

Lord Millet summarised the confusion in this area by outlining that "*every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect to international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts*".[131]

The UK has for far too long relied solely on the statutory jurisdiction of its criminal courts, when cases appear to present an opportunity to use a well founded territorial link to allow jurisdiction. Why not use the substantial connection test, regardless of the level of crime? It can overcome some of the problems of double criminality and extradition, as well as standardising all jurisdictional assertions in criminal prosecutions, especially since there is a hesitancy to use the universality principle in the domestic courts unless specifically extended by statutes for most serious crimes.

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[130] ibid.

[131] supra note 1 p 912.

## PART II: International Criminal Law

### Introduction

Individual criminal responsibility for international crimes has historically been linked to the territory where the alleged acts occurred after a serious conflict or war, as represented by the Nuremberg and Tokyo Tribunals and the more recent *ad hoc* tribunals for the former Yugoslavia and Rwanda. It can therefore fall to domestic courts to pursue prosecution for international crimes in several instances. The more traditional jurisdictional grounds for these prosecutions are normally the nationality or territorial principal, noting there is a reasonable hesitation for domestic courts to use the universal principle for prosecution of international crimes. Also, the advent of the International Criminal Court places the emphasis of prosecution of international crimes within the domestic court in the first instance, through the principle of complementarity. In fact, the Princeton Principles[132] of universal jurisdiction, a persuasive policy document devised by a group of international lawyers, contentedly promoted prosecutions in domestic courts of international crimes based on the aforementioned principle. This may seem to be a valuable solution to the requirement of linking the act with the territory in order to have the successful prosecution for international crimes, however, it does have its drawbacks. Lord Brown-Wilkinson outlined two major problems with following the main emphasis of the Princeton Principles: the potential for political prosecutions and the possibility of prosecuting a national whose state has not consented to the use of universal jurisdiction.[133]

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[132] supra note 124. p146.

[133] Sedley, S. 'No More Victors' Justice.' (January 2003) 25 1 *London Review of Books*. p5.

In 1962 *Eichmann*[134] was not based on an extension of statutory jurisdiction, but is probably the most famous case where the only link to the territory was the current location of victims and relatives of victims, after WWII. The Supreme Court of Israel stated *"the peculiarly universal character of these crimes vests in every state the authority to try and punish anyone who participated in their commission"*.[135] Even though the Supreme Court stated that it was acting as a "*guardian of international law*", the analysis of jurisdiction may lead away from universal principle to the passive personality principle instead because of the link to the victims and their descendants within Israel. Certain elements of this passive personality principle are worrying to various states. Opponents to the application of the principle argue that an individual can gain the protection of their own criminal law in other countries. A more recent example of a conviction for war crimes was the UK case of *R* v *Sawoniuk*,[136] who was sentenced to life imprisonment in 1999, based on the War Crimes Act 1991, instead of universal jurisdiction under customary international law.

It is difficult to find a case since *Eichmann* that has relied on the universal principle without a substantial link to the territory. The argument for the use of the universal principle may be increasing, in an effort to combat serious international crime, but this does not mean that the use of universal jurisdiction is

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[134] *Attorney General of the Government of Israel* v *Adolf Eichmann* (1962) 36 I.L.R. 5

[135] ibid

[136] [2000] 2 Criminal Appeals Reports 220, Anthony Sawoniuk came to the attention of UK officials in 1988 after a list of potential suspects was given to the UK government from the Soviet government.

without certain difficulties. Problems exist with assuming universal jurisdiction regardless of any link to the territory, for example the Belgian statute of 1993.[137] Historically, universal jurisdiction remained a legitimate ground on which to base jurisdictional competence when there is a consensus amongst most states as to which crimes universal jurisdiction can be applied. Also if universality is becoming a more frequented ground for jurisdiction it relies on the assumption that domestic courts can adequately interpret and apply various aspects and norms of international customary law relevant to the prosecution and how these norms interact with domestic law. This is discussed in the analysis of the judgment in *Pinochet 3*.[138]

If international criminal law is in a state of flux with the extension of jurisdictional competence beyond the territorial principle, it remains to be seen if this movement will result in the change of understanding of the standard view to jurisdictional grounds. Higgins wrote, "*Applying a more flexible approach to decision-making, I believe that the key to the issue lies in the protection of common values rather than the invocation of state sovereignty for its own sake... The exercise of extraterritorial jurisdiction to that end seems to me as acceptable as its exercise in the other non-territorial basis of jurisdiction*".[139] Part II of this chapter seeks to examine extraterritorial jurisdiction by states of international crimes and the issues that arise as a result.

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[137] Belgian Act of 16 June 1993. This was the incorporation of its obligations under the Geneva Conventions of 1949 and the Additional Protocols I and II of 1977.

[138] supra note 1.

[139] Higgins, R. *Problems and Process, International Law and How We Use It.* (Clarendon Press, Oxford, 1994). p77.

**An Example of The Interaction between Customary International Crimes and Domestic Statutes: *Pinochet***

The Criminal Justice Act 1998 is an example of a statutory attempt to combat torture by a public official or "a person acting in a public capacity", in the performance of their duties, regardless of nationality. It is not limited to the territory of the UK, arguably applying the universal principle.[140] Torture by a public official and a discussion on the universal principle were famously referred to in the high profile case of *Pinochet (No.3)*[141] by the House of Lords. Lord Brown-Wilkinson and other Law Lords did not consider torture committed abroad to be punishable in the UK until the Criminal Justice Act 1988 came into force, thus limiting the potential charges to be considered for extradition. The Act was a response to Britain's ratification of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984. Conspiracy and other inchoate crimes are not covered by the statute, but the principle from *Liangsiriprasert* could be applied here. The *Pinochet* case is significant for its scrutiny of head of state immunities, the double criminality rule for extradition and considering when torture abroad is an extraterritorial crime in the UK. Most importantly, for the purposes of this discussion, *Pinochet (3)* was hesitant in its analysis of international customary law and the tension between the underlying norms involved in the case.

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[140] The Criminal Justice Act 1998, Article 134.

[141] supra note 1.

First, extradition law in the UK and the concept of double criminality are other areas, which suffer from unnecessary complexity of domestic legislation. Double criminality ensures that a state with custody of an individual is not forced to extradite him or her for an act or omission that is not a crime in both states. It would be absurd to extradite someone for something based on what Mullen[142] describes as 'social crimes' such as homosexuality, from the UK to a state where it was criminalized. There are different interpretations of the double criminality principle. Before the 1989 Extradition Act, it depended on which state was applying for extradition (Commonwealth or non-Commonwealth), furthermore, the offence in the requesting state had to be very close in definition to the list of extraditable offences in the 1870 Act.

The 1989 Act has brought about greater emphases on the conduct itself as opposed to the location and exact definition, but it still is inhibited by interpretation, when it comes to extraterritorial offences. Section 2 (1)(b) *"provides that extradition is to be granted in respect of an extraterritorial offence against the law of a foreign state if in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the UK."*

The interpretation of the preamble to Schedule 1 of the 1870 Act and elements of the double criminality rule requires that the conduct to be criminal under UK law at the date it was committed. Thus returning to *Pinochet*, prior to 1988 charges of torture could not be considered for extradition. Lord Millet in contrast with others did argue that *"the systematic use of torture on a large scale and as an instrument*

[142] supra note 104, p18.

*of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973".*[143] He referred to two General Assembly Resolutions in 1973 and 1975. The first called for international cooperation in the arrest, extradition and punishment of individuals guilty of war crimes and crimes against humanity. The second focused on the international cooperation to reduce torture, as support for his conclusion that freedom from torture is a fundamental human right.[144] He also referred to Article 5 of the Universal Declaration of Human Rights in 1948, and relevant article on torture from the International Covenant on Civil and Political Rights 1966. Through these various international agreements and resolutions he reached the view that there was more than adequate international agreement that torture is a crime of interest to all states and humanity in general. His evaluation of what qualifies as a peremptory norm of international law may be unusual but is a true reflection of judicial reasoning in an attempt to legitimise the normative values present in the case.

Thus, according to Lord Millett, the need for statutory implementation of the Torture Convention into domestic law was not necessary because universal jurisdiction had already existed.[145] Lord Millet did not analyse the legal position of General Assembly Resolutions, however, they were useful to satisfy his two part criteria for universal jurisdiction. Namely, the crime must infringe the

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[143] ibid.

[144] UN GA Resolution 3059, 1973 and UN GA Resolution 3453, 1975 respectively.

[145] Note *Siderman de Blake* v *Republic of Argentina* 965 F. 2d 699 (1992), that dealt with the private enforcement of international customary law. The Alien Tort Claims Act required the plaintiffs plead a violation of the law of nations for the jurisdictional claim.

peremptory norm or *jus cogens* and the seriousness of the crime must be of the highest level to be regarded as an attack on the international legal order.[146] The discussions of the resolutions were useful as they could be seen to represent international customary law. It is regrettable that the other Lords concluded Pinochet could be extradited for only those acts committed after the Torture Convention had been ratified by the UK.

One of the problems highlighted by Robertson[147] is the lack understanding of international law principles by the Law Lords, and their subsequent reliance on the domestic court's 'outlook' of how international law applies to its territory. Recently domestic courts have become more aware of the fact that international customary principles can apply to cases before them, Sugarman reiterated this, *"the Pinochet case (amongst other things) is evidence of the need for judges, lawyers, law teachers and law students to be better appraised of the basic concepts and role of international law and how they are increasingly imbricated within domestic law".*[148] The Senegalese courts took a similar interpretation to *Pinochet* after the lawyers for Hissein Habre, former president of Chad, challenged his indictment for torture and murder based on the universal principle. Although torture is a criminal offence under Senegalese criminal law, and Senegal had ratified the 1984 Torture Convention, the Court of Cassation ruled that the

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[146] ibid.

[147] Robertson, D. 'The House of Lords as the Political and Constitutional Court; Lessons from The Pinochet Case.' *The Pinochet Case a Legal and Constitutional Analysis*. Woodhouse, D. (ed.) (Hart Publishing, 2000), p 24.

[148] Sugarman, D. 'The Pinochet Case; International Criminal Justice in the Gothic Style?' (November 2001) 64 6 *Modern Law Review*. p 937.

Senegalese Court had no jurisdiction over acts committed by foreign nationals outside their territory.[149]

The fundamental jurisdictional distinction between *Pinochet* (No.1) and (No.3) is the difference between deciding when torture has become an extraterritorial offence under UK statutory law, and deciding whether it is represented in the customary domestic law. O'Keefe's[150] analysis of customary international law in English courts and torture is helpful, supporting the reasoning of Millet, as long as *opinio juris* and state practice acknowledge the crime as part of the list of 'customary international crimes', individual criminal responsibility is present and it can be prosecuted in England.[151] *"Customary international crimes are, in particular, crimes ipso facto under English law. They are not, strictly speaking, common-law crimes; but they are assimilated to, common law crimes for certain purposes. Crucially, they are applicable in English courts subject to the constitution".*[152]

This is a clearer understanding of the concepts involved in the case and international customary law. O'Keefe concludes by reinforcing the principle of

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[149] Senegal's Court of Final Appeals upheld the dismissal. This is somewhat political since the new president of Senegal had stated in public that Habre would not be prosecuted in his country. www.hrwatch.org/justice/habre/intro_web2.htm. Belgium took up the investigation and possibility of prosecution through its universal statute.

[150] O'Keefe, R. 'Customary International Crimes in English Courts.' (2001) 72 *British Yearbook International Law*. p293.

[151] ibid p296.

[152] ibid p294.

dualism[153] in the relationship between English law and international law permitting what he calls 'limited direct applicability' with support of the relevant extradition law and constitutional principles. For judges and Law Lords customary international law may represent a quagmire of conceptual principles, somehow less obligatory than the positivist representation of international convention. If the majority of the Law Lords in *Pinochet 3* could not bring themselves to acknowledge torture as a crime of universality, simply relying on the incorporation of the Convention into domestic law, then an analysis of the substantial connection test would have provided a reasonable link between the extradition requests from Spain and the offences, through the passive personality principle. This may not have been able to placate those who take a restricted view of the double criminality rule with regards to the extradition requirement, however as this would require a return to the common law view of torture. The House of Lords had previously dealt with choosing between various principles relating to the assertion of jurisdiction in *DPP* v *Doot*, *"...but there can be no question here of any breach of the rules of international law if they are prosecuted in this country. Under the objective territorial principle...or a principle of universality.. or both, the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law".*[154]

Hazel Fox took a different view, comparable to Lord Nicholls in *Pinochet 1* when she summarised the misinterpretation of jurisdiction in this case, *"the majority decision, (Pinochet 3), then represents a confusion between immunity from*

[153] ibid p335.

[154] Lord Wilberforce, [1973] A.C. 807.

*territorial jurisdiction and absence of jurisdiction and the assertion that the criminal jurisdiction conferred on states by international law extends beyond private criminal law".*[155] Adequate acknowledgement of common law and customary principles of international law can extend jurisdiction within limits of reasonableness. Extraterritorial jurisdiction can be legitimised if there is a substantial link to the territory, which existed for Spain, and the UK can assert territorial jurisdiction and extradite on that basis.

Finally, the situation with respect to immunity of heads of state, or a Minister of Foreign Affairs, can appear to depend on the Court. While the House of Lords removed immunity in the case of *Pinochet 3* the International Court of Justice confirmed immunity for a Foreign Minister from the Congo,[156] and Fox argues that the International Court of Justice would most probably confirm immunity in the *Pinochet* case.[157] Millet viewed Pinochet's conduct as against the peremptory norms of international law, thus he was not entitled to immunity. Again another missed opportunity restricted by not only domestic law but the long overdue review of international laws surrounding immunity.

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[155] Fox, H. 'The Pinochet Case (No.3.)' (July 1999) 48 *International Comparative Law Quarterly.* p698.

[156] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, ICJ Gen. List No.121, Judgment 14 February 2002.

[157] Fox, H. Approaches of Domestic Courts to the Assertion of International Jurisdiction. Capps, P., Evans, M, and Konstadinidis, S (eds.) *Asserting Jurisdiction; International and European Legal Perspectives.* (Hart Publishing, 2003) p185.

Former President of the International Court of Justice, Steven Schwebel, supported the Princeton Principles on universal jurisdiction,[158] which stated that immunity for an official person accused of a serious crime *"shall not relieve such a person of criminal responsibility or mitigate punishment".*[159] Interestingly enough, serious crimes, identified after the *Pinochet* case by the steering committee of the Princeton Principles in 2001, include torture, along with the traditional serious crimes of piracy, slavery, war crimes, crimes against peace, crimes against humanity and genocide. Apartheid, terrorism and drug crimes were rejected as serious crimes to be included in the Princeton Principles, but the committee left open the possibility of inclusion in the future.[160] The participants identified the nature of the crime as the exclusive basis for subject matter jurisdiction. While the Princeton Principles are not authoritative they add to a persuasive argument among prominent international law jurists to extend the use of universal jurisdiction in domestic courts for violations against peremptory norms, as long as a real and substantial link to the territory exists.

**Universal Principle or Lack Thereof and International Crimes: Prosecuting Extraterritorial Offences**

*"The principle of sovereign equality of states generally prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction*

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[158] supra note 124.

[159] ibid Principle 5 p31.

[160] ibid p48.

*beyond a state's territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state".*[161]

International criminal law has recently seen tremendous expansion in both academic writing and numerous tribunal cases, developing into its own distinct area within international law. The traditional categories of international crimes, which originated with the crime of piracy *jure gentium,* for which there is individual criminal responsibly, include war crimes, genocide and crimes against humanity, crimes against peace and torture. Previously, it was generally accepted that jurisdiction for war crimes was limited to international conflict as opposed to internal conflict. War crimes generally defined as, "*violations of the laws and customs of war*"[162] including 'grave breaches' of the Geneva Conventions 1949.[163] The landmark case of *Tadic,*[164] applied these violations to internal armed conflicts as well. *Tadic* also discussed other crimes potentially being applied to internal conflicts besides war crimes because of their customary nature.[165] Crimes

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[161] Cory and Iacobucci JJ. *R* v *Cook* (1999) 32 I.L.M. 271.

[162] Nuremburg Charter 1945 Article 6 (b).

[163] Grave breaches include wilful killing, inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity, wilfully depriving a prisoner of war or other protected persons of rights of a fair trial, unlawful deportation or transfer of unlawful confinement, taking of hostages another serious violations of laws and customs applicable in international conflict, such as attacks on civilian populations.

[164] *Prosecutor* v *Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ITCY Appeals Chamber, 2 October 1995, case no. IT-94-1 –AR72

[165] This would include all serious violations of international humanitarian law except for Article 2, 4 and 5 of the Geneva Conventions. Arai-Takahashi, Y. 'Disentangling Legal Quagmires: the Legal Characterisation of the Armed Conflicts in Afanganistan Since 6/7 October 2001 and the

against humanity are committed against the civilian population for political or racial reasons, specified in the 1945 London Agreement of the Charter of the International Military Tribunal and codified in the statute of the ICC. [166] Although there is no need for a link between the offences and armed conflict, there is a requirement for the mental element of the crime. Proving the intent to bring about a certain result and the awareness of the circumstances can be difficult, as with the current case of *Milosevic*[167] at the International Criminal Tribunal for Yugoslavia (ICTY) for activities committed in Croatia during the early nineties.

The intentional killing, destruction or extermination of a group or members of a group relates to the crime of genocide. The term itself coined after World War II and the Holocaust and extensively defined in the Convention on the Prevention and Punishment of the Crime of Genocide 1948. Here again intention must be proven in order to establish a genocide conviction, again a fundamental issue in the *Milosevic* trial relating to activities in Bosnia-Herzegovina. The International Criminal Tribunal for Rwanda (ICTR) stressed that genocide was 'the crime of crimes' within the ambit of international crimes in the landmark case of *Akayesu*.[168] This phrase was a reiteration of the comments surrounding the Crime of Aggression in the Nuremberg Charter based on the reasoning that if it was not for this crime of aggression, the Holocaust and other atrocities that flowed from it

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Question of Prisoner of War Status', (2002) 61 5 *Yearbook of International Humanitarian Law*. p 67.

[166] Nuremberg Charter 1945, article 6(c). The Rome Statute of the International Criminal Court 1998, article 7.

[167] *Prosecutor* v *Milosevic* 1999 case no. IT-02-54, the defence case started in August 2004.

[168] *Prosecutor* v *Akayesu* ICTR Trial Chamber I 2 September 1998 case no. ICTR –96-4-T, §16.

would not have happened. Justice Robert Jackson, the prosecutor in Nuremberg argued that the waging of war is the superior crime differing only from other war crimes in that it *"contains within itself the accumulated evil of the whole"*.[169]

The crimes of aggression, torture and terrorism are lumped together by Antonio Cassese as "*other international crimes*", after a detailed analysis of the three "core crimes".[170] The identification of international crimes itself can be open to interpretation, for example, Bantekas and Nash take a broader view of the categories of international criminal law by including trans-national offences of drug-trafficking money-laundering and cyber crime.[171] *"An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances".*[172] Core crimes, most commonly identified by international law theorists and the case law, are war crimes, crimes against humanity and genocide, the crime of aggression otherwise known as crimes against peace, originally outlined in the Nuremberg Charter. They have not had the same theoretical focus as the other crimes but have become a popular discussion for the antiwar pressure groups since the war on Iraq. Critics of the

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[169] Cohn, M., 'Crime of Aggression; Why It Is and Why Doesn't the US Want the ICC to Punish It?' *Jurist* March 22, 2001. Available at http//jurist.law.pitt.edu/forum/forumnew18.HTM

[170] See contents page of, *International Criminal Law*, (Oxford University Press, 2003).

[171] See contents page of, *International Criminal Law*, (Cavendish Publishing. 2nd ed, 2003).

[172] Hostages Trial, US Military Tribunal at Nuremberg, 19 February 1948.

legality of the war on Iraq have called for prosecutions of George W. Bush[173] and Tony Blair[174] because of the lack of any material basis for the war, especially since there has been a lack of evidence of a threat from 'weapons of mass destruction.' The understanding of the crime of aggression may be aided by its inclusion in the statute of International Criminal Court, (ICC), once the provision is adopted.[175] However, when it comes to establishing a jurisdictional right or competence, the assumption that even the most traditional and generally accepted categories of international crime benefit from the universal principle is misleading.

The positivist view of international law has led, for the most part, to UN ordered and/or sanctioned tribunals and specials courts, while domestic prosecutions are more rare. *Ad hoc* tribunals have been as a result of the UN Security Council resolution as the examples of the ICTY and the ICTR.[176] They have their jurisdiction limited to the area and time span of conflict specified within the statute of the *ad hoc* tribunal,[177] even though the Nuremberg Tribunal identified

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[173] A citizen's tribunal in Japan sought to indict George Bush for war crimes. April 29, 2004. http://www.shmc.net/news/2004/04/1692710.php

[174] "Legal Action Against the War", Group of anti-war lawyers in Britain headed by Michael Mansfield QC, promoting the prosecution of Tony Blair for war crimes in Iraq. http://www.talkleft.com/new_archives/005508.html. Also see Peacerights Inquiry Report November 8-9, 2003. Published by Peacerights. Argued that the invasion of Iraq 2003 was against International Humanitarian law and the ICC. www.inlap.freeuk.com/peacerights-inquiry.pdf.

[175] The Rome Statute 1998 Article 5 (2).

[176] UN Security Council Resolution 808 (1993) and UN Security Council Resolution 955 (1994) respectively.

[177] ICTY Territorial and Temporal Article 8: ICTR Territorial and Temporal jurisdiction Article 7

universal jurisdiction for crimes against humanity.[178] Customary law can give universal jurisdiction to the 'core' international crimes, but the Security Council of United Nations has always specified jurisdiction for a special court or tribunal. Thus universal jurisdiction is most commonly exercised by domestic courts, except for the possibility of extended jurisdiction in the ICC.

Jurisdiction for the International Criminal Court is limited[179] by the consent of the state on the basis of the territorial or nationality principle, but excludes a Security Council Resolution under Chapter IV from this limitation.[180] Fundamentally, the ICC has jurisdiction based on the principle of complementarity, allowing the individual state to have jurisdiction in the first instance, either the state on whose territory the act or omission has occurred or the state of the national involved. The ICC will only have jurisdiction if the state is unable or unwilling to genuinely investigate and prosecute crimes or if it is done for mere show.[181] One of the arguments in favour of the principle of complementarity is the pressure applied to individual states who may not originally be inclined to prosecute individuals, but may do so to avoid a referral to the court by either the Prosecutor under article 15 or the Security Council under article 16. The establishment of this specialised jurisdictional arrangement from the Rome Statute not only reinforces the two fundamental principles of jurisdiction, nationality and territoriality, but also seeks to support the doctrine of sovereign equality of states, one of the main concerns during the negotiation of the treaty itself. India, for example, felt that the lack of

[178] supra note 172.

[179] The Rome Statute of the International Criminal Court 1998. Articles 12-19.

