Exposé

The Customary International Law of Civil Court Jurisdiction

Florian Ettmayer

Doctoral Candidate: Mag. Florian Ettmayer, LL.M.
University: Universität Wien
Student ID: 1047683
Research Field: Public International Law

Table of Contents

1. Overview

Beyond the issue of immunities, international civil adjudicative jurisdiction ('**ICA-Jurisdiction**') is rarely conceptualised as a question of customary international law ('**CIL**').[1] Whether a court is competent to decide a particular civil case with an international element is mostly discussed under the banner of private international law.[2] However, an approach grounded in private international law alone fails to do justice to the role of CIL that may limit ICA-Jurisdiction.

As Judge Crawford notes, the position that CIL limits ICA-Jurisdiction is controversial.[3] Most prominently, it is contrary to the recent Restatement Fourth of U.S. Foreign Relations Law ('**the Restatement (Fourth)**')[4] – the first U.S. Restatement to unequivocally take the view that CIL does not restrict ICA-Jurisdiction in any way.[5] To this day, the debate has failed to yield a consensus on this point.

The proposed research seeks to advance the understanding of CIL limits on ICA-Jurisdiction by conducting an empirical enquiry into the practice and *opinio juris* of broad range of states and other entities.

[1] Frederick Alexander Mann, 'The Doctrine of Jurisdiction in International Law' 111 Recueil des Cours 1, 73 observes that '[t]he jurisdiction of the courts in civil matters is an aspect of the activity of States, which is more effectively determined and circumscribed by international rules of jurisdiction than many observers recognise or admit'; see Section 4. for a discussion under CIL.

[2] The term private international law includes rules of international civil jurisdiction (see James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, USA 2019) 458).

[3] Ibid 455.

[4] U.S. Restatements of the Law are treatises on legal subjects published by the American Law Institute. While not having the status of a source of law, the Restatements are highly authoritative and widely relied upon by U.S. courts (David B Massey, 'How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law' 22 Yale J Int'l L 419, 421).

[5] ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity : §§ 301-313; 401-464; 481-490, Tables and Index* (American Law Institute Publishers 2018) § 422, Reporter's Notes 1. ALI of course makes an exception for immunities.

2. The Research Question

My research will be guided by and answer the question whether and which CIL limits on ICA-Jurisdiction exist.

3. ICA-Jurisdiction: Defining the Scope of Inquiry

ICA-Jurisdiction is international civil court jurisdiction as established by the private international law rules of each state. It therefore does not concern criminal court jurisdiction or the jurisdiction of administrative courts or tribunals. It does also not concern domestic cases, but only cases against foreign defendants.

These private international law rules may be limited by public international law rules on adjudicative jurisdiction. In this context, jurisdiction refers to the legal power of a state to regulate and enforce conduct.[6] It becomes a concern of public international law when the actions relate to matters which are not purely in the domestic domain.[7] Public international law distinguishes between prescriptive, adjudicative and enforcement jurisdiction.[8] Prescriptive jurisdiction refers to power to enact rules and regulate conduct within the ambit of these rules.[9] Adjudicative jurisdiction concerns the power to subject persons or things to the process of the courts and tribunals.[10] Enforcement jurisdiction refers to the power to enforce the norms of prescriptive (and adjudicative) jurisdiction through official action.[11]

For reasons of feasibility, the inquiry will be limited to 'core' civil and commercial matters excluding in particular insolvency, family law and personal status matters as well as provisional measures and issues of *lis pendens* and *res judicata*.

[6] See *e.g.* Joseph H Beale, 'The Jurisdiction of a Sovereign State' 36 Harvard Law Review 241; see also Derek W Bowett, 'Jurisdiction: Changing Patterns of Authority Over Activities and Resources' 53 British Yearbook of International Law 1.
[7] Mann (n 1) 9, 14; Cedric Ryngaert, *Jurisdiction in International Law* (OUP Oxford 2015) 5.
[8] See Stephen Allen and others, 'Introduction' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 5; see also Oscar Schachter, 'International Law in Theory and Practice: General Course in Public International Law' 178 Recueil Des Cours 9, 244.
[9] Ryngaert (n 10) 9.
[10] Ibid 9.
[11] Ibid 9.

