

EXTRATERRITORIAL CRIMINAL JURISDICTION: DOES THE LONG ARM OF THE LAW UNDERMINE THE RULE OF LAW?

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Assertions of extraterritorial jurisdiction have become increasingly frequent in the 21st century. Although a useful response to transnational crime, such assertions are often highly politicised and used by states to further unilateral foreign policy objectives. Further, some assertions of extraterritoriality undermine the rule of law and do not provide adequate procedural fairness. While principles such as comity and reasonableness may assist in protecting the rights of states, they do not adequately protect the rights of individuals. Therefore, this article argues that extraterritoriality should be treaty-based rather than unilateral, and domestic constitutional guarantees must apply equally to extraterritorial assertions of jurisdiction and territorial assertions. Further, principles to guide exercises of prosecutorial discretion in relation to an assertion of extraterritoriality need to be developed and made available in the form of a model law.

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I INTRODUCTION

In a speech at Princeton University, Justice Michael Kirby discussed judicial reluctance to enforce assertions of extraterritorial jurisdiction¹ and in so doing, observed that: ‘the natural question is asked: Why my court? Why not theirs?’² The question points to the crossroads at which international law and domestic law meet: extraterritoriality. Assertions of extraterritorial jurisdiction are becoming increasingly frequent in the 21st century. Many states claim authority to project law beyond their own territorial borders³ and, as Alejandro Chehtman observes: ‘extraterritoriality is deeply entrenched in the modern practice of legal punishment’.⁴ The extent to which states can assert extraterritorial criminal jurisdiction is a pivotal issue, which sits at the ‘very heart of public international law’.⁵

A fundamental feature of extraterritorial jurisdiction is its transnational character. According to Diane Orentlicher, transnational law is law made by more than one state, and typically with the involvement of non-state actors.⁶ It is also constituted, at least in part, by domestic law. Transnational crime and, therefore, transnational law, comprises elements of both domestic and international law, ‘dissolving traditional dichotomies between the two’.⁷ Therefore, the issues relating to extraterritorial criminal jurisdiction are linked with issues relating to transnational law more generally. Although, as Rain Liivoja observes, jurisdiction is an omnibus term that ‘comes with baggage’,⁸ for the present the term is taken to describe the ‘normative authority ... of a state’⁹ or, as Vaughan Lowe observes, ‘the limits of the legal competence of a State ... to make, apply, and enforce rules of conduct upon persons’.¹⁰ Jurisdiction is of two types: territorial and extraterritorial. Put simply, jurisdiction is

¹ Justice Michael Kirby, ‘Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points”’ (Speech delivered at the Princeton Project on Universal Jurisdiction, Princeton University, 12 August 2002) <http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_princetonproject.htm>. Specifically, the speech discussed judicial reluctance to enforce assertions of extraterritoriality seeking to rely on the universality principle.

² *Ibid.*

³ Anthony J Colangelo, ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’ (2007) 48 *Harvard International Law Journal* 121, 121.

⁴ Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press, 2010) 1.

⁵ Rick Lawson, ‘The Concept of Jurisdiction and Extraterritorial Acts of State’ in Gerard Kreijen et al (eds), *State, Sovereignty, and International Governance* (Oxford University Press, 2002) 281, 281.

⁶ Diane F Orentlicher, ‘Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles’ in Thomas J Biersteker et al (eds), *International Law and International Relations* (Routledge, 2007) 207, 207.

⁷ *Ibid.*

⁸ Rain Liivoja, ‘The Criminal Jurisdiction of States: A Theoretical Primer’ (2010) 7 *No Foundations: Journal for Extreme Legal Positivism* 25, 25

⁹ *Ibid.* 27.

¹⁰ Vaughan Lowe, ‘Jurisdiction’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 2nd ed, 2003) 329, 329.

extraterritorial when asserted by a nation state over conduct occurring outside its borders.¹¹

Both conceptually and in practice, assertions of extraterritorial jurisdiction are controversial, particularly when there are competing claims. For example, at the time of writing, India and Italy are disputing their competing claims of jurisdiction in relation to the killing of two Indian fishermen by Italian naval officers near the coast of Kerala. Both Italy and India claim the right to hear the matter on the basis that both have relevant laws applying extraterritorially.¹²

In addition to (or perhaps because of) the tensions that can arise from competing claims, assertions of extraterritoriality are also controversial because they challenge traditional notions of state sovereignty. As Harold Maier observes:

The assertion of national jurisdiction outside the territory of the acting state has been a source of continuing controversy since the development of the territorial state as the principal political unit in the world community during the sixteenth and seventeenth centuries.¹³

Alfred Van Staden and Hans Volland articulate the dilemma as ‘sustaining outdated but still democratically legitimised territorial political structures or embracing non-territorial structures that may be more effective in dealing with new transnational challenges but lack roots in people’s consent’.¹⁴

The topic is also important because, as with jurisdiction generally, ‘the relevant principles of international law are mostly part of customary law’.¹⁵ State practice both forms and is indicative of customary law. Therefore, it is all the more important to continually review the circumstances in which states assert extraterritorial jurisdiction, lest the international community become entrenched in ‘bad habits’. Further, the issue of extraterritorial criminal jurisdiction is a widely misunderstood topic and deserves closer attention. As Michael Hirst observes:

This topic [extraterritorial criminal jurisdiction] has attracted considerable interest in recent years, largely because of concerns raised by international terrorism, fraud, and other forms of high-profile transnational crime; but it has suffered from

¹¹ Deborah Senz and Hilary Charlesworth, ‘Building Blocks: Australia’s Response to Foreign Extraterritorial Legislation’ (2001) 2 *Melbourne Journal of International Law* 69, 72; Jennifer A Zerk, ‘Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas’ (Working Paper No 59, Harvard Corporate Social Responsibility Initiative, June 2010) 13.

¹² See, eg, Sandeep Dikshit, ‘As Italy Pushes for “Midway Formula”, India Swears by Courts’, *The Hindu* (online), 22 February 2012 <<http://www.thehindu.com/news/national/article2920853.ece>>; Jayanth Jacob, ‘Italy, India in Tug of War over Trial’, *Hindustan Times* (online), 20 February 2012 <<http://www.hindustantimes.com/India-news/NewDelhi/Italy-India-in-tug-of-war-over-trial/Article1-814436.aspx>>; Sachin Parashar, ‘India Hardens Stand on Arrest of Italian Naval Guards’, *The Times of India* (online), 22 February 2012 <http://articles.timesofindia.indiatimes.com/2012-02-22/india/31086102_1_italian-naval-foreign-minister-jurisdiction>.

¹³ Harold G Maier, ‘Resolving Extraterritorial Conflicts, or “There and Back Again”’ (1984) 25 *Virginia Journal of International Law* 7, 7.

¹⁴ Alfred Van Staden and Hans Volland, ‘The Erosion of State Sovereignty: Towards a Post-Territorial World?’ in Gerard Kreijen et al (eds), *State, Sovereignty, and International Governance* (Oxford University Press, 2002) 165, 183.

¹⁵ Liivoja, above n 8, 49.

many years of neglect, and remains largely misunderstood by the majority of criminal lawyers.¹⁶

In this context, this paper asks: in what circumstances are states asserting extraterritorial criminal jurisdiction; and do the grounds upon which it is exercised need to be reformulated? Ultimately, it is concluded that:

- 1 Assertions of extraterritoriality are useful in the response to transnational crime, but such assertions are often highly politicised and are used by states to further unilateral foreign policy objectives.
- 2 Limits traditionally placed on extraterritorial jurisdiction, such as comity and reasonableness, may assist in guiding state to state interaction, but are inadequate in protecting the rights of individuals.
- 3 Some assertions of extraterritoriality undermine the rule of law and do not provide adequate procedural fairness; in order to provide greater certainty and more chance of due process, assertions of extraterritoriality should be treaty-based rather than unilateral.
- 4 Where states are to assert their authority overseas, domestic human rights and constitutional guarantees must apply equally to extraterritorial assertions of jurisdiction as to territorial assertions.
- 5 Principles to guide exercises of prosecutorial discretion in relation to assertion of extraterritoriality need to be developed and made available in the form of a 'model law', such as those developed pursuant to the *United Nations Convention on Transnational Organised Crime*.¹⁷

As a preliminary matter, it is acknowledged here that there is often a distinction made between prescriptive, enforcement and adjudicative jurisdiction.¹⁸ Enforcement jurisdiction refers to the capacity, or otherwise, of that state to enforce compliance with those laws,¹⁹ or punishment for breach. Prescriptive extraterritorial jurisdiction simply refers to the capacity of a state to legislate in respect of persons and/or conduct outside its territory.²⁰ Finally, adjudicative jurisdiction refers to the ability of courts to adjudicate and resolve disputes.²¹ For example, when Adolf Eichmann was kidnapped in 1960 in Argentina and taken to Israel for trial,²² it was not the prescription or adjudication of the offences for which he was charged that troubled the international community. Rather, it was the method of enforcement that caused

¹⁶ Michael Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford University Press, 2003) 1.

¹⁷ *United Nations Convention on Transnational Organised Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

¹⁸ See, eg, Benjamin Perrin, 'Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the *Criminal Code*' (2009) 13 *Canadian Criminal Law Review* 175, 178; American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 101 cmt (c); Liivoja, above n 8, 29–30.

¹⁹ See, eg, Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 344; David J Gerber, 'Beyond Balancing: International Law Restraints on the Reach of National Laws' (1984) 10 *Yale Journal of International Law* 185, 189; Zerk, above n 11, 13.

²⁰ Triggs, above n 19, 344; Gerber, above n 19, 189; Zerk, above n 11, 13.

²¹ Zerk, above n 11, 13; Gerber, above n 19, 189.

²² *A-G (Israel) v Adolf Eichmann (Trial)* (1962) 36 ILR 18 (District Court of Jerusalem).

the United Nations Security Council to declare that Israel had violated Argentinean sovereignty.²³

For current purposes, prescriptive, enforcement and adjudicative jurisdiction are discussed together under the umbrella term of ‘assertions’ of extraterritorial jurisdiction. This is not intended as an attempt to reconceptualise, ignore or challenge current categories of jurisdiction. Rather, it is because the distinctions between them are not determinative of the issues raised in this paper, which is more concerned with the political motives of the asserting state and the substance (rather than the form) of the assertion. In any event, Liivoja argues that there is not always a theoretically sound method for determining the distinction between the three,²⁴ and, according to Ian Brownlie, ‘one is a function of the other’.²⁵ Therefore, in the course of argument, this paper will suggest that there are seven broad categories of assertions of extraterritorial jurisdiction and provide examples of each:

- 1 Treaty based assertions;
- 2 Ad hoc assertions;
- 3 Reactive assertions;
- 4 Generic assertions;
- 5 Uncontentious prosecutions;
- 6 Politically motivated prosecutions; and
- 7 Alternative prosecutions.

The purpose of conceptualising extraterritoriality in these broad categories is twofold. First, the categories give an indication as to the type of circumstances under which states are asserting extraterritorial jurisdiction. Secondly, breaking down examples of assertions according to their circumstance and/or motive supports the argument that although some assertions of extraterritoriality serve a legitimate purpose, others are overtly politicised and undermine the rule of law. It allows us to examine the substance rather than the form of the assertion. In turn, this suggests that the grounds on which extraterritorial criminal jurisdiction is asserted must be reconceptualised. As David Gerber observes, there is a ‘growing divergence between the jurisdictional needs of the international system and the conceptual structures provided for this purpose by international law’.²⁶

It is acknowledged that the examples provided in this paper do focus on the experiences in Australia and Canada and, to some extent, the United States, and therefore more closely reflect the experiences of much of the common law world. However, some examples of assertions by civil law countries and countries in South-East Asia are provided. The examples were chosen in order to illustrate the different types of circumstances in which states exercise jurisdiction and, in some cases, to illustrate the more controversial aspects of extraterritoriality. This assists in identifying the inadequacies of both international and domestic law in regulating assertions of extraterritorial jurisdiction.

²³ SC Res 138, UN SCOR, 15th sess, 868th mtg, UN Doc S/4349 (24 June 1960).

²⁴ Liivoja, above n 8, 31–2.

²⁵ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 311.

²⁶ Gerber, above n 19, 193.

II WHAT IS EXTRATERRITORIAL JURISDICTION?

