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A SURVEY OF PLURALISM IN INTERNATIONAL LAW:
Legal Principles, Judicial Proceedings, and Agency Operations

A Master Thesis
Submitted to the Faculty
of
American Public University
by
Joel Wickwire
In Partial Fulfillment of the
Requirements for the Degree
of
Master of Arts
November 2017
American Public University
Charles Town, WV
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DEDICATION

I dedicate this thesis to my classmates. Without our substantive conversations and engaging debates the completion of this work would not have been possible.
ACKNOWLEDGMENTS

Professor Erisman was particularly helpful in guiding me towards a personal method of approaching the law. His Constitutional Law course taught me the fundamentals of law in the United States and his Property Law course challenged me and changed the way I perceived the world around me. Also, Professor Pieroni was supportive in my academic and professional pursuits. Her Legal Research, Writing, and Analysis course also challenged me and her Contract Law course will have a lasting impact on my view of legal agreements as well as personal relationships.
ABSTRACT OF THE THESIS

PLURALISM IN INTERNATIONAL LAW:
Legal Principles, the Judiciary, and Agency Operations

by

Joel Wickwire

American Public University System, August 1, 2017

Charles Town, West Virginia

Professor Morrissette, Thesis Professor

The functionality of the international legal system is frustrated due to the overly complex relationships between international courts and between law enforcement agencies due to the pluralistic nature of international law. In reviewing the applicability of contemporary arguments for improving legal principles like due diligence and jurisdiction on existing international legislation and case law, this research aims at better informing practitioners of international law and politics.
because it is in these spheres that all nations must interact. A brief history of the problem of legal pluralism is provided followed by the development of the legal principles propositioned as being key to improving the international legal system. The analysis portion of this research project focuses on where these principles are present in various international courts and how these practices need to be emphasized. How these principles are mechanized through the operations of such agencies as International Criminal Police Organization (INTERPOL) and the Organization for Security and Co-operation in Europe (OSCE) is also discussed. This paper reveals that while the international legal system is fragmented, it is poised to embrace a higher standard of legal processes that are embedded in the principles of *due diligence* and *jurisdictional reasonableness*. 
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1) INTRODUCTION

“The plurality of normative identities in [International Criminal Justice] implies that different interpretive methods co-exist side by side, leading to questionable choices and incoherent outcomes.”

Domestic courts, international courts, and law enforcement agencies all interact in an effort to investigate and prosecute international criminal activity. On the international stage this process can become quite complicated creating fragmentation among legal systems. One of the most sacred and debated legal concepts recognized by the nations of the world is the principle of sovereignty. Sovereignty is the legal concept that each nation has the right to control the land and govern the people within its borders without external interference. However, as the world has experienced advancements in means of travel and the ease with which business is conducted across borders, the need to settle disputes across borders has increased. International legal practitioners must work within this pluralistic environment when seeking justice.

In response to the problems inherent in international criminal law (ICL) due to its pluralistic nature, the recently proposed general principles of due diligence, as a requirement of a state in “performing its international obligations,” and jurisdictional reasonableness, as an

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1 American Public University. Written while in attendance of a Thesis Course instructed by Karen Morrissette, esq.
2 PLURALISM IN INTERNATIONAL CRIMINAL LAW 33 (Elies van Sliedregt & Sergey Vasiliev., Oxford University Press 2014).
3 Id. at 10; Fragmentation: The “disintegration and demise of coherent law as a result of increased specialization and proliferation of judicial fora.” Pluralism, supra note 2 at 12. On fragmentation: “The system of ICL [international criminal law] within this paradigm [fragmentation] ceases to operate successfully as a system if it splinters, since there is no way of predicting for defendants which way a particular tribunal may go in its interpretation of available defenses of applicable modes of responsibility.” Id. at 64. Fragmentation “pursues decentralization and spontaneity.” Id. at 95.
4 Id. at 55.
5 Definition of “Sovereignty,” Cornell University Law School, https://www.law.cornell.edu/wex/sovereignty (Last visited May 6, 2017); Professor Ryngaert, leading theorist on jurisdiction in this research, uses the following definition for sovereignty: “the power states do have at any given moment of development of the international legal system.” AJ Colango, Spatial Legality, (2012) 107 Nw. L. Rev. 69, 106.
6 JOANNA KULESZA, DUE DILIGENCE IN INTERNATIONAL LAW 1 (Malgosia Fitmaurice et al. eds., Leiden Boston: Brill Nijhoff, 2016).
7 Id. at 2-3.
interest-based method for establishing jurisdiction,\textsuperscript{8} ought to be recognized as being fundamental norms and be pushed to the forefront of discourse on ICL in an effort to promote better functionality in the international legal system.

This research project will provide background on the legal theories used throughout this paper. The notion of legal pluralism will be presented first in an effort to reveal the problems associated with the concept, such as the fragmentation of courts and law enforcement agencies. Second, the legal principle of due diligence will be discussed. The principle of “due diligence” is applicable to many fields of law, but here the aim is to focus on ICL. Third, a close look will be taken of the principle of jurisdictional reasonableness. With the overlapping of a growing number of legal systems, an overarching framework for establishing jurisdiction is much needed. In the body of this research, these legal concepts, the problems embedded in legal pluralism and the advantages to be gained from contemporary notions of due diligence and jurisdiction, will be explored, analyzed, and applied to the international judiciary and international law enforcement agencies.

2) **Background: Legal Pluralism and Legal Principles**

   “Perspectives on international criminal justice—including its objectives and functions—remain fragmented, and assessments of its performance and prospects discordant and contested.”\textsuperscript{9}

   a) **Global Legal Pluralism**

   There is an enormous body of case law that illustrates the complications that arise when multiple authorities may assert jurisdiction. Examples of these cases include the *Tadić Cases*\textsuperscript{10}

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\textsuperscript{8} CEDRIC RYNGAERT, JURISDICTI ON IN INTERNATIONAL LAW SECOND EDITION 3 (2015).

\textsuperscript{9} Pluralism, supra note 2 at 6.

\textsuperscript{10} Prosecutor v. Tadić, Case No IT-94-1-T, TC, 10 August 1995; On Appeal: Tadić, Case No IT-94-1-AR72, AC, 2 October 1995; Prosecutor v. Tadić, Case No IT-94-1-T, TC II, 5 August 1996; Tadić v. Prosecutor, Case No IT-94-1-T, TC II, 7 May 1997; Prosecutor v. Tadić, Case No 94-1-94-1-T, AC, 15 July 1999; see also: The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06.
that involved problems related to processing evidence in foreign jurisdictions and not adhering to established practices for applying legal principles. There is the Steamer Apure Case\textsuperscript{11} that involved the deaths of Americans working on a steamer ship in Venezuela for which the Venezuelan government was ultimately held responsible and was sued by wives of the deceased steamboat workers. Then there is the Lotus Case\textsuperscript{12} that involved two ships crashing at sea resulting in numerous deaths and the Permanent Court of International Justice (PCIJ) determining that international principles of jurisdiction ought to be considered on par with customary contract law.\textsuperscript{13}

In their book, \textit{Pluralism in International Law},\textsuperscript{14} co-editors Elies van Sliedregt, Professor of International Criminal Law and Dean of the Law School at Vrije Universiteit Amsterdam, and Sergey Vasiliev, Assistant Professor of Public International Law at Univeriteit Leiden at the Grotius Centre, define “global legal pluralism”\textsuperscript{15} as the “existence of a plurality of legal orders created both by states and non-state communities.”\textsuperscript{16} In the introductory chapter, “Pluralism: A New Framework for International Justice,” the authors emphasize that the consequence of multiple legal orders is “fragmentation”\textsuperscript{17} and explain that “[i]nternational criminal justice is a dynamic and multifarious enterprise. The more it is studied, the more dimensions of complexity it reveals.”\textsuperscript{18} Theories on legal pluralism in international criminal law vary greatly. For the purpose of this research, legal pluralism will be viewed as a concept of erosion that fragments

\textsuperscript{11} \textit{Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v. Venezuela (the Steamer Apure case), opinion of the Commissions,} Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885. Reports of International Arbitral Awards Volume XXIX, pp.240-260.

\textsuperscript{12} \textit{(France v. Turkey) (1927) P.C.I.J., Ser. A, No 10.}


\textsuperscript{14} Pluralism, supra note 2.

\textsuperscript{15} Id. at 9


\textsuperscript{17} Id. at 10.

\textsuperscript{18} Id. at 3.
court systems. The focus of this paper is to identify problems arising from legal pluralism, as seen through international case law, and to show how they may be mitigated through the application of contemporary ideas about due diligence and jurisdiction.

A set of cases illustrating the problems associated with global legal pluralism that will be referenced throughout this research are the Tadić Cases. Duško Tadić, at the time of the Bosnia-Herzegovina conflict, was a Bosnian-Serb café owner, part time traffic police officer and a karate instructor who was accused of committing “thirty-one counts of Grave Breaches of the Geneva Conventions, violations of the laws of customs of wars, and crimes against humanity.” In 1992, during the seizure of Prijedor, Serb militants imprisoned non-Serbs into camps and during the attack on Kozarac, 800 people were killed and many more led out of the city. Following these campaigns, in the encampments, the populations were “subjected to beatings, sexual assaults, torture, executions, and psychological abuse.”

During Tadić’s trial, a number of issues arose related to applying legal principles and evidentiary practices. For example, the International Criminal Court for the Former Yugoslavia (ICTY) took a different approach than had previously been established by the International Court of Justice (ICJ) “on the attribution of liability of states.” While the ICJ had employed the “overall control” test in the past, the ICTY employed an “effective control” test. This departure from customary practice regarding the application of international general principles and the ICTY’s claim that they were a “self-contained” system, raised much concern about the

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19 Pluralism, supra note 2 at 11.
21 Id.
23 Id.
24 Pluralism, supra note 2 at 11.
25 Id.
fragmentation of international judicial bodies. During the Tadić hearings the court also faced problems with evidence collection and witness testimony which will be discussed more extensively later in this paper.

Problems associated with facilitating a fair trial and an adequate defense are common before international tribunals according to International Human Rights lawyer, Wayne Jordash QC, and British barrister, Mathew R. Crowe, who have worked with the International Criminal Court (ICC), ICTY and ICJ. In their article, *Evidentiary Challenges for the Defence*, they argue that “despite 20 years of continuous activity, international tribunals have little knowledge to pass on to national courts concerning what constitutes adequate resources to ensure fairness to the accused.”²⁶

Professors van Sliedregt and Vasilieu, in their text on legal pluralism, explain that there are two reasons for this complexity in international law. First, it is due to the high number of courts, tribunals, and agencies that often operate in a decentralized and non-hierarchical manner.²⁷ Second, each of these courts produces its own body of laws and case material which is rarely uniform or easily cross-referenced.²⁸ A solution to these problems is not evident, but the authors do note that perhaps “differences can be reconciled under the international theory of attribution.”²⁹ Attribution is a concept closely related to due diligence, one of the legal principles to be presented in the next section and is a key element in establishing jurisdiction.

