

The criminal jurisdiction of states

A theoretical primer

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No criminal justice system in the world attempts to deal with everything under the sun that it could conceivably regard as criminal. In particular, only exceptionally does a State address through its penal law incidents that take place beyond national frontiers. This constraint results from a combination of expediency and legal principle. A State generally has little interest in spending its scarce resources on investigating offences that it has little or no connection to. At the same time, in a community of territorially sovereign States, considerations of international law and comity advocate against taking too keen a prosecutorial interest in acts occurring on foreign soil. Nonetheless, States do claim the right – even if it is seldom exercised – to punish their nationals and even foreigners for certain acts committed abroad. At the same time, States generally accept that they ought not to send their law enforcement officials abroad to detain suspects or to gather evidence.

These issues are usually discussed in terms of the ‘criminal jurisdiction’ of States. The choice of terminology is not an entirely happy one. ‘Jurisdiction’ is a term that comes with baggage: Michael Akehurst, one of the few international lawyers to have extensively dealt with the general doctrine of jurisdiction (Akehurst 1973), has in fact warned that the word ‘must be used with extreme caution’ (Malanczuk 1997, 109). The problem is that ‘jurisdiction’ is an ‘omnibus’ term (Brownlie 2008, 106), which has several meanings depending on the context. There appear to be at least five main uses, which are to some extent interrelated (cf. Malanczuk 1997, 109; Garner 1995, 488; *Black’s Law Dictionary* 2004).

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- (1) Lawyers most commonly talk about ‘jurisdiction’ when discussing the kinds of issues a court or a tribunal could possibly have on its plate. The question whether a court may hear a case and decide a matter may thus be formulated as an inquiry into the jurisdiction of that court.¹
- (2) The term ‘jurisdiction’ may also be used when addressing the scope of affairs a polity may seek to regulate and control. In this sense, it makes sense to speak about a State having jurisdiction to address a set of issues by means of its own legal system. Likewise, one may deal with the jurisdiction of a unit of a State (especially a federal unit such as a US state or a German *Land*), or a supranational entity (say, the European Union). Here the question is about the reach – geographical or otherwise – of a given legal order.
- (3) ‘Jurisdiction’ can be the word to describe the territory in which a polity, or a judicial body, regularly exercises its authority. Thus when someone says that ‘the accused fled the jurisdiction’, the word ‘jurisdiction’ carries a geographical, territorial meaning.
- (4) The factual relationship between a State and a person or a thing may also be called ‘jurisdiction’. Thus, under human rights treaties, States owe certain obligations to individuals who are ‘within their jurisdiction’.² Here, the question is about effective control, not necessarily about jurisdiction in the sense of legal authority or territory (though in practice a significant overlap exists).³
- (5) ‘Jurisdiction’ can, somewhat colloquially, refer to a political or judicial entity itself. So it might be said that ‘other jurisdictions’ deal with some issue in a particular way, which would refer to the practice of other States or territories, or simply of other courts.

¹ Sometimes the ‘jurisdiction’ and the ‘competence’ of a court are distinguished. See Heiskanen 1994. Jurisdiction would then seem to relate to the *kinds* of cases a court can address, whereas competence would be a question whether it can entertain a *particular* case. Jurisdiction would thus be a precondition for competence.

² See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, adopted at Rome, 4 November 1950, in force 3 September 1953, ETS no. 5, Article 1: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

³ The European Court of Human Rights has made a right royal mess of interpreting the jurisdictional provision of the European Convention by failing to make this distinction. See Milanović 2008.

To be sure, there is room for generalisation. For instance, Vaughan Lowe suggests that, '[i]n abstract terms, the jurisdiction of States and the jurisdiction of tribunals are both instances of the concept of the scope of the powers of a legal institution' (Lowe 2006, 336; cf. Henkin, *et al.* 1980, 420). Even though this sounds very reasonable, it only covers some of the meanings of 'jurisdiction' – in particular (1) and (2). Sometimes, reference is made to the etymology: the word 'jurisdiction' undoubtedly derives from the Latin *iurisdictio*, literally meaning 'speaking the law' (*ius*, 'law' + *dicere*, 'to speak'). But whatever 'speaking the law' might include nowadays, *iurisdictio* had a very particular meaning in Roman law: it was used to describe the judicial or dispute settlement powers of a magistrate. It was only in the Middle Ages, and especially in the writings of Bartolus, that the notion became used in a broader sense (see, e.g., Johnston 1997, 97-99). Here, '[t]he terminological continuity conceals a deep conceptual break' (Fasolt 2004, 183). Appeals to etymology therefore also do not take us much further. In any event, the question of the general meaning of 'jurisdiction' can be safely left to one side, as this paper deals almost exclusively with jurisdiction in sense (2) – the normative authority or regulatory competence of a State. Moreover, pursuit of a general definition of 'jurisdiction' does not seem a particularly worthwhile enterprise to begin with.⁴

Now, jurisdiction in the sense of the legal authority of a State is obviously an issue close to the heart of many international lawyers. After all, by regulating the competencies of States, international law performs a fundamental function of demarcating lines of sovereignty (see Kelsen 1952, 94; Rousseau 1958, 395; Mann 1964, 15; Kennedy 1987, 151), in an attempt to minimise the chances of conflict. In the words of Rosalyn Higgins, '[w]ithout that allocation of competences, all is rancour and chaos' (1994, 56). It is therefore altogether unsurprising that various aspects of State jurisdiction have received extensive treatment in the literature. And yet, curiously, overarching general discussions with a more theoretical twist are in short supply.⁵

The present paper, cursory as it is, does not purport to plug that gap. What it does attempt to do is engage critically, in sections 1 and 2, with the way the *problematique* of the criminal jurisdiction of States is addressed in international

⁴ For a stinging criticism of the quest for definitions, see Popper 2003 [1965], 15-32. On the fallacy of the 'proper' meaning of words and 'true' definitions in the legal context, see Williams 1945, 158. See also Hart 1994, 13-17, refusing to define law in discussing the concept of law.

⁵ The classic writings on the doctrine of State jurisdiction are Akehurst 1973; Mann 1964; and Mann 1984. For a more recent take, see Ryngaert 2008.

law and criminal law doctrine. Sections 3 and 4 draw on insights of legal theorists in explaining the jurisdiction of States on the level of individual rules. Section 5 looks at the implications of that approach for examining immunities from jurisdiction. Finally, section 6 addresses the relationship between national and international law in delimiting State jurisdiction.

This article has a fairly positivistic outlook – appropriately, I think, given the forum. The more principled reason for such a viewpoint is this: Legal positivists rely on the source or pedigree of rules, rather than their content, in determining their binding force (see Gardner 2001). Hence, the circumstances in which a rule applies – whereabouts in the world, say – must also be determined by formal criteria relating to the sources of rules, and not by reference to the morality or desirability of the rule. A positivistic approach therefore highlights the limits of the reach of a legal system. That, I believe, is precisely the meaning of jurisdiction in sense (2).

At the same time, the discussion is underpinned by a subscription to a minimalist conception of the rule of law.⁶ This presumes that law must be able to guide human behaviour (Raz 1977; 1980, 3; cf. Hart 1994, 249). In particular, the law must be knowable. Accordingly, jurisdiction must be exercised so as to allow individuals to take the law into account when planning their actions. This ‘thin’ conception of the rule of law also goes hand in hand with a minimalist understanding of the functions of criminal law. As H. L. A. Hart put it, the purpose of criminal law is ‘[t]o announce to society that [certain] actions are not to be done and to secure that fewer of them are done’ (2008, 6). This is a sufficient starting point for the purposes of this paper.

State jurisdiction in international law

In international law doctrine, the jurisdiction of a State is broadly regarded as a certain ‘power’ (e.g. Beale 1923, 241), ‘authority’ (Westlake 1904, 175) or ‘competence’ of the State (e.g. Brownlie 2008, 299; Capps *et al.* 2003, xix). In particular, jurisdiction is defined as ‘the power of the state under international law to regu-

⁶ A minimalist or formal or ‘thin’ conception of the rule of law – in contrast to a substantive or ‘thick’ one – is agnostic about the content of the law (e.g. whether human rights are recognised) and the form of government (e.g. whether legislation is democratically enacted). It focuses on formal legality: in particular, it demands that laws be prospective, reasonably clear and stable, accessible to their addressees, and implemented by an independent judiciary. See Janse, Liivoja and Sánchez Galera 2007, 12-18.

late or otherwise impact upon people, property and circumstances' (Shaw 2008, 645). Attempting to define 'power' or 'authority' in order to clarify the meaning of jurisdiction does not appear to provide much of a way forward. Instead, it would lead to an infinite regression of definitions. Thus, I am sympathetic to William Bishop's suggestion that, when talking about jurisdiction,

we think about that part of international law which distinguishes situations where the state may lawfully take action with respect to persons, things and events, from those situations in which taking such action is unlawful. Sometimes we are concerned with whether a state may lawfully take physical action, exercise its authority; and at other times with whether the particular state may properly ascribe the character of legality or illegality to particular action of events. (Bishop 1965, 318; cf. Jennings 1967, 515.)

