Extra-Territoriality and Weapons Proliferation

The Maximum Obligations that a State Can Assume in Conformity with International Law for the Extra-Territorial Performance of an Arms Control Agreement vis-à-vis Non-Parties, with Particular Reference to the Activities of Private Corporate Entities

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Ongoing global technological advances, together with the fragmentation of the former Soviet Union, create unprecedented dangers of weapons proliferation, not least in weapons of mass destruction and their delivery systems. Effective prevention of across-border transfer of such weapons, their component parts, technological expertise or relevant plant and materials for manufacture, is well understood to involve technical and political issues. It is not so widely appreciated that many issues of law are also involved.

The set of legal problems to be addressed here relates to the rights and duties that a State may have, in certain circumstances, to exercise authority beyond the limits of its territory, or with respect to aliens, for the purpose of arms control. Fundamentally, these are questions of State responsibility and State jurisdiction. They concern the activities of foreign nationals on the territory of a State, as well as the activities of the nationals of one State that have a bearing on events in another State. Activities of that kind can take many forms, whether undertaken with or without the overt or tacit consent of the State of that national; within or beyond its borders; and whether performed in a purely individual capacity, by a natural person or under the aegis of a corporate entity.

Extra-territoriality has long been a thorny problem, particularly in a commercial context, but in relation to arms control it has a substantially different aspect. In the past, regarding commercial, diplomatic, matrimonial and like matters, a State was engaged in promoting its own sovereign interests and influence over another State. By contrast, in the newly developing fields of arms control, environmental protection and some aspects of humanitarian law, the State of origin[1] may be endeavouring to fulfil an international duty

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1 State where the relevant weapons, components or technologies originated, also known as the "controlling State" regarding export control issues.

under a widely supported treaty or in accordance with emerging legal mores, whether or not they merit the description of "*de lege ferenda*".

Existing arms control treaties only deal with extra-territoriality obliquely, prohibiting transfer of some objects and information, authorising inspections and attributing damage caused extra-territorially in areas of *res nullius* or *res communis*. As arms control assumes ever greater importance and international commitment, extra-territorial application becomes a more urgent issue. It has recently been an item of intense negotiation at the Conference on Disarmament[2] in connection with article VII of the recent Chemical Weapons Convention.[3] Measures of application and enforcement there agreed, could be adopted in a Protocol to the Biological Weapons Convention and - using the same procedure - incorporated so as to bolster older arms control treaties, notably the Non-Proliferation Treaty and the Nuclear Test-Ban Treaty.

A major non-military problem of weapons proliferation is its profitability, combined with the plausible belief that if a particular State or legal entity were to refrain from contributing to that proliferation, others would readily take its place. Consequently, even given strong moral and political commitment, it is also necessary to find the means to ensure that an anti-proliferation regime will encompass all sources of proliferation. It is assumed that if most of the significant supplier States can be assured of total coverage by the methods of international law, then any non-participating supplier State could be persuaded by diplomatic means to join the relevant arms control regime.

The task of closing all supplier loopholes poses many basic problems of international law. These include: the status in international law of arms control treaties; the extra-territorial ambit of State responsibility and State jurisdiction; the law relating to foreign corporations; and the relationship between States and international organisations of various kinds. By examining these and related matters as they apply to arms control, it may be possible to elucidate a vital branch of international law which has, so far, escaped definition due to its relative novelty and absence from judicial scrutiny.

With the above objectives in mind the present author, with the energetic collaboration of Dr Daniel Warner of the Graduate Institute of International Studies in Geneva, and with some essential procedural assistance by the Institute, convened a specialist Colloquium on 6-7 March 1992. The resulting work draws extensively on the papers presented there and on the vigorous discussions which followed, although the author assumes full responsibility for any shortcomings. The participants in the Colloquium were as follows, listed in alphabetical order: Mr Frank A Bauman - Attorney-at-Law,

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2 A permanent body established at the First Special Session of the General Assembly Devoted to Disarmament (1978), now composed of 39 States including the five permanent members of the Security Council.

3 Latest published negotiating text, *Reports of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on its Work during the period 30 September 1991 to 20 January 1992*, UN Doc CD/1046, as updated at 26 June 1992.

Portland, Oregon, USA; Dr Julie Dahlitz – Chairman, Committee on Arms Control and Disarmament Law, ILA; the late Prof Detlev Chr Dicke – University of Fribourg, Switzerland; Dr Vera Gowland – Graduate Institute of International Studies; Mr Wolfgang Hantke – Federal Ministry of Economics, Bonn, Germany; Prof Karl M Meessen – Graduate Institute of International Studies; Prof Maurice Mendelson – University College, London, United Kingdom; Prof Theodor Meron – Graduate Institute of International Studies; Prof Allan Rosas – Abo Akademy University, Finland; and Dr Daniel Warner – Graduate Institute of International Studies.

Prevention of Weapons Proliferation

The prevention of weapons proliferation is an aspect of arms control and disarmament. In the field of arms control and disarmament law,[4] distinctions have been made between prohibitions on research and development, testing, production, stationing, transfer and use. Apart from direct responsibility for the use of weapons, extra-territorial corporate activity can be relevant to all the other types of proliferation, although transfer, development and production are the most preferred. The prohibitions usually take one of two forms – so-called "Gentlemens' Agreements" among supplier States, concerning militarily sensitive goods; and arms control treaties. As we are here concerned with "the maximum obligations that a State can assume", we will concentrate on adherence to treaty provisions which confer rights of application in addition to those sanctioned by the general rules of international law. Nevertheless, it is worthy of note that the voluntary agreements, while relying entirely on commercial methods of operation, have played a major role in retarding the spread of weapons and weapon technologies. The rights and obligations to apply and enforce those agreements may in certain ways be connected with the right of self-defence and self-preservation of sovereign States. However, the exact relevance of that aspect of the law will not be explored further on this occasion.

The major suppliers' agreements are: COCOM – Coordinating Committee, regarding all types of militarily sensitive or dual-purpose materials and know-how which was, until recently, primarily directed against the former Soviet Union; the Australia Group, concerned with the proliferation of chemical weapons and some biological weapons; the London Suppliers' Club, concerned with the proliferation of nuclear weapons and nuclear weapon technology; and the Missile Technology Control Regime, serving the objective of retarding the spread of ballistic missiles to additional States.[5]

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4 See Dahlitz J, *Nuclear Arms Control: With Effective International Agreements*, 2nd ed (Allen & Unwin, London-Boston, 1984); Lysén, Göran, *The Law of Disarmament* (Iustus Förlag AB, Uppsala, 1990; Dahlitz J and Dicke D Chr (eds), *The International Law of Arms Control and Disarmament* (United Nations, New York, 1991).

