

International Association of Prosecutors

Prosecutorial Guidelines for Cases of Concurrent Jurisdiction



Making the Decision

“Which Jurisdiction Should Prosecute?”



IAP

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IAP Prosecutorial Guidelines for Cases of Concurrent Jurisdiction
Making the Decision – "Which Jurisdiction Should Prosecute?"

*IAP holds Special Consultative Status
with the Economic and Social Council
of the United Nations*

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About the IAP

The International Association of Prosecutors (IAP) is the only worldwide organisation of prosecutors. It was established in 1995 and has membership within every region of the world.¹ The IAP hosts an annual conference and regional conferences all over the world. As well as providing lively and interesting discussion on questions which are of practical concern to prosecutors, these conferences provide excellent opportunities for networking and getting to know colleagues from other states. Annual conferences take place in different venues each year. Regional conferences in Africa, South America, Western Europe, Eastern Europe/Central Asia, North America and the Caribbean and the Asia-Pacific and Middle East region are now regular events in the IAP. These educative and practically orientated conferences are aimed primarily at front line prosecutors.

These Prosecutorial Guidelines for Cases of Concurrent Jurisdiction are a product of the IAP's mandate to produce good practice for the benefit of our members. In further support of this mandate and the IAP objective to promote global cooperation and dialogue between prosecutors, the IAP has also created three specialist sister websites: first, the Global Prosecutors E-Crime Network (GPEN) for prosecutors dealing with cybercrime; second, the Forum for International Criminal Justice (FICJ) for prosecutors confronting war crimes, crimes against humanity and genocide; and third, the Trafficking in Persons Platform (TIPP), a specialist forum for prosecutors of human trafficking.

For further information about the IAP visit: <http://www.iap-association.org>.

¹ In December 2013, the IAP counted around 170 organisational members and 2,000 individual members.

Executive Summary

Towards our efforts within the IAP, to promote cooperation among prosecutors from around the world, these **Prosecutorial Guidelines for Cases of Concurrent Jurisdiction ('The Guidelines')** are confined to criminal offences and aim to assist prosecutor practitioners address some of the challenges arising from the globalisation of crime and cross-border criminality. The issue of concurrency has arisen frequently at regional and international IAP events and an outcome of the 14th IAP Annual Conference in The Hague, Netherlands in 2009 was to collate various standards, guidelines, case law and Memoranda Of Understanding (MOUs) on concurrent jurisdiction and then draw similarities from these materials into a more comprehensive set of guidelines on resolving conflicts of jurisdiction and primacy. The IAP is pleased to present the following composite set of guidelines which are drawn from the international legal framework, consultations with senior prosecutors, regional and bilateral guidelines as well as notable case law.²

These Guidelines attest to the expansion of crimes beyond state borders – including piracy, business crime, e-crime, war crimes, terrorism, trafficking in persons, arms and drug trafficking, etc. – rendering traditional notions of territorial jurisdiction insufficient to combat transnational crime. In response, a growing number of states have widened their criminal jurisdiction by giving effect to key international obligations and enacting domestic legislation to regulate criminal conduct abroad and prevent safe havens for criminals.

While the broadening web of extraterritorial jurisdiction is necessary to address cross-border criminality, it has regrettably led to an increase of concurrent and conflicting jurisdiction – where more than one state asserts legitimate jurisdiction over the same criminal conduct and both wish to prosecute the same alleged offender. Indeed, criminal conduct which crosses borders may now result in cases being prosecuted in any jurisdiction where a part of the crime occurred including, *inter alia*, where phone calls or emails were made or received, where an accused is a national, where persons were victimised, where assets were deposited, or where persons travelled while committing crime and where any physical activity occurred in furtherance of the crime.³ The exercise of extraterritorial criminal jurisdiction is further expanding because of states' ability to gain custody over prospective accused persons via more effective extradition arrangements.

Concurrent jurisdiction is not entirely new – for instance piracy cases involving vessels sailing on the high seas while flying the flag of only one state, have long been subject to the jurisdiction of multiple states. However what is new "is the frequency with which criminal jurisdiction overlaps."⁴ An International Bar Association (IBA) survey⁵ of 27 states⁶ found that, "it is

² They were prepared principally by Danya Chaikel, lawyer and IAP consultant, and Elizabeth Howe, General Counsel for the IAP with the assistance of Imogen Canavan, graduate in Law from the University of Kent at Canterbury, England. There has also been extensive consultation both within and outside the IAP membership.

³ T. Burrows, Department of Justice USA 'Concurrent Jurisdiction, (International Association of Prosecutors Conference, September 2010).

⁴ Adam B. Abelson, 'The Prosecute/Extradite Dilemma: Concurrent Criminal Jurisdiction and Global Governance' [2009] 16 UC Davis Journal of International Law and Policy 1, p 10.

⁵ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction, 'Report of the Task Force on Extraterritorial Jurisdiction' (IBA 2009), <http://www.ibanet.org/LPD/Financial_Services_Section/Securities_Law_Committee/Projects.aspx>.

⁶ The 27 states surveyed were: Argentina, Australia, Bahrain, Brazil, China, Denmark, Egypt, Finland, France, Germany, India, Republic of Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Tajikistan, United Arab Emirates (UAE), United Kingdom, United States and Venezuela.

clear that criminal jurisdiction remains primarily territorial, but that almost all of the surveyed states exercise and recognise some forms of extraterritorial criminal jurisdiction, with some states taking an expansive approach to such jurisdiction.⁷⁷

Prosecutors will need to address many critical questions when confronted with cases with overlapping jurisdiction, including: which state should prosecute; which factors should determine which jurisdiction has primacy; are there situations where more than one prosecution should take place; who should decide which jurisdiction should prosecute? Indeed the increasing numbers of extraterritorial laws may serve to confuse and create more conflicts in the ever expanding jurisdictional grid. While these may help prevent impunity for cross-border crime, there must be also corresponding multilateral cooperation to ensure efficient, effective and fair prosecutions. Towards this end, these Guidelines while by no means conclusive or exhaustive, aim to provide prosecutors with practical guidance when deciding who should prosecute cases when more than one state claims jurisdiction.

⁷⁷ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 140.

INITIAL CONSIDERATIONS

First steps

1. The first consideration should be: "In which jurisdiction(s)⁸ might a prosecution take place?" Prosecutors must identify all jurisdictions where there is a legal basis for potential prosecutions, but also where there is a realistic prospect of successfully securing a conviction. Making this assessment will require expertise and knowledge, which can only be provided by experienced practitioners from the relevant jurisdictions.⁹
2. Decisions on conflicting jurisdictional claims should be considered at as early a stage as possible so that if and when a prosecution is contemplated in more than one jurisdiction, action may be taken promptly.
3. Each state¹⁰ has a unique set of jurisdiction criteria and may be subject to various national and international legal obligations which need to be assessed and compared in the first instance. Specifically are there *Aut dedere aut judicare* (extradite or prosecute) treaty requirements? Or has another jurisdiction already prosecuted this person(s) for the same conduct, which might prohibit any subsequent prosecutions under the *ne bis in idem* principle (no one shall be twice tried for the same offence)? Are there any applicable Memoranda of Understanding (MOUs) or regional agreements which will assist the process?
4. This leads to another initial critical factor, the need to gauge the possibility of multiple prosecutions and the ability of states to extradite. When an accused person has committed multiple crimes and is subject to prosecution in more than one state, a key issue to consider is whether the state given the first opportunity to prosecute will later deliver the person to another state for subsequent prosecution. For example, does the first state being considered extradite its nationals? Does it have an extradition treaty with the second state or other means, such as domestic extradition law or deportation authority, to deliver the person for trial?

The framework – a case-by-case matrix of factors¹¹

5. With no set of internationally binding rules or bright lines for prosecutors to follow when dealing with concurrent jurisdiction, decisions on who should prosecute should be made on a case-by-case basis with consideration given to the specific facts and merits of each case.¹²

⁸ In these Guidelines, "jurisdiction" refers to the authority to interpret and apply the law within a particular geographic area containing a defined legal authority, as opposed to a "state" which is a sovereign political community under one government. The terms are to an extent used interchangeably in this paper as generally the separate jurisdictions involved are separate states but states can comprise more than one distinct jurisdiction.

⁹ Eurojust, 'Annual Report 2003' (Eurojust 2003) Annex A, p 60, <<http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202003/Annual-Report-2003-EN.pdf>>.

¹⁰ See (n 8).

¹¹ During the Eurojust consultations leading to their Guidelines, the delegates found it useful to apply a matrix. Whilst applying a matrix rigidly may be too prescriptive, some may find a more structured approach to resolving these conflicts of jurisdiction helpful. The matrix approach is applied in these IAP Guidelines with expanded criteria, allowing a direct comparison and weighing of relevant factors to be applied in the various potential jurisdictions.

¹² Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (applies only in England and Wales, Crown Prosecution Service, 2013), p 1, <http://www.cps.gov.uk/publications/directors_guidance/director_s_guidance_on_concurrent_jurisdiction.html>.