Given that a State can exercise jurisdiction in different ways, a considerable amount of effort has gone into trying to chop State jurisdiction into internally homogenous pieces. Perhaps the most influential take on the matter has been that of the 1987 *Restatement (Third) of the Foreign Relations Law of the United States*. The *Restatement* distinguishes between prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction. Prescriptive jurisdiction refers to the capacity of a State 'to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court' (§ 401(a)). Adjudicative jurisdiction encompasses the capacity of a State 'to subject persons or things to the process of its courts or administrative tribunals' (§ 401(b)). Finally, enforcement jurisdiction covers a State's capacity to 'induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action' (§ 401(b)).

Numerous scholars, particularly in the United States, favour this approach (e.g. Murphy 2006, 253). The terminology varies slightly, as some authors refer to 'legislative', 'judicial', and 'executive' jurisdiction (Akehurst 1973; Henkin *et al.* 1980, 420; Blakesley 1982, 1109). Whichever are the terms used, this triad does not relate to branches of government but to functional manifestations of jurisdiction; these do not necessarily coincide. For instance, when the executive branch issues a decree to implement an act of parliament, it also exercises prescriptive jurisdiction of the State, for it enacts rules with general effect. A traffic warden who issues a parking ticket exercises adjudicative jurisdiction of the State, because the action involves determining that someone has not followed the

prescribed rules. Prescriptive jurisdiction is, therefore, no more a prerogative of the legislative branch of government than adjudication is the prerogative of the judicial branch. The *Restatement (Third)* is quite clear that a court may exercise prescriptive, adjudicative, as well as enforcement jurisdiction.⁷

Many other writers, especially British, prefer a twofold distinction between prescriptive and enforcement jurisdiction (Mann 1964, 13; Brownlie 2008, 299; Shaw 2008, 645-646), sometimes with the explicit clarification that enforcement covers both judicial and executive action (Harris 2004, 265).⁸ The *Restatement (Second)*, published in 1965, tackled the matter pretty much in the same way (§ 6). Under this framework, the enactment of statutes, regulations, or decrees would amount to an exercise of prescriptive jurisdiction, while examples of enforcement jurisdiction would include arrest, a criminal or civil trial, entry of a judgment by a court, confiscation of contraband by customs officers, and the like (*ibid.*, comment (a)).

Dealing separately with adjudicative jurisdiction seems to make some sense in a private law context. A basic principle of private international law is that the competence of a particular national court is decided separately from the question of what law that court ought to apply.⁹ In other words, the forum and the choice of law are distinct matters. Hence, one could argue that legislative and adjudicative jurisdiction should be distinguished. But even here, the idea that adjudicative jurisdiction needs to be treated as a separate category has been set in question (Lowe 2006, 339).

As far as criminal law is concerned, however, the power to legislate goes hand in hand with the power of the courts to determine compliance with legislation. This is so because, as a firm general rule, one State does not apply the public laws of another.¹⁰ Accordingly, adjudicative jurisdiction flows from prescriptive

⁷ Bantekas and Nash are therefore misguided in their belief that the three forms of jurisdiction 'correspond to the three branches of government'. Bantekas and Nash 2007, 71.

⁸ It is hard to tell to what extent this approach draws on John Locke, who regarded judicial power as a form of executive power. For a discussion, see Tuckness 2002, ch. 5.

⁹ In practice, the issue is more complicated: the rules regulating the choice of law are those of the forum, which means that choosing the forum has a significant influence on the substantive law eventually applied. See, e.g., Clarkson and Hill 2006, 1-2.

¹⁰ See, e.g., *The Antelope*, 23 US 66 (1825), at 123 (Marshall CJ): 'The Courts of no country execute the penal laws of another' There are instances that, superficially examined, come very close. For instance, establishing double criminality in extradition cases involves an assessment of charges made under foreign law. Also, domestic law

jurisdiction or is, if you will, a function thereof (see Arnell 2000, 42). Where a State can, in accordance with international law, prescribe certain conduct backed by the threat of sanctions for breach, the courts of that State must be able to direct the application of those sanctions. Otherwise a legal vacuum would appear as the courts of no other State would enforce these rules.

In any event, adjudicative jurisdiction is difficult to delimit as an independent category, for it overlaps with both prescriptive and enforcement jurisdiction.

As Aharon Barak unequivocally puts it (2006, 155), 'Judges not only interpret statutes created by the legislature, they also create law. This applies to all legal systems. There is no judging without creation of law.' Judicial law-making is most obvious where statutory law, duly enacted by the legislature, contains gaps. Particularly in the common law tradition, courts perform a notable function in filling them (e.g. Nerep 1983, 458; Barak 2006, 155-163). But more generally, as Hart argued, the law has an 'open texture': there are 'areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case' (1994, 135). In such instances, 'the courts perform a rule-producing function' (*ibid.*). The line between adjudication and prescription is therefore far from clear.

Moreover, all adjudication and public administration can be seen as norm-creation. Hans Kelsen argued that where a judge hands down a judgment that imposes a punishment on a person, 'the individual norm stipulating that a certain sanction ought to be directed against a certain individual has been brought into existence by the judicial decision; it did not exist before' (1967, 238). In other words, adjudication is the process of enacting individualised norms that resolve particular cases on the basis of more general rules (*ibid.*, 238-239). Thus it is impossible to tell where prescription in the strict sense ends and adjudication begins – it is all one process with varying levels of generality. Yet, from another perspective, adjudicative acts can be seen as squarely falling under enforcement jurisdiction: judgments are, after all, one means of enforcing legal rules.

The foregoing leads to the conclusion that while a distinction between prescriptive and enforcement jurisdiction may be possible to draw on a case-by-case

might require that an offence committed abroad be punished only if it also violated local law, which requires a determination as to whether the conduct was unlawful under foreign law. However, in neither case will one State's courts actually acquit or convict someone in accordance with foreign law. Foreign law is only used as a yardstick for a very specific and limited purpose in the application of domestic law.

basis and by using the trusty I-know-it-when-I-see-it method, it does not seem to be based on any consistent principle. Especially judicial acts may be regarded either as prescription or enforcement. Consequently, little hope exists of reaching a theoretically sound conclusion as to what falls under which type of jurisdiction. Carving out enforcement jurisdiction as a separate category and stipulating that it falls under a different regime than prescriptive and adjudicative jurisdiction is therefore helpful only in the most obvious cases (cf. Mann 1964, 127).

Criminal jurisdiction as a problem of procedure

In contrast to international lawyers who, despite muddy waters, have dealt with State jurisdiction quite systematically, criminal lawyers, particularly in the English-speaking world, seem to have fairly little interest in the topic (Dubber 2006, 1311-1312; but see Hirst 2003). When it is given thought at all, it is often regarded as a purely procedural problem, specifically a question about the competence of courts. In this paradigm, the State, by adopting limitations on the extraterritorial reach of its criminal law, instructs the courts to limit their work to a certain segment of offences occurring in the world. International law, to the extent that its influence on the matter is admitted at all, is seen as determining which State or States could prosecute the crime in their courts. Placing this approach into the framework of prescriptive–adjudicative–enforcement jurisdiction discussed in the previous section, extraterritorial reach of criminal law becomes a problem of adjudication and enforcement, not prescription.

This approach suffers from a fundamental error. Speaking of jurisdiction *over a crime* presupposes that a crime has taken place. Yet a crime is not a fact – it is a legal assessment of facts. Therefore, it is impossible to say in the abstract that some behaviour amounts to a crime. For example, the physical act of one person shooting a firearm, thereby causing the death of another person, can be any number of things. It can be murder or a legitimate use of lethal force in self defence; it can be genocide or a legitimate act of violence in war. An act can only be qualified as a crime by reference to legal rules. The core of the problem is precisely which legal system should be used as the yardstick.¹¹

¹¹ Even to speak of murder in the moral sense presumes the existence a normative order called morality. Whether or not a certain act or omission is (morally speaking) murder depends on the content of a particular system or moral rules. The question which system of morality is the proper benchmark is very similar to the problem of jurisdiction considered in this paper. However, while States (usually) do not regard their

To overcome this hurdle, criminal laws of various States are sometimes treated as forming a common fabric. This rests on the suggestion that, in different States, ‘by and large the same acts’ are criminalised (Nerep 1983, 501). Given that murder, rape, and theft are punishable according to the vast majority of criminal law systems in the world, ‘[t]he problem ... is *who* should punish, and not *whether* the conduct shall be punished at all’ (*ibid.*).

This is a highly problematic premise. While criminal law systems surely have a lot in common, their convergence should not be overstated. Discrepancies between the criminal laws of various States are considerable, though some of them may be more obvious than others. First, it is trite to say that States have wildly different views as to the proper role of the law in enforcing morality or religious dogma, resulting in radically different takes on, say, euthanasia and prostitution. This disagreement relates even more generally to upholding ‘public decency’: what is immoral or indecent varies from community to community, and from State to State.¹²

Second, crimes against the security of the State also present a problem, though of a slightly different nature. Disagreements about what constitutes a threat to the security of the State are an obvious challenge. But even where States agree in broad terms, they apply their laws in a consciously discriminating way. Thus, a State might make acts of espionage committed against it punishable, while at the same time not only tolerating commission of such acts against other States but actively (if clandestinely) promoting these acts for its own benefit.

Third, pronounced differences can also be found in the definitions of commonly accepted offences. Take, for instance, the widely criminalised act of ‘unlawful sexual intercourse’ (perhaps better known as ‘statutory rape’), which refers to sexual relations with a person who is ‘under age’. The age of consent, however, may be anywhere between 9 and 22, to say nothing of the different age limits for males and females, or straights and gays (see AVERT 2009). Thus, while widespread agreement may exist on the criminalisation of an act in principle, differences in definition radically change the extent of the behaviour actually prohibited.

legal systems as universally applicable, people often take the view that their perception of morality is a universal one against which the deeds of all others can properly be measured.