5 Documentation regarding the "Gentlemen's Agreements" of supplier States is not in the public domain.

Arms "control", "prohibition", "limitation", "disarmament" etc – all to be referred to as "arms control" – is synonymous with "anti-proliferation", if that term is understood to encompass both vertical and horizontal proliferation of weapons.[6] For our subject, only horizontal proliferation is relevant. The type of undertakings to which States have committed themselves and which are applicable today regarding widely supported, multilateral arms control treaties that could be relevant to the subject under consideration, are to be found in the Antarctic Treaty of 1 December 1959, article X; the "Partial" or "Limited Test-Ban Treaty" – Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 5 August 1963, article 1(2); the "Treaty of Tlatelolco" – Treaty for the Prohibition of Nuclear Weapons in Latin America, of 14 February 1967, articles 1, 13, 14(3), 15(1), and 16(1); Additional Protocol I, article 1; Additional Protocol II, article 2; the "Non-Proliferation Treaty" – Treaty on the Non-Proliferation of Nuclear Weapons, of 1 July 1968, articles I and II; the "Seabed Treaty" – Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Sub-Soil Thereof, of 11 February 1971, articles I(3) and III; the "Biological Weapons Convention" – Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972, articles III and VI(2); and the "Treaty of Rarotonga" – South Pacific Nuclear Free Zone Treaty, of 6 August 1985, articles 3, 6(b), 7(b) and (c).[7]

The Chemical Weapons Convention, still under negotiation at time of writing, contains much more elaborate undertakings than any of the aforementioned treaties – concerning the subject matter of the treaty prohibitions, methods of compliance and verification. It has a special article devoted to "National Implementation Measures", article VII, which defines each State Party's responsibility as extending to "natural and legal persons anywhere on its territory or in any other place under its jurisdiction *as recognized by international law...*".[8] Future arms control commitments are likely to follow the precedent of this Convention, although improved formulations may be found for its expression.

The imprecision of the existing formulations by which States assume responsibility in these connections are apparent. For example, "to refrain from causing, encouraging, or in any way participating ...";[9] "to refrain from

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6 "Vertical proliferation" refers to quantitative and qualitative increase and improvement of weapons in a given State. "Horizontal proliferation" is the spread of the weapons to additional States.

7 Goldblat J, *Agreements for Arms Control*, SIPRI (Taylor and Francis Ltd, London, 1982); *Arms Control and Disarmament Agreements* (United States Arms Control and Disarmament Agency, Washington DC, 1990); *Status of Multilateral Arms Regulation and Disarmament Agreements*, 3rd ed (United Nations, New York, 1987).

8 See n 3 above.

9 Partial Test-Ban Treaty.

engaging in, encouraging, or authorizing, directly or indirectly ...";[10] undertaking "to apply the statute of denuclearization ... in territories for which, *de jure* or *de facto*, they are internationally responsible and which lie within the limits of the geographical zone established in that Treaty";[11] "not to contribute in any way to the performance of acts involving a violation of the obligations of Article 1 of the Treaty ...";[12] "undertake not to assist, encourage or induce any State to carry out activities referred to in paragraph 1 ...";[13] "undertake not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire ...".[14]

The lack of definition of the above formulations concerning their extra-territorial implications, particularly with regard to the private activities of natural and legal persons, cannot be ascribed to incompetent drafting. The undertakings are deliberately ambiguous, at least in part, but why should they contain self-inflicted impediments? The States concerned clearly seek a treaty regime and, if so, they could only benefit from an efficient regime. The underlying difficulty, which is gradually being overcome, is that the general rules of international law have failed to provide an adequate framework to support more efficient accommodation among the parties to arms control treaties. There seems little prospect of finding a remedy merely by refining the treaty language used, to the exclusion of clarifying the principles and general rules of the law. The phrase "as recognized by international law" or "in conformity with international law" – whether or not explicitly stated – will ultimately determine the efficacy of the provision. The following pages analyse what it is that is "recognized by international law" in this context and what may be recognised in the future, if current trends continue.

Issues of State Responsibility

Responsibility for extra-territorial activities of corporate entities not attributable to the government of any State, is at the periphery of developing law. In order to examine this aspect of international law, a brief recapitulation of the underlying principles and practices is unavoidable. Viewed from the perspective of arms control, well-established principles of international law, like those relating to State responsibility, acquire a new dimension. That is so because arms control is an area of the law that has developed only over the past 30 years, although there had been a few previous experiments with arms limitation. For this and some other reasons the issues have not had the benefit of judicial review and elaboration.[15]

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10 Treaty of Tlatelolco.
11 Ibid, Additional Protocol I.
12 Ibid, Additional Protocol II.
13 Seabed Treaty.
14 Treaty of Rarotonga.
15 States have been reluctant to entrust issues with significant security implications – such as arms control – to any court or tribunal. During the past 30 years, only

For instance, State responsibility usually entails the duty of a State to make some form of reparation or compensation for damage that it has caused. In arms control law the major issue is the prevention of harm and the duty of a State – before any harm has occurred – to take all the necessary steps for its avoidance.[16] The responsibility might consist of building a safe storage facility or supervising certain exports – and it is the breach of that responsibility which has to be prevented. Dereliction of the duty to take due care has to be identified preceding the wrongful exports, which might later fall into the wrong hands and could then be used so as to cause actual damage – maybe a decade or more after the lapse of responsibility. Ultimately, the State suffering damage, possibly in another continent, would find it difficult to identify the State whose export of treaty-prohibited spare parts made it possible to create weapons that were used against its cities.

In an arms control context, the attitude of States to assuming responsibility frequently differs from the usual approach. With respect to other branches of the law, States endeavour to assume as little responsibility as possible, while the contrary often applies regarding arms control law. When negotiating arms control treaties for the prevention of weapons proliferation, States increasingly seek to establish high levels of responsibility in order to benefit, in the longer term, from an efficient arms control "regime". Uncertainties and apprehended limitations in the law are hampering States wishing to give substance to their intentions. Frequently, the problem is not a lack of political will but difficulties with method – both technical and legal.

One of the obstacles is that the legal term "State responsibility" has two meanings:

(a) the duty to compensate for wrongful acts;

(b) the "wrongfulness" of the acts – namely the underlying duty to do whatever is necessary in order to achieve or to prevent certain events.

The "preventative" and "compensatory" aspects of State responsibility are closely related but there is an important distinction, especially for arms control, as well as other developing areas of the law such as environmental law and some aspects of humanitarian law. It is noteworthy that the International Law Commission in its currently formulated Draft Articles on State Responsibility,[17] has referred to State responsibility only in its

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one arms control dispute was referred to the ICJ – on the vital issue of whether there is creation of customary international law by an almost universal arms control treaty – and the court sidestepped the issue: *Nuclear Tests (Australia v France) and (New Zealand v France)*, ICJ Rep 1974, pp 253 and 457, respectively.

16 Most of the treaty language indicates strict liability, so that if the prohibited act should occur, it is proof of non-compliance – at least in the absence of *force majeure*. In view of the strict liability, it is immaterial whether it is direct or vicariously assumed.