4. The History of Thought on ICA-Jurisdiction

Doctrine on state jurisdiction goes back centuries.[12] This section will be concerned specifically with ICA-Jurisdiction. While ICA-Jurisdiction first and foremost concerns litigants, it is accepted that overbroad rules of jurisdiction can become a concern for the 'smooth functioning of inter-State relations'.[13] In line with this observation, the PCIJ concluded in 1927 in *The Case of the S.S. "Lotus"* ('**Lotus**') – before addressing the rules of criminal jurisdiction at stake – that prohibitive rules of jurisdiction, including ICA-Jurisdiction, may exist. However, they 'cannot […] be presumed'.[14]

The following decades witnessed increasing consensus as to the rules of criminal (prescriptive and adjudicative)[15] jurisdiction, which were influenced by the 1935 Harvard Research Draft Convention on Jurisdiction with Respect to Crime.[16] With respect to ICA-Jurisdiction the developments were less pronounced. Predominantly, scholars have taken the view that public international law imposes certain limits on ICA-Jurisdiction. However, prominent scholars have also reached the opposite conclusion. Rather than focusing on different conclusions, Sections (4.1.) and (4.2.) will distinguish the most relevant scholarship on ICA-Jurisdiction by their focus on inductive or deductive reasoning respectively.

[12] F.A. Mann traced the origins of the CIL rules of jurisdiction to rules of private international law (Mann (n 1) 24). For a historical discussion of the public international rules of jurisdiction see also Ryngaert (n 10) 49.
[13] Ryngaert (n 10) 11.
[14] *The Case of the S.S. "Lotus" (France v Turkey)* PCIJ Rep Series A, No 10, 3, 18.
[15] The CIL rules cover criminal prescriptive as well as adjudicative jurisdiction, as in virtually all criminal law systems there is no difference between the two concepts. A criminal court only applies its own criminal law. Regulating the reach of provisions of criminal law thus determines the court's jurisdiction in criminal law matters and *vice versa* (Michael Akehurst, 'Jurisdiction in International Law' 46 Brit YB Int'l L 145 179, Bowett (n 9) 2).
[16] 'Draft Convention on Jurisdiction with Respect to Crime' [American Society of International Law] 29 The American Journal of International Law 439.

4.1. Inductive Approaches

I refer to induction as the method of establishing CIL from empirical evidence of state practice and *opinio juris*,[17] albeit that much of the selected material does not provide for a detailed analysis of these elements.

Proponents of the view that CIL limits ICA-Jurisdiction include Oscar Schachter (1982),[18] with qualifications Derek Bowett (1983),[19] of the reporters of the Restatement (Third) (1987)[20] in particular Andreas F. Lowenfeld,[21] Campbell McLachlan (1993),[22] with qualifications Joachim Bertele (1998),[23] Wendy Collins Perdue (2003),[24] Alan Vaughan Lowe (2005),[25] ALI/UNIDROIT (2006),[26] August Reinisch (2013, 2014),[27] and Cedric Ryngaert (2015).[28]

Among these authorities there is a common thread that there must be a connection of certain closeness between the state asserting jurisdiction and the defendant and/or the dispute. Beyond this rather abstract statement, little is revealed. The Restatement Third of U.S. Foreign Relations Law ('**Restatement (Third)**') is a notable exception. It not only contends that public international law requires a reasonable basis for adjudicative jurisdiction as opposed to an exorbitant basis, but exhaustively lists the bases considered reasonable.[29]

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[17] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 126; see also Georg Schwarzenberger, *The Inductive Approach to International Law* (Stevens 1965) 4.
[18] Schachter (n 11) 246.
[19] Bowett (n 9) 4.
[20] ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (American Law Institute Publishers 1987) § 421 Comment c.
[21] Andreas F. Lowenfeld, 'International Litigation and the Quest for Reasonableness: General Course on Private International Law' 245 Recueil des Cours 9, 81.
[22] Campbell McLachlan, 'The Influence of International Law on Civil Jurisdiction' Hague YB Int'l L 125, 140.
[23] Joachim Bertele, *Souveränität und Verfahrensrecht: eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiktion im Verfahrensrecht* (Mohr Siebeck 1998) 219.
[24] Wendy Perdue, 'Aliens, the Internet, and Purposeful Availment: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction' 98 Nw UL Rev 455.
[25] Vaughan Lowe, 'Expert Opinion on International Law Issues, Professor Alan Vaughan Lowe, in re: Yukos Oil Company, Case No. 04-47742-H3-11' 2 Transnational Dispute Management (TDM); However, Lowe also reasons deductively in questioning the distinction between prescriptive and adjudicative jurisdiction (ibid11).
[26] *ALI / UNIDROIT Principles of Transnational Civil Procedure* (2006) Principle 2.1.2.
[27] August Reinisch and others, 'IV. Abschnitt: Die Völkerrechtssubjekte 1. Kapitel: Die Staaten' in August Reinisch and others (eds), *Österreichisches Handbuch des Völkerrechts Band I - Textteil* (5 edn, Manz Wien 2013) mn 709; August Reinisch, 'Jurisdiction: Grenzen der Staatsgewalt und Verfahrensgerechtigkeit bei internationalen Prozessen' in *Vienna Law Inauguration Lectures – Antrittsvorlesungen an der Rechtswissenschaftlichen Fakultät der Universität Wien*, vol 3 (Manz 2014) 115.
[28] Ryngaert (n 9) 10.
[29] ALI, *Restatement of the Law, Third, The Foreign Relations Law of the United States* Comment c.

