**Reflections on International Criminal Law and on Jurisdiction**

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1. **Introduction: Types of material described as ‘international criminal law’**

For over a quarter of a century, I have offered a course with this title, but with subject-matter that varies in its detail from year to year. Nobody at the Law Schools where I studied, in New Zealand and the United States, offered such a course, so I have approached it as a learning experience. I try here to capture the flavor of what might be included in the topic. The subjects I deal with in my course fit, in a rough-and-ready fashion, into four categories:

1. International aspects of national criminal law.
2. International criminal law *stricto sensu*.
3. Suppression conventions/transnational criminal law.
4. International standards for criminal justice.

I offer a thumbnail sketch of each of these to set the stage (Part I). I then turn to some cross-cutting issues that are in the forefront of both historical and contemporary discussions in the area, organizing the material under the general rubric of ‘jurisdiction’ (Part II). I conclude by introducing a recent international criminal treaty that I regard as the state of the art (Part III).

**1. International aspects of national criminal law**

The first category, ‘international aspects of national criminal law’, I think of as the equivalent in criminal theory of the issues discussed on the civil side as ‘conflict of laws’ or ‘private international law’.[[1]](#footnote-1) What happens if two or more bodies of domestic law apply potentially to a particular situation? The answer lies in a mixture of domestic and international law.

I first encountered such issues as a student of Public International Law pondering the implications of *The Lotus*[[2]](#footnote-2)and the fundamental question of national jurisdiction and its possible limits. *The Lotus* involved a collision between French and Turkish vessels on the high seas (in the Aegean). The Turkish ship sank with loss of life and the French ship limped into Constantinople (as it then was) bringing Turkish survivors aboard. Turkish prosecutors put the French officer of the watch, M. Demons, and the captain of the Turkish ship, Hassan Bey, on trial for manslaughter. France cried foul; it had no objection to the trial of the Turkish sailor, but it did claim exclusive jurisdiction over its own national on its own ship. Notice the nature of the crime (although the setting was exotic) – a mundane homicide, a crime in every legal system. This part of the landscape is populated by thieves and murderers in situations where their thieving and murdering has a cross-border aspect to it. More about *The Lotus* later. Suffice it to say at this point that the parties referred the matter to the Permanent Court of International Justice (predecessor of the present International Court of Justice).[[3]](#footnote-3) The PCIJ held, by a narrow margin,[[4]](#footnote-4) that Turkey could, consistent with international law, do what it did, although there was ‘concurrent’ jurisdiction and France had competence to try the officer too.[[5]](#footnote-5) Neither country had special priority; neither’s jurisdiction was exclusive. The Court’s analysis revealed a fault line that continues to run through the discussion to this day: is the nature of international law such that it was incumbent on Turkey to demonstrate that the rules permitted it to act; or was it necessary for France to show that Turkey was forbidden from acting? The majority plumped for the latter position.[[6]](#footnote-6)

Closely related to jurisdiction are the questions of extradition and mutual legal assistance. If, as is generally asserted, a state will not ‘enforce’ another state’s penal law by prosecuting it in its own courts,[[7]](#footnote-7) can it be persuaded, to hand over (extradite) alleged criminals for trial elsewhere, or to provide ‘mutual legal assistance’ in developing another state’s criminal proceedings, for example by executing search warrants or interviewing witnesses? The positive answers to those questions gave rise to an extensive body of bilateral (and more recently multilateral) treaties and some non-treaty practice that provides considerable fodder for courses in international criminal law.

In this first category, then, the issues are mainly about enforcing crimes defined under domestic law, within the constraints imposed by public international law, or through assistance gained via public international law.

* 1. **International criminal law *stricto sensu***

Jurisdiction, extradition and mutual legal assistance are important features, too, of the second category of topics, international criminal law *stricto sensu.*  Some works on the subject deem this area the only one worthy of examination as international criminal law.[[8]](#footnote-8) Here, it is said, the crimes *arise under* international law. They are a creature of customary international law, although some have been codified by treaty, most recently for the purposes of the Rome Statute of the International Criminal Court in 1998[[9]](#footnote-9) and in the aggression amendments adopted for that Statute in Kampala in 2010.[[10]](#footnote-10) The crimes in question are usually regarded as having the characteristic of being *jus cogens* or peremptory norms. They may be criminal even if domestic law does not recognize them, or even if they conflict with domestic obligations.[[11]](#footnote-11) They are usually said to represent a select list of examples of extreme evil, especially genocide, crimes against humanity, war crimes and the crime of aggression. They are associated in particular with the jurisdiction of the Nuremberg and Tokyo Tribunals the *Ad Hoc* Tribunals for Former Yugoslavia and Rwanda and, most recently, of the International Criminal Court. A feature of these crimes is, thus, that they are regarded as suitable for trial in an international tribunal, although this does not preclude the possibility of national prosecution on various jurisdictional theories, including ‘universal jurisdiction’. Some would see this latter possibility as the defining characteristic of a crime under international law: that it may be subject to universal jurisdiction in the courts of any state. [[12]](#footnote-12)

* 1. **Suppression conventions/transnational criminal law**

Suppression conventions[[13]](#footnote-13) may well be of a different epistemological ilk, although some skepticism is appropriate. Here, the thrust is that states have agreed either by bilateral or by multilateral treaty to make the subject of the treaty criminal under domestic law and to assist one another in various ways in enforcement in domestic courts. It is the treaty in question, not some deeper rules of the international system that are said to render the proscribed activities ‘criminal’.[[14]](#footnote-14) The earliest modern examples I have found dealt with the suppression of land-based assistance to pirates[[15]](#footnote-15) and with suppression of the Trans-Atlantic slave trade.[[16]](#footnote-16) More recent examples include the series of terrorism treaties beginning in the 1970s.[[17]](#footnote-17) Some writers use the term ‘transnational criminal law’ to describe this material.[[18]](#footnote-18) Questions of jurisdiction are crucial. In modern usage there are always several jurisdictions potentially available concurrently, since the idea is that as many domestic legal systems as possible will be ready to make sure that there are no safe havens for those committing the treaty crimes. The early suppression conventions tended to be bilateral; the most notable of the last century have been negotiated in multilateral forums, especially under the auspices of international organizations such as the League of Nations,[[19]](#footnote-19) the United Nations,[[20]](#footnote-20) the International Civil Aviation Organization[[21]](#footnote-21) and the International Maritime Organization.[[22]](#footnote-22) While the suppression treaties are my main focus here, I pause to note that suppression obligations may occasionally arise under customary international law[[23]](#footnote-23) or by the fiat of organs of international bodies such as the UN Security Council, exercising what amounts to a legislative power.[[24]](#footnote-24)

* 1. **International standards for criminal justice**

The final category, international standards of criminal justice, is an aspect of the post-1945 ferment on human rights.[[25]](#footnote-25) A great deal of modern human rights law is devoted to setting standards for performance in the domestic criminal law system. Think, for example, of much of the material in the Universal Declaration of Human Rights,[[26]](#footnote-26) the International Covenant on Civil and Political Rights,[[27]](#footnote-27) the European Convention on Human Rights and Fundamental Freedoms[[28]](#footnote-28) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[[29]](#footnote-29) There is also a plethora of ‘soft-law’ instruments in this area, especially those developed under the auspices of the branch of the United Nations Secretariat in Vienna now known as the United Nations Office on Drugs and Crime.[[30]](#footnote-30) This same office is a focal point for a number of contemporary activities involving the suppression conventions or transnational criminal law activities. The classic example of the work of this nature is the Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955 at the UN Crime Congress that year and later approved by the Economic and Social Council.[[31]](#footnote-31) Another good example of the soft law instruments developed in Vienna is the 1985 UN General Assembly Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power.[[32]](#footnote-32) In addition to insisting that victims be treated with respect in the domestic criminal justice process, the Declaration delineated obligations in respect of reparation and restitution and encouraged a role for victims in criminal proceedings. Some of these fundamental principles have found their into later treaty obligations, as standards for proceedings in international courts[[33]](#footnote-33) or for proceedings in domestic courts exercising jurisdiction over transnational crimes.[[34]](#footnote-34) Two of the subjects to which I have on occasion given special attention in International Criminal Law courses, domestic violence[[35]](#footnote-35) and disappearances,[[36]](#footnote-36) fit here.

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I see the present thoughts as mostly descriptive rather than normative. I am trying to explicate what scholars seem to understand about the field. It should, nevertheless, be apparent that I take an expansive view of the subject-matter of international criminal law, but not one totally out of the mainstream.[[37]](#footnote-37) I am not proposing any radical new understanding of the field.

I turn to an examination of some of the salient issues that cut across the areas concerned, using ‘jurisdiction’ as an organizing principle.

1. **Jurisdiction**

When it is appropriate for a domestic court to exercise its jurisdiction is a fundamental issue in relation to most of the subject-matter of the first three of my categories of international criminal law and to significant instruments developed in the fourth. Accordingly, I structure most of this contribution around that question. It is pedagogically helpful to lay out initially two discrete ways of unpacking aspects of jurisdiction, namely ‘categories’ of jurisdiction and ‘bases’ of jurisdiction.