17 *Reports of the International Law Commission*, UN Docs A/35/10 Ch III (1980) and A/46/10 Ch VII (1991).

compensatory sense. For the purpose of arms control, the observation by Brownlie that "[t]he duty to pay compensation is a normal consequence of responsibility, but is not coterminous with it"[18] provides a more rewarding approach. It should be mentioned in this regard that the International Law Commission is currently considering the preventative aspect of State responsibility, referred to as State "liability" but only in the context of "International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law".[19]

Arms control commitments usually arise as a consequence of treaty commitment. Under the general rules of international law, in the absence of treaty commitment, it is accepted law that a State is not responsible for the acts of unauthorised individuals or corporations subject to its law, unless those acts are expressly ratified subsequently. The principle is encapsulated in article 11(1) of the Draft Articles on State Responsibility drawn up by the International Law Commission: "The conduct of a person or group of persons not acting on behalf of the State shall not be considered as an act of State under international law". A State may be held responsible for culpable negligence as a consequence of not preventing certain acts of individuals such as attacks on aliens,[20] or failure to react to harmful activities of individuals so as to forestall or minimise any untoward consequences.[21]

It follows, that in the absence of treaty undertakings to the contrary, a State is not responsible for acts that have extra-territorial effects perpetrated by private individuals or corporations, even if those acts would have made the State liable in international law had they been performed by authorised persons or State instrumentalities.[22] It is a widely held view that, without treaty commitment, a State is not even accountable for the acts of its nationals on vessels flying its flag.[23]

When giving effect to treaty provisions, there does not seem to be a limit to extra-territorial State responsibility in circumstances when no conflicting State interest is involved,[24] namely in areas of *res nullius* and some areas of

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18 Brownlie I, *Principles of Public International Law*, 4th ed (Clarendon Press, Oxford, 1992), p 435.

19 UN Doc Supp No 10 (A/47/10) of 1992.

20 *Youman's* case, 4 RIAA p 110 (US-Mexico General Claims Commission, 1926); *Janes* case, ibid, p 82.

21 *Corfu Channel* case, ICJ Rep 1949, pp 18-22.

22 In the *Trail Smelter Arbitration* case the acts were performed within State territory although they had extra-territorial effects: 3 RIAA 1905 (US-Canada Arbitration Tribunal, 1938 and 1941).

23 Mendelson M [1991] *Lloyd's Maritime and Commercial Law Quarterly* 284 (book review).

24 "A State cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law": Brownlie, n 18, above, p 35. See re article 27, Sinclair I, *The Vienna Convention on the Law of Treaties*, 2nd ed (Manchester University Press, Manchester, 1984), p 84.

res communis. Arms control treaties contain provisions of this kind, although their validity has not been tested in court. For instance, article VI of the Outer Space Treaty provides that:

> States Parties to the Treaty shall bear international responsibility for national activities in outer space ... whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space ... shall require authorization and continuing supervision by the appropriate State Party to the Treaty.

The Launch Treaty,[25] which is a space treaty with marginal arms control relevance, contains similar provisions in articles 1 and 2. They provide that "A State from whose territory or facility a space object is launched ... shall be absolutely liable to pay compensation for damage ...". Thus, irrespective of whether it is launched by or on behalf of that State or by private persons or corporations – a State could be directly and strictly responsible for compliance with a treaty, extra-territorially, and perhaps be answerable for the actions of a foreign individual or corporation.

In most arms control treaties, where the imposition of extra-territorial State responsibility could lead to overlap with the sovereign rights of other States, provisions regarding extra-territorial application have been less forthright. For instance, the Non-Proliferation Treaty in article 1 prohibits nuclear-weapon States from transferring nuclear weapons etc to "any recipient whatsoever ... directly, or *indirectly*". Parties are forbidden to "*assist, encourage or induce*" the forbidden activity under article 1(3) of the Seabed Treaty; article 1(2) of the Environmental Modification Convention; and in article 3 of the Biological Weapons Convention.

The last-mentioned treaty, in addition, contains a stronger formulation in article IV, which requires that each State Party:

> ... shall, in accordance with its constitutional processes, take *any necessary measures* to prohibit and prevent development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article 1 of the Convention within the territory of such State, under its jurisdiction *or under its control* anywhere.

A somewhat similar provision is to be found in article 4 of the Environmental Modification Convention.

None of these and similar provisions have been tested in court, although some cases are pending in Germany which might provide occasion for their interpretation.[26] In the recent past, when statements have been reported in the

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25 *Convention on International Liability for Damage Caused by Space Objects* of 1972.

26 The italicised provisions present special difficulties of interpretation in the extra-territorial context. Some of the issues were touched upon in the penal judgment of Landgericht Mannheim, in the decided case of *Jurgen Hippenspiel-Imhausen*, 27 June 1990.

press alleging the breach of such provisions, it has been mostly taken for granted that the respective States bore some responsibility for having failed, for instance, to prevent individuals and corporations from transferring the relevant military hardware and technology. However, the response, if any, has been in the form of economic retribution and not a remedy sought in any court of law or administrative tribunal. Yet, in these exchanges States have refrained from claiming to be absolved of responsibility on the ground that the breach of treaty – or of a gentlemen's agreement – was perpetrated by private individuals or corporate entities. Nor has a case arisen so far when a State may have been forced to rely on the defence that the acts in breach of an arms control treaty had an extra-territorial character and therefore escaped State responsibility. The public stance of States when allegations have been made as to arms control transgressions by individuals and corporations – perhaps involving extra-territorial elements – has been to refrain from comment and to rely on the expectation that no legal action would be undertaken against them. That expectation might have been reinforced by the knowledge that detailed evidence was not readily available.

The situation has been changed by the establishment of the Special Commission on Iraq[27] as a subordinate body of the Security Council, pursuant to the ceasefire agreement, concluded at the end of the war in which Iraq invaded Kuwait. Empowered by that Commission, United Nations officials have been able to gather information implicating individuals and corporations in the bypassing of arms control provisions. If they will be permitted to present that evidence in a German domestic court,[28] some of the issues of principle and of treaty interpretation may be given an airing at last. It is not yet clear whether the limits of State responsibility will be a decisive factor.

There are regional and bilateral arms control treaties which are more specific than the aforementioned examples in holding States responsible for the actions of private individuals or corporations, as well as carrying the inference that extra-territorial acts are not excluded from the ambit of the obligation. A noteworthy example is the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals of 1978. Many bilateral safeguards agreements concluded under the Non-Proliferation Treaty, the Treaty of Tlatelolco and otherwise, administered by the IAEA,[29] contain provisions, regarding the sale of radioactive substances, requiring the

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27 SC Res 687 (1991).

28 Since the time of writing, the UN has withheld permission to present such evidence.

29 Under the Statute of the International Atomic Energy Agency, article A III(5), the Agency is authorised: "To establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose; and to apply safeguards, at the request of the parties, to any bilateral or multilateral arrangement, or at the request of a State, to any of that State's activities in the field of atomic energy;...".

purchasing State to bear responsibility that those substances will never be used for weapons purposes, irrespective of resale to third or even subsequent States.