The opposing view – that state practice and *opinio juris* impose no limits on civil court jurisdiction (apart from the rules on immunity) – has been held in particular by scholars with a focus on private international law. Examples include Arthur Lenfoff (1964),[30] Kevin M. Clermont and John Palmer (2006)[31] Franz Matscher (2013),[32] and Donald Earl Childress III (2016).[33]

In public international law scholarship, the view that there are no CIL limits on ICA-Jurisdiction was most prominently held by Michael Akehurst (1973). Akehurst concludes that 'apart from the well-known rules of immunity for foreign States, diplomats, international organizations, etc.) CIL imposes no limits on the jurisdiction of municipal courts in civil trials'.[34] More than forty years later the Restatement (Fourth) (2018) contends – in unmistakable homage to Akehurst – that '[w]ith the significant exception of various forms of immunity, however, modern customary international law generally does not impose limits on jurisdiction to adjudicate'.[35]

4.2. Deductive Approaches

I refer to deductive reasoning as the method of establishing CIL rules from certain premises through legal reasoning.[36] In the context of ICA-Jurisdiction, two main strands of deductive reasoning are relevant.

The first strand conceives ICA-Jurisdiction as yet another emanation of the state's power to prescribe and concludes that it should thus be governed by the same or similar rules. The second strand deduces rules from first-order concepts such as sovereignty, non-intervention and statehood.

Ideas of the first strand were formulated by Joseph Beal (tentatively) (1923),[37] F.A. Mann (1964, 1982),[38] Ian Brownlie (tentatively) (1973),[39] Alex Mills (2014),[40] Ralf Michaels

[30] Arthur Lenhoff, 'International Law and Rules on International Jurisdiction' 50 Cornell LQ 5, 7.
[31] Kevin M Clermont and John RB Palmer, 'Exorbitant Jurisdiction' 58 Me L Rev 474, 475.
[32] Franz Matscher, 'Vor Art IX EGJN: Allgemeines zur (inländischen) Gerichtsbarkeit' in Fasching/Konecny (ed), *Kommentar zu den Zivilprozessgesetzen* (3 edn, Manz 2013) mn 5.
[33] Donald Earl Childress III, 'Jurisdiction, Limits Under International Law' SSRN 2519284.
[34] Akehurst (n 18) 177.
[35] ALI, *Restatement of the Law, Fourth, the Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity : §§ 301-313; 401-464; 481-490, Tables and Index* § 422, Reporter's Notes 1.
[36] Stefan Talmon, 'Determining Customary International Law: the ICJ's Methodology Between Induction, Deduction and Assertion' 26 European Journal of International Law 417, 420.

(2018)[41] and Austen Parrish (2018, 2019).[42] The view is perhaps best summarised in Mann's reaffirmation of his 1964 position. Based on a review of the developments of the previous 20 years, he concludes that '[t]he international jurisdiction to adjudicate is, as has been pointed out, not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate: a State's right of regulation is exercised by legislative jurisdiction which includes adjudication'.[43]

The second strand is composed of a variety of arguments, which focus on first-order concepts. Authors include Derek Bowett (1983),[44] Andrew L. Strauss (1995),[45] Rudolf Dolzer (2003),[46] Gary Born and Peter Rutledge (2018),[47] Alex Mills (2019)[48] and Austen Parrish (2018, 2019).[49] Mills and Parrish are particularly noteworthy as they contend that the exercise of ICA-Jurisdiction must rest on accepted permissive rules, rather than be based on the outdated *Lotus* principle. If correct – this view would have profound consequences. In lieu of definitive evidence of state practice and *opinio juris* for such permissive rules, prohibition of action

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[37] Beale (n 9) 243. Beale did not differentiate between adjudicative and prescriptive jurisdiction. He subjected both categories to the (same?) restraints of public international law.

[38] Mann (n 1) 73. For the 1984 reaffirmation see Frederick Alexander Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' 186 Recueil des Cours 9 67.