**Categories of jurisdiction**

The American Law Institute’s *Restatement (Third) of the Foreign Relations Law of the United States*, echoing concepts that are widely accepted elsewhere, draws a very useful distinction between three ‘categories of jurisdiction’:

1. jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of persons or things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;
2. jurisdiction to adjudicate, *i.e.*, to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;
3. jurisdiction to enforce, *i.e.*, to induce or compel compliance with its laws or regulations, whether through courts or by use of executive, administrative, police or other nonjudicial action.[[38]](#footnote-38)

It is important to appreciate that, while in some situations all three categories of jurisdiction may be exercised at the same time by the same state, this may not always be the case. Take *The Lotus*.Turkey had custody of M. Demons. Its executive enforcement authorities (the prosecution) were able to bring him before an adjudicator (the court) which applied Turkish prescriptive law. Equally, given his presence in Constantinople, Turkey could have taken a different kind of enforcement action , namely surrender Demons to the French authorities. France at least professed an interest in bringing him to trial, thus implicating French adjudicative and prescriptive jurisdiction.[[39]](#footnote-39) The crunch question at the international level was whether it was appropriate for Turkey to exercise its prescriptive jurisdiction and apply the Turkish law of homicide to him.

Think about another kind of enforcement jurisdiction. What if M. Demons had not made the fateful entry into Turkish space voluntarily? What if Turkey had arrested him on the high seas? The PCIJ spoke obliquely to this:

It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels on them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel were to send on board an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.[[40]](#footnote-40)

If it is illegal ‘to make investigations or to take evidence’, then in my hypothetical case, it must, *a fortiori*, be illegal to make an arrest.[[41]](#footnote-41) We shall see a little later what the Court must have meant by the ‘special cases defined by international law’.[[42]](#footnote-42) For now, note what the PCIJ said in the next paragraph: ‘But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas.’[[43]](#footnote-43) This sets up the successful argument that Turkey can prosecute in its own territory one who acts on a floating piece of France and causes damage on a floating piece of Turkey. It emphasizes prescriptive not enforcement jurisdiction.

**Bases of jurisdiction**

The literature often asserts that there are in customary international law five recognized ‘bases of jurisdiction’ on which States may exercise prescriptive jurisdiction. The five are certainly the most commonly discussed, but I do not believe that the categories are closed; and the application of each of them may be disputed in particular situations. Treaty provisions are increasingly opening up new possibilities. The five are: territorial; nationality or active personality (offences committed by nationals); passive personality (offences against nationals); protective; and universal.[[44]](#footnote-44) Exercises of the latter four and the ‘objective territorial’ or ‘effects’ version of the first are often characterized as ‘extraterritorial’, that is, being concerned with events outside the national territory.

Territorial jurisdiction, the most common, is premised on the place where the crime is committed. The simple case, for example, is where all of the elements of a homicide occur in the same State. This is sometimes characterized as ‘subjective territoriality’. The more complicated case is one like *The Lotus* where the carelessness of M. Demons on the French vessel resulted in death on the Turkish one. Two conceptual moves are necessary to apply a territorial theory here – and were made by the PCIJ. First, the ships have to be treated as the equivalent of French and Turkish territory, thence the notion of ‘flag State’ jurisdiction.[[45]](#footnote-45) Second, the territory where the ‘effects’ occur must be treated as having a sufficient relationship to found jurisdiction to prescribe. This, sometimes called ‘objective territoriality’, is what the PCIJ upheld in *The Lotus*. Notice that this is not to deny the right of France to apply its laws also to M. Demons (on a nationality or territoriality/flag State basis). The system tolerates concurrent jurisdiction and there is no clear ‘hierarchy’ of who may act first. Turkey was able to go first in the particular circumstances since it had custody of Demons. It could have been magnanimous (‘done the decent thing’?) and handed him over to French justice, but it did not; it committed no breach of international law in failing to.

Nationality jurisdiction is more typical of civil law countries than of common law ones, but assertions of jurisdiction based on nationality are becoming more common in the Anglo-American system, especially in the case of military personnel and other representatives of the state, and in terrorism cases.

‘Passive personality’ was also asserted as a theory by Turkey against M. Demons. Turkish legislation, based on the Italian Penal Code, made it an offence to commit certain crimes (including homicide) against a Turkish citizen anywhere in the world. The majority of the Court stopped short of upholding Turkey’s actions on this basis, and the United States and other common law countries were long opposed to such assertions of jurisdiction. Today, it is an increasingly asserted ground of jurisdiction, especially as permitting a State’s action against those alleged to have committed acts of terrorism against its citizenry elsewhere on the planet.[[46]](#footnote-46)

‘Protective jurisdiction’ is extraterritorial in its application also.[[47]](#footnote-47) It relates to actions by persons who are not nationals of the target State directed against its security or related interests. The classic everyday case is the visa applicant who lies abroad on a visa application form and then is prosecuted after arriving in the country concerned.[[48]](#footnote-48) Protective jurisdiction is often an alternative basis to justify jurisdiction in terrorism cases.

Universal jurisdiction is exercised by a State even in a situation where the State itself has no particular connection to the specific offence. It exercises that jurisdiction on behalf of the international community to impose sanctions for a small class of crimes regarded as sufficiently heinous to be punishable under international law. [[49]](#footnote-49) Historically, the paradigm example of such a case was piracy on the high seas.[[50]](#footnote-50) In modern usage, the slave trade is usually regarded as attaining a similar status (although many States have not legislated to that effect) and, of course, the same is true of genocide, crimes against humanity, war crimes and perhaps the crime of aggression.[[51]](#footnote-51) While it has been suggested that a domestic court could directly apply international law to provide a basis for the punishment of crimes of universal jurisdiction, most legal systems require some action on the part of the legislature to support the exercise of prescriptive and enforcement jurisdiction. [[52]](#footnote-52)

**Jurisdiction and the suppression conventions**

In the piracy and slave-trade bilateral treaties already mentioned, the focus is on the obligatory[[53]](#footnote-53) exercise of jurisdiction to prescribe on certain bases – territoriality against those who aid pirates by land in the Jay Treaty,[[54]](#footnote-54) and nationality in the case of Portuguese slavers.[[55]](#footnote-55) There was presumably an implied obligation in both treaties to exercise enforcement jurisdiction along with the prescriptive jurisdiction. The implicit Portuguese duty to prosecute was backstopped by an explicit power granted to British warships to board suspected slave ships and free the slaves; but criminal trials would take place in Portugal proper or in its widespread colonies.[[56]](#footnote-56) Thus, the British had a role in enforcement, conferred by treaty.

This division of labour, between enforcement and prescription, was spelled out in a more sophisticated fashion in a remarkable convention on submarine cables later in the nineteenth century, a treaty that deserves much more attention than it has received in the scholarly literature.[[57]](#footnote-57)

Invention of the telegraph led to submarine cables circling the globe. Cables are vulnerable to thieves, vandals and incompetent sailors. Hence the suppression treaty known as the 1884 Convention for the Protection of Submarine Cables.[[58]](#footnote-58) Article II of the Convention made it ‘a punishable offence to break or injure a submarine cable, willfully or by culpable negligence, in such a manner as might interrupt or obstruct telegraphic communication, either wholly or partially, such punishment being without prejudice to any civil action for damages.’[[59]](#footnote-59) Article XII obligated Contracting States to criminalize these offences under domestic law.[[60]](#footnote-60) What about jurisdiction?

Article VIII dealt with prescriptive and adjudicative jurisdiction, decreeing that ‘[t]he tribunals competent to take cognizance of infractions of the present Convention are those of the country to which the vessel on board of which the offence committed belongs.’ Flag state jurisdiction is the norm. But article VIII continued:

It is, moreover, understood that in cases where the provisions of the previous paragraph cannot be carried out, offences against the present Convention will be dealt with by each of the Contracting States in accordance, so far as the subjects and citizens of those States respectively are concerned, with the general rules of criminal jurisdiction prescribed by the laws of that particular State, or by international treaties.[[61]](#footnote-61)

‘Cannot be carried out’ must refer to cases where extradition is not available, either because there is no treaty or other arrangement in place, or the accused has fled to his home state which does not render nationals. This paragraph contemplates nationality jurisdiction, if consistent with the general approach of the State in question. But it stops short of universal prescriptive jurisdiction.

Jurisdiction to enforce is broader. It is universal, or at least shared by all treaty parties. Article X of the Convention provided:

Offences against the present Convention may be verified by all means of proof allowed by the legislation of the country of the court. When the officers commanding ships of war, or ships specially commissioned for the purpose by one of the High Contracting Parties, have reason to believe that an infraction of the measures provided for in the present Convention has been committed by a vessel other than a vessel of war, they may demand from the captain or master the production of the official documents proving the nationality of the said vessel. The fact of such document having been exhibited shall then be endorsed on it immediately. Further, formal statements of the facts may he prepared by the said officers, whatever may be the nationality of the vessel incriminated. These formal statements shall be drawn up in the form and in the language used in the country to which the officer taking them belongs; they may be considered, in the country where they are adduced, as evidence in accordance with the laws of that country. The accused and the witnesses shall have the right to add, or to have added thereto, in their own language, any explanations they may consider useful. These declarations shall be duly signed.

