

# LAWS 5165

## Public International Law



SAMPLE EXTRACT

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# Jurisdiction

The limits of the legal competence of a State or other authority to make, apply & enforce rules of conduct upon persons/entities.

## **TYPES (Third US Restatement of Foreign Relations Law (1986)):**

- ❖ Jurisdiction to Prescribe = power of the State to make its law applicable to the activities, relations, or status of a person, or the interests of persons in things.
- ❖ Jurisdiction to Enforce = power of the State to induce or compel compliance or to punish non-compliance with its laws or regulations.
- ❖ Jurisdiction to Adjudicate = power to subject persons or things to the process of its courts or administrative tribunals (civil or criminal proceedings).

## **SS LOTUS CASE (FRANCE V TURKEY) [1927]**

- ❖ *Lotus* (French) collided with *Boz-Kourt* (Turkish) on high seas, *B* sank causing some deaths, French officer of the watch arrested by Turkey when *L* reached a Turkish port & charged with manslaughter, France protested & alleged Turkey did not have jurisdiction.
- ❖ Due to basis of IL existence of sovereign States, it is axiomatic that restrictions on independence cannot be presumed.
- ❖ A State may not exercise its power in any form in the territory of another State or outside its own territory (unless a permissive rule derived from international custom/convention exists).
- ❖ IL does not prohibit a State from exercising jurisdiction in its own territory in relation to acts that have taken place abroad (even if a lack of a permissive rule of IL).
  - Only if a general prohibition prevented extension to persons/property/acts outside territory.
  - IL leaves States a wide measure of discretion only limited in certain cases by prohibitive rules.
- ❖ Rejected French claim that the flag State had exclusive jurisdiction over *L* as no rule to that effect had emerged in IL & the damage to *B* was equivalent to affecting Turkish territory.
- ❖ [Consider Judges Higgins, Kooijmans & Buergenthal (*Arrest Warrants*): *Lotus dictum* represents high-water mark of *laissez-faire* in international relations & an era overtaken by other tendencies].
- ❖ [Note that the ruling on the high sea jurisdiction has been overruled by *High Seas Convention* 1958, art 11(1) which provides that the flag State or State of the alleged offender has jurisdiction].

## **CRIMINAL JURISDICTION**

### **Territorial:**

- ❖ Logical manifestation of a world order of independent States.
  - ❖ Convenient due to likely location of alleged offender/witnesses (*Congo v Belgium*; Judge Guillaume).
  - ❖ All crimes alleged to have been committed by a foreign citizen may come before municipal courts & if convicted may be sentenced & punished (*Pinochet (No. 3)* [2000] UK; Lord Browne-Wilkinson).
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- ❖ A State cannot enforce its criminal legislation in the territory of another without consent (*Congo v Belgium*; Judge Guillaume).
- ❖ Principal ground for the exercise of criminal jurisdiction.
  
- ❖ Jurisdiction for the State where part of the act occurred & the State where it ended (*Lotus*).
  - Subjective principle = act began on State's territory (e.g. drugs produced).
  - Objective principle = act ended on State's territory (e.g. drugs sold).

#### Nationality:

- ❖ Jurisdiction over national who commit crimes wherever they act.
- ❖ Older form of jurisdiction than territorial (less frequently invoked today).
  
- ❖ IL generally leaves the conditions for grants of nationality to domestic jurisdiction of States.
  
- ❖ Applies to companies (practice varies; CL (locus of incorporation) vs. civil law (main seat of business)).
  
- ❖ Up to each State to determine who are its nationals under its own law & this shall be recognised by other States so far as it is consistent with existing IL (*Hague Convention on the Conflict of Nationality Laws*, 1930 art 1).
  
- ❖ According to State practice, nationality is a legal bond based on a social fact of attachment, genuine connection of existence/interests/sentiments together with the existence of existing rights/duties (*Nottebohm* (1955)).
  
