Section 3: Jurisdiction

Article 4: Territorial Jurisdiction

The criminal legislation of [insert name of state] applies to any person who commits a criminal offense within its territory.

Commentary

Article 4 expresses a principle that is common to all legal systems: criminal laws apply to persons who commit criminal offenses in the territory of a state. This is an undisputable and universally recognized ground of jurisdiction based on the premise that territorial jurisdiction over criminal offenses is an aspect of a state's sovereign powers. Reference should be made to Article 1(12), on the meaning of *territory,* and its accompanying commentary.

The application of this ground of jurisdiction is generally straightforward. However, an issue may arise with regard to the application of territorial jurisdiction in cases in which one element of the criminal offense was committed in one state and another element was committed in another state. In such a case, and according to Article 14 of the MCC ("a criminal offense is committed where one of its elements was committed"), two states may have territorial jurisdiction over a criminal offense. Reference should be made to Article 14 and its accompanying commentary. The *Report on Extraterritorial Criminal Jurisdiction,* drafted by the Council of Europe Select Committee of Experts on Extraterritorial Jurisdiction (page 11), observes that when faced with a scenario like the one just described, "the question is approached from the pragmatic point of view that the actions associated with the principle act form an indivisible whole with that act and that the unity of the offense leads to a unity of jurisdiction and procedure." The report notes that many states resort to such a construction even where both states have a considerable claim to jurisdiction. In addition, the principle of external *ne bis in idem,* or double jeopardy, set out in Article 8 of the MCC, may also act as a control mechanism for such clashes. Reference should be made to Article 8 and its accompanying commentary.

Article 5: Extraterritorial Jurisdiction

1. The criminal legislation of [insert name of state] also applies:
   (a) to a ship flying the flag of [insert name of state] at the time the criminal offense is committed;
   (b) to an aircraft registered in [insert name of state] while in flight, regardless of its location at the time of commission of a criminal offense;
   (c) with regard to unlawful seizure of aircraft, under Article 149, and unlawful acts against the safety of civil aviation, under Article 150, to an aircraft leased without crew to a lessee who has his or her principal place of business or his or her permanent residence in [insert name of state]; or
   (d) with regard to unlawful seizure of aircraft, under Article 149, and unlawful acts against the safety of civil aviation, under Article 150, to any aircraft on board which the criminal offense of unlawful seizure of aircraft or unlawful acts against civil aviation is committed when the aircraft lands in the territory of [insert name of state] with the alleged perpetrator still on board.
2. The criminal legislation of [insert name of state] applies to any national or any stateless person who has his or her habitual residence in [insert name of state] and commits a criminal offense outside the territory of [insert name of state], where the offense is also criminalized in the second state.
3. The criminal legislation of [insert name of state] applies to any person who commits a criminal offense against a national of [insert name of state] outside the territory, where the offense is also criminalized in the second state.
4. In relation to offenses against internationally protected persons, under Article 152, the criminal legislation of [insert name of state] applies to any person who commits a criminal offense against an internationally protected person, as defined by Article 152(2), who enjoys his or her status by virtue of functions that he or she exercises on behalf of [insert name of state].

Commentary

Extraterritorial jurisdiction is a much more controversial area of criminal jurisdiction than is territorial jurisdiction. Although many states have introduced criminal legislation providing for extraterritorial criminal jurisdiction, many other states have not. Recent law reforms show a movement toward the inclusion of extraterritorial jurisdic-

tion in domestic criminal legislation, particularly where states are battling transnational criminal offenses such as organized crime, drug trafficking, terrorist acts, and trafficking in persons.

A state asserts extraterritorial criminal jurisdiction over a person when the criminal offense occurs outside of its "territory." Reference should be made to Article 1(12), on the meaning of *territory,* and its accompanying commentary.

