



Enforcement Quandary in Maritime Crimes: Espousing the Tangle of Prescriptive Jurisdiction

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It is inconceivable to have crimes without laws created prescribing or enforcing them. There must also be in existence a concomitant authority, either a state or an institution vested with the capacity to enforce these laws. In cases those crimes that occur on land, it is usually straightforward to determine the body vested with the legal power to prescribe and enforce these claims. Through qualitative and quantitative sampling, this study argues that for crimes that occur on the sea; territorial, internal or high seas, determining the state with jurisdiction is not so clear. This is because there is the possibility that various states could have competing rights to prescribe, adjudicate and enforce criminal laws in relation to a criminal offense. It is therefore important that a survey of these competing/concurrent rights of states be carried out. This research also investigates whether, by international law, these rights are actually concurrent or whether one is superior to the other. It also carried out an assessment of how the concurrent rights of states are exercised and how conflicts are resolved when they occur. The research finds that in real terms, one should be superior to the others and not so concurrent.



A. Introduction

Generally speaking, maritime security is one of the issues connected with world peace. The movement of human and commercial concerns at sea unhindered is synonymous with tranquility among the comity of nations. The decimal of security in the maritime realm propels the economic stability of states whose sustenance largely depends on the stability of the realm. In other words, where there is a security threat in the maritime domain, the attendant effect would be felt by states that largely depend on water for economic sustainability.¹ In this perspective, where stability occurs in the realm as a result of activities of the criminal element perpetrating attacks at sea, there appears that competing or concurrent rights of states often became an issue. This is why it becomes expedient to identify Maritime jurisdictions or boundaries in the criminal process and determine how these (jurisdictions) give rise to concurrent rights among states to try offenses occurring within them.²

The novelty of this research will make a significant contribution concerning an assessment of how the concurrent rights of states are exercised and how conflicts are resolved when they occur.³ The paper demonstrates the competing rights of states in the criminal process for the purpose of debunking the general assertion that the rights of flag states are not exclusive at all times in every criminal scenario occurring on the seas. The notion of concurrent rights of coastal and flag states to try offenders on board a ship is equally investigated and the paper identifies that the rights are not concurrent but absolutely vested in either the flag state or coastal state. The effectiveness of the legal framework in the matters of concurrent jurisdiction of states is equally taken into cognizance, bearing in mind the various happenings in the U.S. (United States), Mexico, Irish, U.K (United Kingdom), Australia, etc., to justify this variable.

This paper emphasizes in its conceptual analysis, the position that the issue of maritime crimes is not constrained by territorial jurisdiction, as it extends to cover ships carrying the flag of a state outside the state. The work takes into cognizance, how various theories of prescriptive jurisdiction are interconnected and how they generated many innovative ideas and changed the perspective of how we see and understand things around us. A critical look at prescriptive jurisdiction to the effect that states have the power to it over any situation or occurrence unless there is a rule prescribing otherwise was also captured. The same thing goes with the international principles permitting the exercise of prescriptive jurisdiction in terms of territorial, nationality, universal, concurrent as well as effect doctrine principles. The paper mainly emphasizes the power of a state concerning enforcement jurisdiction to ensure adherence to laws, either domestic or international, as the case may be through the instrument of the police and sometimes the judicial system.

B. Discussion

1. Conceptual Analysis of Jurisdiction in Maritime Crimes

Jurisdiction in maritime law is not limited to territories alone, even if our definition of territories includes internal waters, coastal seas, and exclusive economic and contiguous zones.⁴ In Maritime Law, the jurisdiction of a state also extends to cover ships carrying its

¹ Abdulkadir, A.O (2014): Asymmetric Maritime Security Threats: A Factor in the Nigerian Terrorism Eccentricity. *NIALS Maritime Law Journal*, 2; 43-69. Published by Nigerian Institute of Advanced Legal Studies, Abuja, Nigeria. Available at <https://uilspace.unilorin.edu.ng/handle/20.500.12484/5937>

² Satya Talwar Moulant, Rethinking adjudicative jurisdiction in international law, *Washington International Law Journal*, Vol.29 No.1, 2019, p.174.

³ Especially between coastal and flag states.

⁴ For example, the Convention on the High Seas of 1958 and UNCLOS 1982 affirm the general principle enunciated in the Lotus case to the effect that vessels on the high seas are subject to no authority except that of the state whose flag they fly.

flags, even beyond territory and extends to the high seas.⁵ The High Seas Convention 1958⁶ and The United Nations Convention on the Law of the Sea (UNCLOS) 1982⁷ allow ships to sail under the flag of one state, except where there are express international treaties or in these conventions.⁸ However, it must be stated that piracy⁹ has represented a strange and unusual case of the personal and individual character directly subject to rules of national as well as international law (*hostis humani generis*) as a species of “international crime”.¹⁰

In some instances, states while relying on the norms of international law, have argued that their jurisdiction in maritime criminal cases also includes not only territories but also extends to their citizens in the territory or on the ship of another state, especially where their citizen is the perpetrator or victim of a crime.¹¹ Take Australia for example, by virtue of the Crimes at Sea Act 2000, the criminal laws of the state can be extended to a criminal act despite the fact that the occurrence of the offense was not in the territory or internal waters of Australia.¹²

Hence, the above shows that the nature of jurisdiction in Maritime law is not centered only on territory as it applies to physical mass but extends to property outside its territory and also persons within or outside its territory. Jurisdiction in maritime law as it applies to the criminal process can be divided into three to wit:

- a. Prescriptive jurisdiction;
- b. Adjudicatory jurisdiction and;
- c. Enforcement jurisdiction.¹³

2. Theoretical Analysis of Prescriptive Jurisdiction

It is beyond peradventure that theory interconnects, condenses, and organizes knowledge and ideas. Marx, Mills, Hugo Grotius, Weber, and Johannes Riquet,¹⁴ among others, have generated many innovative ideas and they actually changed radically how we see and understand things around us.¹⁵ Of their innovative and original theories, subsequent generations have benefited immensely from them. For example, in the opinion of Gotthard, Mark Gauci, while describing floating islands argues that a ship has long been seen and

Hence, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over foreign vessels.