¹² Consider, for example, attempts by some local and state legislatures, especially in the US, to introduce a ban on wearing pants so low that they expose underwear. See, e.g., Koppel 2007.

Finally, but potentially even more significantly, the general principles of criminal law in different legal systems are far from identical. These differences often remain hidden, only to emerge vividly in international trials. Take, for example, conspiracy, that is to say the joint planning of a criminal offence. As the lawyers involved in post-World War II war crimes tribunals discovered first hand, the Anglo-American legal tradition applies the concept of conspiracy across the board, while in Continental legal systems it is treated as an anomaly to be carefully limited to some specific offences (see Wagner 1951). The disagreement between common law and civil law systems over whether necessity could be a defence to murder made a prominent appearance more recently, in the *Erdemović* case before the International Criminal Tribunal for the former Yugoslavia.¹³

In sum, the argument that criminal laws are substantively similar fails to convince. Legal systems have significant disagreements with each other. State jurisdiction cannot therefore be approached solely with a view to establishing the competent court. It is essential to say what law is applicable.

Two arguments could be advanced to mitigate this problem. First, it could be said that since the courts of no State apply the criminal law of another,¹⁴ the determination of the forum effectively determines the applicable law. This approach is unworkable. The problem is the same that I noted earlier: in order to say that something is an offence for the purposes of determining the competent court, a substantive assessment of the underlying acts as an offence must first be made. That, however, requires the application of substantive law. A vicious circle emerges: to determine the competent court, one needs to know the applicable law, and to know the applicable law, one needs to know the competent court.

Second, it could be argued that whenever a State criminalises an act, the relevant legal rules automatically become applicable to everyone and worldwide. This is a more formidable theory and apparently one that holds currency in criminal law doctrine (Wong 2004, 93, citing Tråskman 1989, 148-149; Fletcher 2007, 18-19). This theory suggests that every person is constantly subject to the criminal law of every State. Hence, any criminal law could be used to test the criminality of behaviour. Whether or not a particular person would then be prosecuted would be a problem of procedural law, not a question of the reach of the criminal prohibitions of a State. Indeed, no lesser authority than George Fletcher has claimed that

¹³ See *Prosecutor v. Erdemović*, Case no. IT-96-22-A, ICTY Appeals Chamber, Judgments (7 October 1997).

¹⁴ See note 10 above and the accompanying text.

[t]he limitations on the scope of criminal liability are found not in the substantive law but in the law of jurisdiction, which defines the range of defendants subject to prosecution in local courts for having violated the statutory definition of the offence. (Fletcher 2007, 18-19, footnotes omitted.)

In other words, the criminal law of a State applies to everyone in the world, but procedural limitations curb the competence of the authorities of the State, so that they can prosecute offences perpetrated only by certain individuals or under certain circumstances.

Criminal jurisdiction as a problem of substantive law

With respect, this line of reasoning must be emphatically rejected. The law can provide no meaningful guidance to individuals if they are at all times supposed to follow all the criminal laws that all the States in the world have deemed wise to enact. In the midst of overlapping and contradictory prohibitions from various national legal systems, any message that criminal law wishes to transmit would be completely lost.¹⁵ In other words, by overlooking the behaviour-guiding function of (criminal) law, the purely procedural approach to jurisdiction fails to pass rule-of-law muster.

Therefore, in the discussion of jurisdiction, the first question to be asked and answered is whether the criminal law of a particular State actually applies to certain behaviour.¹⁶ If it does, then the next question is a procedural one: which is the appropriate court? The question of the jurisdiction of a court is thus parasitical upon the question of applicability (or scope, or ambit, or incidence) of the substantive law. As S. Z. Feller has put it,

the jurisdiction of the court over a criminal act – like the competence of the police to interrogate, and the competence of the state prosecution authority to prosecute – is the outcome of the incidence [i.e. ambit] of the substantive criminal norms of the state ... on that act; or, in short, it is the corollary of the state's power to punish the act, and a natural inference from this power. (Feller 1981, 42; see also Feller and Kremnitzer 1996, 42-43.)

¹⁵ The only instance where such a drastic overlap could be tolerated is where States have internationally agreed on a common definition of a crime. See the text following footnote 32 below.

¹⁶ Cf. *R. v. Treacy*, [1971] AC 537 (HL), at 559 (Lord Diplock): 'The question in this appeal is not whether the ... court has jurisdiction to try the appellant ... but whether the facts alleged and proved against him amounted to a criminal offence under the English Act of Parliament.'

Michael Hirst, in a comprehensive study addressing the distinction between the ambit of substantive law and the competence of the courts, has explained that the

issues that criminal lawyers generally classify as ‘matters of jurisdiction’ and look up in their reference works by turning to chapters of procedure or competence of the court, should properly be considered as elements relating to the *actus reus* itself. (Hirst 2003, 2.)

This suggests that the individual definitions of offences carry a certain ambit, and the possibility to prosecute someone for an offence depends on whether the behaviour falls within the ambit of that definition. Examining the ambit of criminal law at a closer zoom reveals that it is not so much the criminal law as a whole that has a certain ambit, but rather its specific component parts. Indeed, every individual norm possesses some sort of ambit. This is because behaviour has certain dimensions, which the law, if it is to serve as a guide or standard of criticism for behaviour, must capture.

Hans Kelsen suggested that behaviour involves four elements. First, whenever one speaks of behaviour, lurking somewhere must be a *person* whose conduct is in question. The involvement of this agent sets behaviour apart from uncontrollable natural processes and forces, such as rain showers or gravity. Second, behaviour always has certain *content*: it consists in some action or omission. Third, behaviour occurs somewhere, in a certain place. Fourth, behaviour occurs at a certain time. Accordingly, Kelsen believed that behaviour has a personal, a material, a territorial, and a temporal aspect. And ‘the norms,’ argued Kelsen, ‘have to regulate human behavior in all these respects’ (1946, 42).

Kelsen connected law to these four dimensions of behaviour by using the notion of legal validity. The concept of legal validity has to do with law being an abstraction. Law is not a ‘thing’ that is physically present in time and space: to say that law *exists* (or that law *is*) is not the same thing as to say that there *exists* a pile of documents that contain enactments of the parliament. Law only exists in the form of being valid; it exists by being binding (Kelsen 1946, 30). Yet law cannot be binding in the abstract; it has to be binding, for starters, on someone. Indeed, law has to be binding precisely with respect to the four elements of behaviour just mentioned – it must be binding upon someone, with respect to certain behaviour, in a certain place, and at a certain time. Accordingly, Kelsen argued that each and every norm must be endowed with four dimensions of bindingness or, as he called them, ‘spheres of validity’ – personal, material, territorial, and temporal (Kelsen 1946, 42-44; 1967, 12-15).

I find it slightly more convenient to refer to the material sphere of validity of a norm – behaviour required or permitted – as its content, and to the personal, territorial, and temporal dimensions as its scope or ambit. Particularly since I am not concerned here with the ultimate source of validity of norms, but rather with their characteristics if and once they are valid, it seems appropriate to use this more subdued terminology.

The temporal ambit of a rule, that is to say the time when the rule applies, can be left aside here. In legal theory it presents a formidable problem in its own right as it concerns the possibility of retroactive law. This is, however, an issue separate from jurisdiction. So for present purposes, it is only necessary to consider the personal and territorial ambit of rules.

A fundamental preliminary point is that of the four aspects of a rule, content and personal ambit are of the essence (Kelsen 1946, 43). A guide to, or standard of, behaviour emerges only if the prescribed behaviour and the agent have been determined. Thus, as Meir Dan-Cohen observes, ‘norms are commonly understood to be both actor-specific and act-specific. A norm addresses itself to certain subjects or groups of subjects and guides them with respect to a certain type of action’ (1984, 628, footnote omitted).

The idea that a rule must have content, i.e. that it must prescribe *some* behaviour, appears obvious enough. The idea that rules are actor-specific perhaps needs clarification. After all, it seems perfectly possible for a rule to have an unlimited personal ambit. Most criminal law prohibitions appear to be so. The provision dealing with the crime of murder, for instance, does not single out who must refrain from committing the offence. The provision looks as though it gives rise to a rule that is binding on ‘everyone’. Yet ‘everyone’ should not be taken too literally. The crux of the matter is that subjects of the law (or agents capable of behaviour) do not exist independently of law. Law creates them.

Subjects of law are usually said to fall into two categories. Natural persons, that is to say human beings, form one category. Juristic persons such as corporations, NGOs, municipalities, or whatever else a legal system may recognise as distinct holders of rights and duties, constitute the other category. Kelsen strongly criticised this rigid division. On the most fundamental level, he objected to the idea that, for the purposes of law, a person could be regarded as an entity separate from the obligations and rights ‘of’ that person (Kelsen 1946, 93ff; 1967, 168ff). If both so-called natural persons and so-called juristic persons can be subject of obligations and rights, they must have something in common. Yet the only thing that they actually do have in common is that they have obligations and rights. This common feature should, then, be called legal personality. Accordingly, a

legal person (a subject of law) does not *have* obligations and rights, it *is constituted in* these obligations and rights – it is their personification. Hence, the so-called natural person is, for the purposes of law, not the flesh and blood human being, but the ‘the personified unity of the legal norms that obligate or authorize one and the same human being’ (Kelsen 1967, 174).