*International Legal Principles*

²⁶ *Id.* at 277.
²⁷ *Id.*
²⁸ *Id.* at 4.
²⁹ Pluralism, *supra* note 2 at 23.
b) Due Diligence

The ICJ, “whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply...the general principles of law recognized by civilized nations...”\(^{30}\) To facilitate a better functioning international legal system, legal scholars have posited new perspectives on existing general principles of international law. International principles have not always held significant weight before international courts. One case that heightened the consideration given to legal principles to that of contracted agreements was the \textit{Lotus Case}.\(^{31}\) Here, the PCIJ explained that nations ought to freely assert their jurisdiction “failing the existence of a permissive rule [or principle] to the contrary.”\(^{32}\) Two international legal rules or “principles” presently being discussed by legal scholars are \textit{due diligence} and \textit{jurisdiction}.

While due diligence is a well-recognized principle of legal theory in most civilized nations’ \textit{conscience juridique}, it is still being developed as a fundamental norm in international law. Assistant Professor of International Law and Internet Governance at the University of Lodz, Joanna Kulesza in her text, \textit{Due Diligence in International Law}, defines due diligence as “taking vigorous action to identify all events within state territory which might endanger the security of other parties.”\(^{33}\) Kulesza “argues for the recognition of a state duty to show due diligence in performing its international obligations”\(^{34}\) and goes as far as to claim that this standard is the “missing link between state responsibility and international liability.”\(^{35}\)

\(^{30}\) Statute of the I.C.J. art. 38(1)-(c)
\(^{32}\) \textit{Id.} at 31-32: \textit{Lotus} opinion: “[T]he 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 a convention.”
\(^{33}\) Due Diligence, \textit{supra} note 6 at 61.
\(^{34}\) \textit{Id.} at 2-3.
\(^{35}\) \textit{Id.} at back cover.
Kulesza bases much of her reasoning on reports drafted by the United Nations International Law Commission (ILC) that discuss the relationship between state responsibility and due diligence at length. Kulesza utilizes past opinions of ILC chairman Roberto Ago and PCIJ judges Max Huber and John Basset Moore to support her claims. Moore was U.S. Assistant Secretary of State and the first American judge to serve at the PCIJ. Much of Kulesza’s work focuses on the responsibility a nation has to prevent harm to foreigners within its borders and to prevent activity within its borders that may cause harm beyond its borders. A look at the repercussions of *The Steamer Apure case* (1885) will help to develop the notion of “state responsibility.” In this case, a steamer was carrying the President of Venezuela, General Juan Bautista Garcia, and a small security team. The steamer was attacked by rebels and two crew members were killed and one injured, all of whom were American. The wives of the deceased crew members filed suit for damages in amounts of $50,000 and $30,000 and the injured crew member filed suit for $15,000.

The rebels who attacked the steamer were attempting to assassinate the General who was on board. The General had been warned of the threat, yet had ordered the crew to move forward with making port at Apurito, located within a region officially under his jurisdiction. Following the attack, there was little or no effort by the government to punish the rebel group and thus, the question was raised as to whether the General and ultimately the government could be held

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37 Due Diligence, supra note 6 at 1.

38 *Cases of Amelia de Brissot, Ralgh Rawdon, Joseph Stackpole and Narcisa de Hammer v. Venezuela (the Steamer Apure case), opinion of the Commissions, Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885. Reports of International Arbitral Awards Volume XXIX, pp.240-260.

39 Id. at 242.

40 Id.
responsible for the death of the foreigners. 41 In this case, Commissioner Mr. Aдрade lists four criteria for establishing responsibility. 42 These criteria do not so much amend existing law as they strengthen a growing concept of state responsibility in international law. Following the *Steamer Apure Case*, John Basset Moore, as ILC Special Rapporteur, reaffirms the four criteria in his book titled, *The History and Digest of the International Arbitrations*, 43 solidifying the legal concept of state responsibility as an international norm.

The four criteria needed for establishing a nation responsible for denying justice to any foreign victims within its borders after a crime has occurred are: 1) Authorities must have had knowledge of the activity in advance and failed to act; 2) there was the opportunity to act and the authorities chose not to; 3) the authorities demonstrated ignorance in discovering the illegal conduct to such a degree to have acted in “bad faith;” and 4) after having been informed of the illegal activity, took no action to deter future infractions. 44 Kulesza argues that the opinions expressed by the Commissioners on state responsibility, with regards to exercising due diligence, in this case and in subsequent legal literature, “to a large extent [remain] accurate today.” 45

c) Jurisdictional Reasonableness

With a recognized standard of due diligence being required by states when addressing cases involving international entities, states should act with a greater degree of attentiveness, facilitating the process of establishing a court’s jurisdiction when needed. Cedric Ryngaert is a professor of Public International Law at Utrecht University and in his book, *Jurisdiction in International Law*, Ryngaert argues for a new development in the area of jurisdiction. He

41 Id. at 258.
42 Id. at 245.
44 Due Diligence, supra note 6 at 79.
45 Id.
contends that “the current system of jurisdiction is not satisfactory, since it allows several States to claim regulatory rights over one and the same situation… [resulting] in overregulation, which is harmful to the individual over whom jurisdiction is exercised, and harmful to international relations.”46

States retain sovereign power over acts committed within their borders, as may be gleaned from the emphasis on state responsibility discussed above, but Ryngaert calls for the development of a principle of jurisdictional reasonableness where “the State with the strongest nexus to a situation is entitled to exercise jurisdiction, yet if it fails to adequately do so, another State with a weaker nexus…may step in, provided that its exercise of jurisdiction serves the global interest.”47 Given a state has acted with due diligence in investigating a crime within its borders, the parties involved will be better informed when determining what court may be best suited to assert jurisdiction. Ryngaert uses decisions from international courts like the PCIJ and ICC and statute law from many countries including the United States, the United Kingdom, Germany, Belgium, and France to support his argument. However, he does rely heavily upon the Restatement (Third) of the US Foreign Relations Law (1987). The Restatement (Third) alludes to a principle of reasonableness as being possible.48

The Lotus Case (mentioned above) was an important case in the development of international legal principles and played a particularly significant role in the applicability of principles of jurisdiction. This case addresses problems associated with establishing jurisdiction. A French steamer called the Lotus crashed into a Turkish collier called the Boz-Kourt resulting in the deaths of eight Turkish crewmembers. When the Lotus arrived in Constantinople the next day

46 Jurisdiction, supra note 8 at 185.
47 Id. at 231.
48 Subsection 403 of Restatement (Third) of Law on US Foreign Relations (1986); Cited in: Jurisdiction, supra note 10 at 190.
Lieutenant Demons, the officer of watch for the *Lotus*, was arrested. The PCIJ addressed the issue of whether Turkish authorities were right in administering Demons’ trial. This case explores flag ship and territorial jurisdiction, but also sets a standard for when a state may assert prescriptive (legislation) and enforcement (judicial) jurisdiction.

The French claimed that ships are legal extensions of state sovereignty while flying its state flag, and accordingly, Demons was under French jurisdiction (*Active Personality Principle*) at the time of the collision. The French therefore argued that Demons ought to have been tried in French courts. The Turks argued that since the crime, the deaths of the sailors, occurred on the Turkish ship under Turkish jurisdiction (*Passive Personality Principle*) and perhaps most importantly, they had Demons in custody (*Territorial Principle*), they were acting in accordance with international law when they tried and sentenced Demons.

The PCIJ, after weighing the various arguments in this case, ruled in favor of Turkey. It reasoned that nations often assert their jurisdiction extraterritorially through legislation (*prescriptively*), however, it is less common for nations to apply their jurisdiction judicially (*enforce*) through another state’s legal system. The PCIJ opinion advocated for a “voluntary” approach to jurisdiction explaining that nations are allowed to assert their jurisdiction except when there is an agreement to the contrary. The Court’s decision entitled states to assert their jurisdiction in most cases except when the interests of another state may be negatively affected.

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49 *Id.* at 30.
50 *Id.* at 31
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.* at 31-32.
55 *Id.* “[a] consensual legal system could not, in logic or practice, contain a rule prohibiting a sovereign state from prescribing rules against activities outside its borders that have harmful effects within the state’s territory.” Ryngaert cites HG Maier.
In this next section, further analysis of the applicability of these proposed general principles to international judicial procedures and law enforcement practices is conducted.

3) Analysis of Due Diligence in the International Judiciary

Domestic and international courts, tribunals, and law enforcement agencies often operate in a decentralized and non-hierarchical manner.\(^{56}\) The complex nature of international law and overlapping jurisdictions encourages a “fragmentation”\(^{57}\) of legal systems and the solution is not easily identifiable. The product of this is an enormous body of legal norms, laws, and case law that lack uniformity and are rarely shared or cross-referenced.\(^{58}\) In and around Europe there is the PCIJ, the ICC, The Mechanism for International Criminal Tribunals (MICT or The Mechanism), the European Court of Human Rights (ECHR), the European Court of Justice (ECJ), and others.\(^{59}\) Also, while the ICTY has closed and was brought under the MICT, it once shared jurisdiction with some of the above courts.\(^{60}\) In addition to these courts, each nation has its own domestic court that could also potentially assert its jurisdiction over a crime within its borders or within the borders of another sovereign nation.\(^{61}\) It is through applying a higher standard of the above principles, being diligent in preventing harm in international relations and having a standardized method of asserting jurisdiction, that the complexities of global pluralism can be more easily addressed.

a) Steamer Apure, Tadić Cases, and State Responsibility

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\(^{56}\) Pluralism, supra note 2 at 3.

\(^{57}\) Id. at 10.

\(^{58}\) Id. at 4.


\(^{61}\) Jurisdiction, supra note 8 at 6.
Reviewing the *Steamer Apure Case* (1885) helps to develop the notion of state responsibility as a legal norm stemming from due diligence that ought to be applied more strictly in order to facilitate a better functioning international legal system. The four criteria Commissioner Mr. Adrade lists for establishing responsibility provide a foundation for the level of due diligence required by nations concerning the harm caused to foreigners who are essentially extensions of their parent nation’s sovereignty. The criteria: 1) authorities had knowledge of the activity and failed to act; 2) there was the opportunity to act and they did not; 3) they acted in “bad faith” in discovering the illegal conduct; and 4) after being informed of the illegal activity, took no action to deter future infractions, represent a level of state responsibility echoed in future cases. This responsibility is not limited to those being harmed within a nation’s borders, but also those outside. Responsibility for extraterritorial harm, whether environmental or terrorist related, is often determined by the degree of due diligence exhibited by the host nation to prevent such harm.

The focus of this research is ICL functionality across international legal systems, but there has been a cross-pollination of cases to/from ICL and other legal fields such as environmental law with regards to demonstrating due diligence in preventing transboundary harm. One prominent case that explores the legalities of state responsibility and the responsibility of the international community is the *Smelter Case*. The *Smelter Case* was a 15-year long...
dispute between the U.S. and Canada which eventually set a new standard for preventing harm beyond a nation’s borders. In the Canadian town of Trail there was a zinc smelter that was polluting the surrounding areas’ waterways. The level of pollution was great enough that crop yields had significantly decreased, subsequently lowering property values. A large section of the affected area was across the U.S. border in the state of Washington.

At the time of the filing of the U.S. complaint regarding damages being caused to the area in Washington, Smelter had already settled multiple disputes with claimants in Canada, but had not yet been required to restrict the output of pollution resulting from zinc production. The Washingtonian claimants did not only desire compensation for damages, but a limitation set on the emission of pollutants as well. The result of this demand ultimately “became the subject of legal and diplomatic proceedings initiated by both governments…” The case began before the International Joint Commission and over the span of the 15-year dispute, transitioned to the Court of Arbitration. The Court eventually rendered a decision in favor of the U.S. issuing the opinion stating:

…no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

severely damaged after encountering mines resulting in forty-five deaths. The waters had been mined swept twice between 1944 and 1945 and cleared but the issue before the United Nations Security Council (UNSC), who asserted jurisdiction over the matter, was not when the mines had been laid, but that they had been laid under Albanian orders and subsequently, the Albanian government held responsibility for the British sailors that died as a result of lack of communication and due diligence in notifying the vessels of the danger.