This must be one of the ‘special cases’ referred to in *The Lotus*,[[62]](#footnote-62) i.e., there is treaty-based enforcement jurisdiction exercisable by all the parties, namely to board a ship flying another state’s flag, check documents and take statements on behalf of the flag State. So, if M. Demons had negligently damaged a cable (whether Turkish or belonging to another treaty partner) instead of negligently killing Turks, the Turkish navy could have boarded *The Lotus* to make enquiries. Turkey and France being parties to the Convention,[[63]](#footnote-63) the necessary consent to board could be drawn from article X. The article does not justify an arrest, but enforcement jurisdiction short of that emphatically is. Of course, Turkey has no prescriptive jurisdiction under this treaty, that being confined to the flag (or national) state. There is a division of labour among the Contracting States of prescriptive and (parts of) enforcement jurisdiction.

Do not underestimate the randomness in all of this: one might think that killing someone is worse than damaging a piece of wire (albeit an expensive one), and others ought probably to be able to board and investigate homicides, but the treaty dealt with cables, not dead people.[[64]](#footnote-64)

A further division of labour had been devised by 1929 and appeared in the International Convention for Suppression of Counterfeiting Currency.[[65]](#footnote-65) After requiring the criminalization ‘as ordinary crimes’ of various depredations against currency (article 3)[[66]](#footnote-66) and requiring that no distinction should be made in the scale of punishments for offences relating to domestic currency on the one hand and foreign currency on the other (article 5),[[67]](#footnote-67) the Convention (article 8) addressed extradition and jurisdiction as follows:

In countries where the principle of extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence.

This provision does not apply if, in a similar case, the extradition of a foreigner could not be granted.[[68]](#footnote-68)

The state of nationality already has the obligation under article 3 to criminalize, i.e., to exercise its prescriptive jurisdiction over the offences, at least territorially. Now it has an obligation to prescribe and enforce the crimes *extra*territorially against its own nationals when it refuses to extradite them (as many states do) on the basis of nationality.

States that extradite their own nationals, or who find themselves with foreigners sought by a third state, have an enforcement obligation under article10 of the Convention. That article provides that the offences under the treaty ‘shall be deemed to be included as extradition crimes in any extradition treaty which has been or may hereafter be included between any of the High Contracting Parties.’[[69]](#footnote-69) Parties that ‘do not make extradition conditional on the existence of a treaty or reciprocity, henceforward recognise the offences referred to in Article 3 as cases of extradition as between themselves.’[[70]](#footnote-70) The 1929 extradition provisions do not, in themselves, authorize extradition. They merely amend any existing extradition treaties or arrangements by including the counterfeiting crimes in the list of crimes for which extradition may be granted.[[71]](#footnote-71) In the absence of procedures otherwise in place, through treaty or comity, this aspect of the 1929 Convention was a dead letter. The same was true of article 16 of the Convention which sought to encourage the use of what it called ‘letters of request’ or ‘letters rogatory’ relating to Convention offences. [[72]](#footnote-72) In later usage, this morphed into an obligation of ‘mutual legal assistance’.

Article 8 of the Convention concerning nationals combined with article 9 concerning foreigners to form the starting point for a dramatic development that bore fruit in 1970 in the Hague Hijacking Convention[[73]](#footnote-73) in the form of ‘subsidiary’ or ‘fallback’ universal jurisdiction, based on the presence of the accused in-country. Article 9 of the 1929 Convention provided that:

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

Extradition shall be granted in conformity with the law of the country to which application is made.[[74]](#footnote-74)

We are talking here about both prescriptive jurisdiction and jurisdiction to enforce against foreigners! I know of no common law country that had such a ‘general rule’ in 1929,[[75]](#footnote-75) but there may have been some civil law countries that did.[[76]](#footnote-76) The important point for this part of the story was the establishment of the principle both that there could be an obligation undertaken by treaty to invoke nationality jurisdiction to punish nationals who could not be extradited (article 8) and a recognition that it might be possible (even obligatory) to prosecute foreigners who committed their offences abroad (article 9). The Rapporteur of the League of Nations Legal Committee that worked on the drafting of the Convention was Mr. Vespasian Pella of Romania, one of the giants of international criminal law. He is quoted as saying that that provision that became article 9 was ‘a first step towards admitting in the future, without reservations, the principle of universality of justice in the pursuit of criminals’.[[77]](#footnote-77) He added, ‘such proceedings being justified either by the nature of the offence or the interest injured, or on account of the offender’s nationality etc.’[[78]](#footnote-78) Jurisdiction based on nationality was already covered by article 8; ‘universal’ jurisdiction based on the ‘nature of the offence or the interest injured’ was a work in progress in 1929 and so it remains ![[79]](#footnote-79)

The Hague Convention on the Suppression of Unlawful Seizure of Aircraft (Hijacking)[[80]](#footnote-80) was adopted in 1970 under the auspices of the International Civil Aviation Organization. Article 1 declares as criminal the acts of a person who, on board an aircraft in flight, ‘unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of, that aircraft, or attempts to perform such act’, or ‘is an accomplice of a person who performs or attempts to perform any such act.’ [[81]](#footnote-81) In article 2, each Contracting State ‘undertakes to make the offence punishable by severe penalties.’[[82]](#footnote-82) Each party is required by article 4 to ‘take such measures as may be necessary to establish its [prescriptive] jurisdiction over the offence’ in a number of situations:

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1. when the offence is committed on board an aircraft registered in that State;
2. when the aircraft on board which the offence is committed lands in its territory;
3. when the offence is committed on board and aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this article.[[83]](#footnote-83)

Article 4 (2), combined with article 7 takes the Currency Convention model about nationals[[84]](#footnote-84) to the next stage. Article 7 provides that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed on its territory, to submit the case to its competent authorities for the purpose of prosecution. The authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[[85]](#footnote-85)

Now it is not only nationals (the 1929 model) who must be subject to jurisdiction . The optional part of article 9 of the 1929 Convention is now obligatory and is not contingent upon a request for extradition; it is now an obligation owed to all other parties to the treaty.[[86]](#footnote-86) *Anybody* ‘found’ there must be susceptible to prescriptive and enforcement jurisdiction, a regime now widely referred to as ‘extradite or prosecute’ or ‘*aut dedere aut judicare*’ or “*aut dedere aut prosequi*. ‘Prosecute’ and ‘prosequi’ in these phrases, consistent with prosecutorial independence and with the due process requirement that a prosecution be based on adequate evidence, underscore that the obligation is not necessarily to bring the accused to trial. It requires that the prosecutor make an independent professional determination “in the same manner as in the case of an ordinary offence of a serious nature”.[[87]](#footnote-87) Notice that while the ‘found’ jurisdictional theory is often described as universal, this ‘fallback’[[88]](#footnote-88) or ‘subsidiary’ jurisdiction requires some connection to the forum state at the outset – presence. The ‘pure’ form of universal jurisdiction, for example that over pirates, would permit the institution of proceedings in the absence of the accused[[89]](#footnote-89) with the expectation that he might fortuitously turn up later, or, more likely, that extradition proceedings[[90]](#footnote-90) would be instituted.[[91]](#footnote-91)

Article 8 follows the 1929 model of including the Convention offences in existing extradition arrangements, treaty or otherwise. But it goes further. It provides that a state that requires a treaty basis for extradition ‘may at its option consider this Convention as the legal basis for extradition in respect of the offence. Extradition shall be subject to the other conditions provided by the law of the requested State.’[[92]](#footnote-92) In short, the Hague treaty may itself be treated as an extradition treaty, with a short list of applicable crimes: hijacking. Extradition is also facilitated in principle by a fiction contained in article 8. It reads: ‘The offence shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4, paragraph 1.’[[93]](#footnote-93) Many older extradition treaties require that the offence be committed in the ‘territory’ of the states concerned. The fiction enables a court (or executive authority) to treat aircraft located somewhere else (and wherever registered) as being within the territory of the homeland.

Article 10 (1) attempts to firm up the assistance provisions of 1929 model, although its language is still very general: ‘Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence and other acts mentioned in Article 4. The law of the State requested shall apply in all cases.’[[94]](#footnote-94)

The Hague Convention was the state of the art in its day and a model for many other conventions.[[95]](#footnote-95)

**The Rome Statute of the International Criminal Court as (functionally) a suppression convention and the jurisdictional regime flowing from that**

The Rome Statute is an object-lesson in the complexities of the term ‘jurisdiction’. Article 5 of the Statute asserts (subject-matter) jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[[96]](#footnote-96) Article 13 of the Statute, usually called the ‘trigger mechanism’, deals with ‘exercise of jurisdiction’. It says that the Court may exercise its jurisdiction over the article 5 crimes if (a) a situation in which one or more of the crimes appears to have been committed is referred to the Prosecutor by a State Party, (b) a similar situation is referred to the Prosecutor by the UN Security Council, acting under Chapter VII of the UN Charter (i.e., with respect to its powers over international peace and security), or (c) the Prosecutor has initiated an investigation, *proprio motu*, in accordance with the relevant provisions of the Statute.[[97]](#footnote-97) Article 12 deals with what it calls ‘preconditions for the exercise’ of that jurisdiction. It provides, first, that a State which becomes a party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.[[98]](#footnote-98) It continues that, where cases are triggered by a State Party or the Prosecutor herself, the Court may exercise its jurisdiction if one or more of the following are Parties to the Statute:

1. The State on the territory of which the conduct in question occurred, or if the crime was committed on board a vessel or aircraft, the State of registration of that aircraft;
2. The State of which the person accused of the crime is a national.[[99]](#footnote-99)

There is no similar ‘precondition’ to the exercise of jurisdiction in the event of a Security Council referral; the Council may effectively trigger jurisdiction over treaty parties and non-parties alike. Council-triggered jurisdiction is universal jurisdiction writ large, a regime that many of the negotiators, invoking the precedent of Nuremberg,[[100]](#footnote-100) wanted for all crimes under the Statute, but they were unable to obtain a consensus to this effect.