In the absence of any judicial review as to the precise application of such provisions among treaty parties, on the one hand, and non-parties to the relevant treaties, on the other, States have prevaricated. It is claimed, for instance, that during the negotiations on the Biological Weapons Convention, a proposal submitted by the then socialist States which purported to remove the territorial limits of jurisdiction, was rejected on the grounds that a State could not be responsible for the unauthorised acts of natural and legal persons outside national territory, namely in places where the States exercised no jurisdiction or control.[30]

In view of the paucity of documented examples of States responding to a purported extra-territorial responsibility in relation to arms control, it is useful to note the acknowledged practice regarding the exercise of State obligations in comparable situations. Foremost among precedents are the duties assumed by States under the United Nations Charter in the imposition of trade embargoes mandated by the Security Council pursuant to Chapter VII of that Treaty. The Security Council resolutions regarding trade sanctions against Southern Rhodesia and Iraq[31] postulated the adoption of domestic legislation imposing extra-territorial responsibilities, not only on member States of the United Nations but also applying to private individuals and corporations with connections to those States and acting under their protection.[32]

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30 See Fischer, "*L'interdiction des armes bactériologiques*" (1971) *AFDI* pp 111–12.

31 For example, re Southern Rhodesia: SC Res 232 (1966), 253 (1969) and 277 (1970); and re Iraq: SC Res 661 and 670 (1990). See also Gowlland-Debbas V, *Collective Responses to Illegal Acts in International Law* (Martinus Nijhoff, Dordrecht, 1990).

32 Examples of implementing legislation pursuant to the relevant Security Council resolutions:

(1) The *United Kingdom*, Iraq and Kuwait (UN Sanctions Order) of 8 August 1990, referred, *inter alia*, to "a British citizen, a British Dependent Territories citizen, a British Overseas citizen, or a British protected person"; to bodies incorporated or constituted under the law of the UK; to British ships and aircraft registered in the UK or under charter to persons as aforementioned. Council Regulation (EEC) No 2340/90, preventing trade by the Community as regards Iraq and Kuwait of 8 August 1990, which directly applied throughout each of the 12 Member States from 9 August 1990, extended to prohibited activities "in the territory of the Community or by means of aircraft and vessels flying the flag of a Member State, or when carried out by any Council national".

(2) The *French* regulations relating to financial relations with Iraq and Kuwait (Decree No 90681 of 2 August 1990 and the Order of 4 August 1990) specifically excluded from the ambit of their provisions "branches and subsidiaries of French credit institutions or other French institutions situated abroad".

(3) Regulation No 635 of *Norway*, 9 August 1990, extended not only to flag ships and aircraft but also to those "managed or otherwise at the disposal of any Norwegian national, company or association".

The resolutions required that member States prohibit "any activities that promote or are calculated to promote" the sale or supply of prohibited items, including weapons or other military equipment, "by their nationals or from their territories", as well as the "shipment of vessels or aircraft of their registration or under charter to their nationals", in the case of Southern Rhodesia. A similar provision concerning Iraq, extends each State's responsibility to "flag vessels" and "aircraft registered in its territory or operated by an operator who has his principal place of business or permanent residence in its territory". In both cases, States were required to act strictly in accordance with the provisions of the resolutions, notwithstanding any contract entered into or licence granted before the date of the resolutions. In the case of sanctions against the (former) Socialist Federal Republic of Yugoslavia, the Security Council decided that ... all States shall prevent:

> The sale or supply by their nationals or from their territories or using their flag vessels or aircraft of any commodities or products, *whether or not originating in their territories* ... to any person or body in the Federal Republic of Yugoslavia ... and any activities by their nationals or in their territories which promote or *are calculated to promote* such sale or supply of such commodities or products; [and] decides that all States ... *shall prevent* their nationals and any persons within their territories from removing from their territories or *otherwise making available* to those authorities ... funds or resources ... to persons or bodies within the Federal Republic of Yugoslavia ...[33]

While the Security Council embargoes referred to above were not concerned with arms control, they had many similar features. They have a particularly close relevance because they demonstrate *the type of responsibilities that States can assume under international law* as currently practised.

A variety of legal opinion has been expressed on the extra-territorial applicability of State responsibility. At one end of the spectrum is the defence presented by Switzerland before the Sanctions Committee for Southern Rhodesia, relating to the activities of certain corporate entities registered in Switzerland. There the claim was made that:

> Under international public law, each State is entitled to apply legal norms only in its own territory, and the Swiss authorities therefore cannot take any measures that would contravene international positive law.[34]

A strong case in favour of an opposing view was put forward by the United Nations Legal Counsel, in a memorandum dated 8 May 1973.[35] In response to

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(4) The *United States* Executive Order No 12724, "Blocking Iraqi Government Property and Prohibiting Transactions with Iraq", of 9 August 1990, defined persons subject to the jurisdiction of the US, as "any US citizen, permanent resident alien, juridical person organized under the laws of the United States (including foreign branches), or any person in the US, vessels or aircraft of US registration or under charter to any person subject to the jurisdiction of the United States".

33 SC Res 757 (30 May 1992), esp paras 4(c) and 5.

34 S/11178/Rev 1.

35 Ibid.

the argument of Switzerland, the Legal Counsel agreed with the defence to the extent that "a State may only enforce its national legislation within its own territory". However, he argued that it is permissible for:

> ... national legislation controlling the activities of nationals and legal persons not only at home but also abroad and providing for enforcement at home of penalties in respect of contraventions by them abroad without such legislation being regarded in conflict with public international law.

He supported his argument with reference to the United Kingdom's Southern Rhodesia Orders of 1965 and 1966, as well as the *Lotus* case.[36] In that case it was held that, while a State "may not exercise its power in any form in the territory of another State", this does not warrant the inference that international law prohibits "a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad ...".

The positions presented by Switzerland and the United Nations Legal Counsel appear to be diametrically opposed, yet it is to be argued here that the two positions can be reconciled by identifying criteria in accordance with which a case may fall into one or other category. Such a distinction between two categories of cases was made in the *Barcelona Traction* case (Second Phase)[37] in a majority judgment supported by 12 judges. The court there distinguished between two types of State responsibility: (I) the obligations of a State with respect to another State; and (II) obligations "towards the international community as a whole". The majority judgment declared that:

> ... such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

State responsibility to the international community might well include arms control agreements – or at least the various forms of control over weapons of mass destruction. To that extent, the identification of the two categories of responsibility could be very useful for the development of this aspect of international law.