67 Due Diligence, supra note 6 at 91.
68 Smelter, supra note 66 at 1926.
69 Id. at 1939.
70 Due Diligence, supra note 6 at 92.
71 Id.
72 Smelter, supra note 66, at 1965.
As will be touched on throughout this research, environmental law and ICL have contributed to the development of each other’s body of law. This is most recently reflected in the responsibility of states to deter terrorist elements from flourishing within their borders because of the potential future harm caused to nations beyond their borders. First though, a review of the Tadić Cases mentioned above will be conducted to aid illustrating how a “duty of care,” not unlike the one established by the Court of Arbitration in the Smelter Case, is applied to crimes of war.

As mentioned above, the Tadić Cases, which focused on the prosecution of persons involved in war crimes, encountered problems with fragmentation because the ICTY insisted on applying a method of determining state responsibility that was not the norm for other courts such as the ICJ. The ICTY itself was in fact established “to deal with international criminal law and the international responsibility of individuals for grave violations of international law.” One reason for this shift in practice was due to a focus of the court to attribute state responsibility stemming from “individual’s” actions even if “auxiliaries” of the state are not deemed to be official extensions of the state. While the ICJ had previously applied an “overall control” test when attributing state responsibility, the ICTY needed to establish “effective control” in order to obtain the convictions it was seeking.

With regards to the Tadić Court’s choice of unique procedure, Kulesza opines that “due diligence [is] crucial for the resolution of the dispute, the court stated that the obligation in question concerns the need for a state to take certain actions, rather than achieve a certain result…” Essentially, Kulesza is arguing that while a State may not be able to stop genocide or

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73 Due Diligence, supra note 6 at 284.
74 Id. at 109-113.
75 Id.
76 Id. at 158.
77 Id. 109, 278.
78 Id. at 111.
the destruction of crops via pollution, it can be held responsible to the international community for the omission of acts of due diligence in trying to prevent the harm inflicted. This is why Kulesza correctly emphasis the need for a duty to demonstrate due diligence in international relations.

The ITCY in Tadić, even in the midst of controversy relating to its breach of international judicial norms, established three criteria for due diligence in demonstrating a “degree of care,”79 which appear to follow similar logic as is used in the Steamer Apure Case. The crimes here are of a greater magnitude and the approach more general which also drew criticism from the defense. First, the Court decided that there must be an assessment of the possibility that the government could have affected the perpetrator’s behavior; second, there are international legal norms that protect the targeted community; and third, proof that the event (i.e. genocide) actually happened).80 Kulesza identifies the moment when the duty of due diligence arises in the following excerpt: “The obligation to prevent violations and the corresponding duty to take active measures to prevent it arise at the moment when state authorities become aware of or should have, under normal circumstances, learnt about a serious risk of crime being committed.”81 In the Steamer Apure case this would have been at the point when the General was warned of the pending attack.

In Tadić, it was not clear that the State had any power over the actions of Tadić but in other cases, the connection between a criminal and a nation can be less opaque. Under the U.S. Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq., U.S. citizens may file suit against a government of a nation if that citizen is harmed due to actions of that government (i.e. supporting terrorism) or the actions of individuals for which that government is responsible (i.e.  

79 Id.
80 Id. at 112.
81 Id.
A recent case addressing the complexities of international civil suits is Diana Campuzano et al., v. The Islamic Republic of Iran, et al. In 1997, Hamas affiliated suicide bombers targeted a crowded mall on Ben Yehuda Street killing seven people and injuring 200. One of the deceased and two of the injured were American. Hamas took credit for the attack and it is well-known that Iran supports Hamas through training as well as monetarily. The aggrieved parties filed suit for damages.

When Iran failed to appear before the U.S. District Court of the District of Columbia on the specified court date, the judge ordered a default judgement of $423.5 million in favor of the plaintiffs. The problem that arose in this case is that once a suit is granted, there must be a means to collect the award. However, U.S. judgements have little effect in the Iranian judiciary. So, the plaintiffs planned to seize Iranian assets in the U.S. where they are easier to obtain. However, FSIA § 1602 allows for the seizure of commercial assets but not those that might be used for scholarships or held in museums. This case was granted certiorari by the U.S. Supreme Court on June 22, 2017, regarding the question of immunity of assets to be heard later this year.

b) Tadić Cases and Lubanga - Evidence and fragmentation.

82 281 F. Supp. 2d 258 (D.C. 2003), Civil Action (No. 00-2328).
83 Id. at para 9 & 10; “Iran provides terrorist training and economic assistance to Hamas. Exs 3, 4, §§ 13-19, 56 at 9, 12. Dr. Bruce, an expert in the field of terrorism, testified that Iran’s support of Hamas was $30,000,000 in 1995. Tr. At 1/78, 1,81; Ex. 4 § 33. With Iranian funds, MOIS ‘spends between $50,000,000 and $100,000,000 a year sponsoring terrorist activities of various organization such as Hamas.’ Tr. At 1/113.”
84 Id. at Introduction.
Scholars of international comparative law often debate the importance of standardizing national rules of procedure and evidence across borders.87 It is generally accepted that a certain degree of harmonization has occurred but then there are cases where tribunals have developed their own unique *sui generis* rules as in *Tadić*.88 The unique nature of these fragmented legal systems is the product of the judges’ personal experience that is often rooted in their own domestic judging experience which can be difficult to shed as they move into the international legal system.89 This creates a situation where foreign ideals are imposed on an indigenous populace with little consideration given to compatibility. English barrister Rupert Skilbeck in his article, “Frankenstein’s Monster: Creating a New International Procedure,”90 calls this method the “pick and mix”91 approach.

In order to have a cohesive approach that accounts for differing approaches to processing and evaluating evidence there must first be underlying fundamental principles of a fair trial.92 Emphasizing the themes presented in the principles due diligence and jurisdictional reasonableness, as they are presented here, facilitate fair trials by requiring discriminating evidentiary practices and a court to preside that has the strongest interest in the case. Evidentiary procedures are critical to due diligence and are considered embedded in the rule of law.93 Rules of evidence that regulate the admissibility of evidence are to be followed as strictly as any other law.94 Some international legal scholars go as far as to blame the ineffectiveness of international courts on the “lack of judicial discrimination, if not a wholesale abandonment of the judicial

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87 Pluralism, *supra* note 2 at 159.
88 *Id.*
89 *Id.* at 160.
91 *Id.*
92 Pluralism, *supra* note 2 at 159.
93 *Id.* at 380.
94 *Id.*
responsibility to manage a trial efficiently in the interests of justice and fairness.” Judges must be diligent in their responsibility of applying discriminatory evidentiary practices in order to properly manage international cases.

In *Tadić* the issue was whether evidence in the form of witness testimony held “indicia of reliability” before the court. Evidence must pertain to the specific charges against the accused or it may be considered prejudicial or at least contribute to the problem of “evidence debris.”

There are of course different approaches between civil and common law systems when taking statements from witnesses but other complications arise during trials prosecuting war crimes when the safety of witnesses is a concern. The *Tadić Cases* provide a classic example where the well-established right of the accused to confront witnesses against him is challenged. The ICTY Trial Summary rejected the European Court of Human Rights (ECtHR) normal practice and case law that held this procedure as a fundamental characteristic of a fair trial. This rejection of another judicial body’s standards and the limiting of *Tadić’s* rights of due process, led the international community to critically compare the ICTY to a military tribunal. If the Court had been more discriminate in its admittance of evidence this may not have been a concern of the international community.

In an attempt to show diligence in balancing the rights of the accused and the security of the witnesses, the ICTY adopted a five-prong test to decide whether the identity of a witness may remain anonymous. The five factors of consideration were: 1) there must have been a “real” fear for the witness and/or their families; 2) the testimony must have been material to the case; 3)
the Trial Chamber must have considered the witness trustworthy; 4) there must have been a lack of options for witness protection; and 5) anonymity was considered necessary.\textsuperscript{101} Even with this test in place, the defense argued the rights of the accused were being infringed upon and that the overabundance of testimony ultimately led to irrelevant evidence being submitted.\textsuperscript{102} \textit{Tadić} was found guilty on eleven of thirty-one charges and was sentenced to twenty years in jail.\textsuperscript{103}

A case that presents similar issues as the \textit{Tadić Cases} is \textit{The Prosecutor v. Thomas Lubanga Dyilo}.\textsuperscript{104} \textit{Lubanga} was the first person to be convicted by the International Criminal Court (ICC) under the Rome Statute for war crimes. He was charged with playing an active role in the “[e]nlisting and conscripting of children under the age of 15 years in the \textit{Force patriotique pour la liberation du Congo} [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character…”\textsuperscript{105} In this case, the ICC faced several challenges in establishing the guilt of \textit{Lubanga}. There was a need to establish criminal responsibility\textsuperscript{106} with which the ICC “took a distinctively different tack to the mode of participation than the case law of the ICTY…”\textsuperscript{107} The ICC needed to develop methods for interviewing large populations lacking formal education.\textsuperscript{108} The Court also needed to determine whether there was adequate “indicia of reliability”\textsuperscript{109} present prior to the submission of evidence.\textsuperscript{110}

In \textit{Tadić}, the ICTY relied heavily on case law and domestic procedures when determining what direction decisions on various aspects of the trial should go. This, as mentioned above,
differed from the ICJ approach and the ICC, in Lubanga, again diverts from the recent precedent set by a court.\textsuperscript{111} It is true that the ITCY was headed by an American judge, U.S. Federal District Court Judge Gabrielle Kirk McDonald, and this may provide some insight as to why the court relied so heavily on case law, a prominent characteristic of the common law system.

In Lubanga, the court took a more lenient approach to trial practices that the ICC itself had previously disapproved of revealing what might be called “intra-jurisdictional pluralism”\textsuperscript{112} or an interagency pluralistic approach to law. One problem stemming from the pluralistic nature of international law occurs when the population with which an international tribunal is interacting with lack a common language and/or education. This makes the process of collecting statements and preparing witnesses challenging. Specifically, in Lubanga there were problems with “witness proofing.”\textsuperscript{113} Witness proofing occurs when an attorney spends time with a witness to go over the statement previously made in order to clarify and confirm what various aspects of the statement mean prior to the witness giving actual testimony.\textsuperscript{114}

Prior to Lubanga, the ICC court considered there to be a “prohibition”\textsuperscript{115} on witness proofing but in trying to show due diligence through collecting “early investigation statements,”\textsuperscript{116} some lawyers believe it to be a valuable tool.\textsuperscript{117} There are two primary reasons for its use. The first is that, indeed, there often exists the need to clarify the meaning behind the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 59.
\item Id. at 25.
\item Id. at 5, 177 (n.90).
\item Id. at 177.
\item Id. at 5.
\item Id. at 177.
\item Id. “Early investigation statements never enquired as to what w[ere] first-hand perceptions and what w[ere]n’t…So I’d rather start every sentence with I saw, I heard, someone told me and that helps them to distinguish between hearsay and what they saw. Let’s say my basic witness is an uneducated farmer that had just been a survivor or perhaps a perpetrator in prison. My rough experience was that for every three witnesses I met only one was useful for trial and so 67 per cent (sic) of my pre-trial preparation was meeting witnesses who weren’t really helping to advance my case.” Id.
\end{enumerate}
\end{footnotesize}
statement being made. Following dramatic events that often accompany wartime situations, concerns about the past and future can muddle a witness’s perception of the current situation. This unstable mindset can then be further amplified by a lack of education. The second situation when witness proofing may be encouraged is in a case where there is a large population that needs to make statements or testify. If there are hundreds of potential witnesses but two-thirds of them are not providing material information, developing a systematic approach to interview and prepare these individuals for court, may in the end, benefit all involved in the trial process. A solution to this is a problem is discussed in the next section.