Since the crimes delineated in the Rome Statute will also potentially be subject to domestic jurisdiction, at the very least on the basis of nationality or territoriality, the possibility of concurrent jurisdiction arises. How are the relationships and possible clashes between domestic and international jurisdiction regulated? The preamble to the Rome Statute has States Parties ‘*[a]ffirming*  that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.’[[101]](#footnote-101) Nevertheless, the Statute does not contain any language specifically requiring states parties to exercise their domestic prescriptive jurisdiction to criminalize the four offences within the jurisdiction of the Court, genocide, crimes against humanity, war crimes and the crime of aggression.[[102]](#footnote-102) Yet many thoughtful states have done just that.

Other provisions in the Statute encourage this. The first is another paragraph in the preamble which reads: ‘*Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.’[[103]](#footnote-103) This sentence is a masterpiece of the diplomatic art of negotiating ambiguity. In the first place, from whence comes the ‘duty’? Not from the Statute, since the statement is lurking amongst the hortatory language of the preamble, not in the operative part of the Statute. The assumption must be that there is some customary law duty ‘out there’, as it were. Further, what is meant by ‘*its*’ duty? Is it a duty to legislate? A duty or prosecute, but only if it has happened to legislate? Is it a duty to prescribe and enforce its law against nationals? On a territorial basis? On the basis of universal jurisdiction? Then there is the proposition in paragraph 10 of the preamble and article 1 of the Statute that the Court ‘shall be complementary to national jurisdictions’. At the very least, the principle of complementarity, much discussed during the negotiation of the Statute (and since),[[104]](#footnote-104) recognizes that there may be concurrent jurisdiction between the ICC and one or more national jurisdictions. Recall how the PCIJ left things between France and Turkey in *The Lotus*, that is, with no way other than negotiation (or first capture) to resolve the priorities between the two. Article 17 of Rome, headed ‘issues of admissibility’ lays out a solution to the priority conundrum. The Rome negotiators of the were well aware of the solution provided by the Security Council in the Statutes of the Tribunals for Former Yugoslavia[[105]](#footnote-105) and Rwanda,[[106]](#footnote-106) namely that the Tribunals could trump any domestic jurisdiction and take a case for themselves.[[107]](#footnote-107) In the Rome Statute, a different solution prevails; a state acting in good faith can come up trumps. Without getting too much into the detail, the important point to note is that article 17 (1) states that ‘the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution….’[[108]](#footnote-108) To put matters the other way around, a state will trump the ICC if (a) it has (prescriptive) jurisdiction (b) which it is exercising (enforcement jurisdiction), (c) it is willing, and (d) it is able. A state desiring to be trumps will want to fulfill all four criteria. At the ground level, it will need appropriate legislation in place or some other constitutional doctrine empowering its courts. At the very least, it will want to exercise nationality and territoriality prescriptive jurisdiction so that it may wash its own dirty laundry. Personally, I would advocate that the prudent state should claim at least subsidiary or fallback universal jurisdiction[[109]](#footnote-109) over the Rome crimes, if only because it is always possible that a foreigner alleged to have committed one of these crimes will turn up on the national territory and be, for understandable practical reasons such as lack of resources, not sought by the ICC, but cannot be extradited or even deported elsewhere. The options then become impunity or extraterritorial jurisdiction.

**III. Conclusion: The new state of the art? The 2010 Beijing Convention on the Suppression of Unlawful Acts relating to International Civil Aviation**

As should be obvious by now, treaty negotiators build their suppression structures upon what was done in the past, sometimes in quite different substantive areas. The Beijing Convention of 2010[[110]](#footnote-110) is a re-working of the 1971 Montreal Convention of the same name.[[111]](#footnote-111) Articles 1 and 3 contain an obligation to criminalize (make ‘punishable by severe penalties’) a wide range of offences against aircraft and persons associated with them, including destruction of air navigation facilities, using aircraft for the purpose of causing death or serious bodily injury, other actions involving weapons of mass destruction, and acts of violence at airports.[[112]](#footnote-112) There are expansive principles of liability: threats, attempts, complicity, accessories after the fact, inchoate conspiracies,[[113]](#footnote-113) including penalties for corporate entities.[[114]](#footnote-114) There is an extensive extradition article[[115]](#footnote-115) and one on mutual assistance.[[116]](#footnote-116)

But it is article 8, which contains the Convention’s basic jurisdictional assertions, that is really striking in showing where we have come. It provides:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1 in the following cases:

(a) when the offence is committed in the territory of that State;

(b) when the offence is committed against or on board an aircraft registered in that State;

(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(d) when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State;

(e) when the offence is committed by a national of that State.

2. Each State Party may also establish its jurisdiction over any such offence in the following cases:

(a) when the offence is committed against a national of that State;

(b) when the offence is committed by a stateless person whose habitual residence is in the territory of that State.

3. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to Article 12 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraphs of this Article with regard to those offences.[[117]](#footnote-117)

4. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Notice the structure of the obligations here:

Paragraph 1 requires *obligatory* exercise of prescriptive jurisdiction[[118]](#footnote-118) on the bases there listed: territoriality (including state-of-registration and state-of-leasing); landing state; nationality).

Paragraph 2 envisages *permissive* prescriptive jurisdiction in two instances. The first underscores the ambivalence states still have about passive personality jurisdiction; they are, nevertheless, prepared to concede that other states can lawfully exercise it in respect of these offences, although they may not wish to be required to do so themselves.[[119]](#footnote-119) In terms of *The Lotus’*s basic fault line[[120]](#footnote-120) about whether it is necessary to find an authorizing or a prohibiting rule, this one fits either analysis; it either suggests that there is no prohibition, or, if you prefer, it amounts to an authorization to proceed. It is stronger in this respect than a grudging statement of neutrality in the 1929 Currency Convention.[[121]](#footnote-121) The second sub-paragraph in paragraph 2 raises the issue, always a little vague, of who ‘counts’ as a national, by making it possible to include stateless persons as nationals for the purpose of active nationality jurisdiction.[[122]](#footnote-122)

Paragraph 3 presses the *aut dedere aut judicare* button. A state has an obligation to extradite or prosecute .

Ah yes, and paragraph 4! This is a good mystery to end with. Does it mean that anything goes? This language made its first appearance in the 1963 Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft.[[123]](#footnote-123) That Convention required the state of registration of aircraft to take jurisdiction over events occurring on those craft (“flag state” jurisdiction for aircraft). The United States had argued in the negotiations for the primary form of jurisdiction in aircraft cases to be the place where the aircraft landed. It failed to convince the other parties to that effect, but the language about national law was included in the 1963 treaty to save the possibility of exercising “landing state” jurisdiction. [[124]](#footnote-124) In the 1970 Hague Convention,[[125]](#footnote-125) landing state jurisdiction was obligatory, so an identical saving provision[[126]](#footnote-126) may well have “saved” nationality jurisdiction (which was not included). Yet the 2010 treaty itself contains both landing state and nationality jurisdiction (article 8 (1)) which certainly do not now need to be saved. What of a state that now adopts a “pure” form of universal jurisdiction rather than the “fallback” version required by the Convention, which depends on presence?[[127]](#footnote-127) Does the broader principle of *The Lotus* still reign? Does that get a boost from the saving? Is all permitted unless it is forbidden? Or is paragraph 4 merely mindless repetition of past language?

1. \*Board of Governors Professor, Rutgers University School of Law, Camden, New Jersey. These reflections were the basis of lectures at the University of Salzburg Summer School on International Criminal Law, 5-8 August 2012 and later for the United Nations Audiovisual Library in International Law. They are expanded versions of material contained in the author’s contribution on “International Criminal Law” to Dennis Patterson and Anna Södersten eds., *The Blackwell Companion to European Law and International Law,* and in his article “Some aspects of the concept of international criminal law: suppression conventions, jurisdiction, submarine cables and *The Lotus*”, (2011) 22 *Criminal Law Forum* 519.