Even if one does not warm to this attempt to rid law of the concept of a person as traditionally understood, the underlying point is an important one. There is nothing particularly natural about the so-called natural person being a subject of law. A natural person has legal personality because the legal system says so. Once upon a time, slaves were regarded as lacking legal personality: they were not persons for the purposes of legal enquiry (Kelsen 1946, 95; 1967, 172). At the same time, it was hardly doubted – at least in ancient times, though perhaps not in the era of the African slave trade – that they belonged to the human species and were human beings for the purpose of, well, biological enquiry. The situation has not changed because of some logical necessity. That every human being must have legal personality is nowadays a matter of political consensus. However, it is not one engraved in stone. The Bush administration went to great lengths in an attempt to deny any legal rights, and any procedural remedies, to individuals detained at Guantánamo Bay, Cuba. Basically, the administration attempted to deprive them of legal personality.

In this light, one should be cautious in claiming that criminal law binds everyone. There is no ‘everyone’ independent of law. Consequently, law always and necessarily features a defined personal ambit, even though in criminal law it is often not explicit. The criminal code may declare itself valid within the territory of the State, seemingly leaving the personal ambit of rules wide open. However, in such a case, one will need to take into account overarching principles of the criminal justice system. Contemporary criminal law thus usually applies to ‘natural persons’, but in many States also to ‘juristic persons’. ‘Everyone’ thus refers to these (defined) groups of persons.

Sometimes certain human beings, specifically infants and the insane, are regarded as being completely beyond the reach of criminal law – excluded from the personal ambit of the rules of criminal law. That is not so (see Fletcher 2007, 286). Insanity, for one, is an act-specific defence. Whether or not a person with diminished mental capacity should bear criminal responsibility must be examined with respect to a particular act (see *ibid.*, 310). The possibility of ‘temporary insanity’ makes this abundantly clear. In some legal systems, the same considerations apply to infancy: whether or not a minor should bear criminal responsibility is examined on a case-by-case basis and statutory age limits only create

rebuttable presumptions. But in any event, to say that children do not have an obligation not to steal seems somehow awkward, even though we deal differently with thefts committed by adults and by children.

I now come to the territorial ambit of rules, which refers to the place where the persons on whom the rule is binding must behave in the prescribed manner. A rule need not be ‘territory-specific’. As long as its personal ambit is defined, a rule can be regarded as valid for the behaviour of that person wherever that person may be. At the same time, the main constraint on the ambit of criminal law rules appears to be precisely territorial. As I noted at the very beginning of this paper, States only exceptionally extend their law to behaviour abroad. Yet, the importance of territorial constraint arises from the currently prevailing international system, where lines between national legal systems are territorially drawn. Nothing in the nature of legal rules itself would constrain them to a certain territory. Law, including criminal law, is not essentially territorial. If it is essentially anything, it is essentially personal.

The tension between the territorial conception of sovereignty and the personal nature of law reveals itself where States attempt to extend the reach of their law by reference to the *consequences* of human behaviour. Thus, many States claim to apply their law solely on the basis that the victim of a crime had their nationality. Other States attempt to make their laws applicable to crimes the consequences of which, however incidental, can be felt in their national territory. These forms of jurisdiction – usually respectively called the passive personality principle and the effects doctrine – have attracted criticism mainly because of their invasiveness into other legal systems. However, an argument could also be made that these bases of jurisdiction are so ill-defined in terms of their personal ambit that they should not be admissible.

But how is the ambit of rules actually determined? In principle, a statutory provision (or set of provisions) setting forth the content of a rule may also establish, in a comprehensive manner, the rule’s personal, territorial, and temporal ambit. However, that is usually not the case. Delimitation of the ambit of rules is more systemic. Joseph Raz helpfully points out that a legal system not only contains norms in the sense of rules but also other types of ‘laws’ (1980, 168ff; 1972, 824). In fact,

[l]aws which are not norms are a most important category of laws. They have been neglected by most legal philosophers, who refuse to concede that not all laws guide behavior directly, that instead many guide it indirectly through their logical relations with other laws which are norms. (Raz 1972, 835.)

What creates some confusion is that some of the ‘laws which are not norms’, i.e. laws that do not guide behaviour, are often referred to as ‘principles’. Yet, as Raz points out, these are not principles in the sense Ronald Dworkin uses the term (Raz 1972, 835). Dworkin ostensibly considers legal principles as directly guiding behaviour, although in a less precise way than rules (see Dworkin 1967). But Raz has in mind ‘laws which govern a vast area of law: that is, those which are logically related to a great number of other laws, qualifying them and modifying their application’ (Raz 1972, 835). An example of such a law is ‘the law determining the territorial sphere of validity [i.e. territorial ambit] of most of a country’s law (which is clearly not itself a norm)’ (*ibid.*; see also Raz 1980, 145).

Jurisdictional principles, commonly found in criminal law, are precisely what Raz calls ‘laws which are not norms’. They are laws that, while not guiding behaviour themselves, affect the ambit of norms that do guide behaviour. In States with codified criminal law, the penal code usually contains a series of provisions addressing what is called the ambit, incidence, sphere of validity, or scope of application of penal law.¹⁷ In countries where the criminal law is not codified, these principles may be scattered in different legal acts. But in any case, such principles form an inseparable part of the definitions of the offences they relate to, thus limiting the substantive reach of criminal law (Feller and Kremnitzer 1996, 42).

Rules of conduct and rules of adjudication

So far, I have proceeded under the assumption that criminal law is addressed to individuals, prohibiting them from engaging in certain behaviour. However, criminal law also has procedural aspects, dealing with investigations, trials, and enforcement of sentences. How do these rules fit into the jurisdictional picture? Moreover, the theory advanced in the previous sections that jurisdiction is largely a matter of the ambit of substantive criminal law can be countered by arguing that the criminal law as a whole is principally addressed to various officials – in particular, law enforcement officers and judges. A provision that attaches a certain penalty to the crime of murder should, the argument goes, be read as an instruction to the judge to sentence a murderer (Kelsen 1946, 29 and 63).

¹⁷ For example, Strafgesetzbuch [Penal Code] (Germany, 1871), §§ 3-7: ‘*der Geltungsbereich des Strafgesetzes*’; Code Pénal [Penal Code] (France, 1810), Articles 113-1 through 113-12: ‘*de l’application de la loi pénale dans l’espace*’; Rikoslaki [Penal Code] (Finland, 1889), Chapter 1, §§ 1-8: ‘*rikosoikeuden soveltamisala*’.

Let me deal first with the latter point. The main problem of looking at the entire system of criminal law as directed at a judge – as Hans Kelsen would like us to – runs into the same rule-of-law concern that I mentioned earlier in dismissing the possibility of jurisdiction being a purely procedural question. If the common-sense rule ‘thou shalt not kill’ were to become a mere element of a rule directing the application of a sanction by an official, individuals would have to infer their obligations from the behaviour of judges.¹⁸ But, as Hart has argued, this would distort the social function that law serves: law – including criminal law – is *primarily* addressed to the society at large (1994, 38-42 and 80). Individual members of the society should be able, in the first place, to use law as guidance for their behaviour without the intervention of public officials (*ibid.*, 38-39). Joseph Raz has argued in similar vein that ‘the duty and not the sanction is the law’s main concern. The sanction is there to ensure the performance of the duty’ (1980, 90).

That said, criminal law undoubtedly contains rules that are not addressed to the general public, but rather guide the behaviour of various public officials. Most of the law of criminal procedure consists of such rules. But substantive criminal law is made up of two sorts of rules: those addressed to the general public, and those addressed to officialdom. Indeed, Jeremy Bentham observed that ‘[t]he law which converts an act into an offence, and the law which directs the punishment of that offence, are, properly speaking, neither the same law nor parts of the same law’ (1843, 160).

The most widely known theory along these lines is probably that of Hart. As I mentioned earlier, Hart emphasised that law should, in the first place, guide the behaviour of the general public. He accordingly argued that there are two fundamentally different kinds of rules – primary rules, whereby ‘human beings are required to do or abstain from certain action’; and secondary rules providing for ways to ‘introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operation’ (Hart 1994, 81). Hart’s secondary rules have several subspecies, including ‘rules of adjudication’. These rules principally ‘empower[] [certain] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken’ (*ibid.*, 96). In more centralised legal systems, rules of adjudication also ‘specify[] or at least limit[] the penalties for violation, and ... confer[] upon judges, where they have ascertained the fact of

¹⁸ This is precisely what Kelsen claims. See Kelsen 1946, 3. See also and Raz 1980, 85ff and Hart 1994, 35-36.

violation, the exclusive power to direct the application of penalties by other officials' (*ibid.*, 97-98).

According to the approach of Bentham and Hart, then, a penal code provision on murder reflects two rules. On the one hand, a primary rule prescribes a duty not to kill another human being. On the other hand, a secondary rule – more specifically, a rule of adjudication – confers upon the judge a power to determine violation of the primary duty and to direct application of punishment. Later theorists point out that classifying rules directed at officials as secondary rules might erroneously suggest that those rules do not guide behaviour (see, e.g., Hacker 1977). Yet such rules clearly do guide behaviour, albeit not that of the general public, but that of officials. Thus, Raz, consciously steering clear of the same pitfall, distinguishes between 'duty-imposing laws' (which he calls 'D-laws', for short) and 'sanction-stipulating laws' ('S-laws'). Both of these he considers norms, i.e. laws that guide behaviour (Raz 1980, 154-156). Several jurists who have dealt specifically with criminal law maintain a similar distinction. For example, Meir Dan-Cohen separates 'conduct rules' from 'decision rules' (Dan-Cohen 1984), and Paul Robinson talks about 'rules of conduct' and 'rules of adjudication' (Robinson 1990).