Qualified Judges

Much of the principle of due diligence, as represented by Kulesza, relies on decisions of judges at various levels of the judiciary to take action on a particular case. Kulesza explains that even the determination of “fault,” a general concept assuming an international norm was not followed and which is often considered a precondition to attributing state responsibility, only exists if a judge reasons it so opinio juris in the process of reviewing a particular case. This weight placed on the decisions of judges even from the outset of a case requires closer attention to be given to what constitutes an appropriate “professional judicial education” in rendering a judge qualified to sit on an international bench.

The sometimes indiscriminate nature of evidence production and admission “results in long and inefficient trials.” Co-authors, H.H. Judge Peter Murphy and Legal Advisor to the United Nations, Lina Baddour, take an interesting approach in their article Evidence and the

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118 Id.
119 Id.
120 Due Diligence, supra note 6 at 54.
121 Id.
122 Pluralism, supra note 2 at 369
123 Id.
Selection of Judges when providing a theory aimed at mitigating the problems that stem from the fragmented international legal system. They propose the creation of an independent International Criminal Directorate (ICJD).\textsuperscript{124} The ICJD would dictate standards ensuring judicial independence, a diverse bench, and an ethically sound body of judges.\textsuperscript{125} It would also closely scrutinize the education of the appointed judges.\textsuperscript{126}

While the ICJD is a hypothetical solution for establishing standards of trial procedures across a plurality of legal systems, there does exist an organization that monitors specific legal proceedings. The OSCE, while its primary duties include monitoring conflicts in the field and elections processes, has also undertaken the responsibility of monitoring trials.\textsuperscript{127} At present, the ICC uses the \textit{Rome Statute} and its supplement \textit{Rules of Procedure and Evidence} to dictate the trial processes. However, the ICC may also refer cases to domestic courts in which case the Court has an interest in the quality of those proceedings. Article 15 of the Rome Statute dictates that the Prosecutor may “initiate investigations \textit{proprio motu} (at his or her discretion) [and] may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations…”\textsuperscript{128} In the past, the OSCE, as a non-governmental agency, has acted as an intermediary for the ICC and domestic legal systems in monitoring trials.

\textsuperscript{124} \textit{Id.} at 386.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}; The ICJD would also require six characteristics be possessed by each candidate: 1) “sound knowledge of criminal law;” \textit{Id.} at 387. 2) “familiarity with procedure and trial practice;” \textit{Id.} 3) “the ability to manage a complex trial from start to finish; the ability to conduct that trial on a daily basis;” \textit{Id.} 4) “an understanding of the relationship between the bench and the bar;” \textit{Id.} 5) “the ability to evaluate and assign weight to evidence, and draw conclusions from that evidence; and” \textit{Id.} 6) “the ability to write an appropriate judgement reflecting those conclusions.” \textit{Id.}
\textsuperscript{127} \textit{The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi}, ICC-01/11-01/11 at n.221. “[T]he Organization on Security and Cooperation in Europe (OSCE) has taken primary responsibility for monitoring \textit{11bis} trials before the State Court of Bosnia and Herzegovina and transmits reports on the quality of the proceedings to the Prosecutor of the ICTY.”
\textsuperscript{128} \textit{Rome Statute}, Art 15, para 1 \& 2.
For example, in *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, the Defense argued that the ICC’s support of Libyan investigators was in effect “safeguarding” some potential perpetrators from prosecution. If this was indeed the case, the Defense argued it would have rendered the Court’s jurisdiction null under Article 17 of the Rome Statute. To refute this claim, the Prosecutor cited that in the past, such as in the Bosnia-Herzegovina trial process, the OSCE played a critical role in monitoring the quality of legal proceedings after which it reported to the ICTY. The Prosecutor argued that Court’s practice of providing positive support to a national government’s investigation and legal proceedings does not run contrary to the Rome Statute, but is the purpose for it.

Kulesza contends that an identifiable duty of due diligence to others in the international community will ensure quality judicial practices. In the recently published text *Evidence and Objection: Domestic and International Standards*, the author takes less of a rigorous approach when arguing that there is a “new Law on Criminal Procedure.” He explains that “[t]he judge is neither as active as in the civil law system, nor as passive as in the common law system.” Once a judge is appointed and the trial is underway, the judge is “exclusively responsible in freely evaluating the evidence according to his or her convictions obtained from the entire trial, with the understanding that in case of doubt the evidence should be evaluated in a light most

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129 ICC-01/11-01/11
130 Id. at para 182; Rome Statute, Art 17(a)-(b): “(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court…(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”
131 Gaddafi, *supra* note 129 at n. 221.
132 *Id.* at para 185.
133 *Due Diligence, supra* note 6 at 267.
135 *Id.* at Preface.
136 *Id.* at 7.
favorable to the accused.”\textsuperscript{137} Whether Kulesza’s hardline is taken, requiring proof that the duty of due diligence is met in maintaining judicial standards or whether one believes judges reign supreme in their courtroom, judges define judiciary procedures through their conduct \textit{juris-dicere} and special attention ought to be given to their education and experience when they are appointed to international courts.

c) Due Diligence, Terrorism and Sovereignty

Prosecuting international crime, including terrorism, through international courts can be an extremely complicated process as may be gleaned from the material above. “[C]ourts have taken altering approaches to the concept of state supervision over the acts of individuals.”\textsuperscript{138} Today, this type of attribution of responsibility is often discussed in the context of terrorist activity.\textsuperscript{139} To demonstrate the plurality of laws that have been developed to address the international problem of terrorism, one only needs to look to the UN which has held over fifteen conventions on the issue of terrorism.\textsuperscript{140} This interagency horizontal legal pluralism can create unnecessary clutter and even overreaching laws that may come into conflict with the organization itself and/or with inferior courts with which cooperation is normally conducted with ease. Adding to the legal clutter, there are numerous other conventions such as the Stockholm Convention that provide what is essentially soft laws that are often considered by a judge or tribunal yet are not legally binding.\textsuperscript{141} One case that provides a good example of how UN terrorism laws have come into conflict with the interests of EU courts, is \textit{The Kadi Saga}.\textsuperscript{142}

\textsuperscript{137} \textit{Id}.
\textsuperscript{138} \textit{Due Diligence}, \textit{supra} note 6 at 106.
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} \textit{Id}. at 281-82.
\textsuperscript{141} Principle 21 of the Stockholm Convention: This soft law suggests that “due diligence conditions the practical application of state responsibility for transboundary harm, particularly with respect to environmental law, however, Principle 21 applies to those cases where transboundary harm has already resolved to actual harm.” \textit{Due Diligence}, \textit{supra} note 6 at 268. Principle 21 of the Stockholm Convention: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to
The Kadi Saga addresses hierarchical issues within the international judiciary, prosecuting terror financing across multiple jurisdictions, and the rights of the accused. 143 Yassin Abdullah Kadi is a Saudi Arabian businessman with investments in numerous international enterprises. In 2001, the United Nations Security Council (UNSC) suspected him of financing terrorism and placed him on the UN Resolution 1267 terrorist list and later froze his assets. 144 Kadi argued that freezing his assets was overly burdensome and violated his international human rights. 145 The issue before the Court in Kadi’s appeal was whether presumably inferior courts are “in a position to put into question [a] UNSC action and even to treat it as null and void.”146

The EU General Court (previously called the European Union (EU) Court of First Instance) approached Kadi’s appeal from a unique view. The Court opined that general principles and peremptory norms must be considered 147 and that they “create jurisdiction for any court in the world, including EU courts…”148 However, the Court held a priori that since the

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143 CONSTITUTIONALISM ACROSS BORDERS IN THE STRUGGLE AGAINST TERRORISM 33 (Federico Fabbrini & Vicki C. Jackson eds., Edward Elgar Publishing 2016); Author suggests what is needed to clarify the relationship between international courts is a “Marbury v. Madison moment.”
144 UN Resolution 1267 outlines the procedure for placing names of entities on a list that may fall within the scope of the Security Council’s “deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls, and over the significant rise in the illicit production of opium, and stressing that the capture by the Taliban of the Consulate-General of the Islamic Republic of Iran and the murder of Iranian diplomats and a journalist in Mazar-e-Sharif constituted flagrant violations of established international law.” UNSC Res. 1267 (1999) U.N. Security Council, 4051st Meeting, S/RES/1267 at 1 (Oct. 15, 1999).
145 Constitutionalism, supra note 143 at 24.
146 Id. at 22.
148 Id.
sanctions were ordered by the UNSC under the UN Charter and the EU General Court is an inferior court, they could not reverse the sanctions.\footnote{149}{Constitutionalism, supra note 143 at 23.}

\textit{Kadi} appealed again and his case went before the European Court of Justice (CJEU). The CJEU held that the UNSC has strong interests in deterring terrorism, applying sanctions is a legitimate means to pursue these interests, and that the EU judiciary ought to yield to the UNSC. The CJEU did diverge from the General Court in its emphasis on procedure and due diligence.\footnote{150}{Id. at 24.}
The CJEU explained that the EU has a legal responsibility to safeguard human rights when implementing UN sanctions. The CJEU reasoned that when the UNSC added Kadi’s name on the 1267 list and froze his assets, the Court did so in violation of Kadi’s human rights.\footnote{151}{Id. at 27.} The Court neglected to follow rules that govern the judicial process including obtaining sufficient evidence, providing adequate notice of sanctions, and permitting the accused to make a statement before the Court.\footnote{152}{Id. at 26.} This type of oversight and judicial review is an example of courts taking the extra steps to demonstrate a duty of due diligence in fulfilling their international duties.

The above case addresses procedural issues international courts face when combatting the financing of terrorism, which is a concern of the global community at present, but there is still a need to address threats and practices on the ground. According to the U.S. Judge Advocate’s \textit{Operational Handbook}, under international law \textit{jus gentium} when there is a threatening element (i.e. terrorists) within the borders of a country and that country will not act against it, another nation may attack in self-defense \textit{bellum justium et pium}, but must do so providing a degree of proof.\footnote{153}{International and Operational Handbook, Judge Advocate General’s Legal Center & School, U.S. Army 13 (2014).} Sponsoring terrorism can be interpreted as “enabling the operation of a terrorist group”
within the sovereign borders of a nation.\footnote{Due Diligence, supra note 6 at 56.} An older case that stresses the importance of showing due diligence with regards to state responsibility and causing harm via terrorism to neighboring states that is still cited today is discussed next.