[180] Article 13.

jurisdictional restriction on the power of the Security Council within the Treaty of Rome was a violation of sovereign equality. The Security Council has the power to refer the case to the ICC or to block the ICC proceedings.[182] This was also a key concern for the US, as well as the lack of distinction between state parity and non-state parities in the statute. Article 12 and 13 could be interpreted broadly allowing for a universal jurisdiction of the crimes listed. The potential activist nature of the court is yet to be seen. The evolution of the mandatory universal jurisdiction of the ICC originated with the 1996 Draft Code of Crimes Against Peace and Security of Mankind. *"Each state party should take such measures as may be necessary to establish its jurisdiction over the crimes set out... irrespective of where or by whom those crimes were committed".*[183] The potential that the ICC may actually move beyond the 'special universality' which only applies to party states of a particular treaty is based on a broader interpretation of the jurisdictional arrangement.

It is this fear that has led United States to sign a multitude of bilateral agreements, under Article 98(2) in order guarantee immunity for US personnel in those countries. Article 98(2) was not originally intended to allow agreements that would give immunity to personnel of certain states and avoid a trial at the ICC. In fact, Article 27 clearly states that no one is immune from crimes listed in the statute. The original design of the article was to allow cooperation with the ICC if the state had a previous "*Status of Force Agreements*", which would oblige them

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[181] Article 17, 2.

[182] Article 13 (b).

[183] Article 8: Establishment of Jurisdiction.

to return nationals of another state if a serious crime had been committed. Countries that have agreed to bilateral agreements with US have benefited from US aid and arms sales, but may be in violation of the obligations under the statute. The Bush White House generally blocks countries that have not consented to bilateral agreements. As of August 2004 the US has reported over 80 bilateral agreements with party states of the ICC.[184] Thirty-five countries have lost US military assistance, however refreshingly two thirds of the total number states that have ratified the ICC have refused to sign a bilateral agreement with the United States.[185]

The emphasis on the positive view of international criminal law extends beyond the specialist courts, *ad hoc* tribunals or even the permanent International Criminal Court. The possibility of a state prosecuting an individual for an international crime normally requires their presence in the territory of prosecution, unless the state is in the preliminary stage of investigation and the gathering of evidence. Various states have had a growth in particular legislation or ratification of international treaties that will permit criminal jurisdiction of an individual regardless of nationality or the territory where alleged acts are committed. Besides the well-known example of Belgium, Italy has also made it clear in its criminal code that an individual can be liable for any crime that is covered under special legislative provisions of international treaties.[186] The same can be said for the

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[184] www.iccnow.org/documents/otherissues/impunityart98/biadb_current.xls

[185] ibid.

[186] Italian Criminal Code Article 7.5, *"whereby the Italian nationals or foreigners who commit abroad any crime for which either special legislative provisions or international trees establish*

German penal code if there is not a factual link to German territory.[187] Three core crimes are seen as benefiting from universal jurisdiction by German officials during the drafting of the ICC Statute, *"under current international law, all states may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes regardless of nationality of the offender, nationality of the victims, and place where the crime was committed... this is confirmed by extensive practice".*[188]

Belgium's use of universal jurisdiction, as a result of the statute of 1993,[189] over "grave breaches" of the Geneva Conventions led to *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium).*[190] It was aimed at the Congo's then Foreign Minister for alleged crimes in the Congo, but was not allowed because of the court's reinforcement of immunity. One of the balancing factors of the principle of universal jurisdiction is the reinforcement of immunities in order to assure states of the continuing respect for the law, diplomacy and international relations. Sedley identified that the decision;

> "*recognised only immunity - a temporary and localised protection and not impunity; it accorded it to incumbent ministers, not to former ones; and it accorded it to them in international law but not domestically;*

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*that Italian criminal law shall apply may be punished under Italian law*" as quoted in Cassese, A. *International Criminal Law*. (Oxford University Press, 2003). p 287.

[187] ibid.

[188] UN Doc. A/AC.249/1998/DP.2, 23 March 1998.

[189] Article 7.

[190] ICJ Gen. List No.121, judgment of 14 Feb 2002.

*and it limited the immunity to proceedings before other national courts, noting that this was compatible with the absence of any such immunity before the international tribunals at Nuremberg and Tokyo and the international criminal Tribunals dealing with events in the former Yugoslavia and Rwanda".*[191]

The 1993 statute in Belgium has been restricted to that of '*conditional universal jurisdiction'*, because of the decision in *Sharon and Others the Chambre des Mises en Accusation.*[192] This is what Cassese refers to as the narrow notion of universality, only when the state has possession of the individual, can they prosecute or extradite.[193] He distinguishes '*absolute universal jurisdiction*' as the power to prosecute persons regardless of nationality and presence of the individual in the state. However, Belgium has allowed several pending trials to continue.[194]

From a positivist point of view, the future for universal jurisdiction and international criminal law itself is very much dependent on individual states' adherence to international conventions and treaties, for example, the Rome Statute. The impact of recent trends in this area will also lead to a more vibrant discussion of the applicable international customary law principles.

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[191] supra note 133, p5.

[192] *Sharon and Others the Chambre des Mises en Accusation.* 6 March 2002 paragraphs 7-11.

[193] supra note 187, p286.

[194]Ratner, S. '*Belgium's War Crimes Statute: A Postmortem.*' (2003) 97 *American Journal of International Law*, 888.

## Guantanamo Bay: An Extraterritorial Action Ignoring the Rights Based Approach

There have been various examples of state practice of extraterritorial measures and actions, but an important example that cannot go without mention is the US government's detention of individuals it classifies as 'enemy or unlawful combatants' in Guantanamo Bay, Cuba. The intent of the US was to find and use a location outside the territory of United States to avoid individuals acquiring certain rights under the US Constitution. Camp Delta[195] has been used for detainees, from numerous countries, for over two years. In addition to the war on Iraq and the bombing of Afghanistan, this is one of the most extreme examples of a state's response to terrorism. The jurisdictional analysis is complicated. It is a US controlled territory based on a lease from the Cuban government dating back to 1903 and reaffirmed in the 1934 Treaty.[196] Under the terms of the lease Cuba maintained ultimate sovereignty but the United States has 'complete jurisdiction and control' of the territory and waters. The lease was originally intended for naval and/or coaling stations, and so the current use of the land as a detention centre is outside the terms of the agreement. The *Island of Palmas* arbitration in

[195]Camp Delta is comprised of the six detention camps, three are maximum security, one is for juvenile detainees aged between 13 to 15 years old. 16 years old and upwards are housed in the main camp.http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm

[196] Lease to the United States of lands in Cuba for Coaling and Naval stations, February 16-23, 1903 and Treaty between the United States in Cuba Defining Their Relations, May 29, 1934 article III. The lease can be terminated either unilaterally by the United States or by mutual agreement.

1928 held that good title to sovereignty and thus responsibility for those in the territory could be gained by peaceful and continuous display of state authority.[197]

In 1946, the Supreme Court held that an enemy alien held under the control the United States in a foreign territory would be within the jurisdiction of the Constitution. A Japanese General, Yamashita, had been held at a US base in the Philippines and gained access to the protection of the US Constitution,[198] which did not aid his defence as the military tribunal convicted him of war crimes and he was hanged nineteen days later. The classification of the detainees as 'unlawful combatants' is also dubious. This classification is based on the 1942 case *ex parte Quirin*[199] where German spies entered the US during World War II, removing all identification and uniform. The District Court classified the Germans as unlawful combatants and verified their prosecution before a military tribunal. The use of this term to avoid access to rights of *habeas corpus* for detainees is an extrapolation of the terminology used during an actual time of war as opposed to the recent moves to fight terrorism. The terminology of 'unlawful combatants' in *Quirin* also predates most of the relevant human rights conventions and treaties ratified and systematically ignored by the US.[200] For example, The International Covenant on Civil and Political Rights 1966 article 2 (1) calls upon, *"respect*

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[197] 2 RIAA, p 829, 838.

[198] *US* v *Yamashita* 327 U.S. 1.

[199] District Court for Columbia 317 US 1 1942.

[200] Geneva Conventions, discussed earlier, and The International Covenant on Civil and Political Rights 1966, for example; article 2 (1).

*and... ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind".*[201]

In order to justify the arrest and detention of the individuals the US administration is attempting to assert the protective principle based on national security, present in several conventions mentioned previously,[202] and the passive personality principle, although none of them have been charged with the murder of any Americans. The protective principle should be based on a threat to the vital interests of a state, however the broadest interpretation of this principle may be open to abuse by states without a legitimate basis for jurisdiction. In late August 2004, the first detainees began their hearings in military tribunals, facing life sentences or death.[203]

Detainees were not just arrested in the theatre of battle in Afghanistan, but were gathered from various places in and outside of the country. As opposed to *Yunis*, where the arrest took place in international waters, detainees were collected by US military forces in Pakistan, Africa and Bosnia. One of the most surprising examples was the use of SFOR, the NATO stabilising military force in Bosnia, to take possession of two Algerians who were suspected of planning attacks on UK and US embassies in Sarajevo. Donald Rumsfeld has stated that US peacekeepers

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[201] Article 1 of the Optional Protocol has altered this to, "*persons subject to its jurisdiction*".

[202] For example, the Hostages Convention 1979 and the aircraft high jacking conventions.

[203] Borger, J. 'Guantanamo Hearings Begin.' *The Guardian*, August 24, 2004, A Yemeni man, alleged to have been a driver for Osama Bin Laden, will be the first detainee to go before a military tribunal, appeals from that tribunal to be heard by another panel appointed by Donald Rumsfeld.

might have their duties expanded to hunt for possible suspects, not individuals usually sought such as those involved in genocide or crimes against humanity, but suspects in the 'war on terror.' The Bosnian Human Rights Chamber disappointed the US by ordering the release of the Algerians for lack of evidence and further issued an injunction against their handover to the US Forces.[204] The Bosnian police under pressure from SFOR, handed over two Algerians who were then transported to Guantanamo Bay, where they remain.[205] The Chamber felt that the handover breached the European Human Rights Convention regulations on expulsion, illegal detention and abolition of the death penalty.[206]

The legality of the indefinite detention of the individuals on US controlled territory was found to be unlawful by the Supreme Court of United States.[207] Lobby groups, organisations including family members of the detainees, and international human rights organisations have all criticised the continued indefinite detention in the 'legal black hole' that has become the common reference to Guantanamo Bay as quoted from Lord Steyn.[208] The majority of critics to this US practice have argued for adherence to international human rights conventions and obligations, which are undoubtedly more persuasive and have a general universal acceptance amongst the community of nations, rather than the somewhat contrived terminology meant to reduce access to legal protection such

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[204] 'Bosnia Suspects Headed for Cuba'. 18 January 2002. BBC News. http://news.bbc.co.uk/1/hi/world/europe/1767544.stm.
[205] ibid and 'Algerian Guantanamo Prisoners Sue US Government.' 15 July 2004 www.cdi.org/news/law/gtmo-algerians-isn.cfm.
[206] ibid.
[207] *Hamdi* v *Rumsfeld, Secretary of Defense, et al.* 316 E.3d 450, June 28, 2004.
[208] Steyn, J. 'Guantanamo Bay: the Legal Black Hole.' *International and Comparative Law Quarterly*. 53 1 2004, p1-15.

as 'enemy combatants.' The court disagreed with the congressional authorisation[209] of the detention and instead emphasised the doctrine of 'due process', stipulated that an individual being held by the US *"be given a meaningful opportunity to contest the factual basis for their detention before a neutral decisionmaker"*.[210]

However, this was more about the status and the location of the individual, as *Hamdi* is an American citizen being held on American soil in Charleston, who, according to the Bush administration, may be released in the near future. Another American citizen *Padilla*,[211] who also had his case referred back to the lower courts, benefited from the Supreme Court's decision that a US citizen cannot be held indefinitely as an enemy combatant without any challenge to his detention. Other detainees in Guantanamo Bay who wish to invoke *habeas* relief, were also referred to the lower courts with an ambiguous judgment. Multiple lawsuits representing several detainees are now working their way through the US legal system. Groups representing the detainees thought the 14th Amendment of the Constitution of US might realise success considering the true 'effective control' the US has over the territory of Guantanamo Bay. They argued that the principle outlined in *Island of Palmas*, and the specific use of the term of 'jurisdiction' in the amendment; section 1., *"nor shall any state deprive any person life, liberty or property without due process of law, nor denied to any person within its*

[209] 18 U.S.C. § 4001 (a).

[210] supra note 207, para 14-15.

[211] *Rumsfeld, Secretary of Defense* v *Padilla et al.* 352 F.3d 695 case no 03-1027, (2004).

*jurisdiction the equal protection of law,"* however, the court did not seem to want to apply the Constitution to the territory of Guantanamo Bay.

Recent attention has been focused on the 15 detainees that had been nominated for trial by military tribunal including three charged with war crimes conspiracy. In light of the Supreme Court decision in *Rasul* v *Bush*,[212] allowing non-citizen detainees to contest their detention in Federal Court, the Department of Defence announced the formation of the Combat Status Review Tribunal for detainees held in Guantanamo Bay. Through these tribunals detainees could contest their enemy combatants status, with the help of personal representatives but not necessarily lawyers. The tribunals will be run by the military and the judges will be military officers.

Recently, the US authorities have announced the release of the remaining UK citizens from Guantanamo Bay who have been held for just under three years.[213] Jack Straw referred to the negotiations with the US as "*intense and complex*",[214] five detainees were released in March 2003. This might appear to be welcome news for the families of the men who were held for such an extensive period of time but it does not aid those who ponder the jurisdictional overreach by the US that led to the situation in the first place. The practical use of detaining individuals for further time will most probably diminish leaving a core group of individuals who will face military tribunals.

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[212] And *Al Odah* v *US* 321 F..3d 1134 June 28, 2004,

[213] 'Guantanamo Britons Free in Weeks.' 11 January 2005. BBC News, news.bbc.co.uk. They are Moazzam Begg, Martin Mubangam Richard Belmer and Feroz Abbasi.

The current US administration's view of peremptory norms and international legal principles does not cohere with Lord Atkin's statement in the wartime case of *Liverside* v *Anderson* that, *"amid the clash of arms, the laws are not silent, they may be changed, but they speak the same language in war as in peace."* [215] This difference is not surprising since the US jurisdictional grounds for holding the detainees are uncertain and are not in keeping with the accepted principles of jurisdiction, as well as violating international human rights and laws and conventions.

**Conclusion**

Extraterritorial offences that fall into the category of the "core crimes," piracy, slave trade, genocide, crimes against humanity, crimes against peace, war crimes and torture can and should be prosecuted in domestic courts using the principle of universality as a basis for jurisdiction. These crimes have long since been verified as having this jurisdictional competence through international customary law and thus reinforce the normative value of the customary framework. *Ad hoc* tribunals are necessary in certain cases because of the tenuous political situation after an internal conflict and can also offer an unbiased view of adjudication to the warring parties. However, the jurisdictional restriction presented by the nationality and territorial principle should not be confused with the representation of the jurisdictional limitations of the crime or crimes. The advent of the

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[214] ibid.

[215] [1941] 2 ALL ER 612.

International Criminal Court has sought to promote the prosecution of most of the above named crimes in domestic courts through the doctrine of complementarity. Hopefully the increased acceptance of the ICC will lead to more prosecutions for those who are responsible for the commission of a core crime, the unfortunate side effect being the necessity of a treaty in order to establish justification for a state to proceed with such prosecution.

The states who determine terrorism as a crime of universality either through legislative means, (the UK), or unilateral action, (the US), should be guided by the principles of comity and reasonableness inherent in the substantial connection test. This will allow a link back to the territory so as to avoid questionable prosecutions that have tenuous links to the state and restrict state actions to within the realms of international customary law norms. The thematic approach to terrorism through the various treaties and conventions is positive in that it will promote international cooperation and consensus or be shaped by regional needs, but it also has an inherent flaw. Treaties and conventions are often too sluggish to respond to the changing faces of terrorist techniques making codification problematic. Defining terrorism for future inclusion into the International Criminal Court can have a beneficial effect by offering an unquestionable venue for prosecution, the preferable option for small politically unstable countries and would also counteract indefensible situations like Guantanamo Bay in the future.

Jurisdictional competence must be legitimate. The theme of this chapter has been the relationship between international customary norms and the assertion of jurisdiction by state. Paradoxically, the cautious nature of the UK courts to extend

jurisdiction using the substantial connection test for trans-national crimes is compared with the aggressive stance of the UK legislature to extend jurisdiction in anti-terrorist legislation. Since the UK is not an isolated example of this extension through various statutes, the argument has to be made that tackling jurisdictional problems internationally or domestically must be restricted by a valid claim, considering the promotion of the solidarity of nations. Many theorists have argued that extending jurisdiction for various criminal offences is justified because crime hinders all nations. This is true due to the essence of crime itself. However, systematic extension without legitimacy disrupts the normative basis on which all states depend leading to a landscape of varied jurisdictional assertions, increased international conflict and general disregard of international customary principles. Proving a substantial link to the territory may reduce conflicts between states as increased frequency of prosecution raises this possibility.

The question remains how do we define legitimacy and how can it contribute both a theoretical analysis and a functional relevance for states in the jurisdictional quandary? This is the focus of the next chapter.

# CHAPTER FIVE

# LEGITMISING EXTRATERRITORIAL JURISDICTION

## Introduction

The main function of this chapter is to argue that certain forms of extraterritorial measures are essentially coercive and lack legitimacy in international law, at least from a theoretical perspective. The first step in satisfying the criteria of legitimacy in extraterritorial jurisdiction is not only the identification and establishment of a possible substantive link back to the territory in question but a normative basis for the evaluation of a measure. Without adherence to the norms of international customary law, legitimacy of certain jurisdictional assertions is in question.

The use of extraterritorial measures by states has expanded over the last two decades causing a re-evaluation of the theories of jurisdiction. The last two chapters have examined two public law examples of measures extending beyond the state's territorial jurisdiction. The rationale behind the choice of these examples is inherent in the question of the normative relationship between jurisdiction and the theory of legitimacy. In other words, the use of the construct of legitimacy can justify the distinction between the extraterritorial economic sanctions and extraterritorial crimes beyond the legality argument present in the previous chapters. Consequently legitimacy itself, needs to be examined. The more recent popular theory of legitimacy stems from the Franck model,[1] which is a useful model to evaluate the specific indicators of legitimacy for a precise

measure or international institution. Adapting this model to the present comparison of the legality of different types of extraterritorial measures is convincing if not complete. Essentially, the discussion of legitimacy addresses the underlying norms that are needed, or required to be present, to validate the measure as an independent example as well as the purpose to which it is intended to be applied. The foundation of the theory of legitimacy is not only the establishment of the legality of a measure by a state's perception but the rationality of that measure in the framework on which all international customary law is based. Thus evaluating or establishing legitimacy is not only the 'compliance pull' of a measure, legitimacy is the principled rationale in international jurisprudence including the influence and evolving nature of the doctrine of sovereignty and the sovereign equalities of states. These are key elements in the discussion of legitimacy and extraterritorial measures especially since these measures are evidence of the sovereign power of a state.

**Introducing Legitimacy**

Legitimacy is the term that is often quoted with regard to discussions of international actions by different states, especially as of late, with the war on Iraq. The commonplace interpretation in this situation usually refers to the legality of a specific action within the boundaries of international law. The US has continually quoted the right of self-defence as a means of justification for the use of force on both Afghanistan and Iraq. However, for the purpose of this thesis the specific question remains; "Does legitimacy itself as a legal construct have any impact on

[1] Franck, T. *The Power of Legitimacy Among Nations*. (Oxford University Press, 1990).

specific extraterritorial measures and further can the construct be used in the evaluation of a measures acceptance?"

Berman[2] asserts that jurisdiction itself is a claim to exercise 'powers' which require a legal basis beyond a justification such as matters of policy or social need, because they affect people's individual liberty. He correctly surmises that the description of jurisdiction as "*an inherent attribute of sovereignty*"[3] is flawed due to the dependence on the interpretation of the term sovereignty, which is obscure, or at the very least vague. Despite the recent and increasing examples of extraterritorial measures the mainstay of sovereignty is essentially the right and control of the territorial nature of the state. If sovereignty is an "*inappropriate tool to perform a validating function*"[4] for claims of jurisdiction, then perhaps the construct of legitimacy can perform this task.

The interpretive confusion surrounding the definition of legitimacy has for the most part rested on the connotation of the 'justification' of a legal measure or a governmental authority. This is not the exclusive evaluation of legitimacy in current literature; there can be an evaluation of parliamentary legitimacy, technocratic legitimacy, procedural legitimacy, corporate legitimacy and governmental legitimacy.[5] Overall the majority of analysis has been focused on

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[2] Capps, P. and Evans, M. (eds) *Asserting Jurisdiction, International and European Legal Perspectives.* Berman, Sir Franklin. 'Jurisdiction; The State.' (Hart Publishing, 2003). p3.

[3] ibid p4.

[4] ibid.

[5] Lord, C. and Magnette, P. '*Notes Towards the General Theory of Legitimacy in the European Union.*' ESRC Working Paper 39/02 2001. Available at www.one-europe.ac.uk/pdf/

the legitimacy or 'correctness' of a specific governmental institution or court. Locke in his "*Two Treatises on Government*",[6] has discussed the legitimacy of a right of democratic access by the people to governmental institutions and sovereignty as a nation. Raz expanded the analysis with the argument that legitimate authority of an institution of a state rests on the justified 'right to rule' or 'right to claim' this authority.[7] According to Delbruck, Weber focused on the "*empirically verifiable acceptance*"[8] that is a requirement of a government's legitimacy.

Moving on from the focus of institutions, any discussion of legitimacy would have to commence with, and some theorists would argue end with, an analysis of Franck's "*The Power of Legitimacy Among Nations*".[9] Franck outlines several indicators of legitimacy: determinacy, symbolic validation, coherence and adherence.[10] These indicators exert a pull toward compliance of a legal measure. In this way legitimacy is not linked to a coercive authority, but can be a matter of degree depending on the strength of a rule's compliance pull.[11] Certain elements of Franck's thesis are relevant to the comparison of extraterritorial economic

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[6] Laslett, P. (ed.) (Cambridge University Press, 1988). Book II Chp 11 Section 141 and Chp 18 Section 202.

[7] Raz, J. 'Authority and Justification.' (1985) 14 1*Philosophy & Public Affairs*. p20-22, 5.

[8] Delbruck, J. 'Exercising Public Authority Beyond the State: Transitional Democracy and/or Alternative Legitimation Strategies?' (2003) 10 *Indiana Journal of Global Legal Studies*. p33.

[9] (Oxford University Press, 1990).

[10] Determinacy communicates the meaning of a law that must be clear; symbolic validation relates to the authority of the rulemaking or implementing process; coherence is described as a laws' consistency in practice; and adherence is a law's relationship to procedural and institutional framework or a canon of rules. ibid. p49.

[11] ibid p26.

sanctions and extraterritorial criminal law. Beyond the violation of fundamental principles of jurisdiction and trade agreements, extraterritorial economic sanctions are essentially coercive in nature and are a general attempt to change states' behaviour and economic transactions with the target state of the sanction.