In the criminal law context, the distinction between rules of conduct and rules of adjudication makes intuitive sense where a provision in the penal code prescribes a sanction for violation of a duty that arises from another source of law. In German parlance, such a provision is called a *Blankettverweisung*, or 'blanket reference'. The classic example is the penal code provision on tax evasion. What precisely would be punishable depends on the applicable tax law. The penal code only makes provision for the contingency that the relevant taxation regulations are not abided by. In other words, the provision of the penal code gives rise only to a rule of adjudication, whereas the rules of conduct are to be found elsewhere.

In the majority of cases, however, there is no such 'blanket reference'. It is futile to plough through the legislation of a country in the hope of finding a provision that actually says 'thou shalt not kill'. In such cases, the provision of a penal code gives rise to both a rule of conduct and a rule of adjudication.¹⁹ Even if a provision of the penal code is worded as directing a judge to apply a certain

¹⁹ Dan-Cohen 1984, 631, claims that '[a]ny given rule may be a conduct rule, a decision rule or both'. This appears to confuse *provisions* of the law and *rules* to which they give rise. Robinson 1997 has suggested doing away with dual-purpose provisions by splitting the penal code in two – a Code of Conduct and a Code of Adjudication.

sanction to a murderer, a prohibition of murder is put in place.²⁰ That is because it is perfectly possible to read the provision on murder as reflecting two rules – one prohibiting murder, and the other directing the judge to sentence a murderer.

The distinction between two kinds of rules within substantive criminal law might attract the criticism that a judge, in deciding a case, has to look beyond the rules of adjudication: she would have to consider violation of the rule of conduct holistically, especially when determining the precise punishment. The judge, true enough, must consider the rule of conduct, for only if the rule of conduct is not abided by should she direct the application of a punishment. A determination of violation of a rule of conduct is a necessary step in applying the rule of adjudication. But it is an external trigger, a condition for application of the rule of adjudication. As concerns mitigating and aggravating circumstances, these do not affect the obligation under the rule of conduct at all: they do not modify the prohibition of murder, for instance. That the judge must take these circumstances into account is the consequence of supplementary rules of adjudication.

Equally it could be argued that the general public would benefit from knowing the content of the rules of adjudication. Certainly, by knowing the sanctions that can be applied with respect to violations of different rules of conduct, individuals can understand the relative importance of a particular rule – the more severe the potential punishment, the more important the rule. That might be necessary for choosing the lesser evil in circumstances where the individual has conflicting obligations. However, it is probably safe to assume that the average person is not overly concerned about the precise sanction for theft – the prohibition of stealing and the knowledge that some punishment is in store would be sufficient. It is also doubtful whether the average person would engage in a rational comparison of sanctions when it comes to a situation where a necessity defence might apply.

In any event, I am not suggesting that there is, or should be, some air-tight seal between rules of conduct and rules of adjudication. I merely wish to emphasise that the rules of conduct and rules of adjudication are, as Bentham put it long ago, ‘so distinct, that they refer to different actions – they are addressed to different persons’ (1843, 160). In other words, these rules have a different content and a different (personal) ambit. As for the content, abstaining from stealing and sentencing a thief are surely totally different kinds of behaviour. Regarding the personal ambit, the principle that no one shall be the judge in one’s own cause

²⁰ Cf. Bentham 1843, 160: ‘Say to the judges, “You shall punish thieves,” and a prohibition of stealing is clearly intimated.’ (Italics omitted.)

also ensures that the addressee of the rules of conduct against theft will not, in the same case, be the addressee of the rule of adjudication to condemn a thief.

There seldom exists a concise list of principles defining the personal ambit of rules of adjudication. But such principles certainly do exist. What complicates the matter somewhat is that different rules of adjudication have different personal ambits depending, naturally, on which official's conduct they seek to regulate. So when the legal system authorises certain persons to carry out searches or seizures or arrests, the law establishes the personal ambit of the rules dealing with these matters. By determining who may sit as a judge, the law states the personal ambit of the rules of adjudication.

Rules of conduct and rules of adjudication may, but need not, share a territorial ambit (cf. Verdross and Simma 1984, 635-636; Kelsen 1946, 308). Usually, these rules apply in the same territory, namely that of the legislating State. But that does not have to be so. A rule of conduct could pertain to the behaviour of individuals on, say, the high seas, whereas the corresponding rule of adjudication might instruct the judge to apply the sanction when the person is brought within the territory of the State.

In contrast to the personal ambit of rules of adjudication, their territorial ambit may be determined quite exhaustively in a single provision. For instance, the Estonian Code of Criminal Procedure provides in unequivocal terms that the law of criminal procedure 'is valid on the territory of the Republic of Estonia, unless a treaty provides otherwise'.²¹ Where there is no such comprehensive provision, the law will still provide where an arrest warrant may be executed, or stipulate the limits of a judicial district. In doing so, the law also determines the territorial ambit of the relevant rules of adjudication.

Defences and bars to trial

The distinction between rules of conduct and rules of adjudication provides a convenient analytical model for examining the grounds on which a person may be exempt from punishment despite having committed an act that, on its face, violates a rule of conduct. These grounds also include immunities – or more properly 'immunities from jurisdiction' – which are relevant to the discussion at hand.

²¹ Kriminaalmenetluse seadustik [Code of Criminal Procedure] (Estonia, 2003), § 3(1).

It is convenient to begin with a glance at the more ordinary defences. The theoretically most sophisticated approach to defences – originally developed by German theorists but increasingly accepted in Anglo-American scholarship – entails performing three sub-tests to establish whether an act is punishable.²² First, the required elements of the crime must be present: the act must meet the definition of the offence. Second, the act must be wrongful. An act that meets the definition of the crime is deemed wrongful unless valid justification exists. Third, the act must be committed culpably. An act that is wrongful is deemed to be culpably committed unless a valid excuse can be invoked.

A justification is a defence that negates the wrongfulness of the behaviour. The paradigmatic example is self-defence: someone who kills another person in self-defence does not, all things considered, act wrongfully, although all the elements of the crime of murder may be present. Justifications adjust the content of rules of conduct. Fletcher makes the point particularly succinctly by noting that:

self-defense may be taken to modify the norm against killing to read (roughly): ‘Thou shalt not kill unless thine own life or limb is in great danger.’ The defence of self-defense implicitly creates a license to kill that modifies the norm against killing.... (Fletcher 1978, 457; cf. Hart 2008, 13; Colvin 1990, 385.)

Thus, justifications are exceptional, permissive rules of conduct within criminal law. Furthermore, at least some justifications may be seen as positively directing the behaviour of the general public by pointing towards conduct that is desirable. As Hart put it, ‘[i]n the case of “justification” what is done is regarded as something which the law does not condemn, or even welcomes’ (2008, 13). For instance, the existence of necessity-justification can be seen as positively encouraging a person to make efforts to prevent a ‘greater evil’ by committing, if necessary, a ‘lesser evil’.

The situation is completely different as far as excuses are concerned. An excuse calls for exculpation of the perpetrator while not negating the violation. The insanity defence is a case in point. If a person with diminished mental capacity kills another, the wrongfulness of the act is not set in question – it is simply accepted that the perpetrator should not be treated as a criminal. Clearly, then,

²² For a more elaborate, yet still conveniently succinct, explanation in English, see Fletcher 2007, 49-55. See also Robinson 1997, 82; Bentham 1945, 215 (footnote 37) and 236; Austin 1956; Hart 2008, 13. On the development of the related distinction between justifications and excuses, see Eser 1987, 34-46.

excuses cannot be seen as exceptions within the rules of conduct. Here, again, is Fletcher:

The point of recognizing insanity and duress as defences is not that the norm is amended to read: 'Thou shalt not kill unless thou art insane or under a threat of death.' ... The point of all these issues – insanity, duress, and mistake – is not that they generate exceptions to the norms prohibiting conduct, but rather that they provide excuses for violating the prohibitory norms. (Fletcher 1978, 457.)

How, then, should the rules dealing with excuses be looked at? Dan-Cohen's (1984, 633) and Robinson's (1997, 226-229) analyses clearly suggest that excuses fall within the category of rules of adjudication. Fletcher also concedes that in Hartian parlance, 'one might, arguably, treat "excuses" as secondary rules conferring power on judges to abstain from punishment in particular cases' (Fletcher 1978, 457). All things considered, Mitchell Berman seems to be on the right track when he observes that 'justifications ... are those defences that fall within the system's conduct rules, while excuses are the defences residing in the decision rules' (2003, 33).

But criminal law recognises a further category of considerations that exclude criminal responsibility. A person may become mentally incompetent to stand trial well after commission of an allegedly criminal act. A prescribed statutory period for prosecution may expire. A person first acquitted because of lack of evidence may be protected from subsequent conviction even if new evidence were to emerge. These are sometimes called 'non-exculpatory defences', for they deny neither the blameworthiness of the act nor the culpability of the actor, but rather further some other societal interest by preventing a (otherwise fully deserved) conviction (Robinson 1982, 229-232; 1997, 71-81; see also Raz 1980, 154). Moreover, while excuses and justifications relate to the defendant's actions or state of mind at the time of commission of the alleged criminal act, non-exculpatory defences are triggered by some factor present at the time of the trial. These factors might indeed be better called 'bars to trial', rather than defences, and they should be addressed even before a trial commences (Duff 2003). Also, while justifications and excuses should lead to verdicts of 'not guilty', non-exculpatory defences should lead to the charges being dismissed without proceeding to a verdict.