Kulesza contends that \textit{The Caroline Case}, a case often used today in support of extraterritorially combatting terrorism, was one of the original “leading cases for due diligence in preventing foreign harm.”\footnote{Due Diligence, supra note 6 at 59.} This case dates back to 1837 when Canadians were rising up against the British. During this quasi-revolt, the U.S. “tolerated” the ship \textit{Caroline} to smuggle weapons to Canadian insurgents while flying an American Flag at port at Fort Schlosser within U.S. borders. The British attacked and destroyed the ship while it was in U.S. territory but during the commission of the attack a Brit was captured and detained. The British then appealed to the U.S. that their man ought to be released because they had been acting in self-defense.

This case represents one of the first instances where preemptive self-defense was cited as a reason for extraterritorially attacking elements that could potentially cause harm to a foreign sovereign. While the U.S. strongly opposed the British contention that harm was imminent, the case drew attention to the due diligence required by the U.S. to ensure they were not facilitating activities of a “terrorist nature.”\footnote{Id. at 59.} The notion of facilitation takes different forms with regards to the principle of due diligence. What degree of legal fault lies with a party that tolerates \textit{patientia} or gives refuge \textit{receptus} to terrorist activity within its sovereign territory?\footnote{Id. at 136.} Kulesza argues that
“[t]he most important element in this ongoing discussion is the question of state responsibility for omissions, which may be attributed by showing lack of due diligence by a state in preventing a given harmful act.”\textsuperscript{159} Indirect or “vicarious”\textsuperscript{160} responsibility in preventing terrorism is another element of due diligence discussed by legal scholars in the context of cases like \textit{United States v. Iran}.\textsuperscript{161}

Due diligence has taken hold in the international legal zeitgeist and subsequently has begun to be regarded as a recognized duty that ought to be performed by nations and international entities when the potential exists to cause harm to others on the international stage. Domestic and international legal systems are able to prosecute transboundary crimes but to facilitate a better functioning international legal system, the cases ought to be tried by those with proven knowledge of multijurisdictional criminal prosecution. With a better functioning international legal system, greater attention can be given to identifying potentially illegal hazardous elements whether it is the pollution of a river or a terrorist training camp. This greater degree of monitoring given to potential threats will aid in determining what party has the strongest nexus to an international crime. This is the subject of the next section.

\textbf{4) Legal Pluralism and Jurisdictional Reasonableness}

The analysis above has emphasized the importance of demonstrating one’s duty of care when interacting on the international stage. Global legal pluralism allows “domestic authorities

\textsuperscript{159} \textit{Id.} at 136. \textit{Emphasis added.}

\textsuperscript{160} \textit{Id.} at 159-164.

\textsuperscript{161} [1980] ICJ 1; \textit{The Teheran Case} involved the hostile takeover of the U.S. Embassy in the Iranian city of Teheran. In 1979, after the rise of ayatollah Khomeini at the start of the Islamic Revolution, there was a significant increase in anti-American sentiment in the country. During protests, over three thousand people stormed the U.S. Embassy which resulted in 52 hostages being taken captive for 444 days. Due Diligence, \textit{supra} note 6 at 89. During this time, the Iranian government took no action to prevent or discourage the actions of the protestors. The ICJ eventually held the Iranian government responsible for damages to the U.S. citing Article 22 para 2 of the Vienna Convention on Diplomatic Rights which the Court interpreted as requiring states to demonstrate due diligence in protecting diplomatic staff. Due Diligence, \textit{supra} note 6 at 89.
to vindicate international interests through extraterritorial jurisdiction. But they should not, however, be given a blank check to enforce international and transnational law as they please.  

The process of determining jurisdiction ought to be standardized. International courts such as the ICC and UN have provisions in their respective legislatures detailing in what circumstances they may accept referrals or transfer cases. Indeed, there are as many sets of rules and procedures as there are courts in the world. States also retain the power to either exert or relinquish legal jurisdiction over a particular case where they may have interests. International courts are typically subject matter oriented such as the ITCY was in Yugoslavia and the ICC’s focus on only the worst crimes as has been illustrated above.

The goal of Ryngaert’s theory of *jurisdictional reasonableness* is to ensure “legitimate sovereign interests are adequately taken into account. Yet arguably, sovereign interests are only internationally legitimate if other States’ sovereign interests are not disproportionally trampled upon, and if they somehow transmit the global interest.”  

This weight to be given to the interests of foreign sovereignties is frustrated by the fragmentation resulting in a refusal to “cross-fertilize” best practices and common principles. One contributing factor for this resilience of uniqueness in State criminal procedure is that procedural law is inherently domestic. It is only after a nation has failed to or has proven unwilling to prosecute under its domestic legal system that a court such as the ICC may assert jurisdiction.

**a) Lotus Case and Principles of Jurisdiction**

The *Lotus Case* discussed earlier in this text that involved the two vessels that crashed at sea near Turkey provided a basic understanding of how State jurisdictions interact on the global

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162 Jurisdiction, supra note 8 at 220.
163 *Id.* at 190.
164 Pluralism, supra note 2 at 24.
165 *Id.*
stage and emphasized the importance of general principles of international law. Since cases are decided by judges whose trial methods are based on their experience as a judge in their native country, there are inevitably different approaches to establishing jurisdiction. For example, in the Lotus Case the Court relied heavily upon a number of principles of jurisdiction. The PCIJ agreed with the Turk’s reasoning that since the deaths of the sailors (the crime) occurred on the Turkish ship under Turkish jurisdiction (Passive Personality Principle) and they had Demons in custody (Territorial Principle), they had jurisdiction over Demons. This approach to deciding a case reflects the traditional reasoning of civil law. Practitioners of common law and other international legal professionals may prefer to rely more heavily on case law and treaty law jus inter gentes. However, Ryngeart notes that the PCIJ did advocate for a “voluntary” approach to jurisdiction in their opinion. The Court appears to have not desired to restrict a nation’s ability to assert its jurisdiction except when there is an agreement to the contrary pacta sunt servanda.

While this approach appears straightforward on its face, when a nation is part of an overarching agreement or organization like the World Trade Organization, the UN or the ICC, the interests of all members to these groups may need to be taken into consideration when determining the outcome of an appeal to jurisdiction. The interests sovereign nations have in extraterritorially applying jurisdiction are often addressed case by case. In Lotus, the PCIJ ultimately relied heavily on the principle of territorial jurisdiction ratione loci. The U.S. has historically been a staunch supporter of this method of determining jurisdiction, but recently there has been a shift towards subject matter lex specialis jurisdiction as is seen in the

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166 Restructuring, supra note 13.
167 Jurisdiction, supra note 8 at 31.
168 Id; See: Bankovic and others v. Belgium and others, Application No 52207/99; Loizidou v. Turkey, Application No 15318/89; Goldberg v. USB AG, 690 F Supp 2d 92(SDNY 2010)
169 Id. at 31-32.
controversial Alien Tort Statute (ATS) which enables extraterritorial prosecution of torts committed against the U.S. and those with whom treaties are ratified.  \(^{170}\)

**b) Limitations to Jurisdiction (The Schutzzweck doctrine)**

Ryngaert admits that the field of law and all of its subsequent mechanisms have natural geographical limitations to jurisdiction.  \(^{171}\) A principle of jurisdictional reasonableness, which is based on interests, would extend these limits especially if an entity or state is unable or unwilling to assert its jurisdiction over an illegal act within its jurisdiction.  \(^{172}\) However, both the Shutzweck doctrine and § 403 of the US Restatement (Third) on Foreign Relations maintain presumptions against extraterritorial application in the sense that each law has, rooted in the language, limits to the interests the judiciary may defend.  \(^{173}\)

Applying jurisdiction extraterritorially is a complicated matter as is illustrated in the *Lotus Case* but two general methods of doing so include the substantive approach and the principle of subsidiary approach, the latter of which is procedurally closely related to the Ryngaert’s theory of jurisdictional reasonableness. Ryngaert explains that in any situation, the best law ought to be applied.  \(^{174}\) Professor of Law at Indiana University, Hannah Buxbaum, agrees with this notion of a system of “better laws” but argues that it is best exercised through a “substantive approach” \(^{175}\) to jurisdiction. Buxbaum defines this substantive approach as “a

\(^{170}\) Id. at 15; 28 USC 1350 § (1988); ATS 28 USC 1350 § (1988) explains that “[t]he district courts shall have original jurisdiction of any civil action by alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Id. In other words, if an alien commits a tort against the US or a nation that the US is party to a treaty with, the individual who committed the tort will be held accountable to US law regardless of their geographical location. For example, if an individual has used chemical weapons during a civil war in his native country and was then stopped upon attempting to enter the U.S., that individual’s native country or persons therein could seek justice under the U.S. legal system.

\(^{171}\) Jurisdiction, *supra* note 8 at 219.

\(^{172}\) Id.

\(^{173}\) Id. 216-217.

\(^{174}\) Id. at 199.

\(^{175}\) Id.
choice-of-law methodology whose goal is to select the better law in any given case.”176 This feels like a good way to apply international law and to determine what nations may retain jurisdiction, but there are a few problems.

In substantive law, the court tries to apply what may be the best law for the situation but this best law does not always support the interests of the party with the most to lose in a particular case. The notion of “best law” is subjective and it is often the most powerful nation, the nation who has the prosecutorial and judicial resources to assert its jurisdiction, that will be determining what law is best.177 It may be a safe assumption that powerful nations feel their legal system is the best. This approach potentially enables any nation with enough resources to influence the outcome of any case it chooses. This may not be a bad scenario when powerful nations act as objective policing mechanisms, but true altruistic intent is difficult to recognize.178

Ryngeart argues that jurisdictional reasonableness “cannot be determined in abstracto. Instead, jurisdictional assertion is reasonable when it serves the protective purpose of the statute, and when it is exercised on a subsidiary basis.”179 The principle of subsidiary allows for other nations, that may perhaps have a weaker nexus to the case, to step in and legally prosecute in concreto criminal action when the host nation or a nation with a stronger nexus is unable.180 Ryngaert’s theory layers upon this concept procedures for determining which State’s nexus ought to prevail. The most important step in this process is reviewing the language of the statute that a nation is seeking to apply extraterritorially.181 This concept is reflected in the Schutzweck doctrine which holds that “every law, or every legal provision, has its own particular and

177 Jurisdiction, supra note 8 at 204.
178 Neel Burton M.D., Does True Altruism Exist? PSYCHOLOGY TODAY (Aug. 17, 2016)
179 Jurisdiction, supra note 8 at 216.
180 Id. at 219.
181 Id.
reasonable geographical scope of application, and that thus, the reach of one provision is not readily transposable to another provision.”^{182}

Subsection 403 of the Restatement (Third) of the US Foreign Relations Law echoes these limitations on extraterritorial application of law. Subsection 403(1) states that “even when one of the bases for jurisdiction under 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”^{183} Factors of unreasonableness include “connections…between regulating state and the person principally responsible for the activity to be regulated…the character of the activity…the degree to which the desirability of such regulation is generally accepted…the importance of the regulation to the international political, legal, or economic system…the extent to which another state may have an interest in regulating the activity…”^{184} While the Restatement tends to reflect the general sentiment regarding a specific topic, the courts sometime reveal the slightly different perspectives of the judges offering the opinions.