**Extraterritorial Economic Sanctions and the Franck model**

In order to assess whether extraterritorial economic sanctions can be seen as legitimate according to the Franck model it is important to discern whether they fit the indicators outlined above. Bypassing the fact that each of these sanctions was developed in accordance with a valid lawmaking system of a particular state the consideration must move to the overall mandate or rationale of the sanctions as they are applied on the international plane. Thus procedural justifications of the measures are inconsequential to this analysis.

The Helms Burton Act and The Libya and Iran Sanctions Act have never suffered from the lack of a clear message or transparency in the law's essential meaning. The economic isolation of the target state is the clear intention; confusion, if any, lies in the prospect of enforcement by the originating state, in this case, the US. Thus determinacy in understanding the specifics of the sanction itself would not affect its argued legitimacy. If symbolic validation is the authorisation of a specific measure through its implementing process, this may be problematic for extraterritorial economic sanctions on several levels. First, the sanctions do not benefit from any symbols of pedigree or rituals unlike well-honed traditions of UN peacekeeping activities or diplomatic communities. Also they differ from

multilateral sanctions because of their lack of consensus within the international community, regional grouping of states, or United Nations General Assembly. Due to their very nature as a 'unilateral action' the only authority that can have a pull-compliance is that of the state sponsoring the sanction. Although economic sanctions have a long and notable history, extraterritorial sanctions that seek to punish third-party states and individuals lack any deeply rooted traditions or considered practices.

The final two indicators of legitimacy namely, coherence and adherence offer little justification for the sanctions. Neither is based on a series of international customary rules, conventions, or any international organisation. In fact, their lack of adherence to the fundamental principles of jurisdiction is clear.[12] These sanctions focus on individuals who are not nationals of the primary state, the behaviour or investment they target occurs outside the state territory and it is arguable as to whether any action by a third-party state would have an impact or 'effects' within the primary state.[13] Violations of specific articles of the World Trade Organisation have also been put forth by potential target states,[14] a key device to deal with a conflict of rules. Several UN General Assembly Resolutions[15] have tried to put pressure on the US to end the use of extraterritorial

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[12] See chapter 3 p75-80.

[13] In the case of the Helms-Burton Act the claimed 'effects' date back to the time when property was nationalised by the Cuban Government previously owned by the US citizens in Cuba after the revolution in the early 1950s.

[14] See Chapter 3 p97-102.

[15] UN GA Resolution 9654, *"...Assembly adopted a resolution on the need to end the embargo against Cuba, by which it again urges all states that applied laws and measures of an extraterritorial nature that affect the sovereignty of states and freedom of trade and navigation to*

economic sanctions because of their lack of adherence to international customary law principles and comity among nations and effect on international trade and commerce. Therefore, it is obvious that the non-adoption of or nonconformity to extraterritorial economic sanctions represent the view that they share no connection with any secondary rules commonly practiced in international law, (adherence); or holistic meaning and underlying principles, (coherence).[16] Certain government leaders and theorists undermine the existence of international law based on the assumption that underlying principles are mere value judgements and, as such, are open to subjective interpretation or are culturally relative. These criticisms ignore the objective character of *jus cogens* as the highest body of international law, reinforced by the International Court of Justice judgment in *Nicaragua*[17] and the Vienna Convention on the Law of Treaties 1969.[18]

Reinforcing the Franck model, unilateral extraterritorial economic sanctions also present a problem of contradictions in well-established international rules. On the

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*repeal or invalidate them as soon as possible."* UN Press Release. Two countries voted against the resolution, the US and Israel.

Also GA Resolution 3945, calling for the US to end the embargo against Cuba and GA Resolution 9387 titled Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries.

[16] Franck, T. 'The Emerging Right to Democratic Governance.' (1992) 86 *American Journal of International Law*. p 46.

[17] *Nicaragua* v *US* 4 ICJ Reports (1986) p100.

[18] 1155 UNTS 331, Article 53, *"a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character."* Also see ibid.

surface level, the paradigm of state sovereignty is closely linked with the principle of non-intervention in states. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of United Nations (1970)[19] outlines what Brownlie[20] deems "*the principal corollaries of sovereignty and equality of states*". In section (c) there is the duty *"not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter"*. The Declaration specifically mentions the use of "*economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights*". Section (f) deals with the principal of sovereign equality of states, reinforcing the attempt by the international community to recognise equality, regardless of differences in economic, social and the political nature of states. These principles may not reflect the reality of the power distribution on the international plane, but they do represent foundational principles and as a result, lead to a more substantive interpretation of the rules between states. Without one of the arguable exceptions to the non-intervention principle, namely a humanitarian crisis or genocide,[21] it is not just a principle designed to support the paradigm of sovereignty, its purpose is to control the coercion of individual states.

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[19] General Assembly Resolution 2625, 1970.

[20] Brownlie, I. *Principles of Public International Law*. (Oxford, 6th ed., 2003) p287.

[21] Intervention because of a humanitarian crisis or genocide is still questionable under the norms of international law, even though interventions are usually the result of a UN Security Council resolution. *"A lawful war is not necessarily a just, prudent or humanitarian war."* Letter to The Guardian, 7 March 2003, written and presented by several academics from Oxford, Cambridge University and the London School of Economics.

This impacts on the analysis of legitimacy in two ways. Conflicts between prominent and accepted rules in international law can lead not only to disharmony in the international community but also indeterminacy in the so-called 'international legal order'. This indeterminacy creates a fault line for the validity of international law, which is present in the varied state practice of extending the jurisdiction of economic sanctions outside of a state's territory. Understanding of and adherence to the central principles of international law is imperative for the determinacy of international customary law as a set of rules, or code, unlike the analysis of the determinacy of one specific rule.

The second impact on the concept of legitimacy is the inherent rationale behind the legal measure of a particular state. If the intent is to coerce another state's behaviour, then sovereignty is disrupted and indeterminacy returns. Thus by not adhering to the non-intervention principle, the sovereign equality of states is not only undermined but is dependent on the power of a state's reach for whatever purpose. This revisits the teleological aspect of legitimacy and the evaluation of the measure based on the purpose it serves rather than its causes. This is the lack of principled rationale in extraterritorial economic sanctions.

Consequently, not only does the Franck model illustrate the dilemma with extraterritorial economic sanctions and the concept of legitimacy, it also raises other questions of rationale and competing rules, linked to the theory. Constructing legitimacy beyond the Franck model is imperative to the perception of legitimacy and its normative contribution to international customary law.

**Constructing Legitimacy**

Franck's contribution to the development of the concept of legitimacy is not limited to the specific indicators but also extends to the sovereign functions of the state potentially superseded by the paradigm of international law and regulatory administrations. If this is to be true, then his contention of 'distributive justice and procedural fairness'[22] determining legitimacy is founded on the substantive interpretation of the norms of international law. This substantive view can also be seen in various arguments on the subject matter of democratic governance; the concept of failed states and regime change, where the system of international law governing each of these areas is evaluated in terms of its equitable affect on the individuals involved and the standing merits of the system itself.

Sellers contends that the assertion of justice is the essence of law from what he refers to as the 'republican' point of view and that the precondition of any legal system or a law's legitimacy is that its function must serve the 'common good' within the state. [23] On the international plane, he contends that states are part of the world community and as such should have respect for republican principles, akin to the 'for the good of the whole' argument through which democracy gains its legitimacy. In this sense, denial of rights that support the good of the whole,

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[22] supra note 16.

[23] Sellers, M. 'Self-determination and the Right to Democracy.' The Challenge of Non-state Actors. (1998) Proceedings of the American Society of International Law. p116. *"When Republicans contemplated international relations, they did not seek a world republic, despite their belief in universal human community, but rather an overarching federation of republics, to coordinate their mutual relations."* p117.

whether they are human rights violations, denial of minority rights, or even sovereignty, can lead to a lack of authority for international law and hence lack of legitimacy.[24] If sovereignty, from a modern interpretation, is a concept in flux, perhaps it is because of the developing norm of legitimacy and as a result there is a potential theoretical return pleasing to natural law proponents, somewhat analogous to a set of 'body of beliefs' determinable by reason.

However, other scholarship tends to argue that international law based on principles of natural law can be somewhat abstract and utopian removing the social context of a state action, which is necessary for the rule of law.[25] *"The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context".*[26] Georgiev promoted the premise that international law and its relevant theory are social constructs, but become 'real' or 'valid', moving from the abstract, when states follow the rules[27], while at the same time appropriately specifying that valid rules of international law remain valid even if state practice and a certain body of opinion changes until the change undergoes the "*necessary procedures*".[28]

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[24] ibid p8.

[25] Koskenniemi, M. 'The Politics of International Law.' (1990) 1 *European Journal International Law*, p4-32.

[26] ibid p5.

[27] Georgiev, D. 'Politics or the Rule of Law: Deconstruction and Legitimacy in International Law.' (1993) 4 1 *European Journal of International Law*. p3.

### *(1) Differentiating Legitimacy from Legality*

A primary observation in constructing the concept of legitimacy is the distinction between legality and legitimacy. The legality of an action or a measure in a state is dependent upon the process by which it is developed, a perfectly legal measure may lack the moral force of consensus but still remain legal, enforced by arms of the state and upheld by the courts. The Nuremberg trials may have taught proponents of the positivist's side of the debate that international war crimes tribunals reinforce the natural law perspective, upholding that an unjust law is not law, and therefore not legal. Nevertheless, critics formulate a further argument that the process on which an unjust law is based is inherently flawed and in its own sense illegal. One thing is certain, legality is primarily concerned with the state of the law, while legitimacy can be applied beyond a very restrictive legal analysis to include other aspects of study such as international relations theory, and politics. This is the view of Mansell, in his evaluation of legitimacy and the rule of law, noting the constraints on law by the power imbalance of states and state leaders and the economic reality impeding true good governance.[29]

The legality of a law is a formalised, process driven, prescription of acceptance and adherence. In the development and application of the law, a legal measure should adhere to the doctrine on which it is based and, in a modern sense, contain

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[28] ibid p3, 'necessary procedures' are not given a precise definition with regards to international customary law, but it is clear that valid rules are not changed through state practice or *opinio juris* alone.

[29] Mansell, W., Meteyard, B. and Thomson. *A Critical Introduction to Law*. (Cavendish Publishing, 3rd ed , 2004) p143.

some element of social justice in the way in which it is applied. However, this does not automatically create a legitimate legal measure. The formulation of international law is generally more dismembered than a state's constitutional arrangement, but can serve as a useful example in the argument of doctrinal hierarchy. Written constitutions tend to incorporate fundamental principles identified as key compilations of the highest law in the territory,[30] hence the relevant Supreme Court can strike down a law that is not deemed 'constitutional', reinforcing the fundamental norms on which the constitution is based. This example also revisits what some consider as a definition of legitimacy, the ability to *"command acceptance and support from the community so as to render force unnecessary."*[31] On the other hand, avoiding the temptation to discuss the legitimacy of institutions, there is a clear parallel with the supreme nature of *jus cogens* in international customary law.[32] *"Jus cogens acts not as a form of customary international law but as an international constitutional law; the norm that sets the very foundations of the international legal system".*[33]

Georgiev adds to the discussion by arguing that the comparison between legitimacy and legality is the division between what the law 'ought to be' compared with what 'the law is', with legality following in the traditionally

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[30] See Canadian Charter of Rights and Freedoms, the American Constitution, and the constitutions of France, Germany and several others.

[31] Bodansky, D. 'The Legitimacy of International Governance: The Coming Challenge for International Environmental Law?' (1999) 93 *American Journal International Law*. p596.

[32] Vienna Convention on the Law of Treaties 1969, article 53. A treaty is void if it conflicts with a peremptory norm of general international law (jus cogens).

positivist camp. *"The concept of legitimacy addresses the possibility of changing and developing law. Unlike the concept of legality, it does not only reflect the consequences of change but it provides a theoretical point of departure helping to carry out change".*[34]

The concept of legitimacy can be used to promote the requirement of democratic principles to be applied in a particular state or an international organisation that lacks transparency, for example, the WTO or the criticism of a *"democratic deficit"*[35] within the EU, or the argument of economic laws reflecting a fairer trade mechanism between states. Nevertheless, is this essentially a change in law by way of an *"adoption of new principles"*,[36] or is it a reinforcement of the understanding of the key principles of peremptory norms of international customary law? The law itself may alter and progress but, the normative framework has remained, it is the use of legitimacy that allows this progress to take place. Theorists may refer to legitimacy as an 'emerging concept' and it is true that the discussion on legitimacy has never been so widespread, but when has the principal of sovereign quality states, non-interference and equitable settlement of disputes ever disappeared from international customary law or elements of the UN Charter for that matter? Allott once remarked that, *"the law is an ever-*

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[33] Janis. M. *An Introduction to International Law*. 34 (1993) as quoted in Fishman, A. 'Between Iraq and a Hard Place: The Use of Economic Sanctions and Treats to International Peace.' (1999) *Emory International Law Review*. p708.

[34] supra note 27, p14.

[35] Delbruck, J. 'Exercising Public Authority Beyond the State: Transitional Democracy and/or Alternative Legitimation Strategies?' (2003) 10 *Indiana Journal of Global Legal Studies*. p31.

[36] ibid.

*changing set of retained acts of social willing*".[37] If this is so, legitimacy can be perceived as the lens through which a better view of the all-important peremptory norms can be truly appreciated.

### *(2) Necessity of a link with Jus Cogens*

If the construct of legitimacy is dependent upon peremptory norms of international customary law, any analysis of these norms or *jus cogens* is a pivotal element in the support of the theory as well as international jurisprudence as a whole. Previously state sovereignty, the sovereign quality of states and non-intervention have all been linked as part of the normative framework of legitimacy. This is not an exhaustive list; several international crimes have been identified as having the highest standard or crimes of universal jurisdiction.[38] Most commonly, theorists have referred to the first two articles of the UN Charter, reflecting the post-World War II view of the modern interpretation of natural law components as the Charter's "*Purposes and Principles*". The UN Charter is not the origin of sovereign equality and non-intervention but, it is a helpful codified presentation of the supreme importance of these principles.

The variety of General Assembly Resolutions[39] urging states to avoid unilateral extraterritorial economic measures that interfere with the sovereignty of a state

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[37] Allott, P. ' Theory and International Law; An Introduction.' *The British Institute of International and Comparative Law.* (London 1991) p110.

[38] See chapter 4, for analysis of war crimes, genocide p161-170 and torture p 154-161.

[39] UN GA Resolution 9654, *"...Assembly adopted a resolution on the need to end the embargo against Cuba, by which it again urges all states that applied laws and measures of an*

may not be sources of binding law, but can codify a peremptory norm according to the *Use of Nuclear Weapons Case.*

> *"... General Assembly Resolutions, even if they are not binding, may sometimes have a normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly Resolution, it is necessary to look at its content and the condition of its adoption; it is also necessary to see whether an opinio juris exists as its normative character. Or a series of resolutions may show the gradual revolution of the opinio juris required for the establishment of a new rule".* [40]

Not surprisingly, the US and Israel voted against one of the resolutions opposing extraterritorial sanctions, which can disturb the requirement of consensus for a resolution to codify a customary principle. Nevertheless that does not mean to say that is not an expression of opinion and general state practice from the authoritative organ of the General Assembly. Also Simpson has evaluated the

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*extraterritorial nature that affect the sovereignty of states and freedom of trade and navigation to repeal or invalidate them as soon as possible."* UN Press Release. Two countries voted against the resolution, the US and Israel. Also GA Resolution 3945, calling for the US to end the embargo against Cuba and GA Resolution 9387 titled Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries.

[40] The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Reports 254 –255. para. 70.

positivist approach giving General Assembly Resolutions 'normative force' on objector states as part of what he deems "legislative sovereignty".[41]

However, one of the major problems with assuming the argument is now complete is the matter of objector states highlighting the requirement of consensual agreement of states to be bound by international law. Danilenko has argued, "*from a policy perspective, attempts to exploit the concept of jus cogens as the normative instrument for imposing the views of the majorities on the descending minority would appear unwise*".[42] Danilenko and others have referred to the confusion surrounding the identification of *jus cogens* component rules, its subsequent impact and uses from the International Law Commission,[43]comments from leading cases,[44]as well as statements from individual countries[45] to conclude that reinforcement of *jus cogens* is problematic. Critical analysis of *jus cogens* highlights two problems for theorists. The first is the question of the influence of morality in international customary law and the second is the rule of the majority

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[41] Simpson, G. '*Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*', (Cambridge University Press, 2004) p52.

[42] Danilenko, G. 'International *Jus Cogens*: Issues of Law Making.' (1991) 12 1 *European Journal of International Law*. p66.

[43] 2 *Yearbook of the International Law Commission* 1966 247-248. Expressed difficulty in devising a criterion for *jus cogens*, put emphasis on the subject matter of the rule and not just the rule.

[44] The *Lotus* Case (*France* v *Turkey*) PCIJ, Series A, No. 10 at 19 (1927), " *International law governs relations between independent states. The rules of law binding upon states therefore, need from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.*" As quoted in supra note 41, p45.

[45] France's dim view of the majority of states imposing a peremptory norm that would create a source of international law it would be obliged to follow. Also see statements from Germany.

by accepting a fundamental norm. Without addressing these weaknesses directly the reality of the use of *jus cogens* as part of the normative framework for legitimacy is fraught.

It is perhaps simplistic to represent the dilemma as a tension between those who promote moral principles in international customary law and those who prefer the more positivist legalistic approach. Even those who subscribe to the realist view of international customary law, acknowledging the power differential between states as the political realities of the system and giving due deference to the impact of international relations theory, will refer to a moral component in the law as desirable in certain instances. An example is general support for the establishment of the International Criminal Court, the statute of which is a representation of the positivist or codified account of certain natural law principles.[46] The purpose of the Court may be to provide a balance in the international legal order between the politically weak and strong states for prosecution of major international crimes, but it is also consensual in nature, stemming from a treaty, with a possibility of applying to non-party states.[47]

International jurisprudence is not solely reliant upon consent and positivist obligation to international conventions and treaties and organisations. If it were it would be disconnected from any principled basis. Nevertheless, bewilderment

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Comments at the Vienna Conference on the Law of Treaties. UNCLOT I at 94, As quoted in ibid, p48.

[46] The Statute of Rome 1998, the codification of crimes that have been tremendously expanded upon in specified definitions since the Nuremburg Charter, seen to embody aspects of natural law.

[47] See chapter 4 p166.

remains over the classical views of Hobbes and Grotius and those who promote neutral principles particular to individual state ideologies. State practice that is inconsistent with the principles of international customary law can create significant argument over consensual norms. Cohen's response to this problem is to advise international lawyers to think, *"less of discovering international law and more of "constructing" an international legal regime...international lawyers should look to build a legal regime founded upon arguably parochial ideas but that can nonetheless become a source of self-perpetuating universal norms".*[48] He reinforces the realist view in that international lawyers should seize what they can when it comes to norm building and rejects the idea that state practice automatically leads to this end in his support of the standard account or the D'Amato recognition that customary norms are only formed with the coincidence of practice and *opinio juris.*[49] In this way the most fundamental norms or *jus cogens* should be within the realm of what is appropriate and perceived to be morally acceptable by the international community and be effective, according to Cohen.[50] The necessity of a certain degree of morality in international customary law principles is a *'fait accompli'*, this is not to say that legitimacy is a utopian concept, but rather it is one based on the reality of the interaction between state practice and *opinio juris* in order to contribute to customary international law. The final verdict for morality and consensus in international customary law is twofold. Morality is not based on natural law exclusively but those that already have a

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[48] Cohen, H. 'The American Challenge to International Law: A Tentative Framework for Debate.' (2003) *Yale Journal of International Law*. p574.

[49] D'Amato, A. *The Concept of Custom in International Law*. (Cornell University Press, 1971) p49.

[50] supra note 48, p574.

normative status through the agreement of the majority of states, this reflects consensus and can help to avoid the problem of deciding what 'objective' moral principles are. Verdross stated in 1966 that the character of *jus cogens* "*consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community*".[51]

Legitimacy's link with *jus cogens* is reinforced by the modern view of customary international law identified by Roberts.[52] This view emphasises the *deductive*[53] process of establishing custom, through the *opinio juris* of states rather than the traditional view of an *inductive* procedure, through the building blocks of accumulative state practice.[54] In this sense the concept of legitimacy is emerging through the modern analysis[55]of customary law by deduction, while the same time preserving traditional peremptory norms. Finally, to take the positivist approach, the consent required for the components of legitimacy are represented in the UN Charter even if certain state practice ignores or qualifies their existence.

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[51] Verdross, A. 'Jus Dipositivum and *Jus Cogens* in International Law.' (1966) 60 *American Journal of International Law* p 55.

[52] Roberts, A. 'Traditional and Modern Approaches to Customary Law: A Reconciliation.' (2001) 95 *American Journal of International Law* p 758.

[53] Simma, B. and Aston, P. 'The Sources of Human Rights Law: *Jus Cogens* And General Principles.' (1988-89) 82 *Australian Yearbook of International Law*. ibid.

[54] Delimitation of the Maritime Boundary in the Gulf of Maine Area (*Canada v U.S.*) 1984 ICJ Reports 246. supra note 52.

[55] The link between the concept of legitimacy and the modern view of the development of customary law should not be confused with what some argue is the "modern customary law",

**Legitimacy and Sovereign Equality: Divergent from Traditional Sovereignty:**

***(1) Sovereignty:***

The traditional notion of sovereignty is useful in assessing extraterritorial measures as they can interfere with the legal, political and economic aspects of the accepted domain of the state's control. It would be simplistic to conclude that a specific type of extraterritorial measure lacks legitimacy if it interferes with the sovereign rights of the state, but not necessarily incorrect. In order to propose that legitimacy is a key requirement in the assessment of extraterritorial examples, its interaction with the concept of sovereignty is fundamental. Arguments defending extraterritorial economic sanctions rely on an extension of state power beyond territorial sovereignty and without reference to sovereign equality.

It is a requirement in any discussion of international jurisprudence in this area to begin with an analysis of sovereignty with reference to the Westphalia concept,[56] a somewhat outdated proposition of the rights of states and their institutions of authority to exert power over a particular territory under its control to the exclusion of outside influences. Modern theoretical analysis of sovereignty and

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moving away from the traditional theoretical basis of customary law. See discussion by Anthony D'Amato, Sir Robert Jennings and Patrick Kelly and others in supra note 52, p758.