⁵ Flag state has jurisdiction over any criminal action that occurs on a ship carrying it flag.

⁶ Article 6 (1).

⁷ Article 92 (1).

⁸ The exceptions may include piracy, in case of pursuit, slave trade among others. See generally, Amari Omaka, *Fundamental of Maritime, Admiralty and International Water Law*, (Princeton & Associates Publishing Co. Ltd, 2018), p. 80.

⁹ Abdulkadir, A.O. (2015): *Maritime Pirates: The Criminal Underworld of the Nigerian Maritime Domain*. *Al-Hikmah University Law Journal*, 1 (2); 362-384. Published by College of Law, Al-Hikmah University, Ilorin, Kwara State. Available at <https://uilspace.unilorin.edu.ng/handle/20.500.12484/5936>

¹⁰ Eugene Kontorovich, ‘The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation’, *Harvard International Law Journal*, 45 (2004), 183–92. See also Barbara Fuchs, ‘Faithless Empires: Pirates, Renegades, and the English Nation’, *ELH*, 67 (2000) 45.

¹¹ For example is the argument of India in the *Enrica Lexie* case. *Opiniojuris*, ‘The case of *Enrica Lexie*; *Lotus Redux*’ <<http://opiniojuris.org/2012/06/17/the-case-of-enrica-lexie-lotus-redux>> accessed on 20th January 2020.

¹² <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committee?url=spla/crimes%20at%20sea/report/chapter3.pdf> accessed on 30 September 2019.

¹³ Open Learn ‘Exploring the Boundaries of International Law’ <<https://www.open.edu/openlearn/society-politics-law/exploring-the-boundaries-international-law/content-section-4.2>> accessed on the 02 February 2020.

¹⁴ See for example, Johannes Riquet, (2019) *Islands as (Floating) Images: Towards a Poetic Theory of Island Geography* available at https://www.researchgate.net/publication/337694761_Islands_as_Floating_Images_Towards_a_Poetic_Theory_of_Island_Geography

¹⁵ W. Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 7th Ed, (Allyn & Bacon, 2011), 57.

treated in law as a special item.¹⁶ He argues that few items to be endowed with the possibility or likelihood of attribution of nationality¹⁷ which attracts the exclusive jurisdiction of the flag State¹⁸, at least on the high seas in terms of international law.¹⁹ According to him, this is in fact, a matter of necessity when the ship navigates in areas beyond any national jurisdiction.

It is not out of place to argue that a state's prescriptive jurisdiction is a constraint or limited and the grounds for which states legislate concerning matters, due regard must be made as to where the offense occurred, it is a matter of whether in its territory or extraterritorial,²⁰ and the nationality of persons involved.²¹ Therefore, theoretical analysis, as it was in this research, helps to share from deep erudition of earlier writers.

Prescriptive jurisdiction refers to the power of a state through its legislative body to enact laws geared towards regulating the behaviors of individuals and applicable to events and property both within and outside its territory.²² A state exercising prescriptive jurisdiction may make or enact laws binding on its nationals in respect of conduct occurring within or outside its territory. A state can also make laws regulating events that occur abroad, especially if it affects that state's interest. For instance, a state legislating to proscribe maritime criminal acts occurring abroad that affect its security interest.²³

Ryngaert Cedric posits that prescriptive jurisdiction is the power of a state 'to make its laws applicable to the activities or status of persons, or the interest of persons in things whether by legislation, by executive act or order, by administrative rule or regulation, or by administrative rule or regulation or by determination by a court.'²⁴ He espouses what limitations to be imposed in order to render the exercise of jurisdiction selfless reasonable. Hence, the concept of reasonableness was introduced with mitigation mechanisms in various jurisdictions.²⁵

The above definitions underline a vital fact; Prescriptive jurisdiction presupposes the fact that a state may prohibit or regulate at least certain classes of extra-territorial conduct despite the fact that it cannot enforce them in the territory of another state.²⁶

3. Principles in *Lotus Case (France v. Turkey) (1927) P.C.I.J., Ser. A, No. 10*

In this case, a collision on the high seas involving a French vessel known as *Lotus* and a Turkish vessel named *Boz-Kourt*. It was established that *Boz-Kourt* sank and killed eight Turkish nationals on board the Turkish vessel. It was established that 10 survivors of the *Boz-*

¹⁶ Gotthard Mark Gauci, The ship as an extension of flag state territory and an entity with human attributes – is it time to jettison these legal fictions, *CLR, 2021, Vol. 21, No. 2*.

¹⁷ See section, Article 91, United Nations Convention on the Law of the Sea 1982 [UNCLOS 1982].