The universal application of the principles of two categories of responsibility has, so far, failed to develop along consistent lines. There are no clear guidelines that would identify the Swiss Government's position regarding extra-territorial application with category I State responsibility, nor to identify the United Nations Counsel's argument with category II State responsibility, although such a refinement could solve the dichotomy in a both legally and politically satisfactory manner. If that solution were acceptable, the problem would still remain as to whether duties falling into the second category were imposed and executed genuinely in the interests of the international community or whether the alleged altruistic responsibility was merely a pretext for furthering national or sectional interests. There is also a good case

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36 The Case of the SS *Lotus* (1927), PCIJ Ser A, No 10, p 19.
37 ICJ Rep 1970, 3, p 32.

for the proposition that there is a still further degree of State responsibility, category (III), applicable to duties assumed under Chapter VII of the Charter of the United Nations. On appropriate occasions, acting pursuant to Chapter VII, States may be required to act "extra-territorially" in a manner that could *overtly* infringe upon the sovereign rights of other States.

While there has been no serious challenge to the legality of the economic embargoes against Southern Rhodesia and Iraq, it is not clear under what rubric legality was conferred upon the extra-territorial obligations required. Was that degree of State responsibility and corresponding extent of exercise of jurisdiction unequivocally in accordance with international law? If so: (a) was it because it had been adopted within the framework of a treaty? (b) because the underlying purpose was one that served the interests of the international community, namely, to eliminate racial discrimination and to reverse aggression, respectively? or (c) because it was undertaken pursuant to a Security Council resolution and the Charter of the United Nations is a Treaty with unique characteristics?

The last stated justification seems to be the most satisfactory because it could be helpful in making the principles of international law both consistent and forward looking. If the ultimate criterion for exercising State powers to their utmost extent is the fulfilment of an obligation towards the international community as a whole, then who better to designate what those interests are than the structure created by that international community? From a practical standpoint, the principles of *jus cogens* are subsumed by the universal United Nations, which is in the best position to declare what those principles are.

In accordance with that reasoning, there is no higher authority than the United Nations acting in accordance with its self-proclaimed rules. Consequently, those provisions, when in accordance with Chapter VII, can entail the requirement for States Parties to the Charter to assume responsibility and jurisdiction for the acts of natural persons and corporate entities acting extra-territorially, *even if that should bring that State party into direct conflict with another sovereign State.*[38] It further follows that, if an arms control treaty prohibiting the proliferation of certain weapons were to be adopted by the United Nations, through its appropriate organs, as essential for the avoidance of a threat to international peace and security in accordance with article 39, then the concomitant standards of State responsibility and State jurisdiction would assume the same dimensions as in the case of the economic embargoes to which we have referred, imposed pursuant to article 41.

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38 For example, SC Res 670 (1990) "... Calls upon those member states cooperating with the Government of Kuwait which are deploying maritime forces to the area *to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council* to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation ...".

On the other hand, if the responsibility is assumed under a treaty of lesser universality than the Charter, even if it relates to matters that might serve the international community as a whole, it would not seem appropriate to attribute the same level of rights and duties vis-à-vis other sovereign States, non-parties to that treaty, as might otherwise be the case. For example, a regional arms control treaty requiring State parties to take their treaty responsibilities to the point of directly encroaching upon the territorial integrity or political independence of States in another region, could not be justified either in law or in prudent political management. The same limitation would apply to arms control measures undertaken unilaterally or in conformity with a gentlemen's agreement inconsistent with widely supported treaties and other recognised expressions of international opinion, notably General Assembly resolutions. Such export curtailments, for instance, might be thought of as burdens by the exporter States, their nationals and registered corporations, undertaken entirely for the benefit of humanity while, at the same time, those curtailments may be regarded by would-be importing States as measures primarily designed to promote the economic interests of some technologically and economically more developed rivals. Nevertheless, these considerations do not invalidate the notional usefulness of category II State responsibility. They merely highlight the need for legal or quasi-legal procedures to make a binding ruling, in case of dispute, as to the genuine nature of the State responsibility in question.

In summary, it is postulated that three discernible categories of State responsibility exist in international law, which are either supported by – or at least do not conflict with – the meagre case law on the subject and which would materially help in the development of arms control law as it involves the extra-territorial application of the relevant agreements. Going beyond our immediate topic, we may observe in passing that more explicit recognition of the three categories might also benefit the development of commercial law, as well as designating more clearly the special status of the United Nations Charter. The categories could be summarised as follows:

Category I State responsibility

Activities promoting the interests of the State, including those of the natural and legal persons who give it allegiance, exercised as a sovereign entity engaged in normal commercial, communications, etc, intercourse with its neighbours, as well as duties of a like nature owed to other States.

(i) *In the absence of a treaty.* Extra-territorial rights and duties exist only when there is an obvious connection by way of territory, nationality or their derivatives. In this category, the extra-territorial application of domestic laws should be undertaken sparingly, so as not to conflict with corresponding laws of another State.

(ii) *Between treaty parties.* Regarding treaty partners, extra-territorial jurisdiction in conformity with the relevant treaty provisions. Interpretation of the treaty on the presumption that the situation will apply as in (i) in the absence of unambiguous provision to the contrary.

(iii) Application of the treaty with respect to non-parties. As in (i).

Category II State responsibility

Responsibility owed to the international community and widely recognised as such by other States.

(i) *In the absence of a treaty.* This is a grey area. Extra-territorial rights and duties do not differ greatly from category I(i).[39]

(ii) *Between treaty parties.* As in category I(ii) but in the absence of the presumption against conflicting with the "spirit" of the law of another State. In addition, the appropriate presumption would be that extra-territorial application promoting the purposes of the treaty should be exercised even if it duplicates or extends similar provisions in the host State.

(iii) *Application of the treaty with respect to non-parties.* Extra-territorial application would be required using maximum domestic means for its achievement even if those means were inconsistent with the laws and expressed wishes of the host State, but stopping short of direct infringement of the territorial integrity and political independence of the relevant non-party State. If required, assistance could be sought from international organisations or treaty partners for better application.

(iv) As in (iii) but applicable to area of *res nullius* and *res communis*. Unlimited extra-territorial application required.

Category III State responsibility

Pursuant to Chapter VII of the United Nations Charter.

Unlimited responsibility for extra-territorial application. The mandate for action to be interpreted subject to the presumption that extra-territorial application will not infringe upon the territorial integrity and political independence of States, but will be reversible by unambiguous provisions to the contrary. State responsibility regarding the extra-territorial application of arms control treaties to extend to the treaty parties and non-parties alike.

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39 It is a question of evidence whether the particular measure is in the international interest, even if it is clear that the stated overall objective has wide approval. For example the United States threatened sanctions against the Russian Federation regarding a $250 million contract to sell rocket engines to India, allegedly in violation of the Missile Technology Control Regime. "Although Russia has not signed the agreement, it has agreed to abide by it. India hopes to use the Russian rocket engines in the development of a satellite-launching capability." The threatened US action amounted to a decree that the Russian Federation was bound by the agreement, a judgment that a breach was about to occur and that it was of a nature that justified extra-territorial enforcement. "Russia Is Defiant on India Rockets", *International Herald Tribune* (6 May 1992), p 2. Three weeks later, on 29 May, India had fired a ballistic missile with the capacity to carry a nuclear warhead 1550 miles: ibid (30-31 May 1992), p 5.

