

NATIONAL CRIMINAL JURISDICTION

Jo Stigen, 7 February 2012

Selected jurisprudence:

- *SS Lotus* (PCIJ, 1927), PCIJ Series A, No. 10 (1927) p. 3
- *Eichmann*
- *Demjanjuk v. Petrovsky* (1985), 603 F. Supp. 1468 (N. D. Ohio); upheld in 776 F.2d 571 (USCA 6th Circuit)
- *Prosecutor v. Tadic* (IT-94-1), Appeals Chamber, decision on interlocutory appeal, 2 October 1995

Additional reading:

- Luc Reydams, *Universal Jurisdiction; International and Municipal Legal Perspectives*, Oxford 2005
- Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", *Journal of International Criminal Justice* 2 (2004), p. 735

1. Introduction

- a state's right under international law to regulate and prosecute behaviour
- different from executive jurisdiction
- a function of sovereignty
- the jurisdiction of one state ends where the sovereignty of another is violated
- starting point: a state's right to protect territory, citizens and other vital interests
- important: the development of universal jurisdiction
- sovereignty loses terrain to human rights?
- the rules of jurisdiction do not give priority between competing jurisdictions

2. Positive allowance or absence of prohibition

SS Lotus (PCIJ, 1927):

"Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."¹

Arrest warrant case (ICJ, 2002), Higgins, Kooijmans and Buergenthal (Higgins *et al.*), *SS Lotus* represents

"the high water mark of *laissez-faire* in international relations, and an era that has been significantly overtaken by other tendencies".²

¹ *SS Lotus*, p. 19, note 6.

² ICJ Rep. 2002 p. 3, at 78, §§ 50-51.

3. How is the issue of jurisdiction raised?

- the criminal court *ex officio*
- a state before the ICJ
- does the individual have *locus standi*?
- human rights courts

Eichmann (Israel, 1961):

“The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State.”³

Noriega (USA, 1990)

“As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved.”⁴

Tadic (ICTY, 1997):

- Tadic has an individual right
- all courts have “kompetenz-kompetenz”

4. International law’s five jurisdictional bases

a. Territoriality principle

- *SS Lotus*. “in all systems of law the principle of the territorial character of criminal law is fundamental”
- right to control and protect territory
- no surprise for the perpetrator
- proximity to place of crime, evidence, witnesses
- better understanding of conflict?
- but: impartiality?
- Nicolae Ceausescu (Romania, 1989)
- Saddam Hussein (Iraq, 2006)
- Israel’s reluctance to prosecute Ariel Sharon after Sabra and Chatila (1982)

- Can be doubt as to which state is territorial; e.g. Lockerbie; *SS Lotus*:

”offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constitutive elements of the offence, and more especially its effects, have taken place there”.⁵

b. Nationality principle

- a state’s right to regulate behaviour of own citizens

³ *International Law Reports* 36 (1968), p. 5, at 62. Supported by Israel’s Supreme Court, *ibid.*, pp. 277 ff.

⁴ 746 F. Supp. 1506, at 1533 (S.D. Fla. 1990).

⁵ *SS Lotus*, p. 23.

- oldest basis: kings had people before territory
- *Status of Forces* agreements
- *Hague Convention on the Conflict of Nationality Laws* (1930), Article 1:

”It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international law conventions, international custom and the principles of law generally recognised with regard to nationality.”

- I *Nottebohm* (ICJ, 1955): ”genuine link” between home state and citizen

- Impartiality?
- *Leipzig trials*
- *Calley-* and *Medina* (My Lai; USA, 1968)
- Indonesia after East Timor (1999)
- Both reflected in Rome Statute (ICC)

c. Protective principle

- Earlier: Anglo-Americans claimed only territoriality and nationality were acceptable
- Today: widely accepted
- Terrorism
- Vital interests – vague term
- *Gonzales* (USA, 1985); did drug trafficking concern “the nation’s security”?
- *Eichmann* (Israel, 1962): alongside with universal jurisdiction
- Israel existed only from 1948

d. Passive nationality principle

- controversial
- 1986: USA - *The Omnibus Diplomatic Security and Anti-Terrorism Act (Omnibus Act)*
- *SS Lotus*: Turkish citizens, but PCIJ still opted for territoriality. The Court

”does not think it necessary to consider the contention that a State cannot punish offences committed abroad by a foreigner simply by reason of the nationality of the victim. [...] Even if that argument was correct – and in regard to this the Court reserves its opinion – it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory.”⁶

- Spain with *Pinochet* (alongside with universal jurisdiction)

Cutting (1886): Mexico could not prosecute

”a citizen of the United States for an offense committed and consummated in his own country, merely because the person offended happened to be a Mexican”.⁷

Achille Lauro (USA, 1985): US claims the opposite (US citizen in wheel chair)

⁶ *SS Lotus*, pp. 22-23.

⁷ Letter from US Secretary of State to Mexico 1 November 1887, quoted in Darrel Menthe, “Jurisdiction in Cyberspace: A Theory of International Spaces”, *Michigan Telecommunications and Technology Law Review* 4 (1998), p. 4.