6. The responsibility for resolving concurrent jurisdiction exercises for asserting jurisdiction will mainly rest with prosecutors (or police services, ideally in consultation with prosecutors) who routinely make decisions to initiate criminal proceedings. When exercising this duty, prosecutors should balance competing interests for example the applicability of domestic law, the desirability of making a request for extradition, or alternatively to extradite to another state.¹³
7. When more than one state has legitimate links to the same criminal conduct, the following section 'Criteria for Determining Jurisdiction' sets out practical criteria which will help prosecutors navigate through a matrix of relevant factors. Once it is determined which of the factors are relevant for a given case, they should be applied and weighed on a case-by-case approach. Such a process requires flexibility and consultation with partners and counterparts in the other jurisdiction(s). Consideration of the other jurisdiction's track record in terms of application of the rule of law and recognised principles of fairness, independence and compliance with human rights obligations may be a relevant factor.
8. Since each case is inherently unique, any determination about which jurisdiction is best positioned to prosecute should be based on the facts and merits of each case with all relevant factors considered.¹⁴ Which criteria should be applied and their order of priority should be determined in each case.

Two approaches to consider when assessing jurisdiction

9. A European Union Green Paper has noted it may be "necessary to at least agree on a general guiding principle for jurisdiction allocation."¹⁵ For instance, two useful approaches which may be applied to resolve competing jurisdictional claims are the "**balancing or reasonableness test**" and the "**subsidiarity approach**". While valuable to consider, neither approach is yet widespread or established in international customary law.¹⁶
10. First, "under the balancing or reasonableness test, national courts or prosecuting authorities, asked to exercise extraterritorial criminal jurisdiction engage in a 'balancing test', weighing multiple factors to determine whether asserting such jurisdiction is possible and/or appropriate in the particular case."¹⁷ According to the 'American Restatement'¹⁸, the reasonableness test not only reflects US law, but has also developed as a principle of international law, although this assertion is subject to debate.¹⁹ According to the Crown Prosecution Service of England and Wales, as a matter of principle any decision on questions arising from concurrent jurisdiction should be, and should be seen to be, fair and objective.²⁰

¹³ Adam B. Abelson (n 4), p 4-5.

¹⁴ Eurojust (n 9).

¹⁵ European Commission, 'Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings (Green Paper)' COM (2005) 696 final, p 8.

¹⁶ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 168.

¹⁷ Ibid and see European Commission (n 15), p 8.

¹⁸ The Restatement of Foreign Relations Law of the United States reflects the opinions of the American Law Institute in international law as it applies to the United States and domestic law impacting foreign relations, and discusses the sources of international law and its place in U.S. jurisprudence.

¹⁹ Restatement (Third) of Foreign Relations Law of the United States 1987, § 402-3; International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 169.

²⁰ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 1.

11. Second, the subsidiarity approach to resolving competing jurisdictional claims, prioritises states with traditional connections to a crime (such as, *inter alia*, territoriality and possibly nationality under the active personality and passive personality principles). These states have primary jurisdiction, while states with jurisdiction on other bases (such as the protective or universal principles) may only act where the states with primary jurisdiction are unwilling or unable to prosecute.²¹

Multilateral Consultations

12. If it is determined that several states have a jurisdictional claim to initiate proceedings, a meeting should be arranged at a mutually agreed venue between nominated senior prosecutors representing each jurisdiction involved.²² Those prosecutors chosen to attend such a meeting must be fully competent to discuss the issues and make decisions on behalf of the prosecuting authorities in the jurisdiction they represent.²³
13. The decision-making process on who should prosecute ought to be based (wherever possible) on comprehensive multilateral consultations resulting in a consensus on where the cases will move forward. The determination should be reached together with all relevant authorities/contact points in each jurisdiction in accordance with any relevant bilateral MOUs on concurrent jurisdiction, as well as applicable international and regional organisations which either have organised state contact points or can otherwise assist with consultations (e.g. the International Criminal Police Organization (INTERPOL), Eurojust, European Judicial Network (EJN), Organization of American States (OAS), Ibero-American Association of Public Prosecutors (IberRed), Caribbean Community (CARICOM), Association of Southeast Asian Nations (ASEAN), South Asian Association for Regional Cooperation (SAARC)).
14. For example, cases involving European Union Member States may be referred directly to Eurojust²⁴ for assistance, especially when the representatives of the respective jurisdictions cannot reach agreement upon where the case should be prosecuted. Eurojust is available to offer advice and to facilitate such meetings.
15. As part of the discussion to resolve these conflicts, prosecutors should explore all the possibilities provided by current international conventions and instruments, such as transferring proceedings and centralising the prosecution in a single state.²⁵
16. Ideally such multilateral consultations will systematically evaluate the criteria provided in the following section, in order to bring about a collective agreement on who should prosecute.

²¹ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 171. For an explanation of these principles see Annex A.

²² Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 2.

²³ Eurojust (n 9), Annex A.

²⁴ For a full description of Eurojust, see *ibid*, Annex B.

²⁵ *Ibid*, Annex A.

CRITERIA FOR DETERMINING JURISDICTION

Which territory?

17. In which state territory were the alleged offences committed?; where did the majority of the acts in furtherance of the crime take place²⁶ including on or in an aircraft or vessel registered in that state?;²⁷ where was the impact of the offence(s) felt or likely to have been felt?;²⁸ i.e. what was the extent to which the alleged criminal activity took place within the state territory or had a substantial effect upon or in the state territory²⁹ or where was the majority of the loss sustained?³⁰
18. While international customary law recognises no hierarchy among the various territorial and extraterritorial claims to criminal jurisdiction,³¹ there may be practical reasons for the preference of territorial jurisdiction, and the recognition that generally the state where a crime occurred has the greatest connection to the crime, and the strongest interest in regulating the conduct of persons located within their state boundaries.
19. While the territory where an alleged crime occurred is a central factor in determining a state's interest in prosecuting the crime, it "should not be dispositive in establishing jurisdiction."³² Some of the countervailing factors listed below will be relevant as well, and possibly more relevant, since transnational crimes can give rise to a basis for jurisdiction other than territoriality. States with no territorial nexus to an alleged crime may still have stronger interests in prosecuting, "whether in the regulation or protection of its nationals, or in punishing heinous international crimes [...]. The exercise of jurisdiction by the territorial state does not extinguish the other states' interests, or signify that the territorial state's interests should automatically supersede another state's interests."³³

Which jurisdiction has the strongest case?

20. In which state is it relatively more convenient to prosecute? The *forum non conveniens* doctrine (where courts may refuse to assert jurisdiction over cases where a more appropriate forum is available to the parties) in common law states applies to this question.³⁴

²⁶ Ibid; *Swystun v. United States of America* (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Transborder Crime Between the National District Attorneys Association (NDAA) and Directeur des Poursuites Criminelles et Pénales (DPCP) (Quebec) Principle 5(2)(h), p 3; EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009] OJ L 328/42; *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469.

²⁷ Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions Marlborough House, London, October 2010), p 6, para 24.

²⁸ *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Transborder Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(a), p 3.

²⁹ Restatement (Third) of Foreign Relations Law of the United States 1987, (n 19), § 402-3.

³⁰ Eurojust (n 9) Annex A; EU Council Framework Decision 2009/948/JHA, EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009] OJ L 328/42.

³¹ Florian Jessberger, Wolfgang Kaleck and Andreas Schueller, 'Concurring Criminal Jurisdictions under International Law' (Forum for International Criminal and Humanitarian Law, 2010), p 5, <<http://tinyurl.com/k4py7jk>>.

³² Ibid, p 129.

³³ Ibid, p 129.

³⁴ Ibid, p 133-134.

21. Which jurisdiction has the most comprehensive case?³⁵
22. In which state territory are the accused, any co-accused and/or other suspects, as well as the majority of witnesses located, and are they willing and able to testify in another jurisdiction where appropriate?³⁶
23. How has (or will) the evidence be gathered, where is it located,³⁷ and is it available,³⁸ mobile³⁹ and admissible?⁴⁰ Where potentially relevant material is held in one jurisdiction, what is the likely prospect of the material being identified and provided to prosecutors in another jurisdiction which also wishes to prosecute?⁴¹
24. Is there a mutual legal assistance treaty to assist with the investigation and prosecution?
25. Which police force played the major role in the development of the case?⁴²
26. In which territory has the majority of investigations occurred,⁴³ and has either jurisdiction already invested substantial resources in investigating and prosecuting the crime?
27. Has any jurisdiction already laid charges?⁴⁴
28. Is any jurisdiction ready to proceed to trial?⁴⁵
29. In any of the jurisdictions claiming jurisdiction, are there any applicable statutes of limitation (common law) or periods of prescription (civil law) for the alleged crime(s)?

Number of accused & coordinating prosecutions

30. The investigation and prosecution of complex cases of cross border crime will often lead to the possibility of multiple prosecutions in different jurisdictions. Are the alleged crimes in question so serious that it may be appropriate to initiate prosecutions for separate cases in

³⁵ *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Transborder Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(d), p 3.

³⁶ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 4.

³⁷ *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Transborder Crime Between the NDAA and DPCP (Quebec) Principle 5(2)(e), p 3.

³⁸ Eurojust (n 9), Annex A.

³⁹ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 3; *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(f), p 3.

⁴⁰ EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009] OJ L 328/42.

⁴¹ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 3.

⁴² *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America* (1987), 50 Man. R. (2d) 129.

⁴³ Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec), Principle 5(2) (c), p 3.

⁴⁴ *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129.

two or more jurisdictions for one or more accused?⁴⁶ However when practicable, when a crime is committed in more than one jurisdiction, all relevant prosecutions should take place in one jurisdiction.⁴⁷ In such cases, prosecutors should take into account the impact that prosecuting accused persons in one jurisdiction will have on any prosecution in a second or third jurisdiction. Every effort should be made to guard against one prosecution undermining another.⁴⁸

31. Conversely if there are several accused persons in linked criminal conduct, for reasons of efficiency and effectiveness, is it possible to bring them together in one place for trial?⁴⁹
32. Are other jurisdictions able to legally prosecute later, or will a subsequent extradition and/or prosecution be barred by the principle of *ne bis in idem*? If only one state involved applies the principle of "double jeopardy," does that mean that other states are prohibited from prosecuting for the same crime?