Issues of State Jurisdiction

It would be an absurdity to hold States responsible for events over which they have no jurisdiction or control under international law, namely, not the means and power to impose the required standard of conduct.[40] A duty must be accompanied by the legal means to carry it out. If the two facets do not match, the responsibility has to be diminished or the right to employ the necessary means has to be extended. In arms control law, neither the extent of responsibility nor the range of jurisdiction has been clearly defined and it is becoming vital to reach an appropriate accommodation.

The notion of sovereignty, on which international law is founded, entails the right of jurisdiction over the territory of the State, including its territorial waters and airspace. "Extra-territoriality" has been defined as "the extra-territorial operation of laws; that is, their operation upon persons, rights, or jural relations, existing beyond the limits of the enacting State or nation, but still amenable to its laws".[41] A somewhat different definition of the word has been advanced in relation to export control law, namely: "... the adoption of rules of law (including their adjudication and enforcement) that control conduct abroad, thereby undercutting or purporting to override the control exercised or exercisable by the foreign territorial sovereign".[42] Regarding issues of State responsibility for arms control, the firstmentioned definition is adequate but in relation to State jurisdiction we are additionally concerned with the second definition, namely, cases of competing jurisdictions and how to reconcile them within the framework of sovereign equality.[43]

A corporation, although only a legal entity, can have both a territorial and a nationality nexus with States, depending on its places of incorporation, residence and/or operation. Most States have adopted the Anglo-American rule that the nationality of a corporation depends on the State where it is incorporated. However, in many European States the nationality of a corporation may be determined by the location of its principal or home office - "siege social", "Sitz" or "seat". As might be expected, States are free to depart from those two generally accepted tests by signed international agreements to establish different definitions of corporate nationality, as in tax treaties, treaties of friendship, commerce and navigation and in claims agreements. Whilst standardising the rules of corporate nationality would somewhat reduce the incidence of competing jurisdictions, it would not altogether eliminate them in many instances of extra-territorial activity. It is therefore mostly necessary to balance the competing jurisdictions in an

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40 A purported law in excess of jurisdiction is null and void *ab initio*: *Barcelona Traction* case, ICJ Rep 1970, p 106.

41 *Black's Law Dictionary*, 6th ed (St Paul, Minn West, USA, 1990), p 588.

42 Meessen, "Extra-Territorial Jurisdiction in Export Control Law", in Meessen KM (ed), *The International Law of Export Control* (Graham & Trotman, UK, 1992), p 9.

43 Elaborated in *The Antelope*, 6 US 337 at 344 (1825).

equitable manner.[44] There is still a variety of views as to what is equitable in commercial cases. For example, United States courts have sanctioned jurisdiction over an extra-territorial subsidiary,[45] while the United Kingdom has failed to recognise the right of jurisdiction of a foreign State over an enterprise there incorporated, but doing business in the United Kingdom via an affiliate.[46]

The balancing of rights is further complicated in the field of arms control because a State's security interests are involved if it is reasonably feared that the weapons concerned might be used against the State of origin itself. Alternatively, it is plausible to argue that even short of a direct threat, the failure of an arms control regime is consequentially likely to create a menacing international situation liable to rebound on the State of origin.

Notwithstanding the validity of certain criteria under the laws of war and self-defence, State jurisdiction under international law is not necessarily equivalent to the jurisdiction that each State claims for itself. States are traditionally reluctant to set any limits to their jurisdiction in matters that concern their own security interests. Even in connection with matters with lesser bearing on State survival, such as furthering the interests of State nationals abroad or the pursuit of economic interests, States frequently designate a jurisdictional range for themselves that meets with disapproval by other sovereign States. Usually, disagreements of that kind are either tolerated, settled by diplomatic means or countered by some form of mild retaliation.

For instance, the United States Export Administration Act of 1979,[47] *inter alia*, restricts the export of goods and technology by United States corporate entities, their branches and subsidiaries, and purports to extend its jurisdiction not only to United States nationals but also to foreign entities having no legal affiliation with the United States. This statute provides that it is applicable to any legal entity dealing in goods or technology *originating* in the United States. The restrictions may be imposed in order to promote the foreign policy objectives of the United States.

The Export Administration Act also authorises the President of the United States to prohibit the export of goods or technology which might significantly contribute to the military prowess of other States or, if for any reasons the export would, in the opinion of the President, be disadvantageous to United States security interests. These regulations also purport to be applicable to any legal entity dealing in goods or technology of United States origin.

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44 See *Timberlane Lumber Co v Bank of America*, ILR p 270; *Mannington Mills Inc v Congoleum Corp*, ibid, 487; also Meessen, (1984) 78 *AJ* 783–810.

45 Bowett, "Jurisdiction: Changing Patterns of Authority ...", in Macdonald RStJ & Johnston DM (eds), *The Structure and Process of International Law* (Martinus Nijhoff, Dordrecht, 1986), p 561.

46 *Aide Memoire to the European Community* (1969) 21 *ILM* p 891 *et seq.*

47 Pub L No 96–72, ss 6, 93 Stat 503, 513–15 (codified as amended at 60 USC app ss 2405) (1988 and Supp I 1990).

The application of such provisions is often more or less inconsistent with the policies and laws of other States. A case where a direct conflict arose with the laws of other States was over United States sanctions imposed in connection with West European resale of pipelines to the Soviet Union in 1982.[48]

The United States Internal Revenue Code,[49] by virtue of provisions that can deny tax benefits to its nationals, has reputedly been used to modify the conduct of United States corporations and their subsidiaries in their extra-territorial activities.

The extra-territorial jurisdictional rights claimed by the United States are by no means unique and their counterparts can be found among the laws and regulation of a large proportion of sovereign States.[50] The United States version of the laws is merely a good example, due to its comprehensiveness and the greater ability of the United States to enforce its laws extra-

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48 (1982) *ILM* p 864.

49 IRC ss 908, 952(a), 995(b)(1), 999 (1988) (originally enacted as Tax Reform Act of 1976, Pub L No 94-455, ss 1061-1064, 1066-1067, 90 Stat 1520, 1649-54).

50 Regarding, for example, specifically arms control prohibitions:

Germany: War Weapons Control Act, esp 11 November 1990 amendment, imposes heavy penalties if an exporter "intentionally or with gross negligence" "promotes" the development and manufacture of nuclear, biological or chemical weapons anywhere. The Foreign Trade and Payments Act, amended 20 July 1990, applying to all German nationals, *inter alia*, prohibits: violations of UN sanctions, obtaining export licences on the basis of false information as to military utility and illegal exports via agents, without need to prove that the acts are deleterious to Germany's foreign relations interests.

Italy: Statute 185, read in conjunction with article 11 of the Italian Constitution, which provides that: "Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means of settling international controversies; it agrees, on conditions of equality with other States, to such limitations of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations; it promotes and encourages international organizations having such ends in view". Article 5 requires the President of the Executive Council to advise Parliament annually about the operation of the Statute.