- Impartiality?
- Journalist's description from *Eichmann*:

"[T]he bench, composed of three judges, each of whom might have been one of the six million victims of the 'Final Solution', impressively draws the line between a neutrality which civilisation does not permit in its everlasting struggle with savagery and barbarism and that impartiality which even a savage or barbarian may expect in a civilised community."⁸

e. Universality principle

- no link to forum state
- the crime's gravity
- huge potential
- controversial: idealists vs. realists?

CONVENTIONS

- Genocide convention (1948) article VI:

"Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

- Geneva Conventions (1949) – common article regarding "grave breaches" in international conflicts:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

- Torture convention (1984) article 7(1):

"The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

- Crimes against humanity – no convention

CUSTOMARY INTERNATIONAL LAW

1. National legislation

- Genocide

E.g. Australia, Belgium, Canada, Netherlands, Spain, United Kingdom and Germany. All in all relatively few states

⁸ Georg Schwarzenberger, "The Eichmann Judgment: An Essay in Censorial Jurisprudence", *Current Legal Problems* 15 (1962), p. 248, at 249.

- War crimes

E.g. Aserbajdsjan, Australia, Belgium, Finland, Canada, Netherlands, Spain, United Kingdom and Germany

- Crimes against humanity

E.g. Aserbajdsjan, Australia, Belgium, Canada, Netherlands, United Kingdom and Germany

- Torture

E.g. Aserbajdsjan, Finland, France, Netherlands, Spain and United Kingdom. Some state do not regulate torture as it might be considered as covered by crimes against humanity.

2. National case law

- legislation does not necessarily reflect the true *opinio juris* of states
- it is question of a right, not a duty; so too much should not be required
- national cases after WW2; mostly passive nationality and protection
- E.g. *Higaniro* (Belgium, 2001), *Ndombasi* (Belgium, 2000), *Finta* (Canada, 1989), *Knesevic* (Netherlands, 1997), *Bouterse* (Netherlands, 2001), *Grabez* (Switzerland, 1997), *Niyonteze* (Switzerland, 2004) and *Sawoniuk* (United Kingdom, 1999).
- *Pinochet* (United Kingdom 1999)
 - o Difference between *Pinochet 1* and *Pinochet 3* (relied on torture convention)
- *Cavallo* (Spain, 2003)
- *Demjanjuk* (USA, 1985)
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3. Other relevant arguments for the existence of an international custom

- Nuremberg Tribunal: France, Soviet Union, United Kingdom and USA had, by establishing the IMT,

”done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special tribunals to administer law”.⁹

But there was the territorial principle + passive nationality

- ICTY and ICTR in *Furundzija*, *Tadic*, and *Bagaragaza*.

But they represent specific agendas...

- Princeton Principles (2001)

⁹ Trial of German Major War Criminals (1946), reprinted in *American Journal of International Law* 4 (1947), p. 216.

- Krakow Resolution (2005)
- Separate opinions before the ICJ by judges Guillamue and by Higgins, Kooijmans and Buergethal in the *Arrest Warrant case*
- Does the *jus cogens* status of the crimes imply universal jurisdiction?

Suggested in *Eichmann*:

”The crimes of genocide committed against the Jewish People and other peoples were crimes under international law. It follows, therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.”¹⁰

Lord Browne-Wilkinson in *Pinochet*:

”The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state [...]”

Also ICTY in *Furundzija*

Yet: *Jus cogens* might imply *erga omnes*, but hardly a right of any state to prosecute a given individual

- Kirgis on international custom:

“[A reasonable rule] is always more likely to be found reflective of state practice ... than is an unreasonable”¹¹

- States will often not wish to object to the exercise of universal jurisdiction

Congo in the *Arrest Warrant case* – but there was no doubt that Congo did not agree that Belgium had jurisdiction

4. Possible criteria for the exercise of universal jurisdiction

- The suspect’s presence in the forum state’s territory
- Subsidiarity (priority to territorial and suspect’s home state)
- Political independent decision
- Only when absolutely required
- Besides: immunity fro certain persons/acts

Conclusion regarding universal jurisdiction; further development:

¹⁰ *Eichmann*, Jerusalem District Court, § 19.

¹¹ Frederick L. Kirgis, “Custom on a Sliding Scale”, *American Journal of International Law* 81, 1988 p. 146.

- Treaty based universal jurisdiction:
 - Grave breaches of the Geneva Conventions (1949)
 - First additional protocol to the Geneva Conventions (1977)
 - Torture convention (1984)
- Customary international law:
 - Grave breaches of the Geneva Conventions
 - Not for: genocide, crimes against humanity or other war crimes
- States seem to increasingly accept universal jurisdiction
- Important step towards more effective fight against impunity
- Widely accepted that core international crimes must be prosecuted; but the jurisdictional rules are less developed than the prohibitions
- Important to clarify the rules of jurisdiction under international law
- Preferably: a convention on (universal) jurisdiction – drafted by the ILC