The term ‘extraterritoriality’ is generally understood to refer to exercises of jurisdiction by a nation state over conduct occurring outside its borders.²⁷ Exercises of extraterritorial jurisdiction are hardly surprising given the internationalisation of institutions, finance and, inevitably, criminal activity. Spencer Zifcak attributes this to the process of globalisation — the ‘phenomenon of our times’.²⁸ Cheap travel, advances in technology and telecommunications and the anonymity of the internet have created opportunities for the rapid expansion of transnational crimes such as child sex tourism, money laundering, terrorism and human rights abuse.²⁹ As one commentator notes, while crimes have traditionally been a ‘local phenomena’, globalisation has changed this in ways that have yet to be fully explored and understood.³⁰

These fundamental changes to the way in which the international community operates as a result of our interconnectedness have diminished the divide between domestic and international law. Assertions of extraterritorial jurisdiction sit at the crossroads of this divide. However, the notion of extraterritorial jurisdiction is not a novel concept in international law. As noted by the International Court of Justice in 2000:

a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extraterritorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development ... has led to ... the recognition of other, non-territorially based grounds of national jurisdiction.³¹

However, while extraterritorial jurisdiction may not be a new concept in international law, it is still a controversial one.³² As pointed out in a recent report from Harvard University, exercises of extraterritorial jurisdiction are ‘frequently controversial’ and contribute to ‘tensions between states’.³³ Some commentators argue that a state’s power to punish extraterritorially should be more heavily restricted.³⁴ As Gillian Triggs observes, jurisdiction is ‘a manifestation of state sovereignty through its courts, legislature and executive’.³⁵ Kim Rubenstein also notes the challenges that globalisation of laws present for traditional conceptions

²⁷ Senz and Charlesworth, above n 11, 72; Zerk, above n 11, 13.

²⁸ Spencer Zifcak, *Globalisation and the Rule of Law* (Routledge Press, 2005) 1.

²⁹ See National Institute of Justice, US Department of Justice, *Transnational Organized Crime* (15 November 2007) National Institute of Justice <<http://www.ojp.usdoj.gov/nij/topics/crime/transnational-organized-crime/welcome.htm>>.

³⁰ Patrick J Keenan, ‘The New Deterrence: Crime and Policy in the Age of Globalisation’ (2006) 91 *Iowa Law Review* 505, 507.

³¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, 85.

³² Danielle Ireland-Piper, ‘Extraterritoriality and Sexual Offences Outside Australia’ (2010) 22(2) *Bond Law Review* 16, 31.

³³ Zerk, above n 11, 12.

³⁴ Chehtman, above n 4, 56.

³⁵ Triggs, above n 19.

of state sovereignty.³⁶ In essence, changes to the way we understand and enforce jurisdiction mean inevitable changes to the way we understand and enforce sovereignty.

A state is not necessarily able to control the legal destiny of all persons within its borders.³⁷ Equally, states and companies outside a territory can nonetheless influence conduct inside that territory.³⁸ Some commentators argue that states have an obligation to protect against human rights violations by persons or corporations over which they have control.³⁹ It may be that assertions of extraterritoriality are the only effective means of delivering on this obligation. Mark Gibney and Sigrun Skogly argue that, in a globalised world, the notion of jurisdiction over individuals, companies or particular actions makes more sense than the traditional parameters of physical control of territory.⁴⁰ They argue that one or more foreign states may directly or indirectly be in a position to influence the enjoyment of basic human rights by individuals, without having territorial control over the place where those individuals reside.⁴¹

Conversely, others argue that exercises of extraterritorial jurisdiction impinge on the sovereignty of the country in which the criminalised conduct takes place.⁴² They also argue it is an underhand means of promoting foreign policy objectives.⁴³ Commentators such as Anthony Colangelo assert that, rather than being a restraint on state power, the incorporation of international law into national law can actually serve to expand the power of the nation state by providing a constitutional justification to legislate extraterritorially.⁴⁴ By way of example, he cites the extraterritorial scope of anti-terrorism legislation in the US.⁴⁵ He also refers more generally to the international legal doctrine of universal jurisdiction being used to ‘overcome any potential constitutional obstacles to the extraterritorial application of US law’.⁴⁶ Chehtman is also suspicious of some grounds of extraterritorial jurisdiction. He reasons that a state’s power to punish an offender is only justified where the collective interests of individuals in that state have an interest in a system of laws being in force and enforced. He argues that some assertions of extraterritoriality may not be justified by a sufficient collective interest by the domestic population of the asserting state.⁴⁷

Generally speaking, the extraterritorial laws of states are valid under international law to the extent that they do not unduly infringe the sovereignty of

³⁶ Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook, 2002) 270.

³⁷ *Ibid* 296–7.

³⁸ *Ibid*.

³⁹ Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010) 6.

⁴⁰ *Ibid* 4.

⁴¹ *Ibid* 6.

⁴² Senz and Charlesworth, above n 11, 70.

⁴³ *Ibid* 71.

⁴⁴ Colangelo, above n 3, 122 (in the context of his discussion of extraterritorial jurisdiction and the *Constitution of the United States*).

⁴⁵ *Ibid*.

⁴⁶ *Ibid* 122–3.

⁴⁷ Chehtman, above n 4, 58–9.

another.⁴⁸ This means that tensions can arise in resolving competing jurisdictional claims. As Brownlie observes, ‘the sufficiency of grounds for jurisdiction is an issue normally considered relative to the rights of other states and not as a question of basic competence’.⁴⁹ For example, the *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (‘Lockerbie’)⁵⁰ case has given rise to competing jurisdictional claims that have been the subject of on–off negotiations for over 20 years now. In 1988, a flight from Frankfurt to New York exploded over Scotland, killing 259 passengers and crew and 11 people in the town of Lockerbie. The victims were of 21 different nationalities, but predominantly from the US and United Kingdom. The two persons alleged to have put a bomb on the plane were Libyan nationals. The plane was registered in the US, crashed in Scotland and Libya had custody of the accused. After protracted negotiations and legal proceedings, it was ‘agreed that a trial would be held in the Netherlands, in a court that was deemed to be a Scottish court’.⁵¹ A Libyan national was convicted in relation to the incident and was sentenced to life imprisonment in 2001. However, he was released on compassionate grounds in 2009 after he was diagnosed with terminal cancer and returned to Libya.⁵² This in itself was controversial, given the US, British and Libyan interests in the case.⁵³ For example, in 2011 the US indicated it considered prosecuting former Libyan leader Muammar Gaddafi (prior to his death) in relation to the incident.⁵⁴ Notably, as recently as February 2012, the Crown Office in Scotland requested that Libya allow investigators into the country for the purpose of continuing investigations into the incident.⁵⁵ In this way, the confluence of cross-jurisdictional issues in the *Lockerbie* case is not yet fully resolved, even after more than 20 years.⁵⁶

Further, ‘globalising factors — such as international trade and travel, foreign investment, and modern communications technologies — have all greatly increased the potential for overlapping jurisdictional claims’.⁵⁷ As Jennifer Zerk

⁴⁸ Perrin, above n 18, 180.

⁴⁹ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 5th ed, 1998) 301–2.

⁵⁰ *Libyan Arab Jamahiriya v United Kingdom* (Provisional Measures) [1992] ICJ Rep 3.

⁵¹ Triggs, above n 19, 345.

⁵² Christopher M Blanchard and Jim Zanotti, ‘Libya: Background and US Relations’ (Congressional Research Service Report, Library of Congress, 18 February 2011) 3.

⁵³ *Ibid.* See also Jason Allardyce and Tony Allen-Mills, ‘White House Backed Release of Lockerbie Bomber Abdel Baset al-Megrahi’, *The Australian* (online), 26 July 2010 <<http://www.theaustralian.com.au/news/world/white-house-backed-release-of-lockerbie-bomber-abdel-baset-al-megrahi/story-e6frg6so-1225896741041>>.

⁵⁴ ABC News Radio, ‘US Seeks Ways to Prosecute Gadhafi for Lockerbie Plane Bombing’, *World News*, 2 March 2011 (Jeanette Torres) <<http://abcnewsradioonline.com/world-news/us-seeks-ways-to-prosecute-gadhafi-for-lockerbie-plane-bomb.html>>.

⁵⁵ ‘Lockerbie Bombing Probe Formal Request Made to Libya’, *BBC News — South Scotland* (online), 23 February 2012 <<http://www.bbc.co.uk/news/uk-scotland-south-scotland-17138776>>.

⁵⁶ Abdelbaset al-Megrahi, the man convicted for the bombings, passed away on 20 May 2012. Investigations into the incident are nonetheless continuing: ABC News, ‘Lockerbie Bomber Dies, Investigation to Continue’, *The Midday Report*, 21 May 2012 (Rachael Brown) <<http://www.abc.net.au/news/2012-05-21/lockerbie-bomber-dies-investigation-to-continue/4023906>>.

⁵⁷ Zerk, above n 11, 5.

notes, the reactions of states to assertions of extraterritorial jurisdiction depends 'greatly on regulatory motives and modes, and on the potential for inter-state regulatory conflicts'.⁵⁸

However, desirable or not, what is clear is that states are increasingly prepared to assert extraterritorial jurisdiction and this requires close scrutiny of the rules by which they may do so.

III WHAT ARE THE RULES?

The decision of the Permanent Court of International Justice in *SS Lotus*⁵⁹ recognised a presumption in favour of exercises of extraterritoriality, in the absence of any prohibitive rule:

Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect *a wide measure of discretion which is only limited to certain cases by prohibitive rules*; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.⁶⁰

However, commentators argue that the decision in *SS Lotus* is 'no longer adequate to deal with contemporary problems such as transnational environmental harm, terrorism and international crime'.⁶¹ In particular, the criticism is that the presumptive principle in *SS Lotus* fails to recognise that a state's right to claim jurisdiction is relative to the rights of other states.⁶² This is because the decision in *SS Lotus* did not establish any hierarchy by which to resolve competing claims to jurisdiction.

Under customary international law, there are generally accepted bases on which a state may assert extraterritorial jurisdiction. States generally derive authority to exercise jurisdiction from three main principles: nationality, territoriality and universality. Put simply, the nationality principle can provide a basis for jurisdiction where a state's citizen or corporation is either a victim (passive nationality) or a perpetrator (active nationality). The territoriality principle may be invoked where conduct either takes place within a nation's borders (subjective territoriality) or the effects of the conduct are felt within the nation's borders (objective territoriality). The universality principle is reserved for international crimes such as piracy, genocide and crimes against humanity. Some international jurisprudence also recognises a 'protective principle' and an 'effects principle', which dictate respectively that a state can assert jurisdiction over foreign conduct that threatens national security or that has effects within that state.

⁵⁸ Ibid 6.

⁵⁹ *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

⁶⁰ Ibid 19 (emphasis added).

⁶¹ See, eg, Triggs, above n 19, 349.

⁶² Ibid.

A *The Territorial Principle*

That a state may assert jurisdiction over activities in its own territory is uncontroversial and universally recognised.⁶³ The territorial principle is the most common basis of jurisdiction⁶⁴ and is widely regarded as a manifestation of state sovereignty.⁶⁵ However, this basis of jurisdiction has both subjective and objective limbs and this can give rise to controversy. While subjective territoriality is rarely controversial, objective territoriality is more complicated. It will often involve competing claims for jurisdiction,⁶⁶ because although parts of the conduct will have taken place in one territory, it will have been consummated in another. Therefore, even territorial grounds of jurisdiction can give rise to controversy in a globalised world, not to speak of extraterritorial grounds.

B *The Nationality Principle*

The nationality principle authorises extraterritorial jurisdiction by a state over its nationals, even where the relevant conduct may have occurred outside its territory.⁶⁷ Assertions on the basis of nationality have traditionally been ad hoc, rather than general. These ad hoc assertions have generally been in relation to bigamy or national security offences.⁶⁸ However, the rise of international terrorism and other transnational crimes has ‘quickened the pace’⁶⁹ with which states have asserted extraterritorial jurisdiction on the basis of nationality.