France: Decree of 18 April 1939, still in force, provides that: "... *companies* engaged in the production or sale of war materials and of defence weapons and munitions (categories 1, 2, 3 and 4) may only operate, and the activities of their *intermediaries or publicity agents* may only be carried out, upon governmental approval and under governmental control". There is a system of multiple-layered controls, often requiring a non-exportation clause, such as "The buyer hereby agrees not to sell, lend or deliver, for any reasons, free of charge or otherwise, on a temporary or final basis, to any third party, without the prior written approval of the French Government, the materials which are the object of the present agreement, including material and parts covered by the service agreement, documentation, operating instructions and any other information connected with the present agreement". Another device consists of a security deposit generally required to be paid to Customs in the form of a lump sum, which is held by it pending proof from the exporter that the material has indeed reached its destination and that it has not been re-exported.

territorially. Nevertheless, as is the case with other economically and militarily powerful States of the current era, such wide jurisdictional claims have been sparingly applied in the interests of international harmony and good neighbourliness.

So far we have considered jurisdictional range in relation to matters that serve the interests of a particular sovereign State. What is the jurisdictional range regarding matters that serve the international community? Having already reached the conclusion that the ambit of State responsibility appears to vary with the purposes to be served, the question arises whether the jurisdictional range is altered accordingly? It is contended that there is an emerging consensus, which perhaps should be given formal expression, that the various types of responsibility have an influence on the relevant jurisdictional range. *If jurisdiction is elastic in accordance with the type of State responsibility to be satisfied, by what rules should this principle of elasticity be applied?*

Jurisdiction is concerned with the reach and application of domestic law, which has to be internationally acknowledged in order to be within the legally rightful competence of the State. Such competence must have a threefold character: legislative, judicial and administrative – also referred to as the competence to prescribe, to adjudicate and to enforce the law.[51]

It is universally accepted law that States can abrogate some of their sovereign jurisdictional rights by treaty.[52] The extent to which States may divest themselves in this manner has been explored in the *Reparation*[53] and *Expenses*[54] cases, where the powers conferred on the United Nations under article 2(7) of the Charter were examined. There appears to be no case law to suggest that there is any theoretical limit to the abrogation of jurisdictional competence under a treaty, with respect to other treaty parties. Consequently, vis-à-vis the parties to an arms control treaty, all parties being bound to apply the mutually undertaken measures, the issues of jurisdictional reach *determined by treaty* would primarily relate to the most effective means by which the objectives might be carried out by the parties. Of course there could be problems regarding treaty interpretation, the distribution of responsibility or the abuse of jurisdiction so as to serve purposes beyond treaty objectives.

The practice among arms control treaty parties has been to exercise great restraint in the extra-territorial supervision of arms control treaties. As a result, "treaty laundering" has become a practical modality for undermining an arms control treaty. In such cases a corporate subsidiary or independent exporter, resident in a State that is an ineffective treaty partner, acts in a

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51 See American Law Institute, *Restatement of the Law, Third: The Foreign Relations Law of the United States*, Part XIV, 230 (1987), pp 230, 525.

52 *The Wimbledon case* (1923) PCIJ, Ser A, No 1, p 25.

53 *Reparation for Injuries Suffered in the Service of the United Nations* case, ICJ Rep 1949, p 174.

54 *Expenses* case, ICJ Rep 1962, p 246.

manner that leads to treaty contravention – cooperatively or independently of the State of origin. For example, a State of origin A gives an export licence for goods X, having no military utility, to a corporation which sends them to its subsidiary in State B, party to the relevant arms control treaty. The corporation's subsidiary, with or without the knowledge of the parent corporation, then adds components Y which endow goods X with weapons capability. Together or separately goods X and Y are then sent to non-party State C, which deploys the weapons.[55] Can States A and B both wash their hands of breach of the arms control treaty? In other instances, State B merely provides a base – which might be no more than a highly organised office – from where to coordinate inputs from a variety of corporations resident in technologically developed States, being treaty parties, towards the construction of a sophisticated weapons system in a non-party State. Do the States of the various suppliers have a right, flowing from the treaty, to inquire into the activities of the coordinating facilities on the territory of their treaty partner? These are questions that combine treaty interpretation with issues of general rules governing jurisdiction.

The situation is perhaps simpler but no less daunting regarding non-party States. The extent to which those States would be affected by arms control treaty provisions, requiring extra-territorial means of application, would depend on whether the legal limits were in conformity with the general rules of international law.[56] States in the process of deciding whether they intend to join the international regime for the prevention of weapons proliferation, may well be swayed by their assessment as to their prospects of escaping from the operation of the treaty when it eventually comes into force, either due to extra-territorial loopholes or on account of legal ambiguity. Hence, if a consistent international legality under which the rule of arms control law prevails is to be achieved, a precise definition of extra-territorial jurisdictional reach is required, in all of its aspects: legislative, judicial and administrative.

Traditionally, the three jurisdictional competences were assessed with reference to the notion of "connection" between the State claiming jurisdiction and the legal entities over which jurisdiction was claimed. The connection could be a territorial one, when the relevant acts occurred on the territory of the State, or a nationality connection, when the actors were nationals of the State – whether natural persons or corporate entities. The limit of such jurisdiction is to refrain from encroaching on similar sovereign rights of other

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55 See Hedges S, "Saddam's Secret Bomb", *US News and World Report*, (25 November 1991), pp 3–4, concerning a very accurate milling machine to which a laser alignment system was added by a foreign based subsidiary making it weapons capable.

56 The general law was concisely stated by the Attorney-General of the United Kingdom, Sir John Hobson, on 15 July 1964 in *British Practice* (1964), p 153, to the effect that a State "... acts in excess of its own jurisdiction when its measures purport to regulate acts which are done outside its territorial jurisdiction by persons who are not its own nationals and which have no, or no substantial, effect within its territorial jurisdiction".

States, namely, not to violate their territorial integrity or political independence. However, when there are adequate jurisdictional connections with several States, it is evident that competing sovereign rights have to be accommodated. How to achieve this is the crux of the problem.[57]

Historically the law developed with a view to its practical application. Legal "competence" was closely related to physical "capacity". For effective extra-territorial *legislative prescription*, it is necessary not only to proclaim the law but also to have the means of disseminating it to those who are to be bound. Regarding competence for *adjudication* pertaining to extra-territorial breach of State laws, it is indispensable to supervise the extra-territorial activities of the relevant nationals, to be able to notify the parties in case of breach of the law and, preferably, to bring them to a court where their pleas and evidence can be assessed. Extra-territorial *enforcement* could involve restraining legal entities from performing certain acts, as well as punishing or otherwise depriving them if the prohibited acts have already been performed. At each stage, the administrative means available could fall far short of what would be required for effective application, especially if major incursions against the territorial integrity and political independence of other States are to be avoided.

However, the situation with respect to all three competences of jurisdiction is vastly altered under contemporary conditions and within the framework of a widely adhered to arms control treaty.