For a state to assert extraterritorial jurisdiction, there must be some link between the state and the person who committed the criminal offense, the state and victim, the state and the criminal offense, or, in the case of Paragraph 1, the state and a vessel (an aircraft or ship). As mentioned in the commentary to Article 4, territorial jurisdiction is based on the fact that a state has a sovereign right to prosecute criminal offenses committed in its territory. To justify extraterritorial jurisdiction as a valid ground of jurisdiction, it is vital to demonstrate a link to the state's sovereignty that consequently gives the state a valid interest in prosecuting the criminal offense. In the case of criminal offenses committed by a national of the state (Paragraph 2), the national is considered to be an aspect of the state's sovereignty, and therefore there is enough of a nexus to assert jurisdiction. The same reasoning applies to a situation where a criminal offense is committed against a national of the state (Paragraph 3). Under Paragraph 2 of Article 5, a person who is habitually resident in a state is deemed to have "functional" nationality and is covered in the same manner as a national. The nexus between the vessels discussed in Paragraph 1 and the state's sovereignty is based on the "flag principle," discussed below, under which the vessels flying the flag of a state are considered to be part of that state's sovereignty, although they are technically outside its territory as defined in Article 1(12) of the MCC.

The assertion of extraterritorial jurisdiction will often occur in a situation where two states have jurisdiction over the same criminal offense. This clash may be dealt with in the manner discussed in the commentary to Article 4. The principle of external *ne bis in idem*, set out in Article 8, may also act as a control mechanism for such clashes. Reference should be made to Article 8 and its accompanying commentary.

Articles 5(2) and 5(3) require that the criminal offense for which extraterritorial jurisdiction is asserted is also a criminal offense in the state in which the criminal offense occurred. According to the *Report on Extraterritorial Criminal Jurisdiction* (paragraph 14) drafted by the Council of Europe Select Committee of Experts on Extraterritorial Jurisdiction, this provision is a common feature of legal systems that assert extraterritorial jurisdiction over all criminal offenses.

In the course of drafting the MCC, the drafters considered whether to introduce another ground of extraterritorial jurisdiction, one based on the "security principle." This provides a court with jurisdiction over acts that threaten the security of the state or the population of that state even if they occur outside its territory. The drafters did not include this principle because of reservations as to its validity as a ground of jurisdiction under public international law. Additionally, this ground is somewhat ill defined in terms of meaning and how it would be interpreted and applied in practice. The drafters also considered the "effects principle" as a possible ground of extraterritorial jurisdiction. Under this form of jurisdiction, a state may prosecute a criminal offense based on the injurious effects the offense had on the state. This form of juris-

diction was not included in the MCC for the same reasons that prompted the exclusion of the security principle of jurisdiction.

Paragraph 1: This paragraph sets out the "flag principle" under Paragraphs (a) and (b) and an extended form of the principle under Paragraphs (c) and (d). The flag principle is recognized in numerous international conventions as a ground of extraterritorial jurisdiction that states must assert over the criminal offenses covered in the relevant conventions. The extended form of flag principle jurisdiction found in Paragraphs (c) and (d) is unique to the Convention for the Suppression of Unlawful Seizure of Aircraft, Article 4(1)(c), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 5(1)(d), as mandatory grounds of extraterritorial jurisdiction that states parties to both conventions should assert over the criminal offenses of unlawful seizure of aircraft (Article 149) and unlawful acts against the safety of civil aviation (Article 150).

Under the flag principle, criminal jurisdiction may be asserted over offenses committed on board ships or aircraft flying the flag of the state. All states claim jurisdiction over their domestic vessels or aircraft. The only issue that may arise is competing claims of jurisdiction—for example, when a ship flying the flag of one state is sailing in the territorial waters of another state. According to the *Report on Extraterritorial Criminal Jurisdiction* (paragraph 11), drafted by the Council of Europe Select Committee of Experts on Extraterritorial Jurisdiction, "There is no evidence of general international law rules for allocating competence among states, one of whom claims flag jurisdiction." Jurisdiction on the basis of the flag principle is commonly found in many international conventions.