Domestic legal systems such as the one found in the U.S. view sovereignty as one of the most important legal principles. Sovereignty is the concept upon which the global system operates. However, one issue that arises when an emphasis is placed on sovereignty, a problem not unlike that of the EU courts above in the Kadi Cases, is to what degree must a nation abide by international law. The United States Supreme Court wrote in its majority opinion in United States v. Pinto-Mejia^{185} that “[i]f it chooses to do so, it may legislate with respect to conduct

^{182} Id.
^{183} § 403(1) of the US Restatement (Third) on Foreign Relations (1986), emphasis added.
^{184} Id. (a)-(g).
^{185} 720 F 2d 248 (2d Cir 1983); Cited in Jurisdiction, supra note 8 at 73.
outside the United States, in excess of the limits posed by international law.” 186 The hierarchy of courts whether between international and domestic or between seemingly equal nations is a matter of much dispute and is discussed in the next section.

c) Jurisdiction - Horizontal and vertical pluralism

Jurisdictional pluralism moves vertically as between international and domestic courts or between trial courts and appellate courts and horizontally, as is seen between various nations of the world or even between regions or states within a nation. 187 International legal scholars have noted when reflecting on the pluralistic nature of jurisdiction that “[w]ith a prolific body of case law of the ad hoc tribunals, the ICC, hybrid jurisdictions, and domestic courts, the heterogeneity of ICL (and its domestic versions) has become an overwhelming reality and conceptual challenge in this field.” 188 The Kadi Case above demonstrates perfectly the problem that occurs when EU courts assert UN jurisdiction, only to later decide through the appellate process that they were compromising the integrity of their own legal system.

This notion that sovereign states and/or the EU courts are “superior” to international courts may level the playing field to a degree. However, EU courts have a strong interest in applying UN sanctions because of the weight UN support carries with respect to international relations and human rights. The challenge before courts is to apply UN sanctions but in such a manner that is consistent with EU law. Article 15(3) of the Rome Statute requires states to apply substantive ICC law. 189 So, what are the issues that arise between domestic and international courts from this assertion by the ICC? Well, there are two points worth noting here. First, not all

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186 Id. at 259; For further consideration: In Foley Bros Inc v. Filardo, 336 U.S. 281 (1949). a case involving the application of U.S. employment law in Iran, the Supreme Court outlined a three-prong test: “(a) the express language of the statute; (b) the legislative history of the statute; (c) administrative interpretations of the statute.” Id. The language of a statute really ought to state whether a law was meant to be applied domestically or internationally, but often the plausibility of administrative implementation may provide a natural limitation.

187 Pluralism, supra note 2 at 21.

188 Id. at 22, 23.

189 Id.
States are signatories to all treaties or conventions that have created international courts. For example, the U.S. has not ratified the Rome Statute and accordingly, is not subject to ICC jurisdiction. Second, even nations that are party to Rome Statute can still assert their own jurisdiction, disqualifying ICC from taking the case as dictated under Article 17(1)(a) of the Rome Statute.

**d) ICC and UN Transfer of cases**

The ICC and the UN have two different approaches for accepting and transferring cases to and from domestic and regional courts. ICC includes in the Rome Statute three primary provisions that dictate the terms under which cases are transferred to and from the Court. First is Article 14 on the “Referral of a situation by a State Party.” This Article allows member States to refer to the Court for the investigation of situations where one or more crimes may have occurred within the State’s jurisdiction. The request should be accompanied by supporting documentation that aids in the Court determining whether individuals may be held accountable for the crimes being investigated. Second is Article 16 on “Deferral of investigation or prosecution.” This Article essentially enables the Security Council under Chapter VII of the UN Charter to delay ICC investigations and prosecution to allow time for the UN to “determine the existence of any threat to the peace, breach of peace, or act of aggression…” Third, and most detailed is Article 17 on “Issues of admissibility” and lists the restrictions for admissibility as follows:

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190 Rome Statute, Art. 17(1)(a).
191 *Id.* at Art. 14.
192 *Id.*
193 *Id.*
194 Rome Statute Art. 16.
195 U.N. Charter Ch. VII.
196 Rome Statute, Art. 17.
… 1. the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. 197

Similar to the ICC, UN Courts such as The Mechanism (combined ITCY and International Criminal Tribunal for Rwanda) also outline provisions outlining rules for cases being investigated and tried. There are again three example provisions that stand out as being of particular interest here from UN Resolution 1966 (2010). First, Article 5 on “Concurrent Jurisdiction” makes a strong statement asserting that while “The Mechanism and national courts shall have concurrent jurisdiction” in all cases, The Mechanism “shall have primacy over national court in accordance with the present statute...”198 This provision seems to contradict the method of the ICC that excludes itself from a case if a national government is in the process of working the case, unless that process is ineffective.

Article 6 on “Referral of Cases to National Jurisdictions,”199 is perhaps the most detailed of these three examples. While The Mechanism appears to assert its jurisdiction aggressively, it also enables itself to refer cases back to a national government for prosecution when appropriate. Circumstances where this might happen include: “(i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.”200 An important factor of

197 Id. 17(1)(a)-(d).
199 Id. at Art. 6.
200 Id. at Art. 6 §2(i)-(iii).
consideration for The Mechanism is the actual “gravity”\textsuperscript{201} of the crime and the extent to which the accused is responsible for the crimes that have been committed.\textsuperscript{202} However, The Mechanism may refuse to refer a case to domestic courts under the above provisions if there is reason to believe the death penalty may be imposed during sentencing.\textsuperscript{203} The Mechanism, after referring a case, may also monitor that trial for quality and fairness, with the assistance of international and regional bodies.”\textsuperscript{204}

Article 7 on “\textit{Non bis in Idem}”\textsuperscript{205} meaning “not twice in the same thing” holds that “[n]o person shall be tried before the court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried…”\textsuperscript{206} There are of course exceptions to this rule. They include whether the “act for which he or she was tried was characterized as an ordinary crime”\textsuperscript{207} and now ought to be tried under international humanitarian law and if the domestic trial that originally tried the act was not “impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently pursued.”\textsuperscript{208} In examining these provisions one can see an overlapping laws the govern each court’s procedure, but there are also differences that contribute to a more complex international legal system.

\textit{ICL and Domestic Courts}

The ICC and UN take slightly different approaches to asserting their jurisdiction which has to do with their original mandates. There are also differing reasons when a nation may desire to prosecute an individual in lieu of allowing an international court or even ICL norms to prevail.

\begin{footnotesize}
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\item \textsuperscript{201} \textit{Id.} at 6 §3.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} at 6 §4.
\item \textsuperscript{204} \textit{Id.} at 6 §5.
\item \textsuperscript{205} \textit{Id.} at Art. 7.
\item \textsuperscript{206} \textit{Id.} at Art. 7 §1
\item \textsuperscript{207} \textit{Id.} at Art. 7 §2(a)
\item \textsuperscript{208} \textit{Id.} at Art. 7§2(b)
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States are not absolutely required to follow ICL norms and may even aid in further refining international law through developing their own laws, as these are the practices under which international judges are trained.\textsuperscript{209} An example of a state refusing to apply international law in favor of its domestic law is found in the \textit{Van Anraat},\textsuperscript{210} case where Dutch courts refused to apply ICL law because it found it to be unclear.\textsuperscript{211}

Preventing arbitrary choices in ICL and setting jurisdictional standards is the goal of Ryngaert's theory of jurisdictional reasonableness. As has been demonstrated above, when a crime is committed in the international arena, there are always numerous parties that may assert jurisdiction over the accused.\textsuperscript{212} Assistant Professor at the University of British Columbia and former Appeals Counsel to the ICTY prosecution James Stewart lists three sources of international law: 1) customary law, 2) legal principles, and 3) national criminal law systems.\textsuperscript{213} He argues that this plurality of sources of law that “[govern] participation ends up inhibiting

\begin{itemize}
  \item\textsuperscript{209} Pluralism, \textit{supra} note 2 at 22
  \item\textsuperscript{210} \textit{Public Prosecutor v. Frans Cornelis Adrianus van Anraat} 09/751003-04, INTERNATIONAL CRIME DATABASE, http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/ (Last visited 7/7/2017).
  \item\textsuperscript{211} \textit{Id}; Here, Dutch courts refused to apply ICL because it found it to be unclear.\textsuperscript{211} Frans Cornelis van Anraat was a Dutch businessman who worked with international engineering companies in Singapore, Switzerland, and Italy that were building chemical factories in Iraq. After becoming familiar with the industry, \textit{Van Anraat} created a company of his own called FCA Contractor. In the 1980s he began facilitating the sale of thousands of tons of raw materials used in chemical weapons such as mustard gas and nerve gas to the Saddam Hussein regime in Iraq. \textit{Id}. These gases were used both in the Iran-Iraq war and the against the Kurds in 1988 killing some 500,000 people. \textit{Van Anraat} is the only Dutchman to appear on the FBI's most wanted list. “Wanted by FBI,” Crime Alert (May 25, 2000), http://crimealert.bizland.com/_disc6/0000000a.htm (Last visited: 7/7/2017). The question before the court pertains to both legal pluralism and the weight of criminal intent of the accused. Anraat, \textit{supra} note 204 at 7(B). The question the Dutch Court reflects upon is as follows: “to what extent is the Dutch criminal court entitled to apply Dutch law in judging the requirement of intention in the present case and to what extent should it (also) consider the application of international law?” \textit{Id}. at Re B. In noting that the Court has given great consideration to the questions, it offers that “especially regarding the question [of] which degree of intention is required for a conviction on account of complicity in genocide, international criminal law is still in a stage of development and does not seem to have crystalized out completely.” \textit{Id}. The legal text the Court is referring to is the International Crimes Act. In reviewing the document there does not appear to be a clause for conducting sales of raw materials nor does it define “intention.” \textit{International Crimes Act, NETHERLANDS-BILL ON INTERNATIONAL CRIMES} http://www.iccnow.org/documents/NL.IntCrAct.pdf (Last visited 7/7/2017).
  \item\textsuperscript{212} Pluralism, \textit{supra} note 2 at 110-11, 326-328.
  \item\textsuperscript{213} \textit{Id}. at 320-21.
\end{itemize}
rather than enabling justice.”214 For a solution he calls for a “universal concept of participation” that would prevent the types of complications that arose during cases such as the Tadić Cases.215 This “concept of participation” seems to echo a theory of interest-based jurisdiction. Stewart challenges the tendency to follow political power raison d’État that appears “culturally alien, morally superior, and largely insensitive to the needs of the affected societies.”216 Again, this narrow concern for the interests of those more directly affected by a conflict goes to the heart of Ryngaert’s argument and the thesis of this research that “States should not blindly defer to foreign nations’ sovereign-based arguments against a jurisdiction assertion: such arguments are only valid provided they link up with the interests and values of the international community.”217

Mapping the layers of jurisdictions around the globe would be a daunting task further complicated by nations that choose not to prosecute crimes because of relationships with offending parties. In this case, other international entities that have an interest in preventing harm to the global community, ought to have a legal mechanism that enables them to intervene. The process of intervention often begins with an investigation at the scene of the crime locus delecti. In this next section, an examination of those who work in the field and on the front lines of international crime will be conducted. Indeed, it is often local and international law enforcement agencies, objective observers, and national militaries that are called upon to be first on the scene when international crime ensues.