This principle raises questions as to who is to be considered a ‘national’, given that traditional models of citizenship and nationality have been altered by globalisation.⁷⁰ International law is generally neutral to a grant of nationality, provided the granting state does not breach certain international obligations, such as those under the *Convention on the Reduction of Statelessness*.⁷¹ This means that the determination as to who is a ‘national’ for the purpose of the nationality principle is a matter largely left to individual states. For example, Australia’s child sex tourism laws assert extraterritorial jurisdiction over citizens and residents, as well as corporate entities incorporated or principally active in Australia.⁷² Given residents have no right to vote in parliamentary elections, this raises issues as to the moral legitimacy of assertions of authority over Australian residents overseas. It is also problematic in that residents are not always considered nationals in other aspects of the law and, therefore, residents are not truly nationals under Australian law. In this way, assertions of jurisdiction over residents are arguably outside the nationality principle and, therefore, inconsistent with international law.

⁶³ Ibid 347. See also Chehtman, above n 4, 57.

⁶⁴ Zerk, above n 11, 18.

⁶⁵ Chehtman, above n 4, 56.

⁶⁶ See Gerber, above n 19, 195.

⁶⁷ Ibid 190.

⁶⁸ Triggs, above n 19, 351.

⁶⁹ Ibid 352.

⁷⁰ Kim Rubenstein, ‘Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?’ (2007) 25(1) *Law in Context* 88, 88.

⁷¹ *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975); Triggs, above n 19, 354.

⁷² *Criminal Code Act 1995* (Cth) sch 1, s 272.6 (*‘Criminal Code’*).

Larry May articulates the problem with the nationality principle when he asserts that it is a 'mistake to say that there are citizens and yet for it be unclear what political community these citizens are connected to'.⁷³ May argues that there are sufficient grounds to justify recognition of the category of global citizenship. He analogises that 'being a citizen of the US and also a citizen of the world is not significantly different from being a citizen of Missouri and a citizen of the US'⁷⁴ or holding dual citizenship.⁷⁵ It is on the basis of global citizenry that individuals should have access to procedural fairness on a global scale.⁷⁶ In this way, principles of procedural fairness and the rule of law should form part of the basic foundation of the rules relating to extraterritoriality.

In addition, there is also the possibility of persons being subject to multiple, and potentially conflicting, legislative regimes. Rubenstein observes:

Domestic laws about who is and who is not a citizen vary significantly, and laws relating to citizenship in each of the different states are also different. As a result, many people hold more than one nationality by fulfilling the formal requirements for citizenship in more than one domestic legal framework.⁷⁷

For example, Australia's *Criminal Code Act 1995* (Cth) makes it an offence for an Australian citizen or resident to engage in sexual conduct overseas with a person under 16 years old, or a 'young person' with whom they have a trusting or authoritative relationship.⁷⁸ A young person is defined to mean a person of at least 16 years, but less than 18 years of age.⁷⁹ Although the *Convention on the Rights of the Child* ('CRC')⁸⁰ defines a child as a person less than 18 years of age,⁸¹ there is rarely any international consistency between jurisdictions. One commentator reports that in 2009 the age of consent in legislation with extraterritorial reach varied from 13 to 18 years⁸² and cites a proposal in Sri Lanka to lower the age of consent to 13 years.⁸³ Australia does not require double criminality in order to prosecute child sexual offences.⁸⁴ Therefore, if the Australian resident in question happened to be a citizen of a state which defined a child as less than 15 years, then that resident would be subject to conflicting legal regimes.

⁷³ Larry May, *Global Justice and Due Process* (Cambridge University Press, 2011) 198.

⁷⁴ *Ibid.* 200.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Rubenstein, 'Citizenship in an Age of Globalisation', above n 70, 90–1.

⁷⁸ *Criminal Code* ss 272.8–272.9, 272.12–272.13.

⁷⁹ *Ibid.* ss 272.12–272.13.

⁸⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁸¹ *Ibid.* Article 1 reads: 'For the purposes of the present *Convention*, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.

⁸² Karen Fredette, 'International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe *Convention on Commercial Child Sexual Exploitation*' (2009) 32 *Boston College International and Comparative Law Review* 1, 21.

⁸³ *Ibid.* 14.

⁸⁴ See *Criminal Code* s 272.6.

1 Active Nationality

Active nationality refers to a state's jurisdiction over the conduct of its nationals overseas. As noted in Zerk's report for the Harvard Corporate Social Responsibility Initiative, states regard the active nationality principle as the strongest basis for direct extraterritorial jurisdiction.⁸⁵ The nationality principle is heavily relied on by states that prohibit the extradition of their nationals. For example, it has been suggested that there is a connection between the prohibition on extradition of nationals and the broad assertion of extraterritorial criminal jurisdiction.⁸⁶

Some commentators have expressed concerns as to the underlying philosophical justifications for the principle. For example, Chehtman claims 'as a basis for criminal jurisdiction the nationality principle is altogether unjustified at the bar of justice'.⁸⁷ He argues 'individuals in any given state lack an interest in having that state's criminal laws enforced against them or their co-nationals (or co-residents) abroad'.⁸⁸ He analogises:

Inhabitants of Spain may feel horrified by a particular crime committed outside its territory by a co-national, but their belief in the system of criminal laws under which they live being in force is not undermined by these offences.⁸⁹

Alternatively, Arnell argues that the nationality principle is symbolic of an evolution from narrow, self-interested territorial interests to a broader collective interest in the conduct of nationals overseas.⁹⁰ He asserts that the cumulative effects of the 'ever-greater mobility of nationals, the ability to commit crimes remotely ... an evolution in the citizen-state relationship, and the increasing internationalisation of criminal law'⁹¹ strengthen arguments in favour of nationality based jurisdiction.⁹² In addition, Arnell suggests that greater reliance on the nationality principle is further justified on three grounds. First, he argues that, given the conduct of nationals overseas is already regulated on an ad hoc basis, a standard framework should be developed to govern its use more broadly.⁹³ It is possible that this has some merit; a standardised framework would allow for greater transparency and consistency in the employment of the nationality principle. Secondly, he argues that exercises of jurisdiction on the basis of nationality can be used to ensure the accused receives a fair trial.⁹⁴ He refers to the UK, where the rights to a fair trial, liberty and freedom from retrospective legislation are all part of municipal law and therefore would be guaranteed to nationals being prosecuted for extraterritorial criminal conduct.

⁸⁵ Zerk, above n 11, 8.

⁸⁶ Zsuzsanna Deen-Racsmany, 'Modernizing the Nationality Exception: Is the Non-Extradition of Residents a Better Rule?' (2006) 75 *Nordic Journal of International Law* 29, 34.

⁸⁷ Chehtman, above n 4, 66.

⁸⁸ *Ibid* 67.

⁸⁹ *Ibid* 61.

⁹⁰ P Arnell, 'The Case for Nationality Based Jurisdiction' (2001) 5 *International and Comparative Law Quarterly* 955, 960-1 (in the context of Arnell's discussion of assertions of extraterritorial jurisdiction by the UK).

⁹¹ *Ibid* 955.

⁹² *Ibid*.

⁹³ *Ibid* 960-1.

⁹⁴ *Ibid* 959-60.

While this assurance of basic human rights is certainly desirable, the reverse could equally be true. Nationals of states who do not guarantee those same human rights could equally assert jurisdiction over the conduct of their nationals overseas, thereby depriving a person of those rights. Finally, Arnell asserts that the mobility of people has changed the relationship between citizen and state to the extent where territorial boundaries are too vague, and so the relationship ought to be governed by the nationality principle.⁹⁵ However, exactly where dual citizens and residents fit in this framework is not entirely clear. The problems that dual nationality can create are illustrated below in the discussion of the prosecution of Julian Moti in Australia.

2 *Passive Nationality*

This second limb of the nationality principle refers to the power of a state to punish an offender extraterritorially on the ground that the victim — rather than the perpetrator — is its national.⁹⁶ The existence and use of the passive nationality principle is particularly controversial, perhaps because of the particular challenge it poses to territorial-based systems of regulation.⁹⁷ Of all the grounds discussed in this paper, it is the only one *not* included in the *Draft Convention on Jurisdiction with respect to Crime*.⁹⁸ As a ground of criminal jurisdiction, it has been described as among the ‘most contested in contemporary International Law’.⁹⁹ Chehtman argues the passive nationality principle is flawed on the basis that:

While an individual is abroad, the only system of criminal law that can meaningfully contribute to her (relative) sense of dignity and security is the criminal law of the territorial state.¹⁰⁰

In his dissenting judgment in the *SS Lotus* case, Judge Moore expresses a similar view. He argues:

an inhabitant of a great commercial city ... may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes ... this ... is at variance not only with the principle of exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country ... falls under the dominion of the local law.¹⁰¹

Further, the passive nationality principle has potential to create legal uncertainty. Zerk describes a situation where a person in state Y may not be aware of the nationality of N when he acts and therefore will not be in a position to assess the legal framework in which his conduct will be assessed.¹⁰² However, examples of state practice indicate that the international community is increasingly willing to accept assertions of extraterritorial jurisdiction on the

⁹⁵ Ibid 960.

⁹⁶ Chehtman, above n 4, 67.

⁹⁷ Zerk, above n 11, 20.

⁹⁸ ‘Draft Convention on Jurisdiction with respect to Crime’ (1935) 29 *Supplement to the American Journal of International Law* 437.

⁹⁹ Chehtman, above n 4, 67.

¹⁰⁰ Chehtman, above n 4, 68.

¹⁰¹ *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 92.

¹⁰² Zerk, above n 11, 20.

basis of the passive nationality principle.¹⁰³ This is particularly so where the conduct constitutes a serious crime such as terrorism, hijacking and hostage taking.¹⁰⁴ For example, the Australian *Criminal Code Act 1995* (Cth) makes it an offence to recklessly or intentionally harm, manslaughter or seriously injure an Australian citizen or resident anywhere in the world.¹⁰⁵ However, while this may be true generally, assertions of passive nationality jurisdiction are not always limited to these categories. This is particularly the case for states who are less likely, or who refuse, to extradite their nationals for offences committed overseas. For example, French criminal law applies to crimes committed outside French territory by *any* foreign national, where the victim is a French national.¹⁰⁶ This (and/or the accessibility of the internet generally in France) seems to have been the basis for the prosecution in *LICRA v Yahoo!*.¹⁰⁷ In that case, Yahoo! was prosecuted for breaching the French *Penal Code*, under which it is an offence to sell, exchange or display Nazi related materials or memorabilia.¹⁰⁸ The prosecution followed complaints from two French non-profit organisations (the victims) about Yahoo!'s auction site, which allowed the posting of Nazi memorabilia.¹⁰⁹ Yahoo!, an internet service provider, was at the relevant time incorporated under the laws of Delaware and operated principally in California in the US.

The Tribunal in France found that, given French citizens had access to Nazi and Third Reich material on Yahoo!'s internet site, Yahoo! had breached the relevant provisions of the French *Penal Code*.¹¹⁰ Subsequently, Yahoo! successfully sought a declaration in the US (its place of incorporation) that the orders made in France were not enforceable under US law on the basis that the orders would breach constitutional guarantees of free speech.¹¹¹ The case

¹⁰³ Triggs, above n 19, 355.

¹⁰⁴ *Ibid* 356.

¹⁰⁵ *Criminal Code* div 115.

¹⁰⁶ *Penal Code* (France) [Legifrance trans, *Penal Code* (2005) <http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf>] art 113-7: 'French criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place'. See also at art 113-6, which provides that:

French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present article applies even if the offender has acquired French nationality after the commission of the offence of which he is accused.

¹⁰⁷ Tribunal de Grande Instance de Paris [French Superior Court of Paris], 2000/05308 and 05309, 22 May 2000.

¹⁰⁸ *Penal Code* (France) [Legifrance trans, *Penal Code* (2005) <http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf>] art R645-1.

¹⁰⁹ Elissa A Okoniewski, 'Yahoo!, Inc v LICRA: The French Challenge to Free Expression on the Internet' (2002) 18 *American University International Law Review* 295, 313, citing Tribunal de Grande Instance de Paris [French Superior Court of Paris], 2000/05308 and 05309, 22 May 2000.

¹¹⁰ Okoniewski, above n 109, 314, citing Tribunal de Grande Instance de Paris [French Superior Court of Paris], 2000/05308 and 05309, 22 May 2000.