[56] The Treaty of Westphalia 1648, the peace treaty after the end of the Thirty Years' War between the Holy Roman Empire and the King of France. "... *Where there was the rejection of the spiritual domination of the Catholic Church and the political rule of the Holy Roman Empire as well as an agreement on the secular equality of Catholic and Protestant states (in Germany). So Westphalia symbolises, for international Law, the transition from the strict hierarchy to equality... composed of independent, freely negotiating states."* supra note 41. p26.

statehood has moved away from the classical elements leaving an area of debatable argumentation around the reality of sovereignty in the international arena. *'Organised Hypocrisy'*,[57] by Krasner highlighted four distinguishable types of sovereignty:[58] interdependent sovereignty, dealing with trans-border issues such as pollution, terrorism, currency etc, where the cooperation of states is a necessity; international legal sovereignty which is the recognition by other states for the purposes of diplomatic relations; domestic sovereignty, possessing the authoritive structures required within the state for control and finally, Westphalian sovereignty which excludes external influences on domestic authority. In his critical evaluation of the traditional concept of sovereignty Krasner is making the important point that with Westphalian sovereignty non-intervention is a key component that defends the weaker states from the abuse of the more powerful in the international arena.[59] In comparison other authors view it as an evolving concept previously providing stability internationally. One view appropriately expressed sovereignty as a 'social construct',[60] where the reality of sovereignty is different from the theoretical exclusiveness of the state. The term commonly used to describe this new reality is that states possess relative sovereignty, relative to their obligations under international law. The more extreme view of the usefulness of the traditional notion of sovereignty would rest with Henkin who stated, *"For legal purposes at least, we might do well to regulate the term sovereignty to the*

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[57] Krasner, S. *Sovereignty; Organised Hypocrisy* (Princeton University Press, 1999). p9-25.

[58] ibid.

[59] ibid p21.

[60] Biersteker, T. and Weber, C. (ed*) State Sovereignty as a Social Construct* (Cambridge University Press, 1996).

*shelf of history as a relic from an earlier area".*[61] It is a true reflection of modern international relations that absolute and exclusive sovereignty is difficult to locate; interference by powerful states, for whatever reason, continues to exist however annoying it is for international lawyers. Examples of interference in the sovereign rights of other states can range from humanitarian intervention as seen in Kosovo and Rwanda, to the use of force in countries such as Afghanistan and Iraq, and from election tampering in more vulnerable states,[62] and for the purposes of this discussion, economic coercion through extraterritorial economic sanctions. The other side of the coin is the growing integration and interrelation of states, not only through economic trading groupings such as NAFTA, the supposed supranational authorities such as the EU, international dispute mechanisms such as those seen at the WTO, not to exclude the organs of United Nations and the power of NGOs. Theories currently grappling with the concept of sovereignty agree with the more progressive analysis, for instance, Jackson's view of "*Sovereignty-Modern*"[63] which includes a power allocation analysis for policy options. His thesis follows the lines of a functional tool for decision makers using a states' 'monopoly of power' in the consent role of accepting or making key decisions on customary norms, dispute mechanisms and treaties.[64]

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[61] Henkin, L. International Law; Politics and Values. (Westview Press, 1995) as quoted in Jackson, J. 'Sovereignty-Modern; A New Approach to an Outdated Concept.' (2003) 97 *The American Journal of International Law*. p 789.

[62] The most recent example would be the allegations of election tampering by the CIA in Venezuela, to depose the anti-Bush leader Hugo Chavez.

[63] supra note 61, p 802.

[64] ibid p785.

If the old notions of the concept of sovereignty are long since outdated it does not mean that concepts closely linked to sovereignty are invalid, such as a restriction on intervention in other states' affairs and the concept of the equality of nations. Respect for relative or functional sovereignty, rather than absolute or exclusive sovereignty[65]of a state, is an essential element of peaceful coexistence of states and international advancement. It is at this point that legitimacy can add to the dialogue on 'functional sovereignty', defined as the sovereign rights required to act as a state within international law principles. One of the opinions identified by Jackson in his article is Schermer's who outlined, *"... that under international law the sovereignty of States must be reduced. International cooperation requires that all States be bound by some minimum requirements of international law without being entitled to claim that their sovereignty allows them to reject basic international regulations".*[66] States have the power to make decisions to either join economic groups, ratify international treaties or conventions or to participate in international activities. However, the restrictions on states power or rather the abuse of power are the peremptory norms of international law and without this functional sovereignty cannot claim a legitimate right. Thus functional sovereignty relies on the necessity of a link with *jus cogens* as does the concept of legitimacy itself.

[65] ibid.

[66] Schermers, H. 'Different aspects of Sovereignty', in Kreijen, G. et al. (eds.) *State, Sovereignty and International Governance.* (Oxford University Press, 2002). p192.

The tension remains in the post-Westphalia era of the equality of states, what Chinkin,[67] among others, refers to as one of the two visions of international law; the horizontal versus the vertical system of international law. The horizontal system places the emphasis on the nation-state as the ultimate power in the international legal arena and the practical aspect of international relations; consent of the state is the only passport to the peremptory norms of international law. The vertical system alters this assumption by placing the peremptory norms above the power-right of the nation state. [68] The distinction of these two systems may appear to be an over simplistic view of how states perceive and interact with reference to the concept of sovereignty, but it can be useful when it comes to determining the reasoning behind adherence to international law or the lack of it. For example, Mansell critiques the aptly termed 'neo conservative views' of the American author Bolton who questions the legal obligations for the US present under international law, *"which sees no source of democratic legitimacy higher than the nation state".*[69] It is clear that the reality of sovereignty and thus sovereign equality is dependent upon the recognition of the power distribution in international relations and the death of the formalistic reference to the originating theory of sovereignty, '*par in parem imperium non habet'*.[70]

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[67] Chinkin, C. 'Kosovo: A "Good" or "Bad" War.' (1999) 93 4 *The American Journal of International Law.* p846.

[68] ibid "vertical system that upholds norms of *jus cogens* such as those guaranteeing fundamental human rights."

[69] Francis Fukuyma, quoted in Mansell, W. 'Goodbye to All That; The Rule of Law, International Law, the United States and the Use of Force.'(2004) 31 *Journal of Law and Society.*

[70] "An equal cannot exercise power and jurisdiction over an equal."

Other than the US, certain groupings of states have a less protectionist view of international law, which can influence the legal analysis or outlook of the concept of sovereignty. MacCormick's[71] comment of the affect of European integration as the 'pooling' of nation state sovereignty can be replicated in certain European constitutional courts. In fact, European integration is one of the main factors that has contributed to the analysis of the doctrine of sovereignty and the question of the plurality of views in the doctrine by the German Federal Constitutional Court, Bunderverfassungsgericht (BverfG). Unlike the US protectionism with regard to the traditional doctrine of sovereignty based on a fear of disturbance with national interests, the BverfG has sought to protect German national identity through its analysis of fundamental rights cases and German Basic Law.[72] This can be seen in light of the relevance of certain aspects of 'German State Theory'.

Particular components of 'German State Theory' are linked to the historical perception of German nationhood and the unique constitutional and jurisdictional arrangement of the Republic of Germany after World War II. This aspect of the theory is relevant to the discussion of sovereignty as Germany's external matters remained within the control of the Allied Powers for some time. This was reflected in the jurisprudence of the German courts leading to a unique interpretation of sovereignty, where external recognition gave the state its

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[71] MacCormick, N. 'The Maastricht-Urteil: Sovereignty Now.' (1995) 1 *European Law Journal.* p259.

[72] Series of cases where the German Federal Constitutional Court has deemed itself to be the "*ultimate arbiter concerning cases of human rights.*" Examples include *Solange I,* BVerfGE 37,271*: Solange* II, BVerfGE 73,339: and the *Banana Case*, 2000-2 BvL 1/97. Quoted in Aziz,

sovereign rights. This was distinct from the more traditional view of the concept, having total control over a defined territory.

Prior to World War II, German citizenship was not restricted to the territory of Germany itself but extended to include individuals of common heritage or descent and culture living outside the state.[73] Schmitt identified this link with the 'community' and the state as a representation of basic rights forming part of the state's democracy and liberal individualism.[74]Aziz critiques the slow recognition of third party nationals as "*dubious conceptualisation of democracy*"[75] within the state, influencing or contributing to the sovereign right of the Germany people, dependent upon this particular identity or "*societal cohesion*".[76] This pro-nationalist view recognises the uniqueness of the German people and as a result the distinctiveness of the state, opposing external pressures that could potentially dilute sovereignty. The defensiveness of German sovereignty owed a significant portion of its development to the Allied Power's control of the state. Allied restrictions[77] and influence through the Settlement Convention resulted in a legacy

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M. 'Sovereignty Uber Alles: (RE) Configuring the German Legal Order'. Walker, N. (ed) *Sovereignty in Transition.* (Hart Publishing Oxford, 2003) p290-291.

[73] During the time of the Nazis, this was manipulated into a distinction between the Third Reich and German citizenship of the state; the former was only accessible by those who have a German bloodline. ibid p285.

[74] ibid p286.

[75] ibid p286, voting rights of third party nationals deemed incompatible with the Basic Law of Germany by the Federal Constitutional Court.

[76] ibid.

[77] Restrictions on the jurisdiction of the German Courts included a bar on *" the ability to repeal or amend legislation enacted The Occupation Authorities, rights and obligations created or established by or under a legislative, administrative or judicial action of the Occupation Authorities remained valid for all purposes under German Law."* ibid. p283.

of nation state sovereignty open to outside influences. It was sovereignty but not as we know it, Germany (FDR) was deemed to have "*rights inherent in a sovereign state*" as opposed to "*a sovereign state*".[78] A reunified Germany only gained full sovereignty over all internal and external affairs in 1990 with the Treaty of the Final Settlement.[79] The legal ramifications for restrictions on the jurisdiction of the courts in Germany fashioned jurisprudence with the underlying assumption of a 'national community within its own legal culture'.

With the advent of full sovereignty Germany then faced movement towards European integration and the possibility of a European Constitution. On the whole, the debate around sovereignty had a new focus. Certain German theorists, namely Heller, supported a more modern view of the doctrine of sovereignty, proposing that rights previously linked with the protection of state sovereignty depend upon fundamental principles not solely located in a territory or relevant shared heritage.[80] This modern view has been deemed by Aziz to be a "*post-*

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[78] Aziz, M. and Schumann, R. 'Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundedverfassungsgericht's Bananas Judgement.' *Constitutionalism Web-Papers, ConWEB* No.3/2003.

[79] Signed September 12, 1990. The Treaty confirmed the borders of the reunified Germany and article 7 returned full sovereignty to the state removing the restrictions and influence of the US, the UK, France and the Soviet Union. ibid p7. Matters under the jurisdiction of the Allied Control Council until the 1952 Settlement Convention included economic affairs, justice, communications, transport, finance, military issues, political affairs and law and order. The 1952 Settlement left the US, UK and France with rights over the reunification and Germany as a whole, article 2. ibid p5. East Germany (GDR) began to regain full sovereignty in 1970 from the USSR, after GA Resolution 2625 The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of United Nations. supra note 72 p299.

[80] ibid p294.

*sovereignty*" or "*cosmopolitan*" position.[81] Although Heller did not agree with Schmitt's contention that pluralism only weakened a state's sovereignty, they both shared a belief in the strength of a state's right to 'self preservation' even against international law.[82] The German experience had brought about a need to claim sovereignty even in the face of legal and political limitations. This need is a reaction to the power differential between the organs of the state and the remnants of external control. The three part so-called criterion that constitutes the essence of sovereignty; population, territory and a government with ultimate authority over the two previous criteria was the Achilles' heel. Only external recognition validated the sovereign rights of Germany. It was the BverfG that dealt with the constitutional issues of fundamental rights and the resulting effect on the perception of sovereignty.

The Grundgesetz[83] had been designed after World War II to restrict the power of the political authority of the state, in fact the BverfG was established to adjudicate with vast scope on constitutional matters according to the Grundgstz. The courts had been restricted on certain facets of external sovereignty, however, it was through this unique interaction between the restriction and a general attempt to claim aspects as close to sovereignty as possible that resulted in a jurisprudence that would outline a major thread of 'German state theory'. Hobe's analysis of the case law led him to the conclusion that the Grundgesetz, *"must indeed, on a worldwide scale, be regarded as exemplary with respect to its willingness to*

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[81] ibid.

[82] ibid p296.

[83] Basic Law for the Federal Republic of Germany. supra note 72.

*cooperate and its affirmative attitude towards international integration in general".*[84] This can be seen in the interaction between the BverfG and the various international organisations and supranational bodies, revisiting the issue of European integration for Germany, although European integration is not the exclusive international integration. Hobe contends that this is a necessary element for successful interaction in the internationalised world, supporting the transferral of specific characteristics of sovereignty as a positive consequence because of the limitations inherent in the nation state to cope with problems in the international sphere.[85] The reality of the willingness to cooperate in international integration is the representation of 'external state law', which upholds the states functional sovereignty while at the same time recognises the key aspect of the need to adapt constitutional jurisprudence. The approach of flexibility in the constitutional court disturbs the classical view of sovereignty as the absolute power and control over a defined and recognised territory. This strand of German state theory contributes to the proposed vertical view of international law, as outside legal influences of international law and relations can affect the sovereignty of the state. The vertical view is supported by Delbruck's argument that to reject certain obligations under international law, such as Chapter IV Security Council Resolutions because they interfere with state sovereignty is a legal fantasy since members have already

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[84] Khan, D. 'Der offene Verfassungsstaat zwishen Souveranitat und Interdependenz. Eine Studie zur Wandlung des Staasbegriffs der deutschsprachigen Staatskehre im Kontext internationaler instituionalisierter Kooperation.' (Berlin: Duncker Humbot,1998). Book Review, (1998) 9 4 *European Journal of International Law*. Khan summarises Hobe's conclusion from the German publication, certain elements of his thesis can be found in the English language article: Hobe, S. 'Statehood at the End of the Twentieth Century – The Model of the Open State.' (1997) 2 *Austrian Review of International and European Law*. p127.

[85] ibid.

agreed to the Charter of the UN and the subsequent restrictions inherent with that membership.[86] His argument revisits the German philosopher C.F. Von Weizcker who used the term "world internal law" as a perspective of a peaceful interconnected world restricting absolute state sovereignty.[87]

The ideological construction of the 19th Century view of sovereignty links back to a time of state formation and recognition, where power and legitimacy of laws were found within the state, the 'purer' form of the horizontal view of international law. Jellinek concluded in 1914 that sovereignty was more of an "*accidental attribute of supreme power of the state*" as opposed to representing the 'essence' of statehood.[88] This view is more in line with the modern concept of sovereignty and not a product of its time. Even though the decline in sovereignty has not necessarily affected the most powerful states in the international community. Overall the reality of the doctrine of sovereignty has been altered to reflect the growth in a changed world of interdependence and the factual limitations on the power of the individual state, whether the effects are international organisations, certain aspects of international law, or trans-national problems that the state is unable to cope with. This is the situation with the problem of extraterritorial crime. The solutions for these crimes are sometimes outwith the competence of the individual state and the traditional view of territorial jurisdiction. State sovereignty that recognises and incorporates the fundamental principles of international law and its functioning in the domestic

[86] Delbruck, J. 'Prospects for a "World (Internal) Law ?": Legal Developments in a Changing International System.' (2002) 9 *Indiana Journal of Global Legal Studies*. p402 and 428.

[87] ibid p402.

venue is able to deal with the challenges in future. States who prosecute offenders of international crimes because of the recognition of international customary principles as well as incorporation of conventions and treaties are reacting to the evolved doctrine of state sovereignty, or as Krasner termed 'interdependent sovereignty'.[89]

Sovereignty has a key role in a state's relation to the international arena and within the concept of nationhood. It is fairly evident that a state that integrates the doctrine of sovereignty with international laws and institutions is most probably in keeping with the concept of legitimacy, as it would inevitably be adhering to the peremptory norms of international law, (respecting the principles of sovereign equalities and non-intervention). International law by its own construction and development must follow the fundamental principles on which it is based.

Returning to the earlier discussion concerning the debilitating effect on sovereignty when a state abuses a power differential with a weaker state, legitimacy is lost in this instance. The juxtaposition of the evolution or dilution of the modern concept of sovereignty is its legitimacy. Functional sovereignty that is open to the influences of international integration regulated by the peremptory norms of international law supports the concept of legitimacy. The ebbing of certain key aspects of sovereignty due to the coercive power of a state does not hold with legitimacy or the fundamental principles even if it occurs more regularly than anticipated. Thus, a distinction should be drawn between growing

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[88] 'General Theory of the State' 3rd ed. 1914, 64 as quoted in supra note 86, p427.

[89] supra note 57, p12.

interdependence, inter-state relationships and the undesirable examples of intervention. Interventions usually do not conform to customary international law, as well as positive international law. However persuasive the argument for certain examples of interventions, such as humanitarian, may appear desirable in order to solve a crisis, they in reality disturb the key aspects of sovereignty that are essential for an international regime to function.[90] Extraterritorial economic sanctions are less intrusive than physical interventions but in reality it is the 'thin end of the wedge' and ultimately they too are the actions of a hegemonic power.

### *(2) Sovereign Equality and Unilateral Actions*

In the last section the discussion surrounding sovereignty has led away from the traditional concept toward the vision of an 'open state', where state sovereignty is influenced by the norms of international law. This argument is not only founded on certain theoretical considerations, but also on the reality of international integration or what is sometimes referred to as 'global governance'. Fundamentally it is also a necessity in order to combat serious problems, facing states such as trans-national and international crimes.

The sovereign equality of states also presents a traditional formalistic definition that bears nominal similarity with the reality of the interaction of states. The process of inter-state relations is at the heart of sovereign equality of states and it

[90] See Chinkin's analysis on Kosovo: the reality of political disturbance and enforced legal mechanisms after the intervention meant that it compromised both sovereignty and human rights. supra note 67, p846.

is this interaction that needs to be governed by the rules of international customary law.[91] The duty not to intervene within the domestic jurisdiction of another state is touted repeatedly in the analysis and critique of extraterritorial economic sanctions. However, the use of these measures is indicative of the perception that sovereignty and sovereign equality of states are somewhat disposable when it interferes with the will of a powerful state. In certain instances, theorists such as Simpson have highlighted that abuse of this power can create "*tolerated inequalities*",[92] where one state applies pressure or threatens another if they do not act in a desirable fashion. Simpson uses the example of what he deems as a non-illegal threat of direct economic sanctions by the US against Yemen when they refused to support the UN Security Council Resolution against Iraq.[93] Extraterritorial economic sanctions cannot be confused with tolerated inequalities, as their legality is less in question.[94] Indeed even the Yemen example might elicit a formalist response with reference to the customary principles outlined in the Declaration on Principles of International Law Concerning Friendly Relations prohibiting threats of an economic nature.[95] This is not to say that tolerated inequalities are not commonplace practice in international relations, undeniably they have become a significant event of modern relations. The main concern, however, is the potential expansion of tolerated inequalities to include clearly prohibited actions like extraterritorial economic sanctions.

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[91] supra note 20, p287.

[92] supra note 41, p57.

[93] ibid.

[94] See chapter 3; discussions surrounding legality of extraterritorial economic sanctions including violations of articles of NAFTA and GATT, and the conflict with international customary norms of sovereignty and non-interference. p94-102.

The fight against coercive unilateral actions of states, be they extraterritorial economic sanctions or the use of force, relies on counteracting the justification of foreign policies that either defend or promote 'national interests'. This type of national interest is usually a crude representation of frustrating factors one being the belief in the supreme power of the state, beyond the traditional sovereignty to true 'self isolation'. Along with this factor is the unwillingness to participate in a cooperative international system that does not service the interests that need to be fulfilled because there is a potential loss of total power through the rule of the majority. This fear of a diluted visionary implementation of policy initiatives and distrust of the largest group of nations to fully comprehend the ideology under consideration is at the root of the current tensions with the US and the UN. The result is a devaluing of the sovereign equalities doctrine by such self-isolated states and the increased use of extraterritorial measures. As Delbruck argues, "*to compensate for the loss of state control and steering capacity, states are more and more turned to the extraterritorial exercise of public authority*".[96]

However, the concept of legitimacy is not solely dependant on the consensus of the majority alone. It also must maintain a normative association; a general consensus does not automatically result in a legitimate right, for instance the questionable intervention in Kosovo. This association in the international sphere is represented by a regulated inter-state relationship that does not simply acknowledge the absolute power of the state to act against the norms of

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[95] 1970, section (F) sovereignty to equality of states.

[96] supra note 86, p410.

international customary law. In 1999, the UN General Assembly reiterated this thought urging states to restrict unilateral coercive extraterritorial measures adding weight to other Resolutions around similar extensions of jurisdiction beyond the territory.[97] Thus, for the purpose of this discussion the doctrine of the equality of states is legitimised only when there is adherence to the customary norm of non-intervention. Indeed, the resolution was not only a reinforcement of customary international law it was an acknowledgement of the asymmetry of pressure powerful states can exert on a weaker states. Unilateral measures that result in the disturbance of the authority of international customary law and the authority within a sovereign state, without consent of the state, amounts to what Vattel termed "*extravagant injustice*".[98]

Consensual disturbances of state sovereignty through international conventions, and treaty obligations, for example the OECD Anti-Bribery Convention and the new draft European Constitution possess aspects of intervention that are both positive and negative depending on the view of the individual state and its political mechanisms. Even though they appear entirely legally consensual and acquire the ratification of the independent states' public authority institutions, they may be the result of a certain degree of diplomatic and economic pressure on the individual state by the majority in the Union. This reality of international relations cannot be compared with the overt coercion and drastic economic costs that are the result of a legitimate unilateral extraterritorial measure that is in use. These measures can also destabilise the constructs of authority within the target

[97] supra note 15.

[98] supra note 57, p21.

state, undoubtedly one of the main intentions of such sanctions. Needless to say it would be a breach of the fundamental aspects of sovereignty and sovereign equality of states.

Returning to the realist view of sovereign equalities, Simpson rightly identifies sovereign equality of states not as a 'territorial ideal' but as an operational construct to the relations between states.[99] This is the challenge for legitimacy, classifying the appropriate operational construct. Moving on from the Hobbesian view of an international legal order where international law is higher than the subordinated importance of states, Simpson reviews the current system as state sovereignty where international law is still superior, and the sovereign rights of all states are equal to that of each other.[100] This should be the answer for determining a measure's legitimacy, however, it assumes equality between states when inequality remains. Inequalities outlined by Simpson such as tolerated inequalities, mentioned earlier, and legislative hegemony as with the Security Council, where powerful states can enforce laws on non-consenting states are a concern for weaker states.[101] These inequalities can turn questionable unilateral actions of powerful states into multilateral measures. Fortunately, extraterritorial sanctions have had the opposite effect, but this does not mean that other interventions have been held to within the boundaries of international law for instance Iraq. Existential equality,[102] on the other hand, is closely associated with

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[99] supra note 41, p41. Simpson's evaluation of sovereign equalities is unique identifying three distinct forms of sovereign equality: formal equality, legislative equality and existential equality.

[100] ibid p 33, p41.

[101] ibid p51.

[102] ibid p53.

the view of pluralism in the international legal order, the sovereign right to have a different perspective on the form, organisation and operation of a state, *"...the corollary of existential equality is non-intervention and the right to choose one's own form of government free from external control".*[103]

It is the last part of this quote that is essential for the purposes of the legitimising of a particular measure. 'Free from external control' would naturally include unilateral extraterritorial economic sanctions. However, does it also tar examples of interdependence sovereignty such as exterritorial criminal law with the same brush? Legitimacy requires the measure in question to uphold the peremptory norms and general principles of international law, specifically non-intervention and relative sovereign equalities of states. The prosecution of international crimes are within the highest interests of the world community and 'adheres' with the holistic meaning of the underlying principles to quote Franck.[104] Prosecuting international crimes can cause indeterminacy between states if mechanisms for prosecution are not agreed, as in the opposition to the ICC. A majoritarian approach is best to solve the disagreements over time allowing for wide spread use of this normative framework.