¹⁸ The sovereign equality of States has two opposite impacts on the exercise by flag States of their executive jurisdiction over fisheries crime. Outside the zones and activities where coastal States have either sovereignty or sovereign rights,⁵⁹ that jurisdiction is jealously protected in order to deny any State more authority than another. See Patrick Vrankven, State jurisdiction to investigate and try fisheries crime at sea, *Marine Policy*, 2019.

¹⁹ Section 92, UNCLOS.

²⁰ This means or indicates something along the lines of beyond territorial limits. See Anthony J. Colangel, What Is Extraterritorial Jurisdiction, 99 *Cornell L.Rev.* 1304 (2014).

See also Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict 57 *AM. J.C OMP. L.* 631, 635 (2009). 43.

²¹ Julius Adavize Adinoyi, State's Jurisdiction: Prescription on Territoriality and Nationality, (2018) available at https://www.researchgate.net/publication/328355523_State's_Jurisdiction_Prescription_on_Territoriality_and_Nationality

²² Open Learn 'Exploring the Boundaries of International Law' <<https://www.open.edu/openlearn/society-politics-law/exploring-the-boundaries-international-law/content-section-4.2>> accessed on the 05 February 2020

²³ *Ibid.*

²⁴ Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit accessed on 05 February 2020.

²⁵ See also Ryngaert C, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest*, (Oxford, Scholarship Online, 2020).

²⁶ <https://www.cambridge.org/core/books/shipping-interdiction-and-the-law-of-the-sea/basic-principles-of-maritime-jurisdiction> accessed on 05 February 2020.

Kourt (including its captain) were all taken to Turkey on board the Lotus. In Turkey, the officer on watch of the Lotus (Demons) and the captain of the Turkish ship was charged with manslaughter. Demons, who was a French national sentenced to 80 days of imprisonment and a fine. The decision infuriated the French government and they protested, demanding the release of Demons or the transfer of his case to the French Courts. Turkey and France agreed to refer this dispute on the jurisdiction to the Permanent Court of International Justice (PCIJ). The question is whether Turkey could exercise its jurisdiction over this French national under international law.

It is expedient that before delving or carefully analyzing the criminal process as applicable in maritime law, the principles in the *lotus* case enunciated by the Permanent Court of International Justice be painstakingly factored. This will no doubt whet our appetites and ground the understanding of the nature and types of jurisdiction in the maritime criminal process. The first and second lotus principles are:

- a. A state cannot exercise its jurisdiction outside its territory or in the territory of another state unless permitted by an international treaty or international custom. This principle is known as The First Lotus Principle.²⁷

It needs to be emphasized that the court while explaining this principle, held that;

*“Now the first and foremost restriction imposed by international law upon a state is that failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state, in this sense jurisdiction is certainly territorial, it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from the convention.”*²⁸

Enforcement quandary on adjudicative and enforcement jurisdiction: The first lotus principle encapsulates a state's adjudicative and enforcement jurisdiction.²⁹ By this principle, states cannot enforce jurisdiction outside its territory as it establishes the fact that a state while exercising adjudicative and enforcement jurisdiction, cannot extend it to the territory of another state unless there is permission via treaty or customary international law. This position makes jurisdiction to adjudicate and enforce under international law generally territorial unless a state allows another state to enforce its laws on its territory.³⁰

- b. A state can exercise its jurisdiction within its territory over any matter even if there is no international law or custom empowering it to do so. This is known as *The Second Lotus Principle*.³¹

It is essential to mention that the court, while espousing this principle, held that it does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory in respect of any case which relates to acts that have taken place abroad and in which it cannot rely on some permissive international law: such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory. If as an exception to this general prohibition, it allowed states to do

²⁷Ryngaert C., ‘The Concept of Jurisdiction in International Law’ op cit accessed on 02 February 2020.

²⁸RS Lotus Supra No: 10, 18-19.

²⁹Ryngaert C., ‘The Concept of Jurisdiction in International Law’ op cit accessed on 02 February 2020.

³⁰ An example was the adjudicative Jurisdiction treaty between the UK and Netherlands for the trial of the two Lockerbie bombers by a Scottish Court, governed by scots law on Netherlands Soil. Open Learn ‘Exploring the Boundaries of International Law’ <<https://www.open.edu/openlearn/society-politics-law/exploring-the-boundaries-international-law/content-section-4.2>> accessed on the 05 February 2020.

³¹Gunaratne R.D. ‘Lotus Case (Summary)’ <<https://ruwanthikagunaratne.wordpress.com/2012/07/27/lotus-case-summary/>> accessed on 3 February 2020.

so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that states may not extend the application of their law and the jurisdiction of their courts to persons, property and acts outside the territory, leaving them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.³²

4. Enforcement Quandary on Prescriptive Jurisdiction

This explains the second lotus principle to the effect of prescriptive jurisdiction of a state, in the sense that a state can, within its territory prescribe and make laws that will bind property, persons and events both within and outside its territory.³³ In other words, this implies that states are in principle, free to exercise prescriptive jurisdiction over issues as they deem fit unless a law, rule or custom in international law restricts them from doing so. It has been posited that a state has unlimited prescriptive jurisdiction subject only to the limits of international law.³⁴

Bearing the above in mind, it merits mentioning that the first and second lotus principles are very relevant in the discourse about jurisdiction in maritime law. Although some of these principles espoused have been restricted over time by the court, treaties and state practices, they no doubt still set the tone for the analytical evaluation of the forms of the jurisdiction in Maritime law.³⁵