¹¹¹ Okoniewski, above n 109, 316–17, citing *Yahoo!, Inc v La Ligue Contre le Racisme et L'Antisemitisme*, 169 F Supp 2d 1181 (ND Cal, 2001).

stimulated much discussion and debate — mostly due to its implications for the transnational operations of internet service providers and due to differing views on the limits (or otherwise) of free speech. Elissa Okoniewski, in her analysis of the case, argued that France should have focused on prosecuting its own nationals (who intentionally accessed the material) rather than the foreigners who made it available.¹¹²

Clearly, the internet presents new dilemmas for current frameworks on the assertion of jurisdiction based on nationality. As Okoniewski observes, ‘because anyone can view information on the Internet, every nation has an interest in regulating it ... [and determining] which nation has jurisdiction over a particular issue can have a significant impact on the outcome’.¹¹³

C *The Universality Principle*

The universality principle refers to the right of states to assert jurisdiction over serious international crimes regardless of where the conduct occurs or the nationality of the perpetrators.¹¹⁴ The theory being that some crimes are so troublesome as to constitute a threat to international peace and security, that all states are regarded as having a legitimate interest in their prescription and enforcement.¹¹⁵ Unlike other grounds of extraterritorial jurisdiction, which demand some connection with the regulating state, (such as the nationality of the perpetrator or the victim) this principle provides every state with a basis to prosecute certain international crimes. For example, international law grants every state the authority to assert jurisdiction over piracy and slave trading because these crimes are ‘prototypical offences that ... have long been considered the enemies of humanity’.¹¹⁶ Prosecutions of war crimes and crimes against humanity in the post-World War II era also relied on the universality principle.¹¹⁷

Amnesty International argues that when a national court exercises jurisdiction over crimes amounting to international crimes or crimes of international concern committed overseas, the court is ‘really acting as an agent of the international community’,¹¹⁸ rather than in a narrow domestic capacity. Amnesty International cites the 1996 *Draft Code of Crimes against the Peace and Security of Mankind*,¹¹⁹ and refer to the ‘*aut dedere aut judicare*’ [extradite or prosecute] rule, as evidence of a state obligation to assert universal jurisdiction in certain circumstances.¹²⁰ Therefore, in this context, it is necessary to distinguish

¹¹² Okoniewski, above n 109, 328–9.

¹¹³ *Ibid.*, 310–11.

¹¹⁴ Zerk, above n 11, 20.

¹¹⁵ *Ibid.*

¹¹⁶ Kenneth C Randall, ‘Universal Jurisdiction under International Law’ (1988) 66 *Texas Law Review* 785, 788 (citations omitted).

¹¹⁷ *Ibid.*

¹¹⁸ Amnesty International, ‘International Law Commission: The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)’ (Report, Amnesty International, February 2009) 8 <<http://www.amnesty.org/en/library/asset/IOR40/001/2009/en/a4761626-f20a-11dd-855f-392123cb5f06/ior400012009en.pdf>>.

¹¹⁹ *Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May – 26 July 1996*, UN GAOR, 51st sess, Supp No 10, UN Doc A/51/10 (1996) 15–56.

¹²⁰ Amnesty International, above n 118, 8.

between universal jurisdiction over international crimes (such as war crimes) and universal jurisdiction over ordinary crimes. The former is more concerned with the enforcement of international law, while the latter concerns the extraterritorial enforcement of municipal law. However, the line between the two is becoming blurred.

D *The Protective Principle*

The protective principle is invoked to justify claims of extraterritorial jurisdiction by a regulating state for offences against the security, integrity, sovereignty or government functions of that state.¹²¹ The principle has been used to prosecute offences relating to counterfeiting currency, forgery of official documents (such as passports and visas) and political offences (such as treason).¹²² For example, in the English case of *Joyce v Director of Public Prosecutions* ('*Joyce*'),¹²³ concerning allegations of treason, the Court asserted its belief that — principles of comity and territorial jurisdiction aside — the state had a right to protect itself.¹²⁴ In *Joyce*, an American citizen had gained a British passport by fraudulent means and worked for German radio during World War II. It was argued on behalf of the accused that the UK did not have jurisdiction to try a non-national for a crime committed outside British territory. The Court rejected this argument on the basis that

[n]o principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws.¹²⁵

Unlike his criticism of other grounds of extraterritorial jurisdiction, Chehtman accepts the protective principle ground on the basis that individuals within a given state have a collective interest in the security of their state being protected.¹²⁶ As noted earlier, in his view, justification of a state's extraterritorial power exists only where the assertion is in the collective interests of individuals in that state. Although acknowledging the potential for abuse of the principle, Chehtman dismisses this on the basis that 'the fact that a given state can abuse a right it has is hardly a conclusive argument against it initially holding that right'.¹²⁷ In the context of uncertainties as to what constitutes a sufficient threat to 'national interest' to justify reliance on the protective principle,¹²⁸ and Chehtman's resounding criticism of the other grounds, his conclusions in this regard are rather curious.

¹²¹ See Triggs, above n 19, 356–7; Zerk, above n 11, 19. See generally Monika B Krizek, 'The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice' (1988) 6 *Boston University International Law Journal* 337.

¹²² Stephen Hall, *Principles of International Law* (LexisNexis, 3rd ed, 2011) 315; Chehtman, above n 4, 70–1. See generally Krizek, above n 121.

¹²³ [1946] AC 347.

¹²⁴ *Ibid* 372.

¹²⁵ *Ibid*.

¹²⁶ Chehtman, above n 4, 71–5.

¹²⁷ *Ibid* 73.

¹²⁸ See Triggs, above n 19, 357.

Triggs also notes that the protective principle is open to abuse, but observes that reliance on the principle is generally limited to exceptional cases and particular categories of offences.¹²⁹ She also remarks that there is a strong relationship between concerns about terrorism and growing acceptance by the community of assertions of extraterritoriality on the basis of the protective principle.¹³⁰

E *The 'Effects' Principle*

Commentators on extraterritoriality often refer to an 'effects' principle as an additional basis for asserting extraterritorial jurisdiction.¹³¹ The theory is that states can assert jurisdiction over conduct occurring extraterritorially if that conduct has an effect on their territory. The scope of the 'effects' principle is controversial, particularly in relation to purely economic effects.¹³² Some commentators argue that asserting jurisdiction based on the 'effects' principle is incompatible with the traditional view of international jurisdiction.¹³³ In particular, there is concern that in expanding the jurisdiction of the regulating state, the 'effects' principle fails to provide an effective framework for protecting the interests of other states who might be affected by this expansion. For example, Gerber observes:

In a world fragmented into numerous territorial entities, when a state claims jurisdiction based on the effects principle, it is very likely that at least one other state will have a territorial interest in the conduct involved.¹³⁴

Austen Parrish also expresses concerns about the 'effects' principle. He describes it as the 'beginning of the end to meaningful territorial limits on legislative jurisdiction'¹³⁵ and as 'problematic for both conceptual and pragmatic reasons'.¹³⁶ He argues that it has no clear constraints¹³⁷ and gives 'license for near universal jurisdiction'.¹³⁸ Parrish is of the view that the effects test has expanded the potential for jurisdictional conflict between states.¹³⁹

Arguably, the 'effects' principle is one of the most highly contentious bases on which to assert extraterritorial jurisdiction. Its scope is not well articulated, and it is prone to abuse. In a globalised world, anything can affect everything, and therefore the 'effects' principle should not be considered a legitimate base on which to assert extraterritorial jurisdiction. It is also superfluous in the sense that it is hard to imagine a state having a legitimate jurisdictional interest in a conduct that would not otherwise be covered by the protective principle or another less contentious basis of extraterritorial jurisdiction.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.* 358.

¹³¹ Zerk, above n 11, 19.

¹³² *Ibid.*

¹³³ Gerber, above n 19, 185.

¹³⁴ *Ibid.* 191.

¹³⁵ Austen Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 *Vanderbilt Law Review* 1455, 1471.

¹³⁶ *Ibid.* 1470.

¹³⁷ *Ibid.* 1478.

¹³⁸ *Ibid.* 1479.

¹³⁹ *Ibid.* 1478.

IV CATEGORIES OF EXTRATERRITORIAL CRIMINAL JURISDICTION

As noted above in the introduction, this paper suggests that assertions of extraterritorial criminal jurisdiction can be conceptualised in seven broad categories: treaty-based assertions; ad hoc assertions; reactive assertions; generic assertions; uncontentious prosecutions; politically motivated prosecutions; and alternative prosecutions. Rather than focusing on the ground of jurisdiction which may support the technical form of the assertion, these categories more closely reflect the political reality or motive of the asserting state. It is suggested that these categories look more to the substance of the assertion, than to the form. This Part gives examples of each category. In turn, these examples illustrate the ways in which some assertions of extraterritorial criminal jurisdiction can undermine the rule of law. These categories also illustrate that while the doctrine of comity may be in some way helpful for managing the interests of sovereign states in resolving competing jurisdictional claims, this does nothing to protect the procedural rights of individuals. The categories below assist in conceptualising the distinction between these two issues.

A *Treaty-Based Assertions*

Not all assertions of extraterritoriality are necessarily concerned with municipal affairs. For example, some international treaties either impose a positive obligation on states to legislate extraterritorially or permit them to do so on a voluntary basis. Generally speaking, this occurs when offences are considered by the international community to be particularly serious and require transnational cooperation.¹⁴⁰ Zerk observes: ‘In many cases these cooperative regimes represent an attempt to close the “regulatory gaps” that would otherwise exist in a territorially based system’.¹⁴¹

For example, the 1989 *CRC* and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (*Optional Protocol*),¹⁴² read together, require parties to criminalise child prostitution whether or not the acts occur domestically or extraterritorially.¹⁴³ All but two states are party to the *CRC*, making it one of the most highly ratified of all United Nations conventions.¹⁴⁴

Specifically, art 34(b) of the *CRC* obliges signatories to take all appropriate measures so as to prevent the ‘exploitative use of children in prostitution or other unlawful sexual practices’. Article 1 of the *Optional Protocol* imposes the more specific obligation of criminalising child prostitution and art 3 requires that this be so whether or not the acts occur domestically or extraterritorially. Given the lack of central authority to enforce these international obligations, practical

¹⁴⁰ Robert J Currie and Stephen Coughlan, ‘Extraterritorial Criminal Jurisdiction: Bigger Picture or Smaller Frame?’ (2007) 11 *Canadian Criminal Law Review* 141, 155.

¹⁴¹ Zerk, above n 11, 12.

¹⁴² *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002).

¹⁴³ *Ibid* arts 1, 3.

¹⁴⁴ Fiona David, ‘Child Sex Tourism’ (Report on Trends and Issues in Crime and Criminal Justice No 156, Australian Institute of Criminology, June 2000).

effectiveness is dependent on implementation through domestic legal frameworks.¹⁴⁵

Other examples include the international anti-corruption frameworks. The major international treaties on anti-corruption all either require or permit a degree of extraterritorial jurisdiction.¹⁴⁶ State practice also suggests the international community is willing to accept assertions of extraterritoriality in the pursuit of corruption offences. For example, BAE Systems, a corporate national of the UK, has been investigated in several jurisdictions in relation to allegations of corrupt practices to secure deals in Saudi Arabia, Tanzania, South Africa and others.¹⁴⁷ Similarly in the Statoil affair, both Norway and the US investigated the activities of a Norwegian company listed in the US for alleged payment of bribes to a government official in Iran.¹⁴⁸

International treaties relating to terrorism and torture also permit some assertions of extraterritorial jurisdiction. For example, the *International Convention for the Suppression of Terrorist Bombings*¹⁴⁹ calls upon parties to assert jurisdiction on the basis of both passive and active nationality¹⁵⁰ and the *International Convention for the Suppression of the Financing of Terrorism*¹⁵¹ calls upon parties to assert active nationality jurisdiction.¹⁵² Similarly, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*¹⁵³ also permits states to exercise active and passive nationality jurisdiction, where a state deems it to be 'appropriate'.¹⁵⁴ International treaties that either permit or require the exercise of extraterritoriality are indicative of an increased reliance on non-territorial grounds of jurisdiction. Treaty-based assertions are the least troublesome of all the categories because, in theory, such

¹⁴⁵ Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution' (2002) 8(2) *Australian Journal of Human Rights* 101, 107.

¹⁴⁶ See, eg. *Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions*, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999); *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005); *Inter-American Convention against Corruption, Organization of American States*, opened for signature 29 March 1996, [2000] CTS 21 (entered into force 6 March 1997); *Criminal Law Convention on Corruption*, opened for signature 27 January 1999, ETS No 173 (entered into force 1 July 2002); *Additional Protocol to the Criminal Law Convention on Corruption*, opened for signature 15 May 2003, ETS No 191 (entered into force 1 February 2005).