   Joseph Story, *Commentaries on the Conflict of Laws*, Chapter XVI (1834) is the earliest commentator I have found taking this approach. Story’s brief chapter addresses three issues: 1. Whether a crime committed on the territory of another sovereign state can be punishable in the forum state; 2. Whether a state is required to take notice of, or to enforce, a foreign conviction; 3. Whether a state is bound, in the absence of a treaty, to surrender fugitives from justice who seek asylum from punishment. In each instance, after discussing judicial decisions (primarily but not exclusively from common law countries) and an eclectic collection of learned authority, he concluded that the answer was negative. SharonWilliams notes, in a pioneering Canadian work, ‘two basic branches of international criminal law: *conflict of criminal laws* and *the law of international crimes*. In the first case the basic norm is national in character, whereas in the second case it is international.’ Sharon A. Williams, *International Criminal Law* (Toronto: Osgoode Hall Law School, 3rd rev. ed. 1978) i (mimeo). The two ‘basic branches’ and their legal ‘sources’ intrude upon and interpenetrate each other. [↑](#footnote-ref-1)
2. The Case of the S.S. *Lotus* (France v. Turkey),PCIJ, Ser. A, No. 10 (1927) 1. *The Lotus*, with its discussions of the basic structure of international law, is fundamental to courses in Public International Law. I regard it as equally basic to International Criminal Law for its discussion of jurisdiction. [↑](#footnote-ref-2)
3. Neither the PCIJ nor the ICJ was granted criminal jurisdiction – they were empowered to deal with disputes between states and sometimes with issues involving international organizations. Nevertheless, as *Lotus* (a conflict of laws case, surely) and a number of other cases attest, the Court has said quite a lot on criminal law. See K.J. Keith, ‘The International Court of Justice and Criminal Justice’, (2010) 59 *ICLQ* 895. [↑](#footnote-ref-3)
4. The Court being split 6 to 6, the President, acting under the Court’s rules, exercised a (second) deciding vote. [↑](#footnote-ref-4)
5. The 1958 Geneva Convention on the High Seas, 450 *UNTS* 82, article 11, and the 1982 UN Convention on the Law of the Sea, 1833 *UNTS* 3, article 97, provide identically: ‘ In the event of a collision or other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag Sate or of the State of which such person is a national.’ As between the 162 parties to the Convention, this must reverse the effect of the narrow holding in *Lotus*, applicable to ships on the high seas*.* But has it become a rule of customary law, binding on non-parties also? If M. Demons were to arise from the grave and do it all over again, what is the implication of the fact that while France has ratified both of these Conventions, Turkey has ratified neither? [↑](#footnote-ref-5)
6. Supra note 2 at 21. Cf. Lord Finlay’s dissent, ibid., at 52:

   The question is put in the *compromis* with perfect fairness as between the two countries and the attempt to torture it into meaning that France must produce a rule forbidding what Turkey did arises from a misconception. The question is whether the principles of international law authorize what Turkey did in this matter. [↑](#footnote-ref-6)
7. Story, supra note 1 at 516. For something close to what Story saw as impossible, see infra notes 44 and 79. [↑](#footnote-ref-7)
8. E.g., Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003); Antonio Cassese, ed.-in-chief, *International Criminal Justice* (Oxford: Oxford University Press, 2009); Gerhard Werle, *Principles of International Criminal Law* (The Hague: TMC Asser, 2005); Alexander Zahan and Goran Sluiter, *International Criminal Law: A Critical* Introduction (2007). Beth Van Schaack and Ronald C. Slye, *International Criminal Law and its Enforcement* (New York: Foundation Press, 2007), belongs mostly with this group, although it includes torture and terrorism in its discussion of substantive offences along with genocide, crimes against humanity and aggression. Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Law and Procedure* (Cambridge: Cambridge UP, 2007) emphasizes this area, with some references to transnational criminal law. [↑](#footnote-ref-8)
9. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, revised (1998), articles 6-8 (genocide, crimes against humanity and war crimes). Another crime under international law is torture, codified in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (1984). According to the ICJ, such codifications have “a preventive and deterrent character” as “states commit themselves to co-ordinating their efforts to eliminate any risk of impunity”. See Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012 ICJ Rep., para. 75 (discussing Torture Convention). See also ibid., para. 99 (torture *jus cogens* under customary law). The Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* 277 (1948), recalls in its preamble “the declaration made by the General Assembly of the united Nations in its resolution 96(I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.” In its first operative paragraph, “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.” Obligatory jurisdiction under the Genocide Convention lies with “a competent tribunal in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” (Article VI). In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 *ICJ Rep.*, at paragraphs 447-8, the ICJ held that Serbia’s obligation to punish included an obligation to hand General Mladic over to the Tribunal for Former Yugoslavia. See Roger S. Clark, ‘State Obligations under the Genocide Convention in Light of the ICJ’s decision in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide’, (2008) 61 *Rutgers L. Rev.*75, 107-8. [↑](#footnote-ref-9)
10. ICC Resolution RC/Res. 6 (2010), article 8 *bis* (crime of aggression). On genocide, see also infra note 53. [↑](#footnote-ref-10)
11. Principles of the Nuremberg Charter and Judgment, formulated by the International Law Commission, Principle II, 5 UN GAOR, Supp. No. 12 at 11-14, UN Doc. A/1316 (1950). [↑](#footnote-ref-11)
12. There is some debate about whether aggression, or Nuremberg’s ‘crime against peace’, gives rise to universal jurisdiction, although it was adjudicated in international forums in Nuremberg and Tokyo. See Roger S. Clark, ‘Complementarity and the Crime of Aggression’, in Carsten Stahn and Mohamed M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, (Cambridge: Cambridge UP, 2011), Vol. II, 721, 730-5(expressing some doubts); Michael Scharf, ‘Universal Jurisdiction and the Crime of Aggression’, (2012) 53 *Harvard International Law Journal* 358 (emphatic that it does). [↑](#footnote-ref-12)
13. I use the term ‘suppression convention’ in a functional sense. No particular form of words is necessary in the title, although the words ‘suppression’ and ‘prevention’ appear in many titles. An early example of such usage is the 1904 International Agreement for the Suppression of the White Slave Traffic, 1 *LNTS* 83, which required administrative action against trafficking in persons. A criminalization obligation was added in the 1910 International Convention for the Suppression of the White Slave Traffic, 211 *Consolidated Treaty Series.* 45. On ‘transnational’, see infra note 18. [↑](#footnote-ref-13)
14. The line between what offences fit the *stricto sensu* category as opposed to the ‘convention’ or ‘transnational’ category is both fuzzy and subject to change as state practice develops. The custom that creates peremptory norms such as genocide and crimes against humanity is said to precede the treaty crystallization of such norms. But why can the progression not go the other way? Terrorism provisions in widely ratified treaties can surely find their way into the ‘higher” category as custom. There is the further question of what is the key ‘procedural’ characteristic of a crime under international law. Is it that it supports universal jurisdiction? Is it that it can be tried in an international forum? Does one follow from the other? Ponder this: a substantial minority of those involved in the creation of the International Criminal Court thought that serious drug crimes and crimes of terror should join the *stricto sensu* crimes within the jurisdiction of the Court. A consensus could not be found and the matter was left for future consideration at a Review Conference on the Rome Statute. See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex, Resolution E, (1998) UN Doc. A/CONF.183, Vol. I at 71-2. The matter continues to percolate slowly in an intricate committee system designed to ensure glacial progress. See also on piracy, infra note 50. [↑](#footnote-ref-14)
15. Treaty of Amity, Commerce and Navigation between Great Britain and the United States, signed at London, 19 November 1794 (‘Jay Treaty’), article 20, 52 *Consolidated Treaty Series* 243 (‘bring to condign punishment’ those who assist pirates). [↑](#footnote-ref-15)
16. Additional Convention between Great Britain and Portugal for the prevention of the Slave trade, signed at London, 28 July 1817, article III, 67 *Consolidated Treaty Series* 373 (King of Portugal ‘shall prescribe the punishment of any of His Subjects who may in the future participate in the illicit traffic of Slaves’). [↑](#footnote-ref-16)
17. Roger S. Clark, ‘Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg’, (1988) 57 *Nordic Journal of International Law* 49. [↑](#footnote-ref-17)
18. Neil Boister, *An Introduction to Transnational Criminal Law* (2012); Robert J. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010); David Luban, Julie R. O’Sullivan and David P. Stewart, *International and Transnational Criminal Law* (Austin: Wolters Kluwer/Aspen, 2010). The content of the latter book seems to elide my first and third categories, as if to underscore the difficulties in reaching an agreed definition of the beast with which we are concerned. The usage by Luban et al is much closer to the classic statement by Philip Jessup: ‘I shall use the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit such standard categories.’ Philip C. Jessup, *Transnational Law* (New Haven: Yale UP, 1956) 3. ‘Transnational’ found its way into treaty usage in the 2000 United Nations Convention against Transnational Organized Crime, 2225 *UNTS* 209. The *Columbia Journal of Transnational Law* dates from 1961. Is Transnational Criminal Law a branch of Transnational Law, or is the usage subtly different? “Transnational organized crime” is “transnational” because it crosses borders, not because it is subject to a suppression convention. [↑](#footnote-ref-18)
19. E.g. Convention for Suppression of Counterfeiting Currency, Geneva, 20 April 1929, 112 *LNTS* 371, discussed infra at notes 65-79. [↑](#footnote-ref-19)
20. Notable ones include the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (1984); the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); the United Nations Convention against Transnational Organized Crime (2000); the United Nations Convention against Corruption (2003). [↑](#footnote-ref-20)
21. Hague Convention on the Suppression of Unlawful Seizure of Aircraft (Hijacking), 860 *UNTS* 105 (1970); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 *UNTS* 177 (1971). See also infra at notes 110-1 for the modern version of these instruments. [↑](#footnote-ref-21)
22. Notably the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (1988) 27 *ILM* 668. See Roger S. Clark, ‘State Terrorism: Some Lessons from the Sinking of the “Rainbow Warrior”’, (1989) 20 *Rutgers Law Journal* 393, 404-6. [↑](#footnote-ref-22)
23. See US v. Arjona, (1887) 120 U.S. 479 (customary obligation to punish those counterfeiting foreign currency). [↑](#footnote-ref-23)
24. See, e.g, Security Council Res.1373 (2001) (requiring states to ‘[c]riminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in knowledge that they are to be used, in order to carry out terrorist acts…’. [↑](#footnote-ref-24)
25. At the United Nations, much of the activity in norm creation and efforts to enforce those norms has taken place under the aegis of Article 55 of the UN Charter which obligates Member States to ‘promote’, inter alia, ‘conditions of economic and social progress and development’ and ‘universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’. Balanced against this programmatic obligation is article 2 (7) of the Charter, denying the authority of the United Nations to ‘intervene in matters which are essentially within the domestic jurisdiction of any state.’ [↑](#footnote-ref-25)
26. GA Res. 217A (III), 3(1) UN GAOR, Resolutions 71, UN Doc. A/810 (1948). [↑](#footnote-ref-26)
27. 999 *UNTS* 171 (1966). [↑](#footnote-ref-27)
28. http://conventions.coe.int/treaty/en/treaties/html/005.htm. [↑](#footnote-ref-28)
29. G. A. Res. 39/46 (1984). [↑](#footnote-ref-29)
30. Slawomir Marek Redo, *Blue Criminology: The power of the United Nations to counter crime globally* (Helsinki: HEUNI, 2012); Christopher D. Ram, *Meeting the Challenge of Crime in the Global Village: An Assessment of the Role and Future of the United Nations Commission on Crime Prevention and Criminal Justice* (Helsinki: HEUNI, 2012); Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation* (Philadelphia: U of Pennsylvania Press, 1994). [↑](#footnote-ref-30)
31. ESC Res. 663 (XXIV) C, UN ESCOR, 24th Sess., Supp. No. 1 at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076 (LXII), UN ESCOR, 62nd Sess., Supp. No. 1 at 35, UN Doc. E/5988 (1977). [↑](#footnote-ref-31)
32. G.A. Res. 40/34 (1985). [↑](#footnote-ref-32)
33. Particularly the Rome Statute of the International Criminal Court, supra note 9, article 68 (‘views and concerns of victims’ to be ‘presented and considered’ by the Court, subject to right of accused to a fair trial) and article 75 (reparations to victims); Statute of the Special Tribunal for Lebanon, S.C. Res. 1757 (2007), article 17 (strong provision on views and concerns of victims). [↑](#footnote-ref-33)
34. UN Convention against Corruption, articles 32-35 (protection of witnesses and victims); UN Convention against Transnational Organized Crime (2000), article 26 (involvement of victims and reparations). [↑](#footnote-ref-34)
35. See, e.g., Declaration on the Elimination of Violence against Women, GA Res. 48/104 (1993). [↑](#footnote-ref-35)
36. Maureen R. Berman and Roger S. Clark, ‘State Terrorism: Disappearances’, (1982) 13 *Rutgers Law Journal* 531; International Convention for the Protection of All Persons from Enforced Disappearance, GA Res. 61/177 (2006). [↑](#footnote-ref-36)
37. For similarly expansive views, although the categorical details differ, see the seminal work in English, Gerhard O.W. Mueller and Edward M. Wise, (eds.), *International Criminal* Law (London: Sweet and Maxwell, 1965); Sharon A. Williams and J-G Castel, *Canadian Criminal Law: International and Transnational Aspects* (Toronto: Butterworths, 1981); Jordan J. Paust et al*, International Criminal Law: Cases and Materials* (3d ed. 2007); M. Cherif Bassiouni, *Introduction to International Criminal Law* (2003); Claus Kress, ‘International Criminal Law’, *Max Planck Encyclopedia of Public International Law*, www.mpepil.com. See also, Edward M. Wise, Ellen S. Podgor and Roger S. Clark, *International Criminal Law: Cases and Materials* (New Providence, NJ: LexisNexis, 3rd ed. 2009); Ellen S. Podgor and Roger S. Clark, *Understanding International Criminal Law* (Newark, NJ: LexisNexis, 2nd ed., 2008). [↑](#footnote-ref-37)
38. American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States* (1987), § 401. [↑](#footnote-ref-38)
39. Extradition is the classic example of one state assisting another in enforcement. The *Restatement of the Law* supra note 38 asserts in § 432:

    A state may enforce its criminal law within its own territory through the use of police, investigative agencies, public prosecutors, courts, and custodial facilities, provided

    the law being enforced is within the state’s jurisdiction to prescribe; ….

    A state’s law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.

    Comment a to this section adds:

    Accordingly, if a state would not have jurisdiction to adjudicate with respect to a particular crime, for instance because the act did not take place or cause harm within its territory, the state may not bring its criminal law enforcement machinery to bear on the person accused of the act except to assist the law enforcement efforts of a state with jurisdiction to adjudicate. [↑](#footnote-ref-39)
40. *The Lotus*, supra note 2 at 25. [↑](#footnote-ref-40)
41. Note that boarding the ship or making the arrest unlawfully on the high seas would entail state responsibility on Turkey’s part. Some legal systems would permit the trial of the arrested persons nonetheless; others would insist on his return to his home State. See *Restatement of the Law*, supra note 38 discussing § 432 at 329-32; but see US v. Alvarez-Machain, (1992) 504 US 655 (upholding jurisdiction over defendant kidnapped from Mexico notwithstanding vigorous Mexican protests). [↑](#footnote-ref-41)
42. Infra at note 62. [↑](#footnote-ref-42)
43. Supra note 2 at 25. [↑](#footnote-ref-43)
44. Kress, *supra* note 37, adds another, ‘criminal jurisdiction by representation’, or jurisdiction exercised at the request of another state. Such ‘vicarious administration of justice’ as it is sometime called, has an increasing following but appears to be treaty-based, rather than a creature of customary law. The ‘request’ or prior authorization by treaty provides the requested state with jurisdiction that it might not otherwise have. See discussion of UN Model Treaty on the Transfer of Proceedings in Criminal Matters, Clark (1994) supra note 30 at 219 and Podgor and Clark, *Understanding* supra note 37 at 25 (discussing treaties on drugs and weapons of mass destruction). See also infra note 83 re ‘landing state jurisdiction’ as an emerging category. [↑](#footnote-ref-44)
45. A modern version of flag State jurisdiction is state-of-registration jurisdiction in respect of aircraft. The Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft, 704 *UNTS* 219 (1963), obligates each party, in article 3 (2), to ‘take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.’ A few years back, a drunken fellow-passenger urinated on your author aboard a US airline over the middle of the Pacific Ocean. He watched joyfully as the federal officials took the miscreant, handcuffed, into custody in Los Angeles. The slowly-sobering one did not seem amused by the author’s spontaneous exclamation: ‘Gotcha under the Tokyo Convention!’ [↑](#footnote-ref-45)
46. See *Restatement*, supra note 38, § 402 Comment g. Some legislation goes even further. Australia, for example, now asserts passive personality jurisdiction over those who intentionally or recklessly cause death or serious bodily injury to an Australian citizen or resident even if they do not know the victim is connected to Australia. Criminal Code (Offences Against Australians) Act 2002. [↑](#footnote-ref-46)
47. See generally, Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (1994). [↑](#footnote-ref-47)
48. Notice in the example how the guilty one, like M. Demons, has now entered the State that is protecting itself. That State could not parachute into the place where the visa application was made in order to make an arrest, although extradition may be in order. Once the accused is inside the protected territory, voluntarily or otherwise, enforcement jurisdiction is appropriate. [↑](#footnote-ref-48)
49. The class may be expanding. For a distinction between ‘pure’ and ‘subsidiary’ or ‘fallback’ versions of the principle, see infra at notes 88-91. [↑](#footnote-ref-49)
50. Many commentators assume that if something is a ‘crime under international law’ this implies both potential jurisdiction in an international tribunal and universal jurisdiction by states, supra note 14. That this is not universally accepted in the case of aggression has been mentioned, supra note 12. Piracy is curious also. While there is widespread acceptance that piracy is a crime under international law, there has never been an international tribunal set up to adjudicate piracy cases, akin to those set up for genocide, crimes against humanity, war crimes and the crime of aggression. As a result of efforts to deal with piracy off the Somali coast, there have been proposals either to extend the jurisdiction of the ICC or to create a special regional or global piracy tribunal. Nothing has come of these efforts so far. See Report of the Secretary-General on possible options, UN Doc. S/2010/34 (2010). Is this just a policy question or is something deeper going on? [↑](#footnote-ref-50)
51. Supra note 12. And see the list in *Restatement*, supra note 38, § 404 (‘state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism, even when [none of the other bases of jurisdiction is present]’). Hijacking and (other?) acts of terrorism are controversial on this list – to the extent they have a treaty basis it is for ‘fallback’ rather than ‘pure’ universal jurisdiction. See infra note 88. US legislation does not in fact claim universal jurisdiction over the slave trade or war crimes (except to the extent that war crimes may be tried by a military commission), and it was not until the Genocide Accountability Act of 2007 that universal jurisdiction was claimed for genocide. [↑](#footnote-ref-51)
52. The *Princeton Principles on Universal Jurisdiction* (2001) assert that ‘national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it’, but I know of no country where this has been done. The House of Lords declined to do so for aggression in R. v. Jones [2006] UKHL 16. [↑](#footnote-ref-52)
53. Traditional exercise of jurisdiction to prescribe and jurisdiction to enforce is surprisingly “permissive”; legislatures have often not legislated against piracy of the high seas; navies had no obligation to capture pirates, although they could; Turkey had choices about M. Demons, one of which was to do nothing – it had no international law obligation to consider prosecuting him. Suppression treaties change the calculus; now legislating is obligatory and enforcement action must, at the least, be considered in good faith. They also set up the potential argument that, even though a state has done more than the treaty requires, that may be permissible on general principle – the treaty does not act, *a contrario*, to prevent something wider. Thus the 1948 Genocide Convention, supra note 9, required territorial jurisdiction, and an explanatory note during the drafting said that nationality jurisdiction was also an option. The Supreme Court of Israel held in *Eichman* that it also had permissive universal jurisdiction under customary law. Attorney-General v. Eichmann, 36 I.L.R. 277 (Sup. Ct. Israel 1962). Most authorities cite this case as support for the custom; the case itself is a little thin on authority but is (universally?) accepted. [↑](#footnote-ref-53)
54. *Supra* note 15. [↑](#footnote-ref-54)
55. *Supra* note 16. The reference to ‘His Subjects’ in the treaty suggests obligatory nationality jurisdiction, but flag state jurisdiction may have been expected also and was certainly not precluded. [↑](#footnote-ref-55)
56. Additional Convention, *supra* note 16, article V. As Jenny S. Martinez, *The slave trade and the origins of international human rights law* 142 (Oxford: Oxford UP, 2012) points out, ‘mixed commissions’, predecessors of modern international courts, were set up to adjudicate the forfeiture of slave vessels but they had no criminal jurisdiction. On similar treaties with other major powers and African entities, see Roger S. Clark, ‘Steven Spielberg’s *Amistad* and Other Things I Have Thought About in the Past Forty Years: International (Criminal) law, Conflict of Laws, Insurance and Slavery’, (1999) 30 *Rutgers Law Review* 371, 394-410. [↑](#footnote-ref-56)
57. It does rate a short but useful chapter in Williams and Castel, supra note 37 at 261-4. [↑](#footnote-ref-57)
58. Signed in Paris, 14 March 1884. French text in 163 *Consolidated Treaty Series* 391; English Translation in *US Compilation of Treaties in Force.* [↑](#footnote-ref-58)
59. Ibid. article II. [↑](#footnote-ref-59)
60. Ibid. article XII. [↑](#footnote-ref-60)
61. Ibid., article VIII. [↑](#footnote-ref-61)
62. *Supra* note 2. In its oral and written arguments in *The Lotus*, France relied on the Submarine Cables Convention and similar provisions in fisheries and slave-trade treaties to support its argument that flag state jurisdiction was exclusive. See PCIJ, Series C, Documents Relating to Judgment No. 9, The “Lotus” Case, at 162 (oral argument by Professor Basdevant) and 206-7 (French Memorial). The Court responded generally, without citing any particular sources:

    Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offences. Above all it should be pointed out that the offences contemplated by the conventions in question concern only a single ship; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States.

    1927 PCIJ, supra at 27. [↑](#footnote-ref-62)
63. See list of parties derived from French archives, France being the depositary of the treaty: http://cil.nus.edu.sg/1902/1884-convention-for-the-protection-of-submarine-telegraph-cables/. [↑](#footnote-ref-63)
64. In modern usage, a torturer may face extradition based on a universal jurisdiction theory (or at least an extradite-or-prosecute regime); a murderer may not. R. v. Bow Street Magistrate, ex parte Pinochet Ugarte (No. 3), [20000] 1 App. Cas. 147. The law grows incrementally with its own idiosyncratic logic. [↑](#footnote-ref-64)
65. Supra note 19. [↑](#footnote-ref-65)
66. Ibid., article 3. [↑](#footnote-ref-66)
67. Ibid., article 5. [↑](#footnote-ref-67)
68. Ibid., article 8. Examples of the phenomenon mentioned in the second paragraph of this article might include those where a statute of limitations or immunity applies. [↑](#footnote-ref-68)
69. Ibid., article 10, first paragraph. [↑](#footnote-ref-69)
70. Ibid., second paragraph. Members of the Commonwealth (Great Britain and its former colonies with a couple of others who have come aboard) function among themselves on the basis of a ‘Scheme for the Rendition of Fugitive Offenders within the Commonwealth’, adopted at a meeting of Law Ministers in 1966 and amended from time to time. It is not regarded as a treaty and operates through parallel legislation which Members have adopted. Other countries have comparable arrangements. [↑](#footnote-ref-70)
71. An earlier provision of this kind appeared in article 5 of the 1910 White Slave Agreement, supra note 13. Most extradition treaties in place in 1929 contained a (sometimes eclectic) list of offences to which the extradition obligation applied. Most modern extradition treaties do not contain a ‘list’ of crimes; they typically apply the treaty to all offences punishable in both treaty partners by a minimum length of imprisonment (often one year). (Double criminality – an exercise of jurisdiction to prescribe in both places – is usually a feature of extradition regimes, although, depending on the particular treaty, jurisdiction to enforce/adjudicate may be different in the two places.) [↑](#footnote-ref-71)
72. There was no specific promise in the article to comply with such requests, but, in an effort to speed up a notoriously slow process, the article encouraged direct communication between courts, with communication between Ministers of Justice as a fallback and with correspondence through diplomatic channels as a last resort. On letters rogatory and mutual legal assistance, see Podgor and Clark, *Understanding* supra note 37, Chapter 11. [↑](#footnote-ref-72)
73. Hague Convention on the Suppression of Unlawful Seizure of Aircraft (Hijacking), 860 *UNTS* 105 (1970). [↑](#footnote-ref-73)
74. Ibid., article 9. The most likely ‘reason’ why extradition was not possible would be the absence of an applicable extradition treaty or comparable arrangement. Note that the obligation on countries that have this jurisdiction available is contingent on an extradition request – it is not a general obligation owed to all other treaty parties. Cf. later treaties, infra note 86. [↑](#footnote-ref-74)
75. But see Crimes (Extra-Territorial Jurisdiction) Amendment Act 2003 (Samoa) which appears to do exactly that. [↑](#footnote-ref-75)
76. Williams, supra note 1 at 199a-205 has Austrian examples of what seems to fit that category. That the kind of extraterritorial jurisdiction in question was controversial is underscored in article 17 of the 1929 Convention, a live-and-let-live statement of neutrality: ‘The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party’s attitude on the general question of criminal jurisdiction as a question of international law’. This was to be a ‘special case’, like the Submarine Cables Convention, supra note 62. [↑](#footnote-ref-76)
77. Quoted in, Survey of multilateral conventions which may be of relevance for the work of the International law Commission on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”, UN Doc. A/CN.4/630 (2010) at 8. [↑](#footnote-ref-77)
78. Ibid. [↑](#footnote-ref-78)
79. Like the Submarine Cables Convention, supra note 58, the Counterfeiting Currency Convention deserves more scholarly attention. For some, see Williams and Castel, supra note 37 at 266-9 and 332-3 (although one entry says that Canada is a party to the Convention and one says that it is not – it is not according to the depositary’s list). In addition to the innovations mentioned in the text, note these two articles of the Convention:

    Article 6. In countries where the principle of the international recognition of previous convictions is recognized, foreign convictions for the offences referred to in Article 3 should, within the conditions prescribed by domestic law, be recognized for the purpose of establishing habitual criminality.

    Article 7. In so far as ‘civil parties’ are admitted under the domestic law, foreign ‘civil parties’, including, if necessary the High Contracting Party whose money has been counterfeited, should be entitled to all the rights allowed to inhabitants by the laws of the country in which the case is tried.

    Article 6 is an early treaty response to the ‘notice’ of foreign convictions issue mentioned by Story, supra note 1. Similar provisions abound in later suppression treaties. Article 7 is, I believe, the first reference to a procedural role of victims (see supra notes 32-4) in a multilateral treaty. A contemporary analogy would be to allow the victim state to be represented as a civil party in an aggression prosecution instituted in an aggressor state following a change of regime. [↑](#footnote-ref-79)
80. *Supra* note 21. [↑](#footnote-ref-80)
81. Ibid., article 1 [↑](#footnote-ref-81)
82. Ibid., article 2. [↑](#footnote-ref-82)
83. Ibid., article 4. Note what I call ‘landing state jurisdiction’ in paragraph 1 (b). Article 4, paragraph 3 adds: ‘This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.’ A similar provision appears in the Tokyo Convention, supra note 45. In that instance, the US had argued in the negotiations for landing state jurisdiction as the primary form of jurisdiction in aircraft cases. The negotiators settled for state-of-registration jurisdiction but included the provision about not excluding some other possibilities, including surely jurisdiction on arrival. See US v. Georgescu, 723 F. Supp. 912 (ED NY, 1989). The provision must save something else such as active and passive personality here in the Hague Convention (which has landing state jurisdiction) and in the many subsequent treaties in which it appears. At the least, such provisions leave to be debated under general law the compatibility of other emerging theories. See infra notes 123-7. [↑](#footnote-ref-83)
84. Supra note 68. [↑](#footnote-ref-84)
85. Hijacking Convention, supra note 21, article 7. Note also the additional obligation in article 6 to take an offender or alleged offender who is “present” into custody and “make a preliminary enquiry into the facts.” (“Found” and “present” must be synonymous.) Article 6 (4) continues:

    When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in Article 4, paragraph 1 (c), the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