Various immunities also fall within this category of 'bars to trial'. A national legal system may recognise different kinds of immunities, for example for members of parliament to prevent executive interference in their work or for material witnesses in criminal cases in exchange for their potentially self-incriminatory

testimony. For present purposes only immunities arising from international law need be considered, because only those could be seen as immunities from the jurisdiction of a State (and not just from the jurisdiction of a particular court).

Such international-law immunities are best discussed in the context of diplomatic law, because this particular branch of international law is rather well-settled and extensively codified. Similar theoretical considerations apply to immunities of different sorts under international law, such as those enjoyed by high State representatives – heads of State, heads of government, and foreign ministers – or, for example, by service members under Status of Forces Agreements. Passing in silence over the various theories justifying the special status of diplomatic agents (but see, e.g., Wilson 1967, 1-25), it can be said that their position under contemporary international law is encapsulated by three legal concepts – privileges, immunities, and inviolability.

Diplomatic immunities are, in essence, procedural devices meant to prevent judicial or quasi-judicial proceedings against diplomatic agents. According to the Vienna Convention on Diplomatic Relations,²³ diplomatic agents enjoy full immunity from criminal proceedings in the host State: no criminal charge can be brought against them or any administrative penalty applied to them (Article 31). But the Vienna Convention also makes it plain that ‘it is the duty of all persons enjoying such ... immunities to respect the laws and regulations of the receiving State’ (Article 41). Accordingly, diplomatic agents are not ‘outside’ or ‘above’ the criminal law. Rather, should they ‘break the law’, the ordinary measures of law enforcement cannot be taken with respect to them. Diplomatic immunity is therefore not a limitation on the personal ambit of any rule of conduct. Rather, it is an auxiliary principle, directing the adjudicator not to impose punishment for violation of a rule of conduct (see also Hirst 2003, 15ff).

This approach, incidentally, solves two puzzles that might otherwise emerge. The first concerns the possibility of prosecuting the diplomatic agent in the host State after immunity is waived by the sending State (Vienna Convention, Article 32). If immunity were a limitation on the personal ambit of the rules of conduct, a waiver would effectively subject the person to these rules for the very first time. That would mean that the waiver of immunity would put in operation a retroactive law *vis-à-vis* the diplomatic agent.²⁴ The second problem concerns derivative

²³ Vienna Convention on Diplomatic Relations, signed at Vienna, 18 April 1961, in force 24 April 1964, 500 UNTS 95.

²⁴ Williams regards the possibility of a waiver as evidence that the diplomatic agent is ‘capable of committing what is in law a crime’ and that indeed ‘the diplomatic agent

liability. If immunity were to exempt the diplomatic agent from the personal ambit of the rules of conduct, no accessory to the act could be prosecuted, because there would be no offence to begin with. Conceiving of immunity as a special rule of adjudication avoids these problems by postulating that the diplomatic agent was, in fact, bound by the rules of conduct of the host State, but could not be punished. Immunities therefore do not negate jurisdiction, if the latter is understood in the sense of the ambit of rules. The same holds true for personal inviolability, which refers to the principle that the diplomatic agent cannot be searched, arrested, or detained, cannot be forced to give fingerprints, blood, or other samples, and so forth. Inviolability seems to be a subspecies of immunity, concerned with rules of adjudication of a particular nature, namely those that have a physical element.

In addition to immunities, a diplomatic agent enjoys certain privileges. For example, a diplomatic agent is, to a large extent, exempt from paying taxes in the host State (Vienna Convention, Article 34). A diplomatic agent is also completely exempt from 'all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting' (Article 35). These are not just (procedural) immunities against compelling diplomatic agents to perform any of these obligations: the personal ambit of the relevant rules of conduct is made to exclude diplomatic agents. Thus, it is not the case that diplomatic agents must pay income tax, but if they refuse, there is no procedure to force them to pay. Rather, the diplomatic agent has no duty to pay income tax to begin with, making the enforcement issue moot. To the extent a privilege applies, a diplomatic agent is actually exempt from the host State's rules of conduct. In sum, while a privilege is a limitation on the personal ambit of the rules of conduct, immunity, by contrast, is an auxiliary rule of adjudication.

Interplay between international and national law

So far, I have looked at the rules of national criminal law largely from the perspective of the national legal system. Given the potential of overlap and conflict that can result from each State unilaterally determining the ambit of its criminal law, and given the need to ensure certain immunities, it should come as no surprise that international law takes an active interest in this matter. While this

does in legal theory commit a crime, whether waiver actually takes place or not'. Williams 1961, 392, § 131, and 791, § 259.

is not the appropriate occasion to engage in a review of the precise extent of the limitations that international law places on national legal systems, it would be beneficial to consider the ways in which it might do so.

The basic starting point for looking at the interplay between international and national law is that States have a general duty to carry out their obligations under international law in good faith. This means, among other things, that they have to make sure that the ambit of their domestic law conforms to any relevant limitations imposed by international law. Should a State claim a wider ambit for its law than international law tolerates, other States could protest and hold the offending State accountable for violation.

Such is the situation on the international plane. The status of international law domestically is a different matter altogether. There, everything depends on the constitutional context. After all, each State may decide for itself whether to allow international law to penetrate into its domestic legal systems.²⁵ Thus, although a State is doubtless bound by international law internationally, State organs might not be constitutionally empowered to apply international law domestically. In such circumstances, international obligations would have to be transformed into domestic legal acts. In the absence of such acts, the State would have to bear responsibility internationally for any domestic deficits.

What levels the ground somewhat as concerns jurisdiction is that the relevant principles of international law are mostly part of customary law. States are generally far more willing to regard customary law as automatically part of their domestic law than treaties. After all, custom develops over lengthy periods with the common consent of the world community, whereas treaties are often entered into instantly at the whim of the executive branch of government.²⁶

²⁵ I cannot think of a good reason to discuss here the various theoretical models of the relationship between domestic and international law. However, I should note that Kelsen's strong views on conceiving international law and domestic law as part of one system (Kelsen 1946, 363-388) must have influenced his position on the delimitation of domestic legal systems as being an 'essential' function of international law.

²⁶ Constitutional law may impose limits on the treaty-making power of the executive, often requiring approval of the legislature for ratification of a treaty. However, the effect of such limitations internationally is negligible. The Vienna Convention on the Law of Treaties, opened for signature at Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331, provides in Article 46 for the possibility of invalidating consent to be bound by a treaty if such consent was given in manifest violation of a domestic rule of fundamental importance. However, the constitutional rules on whether a particular instrument requires parliamentary approval are often exceedingly complicated. See, e.g., Krutz and Peake 2009. Violations of constitutional rules are therefore unlikely to be manifest, especially for foreign lawyers.

That said, customary international law, and consequently international principles on State jurisdiction, can enjoy a very different status within the domestic system. In some States, Germany being a notable example, international law supersedes ordinary legislation.²⁷ The principles of international law that seek to limit the ambit of the rules of domestic law must therefore be taken into account by the courts when interpreting national law. Should domestic law claim a broader ambit than international law permits, the courts would have to step in and make domestic law conform to international limits.

The situation is completely different in other States. In the United Kingdom and the United States, for instance, customary international law forms part of the law of the land, but has no elevated status. Thus, Parliament and Congress may enact rules that are incompatible with international law.²⁸ The situation is very similar in Israel, where the Supreme Court held in a recent case that ‘the legislature may draw the borders of the law as it pleases, including expanding it beyond the boundaries of the state, without it being restricted by foreign law or even the international law’.²⁹ Astounding as these words may sound, they must be read in the specific constitutional context. The Israeli Supreme Court did not deny – or so one hopes – the relevance of international law in delimiting the ambit of domestic law: it merely noted that the legislature is not, as a matter of domestic law, bound to follow international law.

To mitigate this problem, a principle of statutory interpretation is recognised in many legal systems whereby legislation is presumed not to violate international law.³⁰ This would mean that, if at all possible, domestic law would be interpreted

²⁷ See, e.g., Grundgesetz [Basic Law](Germany, 1949), § 25: ‘The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.’

²⁸ *Ellerman Lines v. Murray*, [1931] AC 126 (HL); *Whitney v. Robertson*, 124 US 190 (1888).

²⁹ CrimA 4596/05 *Rosenstein v. State of Israel*, [2005] 2 IsrLR 232, at para. 20 (Levy J).

³⁰ *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, at 143 (Diplock LJ): ‘there is a prima facie presumption that Parliament does not intend to act in breach of international law’. *American Banana Co. v. United Fruit Co.*, 213 US 347 (1909), at 357: ‘The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.’

in accordance with international law.³¹ Accordingly, statutory provisions establishing the ambit of the rules of law would be interpreted in light of international law, unless the legislature made clear its intention to ignore – or, if you will, violate – international law. A US Federal Court summed up this position nicely:

In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law.³²

International law does not always attempt to reduce the amount of competition between different criminal justice systems. In some situations it actively promotes such competition. That is the case with international crimes. In the context of criminal jurisdiction, such crimes give rise to interesting questions, one of which might be briefly addressed here.