Accused

Location/Nationality of the Accused

33. In which jurisdiction was the suspect arrested, and is he or she in custody? Otherwise what is the nationality or primary residence of the accused?⁵⁰
34. What are the realistic possibilities as well as capacity of the competent authorities in one jurisdiction to extradite or surrender an accused from another jurisdiction?⁵¹
35. Are there proceedings against the accused in another jurisdiction on other charges?

Credibility of judicial systems

36. Is there any indication that one of the states claiming jurisdiction, especially from those that have experienced dictatorship or severe conflict, is seeking extradition not for the purposes of criminal prosecution, but rather for some other form of political or military

⁴⁵ Ibid

⁴⁶ Crown Prosecution Service (England and Wales) *Legal Guidance on Jurisdiction*, <http://www.cps.gov.uk/legal/h_to_k/jurisdiction/>.

⁴⁷ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 3.

⁴⁸ Eurojust (n 9), Annex A.

⁴⁹ Ibid; *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(g), p 3.

⁵⁰ *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(i), p 3; EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009]; Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 4.

⁵¹ Eurojust (n 9), Annex A.; EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009]; *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 4.

reasons, and is there a risk of persecution based on political beliefs, nationality, race or similar discrimination?⁵²

Due Process Rights & Fair Trial Standards

37. Is it appropriate to consult or at least inform the suspect about the jurisdictional conflict? Does the accused have any particular interests in being prosecuted in one jurisdiction over another?⁵³
38. Are there negative consequences for the suspect to be tried abroad compared to facing a trial where he or she is usually located? Is it possible and/or practical to move the accused from the place where he or she lives and works to another state?
39. Do all states asserting jurisdiction guarantee fair criminal proceedings, such as the right to due process and to have one's case heard by a competent court or tribunal established by law?⁵⁴ Will the accused be afforded the following due process rights: presumption of innocence; right to counsel; equality of arms; free interpretation and translation services?⁵⁵ Consideration should also be paid to possible restrictions on an accused's access to employment, finances, family ties, medical services, etc. What is a given state's track record on these defence rights?
40. Is there a risk that the accused may be subject to inhuman treatment in one state?⁵⁶ Do any of the states have specific international human rights treaty obligations? The growing influence of international human rights norms is increasingly playing a role in criminal proceedings. For example, signatories to the *UN Convention Against Torture*, cannot extradite a person to states "where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁵⁷ This obligation is so significant that it would apply even where there would be no basis for criminal jurisdiction in the signatory state.⁵⁸
41. For EU member states, the decision on who should prosecute "must always be fair, independent, objective and it must be made applying the European Convention of Human Rights ensuring that the human rights of any accused or potential accused are protected."⁵⁹
42. Is the accused under the age of criminal responsibility in one state?⁶⁰

⁵² International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 173-174; according to the IBA Survey, such persecution can be grounds for refusing an extradition request and thus for exercising extraterritorial jurisdiction in Argentina, China, Finland, France, Malaysia, Russia, Spain and the United Kingdom.

⁵³ EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009]; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

⁵⁴ EC Green Paper, On Conflicts of Jurisdiction and the Principle of *Ne Bis In Idem* in Criminal Proceedings (n 15), p 27.

⁵⁵ International Bar Association, 'Rights of Defendants at the ICC', <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=621B2B54-6A06-4D05-A3D2-8C951D96D15C>>; EC Green Paper, *On Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings* (n 15), p 38; Colin Warbrick, 'Current Developments, Public International Law', [2007] 56 ICLQ 659, p 659; Seafarers' Rights International, 'SRI Survey: Seafarers and the Criminal Law' (2nd edn, Seafarers' Rights International 2013), p 34, <https://www.seafarersrights.org/images/seafarers_and_the_criminal_law_survey>.

⁵⁶ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 173-174.

⁵⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Art 3.

⁵⁸ Abelson (n 4), p 132.

⁵⁹ Eurojust (n 9), Annex A.

⁶⁰ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 173-174.

43. What is the prospect of rehabilitation post-sentence?⁶¹

Delay

44. An internationally recognised legal maxim is that “justice delayed is justice denied” so any decision on jurisdiction should be reached as early as possible in the investigation or prosecution process.⁶²
45. Prosecutors should therefore consider which jurisdiction can get to trial sooner, any potential delays which may occur and how long it will take for the proceedings to be concluded.⁶³

Victims

46. Are a state’s interests affected by its nationals being victims of crimes abroad, such as in cases of terrorism, thereby justifying jurisdiction based on both passive personality and universality?⁶⁴
47. Where are the victims located, and what are their interests?⁶⁵ Prosecutors must take into account whether any significant interests of victims would be prejudiced if any prosecution were to take place in one jurisdiction over another. Such consideration would include the possibility of victims claiming compensation.⁶⁶
48. The nationality of victims is relevant, but should rarely be determinative of jurisdiction. Nevertheless, “in certain limited circumstances, nationality may become the most important connecting factor, such as with crimes committed outside the territory of all states, such as piracy on the high seas.”⁶⁷

Witnesses

49. Where are the witnesses located?⁶⁸ There should be the least amount of burden on witnesses and where possible significant consideration should be given to their interests.⁶⁹
50. Are potential witnesses both willing to give evidence and, if necessary, to travel to another jurisdiction to give that evidence? If not does the potential prosecuting state have the ability to issue subpoenas (common law) or citations (civil law) to such persons? In the absence of

⁶¹ EC Green Paper, On Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings, (n 15), p 37.

⁶² Eurojust (n 9) Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

⁶³ Ibid; EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009]; Director of Public Prosecutions *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 4.

⁶⁴ Abelson (n 4), p 129.

⁶⁵ Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

⁶⁶ Eurojust (n 9) Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46); EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009]; Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(b), p 3.

⁶⁷ Abelson (n 4), p 130.

⁶⁸ Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

⁶⁹ EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009].

an international witness warrant, the possibility of the court receiving their evidence in written form, or by other means remotely (by telephone or video-link) will have to be considered.⁷⁰

51. Which jurisdictions provide witness protection programmes and adequate security measures?⁷¹ Prosecutors should always seek to ensure that witnesses' rights to be protected are upheld and they are not put at risk.⁷²

Sentencing Powers

52. What are the available offences and penalties which appropriately reflect the seriousness of the criminal conduct in each possible jurisdiction?⁷³
53. Which jurisdiction can secure a sentence that deters similar conduct and results in just punishment?
54. Are any of the concerned jurisdictions party to binding regional provisions or international instruments which address the transfer of prisoners and stipulate the location where sentences may be carried out post-conviction?⁷⁴
55. For states that bar extradition of persons to a state that might impose the death penalty, does the requesting state apply capital punishment as a penalty for the offence at issue and will this require further consultation or assurances that the death penalty will not be invoked?⁷⁵
56. Are there any issues arising from the incompatibility of sentencing systems, such as conflicting judicial policies on practices such as plea bargaining?⁷⁶

State Interests

57. Which jurisdiction has the greater interest in prosecuting the offence?⁷⁷ The 'American Restatement' provides that where it would not be unreasonable for two or more states to exercise jurisdiction, but their laws are in conflict, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction" and should "defer to the other state if that state's interest is clearly greater".⁷⁸

⁷⁰ Eurojust (n 9) Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

⁷¹ *Ibid.*

⁷² Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 4.

⁷³ Eurojust (n 9), Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46); Director of Public Prosecutions *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 4; *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129.

⁷⁴ United Nations Convention against Transnational Organized Crime, Art 16(1); Joon Gyu Kim and Cheol-Kyu Hwang, *New Initiatives on International Cooperation in Criminal Justice* (Seoul National University Press, 2012), p 197.

⁷⁵ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5) p 173-174.

⁷⁶ See *R v Innospec Limited* ([2010] EW Misc 7 (EWCC)) and *R v Robert John Dougall* ([2010] All ER (D) 113), which deal with UK and US conflicts over plea bargained sentences in cross border criminal cases.

⁷⁷ *United States of America v. Cotroni*; *United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469; *Swystun v. United States of America*, (1987), 50 Man. R. (2d) 129; Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec), Principle 5(2)(j), p 3.

⁷⁸ Restatement (Third) of Foreign Relations Law of the United States 1987, (n 19), § 403(3).

SECONDARY CRITERIA FOR DETERMINING JURISDICTION

Proceeds of Crime

58. Prosecutors should consider the legal authority in a particular jurisdiction available to restrain, recover, seize and confiscate the proceeds of crime and make the most effective use of related international cooperation agreements. Prosecutors should not, however, decide to prosecute in one jurisdiction over another solely because it would result in the more effective recovery of the proceeds of crime, while ignoring other factors.⁷⁹

Sentencing Powers

59. The ability of courts in the potential jurisdictions to order an appropriate sentence is an important factor in deciding in which jurisdiction a case should be prosecuted. Prosecutors should not, however, seek to prosecute a case in one jurisdiction solely because that is where the penalties are the most severe. Other factors such as those described in preceding paragraphs must also be considered.