5) Law Enforcement Agencies and the Military

The problems spurred by the pluralistic nature of international law are not isolated to the international judiciary, but affect military campaigns and the daily operations of organizations

214 Id. at 321.
215 Id.
216 Id. 335.
217 Jurisdiction, supra note 8 at 221.
like INTERPOL, the Federal Bureau of Investigation (FBI) and domestic law enforcement agencies. These organizations often have overlapping jurisdictions and must establish relationships for better communications and joint operations.\textsuperscript{218} An example of a nation’s law enforcement community being isolated from international police cooperation organizations (IPCOs) is found in Kosovo.\textsuperscript{219}

Kosovo, while making some progress in building relations with Serbia, remains fragmented from international influence in many respects and because of this, its domestic law enforcement agencies as well as international law enforcement agencies are hindered. Due to its lack of membership with IPCOs Kosovo does not have access to international databases made available through IPCO membership, it lacks the capacity to properly train its officers on the technology it does have, and it inhibits information transfer with other law enforcement agencies such as INTERPOL and EUROPOL.\textsuperscript{220} This essentially creates “black holes”\textsuperscript{221} where criminal organizations can operate without detection. The lack of oversight resulting from this isolation, has been attributed to such incidents as the downing of Malaysia Airlines Flight 370.\textsuperscript{222} Following an investigation, INTERPOL confirmed that stolen passports had been used by two passengers on the flight.\textsuperscript{223} The passports had been entered into INTERPOL’s database but this information was not available to Kosovo’s border agents. INTERPOL’s Executive Committee is

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  \item \textsuperscript{218} \textsc{Combatting International Crime: The Longer Arm of the Law} 41 (Steven Brown ed., 2008).
  \item \textsuperscript{220} \textit{Id.} at 5, 6.
  \item \textsuperscript{221} \textit{Id.} at 5.
  \item \textsuperscript{222} \textit{Id.} at 6.
  \item \textsuperscript{223} \textsc{INTERPOL confirms at least two stolen passports used by passengers on missing Malaysian Airlines flight 370 were registered in databases}, INTERPOL PRESS (March 9, 2014) https://www.interpol.int/News-and-media/News/2014/N2014-038 (Last visited: June 22, 2017).
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to discuss Kosovo’s membership at the General Assembly between September 26 and 29, 2017.\footnote{Interpol to decide on Kosovo’s accession in September, EUROPEAN WESTERN BALKANS, (June 21, 2017) \url{https://europeanwesternbalkans.com/2017/06/21/interpol-to-decide-on-kosovos-accession-in-september/} (Last visited: June 22, 2017).}

INTERPOL is perhaps the “most well-known amongst international policing organizations”\footnote{International Crime, supra note 218 at 43} and has set a standard in the international law enforcement community, but they still must coordinate with local law enforcement when pursuing criminal activity across borders.\footnote{Id.} Conducting operations in a foreign jurisdiction often requires establishing a relationship with local law enforcement, but in some cases, there is no functioning local police force. A problem that must also be considered is when the government of a nation is supporting a criminal element or is simply unable or unwilling to cooperate. Law enforcement must determine under what conditions they can legally conduct operations within a foreign jurisdiction without the formal support of local authorities.

\textbf{a) UN Convention on Organized Crime}

The UN Convention on Organized Crime is a primary authority on how international governments and agencies ought to cooperate. The Convention explains that “[c]riminal groups have wasted no time in embracing today’s globalized economy and the sophisticated technology that goes with it. But our efforts to combat them have remained up to now very fragmented and our weapons are almost obsolete.”\footnote{United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, G.A. Res 55/25 \textit{INTRODUCTION} (Nov. 15, 2000) \url{https://www.unode.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTIONAGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_Thereto.pdf} (Last visited: July 21, 2017).} The Convention provides a list of reasons to request mutual assistance when diligently combatting international crime.\footnote{Id. at. 18(1)-(3).}
The reasons include: 1) collecting evidence and statements from individuals; 2) enforcing judicial orders; 3) conducting searches and freezing assets; 4) monitoring specified locations; 5) sharing information, evidence and expert analysis; 6) making available original copies of documents; 7) monitoring and tracing related financial activity; 8) aiding in providing voluntary presence of persons of interest; and 9) essentially providing any assistance that does not run contrary to domestic law. While this list is relatively exhaustive, there are still instances when policing agencies lack due diligence in establishing contact with their foreign counterpart. However, this Convention provides one of the stronger legislative documents that provides guidelines for policing procedure.

b) Overseas Liaison Officers and Rogatory Letters

Overseas Liaison Officers (OLOs) are those individuals that are on the ground working in direct contact with foreign agencies. The manner in which liaison officers operate and facilitate international interagency cooperation has changed but there are several mechanisms that are essential to enabling cooperation. In many cases, governments and agencies have

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229 Id. at Art. 18(3)
230 For other international legislation that has not been ratified also see: Compréhensive Convention on International Terrorism (CCIT), Article 9. This convention, where negotiations have been deadlocked since 1996, addresses how agencies and services should communicate and cooperate in deterring and combating terrorism. Kulesza argues, a duty of prevention does not stem from Article 2 paragraph 4 of the UN Charter, but from Article 9 of the CCIT draft. Article 9 dictates that all states need to “coordinate in the prevention of offences” as they are enumerated in the treaty “by taking all practical measures, including, if necessary and where appropriate, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission, within or outside their territories, of those offences.” Article 9 of the CCIT draft (emphasis added); Cited in Due Diligence, supra note 6 at 284-85.
231 Former Director of the National Criminal Intelligence Service in the United Kingdom, Neil Baily, in his article called “Overseas Liaison Officers” explains why establishing contact with local authorities is important. International Crime, supra note 16 at 96, 98. Baily recalls a situation when a British OLO was informed of a referred case from his home office regarding a boat in a marina that may be involved in a drug smuggling ring. The OLO, upon receiving the case went to the marina and took pictures of the boat verifying that it was indeed there. Id. The OLO then made contact with the local authorities informing them that he “believed” a boat that was involved in a substantial drug operation was in the marina. The police operation lasted for several months with both agencies monitoring the activity of the boat until one day the boat set sail, was stopped by the local police, and the drugs were confiscated. However, in preparation for trial, all evidence was collected including the first pictures the OLO had taken. This revealed to the local authorities that he had not “believed” but “knew” that the boat was in the marina. This meant two things. First, the local agency had wasted time establishing facts already known, and second, the OLO had engaged in unauthorized surveillance of criminal activity in another agency’s jurisdiction. Id.
established bilateral agreements that outline the role in which foreign officers will conduct themselves. When there is not a prearranged agreement, a rogatory letter may need to be sent. A rogatory letter may transfer authority to local agencies to interview and arrest suspects, gather evidence, interview witnesses, facilitate travel for witnesses, and/or being the extradition process.\textsuperscript{232} Establishing an official relationship is critical in demonstrating due diligence.

When there are prearranged policing agreements it is important for OLOs to show diligence in following protocol in order to avoid interagency tensions. International organizations such as INTERPOL and the OSCE may provide training on policing standards that facilitate the ease with which interagency cooperation is conducted. For example, these two agencies recently published a police training manual titled \textit{OSCE Guidebook: Intelligence-Led Policing}. Also, through its \textit{National Central Bureaux} (NCBs) which is essentially a network of INTERPOL police stations located in each member nation, INTERPOL is able to staff offices and operate its communication network called I-24/7 that relays important information regarding criminal activity.\textsuperscript{233}

Other efforts to decrease the fragmentation of agency operations can be seen in INTERPOL’s and the OSCE’s recently signed a Memorandum of Understanding (MoU) establishing a three-year plan to “increase collaboration [to] combat transnational threats,

\textsuperscript{232} \textit{Id.} at 105; \textit{Also:} One success story involves the Austrian Criminal Intelligence Service that was conducting an investigation into what appeared to be a growing human trafficking operation. They had conducted domestic interviews of victims and had set wiretaps on suspects involved in the network. Eventually, the agency had collected enough evidence to reveal a highly developed network that extended well beyond its jurisdiction into Moldova, Ukraine, Romania, Hungary and even into the western nations of Spain, Portugal, Italy, and Germany. International Crime, \textit{supra} note 16 at 106. At this point, the Austrian intelligence agency decided to contact the South Eastern European Cooperation Initiative (SECI). \textit{Id.} SECI provides a forum for law enforcement officials to meet and facilitates communication pertaining to international crime. \textit{Id.} at 103. The Austrians contacted SECI because the criminal organization they were investigating spread throughout SECI member nations, the scale of the investigation was growing beyond the agency’s capabilities, the operation was going to require multiple simultaneous police actions in a number of countries, and SECI provided a platform to facilitate the operation. \textit{Id.} at 106.

\textsuperscript{233} \textit{Id.} at 58, 45.
including organized crime and terrorism.”\textsuperscript{234} The purpose of MoUs is to essentially create bilateral agreements that outline areas of cooperation for a contracted term. Former OSCE Secretary General Lamberto Zannier, in his address at the 45th ICPO-INTERPOL European Regional Conference, highlighted the following areas of collaboration: police-related activities; border security; irregular migration; and anti-terrorism activities.\textsuperscript{235} One area of law enforcement that two agencies will also collaborate on is the deterring of illicit activity on the Darknet, however, cooperation is critical in all fields of law enforcement from stolen identification to drug smuggling.\textsuperscript{236}

c) International agencies and evidence

One prominent problem for international courts is the fact that they lack their own “police force.”\textsuperscript{237} The collection of evidence is a critical part of establishing guilt before courts, but the process presents several issues. Organized crime and terrorism threaten national security and accordingly, law enforcement and intelligence agencies go to great lengths to monitor and collect evidence pertaining to these groups. The United States Supreme Court noted in \textit{Haig v. Agee}\textsuperscript{238}

\textsuperscript{235} Former Secretary General Lamberto Zannier, Address given at the 45th ICPO-INTERPOL European Regional Conference (May 16, 2017) Transcription available at: http://www.osce.org/secretary-general/320652 (Last visited: June 20, 2017).
\textsuperscript{236} \textit{INTERPOL} and OSCE’s MoU aims at new psychoactive substances (NPS) being distributed on the Darknet and crypto-currencies. Zannier, \textit{supra} note 255 at 2. With increased use of virtual currencies like Bitcoin criminal proceeds can cross borders with ease. Technical expertise is valuable for regional security organizations with advanced capabilities in identifying these virtual criminal assets, freezing them and potentially seizing them becomes more possible. The Deep Web comprises about 96% of the entire World Wide Web and data retrievable on through Google search makes up the remaining 14%. “Pharmaceutical Crime on the Darknet: A study of illicit market places,” \textit{INTERPOL} 5 (2015). Within the Deep Web there are Darknets where activity such as the selling of illegal NPSs occurs and users’ IP addresses are relatively hidden. INTERPOL collecting data on activity that was occurring in two Darknet Markets called Silk Road 2.0 and Evolution. In a joint exercise between the Federal Bureau of Investigation and INTERPOL, the evidence collected led to the arrest of the operator of Silk Road 1.0, Ross Ulbricht a 26-year-old from San Francisco, California, and closure of the market. \textit{Id.} At 8. The ability of INTERPOL and the OSCE to monitor these transactions and spaces is important in combatting organized crime, the financing of terrorism, and the trafficking of NPSs, weapons and, humans.
\textsuperscript{237} Pluralism, \textit{supra} note 2 at 169.
that “no government interest is more compelling”\textsuperscript{239} than concerns related to national security. This is reflected in the Court’s support of the Foreign Intelligence Surveillance Act (FISA) as is reflected in the surveillance warrants issued from the FISA Court to intelligence agencies.\textsuperscript{240} Similarly, Germany’s Agency for the Protection of the Constitution, \textit{Bundesamt für Verfassungsschutz}, is not required to abide by the same rules as local police forces when collecting evidence. However, when agencies follow two different sets of guidelines, they often are not able to share this data.\textsuperscript{241} A different approach is taken by a regional security agency such as the OSCE in that they often publically report the results of their monitoring operations, however, an element of confidentiality remains with regards to the identity of its staff in the field. When law enforcement agencies and surveillance activities act parallel to each other across international borders, there is the potential for complications to arise.