Paragraph 2: Jurisdiction based on the nationality of an offender is commonly called jurisdiction based on the active personality principle. As mentioned above, it is based on the fact that a national is considered an aspect of a state's sovereignty. It is found in a number of domestic criminal codes and also in numerous international conventions. The principle of jurisdiction based on nationality is also found in the Statute of the International Criminal Court, Article 12(2)(b). When a state wishes to comply with its obligation under the statute, it must ensure its domestic legislation asserts jurisdiction based on the nationality of a person, although only with respect to the criminal offenses of genocide, crimes against humanity, and war crimes.

Under the MCC, jurisdiction based on the nationality of the offender applies to both a national and a stateless person who has habitual residence in the state. As mentioned above, persons with habitual residence in a state are deemed to have "functional" nationality and are covered in the same manner as nationals. Specific reference is made in numerous international conventions to the need for states to assert jurisdiction over stateless persons with habitual residence in a state.

Paragraph 3: The ground of jurisdiction provided for in Paragraph 3 is known as passive personality jurisdiction. This means that a state may assert jurisdiction over aliens for acts committed abroad against its nationals. Like the flag principle and jurisdiction based on active personality, this ground of jurisdiction is commonly found in many international conventions.

Paragraph 4: The jurisdiction asserted in Paragraph 4 comes from Article 3 of the Convention for the Protection of Internationally Protected Persons.

Article 6: Universal Jurisdiction

The criminal legislation of [insert name of state] applies to any person who commits any of the following criminal offenses, regardless of the place of commission:

(a) genocide as defined in Article 86;

(b) crimes against humanity as defined in Article 87;

(c) war crimes as defined in Article 88;

(d) torture as defined in Article 101;

(e) establishing slavery, slavery-like conditions, and forced labor as defined in Article 103; and

(f) piracy as defined in Article 157.

Commentary

When a state asserts universal jurisdiction over particular criminal offenses, it can prosecute a person for these offenses irrespective of where they took place, who committed them, or whom they were committed against. Universal jurisdiction is a ground of jurisdiction that does not require linkages to the sovereignty of the state in the way that territorial and extraterritorial jurisdiction do (see the commentaries to Articles 4 and 5). In fact, when a state asserts universal jurisdiction over a criminal offense, that offense will not have taken place on the territory of the state. Nor will it have been committed by or against a national of the state or on board a vessel flying the flag of the state. The criminal offenses contained in Article 6 of the MCC are those that are recognized under international criminal law as offenses subject to universal jurisdiction. Their status as criminal offenses subject to universal jurisdiction derives from either conventional (treaty) law or customary international law. For a fuller discussion on universal jurisdiction, reference can be made to the *Princeton Principles on Universal Jurisdiction* and Amnesty International's *14 Principles for the Effective Exercise of Universal Jurisdiction*. Amnesty International has also produced an extensive and detailed briefing paper titled *Legal Memorandum on Universal Jurisdiction*.

Article 7: Personal Jurisdiction

1. Subject to Paragraph 3, the criminal legislation of [insert name of state] applies to any natural person who commits a criminal offense.
2. Under the conditions set out in Article 19, the criminal legislation of [insert name of state] applies also to any legal person who commits a criminal offense.
3. The criminal legislation of [insert name of state] does not apply to a child who was under the age of twelve at the time of committing a criminal offense.
4. The criminal legislation of [insert name of state] applies to juveniles.

Commentary

Paragraph 2: In addition to asserting jurisdiction over natural persons, the MCC also applies to legal persons, such as companies and corporations. For a fuller discussion of scope and meaning and of the reasons the drafters included jurisdiction over legal persons in the MCC, reference should be made to Section 8, "Criminal Responsibility of Legal Persons," and its accompanying commentaries.

Paragraph 3: Paragraph 3 provides that a court cannot exercise jurisdiction over a child—a person under the age of eighteen years as defined in Article 1(2) of the MCC—who was under the age of twelve years at the time he or she perpetrated a criminal offense.