In the previous chapter, reference to comity was stressed when dealing with trans-national criminal offences, this is because of legitimacy. The broad interpretation of comity reinforces the existential equality of states and allows cooperation on

[103] ibid p54.

[104] supra note 1.

the international plane with advantages of evolved functional state sovereignty open to legitimate influences of international law.

**Conclusion**

In the past legitimacy has been used when evaluating the valid authority of public institutions and their operations. This has limited legitimacy to the analysis of a given right. Legitimacy as a construct has moved the discourse into a broader sphere. Criticisms of legitimation strategies are linked in some way to the limitations of the philosophical explorations that support the understanding of legitimacy. It is difficult for theorists to agree that legitimacy can be more grounded than or distinguished from an idealised standard or notions of equity in international law.[105] Although the normative relationship between legitimacy and *jus cogens* identifies strongly with equitable relationships in international law principles, general reference to international law to these principles can ignore the contribution of the theory of legitimacy with the asymmetry of power relationships between states.

The two divergent examples of extraterritorial measures offer an opportunity to flesh out the application of legitimacy not only making use of Franck's indicators but also applying the evaluation of the 21st Century reality of doctrines of sovereignty and sovereign equalities of states. Extending Simpson's view of sovereign equalities as an 'operational construct between the relations of states'

[105] Tamanaha, B. 'The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Process.' (1999) 76 *Denver University Law Review*. p10.

the essential requirement of non-intervention becomes apparent. This may, at first glance, seem to be in direct opposition to the scrutiny of sovereignty as an 'open state,' but it actually supports the distinction of the two extraterritorial measures. Permitting the influence of international law in the law of the sovereign state is a choice that upholds the fundamental norms of international law. The recognition of a choice by a state reinforces the core element of sovereignty or existential sovereignty, and befits the reality of the relations between states.

Economic sanctions are never a choice for the target state and although international consensus is opposed to their use, they remain a helpful tool for powerful states, especially those who disregard sovereign equality in an attempt to pursue an ideologically driven foreign policy for national interests. Thus legitimacy is also linked with the consent of a state to decide the make up of their laws, operations and relations with other states.

The next chapter critics the lack of legitimacy in the application extraterritorial economic sanctions through a US case and surrounding jurisprudence. It identifies and evaluates the techniques used by the court and compares it with the alternative and normative related substantial connection test. Proving a link with the territory should be applied in both examples of extraterritorial measures in order to maintain the rule of law and international law view of jurisdiction.

# CHAPTER SIX

# THE FUNCTION OF THE RULE OF LAW AND EXTRATERRITORIAL MEASURES: LEGITIMACY NOT REALISED

## Introduction

This chapter will focus on legitimacy not realised and the rule of law, by providing another look at the theories of jurisdiction and their manipulation with regard to extraterritorial measures. Initially *Sabzali*[1] is a poignant reminder of the illegitimate and coercive nature of not only unilateral extraterritorial economic sanctions, but also the policies that surround their implementation by the originating state. It is these policies that distort the concept of legitimacy and in so doing disturb the nature of *jus cogens.* The extent and maintenance of these policies and the relevant jurisprudence within the originating state is normally based on the traditional view of the supremacy of nation-state sovereignty with disregard for the fundamental principles of international law.

Previous chapters have laid the groundwork for the categorisation of certain types of extraterritorial measures into either legitimate or illegitimate actions. Critics may argue that this categorisation may appear to be a moralistically based and somewhat simplistic analysis. This critique ignores the contribution of a normative framework to the evaluation of such measures beyond the traditional argument of whether it can fit within the present legal constraints. The critique also devalues the influence of the power asymmetry of states and the effect of the

[1] *US* v *S. Brodie, D. Brodie, J. Sabzali,*250 F. Supp. 2d 462 2002.

political dimension on the substantive interpretation of the concept of the rule of law on the international plane.

An exploration of the legitimacy of individual measures can be extended to an analysis of legitimacy in jurisdictional competence and in so doing lead to an enhanced understanding of the need for redefining extraterritorial measures. This redefinition must take into account the political nature and reality of international law in the current era of globalisation and the so-called 'New World Order'. There is also a basis for the relevance of international comity and the application of the 'substantial connection test' in the definitional analysis of extraterritorial measures. This reinforces the necessity of a territorial link with the action being examined. Finally, the analysis draws together the major themes of the discussion throughout the thesis, the nature of jurisdiction within the bipolar public law examples of extraterritorial measures, the theory of legitimacy, the evaluation of the intention of measures applied outside a particular states' territory and the requirement for adherence to the fundamental principles of international law.

**The Interaction between Criminal Law and Trade Sanctions: *Sabzali* and Other Initiatives**

At a time when the US economy is fluctuating more than in recent memory and the continuing maintenance cost for some form of stability in Iraq is becoming increasingly apparent, it is surprising to see the increased emphasis the US Administration has placed on its trade sanctions and travel prohibition with its neighbour state, Cuba. It is estimated that the Treasury Department's Office of

Foreign Assets uses an estimated 10-20%[2] of its budget on tracking ordinary US citizens who travel to Cuba without official permission and not on the ever-increasing "war on terrorism". Cuba is not part of the now famous "axis of evil" identified by the US President, which leaves the question as to the motivation for the focus on the country. It is not difficult to compile a short history of parallels between recent US presidential election campaigns and the intensifying policies and trade regulations with Cuba.

President Clinton in 1996 signed the Republican initiated Helms-Burton Act[3] during his re-election campaign in order to gain more support from the significant and well organised anti-Castro Cuban exile population in Florida. He attempted to walk the middle ground between liberal and conservatives by suspending the contentious third title that allowed for rights of actions in US courts against foreign investors who are found by US authorities[4] to be 'trafficking' in formerly US owned expropriated property. After George W. Bush was inaugurated, he also suspended title III of the Act, but has hampered relations in other ways, such as the increase in fines applied to US citizens who holiday in Cuba without an official permit. The Treasury Department[5] sent 766 fine letters in 2001, which is a

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[2]Statistics quoted by Republican Senator Jeff Flake of Arizona on Newsnight, BBC July 25th 2002. Member of the Cuba Working Group.

[3] He had lost Florida to the Republicans in the last Presidential election.

[4]The US Foreign Claims Settlement Commission has certified 5911 claims involving Cuban property

[5] The Treasury Department will consider licenses to travel to Cuba on a case-by-case basis. The Cuban Assets Control Regulations of the US Treasury Department require that persons subject to US jurisdiction be licensed to engage in any transaction related to travel to, from, through, and within Cuba. Licenses are *not* granted for business and tourism. This restriction includes travel to and from Cuba through a third party (such as Canada or Mexico, for example).

dramatic increase from the 188 letters in 2000.[6] The number of cases for civil fines totalled 2,179, out of a possible 6,398 that were investigated.[7] In 2003, the Treasury Office had referred fifty cases for fines or prosecution.[8] Fines ranging from $5000-19000 US dollars have been applied to such individuals as a retired teacher on a cycling trip and a fisherman from Texas who was not only fined $5300 but also lost the right to vote or own a gun when he received a 90-day jail sentence.[9] Dan Snow described himself as the *"world's only travel felon"* when interviewed by the American press.[10] Surprisingly, no restrictions apply to citizens who wish to travel to North Korea or Iran. A vote in the House of Representatives to end the travel ban was passed in 2002, which was followed by a similar vote in the Senate Foreign Relations Committee in 2003 but still the travel ban remains. Although fines for travel to Cuba do not affect states or individuals outside the US, this intense policy is an insight into the policy provisions behind the extraterritorial measures aimed at economically isolating Cuba.

Beyond the travel penalties and the targeting of foreign companies who invest in former US properties in Cuba, the US authorities are pursuing a new and astounding avenue in the conviction of the first foreign national under the 1917

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[6] Berman, J. 'Vote to Lift Travel Ban Faces Veto From Bush', *The National Post*, August 3, 2002.

[7] Written Statement of Richard Newcomb, Director of the Office of Foreign Assets Control, US Department of Treasury before the Subcommittee on Human Rights and Wellness Committee on Government Reform, US House of Representatives. 16 October, 2003.

[8] Statistics given by Taylor Griffen, a Treasury Office Spokesman. supra note 6.

[9] supra note 2.

[10] ibid.

Trading With the Enemy Act (TWEA).[11] Some individuals focused on homeland security might expect the conviction to be a result of importation of an explosive devise or bio-chemical weapons of mass destruction. However, the convictions in April 2002 were based on the sales of water purification chemicals to Cuba from subsidiaries of an American Company Bro-tech. James Sabzali,[12] a Canadian national, was convicted along with two American executives of the company on multiple counts of conspiracy to violate the TWEA and the Cuban Assets Control Regulations (CACR), for the planning and receipt of payment for 'ion exchange resins', otherwise referred to as water purification chemicals, to Cuba.

During the jury trial in Pennsylvania it became clear that US authorities had the employees and/or the companies and its subsidiaries in other countries under investigation over a period of several years, a substantial use of public funds. Seven of the counts against J. Sabzali concerned sales activities from the period when he was a resident of Canada. The extraterritorial reach of US laws has once again brought about the review of an emotionalised trade issue with a difference, a

[11](TWEA), 50 U.S.C. App 5,16. Along with other charges including under the Cuban Assets Control Regulations (CACR) 31 C.F.R 515.101. supra note 1. *"Knowingly and willingly conspiring to violate the 1917 Trading with the Enemy Act and the Cuban Assets Control Regulations."* A motion for a new trial was granted on June 13 2003, due to the improper remarks made by the Prosecutor Joe Poluka in his closing address to the jury. After much negotiation with the US Attorney's Office Sabzali plead guilty to one count of smuggling for a fine of $40,000 and probation of one year, after a total of four years of litigation. *Philadelphia Inquirer* Febuary 28, 2004. The relevant judgment referred to in this chapter is the 2001 ruling by Judge McLaughlin on the motion to dismiss for lack of jurisdiction. This judgment is problematic for companies in Canada, UK and others who have business ties to both the US and Cuba.

[12]*US* v *Brodie, Brodie and Sabzali* 174 F. Supp. 2d 294; 2001 US Dist.

criminal conviction punishable by a maximum fine of $50,000 dollars and/or imprisonment for 10 years on each count.

An appreciation of the policy's intention behind *Sabzali* is directly linked to the domestic political pressures that have led to extraterritorial economic sanctions. The case itself highlights the intensity and manipulation of domestic US law, and is meant to scare businesses away from trading with Cuba if they wish to continue doing business in the lucrative US market. *Sabzali* also highlights the frustration of the US government with the continued foreign investment in Cuba that the Helms-Burton Act was supposed to dramatically decrease. Charges against *Sabzali* included certain provisions of the Cuban Democracy Act, Cuban Assets Control Regulations and Trading with The Enemy Act.[13] The extraterritorial issue arose when seven of the charges included selling merchandise to Cuba hospitals while Sabzali, a Canadian, was living in Canada. Once he was promoted to the head office in Philadelphia, the selling to Cuba continued through the subsidiary offices in Canada, Mexico and the UK and he approved the sales and related expenses as manager of Bio-tech.[14]

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[13]The Cuban Democracy Act (or Mack Amendment) amended section 515.559 of the Cuban Assets Control Regulations CACR to remove the power of the US Treasury to grant licences to US-owned or controlled business outside the US territory permitting them to do business with Cuba. The TWEA and 50 USC App 5(b) The Cuban Asset Control Regulation Code of Federal Regulations, section 515.101 et seq. vol. 19. *"The purchase, importation, transportation or otherwise dealing with merchandise outside the US if that merchandise is: (1) of Cuban origin; (2) is or has been located in or transported through Cuba; (3) is made or derived in whole or in part from articles which are the growth, produce, or manufacture of Cuba, is illegal."*

[14]The indictments cover two basic time periods: from 1992/6 Sabzali was the Sales Manager for Purolite Canada, a subsidiary for Bro-Tech. He travelled to Cuba, negotiated and arranged sales to Cuban entities, during this time his travel expenses where approved and refunded by Purolite in

Bio-Tech owners and mangers had sought legal advice and had organised all sales to Cuba through Purolite International[15] in the three other countries with blocking statutes which would '*prohibit compliance*' with the extraterritorial sanction. Indeed, the Protection of Trading Interests Act in the UK was amended by the Secretary of State to specifically include the Cuban Asset Control Regulations.[16] The wording in each blocking statute may differ but they are all aimed at prohibiting compliance with foreign laws that interfere with normal business practices or attempt to control trade.[17] In reality, these statutes are considered more of a retaliatory measure to extraterritorial economic sanctions. It is difficult to tell whether they actually protect individuals, as they have never been tested in the non-US states. The blocking statutes may act as a monitoring system to determine if companies are complying with US regulations, however a business decision not to sell to a country may be multi-factorial.

The US District Court stated that blocking statutes did not *"compel companies to trade with Cuba"* thus the defendants should have adhered to the TWEA and the

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the UK. From 1996 onwards Sabzali worked for Bro-Tech at its headquarters in Pennsylvania, where he approving further sales to Cuban entities through Canada and reimbursing the Canadian Sales Manger for his business trips to Cuba.

[15] Purolite International Ltd. is 95% owned by Bro-Tech, *US* v *Brodie, Brodie and Sabzali* 174 F. Supp. 2d 294; 2001 US Dist.

[16] SI 2449/1992.

[17] UK's Protection of Trading Interests Act 1980 and the Canadian Foreign Extra-territorial Measures Act 1985, Council Regulation (EC) 2271/96 article 5. Compliance with list sanctions, such as Helms-Burton and Iran and Libya Sanctions Act were prohibited; foreign judgments relating to these sanctions were not to be given effect, article 4; and there is a reporting requirement, article 2. Also see chapter 3 for analysis.

CACRs as the statutes were, *"intended to cover extraterritorial conduct"*.[18] This is a fairly common reliance by US Courts in their legal reasoning, the first 'port of call' in a judgment including a statute that could be applied extraterritorially.[19] Generally without the direct intent of Congress there is a presumption against extraterritoriality.[20] Numerous common law countries have statutes with extraterritorial elements that are usually aimed at their own nationals who commit offences abroad or who conspire to commit offences abroad, as with certain criminal offences such as the UK Sexual Offences Act 1996.[21] The intent of Congress was present in *"the language of the TWEA and the nature of the harm the statute aimed to prevent"*,[22] thus in *Sabzali,* the US District Court assumed subject matter jurisdiction over the conduct in Canada. Generally, the US courts tend to link Congressional intent with the much disputed 'effects doctrine'[23] for the justification of jurisdictional competence ignoring a more harmonious resolution/substitution to this justification available in the substantial connection

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[18] supra note 12, p2.

[19] See a similar discussion in the recent decision of *Re United Pan-Europe Communications N. V.* 2004 U.S. Dist, as quoted in the case note by the same name by Dziedzic, E., 17 *New York International Law Review*. p223. A dispute over a contract between two companies in Europe where one company that had assets in the US filed for bankruptcy and the other wanting to enforce the contract, argued without success the common ground of the lack of intent of Congress to apply the Bankruptcy Code extraterritorially.

[20]Reichel, S. 'Hypocrisy and the Extraterritorial Application of NEPA.' (1994) 26 *Case Western Reserve Journal of International Law*. p118. Also ibid p229.

[21] Examined in Chapter 4 p120.

[22] supra note 12. p8. The US District Court was referring to the reasoning of the Eleventh Circuit in *US* v *Plummer*, 221 F. 3d 1298,1310 (11th Circuit 2000).

[23] Claiming jurisdiction of an extraterritorial act based on the effects it produces within the state. To be differentiated from the objective territorial principle where jurisdiction is based on certain element/s of the offence being completed in the territory. The effects doctrine is wholly extraterritorial without any aspect of the offence located in the territory, bar the 'effects'.

test. Even though the extension of jurisdiction through the effects doctrine is generally assumed to only apply with regard to the standard of reasonableness in section 403 of the Restatement (Third) of Foreign Relations Law,[24] it is often paid little attention in US courts with minimum theoretical or practical analysis. *Sabzali* is another example of the same. When the defence made a motion to dismiss indictments for actions in Canada for lack of jurisdiction, citing the reasonableness standard in section 403 of the Restatement (Third), the court simply found no merit to the defence argument.[25] In comparison, the substantial connection test requires two elements before the assertion of jurisdiction; (a) a real and substantial link to the territory, arguable in the seven counts against *Sabzali,*[26]and (b) more importantly a fundamental consideration of international comity, which will be dealt with later in this chapter.[27]

The last aspect of the dismissal of the various blocking statutes was the lack of any realistic probability of prosecution in the various countries. The position of the US court on the relevance of the blocking statutes had little regard for the laws of other sovereign states. It relied heavily on the importance of Congressional

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[24]1987 (The American Law Institute Publishers, Washington) Volume 1. Limitations on Jurisdiction to Prescribe, *" (1) Even when one of the bases for jurisdiction under section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."* Eight separate factors are listed to evaluate the reasonableness of prescribing jurisdiction, p244.

[25] supra note 12, p8.

[26] The only link with the sales of resins from Canada through Purolite was the approval of the expenses of the sales trips to Cuba, a flawed exampled of a real and substantial link to the territory.

[27] Also see chapter 4 p131-133, and the next section of this chapter.

intent, reinforcing the US stance on the supremacy of nation-state sovereignty,[28] akin to the horizontal view of international law. It is difficult to imagine a Canadian in Canada trading with Cuba would place a higher value on an extraterritorial US statute than a Canadian blocking statute, which it is meant to counteract, regardless of the intent of the US legislature. Still the court found the 'foreign sovereign compulsion doctrine[29] was not an issue in the court's analysis, besides the fact that it was used normally in antitrust cases and not criminal prosecutions. The doctrine *"shields from antitrust liability the acts of parties carried out in obedience to the mandate of a foreign government."*[30] Further quoting the court,

> *"A specific order or action satisfies the need for a real threat of prosecution under the foreign law. Before even considering the extreme remedy of dismissing an indictment, there must have been a threat of tangible sanction to the defendants if they complied with the*

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[28]Although it would be difficult to argue in the case of the Brodie brothers since the court found that the blocking statute, PITA did not protect Donald Brodie while he was head of Purolite in the UK and signing the reimbursement slips for Sabzali's trips to Cuba, among other activities that included organising sales to Cuba. The court rebuffed the idea that he would fall under the definition in PITA and the 1992 UK directions as a "*person in the United Kingdom*", as he is not a citizen of the United Kingdom or her colonies. ibid.

[29] This doctrine, *"shields from antitrust liability the acts of parties carried out in obedience to the mandate of a foreign government."* supra note 12, p4, 5.

[30] ibid, p5, applied in *Interamerican Redefining Corp.* v *Texaco Maracaibo Inc., 307 F. Dupp.* 1291, 1298 (D. Del.1970) and *Societe Internationale Pour Participations Industries et Commerciales* v *Rogers,* 357 U.S. 197,204,78 S. Ct. 1087, 2 L.Ed. 1255 (1958).

*US law. Here, there were no such threats of sanction because there was no realistic possibility of prosecution under these laws".*[31]

Not only is the application of this doctrine misrepresented in criminal cases but it ignores the sovereign equalities of states, reducing the argument to a civil-like dispute or conflict of laws. The sole purpose of the blocking statutes may be the protection of a national business; but it also serves as a public reinforcement of the belief that extraterritorial economic measures lack any legal or legitimate foundation.

*Sabzali* at first glance may appear to be a predictable representation of the US policy behind extraterritorial economic sanctions, however it conveniently highlights several areas of discussion relevant to the main themes of the comparison present in the thesis. These themes constitute a revisit to the central aspects of jurisdictional competence in extraterritorial measures and conclude the need for a normative framework in the theory of legitimacy and international law principles. The themes to be discussed include the clear definition and application for international comity generally, its relation to the theory of legitimacy as well as an essential element of the substantial connection test. Secondly, the problematic use of the effects doctrine, its appropriate application and how it can misrepresent the territorial principle. Finally, the critical lack of due process in measures that are not legitimate.

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[31] ibid, p 6.

***International Comity leading to Legitimacy in Extraterritorial Situations***

The classical view of international comity, or the public law view of comity between nations, has been outlined by the landmark case of *Hilton* v *Guyot*[32] as, *"...having due regard to both international duty and convenience to the rights of its own citizens or of other persons who are under the protection of its laws".*[33] The judgment commented on the difficult nature of defining an acceptable definition of comity,[34] and it is generally seen to be ambiguous in a practical sense. Nonetheless this quote serves as a constructive basis to formulate a connection with the doctrine of legitimacy.

Most frequently comity is viewed from a civil 'conflict of laws' dialogue, assessing the potential for recognition of foreign judgments.[35] This perspective restricts the contribution of international customary law and has limited reference to extraterritorial economic sanctions or trans-national criminal actions. Theoretical differences over the appropriate use of comity have led to Black's Law Dictionary[36] describing its application as a synonym for international law as a *"miss-usage"*. Returning to the "*international duty*" comment in *Hilton* v *Guyot*, it is possible to evaluate the origins of comity, as often defined as *'the*

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[32] 159 U.S. 113, 163-164, 16 S. Ct. 139,143,40 L ED.95 (1895).

[33] ibid.

[34] Several theorists attribute Justice Joseph Story with a significant input to the formalisation of the doctrine of comity, "*Only if the court concluded that there was no conflict could it recognise or enforce foreign law"* Paul, J.'Comity in International Law.' (1991) 32 1 *Harvard International Law Journal.* p23. "*It is not the comity of the courts but the comity of the nations*". Story, J. *Commentaries on the Conflict of Laws.* (1834) ibid.

[35] See *Beals* v *Saldanha* 2003 SCC 72, chapter 4 p128.

*golden rule of nations*' rather than an embodiment of international law itself. However, if the respect for the laws and judgments of other nations lie at the heart of a states' international duty through comity, it has a necessary dependence on the sovereign equalities of states from a realist point of view or "existential equality"[37] as discussed by Simpson.[38]

The US courts historically have not perceived the theoretical underpinnings as imperative in its evaluation of comity, especially when confronted with the difficult enforcement of legislative instruments that may conflict with the overall doctrine. *"International comity can never be a reason to dismiss an indictment because the Executive has already done the balancing in deciding to bring the case in the first case".*[39] Various antitrust cases in the US brought about the development of different 'interests balancing test' to evaluate whether to assert extraterritorial jurisdiction. The initial test from *Timberlane Lumber Co.* v *Bank of America*[40] appeared well constructed including a consideration of "*international comity and fairness*", the intention of the Act to affect the trade and commerce in the US and the magnitude of the activity with regard to the Sherman Act.[41]

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[36] Garner, B. (ed) (West Group Publishing, 7th ed., 1999), p262.

[37] See Chapter 5 p216, Existential equality, on the other hand, is closely associated with the view of pluralism in the international legal order, the sovereign right to have a different perspective on the form, organisation and operation of a state. Simpson, G. '*Great Powers and Outlaw States: Unequal Sovereign in the International Legal*' (Cambridge University Press, 2004) p53.