Legislative prescription

No one could seriously contend that the terms of all relevant arms control treaties whether of global application or applicable in their region, are not known to all States and the giant enterprises there incorporated or resident, which are engaged in the manufacture, distribution and/or installation of the weapons being the subject of those treaties. The efficiency of communications, the coordinating role of international organisations, data retrieval techniques, the sophistication of bureaucracies in even the least developed States and the least prosperous enterprises engaged in activities of this nature, combine to create an entirely new situation.

In order to reinforce this trend, it would be helpful if arms control treaties would specify more clearly the nature of the implementing legislation required, such as imposing a duty on all nationals, residents and enterprises benefiting from the laws of the State, to "promote"[58] the purposes of the treaty

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57 Reciprocity is a good rule of thumb although it is not a legally recognised criterion in these cases. Would the State seeking to impose its jurisdiction be willing to accommodate other States seeking to exercise their jurisdiction in similar circumstances?

58 Although it will be necessary to prohibit certain specific acts, it would be preferable to require the overall enabling legislation to be couched in positive terms, imposing a duty on all natural persons and legal entities to uphold the purposes of the Convention. This approach covers all possible breaches of treaty

and to advise the authorities if its contravention or threatened contravention comes to their notice. Synchronising the content of implementing legislative provisions – even if not the constitutional method of enacting them – would eliminate altogether any reasonable claims of extra-territorial ignorance of the law.

Adjudication

The situation with regard to the judicial aspect of extra-territorial application is not so much altered, yet even here substantial changes have occurred. Due to the type of advances referred to above, arms control treaty violation is usually known to the fact finding authorities of the State of origin, although they may be ignorant of details and have insufficient evidence of the kind acceptable in a court of law. For instance, it had long been suspected that German enterprises – together with many enterprises from other States[59] – may have been guilty of supplying goods and services to Iraq in contravention of arms control agreements and consequent implementing legislation. However, it was only the ceasefire agreement pursuant to the defeat of that State in aggressive war, leading to the establishment of a Special Commission on Iraq as a subsidiary body of the Security Council, which ultimately led to the thorough inspection of those facilities and relevant documentation of purchases. Evidence so compiled now constitutes a *prima facie* case against those German enterprises.[60] At the time of writing it is still uncertain whether the United Nations officials who collected the material will be in a position to present their evidence to the German courts.[61]

The aforementioned example highlights difficulties with both extra-territorial evidence gathering[62] and adjudication of suspected arms control transgressions. Yet, the means are readily available to overcome these problems. Concrete evidence can be obtained by routine and challenge

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provisions, filling all loopholes, regarding acts and omissions by both major actors and merely accomplices. At the same time, it facilitates a variety of punishments to fit the severity and significance of the prohibited conduct, without necessitating endless detail in their designation.

59 "The Republican staff of the Senate Foreign Relations Committee, for instance, has compiled a list of *corporations from 25 countries* that sold Iraq materials, equipment or technology for nuclear, biological or poison gas weapons": Rosenthal AM, "One Way to Paralyze These Salesmen of Death", *International Herald Tribune* (28–29 September 1991), p 4.

60 Penal case being heard by Landgericht Darmstadt, *Directors and Employees of the Karl Kolb GmbH and Ko KG and Pilot Plant GmbH*, 1992 continuing.

61 They were not permitted to do so.

62 For example, mistaken information regarding alleged Israeli re-exports "... of a range of missiles, cluster bombs, tanks and assorted other hardware to South Africa, China, Chile, Ethiopia and other countries". Haberman, Clyde, "Israel Asserts U.S. Inquiry Clears It on Missile Sales", *International Herald Tribune* (27 March 1992), pp 1, 4.

inspections, as provided in the draft Chemical Weapons Convention.[63] Administrative procedures could be established for providing domestic courts with evidence obtained by the international organisations set up under the various arms control treaties or pursuant to the United Nations Charter. Such provisions could be added to existing treaties, such as the Non-Proliferation Treaty, by Protocol.

Thus, with regard to those arms control treaties that contain appropriate evidentiary and adjudicative provisions, there is no practical impediment to the exercise of the adjudicative element of extra-territorial jurisdiction.

Enforcement

Domestic enforcement is the least problem in the present close-knit world. Denial of benefits, fines and penalties, deregistration of corporations – including subsidiaries or parent companies, as the case may be – extradition of persons in order to give evidence or for imprisonment, if appropriate – or, on failure to return, revocation of nationality, would usually serve as adequate deterrents. Again, international assistance could be sought in appropriate cases.

Responsibility/Jurisdiction Interface

In summary, the new possibilities of extra-territorial influence and control by a State over weapons proliferation, without directly trespassing on the sovereign rights of other States, have made it possible to vastly increase jurisdictional range and to impose a commensurately extended area of State responsibility. The exercise of those possibilities should depend on the reason why the extra-territorial extension of domestic law is sought: whether it is mainly to advance the commercial and similar extended local interests of the State of origin; or to protect its vital security interests; or whether it is to satisfy an international obligation. If the obligation arises from a responsibility undertaken under an *arms control treaty* having extensive support regionally or globally – corresponding to category II(iii) of State responsibility as described above – and having adequate evidentiary and adjudicative provisions, then exercising maximum jurisdictional reach short of direct transgression in contravention of the domestic law of another sovereign State, would provide sufficient means for reliable compliance and would be appropriate in law.

Intrusive arms control jurisdiction, however, can only be sanctioned by the Security Council of the United Nations, acting pursuant to Chapter VII of the Charter. This can take two forms: either by pressing domestic means of implementation to their limits, irrespective of the wishes of other States;

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63 *Reports of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on its Work during the period 30 September 1991 to 20 January 1992*, UN Doc CD/1046, as updated at 26 June 1992, "Protocol on Inspection Procedures", pp 135–78 (confirmed in the Convention as signed, esp pp 138–42).

and/or by overtly infringing upon sovereign rights. The precise circumstances in which those powers could be invoked with regard to the prevention of proliferation are still unclear but it is noteworthy that the unanimous statement of that body, on 31 January 1992, on the occasion of the first meeting of the Security Council represented by Heads of State, included the following sentence: "The proliferation of all weapons of mass destruction constitutes a threat to international peace and security".[64] That line of reasoning lays the basis for direct Chapter VII involvement in arms control and possible action by, or authorised by the Security Council in addition to its appellate role under some arms control treaties.

The emerging consensus is, that in every instance of internationally desired State responsibility regarding arms proliferation issues, appropriate forms and procedures are available for the commensurate extension of State jurisdiction. Hence, there need be no extra-territorial limit to that responsibility and accompanying jurisdiction - sometimes augmented by assistance from international organisations - provided such responsibility is undertaken in suitable cases and in the appropriate manner, along the lines indicated under the aforementioned three categories of State responsibility. Such unlimited extra-territorial responsibility may, at times, include responsibility for the activities of corporate entities via any subsidiaries over which they have a managerial or financial controlling interest.

64 UN Doc S/PV 3046.