Costs of Prosecuting

60. The resource implications of prosecuting a case should only be a factor in deciding whether a case should be prosecuted in one jurisdiction over another if all other factors are equally balanced.⁸⁰

Political Considerations

61. When several states claim jurisdiction over the same offences, there are often significant foreign relations implications. While important, such political considerations should not override the other reasons for asserting criminal jurisdiction.⁸¹
62. Relevant authorities should not refuse to accept a case for prosecution in their jurisdiction because the case does not interest them or is not a priority of the senior prosecutors or the justice department/ministry.⁸² Other jurisdictions, however, may well want to consider whether there are better options available than pressuring a reluctant prosecution service to take a case.

⁷⁹ Eurojust (n 9) Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

⁸⁰ *Ibid.*

⁸¹ Abelson (n 4), p 128.

⁸² Eurojust (n 9), Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

Annex A: Legal Terminology

BASES FOR ASSERTING CRIMINAL JURISDICTION

International law recognizes five principal bases for asserting criminal jurisdiction:

(1) Territorial

And extraterritorially through:⁸³

(2) Active Personality (nationality of offender)

(3) Passive Personality (nationality of victim)

(4) Protective Principle (national interests are at stake) and

(5) Universality⁸⁴

Territorial jurisdiction

1. Territorial

The most conventional and common basis for jurisdiction is based on territoriality. A state may assert jurisdiction on the basis that the alleged offence, or any essential element of the crime, was committed on its territory.⁸⁵ This basis can easily lead to concurrency or conflict, since the state or states where the other elements of the crime occurred would also have a jurisdictional claim. The following is illustrative: A suspect abuses children sexually in Thailand and Costa Rica; sells child pornography from his home in Virginia; uses a pornography web site based in servers located in Malaysia; sells child pornography that he has made as well as what he has collected from others to customers all over the world; and uses email accounts to conduct his business that are on servers in California and launders his money in the Cayman Islands.⁸⁶ This scenario may lead to concurrency and competing claims to jurisdiction as the crime has physically taken place in several states.

States interpret territorial jurisdiction in different ways. Some states still consider an offence to have been committed on its territory only if the entirety of the crime was committed in their territory. However according to the Commonwealth Secretariat, "such an approach is likely to lead to legal lacunae in cases in which at least a part of the criminal act has taken place abroad. Since this is typical for transnational crime and criminal networks, the narrow implementation of the territorial principle can be a serious obstacle."⁸⁷ Another wider approach known as the "doctrine of ubiquity" or "objective territoriality", permits territorial jurisdiction even when part of the crime has been carried out in the territory of a state. Therefore, a domestic act of participation may be sufficient even when the main act was committed abroad.⁸⁸

⁸³ The International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5) that surveyed 27 states found, at p 142, that "almost all states exercise ... extraterritorial criminal jurisdiction on one or more of four principal bases: the active personality principle, the passive personality principle, the protective principle and the universality principle."

⁸⁴ The five bases of jurisdiction are widely based on the Harvard Research in International Law, "Jurisdiction with Respect to Crime" (1935) 29 AJIL Spec Supp 435, p 445.

⁸⁵ I. Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, 2008), 301.

⁸⁶ T. Burrows (n 3).

⁸⁷ Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (n 27), p 7, para 29.

⁸⁸ *Ibid*, p 7, para 30.

Extraterritorial jurisdiction

As criminal networks and activities spread beyond state boundaries, states have sought to extend their jurisdiction over offences committed outside their territory. An early international case is the 1927 S.S. *Lotus case*,⁸⁹ when the Permanent Court of Justice (precursor to the International Court of Justice) upheld Turkish criminal jurisdiction over French citizens based on conduct related to a collision between French and Turkish ships on the high seas. The Court observed:

*Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.*⁹⁰

Similarly in the 1989 Canadian case, *United States of America v. Cotroni; United States of America v. El Zein* the Supreme Court of Canada observed:

*The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today.*⁹¹

2. Active Personality/Nationality Principle

This form of jurisdiction is claimed on the basis of the nationality of the accused whereby the alleged offender is a national of that state who has his or her habitual residence in its territory.⁹² This is the most recognised exception to the traditional principle of territoriality, having been applied to the offences of treason, piracy, murder and corruption or bribery.⁹³ The rationale for this principle is that a state should exercise jurisdiction over its own nationals wherever they may commit an offence. This is especially relevant for those states which do not extradite their nationals. Otherwise, such states would be safe havens for their citizens who go abroad, commit crimes and return home. Concurrency and a possible jurisdictional conflict may occur if for example, both the state of nationality of the accused as well as the state where the crime allegedly occurred, assert jurisdiction over the same crime.

This principle is the "least controversial basis for the exercise of extraterritorial criminal jurisdiction, although it is used more often in civil law than common law systems."⁹⁴ It is usually

⁸⁹ S.S. "*Lotus*" (Fr. vs. Turk.) 1927 P.C.I.J. Reports (ser. A), No. 10. (Sept. 7). The incident had occurred on the high seas and France claimed that only the state whose flag the vessel flew had jurisdiction to conduct the trial. The Court, however, rejected that argument and found that there was no rule in international law which prohibited the taking of an extended jurisdiction and that a sovereign state, in that regard, was able to take jurisdiction as it wished so long as, by so doing, it did not breach an express prohibition in, for instance, a formal instrument.

⁹⁰ *Ibid*, para 50.

⁹¹ *United States of America v. Cotroni; United States of America v. El Zein*, Supreme Court of Canada [1989] 1 SCR 1469.

⁹² Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (n 27), p 6, para. 24.

⁹³ *Ibid*, p 3.

⁹⁴ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 144.

provided for by statute in common law systems,⁹⁵ in contrast to most civil law systems which have always asserted jurisdiction according to the active personality principle, without any need for express provisions in statute.

3. Passive Personality

Jurisdiction may also be asserted on the basis of the nationality of the victim, when an alleged offence is committed abroad against a national of the state seeking to prosecute. This principle is potentially far-reaching, since a state could justify applying its law to any crime committed against one of its nationals. Therefore “many courts and commentators are critical of the principle.”⁹⁶ Similar to active personality, the passive personality principle creates instances of concurrent jurisdiction when for instance the state where the conduct occurred also asserts jurisdiction.

Civil law systems have long recognised passive personality as a basis for jurisdiction, but until recently this was not the case in common law systems. Whilst increasingly recognised, “some states and commentators, particularly from common law jurisdictions, do not regard the passive personality principle as a permissible basis for jurisdiction, but this may be changing, at least in respect of some offences.”⁹⁷ Nevertheless, this principle is recognised in numerous domestic laws and in a number of international treaties.⁹⁸ In the IBA study, just over half of the states surveyed adopted some version of the passive personality principle of jurisdiction, although normally only for prescribed crimes.⁹⁹

As an example, the 1971 assassination of the Jordanian Prime Minister in Cairo and the 1973 murder of three foreign diplomats in Khartoum prompted an “international response on passive personality as a basis for jurisdiction in the fight against terrorism.” This then led to the 1973 Diplomats Convention which was the first counter-terrorism instrument which established jurisdiction based upon the nationality of the victim.¹⁰⁰

4. Protective Principle

A state may further assert jurisdiction on the basis that its national interests are at stake. That is jurisdiction over crimes committed abroad by foreigners that constitute a threat against the state, its interests, or its security, even if no nationals of that state are victims.¹⁰¹ While 21 of the 27 states surveyed for the IBA jurisdictional study have enacted legislation based on some form of the protective principle, whether and how this legislation has been utilised in practice is another matter, and furthermore there is no general consensus concerning its exact definition and scope.¹⁰² Jurisdiction based on the protective principle may cause concurrency when the conduct also violates the law of the state where it was committed.¹⁰³

⁹⁵ Commonwealth Secretariat, ‘Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions’ (n 27), p 3.

⁹⁶ Abelson (n 4), p 116.

⁹⁷ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 147.

⁹⁸ Ibid, p 97.

⁹⁹ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 147.

¹⁰⁰ Commonwealth Secretariat, ‘Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions’ (n 27), p 3.

¹⁰¹ Abelson (n 4), p 117.

¹⁰² International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5), p 149-150.

¹⁰³ Abelson (n 4), p 118.

In the U.S. Court of Appeal, the Second Circuit has defined protective jurisdiction as permitting extraterritorial jurisdiction “over non-nationals for acts done abroad that affect the security of the State.”¹⁰⁴ Applying this principle, it upheld jurisdiction over a conspiracy to bomb a U.S. aircraft because “the planned attacks were intended to affect the United States and to alter its foreign policy.”¹⁰⁵

In the 2006 American *Statoil* case, the oil company Statoil ASA was charged with bribing an Iranian official to assist the company gain a contract to develop Iranian oil and gas projects.¹⁰⁶ The company was registered in Norway and so no active conduct occurred inside the United States. However, the “US asserted jurisdiction on the basis that US instrumentalities were used to transfer the bribe payments and as Statoil was quoted on the NY Stock Exchange, it was caught by the Foreign Corrupt Practices Act (FCPA) 1977, (grants jurisdiction where the legal person is a US issuer) thereby asserting jurisdiction arguably on the basis of protective and/or an “extended” active personality principle.”¹⁰⁷ This is a relevant case for other states which may wish to claim protective jurisdiction over cases where their market interests are at stake.