¹⁴⁷ Zerk, above n 11, 44; David Leigh and Rob Edwards, 'Fraud Office Seeks BAE's Prosecution over Bribery', *The Guardian* (online), 1 October 2009 <<http://www.guardian.co.uk/world/2009/oct/01/bae-serious-fraud-office1>>; *BAE Systems Faces Prosecution over Alleged Corruption* (1 October 2009) ABC News <<http://www.abc.net.au/news/2009-10-01/bae-systems-faces-prosecution-over-alleged/1087512>>.

¹⁴⁸ Zerk, above n 11, 46.

¹⁴⁹ *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001).

¹⁵⁰ *Ibid* art 6.

¹⁵¹ *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002).

¹⁵² *Ibid* art 7(1).

¹⁵³ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁵⁴ *Ibid* art 5.

assertions reflect something of an international consensus and provide an element of certainty and consistency between jurisdictions. As will be discussed below, the same cannot be said of other categories, which tend to be unilateral, overtly politicised and lead to a lack of certainty and consistency.

B *Ad Hoc Assertions*

Ad hoc assertions of extraterritorial criminal jurisdiction typically focus on transnational crimes and generally represent the efforts of developed countries to regulate the conduct of their citizens in jurisdictions where enforcement mechanisms are either inadequate or rarely used. The general approaches of the Australian and Canadian legislatures tend to typify this category in that not all criminal offences in those jurisdictions have extraterritorial scope. Only those which are specifically legislated, on an ad hoc basis, have extraterritorial operation.

In Australia, examples of ad hoc assertions of extraterritorial jurisdiction include legislative provisions relating to child sexual offences, immigration offences and money laundering offences.¹⁵⁵ Australia's legislative frameworks on child sexual offences were recently amended to include several new offences which go beyond child sex tourism, and regulate other kinds of sexual offences overseas.¹⁵⁶

In Canada, offences with extraterritorial scope include criminal conduct by Canadian federal public servants,¹⁵⁷ immigration offences,¹⁵⁸ terrorism,¹⁵⁹ torture¹⁶⁰ and various sexual offences against children.¹⁶¹ In 2007, commentators observed that there had been an 'undeniable increase ... in extraterritorial provisions in the *Criminal Code*'.¹⁶²

The courts in Canada have recently had opportunity to consider the extraterritorial dimension of its criminal laws and procedures, and constitutional guarantees. For example, the decisions in *R v Hape*,¹⁶³ *Amnesty International Canada v Canada* ('*Amnesty*')¹⁶⁴ and *R v Klassen*¹⁶⁵ indicate that certain obligations did not apply to the conduct of the Canadian Government overseas. In *R v Hape*, the Supreme Court of Canada found that s 8 of the *Canadian Charter of Rights and Freedoms* ('*Charter*'),¹⁶⁶ which guarantees a right against 'unreasonable search or seizure', does not apply extraterritorially to

¹⁵⁵ See also *Crimes (Aviation) Act 1991* (Cth); *Crimes (Biological Weapons) Act 1976* (Cth); *Crimes (Currency) Act 1981* (Cth); *Crimes (Overseas) Act 1964* (Cth); *Crimes (Ships and Fixed Platforms) Act 1992* (Cth); *Criminal Code* div 274.

¹⁵⁶ *Criminal Code* div 272, as amended by *Crime Legislation Amendment (Sexual Offences against Children) Act 2010* (Cth).

¹⁵⁷ *Criminal Code Act*, RSC 1985, c C46, s 7.4.

¹⁵⁸ *Immigration and Refugee Protection Act*, SC 2001, c 27.

¹⁵⁹ *Criminal Code Act*, RSC 1985, c C-46, ss 7.3.73, 7.3.74.

¹⁶⁰ *Ibid* s 7.3.7.

¹⁶¹ *Ibid* s 7.4.1.

¹⁶² Currie and Coughlan, above n 140, 174.

¹⁶³ [2007] 2 SCR 292.

¹⁶⁴ [2008] FC 336.

¹⁶⁵ [2008] BCSC 1762.

¹⁶⁶ *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*').

investigations conducted overseas by Canadian officials.¹⁶⁷ In deciding that international law principles of sovereignty and noninterference, and practices of comity, placed territorial limitations on the application of the *Charter*, the Court held:

Enforcement of compliance with the *Charter* means that when state agents act, they must do so in accordance with the requirements of the *Charter* so as to give effect to Canadian law as it applies to the exercise of the state power at issue ... Since extraterritorial enforcement is not possible, and enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible.¹⁶⁸

As Pierre-Hugues Verdier observes, these findings of the Supreme Court of Canada depart from a previous decision that charter rights apply to criminal investigations conducted abroad, as long as they did not generate ‘objectionable extraterritorial effects’.¹⁶⁹ Although noting that the Court left open the possibility that violation of Canada’s international human rights obligations during an investigation may trigger a remedy under the *Charter* in the future,¹⁷⁰ Verdier describes the idea that enforcement of *Charter* rights is not possible extraterritorially as ‘problematic’.¹⁷¹

The findings a year later in *Amnesty*¹⁷² and *R v Klassen*¹⁷³ produced a similar result. In *Amnesty*, the Federal Court of Canada held that the *Charter* did not provide protection to individuals captured by Canadian forces in Afghanistan, many of whom were subsequently transferred to Afghani custody. The rationale for the decision seems to be that enforcement of the *Charter* over conduct in Afghanistan would have violated Afghanistan’s sovereignty, and that the relationship between Canada and Afghanistan was governed by international law, including the principle of comity.¹⁷⁴

However, as helpful as it may be in a diplomatic context, comity is an inadequate principle on which to decide whether or not to accord due process to an individual in assertions of extraterritoriality. If a nation state wishes to assert the right to enforce its jurisdiction extraterritorially, then equally it has the responsibility to follow the laws of its jurisdiction extraterritorially.

In his commentary, Stuart Hendin argues that the principle espoused in *Amnesty* — that according domestic rights and freedoms extraterritorially violates the sovereignty of the nation in which it is being asserted — should only apply ‘between functioning states that are capable of executing and then honouring international commitments, including ... fundamental human

¹⁶⁷ *R v Hape* [2007] 2 SCR 292.

¹⁶⁸ *Ibid* 340–1.

¹⁶⁹ Pierre-Hugues Verdier, ‘*R v Hape* 2007 SCC 26’ (2008) 102 *American Journal of International Law* 143, 145; *R v Cook* [1998] 2 SCR 597, [25].

¹⁷⁰ *R v Hape* [2007] 2 SCR 292, 349–50.

¹⁷¹ Verdier, above n 169, 147.

¹⁷² [2008] FC 336. Leave to appeal was refused by the Supreme Court of Canada in *Amnesty International Canada v Canada (Minister of National Defence)* [2008] FCA 401.

¹⁷³ [2008] BCSC 1762.

¹⁷⁴ *Amnesty International Canada v Canada (Minister of National Defence)* [2008] FC 336 [125]–[130].

rights'.¹⁷⁵ While this is a more reasonable proposition that serves to recognise the importance of basic human rights, the idea that a state can assert extraterritorial jurisdiction over the conduct of its nationals abroad and yet not be bound by its domestic obligations is, at best, anomalous; at worst, it will lead to violations of human rights norms.

The decision in *R v Klassen* also followed *R v Hape*. In *R v Klassen*, the applicant, a Canadian citizen, was charged with child sex offences committed outside Canada. The applicant's case was based on the grounds that no nexus existed between Canada and the alleged offences, except his nationality as a Canadian citizen.¹⁷⁶ He sought a declaration that the relevant offence provision was ultra vires the Parliament of Canada.¹⁷⁷ Cullen J disagreed and, in the course of findings, cited *R v Hape* as an authority for the fact that the *Charter* is limited to the Canadian Government and Canadian provinces and territories and does not apply extraterritorially to searches and seizures outside of Canada.¹⁷⁸ Cullen J also held that the principle of comity applies differently to adjudicative and prescriptive jurisdiction, as compared to enforcement jurisdiction.¹⁷⁹ However, for the reasons discussed in the introduction of this paper, this distinction between the three types of jurisdiction will not be discussed at length here.

This line of authority means it is possible for Canadian investigators to circumvent due process requirements in some assertions of extraterritorial jurisdiction. This is not acceptable; states should be bound extraterritorially by the same principles of procedural fairness as would apply in domestic contexts. In practice, given the differences between laws in various states, it may be impossible to ensure every detail of domestic process is also followed extraterritorially. However, basic principles of due process and procedural fairness ought to be followed at the very least. Arguably, if a state cannot enforce at least basic principles of due process, then it should not assert jurisdiction in the first place. As reliance on extraterritorial jurisdiction increases, these issues need to be dealt with by the international community to ensure that citizens do not find themselves in a 'no-man's-land' jurisdiction, burdened by multiple extraterritorial obligations, yet denied corresponding extraterritorial protections.

C Reactive Assertions

Reactive assertions of jurisdiction describe legislation with extraterritorial scope enacted as a reaction to: a specific policy issue, international pressure or a new type of conduct. An example of each is provided below. Specifically, Australia's people smuggling legislation is examined as an example of legislation reacting to a specific policy issue. Both Indonesia and Malaysia's people smuggling legislation provide illustrations of a legislative reaction to international pressure. Finally, proposals by the US to enact the *Securing Human Intelligence and Enforcing Lawful Dissemination Act* ('SHIELD legislation')¹⁸⁰

¹⁷⁵ Stuart Hendin, 'Extraterritorial Application of Human Rights: The Differing Decisions of Canadian and UK Courts' (2010) 28 *Windsor Review of Legal and Social Issues* 57, 81–2.

¹⁷⁶ *R v Klassen* [2008] BCSC 1762, 4 [12].

¹⁷⁷ *Ibid* 2 [1].

¹⁷⁸ *Ibid* 40 [106].

¹⁷⁹ *Ibid* [64].

¹⁸⁰ HR 6506, 111th Congress (2010).

are an example of an assertion of jurisdiction in reaction to an emerging category of conduct — namely, the kind of activities engaged in by the organisation WikiLeaks.

1 *People Smuggling in the Asia-Pacific*

(a) *People Smuggling Legislation in Australia*

The issue of people smuggling and the processing of asylum seekers is a contentious and highly politicised issue in Australia.¹⁸¹ The *Migration Act 1958* (Cth) contains people smuggling offences that apply ‘in and outside Australia’.¹⁸² The corresponding provisions in the criminal code are more complex. Under s 73.4 of the *Criminal Code Act 1995* (Cth), jurisdiction for people smuggling offences is enlivened on two alternate grounds:

- (i) the alleged perpetrator is an Australian citizen or resident and the conduct constituting the offence occurs wholly *outside* Australia; or
- (ii) the conduct constituting the offence occurs wholly or partly in Australia and the results occurred (or were intended to occur) outside Australia, regardless of the alleged offenders nationality.

In June 2010, further amendments to Australia’s people smuggling laws came into effect.¹⁸³ Among other things, the amendments established a new offence of providing ‘material support’ towards a people smuggling venture.¹⁸⁴ Given that receipt of a financial benefit is not a prerequisite to be liable under this offence, persons who are Australian citizens or residents who work in charities and non-governmental organisations that provide some form of ‘material support’ could be caught by this provision, even where that conduct occurs overseas.

The other notable feature of the Australian legal regime on people smuggling is the existence of mandatory penalty provisions. New provisions provide for

¹⁸¹ It should be noted that people smuggling offences are distinct from human trafficking offences both in Australian law, and under the relevant treaties. This is because trafficking does not necessarily require an illegal border crossing, and victims are generally considered commodities, rather than clients. Article 3(a) of the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004) defines people smuggling (the smuggling of migrants) as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’. Article 3(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) defines trafficking of persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

¹⁸² *Migration Act 1958* (Cth) s 228A.

¹⁸³ *Anti-People Smuggling and Other Measures Act 2010* (Cth).