The OSCE plays an important role in monitoring conflicts in and around Europe and has come to be considered by the international community as an agency to be deployed when a legal obligation of “responsibility” falls on the global community to intervene in escalating conflicts.\textsuperscript{242} Two reasons for the OSCE’s reputation for objective monitoring and for producing quality reports is that these documents have been presented as evidence before the various courts.\textsuperscript{243} However, the OSCE also faces challenges in providing evidence because of its unique international legal personality and obstacles associated with witness protection and methods of processing evidence discussed above.\textsuperscript{244}

\begin{thebibliography}{9}
\bibitem{239} Id. See \textit{In re Directives}, 551 F.3d at 1012 (the governmental interest in national security “is of the highest order of magnitude”); \textit{In re Terrorist Bombings of U.S. Embassies}, 552 F.3d 157, 174 (2d Cir. 2008).
\bibitem{240} \textit{Clapper v. Amnesty International}, No. 11-1025.
\bibitem{241} Constitutionalism, \textit{supra} note 143 at 153.
\bibitem{242} Separate Opinion of Judge Peter Kovač, ICC-01/15-12-Anx1 27-01-2016 1/31 EO PT at para 15.
\bibitem{243} \textit{Prosecutor v. Milosevic}, ICC-01/04-01/07-2253-Anx6 09-07-2010 1/14 RH T para 2 § 4
\bibitem{244} \textit{The Prosecutor v. Germain Katanga and Mathieu Ngudjolo}, 1130 at n. 46; \textit{Also see: Prosecutor v. Milutinovic et al.}, Case No. IT-05-87, Decision on Evidence Tendered Through Sandra Mitchell and Fredrick Abrams, 1 September 2006, para. 21; Cited in \textit{The Prosecutor v. William Samoei Ruto and Joshua Arap Sang}, ICC-01/09-
\end{thebibliography}
Evidence is the basis for any charge brought against a party, but it also acts as a measure of proof when establishing a party has taken diligent steps in preventing transboundary harm. Professor Kulesza sees a direct line from the Corfu Channel Case, through Tadić leading directly to modern environmental cases like Smelter. She contends that the criterion of “good government” ought to be “perceived objectively, with reference to the best international practice and best available technology.” This higher standard manifested in environmental law calls for, as a duty, to conduct Environmental Impact Assessments prior to beginning any substantial project that could reasonably affect the surrounding environment such as was expressed in the opinion of the court in Argentina v. Uruguay. The use of new assessment techniques as provided through specialized agencies and focus groups is a step in the right direction for nations trying to meet Kulesza’s standard of showing a duty of due diligence in maintaining their international obligations.

**d) Detention Centers and Cybercrime**

Unique problems present themselves when private or extraterritorially controlled detention centers are used to hold persons of interest or those in transit without possession of the required documentation. A case that illustrates what might be called the problem of hybrid-

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01/11-1130 at n. 44: “(a) the methods of these organizations can at best assure the accuracy of the process for recording the information, not the reliability of the material; (b) the reports do not identify the persons interviewed, leaving the sources of the critical information largely anonymous; (c) the witness to testify on these reports was in supervisory role with respect to collection and analysis of information, but she never took any of these information herself; (d) the other witness to testify on the report, although personally interviewed some of the persons, it was not possible to determine, which portions of the report were based on his interviews; (e) most of the tendered excerpts of the reports set forth allegations of criminal conduct made by persons who claimed to be the victims of, or witnesses to these crimes, and the court had no opportunity of hearing any of these person upon whose statements these entries were based; and the Chamber was not in position to assess the reliability of factual connections contained herein.”

*Id.*

245 Due Diligence, supra note 6 at 114.

246 *Id.*

247 *ICJ Reports, 2010, 3-4.* Here, the impact of the dispute, unseen before between the friendly nations, had a significant negative impact on diplomatic relations as well as on economic factors i.e. tourism and transportation.

248 *TUGBA BASARAN, SECURITY, LAW AND BORDERS: AT THE LIMITS OF LIBERTIES* 87 (Routledge 2011).
jurisdiction is *Boumedeine v. Bush*.\(^{249}\) *Boumedeine* involves extending *habeas corpus* to a detainee being held at Guantanamo Bay in Cuba. Guantanamo Bay is a U.S. military detention center located within the borders of Cuba. According to the terms of a 1903 lease agreement, Cuba retains sovereignty over the land where the center is located.\(^{250}\) However, since the center is operated by the U.S. military, the U.S. retains jurisdiction at the facility. This case brought to attention the problem of using private detention centers that are legally “controlled” by one sovereign power within the borders of another sovereign, both of which must act in accordance with international law. Here, the Supreme Court had to determine what protections under U.S. law the detainees had, if any. The repercussions of this decision are still being felt today. A more recent case, *Aamer v. Obama*,\(^{251}\) will be discussed below to aid in analyzing the legal jurisdictional repercussions of *Boumedeine*.

*Aamer v. Obama*

*Aamer v. Obama* addresses the repercussions of extending the right to appear before a judge, *habeas corpus*, after being detained for an extended time at Guantanamo Bay as was established in *Boumediene v. Bush*. It was thought by some that following *Boumediene*, other substantive Constitutional rights would be extended to the detainees there, but this has not been the case.\(^{252}\) *Boumediene*’s appeal was to simply appear before a judge but in *Aamer* the grievance involved a group of detainees who were participating in hunger strikes. The guards, out of an obligation to maintain the detainees’ health, began force feeding those participating in

\(^{249}\) 553 U.S. 723 (2008).


\(^{251}\) 742 F.3d 1023 (D.C. Cir. 2014).

the hunger strike with a feeding-tube. The detainees argued that the process was “painful, humiliating, and degrading.”

In Boumedeine, habeas corpus was granted but the D.C. Court maintained that other forms of jurisdiction, as would apply to conditions at the Center, still remained restricted as dictated by the Military Commissions Act (MCA). United States code 28 U.S.C. § 2241(e)(2) (2012) mandates that aside from the Boumediene exception, “no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspects of detention [by] an alien who is or was detained by the United States…” It is under this law that two lower courts denied hearing Aamer’s case due to their lacking jurisdiction. When the petitioners’ appeal did reach the D.C. Circuit, the court was divided. It reasoned that claims pertaining to conditions were extended though habeas corpus but that the obligation of the officers at the detention center to maintain the detainees’ health outweighed the appellants’ grievance. However, the Court did allude to the possibility that it may be “conceivable that petitioners could establish” other substantive constitutional claims in the future. While these cases deal with the complicated matter of detainees on foreign soil under U.S. jurisdiction, the complexity of establishing jurisdiction in cases echoes Ryngaert’s call for a standardized approach.

Cybercrime

Briefly, cybercrime, like that of terrorism, is an activity for which nations may be held responsible for allowing to be perpetrated within their jurisdiction. As recently as May 12,

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255 Aamer, 742 F.3d at 1041.
256 Id; Also see: Security, supra note 254 at Ch. 5 (Routledge 2011). Australia’s use of extraterritorial detention centers for holding those trying to enter the country has gained some attention and is discussed thoroughly in Basaran’s text.
257 Due Diligence, supra note 6 at Ch. 5.
2017, hospital databases in nearly 100 countries were compromised and held for ransom.\textsuperscript{259}

There have also been accusations of Russian interference with elections in the United States and France.\textsuperscript{260} These types of crimes present unique challenges and problems to both international and domestic law enforcement and courts. Terrorism and cybercrime present similar problems due to the international element, however, terrorism can more often be traced back to a “physical” place of origin. This lack of physical location often associated with cybercrime makes it a challenge to attribute State responsibility, but it is still possible to identify the effects of such criminal activity upon a nation which in turn creates a responsibility to prevent its spread.\textsuperscript{261}

One of the most important concerns related to cyberterrorism\textsuperscript{262} is its impact on critical infrastructure\textsuperscript{263} which is why it is important that there be a standardized approach to reacting to large scale attacks. There are four “elements of notice” with regards to exercising a functioning cybercrime network: “(1) a prompt notification of any such risk for all potentially affected states, (2) sharing all available information relevant to responding to a given disruption, (3) prompt engagement in multilateral consultations aimed at identifying and applying mutual acceptable measures of response to threats already arisen as well as provide (4) mutual assistance “as

\begin{footnotesize}
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\item[258] Id. at 290.
\item[261] Due Diligence, supra note 6 at 290.
\item[262] Definition of cyberterrorism: “an international use or threat of use, without legally recognized authority, of violence, disruption of interference against cyber systems, when it is likely that such use would result in death or injury of a person or persons, substantial damage to physical property, civil disorder, or significant economic harm.” Stanford University, Draft International Convention to Enhance Protection from Cyber Crime and Terrorism Art. 1 (2000) http://cisac.fsi.stanford.edu/sites/default/files/sofaergoodman.pdf (Last visited: July 7, 2017).
\item[263] Definition of critical infrastructure: “interconnected networks of physical devices, pathways, people and computers that provide for timely delivery of government services; medical case; protection of the general population by law enforcement; firefighting; food; water; transportation services, including travel of persons and transport of goods by air, water, rail or road; supply of energy, including electricity, petroleum, oil and gas products; financial and banking services and transactions; and information and communication services. Id. at Art. 1 pt. 7.
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appropriate.”264 Showing diligence in identifying and preventing harm caused to critical infrastructure across jurisdictions is a concern that will only grow over time.

6) CONCLUSION

The research above illustrates the negative affect that a fragmented legal system has on the international courts and law enforcement agencies. The purpose of this research project is to contribute timely content to the discourse on pluralism in international law in the hopes of better informing those who engage in the practice of international law. Recently proposed developments to the principles of due diligence and jurisdiction provide the international legal community an opportunity to reframe the problem of legal pluralism. It is through a greater degree of care and a standardized method of establishing jurisdiction that the international legal system can obtain greater functionality.

Practitioners of law ought to be prepared to face the challenges inherent in the legally pluralist environment of international law. Enabling their success should be a principle of due diligence that requires proof of action in fulfilling an international duty of care so that when harm does occur, a systematic approach for asserting jurisdiction that is based on state and global interests can be applied. Legal scholars contend that the “[a]lthough the institutional and legal diversity of international criminal justice has been the traditional subject of scholarly inquiries, debates aiming to make sense of it are still at an embryonic stage.”265 Legal pluralism is not new but the current discourse lacks structure. The aim of this research is to provide a new perspective for those who continue to engage in the debate.

264 Id. at 295; Additionally, the Council of Europe (CoE) has addressed the need for cooperation in combatting online crime. In CoE, Recommendation CM/Rec(2001)8 the Council expresses the need to “develop reasonable legislative, administrative or any other measures appropriate to implement their due diligence commitments concerning online security.” CoE, Recommendation CM/Rec(2001)8, at para 2.3. Also, the CoE notes that “States should engage in dialogue and co-operation for the further development of international standards relating to responsibility and liability and of the settlement of related disputes. Id. at para 2.4.

265 Pluralism, supra note 2 at 13.