5. Is Prescriptive Jurisdiction Unlimited?

As mentioned earlier in this paper, prescriptive jurisdiction as a form of jurisdiction stems from the second principle analyzed above. This is to the effect that states have the power to exercise prescriptive jurisdiction over any situation or occurrence unless there is a rule prescribing otherwise.³⁶ This would appear that states have unlimited prescriptive jurisdiction in international law of which maritime law is a part.³⁷ Cedric, however disagrees and states that the state has after 1927 adopted a more restrictive approach to the effect that before a state can even exercise prescriptive jurisdiction, there must be a principle permitting its exercise.³⁸ This in a way appears logical, while a state may be able to exercise prescriptive jurisdiction and make laws in respect of an act committed by its nationals abroad, it would be preposterous and seemingly illogical for a state to regulate by legislation the conduct of foreigners significantly when the effect of the act does not affect the legislating country in any way.³⁹ Such legislation in no doubt infringes on the right of the state within which the incident occurred to regulate its affairs.

Consequently, a literal analysis of the second principle of the lotus case goes strongly against the core principle of international law. This sovereignty is the power of a state to exercise jurisdiction/authority over its affairs without interference from other states. An illogical implication of the second principle of the lotus case is if, for example, a ship flying the flag of State X collides with another flying the flag of Ship Z in the coastal state of State

³²Gunaratne R.D. 'Lotus Case (Summary)' op cit accessed on 3 February 2020; RS Lotus Supra No: 10, 18-19

³³Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit accessed on 02 February 2020.

³⁴Gunaratne R.D. 'Prescriptive and Enforcement Jurisdiction and Extra Territorial Application' <https://ruwanthikagunaratne.wordpress.com/2011/04/13/jurisdiction> accessed on 5 February 2020.

³⁵Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit accessed on 05 February 2020

³⁶RS Lotus PCIJ, (1927) PCIJ Reports, Series A: No: 10, 18-19; Gunaratne R.D. 'Prescriptive and Enforcement Jurisdiction and Extra Territorial Application' op cit. Accessed on 5th February, 2020.

³⁷<https://study.com/academy/lesson/extraterritoriality-jurisdiction-defect-international-law.html> accessed on 5th February, 2020.

³⁸Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit accessed on 5th February, 2020.

³⁹ Cedric Ryngaer, The Concept of Jurisdiction in International Law available at <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>

Y. While it will make sense that State Y could in certain circumstances, make laws to regulate the collision or criminal acts if it occurs in its coastal waters, it would be preposterous for State D to criminalize by legislation such an action where none of its citizens were affected in the collision or such a collision was perpetrated by its citizens. In essence, before a state can exercise prescriptive jurisdiction, there has to be a principle of international law permitting it to do so.

6. International Principles Permitting the Exercise of Prescriptive Jurisdiction

a. Territoriality

Territorial jurisdiction implies a geographical area within which the authority of the court may be exercised and outside which the court has no power to act. Jurisdiction, territorial or otherwise, is statutory and it is conferred on the court by the law creating it.⁴⁰ One foundational principle permitting a state to exercise prescriptive jurisdiction is the principle of territoriality.⁴¹ Territoriality is the principle that a state is vested with the ability to regulate, control and proscribes criminal acts within its territory.⁴² This traditional principle allows a state to exercise prescriptive jurisdiction over particular criminal acts. The principle is however not holistic, or its application uncomplicated as what will happen if a sailor on the ship of State A commits an offense in part of the ship of state A and completes the criminal act on the Ship of State B. The question is, can you state A prescriptive exercise jurisdiction in that context?

In the case of *Fermangh v Farrendon*, Farrendon, a British soldier was shot by an Irish within the boundary of Northern Ireland and the free Irish State, which eventually became part of the UK.⁴³ The issue arose regarding which state had jurisdiction as the shot was fired from the free Irish state and injured someone in Northern Ireland. The Northern Ireland Court of Appeal held that both states could exercise jurisdiction.⁴⁴ The territorial principle based on the foregoing is the foundational platform that allows states to regulate criminal actions occurring on a ship within its ports, internal waters and coastal states.⁴⁵

b. Nationality

This is another principle that a state can rely on.⁴⁶ The principle of Nationality can either be active or passive.⁴⁷ The principle underlies the fact that a state can exercise prescriptive jurisdiction over a criminal act where its citizen is the perpetrator (active) or the victim (passive).⁴⁸

⁴⁰ *Dariye v. FRN* (2015) LPELR-24398 (SC). See also sections 4 of Penal Code and 12 Criminal Code.

⁴¹ Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit accessed on 11th February 2020.

⁴² Amann D. M. 'Jurisdictional, preliminary and procedural concerns in Benchbook on International law' www.asil.org/benchbook/jurisdiction.pdf accessed on 11 February 2020.

⁴³ 2 IR 180 at 496-497.

⁴⁴ *County Council of Fermangh v Farrendon* 2 IR 180 at 496-497; Adinoyi J., 'States Jurisdiction: Prescription on Territoriality and Nationality' <https://www.researchgate.net/publication/32835523> accessed on 11th February, 2020.

⁴⁵ In the case of *Patrick Njovens v. The State* (1973) 5 SC17, the court was of the opinion that entry into a state from another state where the offence was actually committed conferred jurisdiction to try the offender on the state where he was arrested.

⁴⁶ Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit. accessed on 11 February 2020.

⁴⁷ Gunaratne R.D. 'Prescriptive and Enforcement Jurisdiction and Extra Territorial Application' op cit. accessed on 11 February 2020.