[38] ibid, p57.

[39] supra note 12 p9.

[40] 549 F.2d 597, 615 (1976).

[41] The Sherman Antitrust Act of 1890 15 U.S.C. Justified extraterritorial jurisdiction based on the effects doctrine. Just after the *Timberlane* case the Foreign Antitrust Improvements Act was passed in 1982 15 U.S.C. limiting the application of the Sherman Act only were the effects in the

Nonetheless it was quickly followed by another more detailed ten-factor test in *Mannington Mills*[42] that is commonly referred to as the most authoritative evaluation of comity when assessing jurisdictional competence with extraterritorial measures in the US. This 'balancing test' is a representation of a formalistic approach to jurisdictional competence, with almost complete ignorance for sovereign equality of states. The test comprises:

> *"1) Degree of conflict with foreign laws; 2) nationalities of the parties; 3) relative importance of the alleged violation of conduct here compared with that abroad; 4) availability of remedy abroad and the pending of litigation there; 5) existence of intent to harm or affect American commerce and its forseeability; 6) possible effect on foreign relations if the court exercises jurisdiction and grants relief; 7) whether if relief is granted, a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8) whether the court can make its order effective; 9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and 10) whether a treaty with the affected nations has addressed the issue".*[43]

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US were 'direct, substantial and reasonable'. Also see Layton, A. and Parry A. 'Extraterritorial Jurisdiction-European Responses.' (2004) 26 *Houston Journal of International Law*. p314.

[42] *Mannington Mills Inc.* v *Congoleum Corporation* 595 F. 2d 1287 (1979).

[43] ibid p9.

*Mannington Mills* loses the importance of international comity by the dilution of the theory into its interpretive components; components that fail to encapsulate the entire meaning of the doctrine. A general assumption that US courts might follow two aspects of this test taking full consideration of a conflict of laws with other states and the effect on foreign relations would be misleading. The so-called 'balancing test' may appear to be a functional solution to problematic jurisdictional assertions but in reality the test, as well as the jurisprudence in this area by US courts is theoretically constrained. International comity as a doctrine has been limited in the case law, either through deference to the legislature or limited criteria of its application. The judgment in *Sabzali* repeated the test in *Mannington Mills* and the reasoning in even a more limited case from the Supreme Court, *Hartford Fire Ins. Co.* v *Californinia*[44] which held that comity does not automatically mean extraterritorial statutes cannot be enforced. Comity only need be considered if there is a 'true conflict' of laws between states.[45] This true conflict of the laws between states is not to be confused with differences in the application of the conflict of laws in the courts of the two states, *"only in cases where the preferential law of the foreign or domestic law would produce a different result depending on the law applied is there a true conflict".*[46]

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[44] 509 U.S. 764 (1993).

[45] ibid, where the Supreme Court outlined a more restrictive test for comity, *"(1) the alleged relevant conduct occurred extraterritorially and (2) whether the alleged actors were unable to comply with both domestic and foreign law."* as stated in supra note 12, p9.

[46] *Re Simon* 153 F. 3d 991,999 (1998). Also see Dziedzic, E. 'In Re United Pan-Europe Communications N.V.' 17 *New York International Law Review*. p227, where she argues that international comity is further limited by not only by a requirement of a true conflict between foreign and domestic law but also where both states have an interest having their laws applied.

The case law has reflected the protectionist nature of states in trans-national business practices as the doctrine is commonly defined as an applied test for jurisdiction with regard to antitrust disputes. In *Libman*[47] it was applied in a criminal prosecution. This was not to be in *Sabzali*. The US court single-mindedly perceived the doctrine through the eyes of an antitrust dispute, applying the test for comity and avoiding any other relevance. Justification by the court seemed to do an about face in the civil verses criminal applications of doctrines when the court dismissed the foreign sovereign compulsion doctrine[48] as a defence for trading with Cuba, minimising the Canadian blocking statue. This is a clear instance of a contrived interpretation over the intention of the foreign sovereign compulsion doctrine, allowing the US court to argue that the blocking statues did not compel trade with Cuba. The decision was based on the lack of any application of this doctrine in a criminal context.[49] Hypocrisy in the use of a civil test on one hand and its dismissal on the other hand is representative of the flexible nature of judicial rhetoric that can lead to a difficult precedent for individuals and businesses that trade with both Cuba and the US.

This is not the only dilemma concerning the limitation of international comity. The limited use of its application ignores the underlying theoretical necessity for comity as part of a normative framework. If there is a general assumption against

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[47] *R* v *Libman* [1985] 2 S.C.R. 178, 21.

[48] The Restatement (Third) § 441defines foreign state compulsion as *"(1) (a) to do an act in another state that is prohibited by the law of the state of which he is a national; or (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national."* p341.

[49] supra note 12, p5.

extraterritoriality without Congressional or legislative intent this must be based on the corollaries of sovereignty and the sovereign equalities of states. Thus the rules of international comity are representative of not only basic international order and rights within a defined territory, but also the reinforcement of specific norms of international law. In the last chapter it was argued that sovereignty could be seen as an open concept influenced by the principles of international law. Further, that sovereignty was intrinsically linked with the realist view of sovereign equalities, not to be confused with the influence of the domestic law of another state without consent. International comity, while not a topic of heated discussion in public international law, is inextricably linked to the underlying principles and norms of international customary law and thus needs, arguably, to be applied with a broader interpretation in cases of competing jurisdictional assertions. Due to this normative relationship, the theory of legitimacy also has an expected component in the broad definition of international comity.

The somewhat dated, but still commonly quoted language in *Hilton* v *Guyot,*[50] as an early definition of international comity having regard to "*international duty*" is not inconsistent from the underlying principles and norms. Referring to the Restatement (Third) of Foreign Relations Law[51], the limitations on the jurisdiction to prescribe includes in its factors of reasonableness two key areas related to international comity; *"(f) the extent to which the regulation is consistent with the traditions of the international system"* and *"(h) the likelihood of conflict with*

[50] supra note 32.

[51] supra note 24, p245.

*regulation by another state".*[52] Once again the intention of these factors to guide a reasonableness test is practically limited by the jurisprudence of the courts. The broad language of (f) may not automatically lead to a link with the norms of international law, but it can offer a persuasive angle on the relationship. Resolving conflict with the laws of another state is plain enough for any practitioner or theorist but still it has been dismissed in the case of *Sabzali*. It would appear the influence of the American Institute's Restatement (Third) on the jurisprudence of the US court can sometimes be minimal.

Other problems with the application of international comity are the perception by the courts that comity is fundamentally a voluntary action by a state. This reinforces the right of a sovereign state to ignore the influence of or adherence to the doctrine. This view is subject relative, a result of the use of comity in the arena of recognition of foreign judgments. In this specific application, the foreign judgment to be considered occurred wholly outside the state and it is a relatively functional decision whether to apply it to individuals or companies inside the territory that are involved in the particular dispute. Considering the situation of recognition of foreign judgments comity can be seen in its flexible form, *"neither as a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other".*[53] Here the description of international comity revisiting its bond with the sovereign equality of states.

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[52] ibid.

[53] supra note 34, p9.

It is not the only voluntary aspect of the use of comity in its rather simplistic interpretation that is relevant to the discussion. Here it is also the basis on which the determination is made when considering the recognition of foreign judgments. The Canadian courts use the following test: an analysis of the pertinent allegations not being subject to prior adjudication; the fact that the foreign procedure was consistent with Canada's concept of 'natural justice'; and consideration that the judgment does not go against the public policy in Canada.[54] This was generally reiterated in the US in *Hilton*[55], where it was established that the doctrine can be limited if there would be interference with state public policy.[56]

The various applications of comity offer differing approaches to the understanding and definitional confusion surrounding the doctrine. It is clear that comity may be applied through functional tests in specific cases. The adherence to the general intention underpinning of the doctrine is a combination of the sovereign equality of nation states and the subsequent respect of a state to formulate its own laws and the effect on international relations. The principles underpinning international comity are reflected in the opposing nature of foreign judgments recognition and the rejection of blocking statues that protect the citizen of a foreign state. One is an acknowledgement of a sovereign state in its more obvious form and not extraterritorial by nature. The other is a rejection of any sovereign right of another state over the national interests of the state assuming extraterritorial jurisdiction.

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[54] supra note 35.

[55] supra note 32.

Extraterritorial examples of the normative link between international comity and international law can also be seen in the interaction between the UK Court of Appeal and the US Government authorities concerning the indefinite detention of a UK national, Abbasi,[57] in Guantanamo Bay as an enemy combatant. While acknowledging the right of the US to formulate and apply its own law, this sovereign right does not negate the requirement for such a law not to breach international principles and laws.[58] The court stated that it was *"free to express a view in relation to what it conceives to be a clear breach of international law...in apparent contravention of fundamental principles recognised by both jurisdictions"*.[59] Therefore comity allows laws of other sovereign nations to be discredited in a domestic sense if this requirement is not met. Two fairly dramatic examples were cited by the Court of Appeal in this case, *Oppenheim* v *Cattermole*[60] and *Kuwait Airways Corporation* v *Iraq Airways Co.*[61] The first was a refusal to recognise the 1941 German decree removing German citizenship from emigrated Jews, while the other was a refusal to recognise the Iraqi decree making Kuwait Airways part of Iraqi Airways.

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[56] Beard, R. 'Reciprocity and Comity: Politically Manipulative Tools for the Protection of Intellectual Property Rights in the Global Economy.' (1999) 30 *Texas Tech Law Review*. p166.

[57] *R (Abbasi)* v *Foreign Secretary and Home Secretary* [2002] EWCA Civ 1598, (2003) UKHRR 76.

[58] ibid paragraph 57. Application for judicial review of the mother of Abbasi to order the Foreign Secretary to make representations to the US Government or give reasons why not. As discussed in Endicott, T. 'Symposium: Has Law Moral Foundations? The Reason of the Law.' (2003) 48 83 *American Journal of Jurisprudence*. p101.

[59] ibid.

[60] [1976] AC 249 as quoted in supra note 57,p101.

[61] [2002] 2 WLR 1353, ibid.

A not so normative example of what has been termed a 'positive comity agreement' is represented by the Transatlantic Partnership Agreement and Understanding with Respect to the Disciplines for Strengthening of Investment Protection.[62] This agreement was essentially a political solution to the EU complaint against the two US extraterritorial economic sanctions at the WTO panel.[63] The compromise focused on the suspension of title III and waiver of title IV of the Helms-Burton Act, and an agreement to not take action against EU individuals and companies under the Iran and Libyan Sanctions Act. In return the EU would help to 'strengthen investment protection', avoid investing in US listed expropriated properties in Cuba, and potentially set up a register of expropriated properties.[64] The agreement is an example of comity between states in its more simplistic form, excluding the reality that the EU is essentially consenting to the continued presence of extraterritorial economic sanctions in lieu of an opt out for specific targeting enforcement. Even though a statement accompanying the agreement reinforces the EU position against the illegal nature of the sanctions, the agreement helps to support the reasons for the use of sanctions.[65] The bilateral agreement may have solved problematic issues surrounding EU investments in the three countries, nevertheless it disturbs international comity since it is an agreement based on the refusal to recognise the normative doctrine of international comity in a full sense. The Council Regulation blocking compliance

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[62] Bulletin EU 5-1998 Council conclusions on the EU-USA Summit.

[63] WTO DS38 Complaint brought by EC against the Cuban Liberty and Democratic Solidarity Act (Helms-Burton), May 13, 1996.

[64] B: Specific Disciplines, section of the agreement, May18, 1998.
http://www.eurunion.org/partner/summit/summit9805/invest.htm

with these sanctions and the complaint at the WTO uphold the norms of international comity and rebuke the interference in the affairs of others states that they can potentially cause. The political solution may put the issue on the back burner but it does not remove the detrimental impact to the understanding of the broader definition of international comity.

International comity as a doctrine can be either "*a bridge or a wall*"[66] depending on its situational application. The main aspect is the reinforcement of sovereign equalities within the parameters of the international law. This is the broader definition of the essential meaning of comity, moving away from the more civil based balancing interests approach discussed earlier. When presented with an extraterritorial measure that arguably lacks legitimacy, such as extraterritorial economic sanctions, it is understandable that the US courts are hesitant to use comity to dispel its force because of the relationship with its legislature body. Endicott would argue that comity promotes a smooth recognition of powers between institutions of a state.[67] However, understandable it does not justify the rejection of international comity in any domestic court.

International comity has been described as *"a constellation of ideas that courts sometimes employ to manage conflicting public policies between sovereign states."* [68] While this is true, it is an incomplete picture. International comity

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[65] EU Unilateral Statement. May 18, 1998 Available at http://europa.eu.int/comm/external_relations/us/extraterritoriality

[66] supra note 34, Paul, p4.

[67] supra note 58, p101 and 102.

[68] supra note 34, p2.

similar to the theory of legitimacy is recognition of the right of a sovereign state within the principles of international law. Without the necessary link to international law, the doctrine is reduced to a voluntary decision by a state in the courteous recognition of the laws and judgments of other states.

**A Closing Assessment of Jurisdiction:**

***International Law Prefers the Substantial Connection Test to the 'Effects Doctrine'***

Issues surrounding asserting extraterritorial jurisdiction regulated by the doctrine of international comity are closely related to the reasonableness test in the contentious 'effects doctrine'. In order to assert jurisdiction using the effects doctrine, as mentioned earlier, the Restatement (Third)[69] outlines this reasonableness test based on 'foreseeable and substantial effects' in the particular state. The Restatement (Third) offers a description with respect to the activity in question as, *"having or intended to have substantial effects within the state's territory"*. [70] This is a key consideration that should be applied in any analysis of the effects doctrine, unlike the reasoning in the US courts when examining extraterritorial economic sanctions. It is unlikely that any business is intending to have substantial effects in the US when trading or investing in another state, such as Cuba. Surprisingly, this is the conclusion of the jurisdictional assertion in *Sabzali*.

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[69] supra note 48, § 402, p.239 and §403, p250.

[70] ibid, p239.

Assessment of the effects in the territory of the US was the second part of a two-stage analysis, after the initial consideration of the intent of Congress. The court mistakenly relied on *US* v *Martinez-Hidalgo*[71] and *US* v *Wright-Barker*[72] to argue that no effects test is required if Congress expressly overrides it. This should not be interpreted as a general rule in the US case law as *Martinez-Hidalgo* concerned the seizure of a vessel on the high seas through the Maritime Drug Enforcement Act with drugs bound for US territory and a similar situation existed in *Wright-Baker*. The US asserted jurisdiction even though it is not generally accepted that any nation may assert territorial jurisdiction over the high seas.[73] This is the contradiction the courts in these cases faced, however, the extension of jurisdiction may be considered reasonable based on the obvious effects of drug importation into the US and the trafficking of narcotics is generally condemned by all nations,[74] with little problem of disturbing international comity. Nevertheless, the court in *Sabzali* seemingly ignored the due process limitations on extending extraterritorial assertions of US law outlined in *US* v *Javino*[75] and *US* v *Davis,*[76]

> *"The reasonableness of an attempt to exercise extraterritorial control depends on such factors as the extent to which the conduct has*

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[71] 993 F. 2d 1052 (3rd Cir 1993). The court stated that there is *"no doubt the Congress may override international law by clearly expressing its intent to do so."* para 1055.

[72] 784 F. 2d at 167 (1986).

[73] Only the flag state has jurisdiction of a vessel on the high seas, as per customary international law and the Law of the Sea Convention 1982, article 94, 108 and 110(d).

[74]Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, Convention on the Psychotropic Substances 1971.

[75] 960 F. 2d at 1137 (1992).

*substantial, direct, and foreseeable effects in the legislating country, and the extent to which other states may have an interest in regulating the activity".*[77]

The judgment in *Sabzali* was inherently flawed in its reference to the US jurisprudence considering the avoidance of the reasonableness test. This theme of judicial reliance on the intent of the legislative body to avoid the compulsory nature of the application of a standard in extraterritorial jurisdictional assertions is another representation of an outlook that supports the supreme power of the nation-state on the international plane. A quick reference to the appropriate standard in the US precedent of *The Republic of the Philippines* v *Westinghouse Electric Corp.*,[78] would place any court, faced with these jurisdictional considerations, in the position where the onus was on performing the reasonableness test. Any assertion of extraterritorial jurisdiction *"requires the court to balance the interests it seeks to protect against the interests of any other sovereign that might exercise authority over the same conduct".*[79]

The emphasis for the use of the test could usefully be placed on the international customary law requirement or respect for the sovereign equality of states and the principle of non-intervention as opposed to importing the civil law view of avoiding conflicts of law reminiscent of the 'balancing of interests' test. These tests can perform a valued function in the protection of illegitimate assertions of

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[76] 905 F. 2d 245, 248 (9th Cir. 1990).

[77] 960 F. 2d at 1137 (1992) p5.

[78] 43 F. 2d 65,75 (3d Cir.1994) para 75.

extraterritorial jurisdiction; however, as part of the effects doctrine, the main criterion of the reasonableness test is the character of the activity as the crucial consideration. This is one of the flaws with the effects doctrine, its origin and most common usage is in the arena of antitrust disputes and as such fails to acknowledge the true intent of the activity. The hybrid of economic activity and criminal liability presented in *Sabzali* presented an interesting scenario for the court. Although the judgment repeatedly reinforced[80] the criminal nature of the case itself, it not so tactfully avoided the requirement of reasonableness and reverted to the government line of, *"violations that benefit an economy and a regime that is deemed by the political branches of the government to threaten the national interests"*.[81]

Returning to the Restatement (Third),[82] there is a stated hesitation to apply jurisdiction to conduct wholly outside the territory, due to the consideration of reasonableness, as the assertion may be perceived as *"particularly intrusive"*.[83] The Restatement (Third) reinforced the natural distinction between civil and criminal assertions of extraterritorial jurisdiction counselling against criminal assertions unless they fall into the category of serious offences condemned by most states, including drug trafficking, where opposition to jurisdictional assertions are likely to be minimal. Interestingly, the Reporters' Notes observed that, *"no case is known of criminal prosecution in the United States for an*

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[79] ibid.

[80] supra note 12.p3 and 9.

[81] ibid.p9.

[82] supra note 48, § 403, Reporters Notes p252.

[83] ibid, citing the *Rio Tinto Zinc Corp.* v *Westinghouse Electric Corp.* [1978] A.C. 547 at 630.

*economic offence (not involving fraud) carried out by an alien wholly outside the United States".*[84]

Overall, the effects doctrine not only has suffered from its antitrust heritage in application and interpretation as apparent in *Sabzali,* but it also lacks the influence of the doctrine of comity that the substantial connection test benefits from reinforcing the equality of states. The substantial connection test may be considered a 'cousin of sorts' when initially compared with the effects doctrine but it has a more widely recognised normative element in its inclusion of the requirement of comity. It also benefits from a previous application in a criminal prosecution, and perhaps enough distinction from the antitrust applications to be effective in this application. Lowenfeld, on the other hand, seems to support the 'balancing of interests' test with what he described as the 'rule of reasonableness' to the uncertainty of the comity doctrine in extraterritorial jurisdiction.[85] This is possibly due to the ease of application by the courts of the more functional multifactor 'balancing of interests' test. Lowenfeld's preference is more focused on the ease of judicial application, where in reality the 'balancing of interests' test can be considered highly subjective[86] with no real reference to the principles of sovereign equalities or non-intervention. Indeed the effects test contains some similar indicators of the substantial connection test but lacks the link with international customary principles inherent in the comity doctrine.

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[84] supra note 48, § 403, Reporters Notes p252.

[85] Lowenfeld, A. 'Sovereignty, Jurisdiction and Reasonableness: A Reply to A.V. Lowe.' (1981) 75 *American Journal of International Law.* p629.

Often in cases of extraterritorial jurisdiction the use of the effects doctrine has been reduced to the 'balance of interest' analysis where the factors in the test do not adequately represent the test of reasonableness either in their specific wording or, as in *Sabzali*, their manipulation. The functional application has become too far removed from the consideration of a real and substantial link with the territory, thus lacking a true territorial analysis, which is replaced instead by governmental policy objectives, as apparent with extraterritorial economic sanctions. This is how comity can act as a wall, restricting interference with another state's sovereign right. It is unrealistic to assume that any consideration of governmental policy will not be a factor in a domestic court when faced with a jurisdictional quandary. Nevertheless the substantial connection test promotes the reflection of public policy concerns without the necessary baggage of political management.

Generic territorial analysis by itself does not automatically include the broader notions of comity and fairness.[87] It is the link between a well-founded territorial analysis and comity that sets it apart from strictly functional tests and cements its connection with international law principles. This does not mean that all activities outside the state are void by the analysis. The previous argument to increase legitimate jurisdictional assertions in trans-national criminal cases are appropriate if the crime is generally recognised by nations as a serious crime and the intent is to battle the occurrences of the crime itself. The territorial analysis must result in a substantial link, but can include one important element of the activity.

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[86] supra note 34. p46.

[87] ibid p46.

Determining a 'substantial link' may lead to standardised analysis, but it is an analysis that is fundamentally flawed without the consideration of comity.

The comparison of trans-national or international crime and extraterritorial economic sanctions offers a diametrically opposite representation of the appropriate territorial analysis. The adoption of the substantial connection test rests on the fundamental meaning of the territorial principle without disturbing international comity. The effects doctrine can lead away from the territorial principle through its emphasis on interpreting the effects within the state. The use of the effects doctrine has become problematic in its evolution as a 'distinct category' without the need for a link to the territorial principle. The substantial connection test does not posses the same fault line. It remains true to the territorial principle as a basis for jurisdiction and further more places premier importance on international law principles through the comity doctrine. The evaluation of US case law and principles in this area, with specific focus on cases such as *Sabzali* is a helpful illustration of the inherent difficulties of the effects doctrine as it has become too directly interpreted to be applied with any potential effects within a state-claiming jurisdiction regardless of the consideration of reasonableness.

The reinforcement of the importance of comity and fairness as part of the substantial connection test does not detract from the intention of the activity being considered. It would by its application refuse the jurisdiction of extraterritorial economic sanctions on several grounds, for instance the lack of a real and substantial link with the territory and the interference with sovereign equality and non-intervention principles represented in the presence of the various blocking

statutes. The consideration of the potential prosecution of the individual under the protection of blocking statute would not be a primary concern; the mere existence of extraterritorial economic sanctions is a representation of a disturbance of international comity. The substantial connection test offers a close tie with the territorial principle while extending it in legitimate circumstances. It reinforces comity as a bridge, much like the open view of sovereignty, allowing the influence of international law principles to impact the doctrine, while at the same time acting as a wall or a shield to the unfounded extensions of extraterritorial assertions, such as in these particular economic sanctions.