- ❖ A ship has the nationality of the State whose flag they are entitled to fly (*Convention on the Law of the Sea*, 1982 art 91), but there still has to be a genuine link between the State & the ship (*Geneva Convention on the High Seas*, 1958 art 5).
  
- ❖ Invoked where States have an interest in suppressing crimes or avoiding foreign prosecutions.

#### Passive Personality Principle:

- ❖ Jurisdiction in cases where nationals are victims of crimes.
  
- ❖ *US v Yunis (No. 2)* (1988) US – FY (Lebanese national) accused of participation in the 1985 hijacking of a Jordanian plane, did not fly over US airspace but contained US citizens. Held: both universality principle & PP principle provided an appropriate basis for jurisdiction, **PP principle is recognised by the international community but is the most controversial head of jurisdiction.**
  
- ❖ Increasingly broad acceptance (*Hostage-Taking Convention* (1979) art 5).
  
- ❖ In the context of terrorist & other internationally condemned crimes the PP principle meets with relatively little opposition today (*Arrest Warrants* [2002]; Judges Higgins, Kooijmans & Buergenthal).

#### Protective Principle:

- ❖ State can assert jurisdiction over a person whose conduct outside its territory threatens its security or could potentially interfere with the operation of its governmental functions (*US v Gonzalez* (1985) US).
  
  - ❖ Requires no actual or intended effect so long as the interdicted conduct has a potentially adverse effect & is generally recognised as a crime by nations (*US v Gonzalez* (1985) US).
  
  - ❖ Consent of other States not required, but desirable (*US v Gonzalez* (1985) US).
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**Universality:**

- ❖ Criminal jurisdiction based solely on the nature of the crime, without regard to location, nationality of perpetrator or victim or any other connection to the State (*Princeton Principles*, 2001).
  - ❖ **Piracy an offence against the law of nations** – operates on the high seas which no nation has the right/duty to police, without protection of a flag, an enemy of all mankind – any nation may capture & punish in the interest of all (*Lotus*; Judge Moore).
  - ❖ *Convention against Torture*, 1984.
    - Each State party shall ensure that all acts of torture are offences under domestic law.
    - Each State party shall take such measures necessary to establish jurisdiction.
    - Each State party agrees to either extradite or prosecute alleged offenders.
  - ❖ Examples:
    - Mere fact an act violates IL does not raise universal jurisdiction (Judge Higgins).
    - Eichmann (SC of Israel, 1962).
      - These crimes damage vital international interests; impair the foundations & security of the international community; violate the universal moral values underlying the criminal law systems adopted by civilised nations
      - Not all the crimes were international in character, but their harmful/murderous effects were so widespread as to shake the international community (Israel therefore entitled to try the appellant under universal jurisdiction).
    - **Piracy; slavery; war crimes; aggression; crimes against humanity; genocide; torture** (*Princeton Principles*, 2001).
  - ❖ Belgium's Anti-Atrocity Law.
    - Jurisdiction over crimes against humanity & genocide in anywhere.
    - Cases filed against Saddam Hussein; Fidel Castro; Yassir Arafat etc.
    - Butare Four (2001) – murder/assassination in Rwandan War, 1994 (Ds lived in Belgium).
    - *Arrest Warrants [2002]* ICJ - argued the UJ Belgium attributed to itself constituted a violation of the territorial restrictions on jurisdiction & the principle of sovereign equality.
      - President Guillaume.
        - IL recognises ability to prosecute perpetrators when in territory.
        - Not envisaged to extend to anywhere such perpetrators may be.
        - Apart from piracy cases, IL does not accept UJ (or UJ in absentia).
      - Judges Higgins, Kooijmans & Buergenthal: no general rule of positive IL giving States the right to punish crimes against humanity the same way as piracy, but there are clear indications of the gradual evolution of such a principle.
    - Reforms (2003) = Jurisdiction only if:
      - Accused must be Belgian or have primary residence in Belgium.
      - Victim must be Belgian or lived in Belgium for min 3 yrs at time of crimes.
      - Belgium is required by treaty to exercise jurisdiction.
    - *Belgium v Senegal (2012)* ICJ – B filed application instituting proceedings against S in ICJ alleging it had breached obligations under the CAT by failing to prosecute Habre or extradite him to B for prosecution. Held: confirmed S' obligation either to prosecute or extradite.
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# State Responsibility