⁴⁸ See below part 2 for examples. As to the history of UK and Australian criminal jurisdiction over ships at sea, see Sir Harry Gibbs 'Criminal law on the High Seas' (1989) 6 *MLAANZ Journal* 3; also Australian Law Reform Commission *Criminal Admiralty Jurisdiction and Prize* (report 48)1990 . See also Ryngaert C., 'The Concept of Jurisdiction in International Law' op cit accessed on 05 February 2020, Gunaratne R.D. 'Prescriptive and Enforcement Jurisdiction and Extra Territorial Application' op cit accessed on 11th February 2020, Adinoyi J., 'States Jurisdiction: Prescription on Territoriality and Nationality' op cit accessed on 11 February 2020.

The case *US vs. Roberts* exemplified this position. In this case, one of the crewmembers was charged with engaging in a sexual act onboard with a minor.⁴⁹ The accused was on the coast of Mexico, and the child, who happened to be the victim, was an American citizen. The accused disputed that the US had jurisdiction to prosecute the crime. The court, while relying upon the fact that the child was a US citizen, disagreed with the submission and held that the ship had a US port as an embarkation and disembarkation port, in addition to the fact that the crime had an effect in the US. The court further held that international law did not prohibit the US Congress from incorporating the passive personality principle into its legislation.⁵⁰ Essentially, it was noted that the flag State had “little or no interest in the alleged offense”. This is because neither the victim nor the defendant was Liberian. This allowed the court to rely on advanced to support the assertion of the jurisdiction of an interested State. Those assertions of jurisdiction are usually available in the domestic legislation of a particular State,⁵¹ seeking to apply its domestic laws to ships that have committed offenses or crimes at sea outside its territorial waters.⁵² This principle allows a state to exercise prescriptive jurisdiction over its nationals whether they are staying abroad, within its territory, or in transit on a ship.

c. Universal Jurisdiction

Universal jurisdiction allows prescriptive jurisdiction. The universality principle allows a state to exercise prescriptive as well as adjudicative jurisdictions⁵³ over certain criminal acts that are heinous, which all states can exercise jurisdiction over same.⁵⁴ However, it must be stated that what gives the permissive state authority to exercise jurisdiction over such criminal acts is not the link between the states without the criminal acts but rather the gravity of the offense.⁵⁵ Hence, the national of St Vincent & the Grenadines and the ship was actually registered in Liberia. The ship was owned by a Panamanian company, while the owner had a significant presence in the US. The offense was committed in international waters off the on passive personality to find that the US had jurisdiction over this case.

In addition, it is has been posited that the general principles of international law. It merits mentioning that the phrase “exclusive jurisdiction” has been said to be somewhat of a misnomer. This is because there are in fact, other States that may also claim jurisdiction on internationally recognized grounds. Therefore, any other claim of jurisdiction is considered as being concurrent with the flag State’s jurisdiction and this provision has been adjudged justified as an alternative jurisdiction. While the flag State, as it were, has an apparent burden

⁴⁹ 1 F.Supp.2d 601 (E.D.La. 1998).

⁵⁰ The exercise of jurisdiction under § 7(8).

⁵¹ See for example, Part 5.4 of the Australian *Criminal Code Act 1995* and France Penal Code (France) [Legifrance trans, Penal Code (2005) among others.

⁵² Kate Lewins, “Jurisdiction over Prosecution of Criminal Acts on Cruise Ships and Regulation of the Cruise Ship Industry”, *Background paper/submission on behalf of MLAANZ updated 18 Jan. 2013*.

⁵³ This is when the said perpetrator is within the state’s territory. Reydam L. *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, Oxford, 2003); Ryngaert C., ‘The Concept of Jurisdiction in International Law’ op cit accessed on 11 February 2020.

⁵⁴ Britannica ‘Universality Principle, International Law’ <https://www.britannica.com/topic/universality-principle> accessed on 13 February 2020. Jurisdiction can be territorial in nature or based on internationally recognised grounds of extra-territorial application of law.

⁵⁵Ryngaert C., ‘The Concept of Jurisdiction in International Law’ op cit accessed on 11 February 2020 *International and Municipal Legal Perspectives* (Oxford, Oxford, 2003); Ryngaert C., ‘The Concept of Jurisdiction in International Law’ op cit accessed on 11 February 2020.

⁵⁵ Britannica ‘Universality Principle, International Law’ <https://www.britannica.com/topic/universality-principle> accessed on 13 February 2020. Jurisdiction can be territorial in nature or based on internationally recognised grounds of extra-territorial application of law.

⁵⁵Ryngaert

to exercise that jurisdiction and control over its ships under UNCLOS,⁵⁶ basically, most cruise ships are registered in open registries. It is axiomatic that open registries lack the financial power to investigate and prosecute all crimes on ships flying their flag. Flag of convenience states no doubt have no capacity to enforce their laws on ships flying their flag. Hence, little incentive exercise of jurisdiction over a criminal act is mainly the responsibility of the territorial State where the crime occurred. But in certain cases, States other than territorial may claim jurisdiction over the same criminal act based on extra-territorial jurisdiction.⁵⁷ Can be universality principle derives from the view that “certain conduct so concerns the entire international community of states that the prosecution of offenders by any other state is warranted.”⁵⁸ The maritime offense of piracy is a heinous offense and under the Universality principle, all states can exercise prescriptive jurisdiction to regulate same.⁵⁹

d. Concurrent Jurisdiction

Concurrent jurisdiction allows more than one state to have the authority to prosecute for offenses committed outside their territories. For example, UNCLOS provides that the flag State has “exclusive jurisdiction” over crimes occurring on board. “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”.⁶⁰