¹⁸⁴ *Ibid* sch 1 item 6, inserting *Criminal Code* s 73.3A.

mandatory sentencing, including minimum non-parole periods, for aggravated offences where more than five non-citizens are smuggled,¹⁸⁵ false papers are created¹⁸⁶ or where the venture is exploitative or entails a risk of death or serious injury.¹⁸⁷

Many of these offences have extraterritorial scope. While some of the conduct discussed above can seem both territorial and extraterritorial, extraterritoriality can sometimes be a question of degree.¹⁸⁸ Australian assertions of extraterritorial jurisdiction over people smuggling offences has led to more intimate engagement with regional governments such as Sri Lanka, Indonesia and Malaysia.¹⁸⁹ Working groups have been established between these nations in efforts to 'harmonise' legal frameworks, including issues of jurisdiction.¹⁹⁰ Increased cooperation with countries in the Asia-Pacific region is of importance to Australia in its pursuit of people smugglers, because many regional neighbours do not have corresponding extraterritorial components in their legislative regimes. This means double criminality requirements can make extradition and mutual assistance requests complicated and protracted.

While cooperation on transnational crime is a legitimate pursuit in itself, Australia's regional 'cooperative' activities on people smuggling may negatively impact on the human rights of asylum seekers. It also suggests an uncomfortable dynamic where Australia is 'buying' cooperation on transnational crime in exchange for aid much needed by its poorer neighbours.

For example, after years of persistent urging by Australia, the Indonesian Parliament recently passed legislation criminalising people smuggling activities.¹⁹¹ The legislation reportedly provides for the imposition of penalties for people smuggling offences, ranging from 5 to 15 years imprisonment,¹⁹² and it is understood some provisions have extraterritorial components. Prior to the passing of these laws, persons found to be involved in people smuggling activities have been prosecuted for minor immigration or maritime offences.¹⁹³ The Australian Home Affairs Minister reportedly applauded the Indonesian Parliament and asserted that the laws will serve as a 'strong deterrent' against people smuggling activities.¹⁹⁴ It is telling that Indonesian people smuggling laws were described by the Australian media as 'honouring an undertaking made by President Susilo Bambang Yudhoyono to ... the Australian Parliament'.¹⁹⁵

Australia has also had intimate cooperation with Malaysia on people smuggling issues, including a memorandum of understanding proposing the

¹⁸⁵ *Migration Act 1958* (Cth) s 233C.

¹⁸⁶ *Ibid* s 234.

¹⁸⁷ *Ibid* s 233B.

¹⁸⁸ Zerk, above n 11, 15.

¹⁸⁹ Savitri Taylor, 'Australia's Expanding Borders', *Inside Story* (online), 2 December 2009 <<http://inside.org.au/australias-expanding-borders/print/>>.

¹⁹⁰ *Ibid*.

¹⁹¹ Matt Brown, *Indonesia Passes Laws Criminalising People Smuggling* (27 May 2011) ABC News <<http://www.abc.net.au/news/stories/2011/04/07/3185410.htm>>.

¹⁹² *Ibid*.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*.

¹⁹⁵ Peter Alford, 'Indonesia Delays People Smuggling Law', *The Australian* (online), 14 December 2010 <<http://www.theaustralian.com.au/news/nation/indonesia-delays-people-smuggling-law/story-e6frg6nf-1225970520112>>.

exchange of refugees in Malaysia awaiting settlement and asylum seekers in Australia awaiting processing. This met with mixed responses, including from the United Nations High Commissioner for Refugees.¹⁹⁶ The Australian Government's refusal to exempt child asylum seekers from transfer to Malaysia as part of the exchange was particularly controversial. The chair of an Australian Government immigration detention health advisory group is reported to have claimed that the safety of children sent from Australia to Malaysia under the agreement could not be guaranteed.¹⁹⁷ Again, while regional cooperation on transnational crime is sensible, the human rights implications do not appear to have been well thought-through. Commentator Savitri Taylor alleges that asylum seekers in Malaysia 'face fines, jail, caning and eventual deportation, even if they have sought asylum'. She claims:

On 1 January 2005, for example, eleven Afghans attempting to travel from the Middle East to Brisbane on counterfeit Australian visas were intercepted at the Kuala Lumpur airport by an Australian ALO [Airline Liaison Officer]. They were detained by Malaysian immigration authorities and returned to the Middle East later the same day, despite the fact that they sought asylum: a disquieting outcome, to say the least.¹⁹⁸

In any event, a decision of the High Court of Australia in August 2011 found that the Australian Government did not have the power to remove asylum seekers from Australia to Malaysia because certain human rights standards could not be guaranteed.¹⁹⁹ This decision supports the proposition that assertions of extraterritoriality have corresponding rights *and* responsibilities.

Sri Lanka is another of Australia's 'partners' on people smuggling issues. In 2009, the then Minister for Home Affairs, Brendan O'Connor, announced that the Australian Government would offer assistance to Sri Lanka to combat people smuggling in the form of police training, computers, cameras and evidence collection kits.²⁰⁰ In September 2011, the Australian Government came under criticism for congratulating the Sri Lankan police and navy for successfully intercepting a boat carrying 44 asylum seekers. For example, John Dowd, president of the International Commission of Jurists, said Australia's praise of Sri Lanka was ignoring the right of people to seek asylum.²⁰¹ Dowd claims:

It is likely these asylum seekers will be treated harshly when all they have done is exercising [sic] a legal right ... People who are desperate to get away from Sri Lanka know that it is a dangerous enterprise coming by sea. We Australians

¹⁹⁶ United Nations High Commissioner for Refugees, 'UNHCR Statement on the Australia-Malaysia Arrangement' (Press Release, 25 July 2011) <<http://www.unhcr.org/4e2d21c09.html>>.

¹⁹⁷ 'Key Government Asylum-Seeker Adviser Says No Kids Should be Sent to Malaysia', *The Australian* (online), 6 June 2011 <<http://www.theaustralian.com.au/national-affairs/key-government-asylum-seeker-adviser-says-no-kids-should-be-sent-to-malaysia/story-fn59niix-1226070118457>>.

¹⁹⁸ Taylor, above n 189.

¹⁹⁹ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 280 ALR 18.

²⁰⁰ Yuko Narushima and Jonathan Pearlman, 'Aid Given to Sri Lanka to Stem People Smuggling', *Sydney Morning Herald* (online), 16 October 2009 <<http://www.smh.com.au/national/aid-given-to-sri-lanka-to-stem-people-smuggling-20091015-gz9y.html>>.

²⁰¹ Daniel Flitton, 'Sri Lankan Navy Thwarts Refugees', *The Age* (Melbourne), 15 September 2011, 10.

praise ourselves as great humanitarians — this is hardly an example of compassion.²⁰²

Taylor also expresses concerns about Australia's cooperation in Sri Lanka, arguing:

the fact that Australia is making praiseworthy attempts to eliminate in the longer-term the root causes of Sri Lankan asylum seeker movement does not constitute any kind of moral alibi for seeking to ensure that those who need to flee the country in the meantime are unable to do so.²⁰³

Unsurprisingly, Australia's general approach to extraterritorial people smuggling laws in the region, while generally accepted in the relevant domestic communities, has attracted criticism. The desire to appear 'tough' on immigration has resulted in assertions of extraterritoriality over people smuggling offences throughout the Asia-Pacific region. This raises concerns as to the implications for the human rights of those persons subject to the extraterritorial legislation and calls for a 'due diligence' to be undertaken on the consequences of its scope.

(b) *SHIELD Legislation in the US*

The proposed *SHIELD* legislation would amend § 798 of the *US Code*, which relates to the disclosure of 'classified information'.²⁰⁴ The amendments create offences that would purportedly apply to journalists who publish leaked confidential documents.²⁰⁵ Ironically, the term 'shield' legislation is usually used to describe legislation that protects journalists from having to name their sources.²⁰⁶ The proposed *SHIELD* legislation appears to be extraterritorial in nature, targeting 'transnational activity ... that threatens the security of the United States'²⁰⁷ and applying to 'any individual or group'²⁰⁸ engaging in that activity. It is unclear whether this conduct must be undertaken knowingly to incur punishment or whether liability is absolute. The scope of the Bill's offence provisions is not limited to US nationals, but appears to assert extraterritorial jurisdiction on the basis of the protective principle. The proposed legislation is clearly a reaction to the mass dissemination of diplomatic cables and communiqués by the website WikiLeaks and its founder, Julian Assange.²⁰⁹

²⁰² Ibid.

²⁰³ Taylor, above n 189.

²⁰⁴ Securing Human Intelligence and Enforcing Lawful Dissemination Act, HR 6506, 111th Congress (2010).

²⁰⁵ Ibid.

²⁰⁶ See Hagit Limor, 'Shield vs SHIELD' (2011) 99(1) *The Quill* 3; 'Bill Aimed at Wikileaks Introduced', *UPI* (online), 3 December 2010 <http://www.upi.com/Top_News/US/2010/12/03/Bill-aimed-at-WikiLeaks-introduced/UPI-80501291412644/>.

²⁰⁷ Securing Human Intelligence and Enforcing Lawful Dissemination Act, HR 6506, 111th Congress (2010) § 2(b)(7)(a).

²⁰⁸ Ibid § 2(b)(7)(b).

²⁰⁹ Limor, above n 206.

The report by the Congressional Research Service itself acknowledges:

The publication of the leaked documents by WikiLeaks and the subsequent reporting of information contained therein raise questions with respect to the possibility of bringing criminal charges for the dissemination of materials by media organisations following an unauthorised disclosure, in particular when done by non-US nationals overseas.²¹⁰

The legislation was presented to the Senate on 10 February 2011. However, at the time of writing, it was still being debated and considered by the Senate Judiciary Committee.²¹¹ In any event, the legislation, if passed, may be subject to constitutional challenge. As observed in a report on the issue prepared by the Congressional Research Service, although unauthorised acquisition of information may be punished, the issue remains open as to whether the criminalisation of the *publication* of unlawfully obtained information would be consistent with First Amendment rights relating to freedom of speech.²¹²

If Assange is an Australian citizen and not a US national (it is assumed here that he is not) and/or other participants in WikiLeaks distribution are also not, then his and/or their hypothetical prosecution under this legislation for conduct committed extraterritorially could not be grounded in the nationality principle. However, such a prosecution(s) would probably be justified by reference to the protective principle as discussed above in Part III. If this were the case, it is not clear whether or not he and they would be accorded First Amendment rights if prosecuted in the US. This lack of certainty and consistency is characteristic of reactive assertions and points to the need for international consensus on the means and method by which extraterritoriality is asserted. This could take the form of a model law or as a codification of principles, particularly principles to guide prosecutorial discretion in relation to extraterritorial offences.

D *Generic Assertions*

Generic assertions of extraterritoriality describe municipal legislation, which provides for the extraterritorial applicability of an entire criminal law framework, rather than for specific ad hoc offences. For example, unlike jurisdictions such as Australia and Canada, criminal laws in France have generic extraterritorial scope. The French *Penal Code* provides:

French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French national or foreign national outside the territory of the French Republic, where the victim is of French nationality at the time the offence took place.²¹³

As noted above, there is likely a strong connection between generic assertions of extraterritoriality and the policy of non-extradition of nationals. Generic

²¹⁰ Jennifer K. Elsea, 'Criminal Prohibitions on the Publication of Classified Defense Information' (Congressional Research Service Report, Library of Congress, 10 January 2011) 3.

²¹¹ Securing Human Intelligence and Enforcing Lawful Dissemination Act, HR 6506, 111th Congress (2010).

²¹² Elsea, above n 210, 21.

²¹³ *Penal Code* (France) [Legifrance trans, *Penal Code* (2005) <http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf>] art 113-7.

assertions of extraterritoriality such as those in France are grounded in the nationality principle. In some ways, this kind of assertion is preferable to ad hoc and reactive assertions because, in theory, the same procedural rights are accorded to all offences, as there is no significant distinction made between domestic offences and extraterritorial offences. Generic assertions are also more predictable and, arguably, consistent. Of course, the problem with generic assertions are the multiple tiers of regulation that they create for dual nationals or citizens with residency elsewhere. Nonetheless, it is a less troublesome form of extraterritoriality.

E *Uncontentious Prosecutions*

This category describes uncontroversial prosecutions where there are little (or no) negotiations between competing jurisdictions. For example, in *R v ONA*²¹⁴ the accused, ONA, pleaded guilty to two federal sexual offences committed against a person less than 16 years of age while outside Australia. The first was committing an act of indecency with a person under 16 while outside Australia and the second was the offence of engaging in sexual intercourse with a person under 16 while outside Australia.