5. Universal Jurisdiction

Universal Jurisdiction may be asserted over offences committed outside national borders where there is no, or limited, nexus with the crimes and the prosecuting state, but where the offence is regarded as so grave as to deserve of universal condemnation. Whilst there is no internationally accepted definition, the Princeton Principles on Universal Jurisdiction offers the following description: “Criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or the convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”¹⁰⁸ The justification of such a broad jurisdiction is to safeguard the entire international community, since certain heinous crimes like genocide affect the interests of all states, or transient crimes such as piracy, could slip through the jurisdictional cracks and otherwise go unpunished.¹⁰⁹

Since this basis for jurisdiction is so wide sweeping, it is the most controversial and unsettled. Even so, many states now authorise prosecutions based on universal jurisdiction for a narrow range of crimes including war crimes such as grave breaches of the Geneva Conventions,

¹⁰⁴ United States v. Yousef, 327 F.3d 56, 110 (2d Cir. 2003).

¹⁰⁵ For example, see Spanish law established the passive personality principle in Article 23.4 and 5 of the Spanish Law of the Judiciary by the Organic Law 1/2009 on 3 November 2009; according to Article 5(1) (c) of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states are authorized but not obliged to establish criminal jurisdiction on the basis of the passive personality principle.

¹⁰⁶ United States v. Statoil, ASA, 06 Cr. 960 (S.D.N.Y. Oct. 13, 2006).

¹⁰⁷ Commonwealth Secretariat, ‘Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions’ (n 27), p 3.

¹⁰⁸ Stephen Macedo, ‘Princeton Principles on Universal Jurisdiction’ (Princeton University Press, 2001), p 28, <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf>.

¹⁰⁹ Abelson (n 4), p 118.

piracy, genocide, torture, slavery, and certain acts of terrorism.¹¹⁰ However, pure universal jurisdiction – where a state has absolutely no nexus to an alleged crime – is not widely invoked. In the *Arrest Warrant* case, the International Court of Justice (ICJ) considered, *inter alia*, the issue of the exercise of universal jurisdiction.¹¹¹ The ICJ concluded, *obiter*, that a nexus with the state seeking to exercise jurisdiction was required and that universal jurisdiction could not be asserted if the offender was not within its territory or there was no other nexus with the state. Therefore, the issuing of a warrant *in absentia* for an offence that attracts universal jurisdiction was “struck” down.¹¹² Conversely however in another example on 11 May 2012, the Malaysian Kuala Lumpur War Crimes Tribunal exercised universal jurisdiction to symbolically convict *in absentia* former US president George W. Bush and seven administration officials for war crimes.¹¹³ While jurisdiction based on universal jurisdiction is not internationally recognised or settled, this is nonetheless one basis on which states do assert jurisdiction for certain cross-border grave crimes.

OTHER RELEVANT LEGAL MAXIMS

***Ne bis in idem* (“not twice in the same”)**

Ne bis in idem is a maxim of international criminal law originating from civil law, which is also known as a plea of ‘*autrefois convict*’ or ‘*autrefois acquit*’ (French for previously convicted or acquitted), which all essentially mean that an accused person should not be prosecuted more than once for the same criminal conduct. Therefore in concurrent jurisdiction cases a foreign prosecution which is already completed may preclude other jurisdictions from prosecuting the same person for the same alleged discrete crimes. The principle of ‘double jeopardy’ in common law jurisdictions is also related.

According to the International Covenant on Civil and Political Rights, “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each state.”¹¹⁴ The Eurojust Guidelines for Deciding which Jurisdiction Should Prosecute (and other guidelines which refer to the Eurojust Guidelines therein) support and endorse this principle.¹¹⁵

¹¹⁰ Commonwealth Secretariat, ‘Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions’ (n 27), p 4, p 8 and para 38; Abelson (n 4), p 119; In the International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5) survey of 27 states at p 154-155: approximately three-quarters of states surveyed recognise in legislation some form treaty-based universal jurisdiction and applying to: piracy (covered in national legislation in eight of the 27 surveyed states), crimes against humanity (five states), war crimes (eight states), hijacking (five states), terrorism (five states), torture (four states), human trafficking (three states) and drug trafficking (three states).

¹¹¹ *Democratic Republic of the Congo v. Belgium*, Arrest Warrant of 11 April 2000, (2002), Judgment, ICJ, p 3.

¹¹² Judge Guillaume noted that customary international law traditionally recognised only one case of universal jurisdiction, that of piracy. Judge Guillaume described that, following the The Hague Convention of 1970 and the express principle contained therein of “extradite or prosecute” the concept of universal jurisdiction has gained wider currency in respect of a broader range of offences. However, that did not allow for an unlimited right to a state to claim jurisdiction. Rather, there must be some connection or nexus between such a state and the offence (for instance through the nationality of the victims), or between the state and the offender (for instance if the accused is present in the territory). *Democratic Republic of the Congo v. Belgium*, Arrest Warrant of 11 April 2000, (2002), Separate opinion of President Guillaume, ICJ, at p 37-39.

¹¹³ *Chief Prosecutor of KLWCC v George W. Bush & 7 Ors*, Tribunal Judgment, Case No. 2-CTH-2011, KLWCT 7-11 May 2012, para 2.3, <<http://criminalisewar.org/tribunal/Judgement%20KLWCT%20May%202012.pdf>>.

¹¹⁴ United Nations, Treaty Series, vol 999, p 171, Art 14(7).

¹¹⁵ Eurojust (n 9), Annex A; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

Extradition

Extradition is the criminal procedure by which a person is sent from the state in which he or she is found to a state requesting his or her return, pursuant to an official request in order to stand trial for crimes which the requesting state alleges jurisdiction over, or to serve a sentence of imprisonment therein. This is normally facilitated via treaty arrangements, and there is no general obligation under customary international law to extradite persons for offences not covered by international agreements containing such an obligation.¹¹⁶

Concurrency and conflicts over jurisdiction are sometimes exacerbated by challenges over extradition since one state normally has custody of the accused, which raises the question of whether the custodial state should prosecute or extradite.¹¹⁷ Extradition treaties usually do not address how to prioritise conflicting jurisdictional claims, or whether a state should prosecute or extradite.¹¹⁸ Some jurisdictions are not willing to extradite their own nationals for prosecution in another jurisdiction, but are for instance willing to broadly claim domestic jurisdiction and prosecute locally on such a basis of 'passive jurisdiction' for a crime committed wholly outside their jurisdiction.¹¹⁹

Extradite or Prosecute

The principle of extraditing or prosecuting has become a core obligation in international treaties and some scholars claim it has a place in international customary law.¹²⁰ When an alleged offender is found on the territory of a treaty party, the state must either extradite the person or assert jurisdiction and prosecute in its domestic courts as outlined by the treaty. This is to ensure that there are no jurisdictional gaps in the prosecution of internationally committed crimes since "criminals should not escape trial and punishment simply by absconding to another country".¹²¹ This method of deciding on and granting jurisdiction has become increasingly common since World War II including the following notable conventions:

¹¹⁶ Ibid, p 165.

¹¹⁷ For instance, French case against Véronique Courjault in which a jurisdiction dispute arose between France and South Korea. In 2006 Ms Courjault's husband found two infant corpses in the freezer of their South Korean residence. South Korean DNA tests confirmed that the infants were those of the Courjaults who were both French citizens. Korean authorities requested MLA from France to deliver the summons and interrogate the couple who were back in France. France refused, but then asked for MLA from Korea. Deciding on who should prosecute involved considerations such as which government had more interest in bringing justice in the case, guaranteeing due process for the defendants and that the defendants received appropriate punishment for infanticide if found guilty. Ultimately South Korea decided to convey jurisdiction to France because France already had custody of the two accused and was willing to administer justice. Based on the MLA Treaty between the two states, South Korean authorities provided the necessary evidence for the French prosecution. In 2009, Ms Courjault alone was found guilty of having murdered three of the couple's infants: see Joon Gyu Kim and Cheol-Kyu Hwang, 'New Initiatives on International Cooperation in Criminal Justice' (Seoul National University Press, 2012), p 163-165.

¹¹⁸ Eurojust (n 9) p 161; Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

¹¹⁹ For example, UK case of Lee Murray. Mr Murray fled to Morocco after masterminding a major £53m robbery committed in England in 2006 and claimed Moroccan nationality. He was convicted and sentenced to 25 years imprisonment in Morocco in 2010 based on evidence provided by UK authorities; see BBC, 'Cage-fighter jailed over £53m Kent Securitas Raid', (BBC, 1 June 2010), <<http://www.bbc.co.uk/news/10209285>>.

¹²⁰ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5) p 162; International Law Commission, *Fourth Report on the Obligation to Extradite or Prosecute*, (U.N. Doc. A/CN.4/648, 2011), para. 74.

¹²¹ Anton Du Plessis, 'A snapshot of international criminal justice cooperation against terrorism since 9/11', in *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press 2013), p 41.

- The Geneva Conventions of 1949,¹²²
- The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970,
- International Convention Against the Taking of Hostages 1979,
- International Convention for the Suppression of Terrorist Bombings 1997,
- International Convention on the Suppression of the Financing of Terrorism 1999,
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment 1984, and
- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973.

The *aut dedere aut judicare* obligation must be considered in concurrent jurisdiction cases where at least one of the states is party to a treaty obliging that state to prosecute or extradite a suspect. In fact this added legal obligation may assist in speeding up the decision making process on which jurisdiction should prosecute. Typical offences which fall under the *aut dedere aut judicare* principle include hijacking of civilian aircraft, taking of civilian hostages, acts of terrorism, torture and crimes against internationally protected persons, among other international crimes. This rule is also extended to other 'regular' crimes such as murder, trafficking, fraud, etc.