***Territorial Analysis: Is a link a Necessity?***

Extraterritorial measures have propelled the jurisdictional debate beyond the strict territorial analysis. With the application of the substantial connection test there is adherence to the territorial principle. This adherence does not necessitate doctrinal flexibility in order to justify jurisdictional assertions but an understanding of the legitimate competence of a state to claim subject matter jurisdiction. The substantial connection test is not inhibited by some of the problems with specific statutory extensions of jurisdiction, such as the piecemeal application or the sometimes faulty language of the particular statute. It also does not allow for judicial interpretation of jurisdictional competence to be based solely on the intent of a particular state's legislature as in *Sabzali*, negating the reference to international law principles. Comparable with the reasonableness basis[88] for extraterritorial measures, it offers more of an objective standard to be applied to

the jurisdictional claim. O'Keefe critiques the development of non-statutory techniques in extraterritorial assertions as the "*traditional common-law fiction*",[89] where there appears a judicial discovery of a previously existing principle or norm. He proposes that this 'serious fiction' can raise worrying issues of retroactivity.[90] The components and underlying principles of the substantial connection test are not a newly discovered pre-existing theoretical application of a test; it is in itself the criminal application of a combination of certain aspects of international customary law. Customary principles, especially those linked with a *jus cogens* norm are superior to conflicting codified international law, which leads to the objective standard of the test.

In *Lockerbie,* the Scottish courts claimed jurisdiction based on the location of the debris from the exploding plane on Scottish territory and the subsequent death of Scottish residents[91] to try the Libyan defendants. This was an example of a unique situation of the extraterritorial sitting of a Scottish court in the Netherlands as a result of negotiated arrangement. Other situations allow for presence of the alleged offender and only a part of the offending activity in the territory of the state. These scenarios, and many others, can be addressed satisfactorily through the fitting choice of a principled basis for jurisdictional assertions and the application of the substantial connection test as long as the construct of legitimacy

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[88] Not to be confused with the balancing of interests test discussed previously, p244.

[89] O'Keefe, R. 'Universal Jurisdiction: Clarifying the Basic Concept.' (2004) 2 *Journal of International Criminal Justice*. p742.

[90] ibid.

is not disturbed. Generally, states will refer to their constitutional limitations when evaluating extraterritorial circumstances, which is part of the legal methodology. The other limitation that can sometimes be minimised is the constraint of international law principles. The appropriate use of prescriptive jurisdiction stems from the limitations of these two aspects when exercising extraterritorial jurisdiction. The substantial connection test revisits the essential aspects of the *'constructive presence'*, terminology from Justice Holmes in 1912, *"when a man is said to be constructively present where the consequences of an act done elsewhere are felt, it is meant that for some special purpose he will be treated if he had been present, although he was not".*[92]

***Universal Jurisdiction and Territoriality***

Normally the assertion of extraterritorial jurisdiction can be legitimately founded on a crucial element of the activity or the result linked with the state. It becomes a far more onerous argument when there is no personal jurisdiction and subject matter jurisdiction is questionable. Without any link with the territory, the state enters the realm of true universality, a rare form of jurisdictional competence that has inherent limitations on specific types of criminal activity. Some proponents of the increased use of the universal principle would suggest that it is, in effect, a

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[91] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahirya* v *United Kingdom*) Preliminary Objections, ICJ Reports, 1998/9.

[92] *Hyde* v *U.S.* 225 U.S. 347 (1912) at 386 as quoted in Swalm, E. 'State v Dudley: Defining The Theory of Extraterritorial Criminal Jurisdiction.' (2004) 55 *Annual Survey of South Carolina Law Criminal Procedure.* p588.

departure from the constraints of doctrinal forces of comity and reasonableness. It is evidently true that indirect economic activity, the rationale for the implementation of extraterritorial economic sanctions, would be outwith any justification under the universal principle. This does not limit the consideration of other criminal offences that have been based on the universal principal in the past.[93] Nevertheless, it remains a valuable question in the future, if universal jurisdiction can be legitimately asserted without any link to the territory?

The Canadian statute, Crimes Against Humanity and War Crimes Act[94], which arguably allows for universal jurisdiction[95] has been touted by a group of Zimbabweans in exile and representative lawyers as an appropriate tool for Canada's Attorney General to charge President Robert Mugabe[96] with various human rights abuses. Aware of the ruling in *Congo* v *Belgium*,[97] giving immunity to a head of state in office, the reality of a possible charge is on hold, leaving the

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[93] See chapter 4 p 161, piracy, high jacking, crimes against humanity, war crimes and genocide.

[94] 2000, C-24.

[95] Offences Outside Canada, Section 6 "*(1) Every person who, either before or after the coming into force of this section, commits outside Canada: (a) genocide, (b) a crime against humanity, (c) a war crime, is guilty of an indictable offence and maybe prosecuted for that offence in accordance with section 8.* Section 8: *A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if; (a) at the time the offence is alleged to have been committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state, (iii) The victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict or (b) after the time the offence is alleged to have been committed, the person is present in Canada."*

[96] Nolen, S. Can Ottawa Act Against Mugabe? *The Globe and Mail* November 5 2004.

[97] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v *Belgium)* ICJ Gen. List No. 121, judgment of 14 Feb 2002.

jurisdictional question split between those who, similar to Schabas,[98] propose that the statute does not require any link to the territory and others who propose that a reasonable link must exist.[99] Re-evaluating the wording of the statute it would appear that the intention is for a link with the territory, hence the various descriptors lists in section 8; (the alleged offender or victim was a citizen in Canada or is now present in Canada or is a citizen of a state that was engaged in armed conflict with Canada).[100] The Canadian Criminal Code stipulates that Canada can assert jurisdiction over an individual present in the territory in conformity with international law.[101] This is not universal jurisdiction but territorial jurisdiction over an extraterritorial offence with a substantial link. It is important to note the origin of the statute was to give effect to its international treaty obligations under the Rome Statute.

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[98] Author of, *An Introduction to the International Criminal Court.* (Cambridge University Press, 2001) and many other publications in the area of international criminal law.

[99] supra note 95. *"The Justice Department is wrong if they say that the intention of the act is that there must be a nexus with Canada. The whole point of the Crimes Against Humanity and War Crimes Act is to give Canada universal jurisdiction, which means you can prosecute people when there is no nexus."* William Schabas disagreed with the Lynn Lovett, Deputy Director of the war crimes and crimes against humanity branch of the Justice Department, who outlined the government's interpretation was any charge should have some link with Canada.

[100] supra note 94.

[101] Constitution Act 1982 stipulates the primacy of the Constitution above all laws in Canada, Section 52.1. Under Part I Section 11 of the Charter of Rights and Freedoms; Proceedings in Criminal and Penal Matters, *"(g) a person is not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or International law or was criminal according to general principles of law recognised by the community of nations."*

This discussion shares some similarities with the Belgian statute[102] that was interpreted by the Court of Appeal in Brussels to link the crime to the territory by some means after much international diplomatic pressure.[103] This is what Cassese termed 'conditional'[104] universal jurisdiction, when the accused is apprehended in the territory for either prosecution or extradition, as opposed to the non-restricted absolute universal jurisdiction. It could be argued that this type of situation represents the more traditional interpretation of universal jurisdiction. Cassese highlights its acceptance in international customary law, with reference to piracy and later codification in various treaties such as the 1949 Geneva Conventions.[105] It is true that states have been generally limited in any assertion of absolute universal jurisdiction usually stemming from a non-interference stance with the jurisdictional rights of other states. *"In the context of inter-state relations, where a state wishes to take charge of offenders who are not in its territory, the correct procedure is that of extradition...Moreover, the UN Charter presents territoriality*

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[102]Belgian Act of 16 June 1993. This was the incorporation of its obligations under the Geneva Conventions 1949 and the Additional Protocols I and II of 1977. The statute was expanded from war crimes in 1996 to include crimes against humanity and genocide and other serious crimes against international human rights. Further amendments were in 1999. See Vandermeersch, D. 'The ICC Statute and Belgian Law.' (2004) 2 *Journal of International Criminal Justice*. p134.

[103]Cassese, A. *International Criminal Law*, (Oxford University Press, 2003). p286. Although Vandermeersch states that the provisions of the 2003 Act in Belgium were; *"confirming the principle of expanded universal jurisdiction, whilst at the same time articulating it with the jurisdiction of the ad hoc tribunals, the ICC and other municipal jurisdictions."* Vandermeersch, D. 'The ICC Statute and Belgian Law.' (2004) 2 *Journal of International Criminal Justice*. p145.

[104] ibid. p286.

[105] ibid, Cassese mentions the First Additional Protocol of 1977, the Torture Convention 1984, article 7 of the Montreal Convention of 1971 (the suppression of unlawful acts against the safety of civil aviation), article 8 of the Convention Against taking Hostages 1979 and article 7 of the Convention of the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988.

*as a corollary of the proclaimed equal sovereignty of states".*[106] Following this line of thought Higgins agrees with Cassese that these treaties limit assertions of jurisdiction to the contracting state, similar to conditional jurisdiction, where it is provided the state can prosecute or extradite the accused in their territory.[107] Conditional universal jurisdiction is present in the Canadian statute.

Universal jurisdiction is a challenging principle to define in a precise fashion, which leads to O'Keefe's comment that it is sometimes easier to establish what it is not.[108] He begins his analysis of the universal 'concept' through the proposition that the assertion lacks any connection or nexus to the territory in question. Thus, in reality, it is an attempt to prescribe jurisdiction over a foreign individual outside the territory for acts committed elsewhere that have no connection or effects with the territory.[109] Absolute universal jurisdictional assertions can lead to problems of trials in absentia[110] in states where the accused will be put in a position of having to mount a defence possibly where they have never been present and where the proceedings may not follow any international scrutiny or norms of due process. It is not surprising that most theorists and members of the international judiciary generally view trials in absentia not only as risky legal ventures but unacceptable applications of unfounded assertions with limited theoretical adherence to customary norms. President Guillaume of the International Court of Justice, making an exception for only piracy, reaffirmed the general hesitation

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[106] *Sharon and Others the Chambre des Mises en Accusation.* 6 March 2002 para 9.

[107] supra note 89. p746.

[108] ibid.

[109] ibid.

[110] ibid p747.

against this reality, "*universal jurisdiction in absentia is unknown to international conventional law*".[111] The final summation of the judges in *Congo* v *Belgium*[112] contributed to the denunciation of absolute universal jurisdiction in the controversial Belgium statute.

> "*That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum state; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.*"[113]

The Belgium Court reiterated this view requiring a link with the territory in opposition to 'in *absentia* proceedings' when faced with the assertion of absolute universal jurisdiction.[114] *"The so-called 'in abstentia' jurisdiction... cannot be found in either the Geneva Conventions, The Genocide Convention, The Rome Statute or Belgian law."*[115]

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[111] supra note 97. Separate opinion of Guillaume at § 9, as quoted in ibid, p748.

[112] ibid.

[113] ibid at § 45. p754.

[114] supra note 106. para 9. *"The so-called " in abstentia" jurisdiction... cannot be found in either the Geneva Conventions, The Genocide Convention, The Rome Statue or Belgium law."*

[115] ibid.

O'Keefe's argument against universal jurisdiction *'in absentia'* is based on the distinction between the jurisdiction to prescribe and the jurisdiction to enforce, since the universality principle is a principle of prescriptive jurisdiction. Similar to other principles,[116] its legality with regard to enforcement is a separate issue.[117] This would require trials in *absentia* to be lawful in the particular forum state and potentially lead to other principles of jurisdiction in absentia.[118] He also refers to the non-uniformity of application of absolute universal jurisdiction among states and the use of treaty obligations that mistakenly call for universal jurisdiction by contracting states if the accused is present in the territory. He concedes that a leading reason behind the lack of enforcement of absolute universal jurisdiction is the political consideration such as in *Pinochet*,[119] and the practical restrictions of evidence and witness availability for a successful prosecution.[120]

It is true that the practical considerations of enforcing absolute universal jurisdiction are numerous, complex, and compounded by the lack of general state practice. There is also the general fear promoted by the US stance on the International Criminal Court (ICC), that absolute universal jurisdiction will lead to politically motivated prosecutions in countries without adherence to due

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[116] Territorial, nationality, passive personality, and protective principles, see chapter 2 p28-41.

[117] supra note 89. p753.

[118] ibid. Also he recalls the *Pinochet* case were a request came from Spain '*in absentia*' for extradition for crimes committed in Chile against Spaniards. p752.

[119] *R* v *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3)[1999] 2 WLR 827.

[120] supra note 89. p757, 758.

process norms.[121] These considerations do not put emphasis on certain theoretical considerations relevant to the use of absolute universal jurisdiction, such as the construct of legitimacy, comity and the substantive view concept of the rule of law.

The practical and political strands ignore the calculation behind the restriction of extraterritorial jurisdiction, which is the re-enforcement or maintenance of true sovereign equality of states. Requiring a link to the territory in order to limit the prescription of jurisdictional principles also has the effect of limiting enforcement of these principles as well. The defence of territorial sovereignty is at the heart of the principle governing enforcement jurisdiction.[122] This may appear obvious and practically driven but it is also represents the indispensable requirement of sovereign equality among states. The requirement of a link that is not merely tenuous reduces absolute universal jurisdiction, a disappointment for those who promote prosecutions for serious crimes without jurisdictional considerations, but nonetheless a necessity. If fundamental norms relevant to extraterritorial jurisdictional considerations are not a part of universal jurisdiction prescription the disturbance to international customary law is not only deep-seated but also encroaching on decisive support of the asymmetry of power between states.

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[121] Cassel, D. 'Universal Criminal Jurisdiction.' (2004) 31 22 Wtr *Human Rights*, p24. Cassel outlines the principle of due process of law as *"a nation should not exercise universal criminal jurisdiction if its courts fail to comply with international norms on the protection of human rights in criminal proceedings... International Covenant on Civil and Political Rights, art. 14."*

[122] Lowe, V. 'The Scope of Sovereignty.' in Evans, M. *International Law*. (Oxford University Press, 2003), p350.

Others may take a more pragmatic view, such as Cassel who restricts absolute universal jurisdiction on several grounds. One is what he deems the 'principle of legality', only applying the principle to the list of accepted crimes in international customary law and treaties.[123] This is a relevant consideration; legality underpins certain aspects of the construct of legitimacy. Although this is where legitimacy is divergent from legality; the necessity of a link is to restrict illegitimate jurisdiction, support the sovereign equalities of states, international comity and ensure the rule of law between states. Cassel's view of 'principle of necessity' is when the state where the accused is a national has primary jurisdiction as long as it has conducted a genuine investigation and conforms to human rights norms. Thus another state should only have secondary jurisdiction similar to the complementarity of the ICC.[124] Developing secondary jurisdiction for serious crimes is not a necessity. If domestic courts do not prosecute offenders in their own state for whatever reasons, it does not and should not restrict another state from proceeding with extradition. The concept of the rule of law protects individual states and their sovereign integrity; adherence to the rule of law and legitimacy does not require secondary jurisdiction, but rather the appropriate use of existing methods to establish a jurisdictional ground.

Absolute universal jurisdiction carries many problematic anxieties for states. It can, potentially, result in the extension of jurisdictional claims that would

[123] ibid p24.

[124] ibid.

interfere with the sovereign equalities of states and the rights that are inherent within. Political and practical problems highlight issues with the substantive application of the rule of law, however the process is as important as the result. Extraterritorial situations require a real and substantial link to the territory in any case.[125]

**Conclusion**

The substantive view of the rule of law is the recognition of the power asymmetry between states and the necessary adherence to an international normative framework that seeks to redress this imbalance. Jurisdictional considerations play a key role in the maintenance of an objective standard for international law and international relations, if an objective standard can ever truly be attained.

*Sabzali* is a useful example of the manipulation of jurisdictional principles in order to promote national interests and foreign policy goals. Its significance extends beyond these aims, as it is the only prosecution of a foreign national under the Trading with the Enemy Act in the US. Even though the initial conviction was set-aside on a technicality,[126] the judgment on the jurisdictional argument remains a stark and worrying reminder for individuals and businesses

[125] Note pending case before the ICJ on the extent of universal jurisdiction in the case of *Democratic Republic of Congo* v *France,* Gen List No. 129. Order of July 11, 2003.

[126] *US* v *Brodie, Brodie and Sabzali* 268 F. Supp. 2d 420, 2003. Motion for a new trial granted. The District Court held that: *"(1) convictions were supported by the evidence; but (2) prosecutors*

that have operational links with the US. It may not be surprising that this policy of punishing businesses that trade with Cuba is not standardised.[127] This policy is undoubtedly irrational and ill founded, but so is the jurisdictional reasoning of the court. The first section of this chapter scrutinized the frequently used US case law in this area in order to evaluate the doctrinal basis for the decision.

Recently, the House of Lords decision[128] concerning the indefinite detention of foreign nationals without charge or trial under Anti-Terrorism Crime and Security Act 2001 restricted the legislative intent of a statute through the application of proportionality. *"Whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective,"* Lord Bingham quoting a Privy Council case.[129] This reasoning should reflects on *Sabzali*, where the court abrogated any discussion on the

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*made improper remarks during closing argument and rebuttal; and (3) defendants were prejudiced thereby.*"

[127] Coca-Cola gets its products into Cuba through a Mexican subsidiary; AT&T provides telephone service through AT&T Latin America. Berman, J. 'Vote to Lift Travel Ban Faces Veto From Bush', *The National Post*, August 3, 2002.

[128] *A (FC) and Others* v *Secretary of State for the Home Department, X* (FC) *and Another* v *Secretary of State for the Home Department.* [2004] UKHL 56, para.30.

[129] Privy Council in *de Fretas* v *Permanent Secretary of Ministry of Agriculture, Fishers, Lands and Housing* [1999] 1 AC 69,80. ibid para. 30.

extraterritorial measures' reasonableness versus the extent of the criminal charge, using the legislative intent as a means of justification regardless of the impact.[130]

The effects doctrine not only suffers from a questionable jurisdictional foundation but is also misapplied in criminal cases. The basis of the effects doctrine removes the requirement of a real and substantial link with the forum state and is far too often applied without the reasonableness standard to ration such application. The essence of appropriate jurisdictional assertions in extraterritorial situations is the theory of legitimacy and the acceptance of international comity. The normative relationship reaffirms the equality of states and reduces the complicated instances of concurrent national jurisdictional claims. The US case law exemplifies the diminution of comity from its doctrinal understanding to a functional 'balancing test' that loses the true nature of its meaning.

Finally, the problems raised by the lack of any link with the territory is highlighted through the principle of universality. State practice generally does not recognise absolute universal jurisdiction even though several theorists promote its use potentially leading to trials 'in *absentia*'. This is a crisis for international customary law. The Belgium Statute is an example of an extraterritorial assertion

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[130]Lowenfield took a more sympathetic view of the US Courts by referring to the act of state doctrine, *"Congress do not trust the executive branch, and it does not trust the judicial branch. Rather than letting the courts set the ground rules for the scope of their jurisdiction, Congress wants to use the courts as instruments in furthering its own foreign policy"*. Lowenfeld, A. 'Congress and Cuba: the Helms-Burton Act.' (1996) 90 3 *American Journal of International Law*. p428. The act of state doctrine is commonly used to avoid enforcing awards made in foreign courts in private law cases, legislation passed in1988 (FSIA) specifically excludes the applicability of the Act of State Doctrine to enforce judgments in other states.

of national legislation attempting to acquire absolute universal jurisdiction without any link to the territory. The prosecution of *Eichmann*[131] and the extradition request of *Pinochet*[132] were based on the location of the victims (the passive personality principle); *Sawoniuk*[133] was prosecuted in the UK, where he was a resident for crimes in another territory during the WWII. (nationality principle), similar to other nationals who commit offences abroad. Furthermore, other prosecutions are linked to the territorial principle, either directly or through the substantial connection test, for example *Reyat*[134] in Canada. The use of these principles restricts unsupported jurisdictional assertions and reduces the frequency of concurrent claims from various states.

However, providing a link with the territory is more than a strict adherence to the principles to prescribe jurisdiction, or even a basic practicality argument. A quote from the *Congo* v *Belgium* case summarises the inherent problem.

> *"The universal jurisdiction that the Belgian State attributes to itself...constituted a violation of the principle that a state may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United*

[131] *Attorney General of the Government of Israel* v *Adolf Eichmann* (1962) 36 I.L.R. 5.

[132] *R* v *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3) [1999] 2 WLR 827.

[133] *R* v *Sawoniuk* [2000] 2 Criminal Appeals Reports 220.

[134] Inderjit Singh. *Re Reyat* Queens Bench Division 1989 Unreported.

*Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".*[135]

The central theme of this chapter is the normative relationship with jurisdiction and customary international law. Any and all jurisdictional assertions should conform to the principle of equality of nations and international comity in order to be a legitimate claim. The construct of legitimacy and the necessity of a link with the territory are the components of the redefinition of an acceptable extraterritorial assertion.

[135] supra note 97. p 17. Also quoted in Summers, M. 'The International Court of Justice's Decision in *Congo* v *Belgium*: How Has it Affected the Developments of a Principle of Universal Jurisdiction that would Oblige All States to Prosecute War Criminals?' (Spring 2003) 21 *Boston University International Law Journal*. p66.

# CHAPTER SEVEN

# CONCLUSIONS

The examination of jurisdiction occupies a fundamental role within the current discourse on international law. If, as has been stated countless times before, considerations of international law are in a state of flux, this is certainly true of the increase in extraterritorial assertions by certain individual states. Previous discussion has sought to bring together two divergent public law categories or types of extraterritorial measures in an attempt to discover useful theoretical premises that contribute not only to the understanding of extraterritoriality, but also hopefully guide any future appropriate application of extraterritorial state jurisdiction. The overall purpose of the comparison is to illustrate the pivotal function the norms of international law play in the determination of 'legitimate state assertions' of extraterritorial measures.

In recent years extraterritorial measures have increased in frequency and type, at times reflecting the contemporary reality of foreign policy goals held by powerful states, such as in the first category of measures, unilateral extraterritorial economic sanctions. The other category detailed in this thesis is the extraterritorial measures designed to address either trans-national criminal activity or crimes that are generally deemed to be of an international nature. This category can also fall victim to political motives as represented by *Sabzali*[1] or the indictments of national leaders in domestic courts, even if several examples of such indictments are not without merit.

In this comparison the intent of extraterritorial economic sanctions is questionable at best, while extraterritorial measures to fight crime are usually perceived as a positive reflection of a globalised community. The coercive nature of extraterritorial economic sanctions is generally without dispute excluding the rather predictable view of the originating state. Unilateral sanctions are generally thought to be undesirable. Nevertheless, extraterritorial examples of the same do more than disturb the international legal order, they are an economic assault on an indiscriminate number of states that merely wish to form normal trade investment links with the target state. They also potentially breach international trade agreements, the fundamental basis for jurisdiction as well as cause other states to implement domestic blocking statutes. The positivist might be inclined to accept the existence of a measure that has been derived through the lawful mechanisms of a state's authority structures, ignoring any adherence to international law norms. The acceptability of this response is a representation of supreme power of the nation-state. It is clear that the thesis had to address this particular perspective in the extent of the discussion, moving beyond the fairly obvious coercive versus necessary justification in the comparison of sanctions versus criminal law.