To co-operate with other states to remedy the deficiency can be unattainable. This is the subject of criticism by commentators. It is against this background that it becomes desirable to have a concurrent jurisdiction, whereby another State with the will and resources to prosecute can embark on such. This will make other State to support their claim for jurisdiction on internationally recognized grounds.⁶¹

e. The Effect Doctrine

Although this principle appears somewhat knotty, it permits prescriptive jurisdiction.⁶² The effect doctrine is based on the principle that a state has jurisdiction over actions abroad, which has effects within the state’s territory, no matter how remote.⁶³ Developed and well used by the American courts and jurisprudence,⁶⁴ the earliest use of the doctrine was in 1945 in *United States v. Aluminum Co. of America (ALCOA)*.⁶⁵ In that case, it was stated that states might hold an individual liable for conduct outside its own territory if such conduct has consequences on its territory.

The effects doctrine, though subject to various dissents by the international community due to its ability to cause international tensions, it can be said to be a part of the principles that allow for prescriptive jurisdiction.⁶⁶ An illustration will be if the United States legislates to

⁵⁶ This is particularly apposite considering article 94 which says ‘every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. (2) in particular every State shall: ... (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.’

⁵⁷ Kate Lewins, “Jurisdiction over Prosecution of Criminal Acts on Cruise Ships and Regulation of the Cruise Ship Industry”, *Background paper/submission on behalf of MLAANZ updated 18 Jan. 2013, page 3.*

⁵⁸ Amann D. M. ‘Jurisdictional, preliminary and procedural concerns in Benchbook on International law’ op cit accessed on 13 February 2020.

⁵⁹ Ibid.

⁶⁰ See Article 92.

⁶¹ Kate Lewins, “Jurisdiction over Prosecution of Criminal Acts on Cruise Ships and Regulation of the Cruise Ship Industry”, *Background paper/submission on behalf of MLAANZ updated 18 Jan. 2013, page 4.*

⁶² This is somewhat different from the effect doctrine referred to by the PCIJ in the Lotus case.

⁶³ Vagias ‘The Territorial Jurisdiction of the International Criminal Court a jurisdictional point of reason for the ICC’ 24; Adinoyi J., ‘States Jurisdiction: Prescription on Territoriality and Nationality’ op cit accessed on 13 February 2020.

⁶⁴ Adinoyi J., ‘States Jurisdiction: Prescription on Territoriality and Nationality’ op cit accessed on 13 February 2020.

⁶⁵ (2ND Cir. 1945) 148 F.2d 416.

⁶⁶ Adinoyi J., ‘States Jurisdiction: Prescription on Territoriality and Nationality’ op cit accessed on 13 February 2020.

regulate criminal acts occurring in the Strait of Hormuz just because its oil tankers would pass through that sea route to bring oil to its territory.

7. Nigerian Admiralty and Extra-territoriality Regime

The Nigerian Admiralty legal regime also embraced the extra-territoriality aspect of prescriptive jurisdiction.⁶⁷ The Jurisdiction of the Federal High Court extends to all maritime claims wherever arising and to all ships, irrespective of the place of residence or domicile of the owner.⁶⁸ It is worthy of note that Admiralty Jurisdiction Act does not limit the jurisdiction of the Federal High Court to criminal acts occurring within the territory of Nigeria. To further reinforce this point, a community reading of Section 1(1) (a) and 1(i) (g) of the Admiralty Jurisdiction Act indicates that the Court has jurisdiction in criminal cases arising from maritime claims.

Section 2 defines what a maritime claim entails. It varies from a claim done by damage to a ship whether by collision or otherwise, to a claim for a loss of personal injury⁶⁹ arising out of an act or omission of the owner or charterer of a ship, a person in possession or control of a ship, a person for whose wrongful act the owner, charterer or person in possession or control of the ship is liable. These are claims that can give rise to criminal acts or criminal proceedings when they occur. Therefore, by reading sections 1, 2 and 3 of the Admiralty Jurisdiction Act the prescriptive jurisdiction of the court and the legislature extends beyond the territory of the country.⁷⁰

8. Adjudicatory Jurisdiction

Adjudicatory jurisdiction of a state under international law and by extension, maritime law refers to the power of a state to hear and settle legal disputes arising out of any claim over which it has jurisdiction.⁷¹ The adjudicative jurisdiction of a state is usually vested in the courts or quasi-judicial bodies.⁷²

Adjudicatory Jurisdiction under international law has been somewhat nebulous.⁷³ It has been stated that Adjudicatory Jurisdiction is not a separate category under international law and that jurisdiction ought to be divided into prescriptive and enforcement.⁷⁴ However, it has been argued that it is a separate form of state jurisdiction but has been largely left unregulated by state practice and convention.⁷⁵ It can however be safely stated that the reason for the position exercised by the two sides of the divide is because adjudicatory jurisdiction carries elements of being either prescriptive or enforcement in nature.⁷⁶ It is prescriptive in nature where the judge is “participating in law-making, including through interpretation of the scope

⁶⁷ This was also the position in *CSL Pacific* [2003] 214 CLR 397, where the High Court held that Australian laws will apply to foreign ships in port where legislation is expressed to apply to them.