An international crime in the strict sense is an act deemed criminal by customary international law.³³ Genocide is a case in point. Not only does customary international law supply the definition of genocide, it also permits all States to prosecute the alleged *genocidaire* irrespective of any territorial link to the offence or personal link to the offender or the victim. This latter aspect is usually referred to as ‘universal jurisdiction’.³⁴

Now, what does this mean for the ambit of domestic law? One option would be to say that States are permitted to give their domestic law very extensive ambit so as to bring as many persons as possible within the reach of their rules of con-

³¹ *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, at 143: ‘if one of the meanings which can reasonably be ascribed to the legislation is consonant with [international law] and another or others are not, the meaning which is consonant is to be preferred’. See also *Murray v. The Charming Betsey*, 6 US 64 (1804), at 118: ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’.

³² *US v. Yousef*, 327 F3d 56 (US Court of Appeals, 2nd Circuit, 2003), at 86.

³³ International crimes defined only by treaty give rise to special problems because some States may participate in the treaty and others not. Also, treaties generally create intricate jurisdictional arrangements that cannot be fairly dealt with here.

³⁴ See, e.g., *Jorgic v. Germany*, Application no. 74613/01, ECtHR, Judgment (12 July 2007), particularly paras 52-54 and 67-71 and the sources cited therein. The amount of literature on this topic is overwhelming. Benavides 2001 and O’Keefe 2004 are solid starting points.

duct. In other words, universal jurisdiction could be seen as a device for creating a large number of overlapping rules of conduct. The extensive overlap would be permissible precisely because the content of the rule would be identical – it would derive from international law.

Another construction is also available. Where international law criminalises a certain act, the rule of conduct can be seen as arising from international law. There is no need for States to enact overlapping rules of conduct. All they need to do is enact rules of adjudication directing law enforcement officials to deal with violations of the international rule of conduct. In other words, the rules of conduct of international law prohibiting genocide would be supplemented by domestic rules of adjudication directing the application of punishment. Rules of adjudication could also be contained in the statutes of international tribunals. Thus, a single rule of conduct could have numerous corresponding rules of adjudication on both international and domestic levels.

But is international law actually interested in the ambit of domestic law or only acts of its implementation? To put it differently, does the mere promulgation of rules with a wider ambit than international law permits violate international law? I would suggest that here the distinction between rules of conduct and rules of adjudication again becomes important.

Rules of conduct are directed at ordinary persons in an attempt to influence their behaviour. Those rules achieve their purpose when individuals comply with them and behave as the rules prescribe. Any further acts by State organs are not necessary for the rules to have effect. To be sure, some individuals may comply with the rules only because the possibility exists that they may be punished for not doing so, but others might comply with the rules because they think it appropriate or morally necessary to be law-abiding.

In the case of rules of conduct, a violation of international law occurs simply by virtue of enacting a statute that has an impermissible ambit. To illustrate, allow me to use a preposterous example. Let's suppose that UK law requires British nationals to abide by English road rules – including driving on the left-hand side – while they are abroad. A British motorist following this prescription anywhere in Continental Europe would cause havoc. Hence, the concern of other governments would not be so much the possibility that the motorist would, after returning home, be punished by the British authorities, in defiance of the territorial States' authority. Their concern would be precisely the possible effect of anyone trying to abide by British law on their territory; in other words, they would object to the implications of the extended ambit of hypothetical British rules of conduct.

Admittedly, most extraterritorial extensions of the ambit of criminal law would not cause quite such dramatic effects, but the principle remains the same.

Support for the view that enacting domestic rules can itself be contrary to international law can be derived from the *Headquarters Agreement Opinion*, where the International Court of Justice had to consider a piece of US legislation that declared it illegal for the Palestinian Liberation Organisation to maintain an office in the US. The UN believed such legislation to be contrary to the UN Headquarters Agreement as the General Assembly had conferred observer status on the PLO. The US advanced the argument that no legal dispute had arisen between itself and the UN because the legislation in question had not yet been implemented (i.e. the PLO Observer Mission had not yet been closed). The court explicitly rejected this argument.³⁵ I am inclined to agree with Ivan Shearer's suggestion that, 'by extension, ... the mere assertion of an inadmissible prescriptive power is contrary to international law, insofar as it may put persons or entities in fear of possible enforcement and thus restrain their lawful freedom of action' (2005, 156).

The situation is somewhat different as concerns the ambit of rules of adjudication. Should, for instance, the national law of a State permit the judiciary to hold criminal trials outside the territory of the State, there is no real harm to other States as long as judges do not go about dispensing justice abroad. Moreover, in some instances foreign States may look favourably on 'visiting judges'. That, for example, has been the case with the trial by a Finnish court of a person accused of having committed genocide in Rwanda. Some of the hearings were held in Kigali, Rwanda, with the full consent and cooperation of the Rwandan government. Thus, totally precluding applicability of the rules of adjudication on foreign soil does not seem to be necessary or even desirable. Rather, it would be necessary to ensure that any acts of the State would be carried out abroad, in a particular case, in conformity with international law.

Thus, international law appears to be concerned with the permissible ambit of rules of conduct and the actual application of rules of adjudication (cf. Chen 1989, 234; Maier 1996, 78).

³⁵ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)*, ICJ Reports (1988) 12, para. 42.

Concluding remarks

Discussion of State jurisdiction under international law is hampered by a danger of terminological and conceptual misunderstandings, not least because of the myriad meanings of the term 'jurisdiction'. Moreover, the usual division of jurisdiction into a legislative, adjudicative, and enforcement branch is ambiguous and may conceal more nuanced problems.

A particularly striking example of the confusion that may arise is the miscommunication between Ian Brownlie and F. A. Mann over the necessity (or otherwise) of distinguishing between prescriptive and enforcement jurisdiction. F. A. Mann has noted that the distinction 'is indispensable to explain several aspects of the problem of jurisdiction' and that '[f]ailure to observe it has led to much misunderstanding' (1964, 13). According to Brownlie, however,

[t]here is ... no essential distinction between the legal bases for and limits upon substantive (or legislative) jurisdiction, on the one hand, and on the other, enforcement (or personal, or prerogative) jurisdiction. The one is a function of the other. If the substantive jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful. (Brownlie 2008, 311, footnote omitted.)

Commenting on an earlier edition of Brownlie's work, Mann noted that 'this must surely be due to some misunderstanding: the fact that a State has legislative jurisdiction does not authorize its enforcement abroad' (1984, 35).

But the point that Brownlie was making, as far as I can tell, was that enforcement jurisdiction presupposes legislative jurisdiction. To put it differently, application of a rule of adjudication is possible only where an underlying rule of conduct exists. The point is about the connection between rules of conduct and rules of adjudication, not the territorial ambit or the actual place of execution of rules of adjudication. And as far as that is concerned, Mann himself noted that 'it is hardly possible for [a State] to enjoy enforcement jurisdiction, when it is without legislative jurisdiction' (1964, 128).

Furthermore, when it is said that a State 'has jurisdiction', that can mean two radically different things. On the one hand, such a statement might refer to the actual ambit of the rules, as determined by the national legal system itself. Thus, if a rule of conduct applies to a person, the State has jurisdiction over that person. On the other hand, the same phrase can be used with reference to the limits imposed by international law. Thus, to have jurisdiction would mean that the State is entitled under international law to extend the ambit of its law in a certain way.

In sum, international law doctrine would clearly benefit from a finer-grained analysis of questions of jurisdiction. In this respect, much could be learned, it seems, from criminal law doctrine and legal theory.

Bibliography

- Akehurst, Michael: 'Jurisdiction in International Law'. 46 *British Year Book of International Law* (1973) 145-257.
- Arnell, Paul: 'The Proper Law of the Crime in International Law Revisited'. 9 *Nottingham Law Journal* (2000) 39-52.
- Austin, J. L.: 'A Plea for Excuses'. 57 *Proceedings of the Aristotelian Society* (1956) 1-30
- AVERT: 'Age of Consent', <www.avert.org/age-of-consent.htm> (visited 7 December 2009).
- Bantekas, Ilias and Susan Nash: *International Criminal Law*. 3rd edn. Routledge-Cavendish, London 2007.
- Barak, Aharon: *The Judge in a Democracy*. Princeton University Press 2006.
- Beale, Joseph H.: 'The Jurisdiction of a Sovereign State'. 36 *Harvard Law Review* (1923) 241-262.
- Benavides, Luis: 'The Universal Jurisdiction Principle: Nature and Scope'. 1 *Anuario Mexicano de Derecho Internacional* (2001) 19-96.
- Bentham, Jeremy: *Limits of Jurisprudence Defined*. Columbia University Press, New York, NY 1945.
- Bentham, Jeremy: 'A General View of a Complete Code of Laws'. In Bowring, John (ed.), *The Works of Jeremy Bentham*. William Tait, Edinburgh 1843, 155-210.
- Berman, Mitchell N.: 'Justification and Excuse, Law and Morality'. 53 *Duke Law Journal* (2003) 1-77.
- Bishop, William W.: 'General Course of Public International Law'. 115 *Recueil des Cours* (II, 1965) 147-470.
- Black's Law Dictionary*. 8th edn. Thomson-West, St. Paul, MN 2004.
- Blakesley, Christopher L.: 'United States Jurisdiction over Extraterritorial Crime'. 73 *Journal of Criminal Law & Criminology* (1982) 1109-1163.
- Brownlie, Ian: *Principles of Public International Law*. 7th edn. Oxford University Press, Oxford 2008.
- Capps, Patrick, Malcolm Evans and Stratos Konstadinidis: 'Introduction'. In Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives*. Hart, Oxford 2003, xvii-xxix.
- Chen, Lung-chu: *An Introduction to Contemporary International Law*. Yale University Press, New Haven, CT 1989.
- Clarkson, C. M. V. and Jonathan Hill: *The Conflict of Laws*. 3rd edn. Oxford University Press, Oxford 2006.
- Colvin, Eric: 'Exculpatory Defences in Criminal Law'. 10 *Oxford Journal of Legal Studies* (1990) 381-407.