One of the main conclusions is drawn from the intention of the specific category of the measure, detailing the coerciveness of this type of unilateral economic sanction and comparing it with the protection against crime. There are, however, various problems with wholesale justification of extraterritorial assertions in order to fight criminal actions. These problems include the potential impact on the

[1] *US* v *Brodie, Brodie and Sabzali* 174 F. Supp. 2d 294; 2001 US Dist.

sovereignty of other states creating a situation where the assertion is without any link to the territory; or in certain statutory examples involving terrorism. This trend of extending jurisdiction is based on an assumption that the universal principle can be applied almost automatically in a post September 11th world. This is the essence of the justification argument. Identifying a distinction between the two categories on the basis of the intention the measures represent is not to be understated.

Determining whether a measure adheres to the fundamental principles of international law is a key assessment. It is the goals and aims of international law identified in the norms of international customary law and further ratified by most nations in the UN Charter, that form the criteria for peace and stability in the 'international legal order'. These basic goals and aims do not constitute the entire analysis, outlining the major theme of the thesis, it is a measure's normative relationship that is also a constituent to establishing legitimacy, mere justification is not sufficient.

The first substantive chapter undertook a broad analysis of jurisdiction relevant to extraterritorial measures and the general themes of thesis. Initially, the definition of extraterritorial measures critiques the reference to the clash created by extraterritorial measures as a mere 'conflict of laws' between individual states. This label devalues the influence of international customary law in the determination of jurisdictional competence. Thus, any extraterritorial measure lacks jurisdictional competence if it is not consistent with the normative bounds of international customary law. The jurisdiction to prescribe and the jurisdiction to

enforce extraterritorial measures lead to an evaluation of the *Lotus*[2] principle, requiring an offended state to argue that an extraterritorial measure has breached a prohibitory rule of international law. State practice has not supported the *dictum* in this case, and it does not support the requirement of reasonableness that should accompany any prescriptive jurisdictional assertion. Subsequently, the focus of the chapter moved to a critical evaluation of the principles on which jurisdictional assertions are based and established how these principles have been utilised certain examples of state practice. This is crucial in order to lay the foundations for a later discussion of the interpretation of these principles and their relationship to norms of international law. The discussion highlighted the primacy of the territorial and nationality principles in jurisdictional assertions with other principles having less general acceptance. In the comparison of the categories of extraterritorial measures, the main requirement is the adherence to the original meaning or interpretation of the principle, as opposed to a certain degree of manipulation of the principles by individual states. The substantive interpretation of the individual basis of jurisdiction is a reinforcement of the sovereign rights of individual states, the equality of states and the duty of non-interference. These are the international customary norms that act to restrict jurisdictional assertions of an extraterritorial nature. Sovereign rights of a state are essential to the concept of statehood and territoriality, the fundamental basis of the doctrine of jurisdiction. Recognition of the sovereign rights of state places jurisdiction within the bounds of international customary law, as opposed to a consensual agreement on the expansion of jurisdiction for certain activities. Consensual common law non-treaty agreements to extend jurisdiction minimise the influence of international

[2] *Lotus* case, (*France* v *Turkey)*, Judgment No.9, 1927, PCIJ, Ser A, No.10., p18-19.

customary norms. The chapter also outlined a brief distinction and comparison of extraterritorial measures stating the various purposes for which extraterritorial measures are applied. It argued that the purpose of the measure needs to be taken into consideration when evaluating the particular jurisdictional assertion. The distinction between economic extensions of jurisdiction and criminal extensions of jurisdiction concludes with the contention that extraterritorial economic sanctions should not be seen from a private law point of view. They should be evaluated as fully public law applications affecting the only the individuals in another state but the state as a whole through its sovereign rights.

Essentially two examples of unilateral extraterritorial economic sanctions were discussed in chapter three. The Helms-Burton Act and the Iran and Libya Sanctions Act. The political emphasis behind the sanction's introduction is a key part of its intention and the first stage in the scrutiny of its relationship with the norms of international law. Consequently, it is important to detail the specifics of the measures themselves and the extraterritorial elements each contains in order to assess, not only the potential damage they may present, but also their possible interference with various aspects of international law. The assessment demonstrated that the sanctions are ill-founded, in light of the fundamental principles or a bases of jurisdiction. There is also a dilemma with the sanction's adherence to international trade agreements such as NAFTA and the WTO, which has sparked international concern from various states that would be affected by these extraterritorial economic sanctions. One of the key responses from various states was the implementation or amendment of blocking statutes. These statutes prohibit compliance by a national or resident with foreign extraterritorial

measures, they are also meant to act as a monitoring device in order to evaluate whether businesses have altered investment opportunity as a result of these economic sanctions. The blocking statutes are a retaliatory reaction to the problematic extension of jurisdiction, a reassertion of state sovereignty. Nevertheless, there has been a somewhat extraordinary political agreement to bypass the sanctions' impact on EU member states although it does not legitimise or even legalise their existence. Indeed, by breaching the rule against interference in the domestic affairs of other states extraterritorial economic sanctions do not conform to the fundamental norms of sovereignty and equality of states. The agreement between the EU and the US represents the reality of the power of the EU as a trading partner to negotiate an exception for itself to be excused from the applications of these sanctions. The problem remains, however, extraterritorial economic sanctions are an inexpensive foreign policy tool for powerful states that have a large economic dominance over the global marketplace to influence trading partners. The rationale of the sanctions, the lack of adherence to the fundamental basis of jurisdiction, and the potential breach of international trade agreements, play a part in the determination of the legitimacy of these measures. Despite calls from the UN General Assembly, to limit the use of unilateral sanctions the frequency of the application of economic sanctions in general is considerable.

Trans-national and international criminal law was the focus of chapter four in order to formulate the basis for a comparison of the different categories of extraterritorial assertions by states. This is another growth area in international law, a reality of the nature of modern crime and its influence on states. Higgins has argued that there is a justification for extending jurisdiction in criminal law

because the purpose is the *"protection of common values"*.[3] Support for the justification argument, extending jurisdiction to tackle crime that transcends boarders, is powerful and benefits from a significant amount of international support. The cautionary note is the theoretical method by which this extension is formulated and applied. The practical division of the chapter into two parts demonstrated the perceived jurisdictional distinction between the levels of criminal offences; general trans-national offences and the so-called international crimes. The division is less important than the jurisdictional principles on which all assertions are based. Overall, the theme of the argument was the need to maintain a substantial link with the territory or forum state regardless of the level of crime.

On the whole, common-law states have opted for specific statutory extensions of jurisdiction that are discrete to a particular criminal offence. This raises two problems. Overlapping provisions that can create confusion and are potentially insufficient to deal with future changes in criminal behaviour. Also, it limits the range of crimes that can be dealt with relying on the desire of the individual legislative arm of the state to pass a statute for each type of criminal offence. Instead, the substantial connection test solves the limitation of statutory extensions and also has a positive influence on the determination of jurisdiction. The test requires a real and substantial link to the territory, which re-enforces the territorial principle, the traditional basis of criminal law jurisdiction. The first part of this two-stage test relies on a real and substantial link with the territory; it is not

[3] Higgins, R. *Problems and Process, International Law and How We Use It.* (Clarendon Press, Oxford, 1994). p77.

limited to the initiatory or the terminatory approach to criminal jurisdiction. However, it does require that a reasonableness standard to be applied. This reasonableness standard should reduce any occurrence of conflict between states and concurrent jurisdictional claims as well as assertions when the links with the forum state are truly tenuous.

While the link to the territory is essential, the substantial connection test also adds value to the theoretical evaluation of jurisdictional assertions by requiring adherence to international comity. It is international comity that reinforces the sovereign equality of states and, in doing so, adheres to the normative framework of jurisdiction and *jus cogens* in international law. The two parts of the substantial connection test ensure that any assertion of an extraterritorial measure is restricted by a reasonable standard, substantial link to the territory and in keeping with the norms of international law.

The second part of chapter four dealt with the traditional hesitancy of domestic courts to prosecute offenders for international crimes. The discussion charted the growth in international criminal law from Nuremberg and *Eichmann*[4] to the *ad hoc* tribunals for Rwanda and the former Yugoslavia, before ending with the jurisdiction of the International Criminal Court, and the jurisdictional quandary that is Guantanamo Bay. This hesitancy was first outlined in the analysis of *Pinochet*,[5] where the House of Lords restricted the extraditable offences to those

[4] *Attorney General of the Government of Israel* v *Adolf Eichmann* (1962) 36 I.L.R. 5.

[5] *R* v *Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* (No. 3) [1999] 2 WLR 827.

committed after the 1984 Torture Convention had become part of domestic law. It has since served as a useful illustration of a court's disinclination to recognise international customary law. Torture is an international crime without the perceived legitimacy of an international convention. This revisits the emphasis on statutory extensions of jurisdictions within common-law states. The substantial connection test would have provided a substantial link to the forum state requesting extradition and reinforced international customary norms simultaneously.

Besides specific *ad hoc* tribunals that are arranged to focus on a particular conflict usually within a defined territory or state; the advent of the International Criminal Court (ICC) has altered the landscape in the current area of international criminal prosecutions. Its jurisdiction is based on the territorial and nationality principles, which along with principle of complementarity means individual states have jurisdiction in the first instance before the ICC can gain jurisdiction. This arrangement reinforces the sovereign equality of states, while at the same time promoting domestic prosecutions of international criminals, if only to avoid a referral to the Court by the prosecutor or the Security Council. The Court is a positivist reflection of the need for domestic courts to recognise international crimes. One of the main problems surrounding the ICC is not only the refusal of the US to sign the treaty, but also the use of bilateral agreements by the US to avoid liability for Americans in other states. Many agreements are a result of either economic or military aid assistance or sanctions and thus weaken the purpose of the ICC and the norms of international law.

Prior to the ICC, Belgium extended its jurisdiction through a domestic statute in 1993. Belgium claimed universal jurisdiction for certain international crimes regardless of any link to its territory, subsequently international pressure opposed this jurisdictional assertion. The Supreme Court in Belgium reaffirmed that the link to the territory was a requirement and that potential trials *'in absentia'* were against the norms of due process and international law. The resulting restriction on universal jurisdiction reflects the main argument of this thesis that extraterritorial jurisdiction must be reasonably based. The indefinite detention of individuals in Guantanamo Bay by the US government also avoids any link to the territory and raising serious questions of due process. The intention of the US administration was to develop a detention and interrogation facility outside the territory of the US, which would restrict individual suspects from gaining access to US constitutional rights. The use of Guantanamo Bay not only ignores international human rights conventions and treaties, it also raises two problems with jurisdiction. The first is the questionable removal of individuals from not only Afghanistan but also Pakistan and, in a rather extreme example, Bosnia. The removal of two individuals from Bosnia occurred in direct opposition to the Bosnian Human Rights Chamber. The second problem is the continued detention, and possible prosecution, of 'unlawful combatants' by military tribunals. This is the opposite of trials '*in absentia*'. The US has possession of the individuals but has not justified a jurisdictional link to the territory of the US in other to establish a reasonable basis for jurisdiction. International condemnation of the continued detention of individuals from various states exemplifies the lack of international agreement or support for this jurisdictional claim. Recent US decisions from the Supreme Court have allowed detainees to challenge the status through special

tribunals. Guantanamo Bay ranks as an extreme example of extraterritorial jurisdictional assertions that would not be legitimised under the substantial connection test or any interpretation of international comity.

The main emphasis of chapter four was to promote a common-law test to facilitate the establishment of legitimate jurisdictional assertions. Ranging from trans-national to international crimes the jurisdictional assertion must have a real and substantial link to the territory, and adhere to the rules of international comity. However, this is not the only requirement for questionable jurisdictional claims, there must also be a theoretical basis to support the objective methodology applied through the substantial connection test. The next chapter evaluated the question of what constitutes legitimate extraterritorial jurisdiction.

Legitimising extraterritorial jurisdiction commences with the understanding of legitimacy as a construct. Legitimate jurisdictional claims are a necessity in the consideration of extraterritorial measures because by their very definition these measures disturb the doctrine of sovereignty and the sovereign equality of states. Bypassing the various definitions of legitimacy, the explanation relevant to jurisdictional claims is the normative interpretation of legitimacy. This was initially outlined by Franck in his "*The Power of Legitimacy Among Nations*".[6] The Franck model is broken down into several indicators of legitimacy such as determinacy, symbolic validation, coherence and adherence. These indicators are useful in the evaluation of extraterritorial economic sanctions, as it is fairly obvious that these sanctions do not benefit from any of the indicators. Overall,

there are two main factors that impact on the determination of a legitimate assertion. Applying an extraterritorial measure outside of a state's territory can cause a conflict of laws, especially when considering economic sanctions that prohibited free and independent trade decisions by third party states. This conflict can result in disharmony in the international legal order and the lack of adherence to the fundamental principles of international law. The second is the inherent rationale behind the particular measure. If the rationale is essentially coercive it is not within the construct of legitimacy. The construct is devised on the assumption of a measure's legality with the necessity of a correlation with *jus cogens*. These factors reveal the development of the thesis beyond the mere justification argument, as a distinguishing feature between the two categories of extraterritorial measures.

Using the construct of legitimacy, extraterritorial economic sanctions are neither legal nor legitimate because of their inherent coercive rationale and the lack of adherence to *jus cogens*. However, the comparison based on legitimacy is not complete. The principle of sovereignty is often quoted as an attempt to rebuke extraterritorial economic sanctions. This is a valuable response to these intrusive measures, nevertheless sovereignty can be a vague term and since jurisdiction is "*an inherent attribute of sovereignty*"[7] it is imperative to identify the interpretations relative to the category of extraterritorial measure. The functional

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[6] Franck, T. *The Power of Legitimacy Among Nations*. (Oxford University Press, 1990).

[7] Capps, P. and Evans, M. (eds) *Asserting Jurisdiction, International and European Legal Perspectives.* Berman, Sir Franklin. 'Jurisdiction; The State.' (Hart Publishing, 2003). p4.

or open view[8] of sovereignty is a recognition that the theory of the state can be affected by outside influences. This does not mean that jurisdictional assertions by other states are immediately welcome. The open view of sovereignty reflects the vertical notion of international law, acknowledging increasing legal interdependences and supranational institutions, the most important being the influence of international law on the nation-state. The practice of extraterritorial economic sanctions does not follow the open view of sovereignty; it does not adhere to the norms of international law and the philosophy behind their use is the dependence on the supremacy of the nation-state from a Westphalia perspective. In comparison, extending jurisdictional assertions in international criminal law can be in keeping with the open view of sovereignty as long as the extension includes a link to the territory and follows the rules of international comity regardless of whether the extension is originating from an international instrument or from international customary law. Generally, the open view of sovereignty does not present any of the debilitating effects on the state's sovereignty that can occur when a powerful state tries to force a weaker state into a policy change. The open view of sovereignty is not indiscriminate; it is only open to the higher norms of international law.

The corollary of sovereignty is the sovereign equality of states, which has been a principal concern of this thesis. Various interpretations of sovereign equality have been discussed concluding with the preference for what has been deemed

[8] Hobe, S. 'Statehood at the End of the Twentieth Century-The Model of the Open State.' (1997) 2 *Austrian Review of International Law*. p127.

"*existential equality*",[9] the sovereign right to have individual control on the organisation and operation of a state. This interpretation recognises the power asymmetry of states on the international plane, and gives credit to this pluralist reality. Thus the substantive interpretation of non-intervention is the essence of the equality of states and it is this equality that has to be maintained when considering any extraterritorial jurisdictional assertion. Sovereign equality of states is also the main component of international comity, giving the substantial connection test a measurement in the theory of legitimacy.

Summarising legitimacy, the evaluation of an extraterritorial measure takes into account the supremacy of the peremptory norms of international law and their influence in the nation-state. Legitimacy assumes legality, but is dependent upon the maintenance of the existential equality of nation-states adhering to the rules of international comity. The extraterritorial measure that is legitimate has been designed by the state to be compatible with the fundamental principles of international law.

The final chapter drew together the major themes inherent in the thesis; jurisdictional competence in the bipolar examples of extraterritorial measures, the necessity of a link with the territory in order to make a jurisdictional claim, and methods utilized in order to establish jurisdiction within the normative framework of international customary law. Initially it uses *Sabzali* to illustrate the coercive motivation behind extraterritorial economic sanctions by the originating state and

[9] Simpson, G. '*Great Powers and Outlaw States: Unequal Sovereign in the International Legal*' (Cambridge University Press, 2004). p53.

the surrounding US jurisprudence that seeks to rationalise this policy. The concept of the rule of law located within the theory of legitimacy is negated in a variety of ways. First in the criminal prosecution of a Canadian trading with Cuba and secondly in the rejection of other state's blocking statutes and finally the reliance on the intent of the legislative body in order to justify extraterritorial jurisdictional assertions. *Sabzali* represents the more extreme application of a general government policy that seeks to punish foreign individuals, states and even US citizens who have financial relationship with Cuba. There was international astonishment that in a post cold war peacetime era, a Canadian was found guilty under the US Trading with the Enemy Act 1917. It is equally surprising that individuals from other states are not protected by their own laws designed to prohibit compliance, because in the eyes of a US court the blocking statutes were not a practical protection or sanction to the individuals concerned. The judgment made it clear that the broad and substantial rules of international comity made no impact on the consideration of the blocking statutes in the US decision.

The importance of the legislative intent was also used to avoid the reasonableness component of the effects doctrine and international comity. The jurisprudence of the US when evaluating extraterritorial jurisdiction showed a preference for a functional test, namely the 'balancing of interests test'. The problem with reducing jurisdictional considerations to a functional test is the loss of recognition of the broader definition and influence of doctrinal considerations such as international comity. In *Sabzali* the first question in the 'balancing of interests test' was the degree of conflict of foreign laws, which made little, if any, difference to the US court since the blocking statutes of other countries had been

seen as ineffective. Certain aspects of the US jurisprudence in this area become even more theoretically constrained when comity is perceived only to be considered as a voluntary action of state,[10] similar to the recognition of foreign judgments or if there is the true conflict of laws between states, thus creating a more limited situation where comity would even be considered by the courts. This is not the broader interpretation of the doctrine nor is it representative of the reasonableness factor highlighted by the Restatement (Third) of Foreign Relations Law.[11]

The broader definition of international comity may have originated with the phrase an "*international duty*",[12] but it is probably best represented by the UK Court of Appeal[13] as a clear breach of international law and fundamental principles recognised the states generally. International comity supports the theory of legitimacy due to its reinforcement of the sovereign qualities of states. Regardless of the trend in jurisdictional analysis in the US courts, dismissing comity either through an emphasis on legislative intent or by the use of a reduced functional test, results in a disturbance of international law principles.

The effects doctrine, which is commonly used in US courts to establish jurisdiction in antitrust cases and often applied without its theoretical foundation

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[10] *Beals* v *Saldanha* 2003 SCC 72

[11] 1987 (The American Law Institute Publishers, Washington) Volume 1.

[12] *Hilton* v *Guyot* (1895) 159 U.S. 113, 163-164.

[13] *R (Abbasi)* v *Foreign Secretary and Home Secretary* [2002] EWCA Civ 1598, (2003) UKHRR 76.

of reasonableness, is too broad as a jurisdictional principle. In certain criminal cases such as drug smuggling the effects on the territory can be foreseeable and substantial. However applied, as it is in *Sabzali,* without appropriate due process limitations the basis for jurisdiction becomes inherently political. In effect, the political nature of extraterritorial economic sanctions actually transcends the jurisdictional reasoning of the court resulting in a highly subjective use of the effects doctrine. Originally, the effects doctrine was born out of the objective territorial principle, nonetheless, in a criminal prosecution for a violation of an economic sanction, as in *Sabzali* any territorial heritage is lost.

This is why international law prefers the substantial connection test to the effects doctrine. It can, and often is, applied without the restriction of reasonableness and thus results in the subjective allocation of jurisdiction without any reference to the principles of international law. However, the substantial connection test has an inherent link to international customary law through the rules of international comity and, by its very title, maintains a necessity of link to territory. It is the combination of these two parts of the substantial connection test that give the test its normative quality. Extraterritorial measures of any kind always require territorial analysis in order to establish jurisdiction. The method of analysis is crucial in order to maintain certainty and consistency within the international forum at a time when jurisdictional assertions of extraterritorial measures are increasing.

It can be argued that the only relevant exception to the territorial link in jurisdictional analysis are those crimes which fall under the universal principle.

An analysis of the domestic statutes incorporating the ICC as well as other international conventions and treaties in various states has shown their wording to include a link with the territory. This would seem to be the case with the Belgian Court's limitation of the famous Belgian statute. Thus, we see reasonableness and comity returning to the jurisdictional analysis of universality. True absolute universal jurisdiction has not been common in the international arena and it may lead to several due process concerns such as trials "*in absentia*". Trials such as these raise an abundance of criticisms that potentially contravene principles of international law. Extensions of jurisdictional claims without any link to territory becoming state practice is not only highly unlikely, but lacks legitimacy. The substantial view of the rule of law is a rejection of the inherent political manipulation of the grounds for jurisdiction as well as the critique of tests that are over practical without theoretical consideration because the rule of law seeks to redress the power asymmetry between states.

The main themes and aims of the thesis interact along the foundational principles of international customary law. The comparison between extraterritorial economic sanctions and extraterritorial criminal law is a perfect opportunity to discuss the inherent rationale of jurisdictional assertions and their normative framework. Generally, all jurisdictional assertions by states need to have a real and substantial link to the territory. This link can take a variety of forms. It can be where the action began, where the action concluded, where the victims are located, or where the main evidence and witnesses are indeed all these instances can be substantial, even where the foreseeable effects are felt. However, the effects doctrine misses the second and far too often forgotten element of jurisdictional analysis, the

doctrine of comity, that is, the reinforcement of the substantial interpretation of the equalities of states. Comity from a jurisdictional standpoint should be applied in its broadest sense. This would allow for comity to act as a protection against jurisdictional assertions from powerful states. It would also increase international co-operation to reduce the number of concurrent claims of jurisdiction between states.

The comparisons of these specific categories of extraterritorial assertions are more than the simplistic good versus bad analysis, or the fairly common justification argument. The comparison creates a view of the current and fundamental concerns of international law, the exertion of power by states through the most questionable form of jurisdiction, extraterritorial. The thesis formulates an argument that no extraterritorial assertion should be applied unless it is in keeping with the restrictions of international customary law norms, and it is only through this normative relationship that the sovereign rights of the state can extend beyond its territory in these two particular categories of extraterritorial measures. These are the components of the theory of legitimacy. The theory should be useful to states unclear about jurisdictional assertions and their conformity with international customary law, as well as courts examining the basis of the jurisdictional claim.

Revisiting the introduction, the two categories used in the comparison of extraterritorial jurisdiction represent the two fastest-growing areas of extraterritorial jurisdiction of the modern age, the function of international commerce and the reality of international crime. Even when these two very different worlds are compared on a jurisdictional foundation the normative bounds

remain consistent. Therefore, the theory of legitimacy should be applied to any determination of the measure's overall legality within as well as outside the state, just as one or more of the bases of jurisdiction would have been in the past. This is not necessarily a new test for states and courts to be concerned with, on the contrary assessing the legitimacy of a jurisdictional assertion is a call to reengage with the international community on a substantively equal level.

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