Originally, the drafters considered whether or not persons under the age of eighteen years should fall within the jurisdiction of the MCC at all. Some thought they should not and that a system of juvenile justice should be drafted, separately from the Model Codes, to address criminal offenses committed by persons under the age of eighteen years. However, in the course of the consultation process on the Model Codes, many people noted that in post-conflict states that do not have operational juvenile justice systems, and that do not subject juveniles to criminal jurisdiction in "adult" courts, juveniles perpetrate serious criminal offenses for the benefit of organized criminal gangs with impunity. This was the case in post-conflict states such as Afghanistan, Kosovo, and Bosnia and Herzegovina. Moreover, this phenomenon is not restricted to post-conflict countries. UNICEF has reported that in many states children are involved in a wide variety of criminal offenses, including drug distribution and trafficking and firearms offenses (see UNICEF, *Innocenti Digest: Juvenile Justice*). In light of these facts, the drafters decided that it was imperative to include jurisdiction over children in the MCC. This is not to say that children who commit criminal offenses will necessarily end up in prison. The MCCP requires that diversion measures be set up to ensure that, where possible, children do not have to enter the criminal justice system in the first place. If the juvenile enters the criminal justice system, the MCC

provides for a range of noncustodial dispositions that can be applied to convicted juveniles. In addition, under the MCC, children under the age of sixteen years cannot be sentenced to imprisonment. Reference should be made to Chapter 15 of the MCCP and Article 85 of the MCC and their accompanying commentaries.

The age of criminal responsibility in the MCC is set at twelve years. International standards on the rights of the child do not define an appropriate age of criminal responsibility that should be followed by states. What is provided, however, according to the Convention on the Rights of the Child, Article 40(3)(a), is that an age of criminal responsibility must be set in the penal law of a state. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Article 4(1), qualifies this provision by stating that the age "shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity." The official commentary on this provision states:

> The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of criminal responsibility would become meaningless.

The Committee on the Rights of the Child (a body set up under the Convention on the Rights of the Child to monitor state compliance with obligations under the convention) consistently urges states to set the age of criminal responsibility at the highest level possible and has declared that setting the age of criminal responsibility below the age of ten years is unacceptable. This position has been supported by Penal Reform International, which in its *Ten Point Plan for Juvenile Justice* urges states to follow a similar course. The age of criminal responsibility varies from state to state. In some states it is set as low as seven years, while in others it is as high as eighteen years.

After surveying of the age of criminal responsibility set in different states around the world, it was decided to set twelve years as the age at which criminal jurisdiction may be exercised over children. In some legal systems, the law contains rebuttable presumptions regarding criminal responsibility—for example, children below the age of fifteen are deemed not to have the requisite mental element, or mens rea, to commit an offense, but if this presumption can be rebutted by the prosecution where it can prove that the child had the requisite mental element, then a child between the ages of seven and fourteen years will be held criminally responsible. For the sake of certainty and to avoid unnecessary legal proceedings, rebuttable presumptions have not been included in the MCC. While the age of twelve years has been provided for in the MCC, a state should set the age of criminal responsibility in light of the state's specific legal tradition and culture, bearing in mind that the age cannot be set too low. The current trend among states is to raise the age of criminal responsibility in domestic criminal law.

The issue of how to determine the age of a person is dealt with in Chapter 15 of the MCCP. The United Nations Guidelines for Action on Children in the Criminal Justice System, paragraph 12, urges states to ensure the effectiveness of birth registration pro-

grams and, where the age of a child involved in the justice system is unknown, to take measures to ensure an "independent and objective" assessment of the true age of the child. In a post-conflict state, it may be the case that adequate birth records are not available, especially in places like Kosovo and East Timor, where the conflict resulted in the destruction of many records. This situation may require significant efforts to draft legislation on birth registration and to fund and establish a system to implement the legislation. It should be borne in mind that in many states children are not registered on their actual birthdates. For example, if the birth registration center is far from a family's home, the parents may wait and then register a number of children at one time—resulting in children having "real" and "official" birthdays. In the absence of documentation and a reliable birth registration system, another method is required to determine age. Where there is no reliable documentation and where police or prosecutors suspect that a person is under the age of twelve years, a qualified medical expert should determine the age, taking into account the child's emotional, mental, and intellectual maturity.