The treaty provisions referred to above, do not provide guidance or help determine which of the two options (prosecute or extradite) states should choose.¹²³ In July 2012, the International Court of Justice (ICJ) provided some guidance on the *aut dedere aut judicare* principle in a case concerning 'Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)'.¹²⁴ In their final judgement, the ICJ confirmed the obligation of states parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to either prosecute alleged perpetrators or extradite them to another state which has jurisdiction to prosecute (in accordance with Article 7).¹²⁵ This case pertained to a longstanding conflict between Belgium and Senegal over the prosecution of former President of Chad, Hissène Habré for acts of torture, crimes against humanity and possibly genocide allegedly perpetrated during his presidency in the 1980s. This ruling has implications for other former leaders as it gives all 151 state signatories to CAT the right, even if they have no direct involvement in the case, to demand prosecution of a suspect residing in another signatory state's territory.

¹²² The grave breach regime of the Geneva Conventions is a classic example of a treaty based duty to prosecute or extradite with the following text common to all four Conventions with Art 49/50/129/146 common to the four Conventions stating: "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

¹²³ Abelson (n 4), p 124-125.

¹²⁴ Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (Jul. 20, 2012), <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=bs&case=144&k=5e>>.

¹²⁵ Ibid.

Annex B: International Legal Framework

INTERNATIONAL

Currently there is no comprehensive international convention, treaty, set of guidelines or customary rules to assist prosecutors resolve conflicts of concurrent jurisdiction. Nevertheless, states do agree on particular approaches for discrete crimes as a matter of treaty law. In some treaties, "states agree to cooperate to determine the most appropriate state to exercise jurisdiction where more than one state claims or could claim jurisdiction."¹²⁶ According to an extensive survey of multilateral conventions by the Secretariat of the UN's International Law Commission, there are 61 multilateral instruments that contain provisions providing extradition and prosecution as optional courses of action for the punishment of offenders.¹²⁷

Most international instruments, such as the UN Convention Against Corruption and the UN counter-terrorism conventions and protocols apply more traditional forms of jurisdiction, namely territorial or active personality. These instruments may also include discretionary jurisdictional provisions for passive personality or protective jurisdiction.¹²⁸ Nearly all of the international counter-terrorism instruments, and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons introduced the requirement that a State Party must establish jurisdiction over an alleged offender who is a national of that state.¹²⁹

Notably, the UN Convention against Transnational Organised Crime (UNTOC) is specially mandated to promote cooperation to prevent and combat transnational organized crime more effectively. Article 15 refers to jurisdictional issues over the relevant offences, and particularly article 15(5) refers to situations of concurrent jurisdiction and the need for authorities in the implicated States Parties to consult one another in order to coordinate their actions. Article 16 further addresses extradition.¹³⁰ At the time of writing 175 states are States Parties to UNTOC.

Furthermore, there are numerous bilateral and regional Mutual Legal Assistance (MLA) treaties which assist states in exchanging the necessary information for deciding who should prosecute and also to assist with compiling relevant evidence which, in cross-border cases, may be spread throughout several states.¹³¹ Such treaties may also serve as a useful starting point to organising multilateral discussions on which jurisdiction should prosecute. Several examples of

¹²⁶ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5) p 167; See for example: 2002 UN Convention Against Corruption Article 42(2)(a), entry into force 14 December 2005, 41 ILM 31, at Article 42(5); COE Convention on Cybercrime Article 22(5), 23 November 2001, 41 ILM 282; International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, S Treaty Doc 106-49, Art 7.

¹²⁷ International Law Commission, Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic, *The obligation to extradite or prosecute (aut dedere aut judicare)*, (U.N. Doc. A/CN.4/630, 2010), para. 4.

¹²⁸ Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (n 27), p 5, para 18.

¹²⁹ UN General Assembly, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, No. 15410, Article 3(b); Commonwealth Secretariat (n 27), p 3, paras 10-11.

¹³⁰ UN Office on Drugs and Crime, *UN Convention Against Transnational Organised Crime and the Protocols Thereto* (UNODC, 2004), <<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook.pdf>>.

¹³¹ Crown Prosecution Service, (England and Wales) 'International Enquiries', <http://www.cps.gov.uk/legal/I_to_o/obtaining_evidence_and_information_from_abroad/>.

regional MLA treaties are described below under the relevant regions. In February 2013, the United Nations Office on Drugs and Crime (UNODC) produced a Draft of a comprehensive Study on Cybercrime in 2013 and Chapter 7 deals with international cooperation and gives a good overview of issues around conflicts of jurisdiction.¹³²

The Commonwealth

The Commonwealth Secretariat established the Commonwealth Network of Contact Persons (CNCP) in 2007, to facilitate international cooperation in criminal cases between Commonwealth Member States including mutual legal assistance and extradition and to provide legal and practical information necessary to the relevant authorities. The CNCP works to strengthen the existing Commonwealth Schemes namely the Scheme on Mutual Legal Assistance in Criminal Matters (Harare Scheme) and the London Scheme on Extradition.¹³³ The Commonwealth Secretariat also issued a *Paper on Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions* in October 2010 which is referenced in these IAP Guidelines.¹³⁴

EUROPE

The European Union's (EU) institutions have both legislated and provided guidance for resolving conflicts of jurisdiction amongst its member states. The EU is arguably the most advanced regional or international body to have considered cases involving conflicting jurisdiction. In terms of legal provisions, Article 31(1) of the Treaty on European Union provides that "Common action on judicial cooperation in criminal matters shall include [...] (d) preventing conflicts of jurisdiction between member states." Article 31(2) of the Treaty on European Union states "The Council shall encourage cooperation through Eurojust by: (a) enabling Eurojust to facilitate proper coordination between Member States' national prosecuting authorities."¹³⁵ The principle of *ne bis in idem* is also provided for in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA).¹³⁶ The European Convention on Extradition further discusses prioritisation of claims where multiple states have jurisdiction.¹³⁷

Within the European Union, increasingly, mutual legal assistance mechanisms are being replaced by mutual recognition instruments – that is the "process by which a decision usually taken by a judicial authority in one EU state is recognised, and where necessary, enforced by other EU states as if it was a decision taken by the judicial authorities of those latter states."¹³⁸

¹³² UN Office on Drugs and Crime, 'Comprehensive Study on Cybercrime' (2013), <http://www.unodc.org/documents/commissions/CCPCJ_session22/13-80699_Ebook_2013_study_CRP5.pdf>.

¹³³ The Commonwealth, 'Commonwealth Network of Contact Persons', <<http://www.thecommonwealth.org/subhomepage/165671/>>.

¹³⁴ Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (n 27), p 7, para 29.

¹³⁵ Consolidated Version of the Treaty on European Union [2002] OJ C325/5 5, <http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf>.

¹³⁶ Convention Implementing the Shengen Agreement [2000] OJ L 239 19, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2802%29:en:HTML>>.

¹³⁷ International Bar Association Legal Practice Division Task Force on Extraterritorial Jurisdiction (n 5) p 167; European Convention on Extradition 1957, 359 UNTS 273, Art 17.

¹³⁸ See European Commission, 'Recognition of Decisions Between EU Countries' (16th July 2013), <http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm>.

However, one MLA agreement between EU states still in place is the Convention on Mutual Assistance in Criminal Matters adopted in 2000.¹³⁹

Under the European Arrest Warrant (EAW) system, the EAW Council Decision provides a rubric in the event of multiple requests among member states: "if two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order."¹⁴⁰ Another example is the European Evidence Warrant (EEW) which supplements the system of mutual assistance for obtaining objects, documents and data for use in criminal proceedings.¹⁴¹

To access more resources on EU mutual recognition, extradition and cooperation, visit the EU website judicial cooperation in criminal matters:

http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/index_en.htm

Eurojust

Eurojust is the EU Agency dealing with judicial cooperation in criminal matters, and is made up of national prosecutors who are mandated to bolster the fight against serious forms of cross-border crime.¹⁴² In order to carry out its tasks, Eurojust maintains privileged relationships with the European Judicial Network (see below), the European Police Office (Europol), the European Anti-Fraud Office and liaison magistrates. It is also able, through the EU Council, to conclude cooperation agreements with non-member States and international organisations or bodies such as UNODC for the exchange of information or the secondment of officers. At the request of a member State, Eurojust may assist investigations and prosecutions concerning that particular member State and a non-member State, if a cooperation agreement has been concluded or if there is an essential interest in providing such assistance.

In addition to cooperation agreements, Eurojust maintains a network of contact points worldwide. Eurojust stimulates and improves the coordination of investigations and prosecutions between the competent authorities in the member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust supports in any way possible the competent authorities of the member States to render their investigations and prosecutions more effective when dealing with cross-border crime.

¹³⁹ See Council Act [2000] OJ C197/1, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF>>.

¹⁴⁰ Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States [2002] OJ 2002 L 190, Art 2(2) and Art 16.

¹⁴¹ See Europa, 'European Evidence Warrant (EEW)' 11th May 2009 <http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl0015_en.htm>.

¹⁴² Council Decision 2002/187/JHA of 28 February 2002 Setting up Eurojust with a View to Reinforcing the Fight Against Serious Crimes [2002] OJ L063.