[39] Ian Brownlie states in the 2nd edition of his textbook on public international law that 'there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens' (Ian Brownlie, *Brownlie's Principles of Public International Law* (2nd edn, Oxford University Press 1973) 262. In the 9th edition Judge Crawford juxtaposes this view with the competing view that there are no CIL limitations on ICA-Jurisdiction (Crawford (n 2) 455).

[40] Alex Mills, 'Rethinking Jurisdiction in International Law' 84 British Yearbook of International Law 187, 201.

[41] Ralf Michaels, 'Is Adjudicatory Jurisdiction a Category of Public International Law?' (*opiniojuris*, 20 September 2018) <http://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/> , accessed on 22 May 2020.

[42] Austen Parrish, 'Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law' (*opiniojuris*, 6 September 2018) <http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law/> , accessed on 22 May 2020; Austen Parrish, 'Personal Jurisdiction: The Transnational Difference' 59 Va J Int'l L 97 132.

[43] Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (n 41) 67.

[44] Bowett (n 9) 17.

[45] Andrew L Strauss, 'Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts' 36 Harv Int'l LJ 373 405.

[46] Rudolf Dolzer, 'Extraterritoriale Anwendung von nationalem Recht aus der Sicht des Völkerrechts' Bitburger Gespräche Jahrbuch 71, 82, 84. Dolzer's view is reminiscent of Kant's categorical imperative, see Stephan Wittich, 'Immanuel Kant and Jurisdiction in International Law' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 82.

[47] Gary Born and Peter Rutledge, *International Civil Litigation in United States Courts* (Wolters Kluwer Law & Business 2018) 101.

[48] Alex Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 330, FN 29. Mills also formulated ideas of the first strand, see (n 43).

[49] Parrish, 'Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law'; Parrish, 'Personal Jurisdiction: The Transnational Difference' (n 45) 134. Parrish also formulated ideas of the first strand.

would be the residual rule. This is effectively the position that has been advocated for criminal law jurisdiction.[50]

5. The Practical Dimension of the Debate

The research questions are motivated by practical considerations. Clarity in this area of the law is not only important for states, but also for private parties seeking legal certainty.

There are in principle three ways in which CIL limits on ICA-Jurisdiction may feature in domestic proceedings. First, CIL may be in line with domestic provisions and the courts may cite CIL for emphasis. Second, domestic provisions may conflict with CIL and the courts may apply CIL instead of these provisions. Even for monist systems this is a practically unlikely scenario and the constitutions of certain countries even bar it.[51] Third, principles of interpretation may permit – or even demand – to interpret a potentially conflicting domestic provision in line with CIL. The principle of interpretation that domestic law should – where possible – be interpreted in line with public international law is recognised by common law as well as civil law jurisdictions.[52]

6. The Research Project's Methodology

Article 38 (1) (b) of the ICJ Statute lists 'international custom, as evidence of a general practice accepted as law' as one of the ICJ's sources of law and – as is generally accepted –it reflects a source of public international law.[53] The methodology for CIL's identification has occupied generations. Looking at the last century, Jean d'Aspremont speaks of 'four lives' of CIL.[54] He considers the 2018 ILC Draft conclusions to mark the beginning of the 'fourth life'. These draft conclusions are the result of the ILC's efforts from 2012 to 2018 and were

[50] Ryngaert (n 10) 29.
[51] Ibid 46.
[52] For the USA see the *Charming Betsy* canon (*Murray v. The Charming Betsey* 6 US (2 Cranch) 64 (1804) 118); see also William S. Dodge, 'The Charming Betsy and The Paquete Habana (1804 and 1900)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Bloomsbury Publishing 2017); for the U.K. see *e.g. Mortensen v Peters* [1906] High Court of Justiciary of Scotland 14 Scots LTR 227; for Germany see *e.g.* the decision by the Federal Constitutional Court BVerfGE 64, 1, 20.
[53]Anthea Roberts and Sandesh Sivakumarani, 'The Theory and Reality of the Sources of International Law' in Malcolm D. Evans (ed), *International Law* (5 edn, Oxford University Press 2018) 91.
[54] Jean d'Aspremont, 'The Four Lives of Customary International Law' 21 International Community Law Review 229.

produced with extensive state involvement[55] and scholarly attention.[56] Arguably, they represent the current consensus on the establishment of CIL. As a result, I will treat the 2018 ILC Draft conclusions as authoritative unless cogent reasons for departure become apparent.