Paragraph 4: Once a child reaches the age of criminal responsibility, he or she is termed a juvenile and is subject to prosecution for any criminal offense he or she is alleged to have committed. A child is a person under the age of eighteen years. A juvenile is a person from age twelve to eighteen years. Reference should be made to the commentary to Article 1(2) for a discussion of the meaning of the term *juvenile* and of international standards regarding the treatment of juveniles in criminal proceedings.

General Note: Where all other grounds of jurisdiction exist to prosecute a person, personal jurisdiction may be excluded by any other legislation on immunity from prosecution that exists in the post-conflict state. The issues of domestic immunity, immunity for foreign officials, and immunity of United Nations and other international personnel, including members of militaries, in relation to criminal offenses committed in a post-conflict state is very relevant to whether the state can assert personal jurisdiction over a person. Prosecutors should be aware of the existence of domestic legislation or agreements that would preclude them from taking a case before the domestic courts. Also, prosecutors may need to look to any relevant status of force agreements (SOFAs) made by a post-conflict state and an international military force serving in the state, any memoranda of understanding (MOUs) between the post-conflict state and an international organization, or even any Security Council resolutions that exempt civilian staff of the organization from the jurisdiction of domestic courts. The MCC does not address the issue of immunity from prosecution. Immunities may exist at a domestic level, where the constitution of a state or another piece of legislation prohibits the criminal prosecution of a monarch, president, ministers, or members of the government or parliament. Diplomatic or consular immunity—that is, immunity for officials of foreign states—may also preclude criminal prosecution in some cases.

In post-conflict states where international personnel are immune from prosecution, for example through immunity granted to United Nations officials, immunity is not always absolute. In the case of the United Nations, for example, under certain conditions, the secretary-general can waive immunity. When immunity is lifted, a person

who commits a criminal offense in the host state may be prosecuted for the offense. This has occurred in Kosovo, for example, where immunity for international staff members accused of committing criminal offenses was lifted on the understanding that the cases would be prosecuted and tried by an international prosecutor and an international judge in Kosovo.

The lifting of immunity is less common in relation to criminal offenses committed by a member of the military of a troop-contributing country. This does not mean that military personnel who commit criminal offenses in post-conflict states are never held to account. Many states have legislation that allows them, under military laws or military codes, to prosecute offenses by members of their militaries for crimes committed abroad. The issue of immunity of international personnel for criminal offenses committed in peace operations is a controversial one, especially when the offenses involve sexual exploitation of women and children. The issue is currently being addressed within the United Nations and is the topic of a report by Jordan's permanent representative to the United Nations, Prince Zeid Ra'ad Zeid Al-Hussein, entitled *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*.

The area of immunities is a complex one and in-depth research should be conducted when a post-conflict state is considering this issue. One of the most contentious issues is that of immunity from prosecution relating to offenses committed in the context of a conflict by persons who were protected from prosecution by reason of their official capacity. The situation might arise, for example, when a member of a government or parliament is prosecuted in the domestic legal system for offenses committed while he or she was a member of the government or parliament.

The question of whether or not domestic or international immunities apply when prosecuting the offenses of genocide, crimes against humanity, and war crimes is much debated and has been litigated in domestic and international courts. It is especially complicated when the issue is the prosecution of current heads of state or government officials, as was evidenced in case of *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* before the International Court of Justice. A full analysis of the debate is beyond the scope of this work. Reference should be made to the extensive literature and case law on this subject. In the creation of specialized domestic tribunals in the post-conflict states in East Timor and Sierra Leone, the issue has been dealt with by simply declaring no immunities, past or present. In East Timor, for example, where a special panel was established to deal with the criminal offenses of genocide, crimes against humanity, and war crimes, along with other serious offenses, Section 15(2) of UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses declared that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person."