    This helps set up the obligation to “extradite or prosecute”, or, as the Court would have it in Belgium v. Senegal, supra note 9, to “prosecute or extradite”. (The emphasis between the two may depend on the wording of a particular treaty. In Belgium v. Senegal, the Court comments, at para. 95: “Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.”) [↑](#footnote-ref-85)
86. See discussion of similar provisions of the Torture Convention in Belgium v. Senegal, supra note 9, para. 94. [↑](#footnote-ref-86)
87. Ibid. para. 90. [↑](#footnote-ref-87)
88. Clark, supra note 17 at 58. [↑](#footnote-ref-88)
89. In respect of the *Yerodia* case where a Belgian magistrate commenced proceedings against the Congo’s Foreign Minister on a universal jurisdiction theory, the term ‘universal jurisdiction *in absentia*’ was often used. The Belgian court did not want to *try* (or “adjudicate”) the accused in his absence, merely to get things under way in his absence and, indeed, issued a warrant to that effect. The Foreign Minister was eventually held to be immune at the time of the issue of the warrant. See Case Concerning the Arrest Warrant of 11 April 2000 (DR Congo v. Belgium), 2002 ICJ Rep. (Immunity is itself emerging as a cutting edge issue as more states claim universal jurisdiction and as accused try to avoid rendition to other states and to the ICC. The ILC is seized of the issue. See Preliminary report on the immunity of State officials from foreign criminal jurisdiction, prepared by Ms. Concepcion Escobar Hernandez, UN Doc. A/CN. 4/654 (2012).) [↑](#footnote-ref-89)
90. For example, the 1931 United States/United Kingdom Extradition Treaty, 28 *UST* 5290, still in force between the US and numerous Commonwealth countries, included in its list of extraditable offences ‘piracy by the law of nations’ which surely could only be tried on a universal jurisdiction theory. [↑](#footnote-ref-90)
91. It is hard to base an extradition application on the theory that once the accused is delivered he can now be triumphantly ‘found’ (in custody). See US v. Rezaq, 134 F.2d 1121, footnote 4 (DC Cir. 1998). On the other hand, in the *Demjanjuk* case, Israel’s extradition request based on its universal jurisdiction theory for crimes against humanity, war crimes and crimes against the Jewish people was successful. See Demjanjuk v. Petrovsky, 776 F.2d 571 (1985) (although his conviction was overturned in Israel on appeal). See also the, ultimately unsuccessful, attempt to extradite Pinochet to Spain, supra note 64. Spain’s final theory (based on the relevant legislation) was a ‘pure’ universal one for torture; the Spanish and English legislation went beyond the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 *UNTS* 85, article 5 (2) (based in this respect on the Hague Convention), which requires only that the State Party extradite or prosecute one who is ‘present’ in its territory (being present’ is functionally equivalent to ‘being found’ and ‘found’ is used in article 7 of the Convention). Spain at an early stage of the proceedings had a passive personality theory based on offenses against its citizens in Chile. That failed in the UK courts, the UK not having exercised its right under the Torture Convention to exercise passive personality jurisdiction over torture and not otherwise accepting passive personality on a general basis. The US did not at the time of *Demjanjuk* exercise universal jurisdiction over genocide, as Israel did, but the US was prepared to extradite on the basis that the Israeli crimes fit (loosely) within the list of crimes in the bilateral extradition treaty. The House of Lords took a different approach in *Pinochet*, insisting that both states must have an equivalent jurisdictional theory. [↑](#footnote-ref-91)
92. Ibid., article 8 (2). [↑](#footnote-ref-92)
93. Ibid., article 8 (4). [↑](#footnote-ref-93)
94. Ibid., article 10 (1). Paragraph 2 states that the provisions of paragraph 1 ‘shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.’ The expectation is that, as in the case of extradition, there will normally be other mutual legal assistance treaties that spell out such obligations in much more detail. On the even weaker 1929 provision, see supra note 72. [↑](#footnote-ref-94)
95. Including a whole series of treaties on various aspects of terrorism, the Torture Convention, supra note 9 and the Convention on Enforced Disappearances, supra note 36. [↑](#footnote-ref-95)
96. Rome Statute, supra note 9, article 5 (1). Article 5 (2) dealt with further defining the crime of aggression. This was carried forward in 2010, supra note 10. [↑](#footnote-ref-96)
97. Rome Statute, article 13, (a), (b) and (c). See also article 15 (delineating the Prosecutor’s *proprio motu* powers). [↑](#footnote-ref-97)
98. Rome Statute, article 12 (1). [↑](#footnote-ref-98)
99. Rome Statute, article 12 (2). Paragraph 3 adds that if the acceptance of a State which is not a party to the Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the jurisdiction of the Court with respect to the crime in question. [↑](#footnote-ref-99)
100. On the debate about whether the Allies exercised universal jurisdiction or some form of territorial/nationality jurisdiction pursuant to the German surrender, see Scharf, supra note 12, at 374-79. [↑](#footnote-ref-100)
101. Rome Statute of the International Criminal Court, preambular paragraph 4. [↑](#footnote-ref-101)
102. Supra note 94. [↑](#footnote-ref-102)
103. Rome Statute, preambular paragraph 6. [↑](#footnote-ref-103)
104. See the comprehensive two volume discussion in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge UP, 2011). [↑](#footnote-ref-104)
105. <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (updated through 2009). [↑](#footnote-ref-105)
106. <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> (updated through 2010). [↑](#footnote-ref-106)
107. Yugoslavia Statute, article 9; Rwanda Statute, article 8. [↑](#footnote-ref-107)
108. Rome Statute, article 17 (1) (a), supra note 9. The article also deals with situations which need not concern us here: where a state has decided not to prosecute, certain instances of *ne bis in idem* or double jeopardy and where ‘the case is not of sufficient gravity to justify further action by the Court’. ‘Unwillingness’ and ‘inability’ are also defined in some detail. [↑](#footnote-ref-108)
109. Supra note 86. Note also the debate about whether aggression gives rise to universal jurisdiction, supra note 12. [↑](#footnote-ref-109)
110. Beijing Convention on the Suppression of Unlawful Acts relating to International Civil Aviation (not yet in force). [↑](#footnote-ref-110)
111. Supra note 21. The Beijing negotiation that produced the ‘new Montreal’ treaty also produced a Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, updating the 1970 Hague Convention along similar lines, but by way of amendment to the original rather than by replacing it with a wholly new one. [↑](#footnote-ref-111)
112. Beijing Convention, supra note 110, articles 1 and 3. [↑](#footnote-ref-112)
113. Ibid., article 1 paragraphs (3), (4) and (5). [↑](#footnote-ref-113)
114. Article 4. This is permissive: parties ‘may’ impose such liability. Some legal systems still have conceptual hangups about holding corporations liable criminally, but the opposition is slowly dissipating. [↑](#footnote-ref-114)
115. Ibid., article 12. Article 13 adds that:

     None of the offences set forth in Article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

     An earlier provision to the same effect appeared in article VII of the Convention for the Prevention and Punishment of the Crime of Genocide in 1948, 78 UNTS 277, but was out of style for some time. It reappeared in the 2005 Convention against Nuclear Terrorism, GA Res. 59/290, and the Enforced Disappearance Convention of 2006, supra note 36. Most extradition treaties from the nineteenth and twentieth centuries included an exception for political offences from the obligation to extradite. The exception is slowly being chipped away by exceptions-to-the-exception in both bilateral and multilateral practice. [↑](#footnote-ref-115)
116. Ibid., article 17. [↑](#footnote-ref-116)
117. Ibid., article 8. Article 10 adds the, now standard, extradite or prosecute requirement, in essentially the language of article 7 of the Hague Convention, supra note 21. It is clearly assumed in *The Lotus*, supra note 2 at 26-7, that multilateral treaty practice may wend its way into customary law; it was just that the ones relied upon by France were held not to have had that effect. Given that there were 188 parties to the 1970 Convention by 2012, are its jurisdictional provisions now indicative of custom? For that matter, can it be argued that its subsidiary universal jurisdiction provisions have spawned a pure version of universal jurisdiction (as suggested by the authors of the *Restatement*, supra note 51). [↑](#footnote-ref-117)
118. See also, on shared enforcement jurisdiction, article 9 (temporary custody of suspects pending enquiry and extradition request); article 16 (1): ‘States Parties shall, in accordance with international and national law, endeavor to take all practicable measures for the purpose of preventing the offences set forth in Article 1’; and article 18: ‘Any State Party having reason to believe that one of the offences set forth in Article 1 will be committed shall, in accordance with its national law, furnish any relevant information in its possession those States Parties which it believes would be the States set forth in paragraphs 1 and 2 of Article 8’. [↑](#footnote-ref-118)
119. A similar permissive passive personality provision appears in article 5 (1) (c) of the Torture Convention, supra note 88. Neither the UK nor the US, for example, has availed itself of the permission contained therein. It remains to be seen what they will do this time around. (The 2010 Convention is not yet in force.) [↑](#footnote-ref-119)
120. Supra note 6. [↑](#footnote-ref-120)
121. Supra note 76. [↑](#footnote-ref-121)
122. Are resident aliens (a much broader class than resident stateless persons) nationals for the purpose of active or passive personality jurisdiction? See the Australian legislation which extends to residents, supra note 46. [↑](#footnote-ref-122)
123. Supra notes 45 and 83. [↑](#footnote-ref-123)
124. See US v. Georgescu, supra note 83. [↑](#footnote-ref-124)
125. Supra note 21. [↑](#footnote-ref-125)
126. Ibid., article 4 (3). [↑](#footnote-ref-126)
127. On the distinction, see supra at notes 88-91. [↑](#footnote-ref-127)