⁶⁸ See section 3 of the Admiralty Jurisdiction Act.

⁶⁹ See for example, in *Ijeoma v. Petrolmed Oil Nig. Ltd* (2010) ALL FWLR (Pt. 539) 1120 at 1135, the court held that where a matter relates to claims for wages or salary and allowances by master or crew members of a ship, claim for loss of life or personal injury sustained, they are all part of the definition of general maritime claim which fall under the exclusive jurisdiction of the Federal High Court. See also see the case of *Baobab Industries Limited v Owners of the Yatch Jubilant* (2009) FJHC 167.

⁷⁰ Nwazee L. ‘Admiralty Jurisdiction in Nigeria’ <https://www.hg.org/legal-articles/admiralty-jurisdiction-in-Nigeria-21404> accessed on 15 February 2020.

⁷¹ ‘Rethinking Jurisdiction in International Law’ <https://academicoup.com/bybill/article/84/1/187/2262836> accessed on 15 February 2020.

⁷² ‘Rethinking Jurisdiction in International Law’ <https://academicoup.com/bybill/article/84/1/187/2262836> accessed on 15 February 2020.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

of application of the law or development of a common law system” or enforcement if the judge is “ordering the seizure of persons or assets.”⁷⁷

It is important to evaluate the two arguments, especially in the face of the *lotus* decision and territorial principle of international law. A fusion of the two arguments would establish that the Adjudicatory jurisdiction of a state is not a category of jurisdiction under international law. If it is a category, it has been largely unregulated.⁷⁸ So, while public international law has created relevant general limits restricting prescriptive and enforcement jurisdiction, adjudicatory jurisdiction has been left unrestricted and unregulated.⁷⁹

The above, however, does not correlate with the inherent nature of public international law which is to constrain state action regardless of the form in which the power is exercised.⁸⁰ It is the position of this paper that adjudicatory jurisdiction is largely territorial. It will be preposterous for a state to adjudicate over a matter in the territory of another state, especially when it comes to criminal matters, except if there is a treaty between both states to that effect. State practices flowing from the first *lotus* principle apply to limit adjudicative jurisdiction to the territory of a state.⁸¹ This however does not say that adjudicatory jurisdiction, especially where the judge is making laws or adding to the legal jurisprudence, cannot be extra-territorial.⁸² It is however necessary to reiterate that adjudicatory jurisdiction is largely territorial.

A typical example can be seen when it comes to the arrest of ships in Nigeria.⁸³ A ship cannot be arrested and brought under the jurisdiction of the Federal High Court unless the such ship is within its territorial waters.⁸⁴ This shows that the adjudicative jurisdiction of the federal high court is usually and largely territorial.

9. Enforcement Jurisdiction

The first *lotus* principle has argued earlier centers predominantly on Enforcement Jurisdiction. Enforcement jurisdiction refers to the power of a state to ensure adherence to

⁷⁷ Ibid; Keefe R.O., ‘Universal Jurisdiction: Clarifying the basic concept’ (2004) 2 Journal of International Criminal Justice 735, 737.

⁷⁸ ‘Rethinking Jurisdiction in International Law’ <https://academicoup.com/bybill/article/84/1/187/2262836> accessed on 15 February 2020.

⁷⁹ Raif M, ‘accessed on 15 February 2020.

⁸⁰ Raif M, ‘Is Adjudicatory Jurisdiction a category of public international law?’ op cit accessed on 15 February 2020.

⁸¹ Daniele Fabris, Crimes committed at Sea and Criminal: Criminal Issues of International Law of the Sea Awaiting the *Enrica Lexie* Decision, Amsterdam Law Forum, (2012) Vol. 9:2,

⁸² Reference can be made to the admiralty jurisdiction of the Federal High Court of Nigeria. See Section 1, 2, 3 of the Admiralty Jurisdiction Act. A court in the instances created may make pronouncement on legal jurisprudence to bind a ship that is not within the territory of Nigeria. The court in this instance is not necessarily enforcing a law but prescribing the law.

⁸² Ibid.

⁸² Ibid. Is Adjudicatory Jurisdiction a category of public international law? <https://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/> accessed on 15 February 2020; ‘Rethinking Jurisdiction in International Law’ <https://academicoup.com/bybill/article/84/1/187/2262836>

⁸² Ibid; Keefe R.O., ‘Universal Jurisdiction: Clarifying the basic concept’ (2004) 2 Journal of International Criminal Justice 735, 737.

⁸² ‘Rethinking Jurisdiction in International Law’ <https://academicoup.com/bybill/article/84/1/187/2262836> accessed on 15 February 2020.

⁸² Raif M, ‘Is Adjudicatory Jurisdiction a category of public international law?’ <https://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/> accessed on 15 February 2020; ‘Rethinking Jurisdiction in International Law’ <https://academicoup.com/bybill/article/84/1/187/2262836> accessed on 15 February 2020.

⁸² Raif M, ‘Is Adjudicatory Jurisdiction a category of public international law?’ op cit accessed on 15 February 2020.

⁸² Daniele Fabris,

⁸³ Fubara L. ‘Ship Arrest in Nigeria’ <https://shiparrested.com/ship-arrest-in-nigeria/> accessed on 28 February 2020.