Eurojust, in partnership with Europol, also runs the Joint Investigation Teams (JITs) Project. Formed in support of fighting cross-border crime, JITs are investigation teams set up for a fixed period, based on an agreement between two or more EU Member States and/or competent authorities, for a specific purpose. Non EU Member States may participate in a JIT with the agreement of all other parties.¹⁴³

Eurojust issued guidelines entitled *Making the Decision: Which Jurisdiction Should Prosecute?* in its 2003 Annual Report and these guidelines have subsequently been widely referred to and relied upon both within and outside the EU. At present, these are considered to be the most helpful and practitioner-friendly guidelines. Indeed, the factors contained therein are practical and readily applicable to the position in most cases.

EU Green Paper and Framework Decision

In 2005 the European Commission presented a Green Paper on Conflicts of Jurisdiction and the principle of *ne bis in idem* in criminal proceedings, which outlined the possibility of creating a mechanism, which would complement the principle of mutual recognition and resolve conflicts and for allocating cases to the appropriate jurisdiction in Europe.¹⁴⁴ The Green Paper recommended a three-part procedure for settling conflicts of jurisdiction amongst EU Member States. First, a state commencing a prosecution would be under the duty to inform the competent authorities of other Member States where a prosecution has or will be started. Second, the relevant authorities of the Member States interested in commencing prosecutions would be required to enter into discussions. Third, when an agreement cannot be reached through consensus, an EU-level body (such as Eurojust) could be called upon to mediate.¹⁴⁵

Following the Green Paper, the EU Council passed a Framework Decision in 2009 on the prevention and settlement of conflicts and exercise of jurisdiction in criminal proceedings.¹⁴⁶ Similar to the Green Paper, the aim of the Framework Decision is to put in place transparent rules and common criteria, and to improve judicial cooperation by assisting national authorities to enter into direct consultations with each other, with the aim of preventing two or more EU members from conducting parallel criminal proceedings against the same person and for the same conduct.¹⁴⁷ The Framework Decision therefore seeks to prevent an infringement of the principle of *ne bis in idem*.

It further establishes the network for EU states to share information and enter into direct consultations on their criminal proceedings. Notably when a consensus on criminal jurisdiction cannot be reached, under Article 12(2), "the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision."¹⁴⁸ The Framework Decision refers specifically to

¹⁴³ See Europol, 'Joint Investigation Teams' (Europol), <<https://www.europol.europa.eu/content/page/joint-investigation-teams-989>>.

¹⁴⁴ EC Green Paper, On Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings (n 15).

¹⁴⁵ Colin Warbrick, 'Current Developments, Public International Law', [2007] 56 ICLQ 659, p 663.

¹⁴⁶ EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009].

¹⁴⁷ Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (n 27), para 41; EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009] OJ L 328 42.

¹⁴⁸ EU Council Framework Decision 2009/948/JHA, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings [2009] OJ L 328 42.

the criteria set out in the Eurojust Guidelines as a source which competent authorities should consider when addressing conflicts of parallel criminal proceedings.

Ultimately however EU framework decisions such as this are not binding on member states like the way EU directives are, so they do not have direct effect, and are only subject to the optional jurisdiction of the European Court of Justice.¹⁴⁹ For instance enforcement proceedings could not be taken by the European Commission for any failure to implement a framework decision into domestic law.

European Judicial Network (EJN)

The European Judicial Network (EJN) is a network of national contact points for the facilitation of judicial cooperation in criminal matters. The network was created in order to fulfil the Council of the European Union's Action Plan to Combat Organised Crime. National contact points are designated by each Member State among Central authorities in charge of international judicial cooperation, judicial authorities and other competent authorities with specific responsibilities in the field of international judicial cooperation, both in general and for certain forms of serious crime, such as organised crime, corruption, drug trafficking or terrorism. The Network is composed of more than 300 national contact points throughout the member States of the European Commission and the Secretariat is based in The Hague.¹⁵⁰

Bilateral/Regional Agreements

Following the 9/11 attacks in New York, the EU and the United States took steps to improve cooperation on law enforcement and judicial cooperation. This resulted in two EU-US framework agreements which entered into force in February 2010 and which are designed to facilitate and expedite assistance between the EU and the United States on issues of justice and home affairs. They set a common framework for cooperation and will complement existing bilateral agreements between the US and individual EU states.

The Agreement between the European Union and Japan on mutual legal assistance in criminal matters entered into force in January 2011 and provides mutual provisions of legal assistance to establish more effective cooperation in this area.¹⁵¹ The Agreement introduces cooperation tools including the possibility to provide testimony via videoconference to simplify the procedure of hearing witnesses or experts, eliminating long and expensive travel; and the exchange of bank information so police authorities and prosecutors can access the necessary information.

The 'Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States'¹⁵² aims to build on existing cooperation, encourage early consultation, and to coordinate actions taken between prosecuting authorities on a case by case basis. This agreement includes the role of a liaison prosecutor. The arrangement also protects prosecutors from having their decisions second-guessed by courts. The agreement provides that

¹⁴⁹ The Treaty of Nice Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts [2001] OJ C 325, Art 35.

¹⁵⁰ See the European Judicial Network Official Website, <<http://www.ejn-crimjust.europa.eu/ejn/#>>.

¹⁵¹ See European Commission, 'Mutual Legal Assistance and Extradition' (EC, 16th July 2013), <http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm>.

¹⁵² See 'Attorney General's Domestic Guidance for Handling Criminal Cases Affecting Both England, Wales or Northern Ireland and the United States of America', <<http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>>, signed on 18 January 2007.

it "does not create any rights on the part of a third party to object to or otherwise seek review of a decision by UK or US authorities regarding the investigation or prosecution of a case or issues related thereto."¹⁵³

The Memorandum of Understanding between the prosecutors of Macedonia, Albania, Bosnia and Herzegovina, Croatia, Serbia and Montenegro for Regional Cooperation Against Organised Crime, was ratified in 2005 and amended in 2010.¹⁵⁴ Among other things, this MOU establishes national contact points who will communicate with each other, and under Article 5, the "Signatories shall develop a mechanism to ensure a coordination of investigation of cases of cross-border organised crime with a view to preventing possible overlaps and disadvantageous effects on investigations undertaken by other Signatories."

National Guidance and Case Law

In July 2013 the Crown Prosecution Service of England & Wales (CPS) published new guidelines on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas.¹⁵⁵ The guidelines follow a step-by-step approach to determining issues arising in cases with concurrent jurisdiction. The UK Government further intends to introduce a forum bar in legislation, such that "where prosecution is possible in both the UK and in another state, the British courts will be able to bar prosecution overseas, if they believe it is in the interests of justice to do so."¹⁵⁶ The CPS online guidance on concurrent jurisdiction also provides that: "In cross-border cases involving England and Wales and other jurisdictions, the best practice is for prosecutors and investigators of the relevant jurisdictions to meet face to face to consider and balance the different factors that should be considered when reaching a decision where to prosecute."¹⁵⁷ The CPS guidance also refers its prosecutors to the Guidelines issued by Eurojust on competing jurisdiction claims which are described above.

In cross-border cases involving England and Wales and other jurisdictions (including non-EU states), an offence must have a "substantial connection with this jurisdiction" for courts in England and Wales to have jurisdiction. It follows that, where a substantial number of the activities constituting a crime take place within England and Wales, the courts of England and Wales have jurisdiction unless it can be argued, on a reasonable view, that the conduct ought to be dealt with by the courts of another state (*R v Smith (Wallace Duncan) (No.4)* [2004] 3 WLR 229, per Lord Chief Justice Woolf).¹⁵⁸

In Danish cases of concurrent jurisdiction, the legitimate interest of Denmark in exercising jurisdiction may be balanced against the interest of other states in retaining (exclusive) jurisdiction on the basis of Section 12 of the Danish Criminal Code.¹⁵⁹

¹⁵³ See *ibid*, para 13.

¹⁵⁴ See Council of Europe, 'Memorandum of Understanding for the Public Prosecution of the Republic of Macedonia' (2010), <<http://www.coe.int/t/dghl/cooperation/economiccrime/judicialcooperation/projects/proseco/Signed%20MoU%20in%20English.pdf>>.

¹⁵⁵ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12), p 1.

¹⁵⁶ See HC Deb 16 October 2012, vol 551, col 165.

¹⁵⁷ Director of Public Prosecutions, *Guidelines on the Handling of Cases Where the Jurisdiction to Prosecute is Shared with Prosecuting Authorities Overseas* (n 12); Crown Prosecution Service, *Legal Guidance on Jurisdiction* (n 46).

¹⁵⁸ *Ibid*.

¹⁵⁹ Redress and Fidh, 'Extraterritorial Jurisdiction in the European Union' (2010), p 111.

Bilateral/Regional Agreements

The Directeur des Poursuites Criminelles et Pénales (Director of Public Prosecutions) of Quebec and The Board of the American National District Attorneys Association approved on 17 July 2011 a Memorandum of Understanding (MOU) on Trans-border Crime as a model and template for use by prosecutors.¹⁶⁰ The template provides for potential MOUs on Matters of Extraterritorial and Concurrent Jurisdiction with Quebec along with any hypothetical County Office of the District Attorneys, and may apply in circumstances of concurrent jurisdiction over a given matter or in situations where extraterritorial jurisdiction may arise.¹⁶¹ Under principle 5(2) of the MOU template, the "Parties shall consider each case in which concurrent or extraterritorial jurisdiction arises, and determine the appropriate forum for prosecution." The MOU template further provides a list of 10 criteria (included in the Guidelines of this paper) to be taken into account during this process.