The first offence took place in Liberia and the second in Thailand. ONA, around 56 years of age at the time, had commenced a relationship with the mother of the victim in Liberia. The victim was between five and seven years of age at the time of the offence. In Liberia, ONA indecently assaulted the victim. ONA, the mother and the victim then travelled to Thailand, at which time ONA filmed himself attempting to have sexual intercourse with the victim. The victim complained to her mother, who in turn reported the incident to the police and the footage was discovered. There were several grounds of appeal, but none relating to jurisdiction. Instead, ONA argued that he ought to have received a lighter sentence because he did not travel overseas with the specific purpose of engaging in commercial child sex tourism and this made his conduct less grievous than if it had been premeditated. The Court found that while premeditation may be a circumstance of aggravation, it did not follow that its absence ought to warrant a lighter sentence. In any event, the Court found that the sentence imposed was not 'in any aspect manifestly excessive'²¹⁵ and noted the purpose of the legislation as espoused in the second reading speech was to 'provide a real and enforceable deterrent to the sexual abuse of children outside Australia by Australian citizens'²¹⁶ and was therefore not limited to premeditated commercial ventures.

By way of contrast, in a very similar case the accused did contest jurisdiction. In *XYZ v Commonwealth*,²¹⁷ an Australian citizen, XYZ, was committed to stand trial on three charges, each alleged to have been committed in Thailand. The charges included engaging and attempting to engage in sexual intercourse with a child under 16 years of age, contrary to provisions in the then pt IIIA of the *Crimes Act 1914* (Cth).²¹⁸ XYZ challenged the validity of the provisions on the

²¹⁴ (2009) 24 VR 197.

²¹⁵ *Ibid* 201 (Ashley JA).

²¹⁶ *Ibid* 207 (Neave JA).

²¹⁷ (2006) 227 CLR 532.

²¹⁸ As repealed by *Crime Legislation Amendment (Sexual Offences against Children) Act 2010* (Cth) sch 1 item 1.

basis that the Commonwealth of Australia did not have the authority to assert extraterritorial jurisdiction over offences that occurred in Thailand. The case went all the way to the High Court of Australia, where the issue was whether s 51(xxix) of the *Australian Constitution*, the external affairs power, permitted the Commonwealth to assert extraterritorial jurisdiction over the conduct of its citizens or residents overseas. The Court concluded that, given the conduct proscribed by the extraterritorial components of the relevant child sex offences occurs *outside* Australia, it was conduct within the scope of the external affairs power.²¹⁹ In arriving at his individual decision, Gleeson CJ noted that the territorial principle of legislative jurisdiction is not the only source of jurisdiction recognised by international law.²²⁰ He found that the principle of national sovereignty, according to the law of nations, grants Australia a right to 'regulate, by legislation, the conduct outside Australia of Australian citizens or residents'.²²¹ According to His Honour, and consistent with the principle that international law may guide the interpretation of domestic law,²²² this was relevant to determining the scope of the external affairs power and, consequently, the validity of the legislation.

Notably, Gleeson CJ seemed to attribute weight to the fact that the legislation still required a tangible nexus, that is, the perpetrator must be either a citizen or resident of Australia and that this was required by the 'comity of nations'.²²³ This is clearly not the case with some assertions of extraterritoriality, which might be grounded in the protective principle or in the 'effects' principle, for example.

As the title of this category suggests, these assertions are not problematic in the way other categories are. *Prima facie*, this is because most uncontentious prosecutions are grounded in extraterritorial legislation that is treaty-based, rather than *ad hoc* or reactive. However, treaty-based extraterritorial jurisdiction can still be misused as was the case in the prosecution of Julian Moti for child sexual offences committed extraterritorially.

F *Politically Motivated Prosecutions*

This category describes prosecutions that are highly politicised and motivated by a broader policy agenda. The prosecution of Julian Moti for child sexual offences and Hadi Ahmadi for people smuggling offences are examples of this category.

1 *Julian Moti*

In December 2007, Julian Moti was deported from the Solomon Islands and, on arrival in Australia, prosecuted under Australian law for child sexual offences.²²⁴ The charges referred to a time when Moti was a resident of Vanuatu and were asserted on the basis of the active nationality principle (Moti has

²¹⁹ *XYZ v Commonwealth* (2006) 227 CLR 532.

²²⁰ *Ibid* 536.

²²¹ *Ibid* 540.

²²² *Ibid* 536, citing *R v Jameson* [1896] 2 QB 425, 430.

²²³ *Ibid* 538.

²²⁴ *R v Moti* [2009] 235 FLR 320.

Australian citizenship). The Moti case has been a high profile one; Moti was the Attorney-General of the Solomon Islands. Three days before his deportation to Australia it was officially published in the *Solomon Island Gazette* that Moti's appointment as Attorney-General had been terminated.²²⁵ Not surprisingly then, the case has been the subject of media attention and speculation as to the potential political motives of the Australian Government in pursuing the case. For example, Purnell suggests the exercise of extraterritorial jurisdiction in the case was really about asserting Australia's foreign policy objectives, rather than the alleged conduct in issue.²²⁶ Purnell asks:

Why is the Australian Government running so hard in the Julian Moti affair? Is there a political dimension to this matter? The Commissioner for the Australian Federal Police has stated that the AFP commenced investigation into this matter in 2005. It was in 2005 that Julian Moti was first asked to be attorney-general. He declined that first offer but accepted the 2006 offer. Why has the AFP sought new witnesses and re-interviewed the complainant? Does the Australian Government want to see a regime change in the Solomons?²²⁷

Purnell concludes his commentary with a further question:

was the *Crimes (Child Sex Tourism) Act* passed with the intention of enabling the Australian prosecution authorities to launch a prosecution against a person who resided in Vanuatu and the Solomons — and who happened to take out Australian citizenship but had not lived in Australia since student days and is currently living in the Solomons — to be tried in Australia for offences allegedly committed when he was a citizen of Vanuatu?²²⁸

In the initial proceedings, Moti argued that the prosecution was an abuse of process and applied for a stay of the indictment presented against him. Among other things, he argued that his deportation was a disguised extradition and an unlawful removal, and that the investigation was politically motivated. Australia has no coercive powers to compel witnesses from overseas countries to give evidence, so the prosecution relied heavily on the willingness of witnesses. This resulted in payments by the Australian Federal Police to the main witness, which were described as living expenses. In deciding the application, Mullins J held there was no basis for the disguised extradition ground because the decision to deport was one for the Solomon Islands as a sovereign nation. Mullins J concluded that it was not for courts to express an opinion on the decisions made by sovereign governments.²²⁹ The Court then went on to reject all other grounds, except one. The stay of prosecution was granted on the basis that payments made to the witnesses who lived in Vanuatu brought the administration of justice into disrepute.²³⁰ Mullins J found that, while there may have been some justification for humanitarian support for the family of the complainant,²³¹ the payments were

²²⁵ Ibid 326.

²²⁶ F J Purnell, 'Politics Overtakes Justice in the Pursuit of Julian Moti', *The Canberra Times* (Canberra), 26 October 2006, 17.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ *R v Moti* (2009) 235 FLR 320, 333.

²³⁰ Ibid 347.

²³¹ Ibid 344–5.

of an amount that exceeded merely subsistence support.²³² However, that decision was reversed on appeal by the Crown and the Commonwealth Director of Public Prosecutions committed to resume the prosecution.²³³ In turn, Moti applied for — and was granted — special leave to appeal to the High Court of Australia. That decision was handed down in late 2011.²³⁴ In its findings, the High Court did not take the view that the payments to witnesses were an abuse of process. However, the Court did order that the prosecution of Moti should be stayed as an abuse of process because Australian officials facilitated his deportation from Solomon Islands to Australia knowing that his deportation was, at that time, unlawful under Solomon Islands law.²³⁵

Clearly, in its rush to deliver on a political agenda, the Australian Government cut corners and undermined the rule of law and basic principles of procedural fairness. Remarkably, the political agenda in the Moti case is not denied by the Australian Government. In written argument, the Crown conceded that

the Australian High Commissioner to the Solomon Islands, Mr Cole, on a number of occasions requested the AFP to investigate the applicant, and *that the motivation was largely based on his view that the appellant was unsuitable to be appointed Attorney General in the Solomon Islands.*²³⁶

This case is another example of a state asserting extraterritorial jurisdiction in a way that undermines due process. It illustrates the ‘enormous discretion’²³⁷ given to prosecutors in deciding whether to prosecute an extraterritorial crime and the need for the development of prosecutorial guidelines in relation to extraterritorial offences. As Ellen Podgor notes, the decision as to whether to pursue an extraterritorial offence is ‘subject not only to the whims of prosecutors, but also to the political desires of a particular administration’.²³⁸ This does not say much for the rule of law in the prosecution of extraterritorial crimes. In this context, development of a model law, or guiding principles on prosecutorial discretion in extraterritorial matters, should set out a requirement to observe the rule of law and, as argued above, due process and procedural fairness.

2 *Hadi Ahmadi*

The most recent and significant prosecution for people smuggling in Australia is that of Mr Hadi Ahmadi. Ahmadi, a dual citizen of Iran and Iraq and a refugee

²³² Ibid 345.

²³³ Jamie Walker, ‘Child-Sex Case against Julian Moti Revived’, *The Australian* (online), 17 July 2010 <<http://www.theaustralian.com.au/news/nation/child-sex-case-against-julian-moti-revived/story-e6frg6nf-1225892983108>>.

²³⁴ *Moti v The Queen* (2011) 238 ALR 393.

²³⁵ Ibid 412.

²³⁶ Commonwealth Director of Public Prosecutions, ‘Respondent’s Written Submissions’, Submission in *Moti v The Queen*, B19/2011, 6 June 2011, 2 (emphasis added).

²³⁷ Ellen S Podgor, ‘“Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes’ (2002) 31 *Georgia Journal of International & Comparative Law* 1, 24.

²³⁸ Ibid.

himself,²³⁹ was the first person ever extradited by Indonesia to Australia for people smuggling offences. The extradition was significant because, at the time, Indonesia did not have people smuggling laws, only a series of migration offences targeting illegal entry to Indonesia and fraudulent immigration documents.²⁴⁰ This meant that the ‘dual criminality’ requirements of the extradition frameworks were not truly met. This is another example of the rule of law being undermined.

The announcement of the extradition followed a meeting between the then Australian Prime Minister Kevin Rudd and Indonesian President Susilo Bambang Yudhoyono on 10 December 2008.²⁴¹ At that time, and following the same meeting, it was also announced that Australia would provide a \$1.5 billion loan facility to help Indonesia through the current financial turmoil and spend \$3 million helping Indonesia’s new Institute for Peace and Democracy.²⁴² In 2009, journalists for the Sydney Morning Herald reported:

Over the next four years Australia will pay Indonesia more than \$14 million to help stop asylum seekers coming here, including \$1 million to “enhance capacity” at its two detention centres and \$5 million for community housing. The funding adds to at least \$70 million poured into the partnership over the past 10 years.²⁴³

There is no necessary implication that the announcements were related, but this does illustrate political complexities where a wealthy country asserts jurisdiction over persons or offences within the borders of poorer countries.

Ahmadi was later convicted and sentenced in Australia. At the time of writing, the decision could not be found in standard legal databases²⁴⁴ or on the judgment pages of Western Australian courts, where the matter was heard.²⁴⁵ However, media reports indicating that Ahmadi was sentenced to five years for each of two counts of people smuggling, also report that the sentence was reduced to an overall sentence of seven and a half years.²⁴⁶ The Court was reported to have expressed reticence in sentencing Ahmadi, noting that Ahmadi was ‘not the primary organiser’, but rather ‘a middle man’.²⁴⁷

²³⁹ ‘People Smuggler Hadi Ahmadi Jailed for 7.5 Years’, *Herald Sun* (online), 24 September 2010 <<http://www.heraldsun.com.au/news/people-smuggler-jailed-for-75-years/story-e6frf7jo-1225929054280>>.

²⁴⁰ *Ibid.*

²⁴¹ Tom Allard, ‘Indonesia Agrees to Extradition’, *The Age* (Melbourne), 11 December 2008, 9.

²⁴² *Ibid.*

²⁴³ Yuko Narushima and Jonathan Pearlman, ‘Aid Given to Sri Lanka to Stem People Smuggling’, *The Sydney Morning Herald* (Sydney), 18 October 2009, 8.