⁸⁴ Ibid.

laws,⁸⁵ either domestic or international as the case may be, through the instrument of the police and sometimes the judicial system.⁸⁶ There is a limit placed on the enforcement jurisdiction of the state and that is territoriality. The police of a state or other similar forces can only enforce maritime claims in its territory, which include its territorial waters. They cannot extend the same to the territory of another state unless such state authorizes the exercise or there is a permissive rule of international that allows same.⁸⁷ A typical example of such a permissive rule is the provisions of Article 27 of UNCLOS which allows the coastal state;

- a. to exercise criminal jurisdiction if the consequences of the crime extend to the coastal state;
- b. if the crime is of a kind that will disturb the peace and order of the territorial sea;⁸⁸
- c. if the assistance of the local authorities has been requested by the master of the ship or diplomatic agent or consular officer of the flag state; or
- d. if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.⁸⁹

A ship, according to the decision of the *lotus case*, defines a ship as an extension of the flag state and as such, what occurs on that ship can be deemed to be occurring on the territory of the flag state.⁹⁰ However, under Article 27 of the UNCLOS,⁹¹ a coastal state can enforce its internal laws on board a foreign ship passing through its territorial waters if the circumstances mentioned in that article occur. It is important to state that it has been argued that the decision of the court in the *lotus case* to the effect that a ship is a territory of a state is no longer the law in the face of the advent of the provisions of UNCLOS,⁹² it is my opinion that a state can still be viewed as the territory of the flag state for the purpose of Article 27 of UNCLOS especially where there is a consideration of the principle that the exercise of the enforcement jurisdiction of a state is territorial. Article 27 provides that despite the fact that a foreign ship is passing through its territorial waters, a coastal state cannot enforce criminal jurisdiction unless the existence of certain occurrences. These occurrences include, among others, if the

⁸⁵ Zacharias L. Kapsis, The prescriptive and enforcement jurisdiction of a coastal state in relation to ship source pollution occurs in its various maritime zones, under the united nations convention on the law of the sea and the customary international law, available at <https://www.journalijar.com/article/35472/the-prescriptive-and-enforcement-jurisdiction-of-a-coastal-state-in-relation-to-ship-source-pollution-occurs-in-its-various-maritime-zones,-under-the-united-nations-convention-on-the-law-of-the-sea-and-the-customary-international-law/>

⁸⁶ 'Rethinking Jurisdiction in International Law' <https://academicoup.com/bybill/article/84/1/187/2262836> accessed on 15 February 2020.

⁸⁷ It would appear that a permissive rule of International law would be the jurisdiction of Flag States under UNCLOS. See Article 94(1) and (2) of UNCLOS; Ozobu C.L., 'Role and Responsibilities of Flag States under UNCLOSIII' available at https://www.researchgate.net/publication/279748889_ROLE_AND_RESPONSIBILITIES_OF_FLAG_STATES_UNDER_UNCLOS_III accessed on 28th February 2020.

⁸⁸ See for example *Mali v Keeper of the Common Jail* 120 US 1 (1887) where the US Supreme court exercised jurisdiction over an on board murder of one crew by another, on a Belgian flagged ship, whilst the ship was at dock in a US port, on the basis it had disturbed the peace of the US. See generally, Kate Lewins, "Jurisdiction over Prosecution of Criminal Acts on Cruise Ships and Regulation of the Cruise Ship Industry", *Background paper/submission on behalf of MLANZ updated 18 Jan. 2013*.

⁸⁹ See generally, Article 27 (1) a-d of the UNCLOS, 1982.

⁹⁰ The Case of the RS 'Lotus' Supra.

⁹¹ 1982 UNCLOS.

⁹² It has been argued by Sondre Torp Helmersen that Flag State Jurisdiction is not territorial in nature but *Suigeneris* in its own right. Some of the reasons canvassed includes the transferability of flag state jurisdiction to another state upon the change of flag of registry without consulting the previous state who was the previous flag state, the fact that there has to be 'genuine link' between a ship and flag registry before same can be respected by other states and the provisions of Article 97 of UNCLOS to the effect that in the case of the collisions on the High Seas, a person may only be prosecuted by the flag state of the vessel where the person was located at the time of the collision. See Helmersen S. T. 'The *Sui Generis* Nature of Flag State Jurisdiction' <https://www.duo.uio.no/bitstream/handle/10852/64696/helmersen-flag-state.pdf> accessed on 15 February 2020.

criminal act affects the coastal state or the peace of the territorial waters or if such jurisdiction is for the suppression of narcotics drugs.⁹³ This is a permissive rule of International law allowing a state to exercise enforcement jurisdiction in the territory of another state, i.e. upon the ship of a flag state if the circumstances demand.

C. Conclusion

Prescriptive jurisdiction is no doubt one of the methods of enforcing criminal jurisdiction under international maritime law. The general phenomenon of criminal jurisdiction is that the flag state is responsible for prosecuting ships and persons onboard ships flying its flag regardless of where the offense is committed. As explained earlier, exercising criminal jurisdiction by a flag state does not mean that ex-territorial or concurrent jurisdiction cannot be exercised by other interested states where occasion demands. However, based on the provisions of the UNCLOS, the flag state appears to enjoy, in real terms, superior jurisdiction as domestic legislation of states like the US, Australia, UK, New Zealand, etc. tend to be controversial, and the criminal jurisdiction of others states cannot be so concurrent. One can also conclude that Article 27 of the UNCLOS enumerates the circumstance under which a coastal state can exercise criminal jurisdiction. This invariably presupposes that the right is concurrent in this perspective.

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⁹³ Article 27 1(a-d) UNCLOS.

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