See above 'Europe' section for information on the *Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States*.¹⁶²

National Guidance and Case Law

In the United States, the *Restatement* (Third) of Foreign Relations Law of the United States ("*Restatement*") provides a starting point for analysing concurrent jurisdiction, as well as factors for an impartial tribunal to take into account in determining whether the exercise of jurisdiction is reasonable in any given case (these factors are included in the IAP Guidelines above).¹⁶³ First, any effort by a state to apply its laws to particular conduct must satisfy one or more of the traditional bases of prescriptive jurisdiction.¹⁶⁴ Second, if the factors demonstrate that exercising extraterritorial jurisdiction is "unreasonable," even if otherwise supported by a valid basis of prescriptive jurisdiction, a state "may not exercise jurisdiction to prescribe law" over the conduct at issue.¹⁶⁵ Third, where it would "not be unreasonable" for more than one state to apply its laws to particular conduct – that is, where concurrent jurisdiction is the result of reasonable exercises of jurisdiction by multiple states – each state that seeks to apply its laws to the conduct "has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors."¹⁶⁶ After this evaluation, "a state should defer to the other state if that state's interest is clearly greater."¹⁶⁷

In Canada, the state's Supreme Court has established a 'real and substantial connection test' for determining whether criminal jurisdiction exists whereby, "even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question...where two or more states have a legal claim to jurisdiction, comity dictates

¹⁶⁰ Memorandum of Understanding on Trans-border Crime Between the NDAA and DPCP (Quebec).

¹⁶¹ *Ibid.*

¹⁶² See Attorney General (n 152).

¹⁶³ *Restatement* (Third) of Foreign Relations Law of the United States 1987, (n 19), § 402–3.

¹⁶⁴ *Ibid.*, § 402 and 404.

¹⁶⁵ *Ibid.*, § 403(1).

¹⁶⁶ *Ibid.*, § 403(3).

¹⁶⁷ *Ibid.*

that a state ought to assume jurisdiction only if it has a real and substantial link to the event...".¹⁶⁸

As mentioned in the Commonwealth Guidelines, in the case of *United States of America v. Cotroni; United States of America v. El Zein*,¹⁶⁹ the US had submitted a request to Canada for extradition of two fugitives for offences relating to conspiracy to import and distribute heroin in the US.¹⁷⁰ The accused respondents argued they should not be extradited to the US, but instead be prosecuted in Canada. The Supreme Court of Canada held that the extradition of a Canadian national infringes the citizen's right to remain in Canada as guaranteed by the Charter of Rights and Freedoms, but the objectives underlying extradition made it a reasonable limitation in the cases before the court. The Court acknowledged the challenges of transnational crime and adopted the list of criteria that should be taken into consideration when dealing with instances of concurrent jurisdiction. The Court held that in practice, deciding whether to prosecute or extradite, is made after consultations on the relevant factors between the domestic authorities in both states.¹⁷¹

Mutual Legal Assistance

The Organization of American States (OAS) has convened a number of Inter-American Treaties for legal and judicial cooperation.¹⁷² Of note is the Inter-American Convention on MLA in Criminal Matters adopted in 1992 in which the member states "shall render to one another mutual assistance in investigations, prosecutions, and proceedings that pertain to crimes over which the requesting state has jurisdiction at the time the assistance is requested."¹⁷³ The OAS also established the Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition in 2000 providing extensive legal information on their website related to mutual assistance and extradition for the 35 OAS member states.¹⁷⁴

The Ibero-American Legal Assistance Network (IberRed) is a structure formed by contact points from the Ministries of Justice and Central Authorities, Prosecutors and Public Prosecutors, and judicial branches of the 23 states comprising the Latin American Community of Nations, aimed

¹⁶⁸ *R v Hape* [2007] 2 SCR.292, 2007 SCC 26, para 62 (Canada), quoting earlier Canadian Supreme Court jurisprudence.

¹⁶⁹ *United States of America v. Cotroni; United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469.

¹⁷⁰ Commonwealth Secretariat, 'Criminal Jurisdiction: Criteria to be Considered by States in Relation to Competing Criminal Jurisdictions' (n 27), p 9-10.

¹⁷¹ The relevant factors include the following which are included in the IAP Guidelines above: where the impact of the offence was felt; who has the greater interest in prosecuting; which police force played the major role in developing the case, which jurisdiction has laid charges; which jurisdiction has the most comprehensive case, which jurisdiction is ready to proceed to trial, where is the evidence located and whether it is mobile; the number of accused involved and whether they can be gathered together in one place for trial; where most of the acts in support of the crime committed; the nationality and residence of the accused; and the severity of the sentence the accused is likely to receive in each jurisdiction: *United States of America v. Cotroni; United States of America v. El Zein*, Supreme Court of Canada, [1989] 1 S.C.R. 1469, <<http://scc.lexum.org/en/1989/1989scr1-1469/1989scr1-1469.html>>.

¹⁷² Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition, 'Inter-American Treaties for Legal and Judicial Cooperation', <http://www.oas.org/juridico/mla/en/en_convention.html>.

¹⁷³ See the Organization of the American States, 'Multilateral Treaties', <<http://www.oas.org/juridico/english/treaties/a-55.html>>.

¹⁷⁴ Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition, <<http://www.oas.org/juridico/mla/en/index.html>>.

at optimizing instruments for civil and criminal judicial assistance and strengthening cooperation between states.¹⁷⁵

The Caribbean Community (CARICOM) adopted the Caribbean Mutual Legal Assistance Treaty in Serious Criminal Matters in 2000 in which "State Parties shall afford one another the widest measure of mutual legal assistance at any stage of investigations, prosecution and judicial proceedings in relation to serious criminal offences."¹⁷⁶

AFRICA

The Southern African Development Community (SADC) (Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe) signed the Protocol on Mutual Legal Assistance in Criminal Matters in 2002.¹⁷⁷ As for scope, the Protocol defines mutual legal assistance as "any assistance given by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in a criminal matter, irrespective of whether the assistance is sought or is to be provided by a court or some other competent authority."¹⁷⁸

The Terrorism Prevention Branch and Organized Crime and Illicit Trafficking Branch of the UN Office of Drugs and Crimes (UNDOC) established the Judicial Regional Platforms of Sahel (Burkina Faso, Mali, Mauritania, and Niger, launched in Bamako) and Indian Ocean (Comoros, France (Réunion), Madagascar, Mauritius and Seychelles) to strengthen international cooperation in criminal matters in the region. Their main focus is to prevent and combat forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism. UNDOC has further established cooperation networks of focal points, that meet at least once a year to facilitate extradition and mutual legal assistance in criminal matter procedures. They also identify technical assistance needs for strengthening the judicial cooperation among them.¹⁷⁹

The African Union has drafted, but not concluded, a Draft Convention on Extradition and a Draft Convention on Mutual Legal Assistance in Criminal Matters in 2001.¹⁸⁰

¹⁷⁵ Red Iberoamericana de Cooperación Jurídica Internacional, <<http://www.iberred.org/>>.

¹⁷⁶ Caribbean Mutual Legal Assistance Treaty in Serious Criminal Matters [2000], <http://www.caricom.org/jsp/secretariat/legal_instruments/mutual_legal_assistance.pdf>.

¹⁷⁷ Southern African Development Community, 'Protocol on Mutual Legal Assistance in Criminal Matters' (2002), <http://www.sadc.int/documents-publications/show/Protocol_on_Mutual_Legal_Assistance_in_Criminal_Matters_2002.pdf>.

¹⁷⁸ Ibid, Art 2(2).

¹⁷⁹ United Nations Office on Drugs and Crime, 'International Cooperation Networks' <http://www.unodc.org/unodc/en/legal-tools/international-cooperation-networks.html#Sahel_Indian_Ocean_Commission>.

¹⁸⁰ African Union, 'Preventing and Combating Terrorism in Africa' <http://www.africa-union.org/root/au/AUC/Departments/PSC/Counter_Terrorism.htm>; Africa Prosecutors Association, 'Maputo Recommendations', <<http://www.africaprosecutorsassociation.com/related-reports/70-maputo-recommendations.html>>.

The Association of Southeast Asian Nations (ASEAN) adopted the Treaty on Mutual Legal Assistance in Criminal Matters, namely for investigations, prosecutions and resulting proceedings in 2004.¹⁸¹

The South Asian Association for Regional Cooperation (SAARC) adopted the SAARC Convention on Mutual Legal Assistance in Criminal Matters in 2008. The Convention, which was signed by the eight SAARC Member States seeks to provide the legal basis that aims to harmonize different domestic legal systems of states which would facilitate mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings.¹⁸²

The IAP Model Treaty for the Asia-Pacific Convention on Cooperation in Criminal Justice was endorsed at the 2012 IAP Annual Conference in Thailand. While the ratification and adoption of the substance of such a treaty is a matter for individual states, the IAP Executive Committee commends the model treaty and the initiative it represents for the purpose of advancing cooperation and mutual legal assistance in criminal matters in order to more readily combat cross border crime in the Asia Pacific Region.¹⁸³

¹⁸¹ Association of Southeast Asian Nations, 'Staff Papers', <<http://www.aseansec.org/17363.pdf>>.

¹⁸² South Asian Association for Regional Cooperation Convention on Mutual Assistance in Matters Criminal, <<http://tinyurl.com/kvdrdwo>>.

¹⁸³ Joon Gyu Kim and Cheol-Kyu Hwang, *New Initiatives on International Cooperation in Criminal Justice* (Seoul National University Press, 2012), p 187-201.