- Dan-Cohen, Meir: 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law'. 97 *Harvard Law Review* (1984) 625-677.
- Dubber, Markus Dirk: 'Comparative Criminal Law'. In Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law*. Oxford University Press, Oxford 2006, 1287-1325.
- Duff, R. A.: "'I Might Be Guilty, But You Can't Try Me": Estoppel and Other Bars to Trial'. 1 *Ohio State Journal of Criminal Law* (2003) 245-259.
- Dworkin, Ronald M.: 'The Model of Rules'. 35 *University of Chicago Law Review* (1967) 14-46.
- Eser, Albin: 'Justification and Excuse: A Key Issue in the Concept of Crime'. In Albin Eser and George P. Fletcher (eds), *Justification and Excuse: Comparative Perspectives*. Max Planck Institute for Foreign and International Criminal Law, Freiburg in Breisgau 1987, 17-65.
- Fasolt, Constantin: *The Limits of History*. University of Chicago Press, Chicago, IL 2004.
- Feller, S. Z.: 'Concurrent Criminal Jurisdiction in the International Sphere'. 16 *Israel Law Review* (1981) 40-74.
- Feller, S. Z. and Mordechai Kremnitzer: 'Proposal for a General Part of a New Penal Code – Introduction'. 30 *Israel Law Review* (1996) 36-59.
- Fletcher, George P.: *The Grammar of Criminal Law: American, Comparative, and International*. Oxford University Press, Oxford 2007.
- Fletcher, George P.: *Rethinking Criminal Law*. Little, Brown and Company, Boston 1978.
- Gardner, John: 'Legal Positivism: 5½ Myths'. 46 *American Journal of Jurisprudence* (2001) 199-227.
- Garner, Bryan A.: *Modern Legal Usage*. 2nd edn. Oxford University Press, New York, NY 1995.
- Hacker, Peter: 'Hart's Philosophy of Law'. In Peter Hacker and Joseph Raz (eds), *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*. Oxford University Press, Oxford 1977, 1-21.
- Harris, D. J.: *Cases and Materials on International Law*. Sweet & Maxwell, London 2004.
- Hart, H. L. A.: *The Concept of Law*. 2nd edn. Clarendon, Oxford 1994.
- Hart, H. L. A.: 'Prologomenon to the Principles of Punishment'. In *Punishment and Responsibility*. 2nd edn. Oxford University Press, Oxford 2008, 1-27.
- Heiskanen, Veijo: 'Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction'. 5 *Finnish Yearbook of International Law* (1994) 1-33.
- Henkin, Louis, Richard C. Pugh, Oscar Schachter and Hans Smit: *International Law: Cases and Materials*. West, St. Paul, MN 1980.
- Higgins, Rosalyn: *Problems and Process: International Law and How We Use It*. Clarendon, Oxford 1994.
- Hirst, Michael: *Jurisdiction and the Ambit of the Criminal Law*. Oxford University Press, Oxford 2003.

- Janse, Ronald, Rain Liivoja and María Dolores Sánchez Galera: 'Rule of Law Inventory Report: Academic Part'. HiiL Research Report 2007. Available on <www.hiil.org/assets/44/1-947-Rule_of_Law_Inventory_Report_2007.pdf> (visited 23 February 2010).
- Jennings, Robert Y.: 'General Course on Principles of International Law'. 121 *Recueil des Cours* (II, 1967) 323-605.
- Johnston, David: 'The General Influence of Roman Institutions of State and Public Law'. In David L. Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*. Duncker & Humblot, Berlin 1997, 87-101.
- Kelsen, Hans: *General Theory of Law and State*. Harvard University Press, Cambridge, MA 1946.
- Kelsen, Hans: *Principles of International Law*. Rinehart, New York, NY 1952.
- Kelsen, Hans: *Pure Theory of Law*. University of California Press, Berkeley, CA 1967.
- Kennedy, David: *International Legal Structures*. Nomos, Baden-Baden 1987.
- Koppel, Niko: 'Are Your Jeans Sagging? Go Directly to Jail'. *New York Times*, 30 August 2007 <www.nytimes.com/2007/08/30/fashion/30baggy.html> (visited 23 February 2010).
- Krutz, Glen S. and Jeffrey S. Peake: *Treaty Politics and the Rise of Executive Agreements: International Commitments in a System of Shared Powers*. University of Michigan Press, Ann Arbor, MI 2009.
- Lowe, Vaughan: 'Jurisdiction'. In Malcolm D. Evans (ed.), *International Law*. 2nd edn. Oxford University Press, Oxford 2006, 334-360.
- Maier, Harold G.: 'Jurisdictional Rules in Customary Law'. In Karl M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice*. Kluwer Law International, London 1996, 64-102.
- Malanczuk, Peter: *Akehurst's Modern Introduction to International Law*. 7th edn. Routledge, London 1997.
- Mann, Frederick A.: 'The Doctrine of International Jurisdiction Revisited after Twenty Years'. 186 *Recueil des Cours* (III, 1984) 9-116.
- Mann, Frederick A.: 'The Doctrine of Jurisdiction in International Law'. 111 *Recueil des Cours* (I, 1964) 9-162.
- Milanović, Marko: 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties'. 8 *Human Rights Law Review* (2008) 411-448.
- Murphy, Sean D.: *Principles of International Law*. Thomson-West, St. Paul, MN 2006.
- Nerep, Erik: *Extraterritorial Control of Competition under International Law, with special regard to US Antitrust Law*. 2 vols. Norstedt & Söners, Stockholm 1983.
- O'Keefe, Roger: 'Universal Jurisdiction: Clarifying the Basic Concept'. 2 *Journal of International Criminal Justice* (2004) 735-760.
- Popper, Karl: *The Open Society and Its Enemies. Volume One: The Spell of Plato*. 5th edn. Routledge, Abingdon 2003 [1965].

- Raz, Joseph: *The Concept of a Legal System: An Introduction to the Theory of Legal System*. Clarendon, Oxford 1980.
- Raz, Joseph: 'Legal Principles and the Limits of Law'. 81 *Yale Law Journal* (1972) 823-854.
- Raz, Joseph: 'The Rule of Law and its Virtue'. 93 *Law Quarterly Review* (1977) 195-202.
- Restatement, Second, Foreign Relations Law of the United States*. American Law Institute, St. Paul, MN 1965.
- Restatement, Third, Foreign Relations Law of the United States*. 2 vols. American Law Institute, St. Paul, MN 1987.
- Robinson, Paul H.: *Structure and Function in Criminal Law*. Clarendon, Oxford 1997.
- Robinson, Paul H.: 'Criminal Law Defenses: A Systematic Analysis'. 82 *Columbia Law Review* (1982) 199-291.
- Robinson, Paul H.: 'Rules of Conduct and Principles of Adjudication'. 57 *University of Chicago Law Review* (1990) 729-771.
- Rousseau, Charles: 'Principes de droit international public'. 93 *Recueil des Cours* (I, 1958) 369-550.
- Ryngaert, Cedric: *Jurisdiction in International Law*. Oxford University Press, Oxford 2008.
- Shaw, Malcolm N.: *International Law*. 6th edn. Cambridge University Press, Cambridge 2008.
- Shearer, Ivan: 'Jurisdiction'. In Sam Blay, Ryszard Piotrowicz and Martin Tsameny (eds), *Public International Law: An Australian Perspective*. 2nd edn. Oxford University Press, South Melbourne 2005, 154-183.
- Tråskman, Per Ole: 'Should We Take the Condition of Double Criminality Seriously?'. In Jareborg, Nils (ed.), *Double Criminality: Studies in International Criminal Law*. Iustus, Uppsala 1989, 135ff.
- Tuckness, Alex Scott: *Locke and the Legislative Point of View: Toleration, Contested Principles, and the Law*. Princeton University Press, Princeton, NJ 2002.
- Verdross, Alfred and Bruno Simma: *Universelles Völkerrecht*. Duncker & Humblot, Berlin 1984.
- Wagner, Wienczyslaw J.: 'Conspiracy in Civil Law Countries'. 42 *Journal of Criminal Law, Criminology & Police Science* (1951) 171-183.
- Westlake, John: *International Law*. Cambridge University Press, Cambridge 1904.
- Williams, Glanville L.: *Criminal Law: The General Part*. 2nd edn. Stevens & Sons, London 1961.
- Williams, Glanville L.: 'International Law and the Controversy Concerning the Word "Law"'. 22 *British Year Book of International Law* (1945) 146-163.
- Wilson, Clifton E.: *Diplomatic Privileges and Immunities*. University of Arizona Press, Tucson, AZ 1967.
- Wong, Christoffer: *Criminal Act, Criminal Jurisdiction and Criminal Justice*. Polpress, Cracow 2004.