The 2018 ILC Draft conclusions advocate an inductive approach to the establishment of CIL following the tradition of Georg Schwarzenberger[57] and others:[58] '[O]ne must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way' as this 'serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist'.[59]

Yet, the inductive method has not been without challenges and the deductive method, which deduces rules from premises through legal reasoning, has also become part of the methodological discourse. Cases in point are Stefan Talmon's discussion of the ICJ's use of deduction and Peter Tomka's confession that the ICJ has employed the deductive method as part of a 'pragmatic approach'.[60] Furthermore, extensive research is currently being undertaken on the interpretability of CIL,[61] which arguably is just another term for deductive analysis. The same holds true for analogies, the use of which is considered methodologically appropriate in the literature.[62] The ILC accepts the use of deduction as 'an aid, to be employed with caution, in the application of the two-element approach.'[63]

Therefore, the proposed research will be primarily inductive, but will also engage with the deductive arguments.

[55] Analytical Guide to the Work of the International Law Commission, 'Identification of customary international law', <https://legal.un.org/ilc/guide/1_13.shtml>, accessed on 22 May 2020.
[56] Talmon (n 39).
[57] Schwarzenberger (n 20).
[58] See *e.g.* Anthony D'Amato, 'The Inductive Approach Revisited' 6 Indian Journal of International Law 11, 509, 510
[59] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 125.
[60] Peter Tomka, 'Custom and the International Court of Justice' 12 The Law & Practice of International Courts and Tribunals 195 215.
[61] Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' 19 International Community Law Review 126.
[62] Silja Vöneky, 'Analogy in International Law' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008); Cedric Ryngaert cautiously favours analogies in the context of state jurisdiction where appropriate (Ryngaert (n 10) 46).
[63] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 126.

6.1. Analysis of the Evidence per Country

The empirical analysis of the Selected Entities will start with the jurisdictional frameworks in which each state's civil courts operate (be they defined through statutes or case law). Furthermore, it will look at available diplomatic interactions, such as protests of states against overreaching exercises of civil jurisdiction by other states, and the preparatory work of conventions on ICA-Jurisdiction.

Another source material (in particular for *opinio juris*) is expected to be domestic court decisions including interventions by states in those proceedings.[64] The analysis will need to treat this material with great care due to the high likelihood of encountering hybrid decisions, as referenced by Anthea Roberts:[65] Judicial decisions may limit ICA-Jurisdiction in taking account of domestic and international law, but without clarifying the effect of each doctrine on the decision. Courts may also – on the face of it – rely solely on domestic doctrine, which – on closer inspection – is, however, historically deeply rooted in international law.

6.2. Inductive Comparative Analysis

At this stage of the analysis, it seems that three issues in particular have presented challenges for past researchers. First, it will have to be evaluated if and when a state's failure to protest against overreaching exercises of ICA-Jurisdiction results in acquiescence, as scholars have reached different conclusions on this issue.[66] Second, certain states, most notably the USA, may have acquired the status of a persistent objector, meaning that the interactions between states will have to be analysed in their historic context.[67] The third issue concerns the potential result of the analysis. Scholars have formulated the rule as one of close connection between the state and the defendant. However, without rules on interpreting CIL, a limitation

[64] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, 121, Conclusions 5, 6 and 10.
[65] Roberts (n 6) 74.
[66] Akehurst (n 18) 177; Austen Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach' The Restatement and Beyond: The Past, Present, and Future of the Foreign Relations Law of the United States (31st Sokol Colloquium) 5; Mills, 'Rethinking Jurisdiction in International Law' (n 43) 201 FN 53.
[67] The idea of persistent objection with regard to the USA has been coined by Campbell McLachlan in the context of jurisdiction in general (McLachlan (n 25) 129).

on ICA-Jurisdiction at this level of abstraction is not very practical as there is no accepted methodology for determining how this limitation applies in specific cases.

7. Concluding Remarks

The proposed research aims to further the understanding of CIL limits of ICA-Jurisdiction. The results will likely be of considerable value to researchers interested in the subject as well as practitioners involved in international civil disputes. It may also inform work on a multilateral jurisdiction treaty.

8. Preliminary Outline

1. **Introduction**
2. **Methodology**
3. **State Jurisdiction**
4. **The History of ICA-Jurisdiction**
5. **State Practice including Treaties**
6. **Opinio Juris**
7. **Doctrine**
8. **Access to Court and Denial of Justice**
9. **Foundational Principles**
10. **A Theory of ICA-Jurisdiction**
11. **Analysis**
12. **Conclusion**
13. **Annex: Country Data**

9. Preliminary Bibliography

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