²⁴⁴ The following databases were searched: Westlaw <<http://www.westlaw.com.au>>; Thomson Reuters <<http://legalonline.thomson.com.au>>; Lexis Nexis <<http://www.lexisnexis.com/au>>; Australian Legal Information Institute <<http://www.austlii.edu.au>>.

²⁴⁵ Western Australian District Court <<http://www.districtcourt.wa.gov.au>>; Supreme Court of Western Australian <<http://www.supremecourt.wa.gov.au>>.

²⁴⁶ ‘People Smuggler Hadi Ahmadi Could Be Free in Two Years’, *The Australian* (online), 24 September 2010 <<http://www.theaustralian.com.au/news/nation/people-smuggler-hadi-ahmadi-could-be-free-in-two-years/story-e6frg6nf-1225928906437>>; ABC Radio National, ‘Hadi Ahmadi Gets Minimum Four Years for People Smuggling’, *PM*, 24 September 2010 (David Weber) <<http://www.abc.net.au/pm/content/2010/s3021541.htm>>; Angie Raphael, ‘People Smuggler Pleads with Judge’, *The Sydney Morning Herald* (online), 23 September 2010 <<http://news.smh.com.au/breaking-news-national/people-smuggler-pleads-with-judge-20100923-15odc.html>>.

²⁴⁷ ‘People Smuggler Hadi Ahmadi Could Be Free in Two Years’, above n 246.

Notably, there are claims from other internet sources that, of the 900 passengers whose entry Ahmadi facilitated, 866 were declared genuine refugees once their claims were processed.²⁴⁸ How accurate these figures are is unclear, given other media reported on the number being 562 refugees.²⁴⁹ It has been reported the Australian Federal Police provided \$250,000 from the Australian Government to another people smuggler who gave evidence against Ahmadi in court and in two other cases against people smugglers.²⁵⁰ It was also reported that Ahmadi himself had been offered money by the Australian Federal Police for information about other alleged people smugglers, but had refused.²⁵¹

In essence, the prosecution of Ahmadi represented a shift in Indonesian–Australian cooperation on people smuggling. Although Australia receives few applications for asylum compared to other destination countries,²⁵² border protection is a heated issue in the Australian community and one that is hotly contested during election campaigns. This gives the Ahmadi prosecution a distinctly political flavour.

G *Alternative or Reactive Prosecutions*

This category refers to assertions of extraterritorial criminal jurisdiction that occur as a result of one jurisdiction being dissatisfied with prosecutorial outcomes in another. An example of this type of prosecution is the prosecution of Mr Gabe Watson in both Queensland and Alabama courts. Watson, a citizen of the US, served 18 months imprisonment in Australia for the manslaughter of his wife on a dive trip in Australia in 2003.²⁵³ Dissatisfied with the lenient sentence, an Alabama court indicted Watson for murder for money and kidnap by trick²⁵⁴ and sought extradition.²⁵⁵

Under Australian law, a person must not be extradited if the offence for which he is sought would result in the accused being subject to the death penalty.²⁵⁶ After receiving assurance that he would not be subject to the death penalty,

²⁴⁸ Project Safecom, *The Case of Mr Hadi Ahmadi* <<http://www.safecom.org.au/ahmadi-case.htm>>.

²⁴⁹ 'People Smuggler Hadi Ahmadi Jailed for 7.5 years', above n 239.

²⁵⁰ ABC Radio, 'People Smuggler Gets Seven Years in Jail', *The World Today*, 24 September 2010 (David Weber) <<http://www.abc.net.au/worldtoday/content/2010/s3020954.htm?site=perth>>.

²⁵¹ *Ibid.*

²⁵² In 2010, France received 47 800 applications for asylum. By comparison, Australia received only 8250: United Nations High Commissioner for Refugees, 'Asylum Levels and Trends in Industrialised Countries 2010' (Report, United Nations High Commissioner for Refugees, 28 March 2011) 7.

²⁵³ *R v Watson; Ex parte A-G (Qld)* [2009] QCA 279.

²⁵⁴ Tuck Thompson, 'California Governor Arnold Schwarzenegger Signs Extradition Order on Gabe Watson', *The Courier Mail* (online), 15 November 2010 <<http://www.couriermail.com.au/news/queensland/california-Governor-arnold-schwarzenegger-signs-extradition-order-on-gabe-watson/story-e6freoof-1225953440198>>.

²⁵⁵ Note, the State of California also sought extradition from Australia, and ordered Watson's extradition to Alabama.

²⁵⁶ *Extradition Act 1988* (Cth) s 22.

Australia agreed to extradite Watson to the US.²⁵⁷ The prosecutor leading the case against Watson in Alabama, when asked about the fact that Watson could not face the death penalty due to the assurances given to the Australian Government, is reported to have said: ‘A jury should make a decision, and they should decide the case in its entirety, not half strung-up or half hung-up by some Australian politician’s decision’.²⁵⁸

This in itself illustrates the tensions that can arise between states in extraterritorial prosecutions. However, it is not clear how the issue of double jeopardy was dealt with between Australia and the US. Section 7(e) of the *Extradition Act 1988* (Cth) provides that there is an ‘extradition objection’ if a person has undergone punishment under the law of Australia in respect of the extradition offence *or* another offence constituted by the same conduct as the extradition offence. Therefore, although the murder and kidnapping offences for which Watson was indicated in the US are technically different offences from the manslaughter conviction in Australia, the conduct in question was arguably the same conduct and should have been caught by s 7(e). It is not clear how the US and Australia negotiated this issue.

International law does little to assist in this context. Article 14(7) of the *International Covenant on Civil and Political Rights* provides: ‘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 country’.²⁵⁹ However, the Human Rights Committee has interpreted this principle to only apply to trials within a single jurisdiction, as opposed to trials in several different countries.²⁶⁰ Therefore, art 14(7) would not apply to the prosecution of Watson by the US.²⁶¹ Further, as Michele Morosin notes, ‘there is a good deal of disagreement over the interpretation and application of double jeopardy’.²⁶² This is an example of the way in which international law currently

²⁵⁷ *Qld Seeks Further Assurance over Watson Extradition* (12 August 2010) ABC News <<http://www.abc.net.au/news/2010-08-12/qld-seeks-further-assurance-over-watson-extradition/942164>>; Thompson, above n 254; Paul Toohey, ‘Prosecutor Hunts “Guilty” Gabe Watson’, *The Daily Telegraph* (online), 30 April 2011 <<http://www.news.com.au/world/prosecutor-hunts-guilty-gabe-watson/story-e6firkyi-1226047357581>>; Alabama’s 13, ‘Gabe Watson Trial Scheduled for February’, *News*, 3 January 2012 (Paris Jackson) <<http://www2.alabamas13.com/news/2012/jan/03/gabe-watson-trial-scheduled-for-february-18999-vi-114993/>>.

²⁵⁸ Toohey, above n 257.

²⁵⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(7).

²⁶⁰ Human Rights Committee, *Views: Communication No 204/1986*, 21st sess, UN Doc CCPR/C/OP/2 (1990) 67 [7.3] (*‘AP v Italy’*).

²⁶¹ See generally Jill Cogan, ‘Gabe Watson Murder Trial Thrown Out’ (24 February 2012) ABC News <<http://www.abc.net.au/news/2012-02-24/gabe-watson-murder-trial-thrown-out/3849836?section=qld>>; Nina Mandell, ‘Gabe Watson’s Father Says His Family is ‘Relieved’ after the Case is Dismissed’, *New York Daily News* (online), 24 February 2012 <<http://www.nydailynews.com/news/world/gabe-watson-father-david-watson-family-relieved-case-dismissed-article-1.1027987?localLinksEnabled=false>>; ‘Gabe Watson Acquitted of Honeymoon Dive Death’, *The Sydney Morning Herald* (online), 24 February 2012 <<http://www.smh.com.au/world/gabe-watson-acquitted-of-honeymoon-dive-death-201202-24-1trff.html>>.

²⁶² Michele N Morosin, ‘Double Jeopardy and International Law: Obstacles to Formulating a General Principle’ (1995) 64 *Nordic Journal of International Law* 261, 261.

lacks the appropriate procedural infrastructure to adequately regulate extraterritorial prosecutions.

Ultimately, Watson was tried in Alabama in February 2012 and was acquitted of the murder of his first wife on the basis of insufficient evidence.²⁶³ However, the double jeopardy issue and other procedural issues were not satisfactorily resolved. Although, from a substantive point of view, the prosecution by the US can be justified on the basis of the active nationality principle, from a procedural point of view, it is concerning that Watson could be tried twice for the same conduct.

V CONCLUDING THOUGHTS ON EXTRATERRITORIALITY AND THE FUTURE OF CRIMINAL LAW

It is clear from the examples provided above that extraterritorial criminal jurisdiction is a live and controversial issue. States are increasingly relying on assertions of extraterritorial criminal jurisdiction. On one level this is a justified response to the post-globalisation rise of transnational crime. However, fundamental human rights may be undermined if the right to assert extraterritorial jurisdiction is not accompanied by corresponding responsibilities to accord due process, procedural fairness and domestic human rights guarantees. Further, there is a lack of consistency and certainty as to the means and methods by which extraterritoriality is asserted.

Undoubtedly, assertions of extraterritorial criminal jurisdiction can 'provide a meaningful response to, individuals around the world who face torture, starvation, [and] lack of housing ... due to acts or omission on the part of foreign states'.²⁶⁴ However, it can also lead to uncertainty and a lack of due process as evidenced by decisions such as *R v Hape* in Canada and the prosecution of Julian Moti in Australia. Further, it can result in individuals being subject to multiple legal regimes, such as was the case in the prosecution of Gabe Watson in both Australia and the US.

Extraterritorial criminal jurisdiction is also problematic because it creates multiple layers of legal regulation and 'people cannot obey the law unless they know which law to learn'.²⁶⁵ As Liivoja asserts in explaining his subscription to a 'minimalist conception of the rule of law',²⁶⁶ the law 'must be knowable'²⁶⁷ and therefore 'jurisdiction must be exercised so as to allow individuals to take the law into account when planning their actions'.²⁶⁸ In this way, the conceptual foundations and the jurisprudence relating to extraterritorial criminal jurisdiction would benefit from a deeper engagement with principles of procedural fairness and the rule of law. As May suggests, the 'infirmities of international law ... can be cured by focusing more on procedural rights than is commonly done'.²⁶⁹ He describes procedural issues in international law as a 'vastly underdeveloped

²⁶³ Coglan, above n 261.

²⁶⁴ Gibney and Skogly, above n 39, 9.

²⁶⁵ Parrish, above n 135, 1486.

²⁶⁶ Liivoja, above n 8, 28.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ May, above n 73, 11.

field'²⁷⁰ with 'proportionally little attention'²⁷¹ given to 'global procedural justice'.²⁷²

While criteria such as 'reasonableness', 'comity of nations' or 'non-interference' have been coined by courts and commentators as limiting extraterritoriality, such limitations focus on the rights of states and are ineffective in protecting the rights of individuals. Therefore, the procedural circumstances in which a state can assert extraterritorial jurisdiction need to be revisited. To that end, the international community should move towards a treaty-based system when asserting extraterritorial criminal jurisdiction, rather than doing so on an ad hoc and/or unilateral basis.

Additionally, a state exercising extraterritorial jurisdiction has no reasonable justification for denying access to basic human rights and/or constitutional guarantees available domestically. Further, the politicisation of extraterritorial prosecutions also calls for the development of a consistent set of principles to guide prosecutorial discretion in the context of extraterritorial crimes. As Podgor observed, prosecutors have insufficient ethical mandates and their decisions can impact significantly on international relations.²⁷³ The lack of consistency and clear guidelines to regulate prosecutorial discretion in relation to extraterritorial offences should be a point of concern for the international community. Principles to guide exercises of prosecutorial discretion in relation to assertion of extraterritoriality need to be developed and made available in the form of a 'model law', such as those developed pursuant to the *United Nations Convention on Transnational Organised Crime*.

Extraterritorial criminal jurisdiction sits at the crossroads of domestic and international law. Those crossroads should be a pinnacle of best practice and due process, not a no-man's-land devoid of proper adherence to the rule of law.

²⁷⁰ Ibid 2.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Podgor, above n 237, 25.