## ELEMENTS

1. Act/omission is attributable to the State & constitutes a breach of an international obligation (art 2).
2. Characterisation of a wrongful act depends on IL (art 3).

## ATTRIBUTION

- ❖ States are juridical abstractions (they act through intermediaries).
- ❖ Rules of attribution specify which actors may engage the international responsibility of a State.
- ❖ Distinguish from individuals who can enter into obligations on behalf of the State.

### **Organs of the State:**

- ❖ Conduct of any State organ shall be considered an act of that State under IL (art 4(1)).
  - Whatever its legislative, executive, judicial or other functions.
  - Whatever its position within the organisation of the State.
  - Whatever its character as an organ of the central or territorial government.
- ❖ ‘Organ’ includes any person/entity which has that status IAW internal State law (art 4(2)).
- ❖ Article 4 reflects customary IL (*Genocide Case* [2007] ICJ).
- ❖ Conduct of an organ placed at disposal of a State by another State shall be considered an act of the receiving State under IL if the organ is acting in the exercise of its governmental authority (art 6).
  - Needs to be State organ of the sending State.
  - Placed at the disposal of the receiving State.
  - Exercising governmental authority of the receiving State.
  - *X & Y v Switzerland* (1977) ECHR – exercise of ‘delegated powers’ by Swiss police in Lichtenstein, no breach if Lichtenstein responsible as not a party to the Convention. Held: police not placed at disposal of Lichtenstein, were exercising authority of Switzerland (under treaty Switzerland exercised its own customs & immigration jurisdiction in Lichtenstein with the latter’s consent, police in question were governed exclusively by Swiss law).

### **Agents of the State:**

- ❖ Conduct of a person/entity that is not an organ but is empowered by State law to exercise elements of governmental authority shall be considered an act of the State under IL provided they are acting in that capacity in the particular instance (art 5).
  - ❖ Limited to entities empowered by internal law.
  - ❖ Deals with phenomenon of parastatal entities & former State corporations exercising public or regulatory functions (e.g. private security firms running prisons).
  - ❖ Factors relevant? (ARSIWA Commentary).
    - Content of the powers.
    - Manner in which they are conferred upon the entity.
    - Purpose for which the powers are to be exercised.
    - Extent to which the entity is publicly accountable for their exercise.
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**Ultra Vires (art 7):**

- ❖ Conduct shall be considered an act of the State even if the person/entity exceeds its authority or contravenes instructions.
- ❖ Only applies to organs, agents & organs placed at disposal of another under arts 4, 5 & 6 (Crawford).
- ❖ **Officers acted under cover of their status as officers & used means placed at their disposal on account of that status** even though they acted outside their competence & their superiors had countermanded an order (*Caire* (1929) RIAA).
- ❖ *Youmans* (1926) – militia ordered to protect threatened US citizens in a Mexican town instead joined a riot during which the Americans were killed. Held: unlawful acts imputed to the State of Mexico.
- ❖ No indication that Iran Air agent was acting for any other reason than personal profit or the extra payment he demanded had been passed on to Iran Air (**did not act on behalf of their interests**) **therefore he acted in a private & not official capacity** as organ for Iran Air (*Yeager v Iran* (1987)).
- ❖ **In absence of evidence the State made at least an attempt to enjoin/hinder the activity** of the Revolutionary Guards in seizing cash, **these acts are attributable to the new government** (*Rainbow Warrior Arbitration* (1997)).

**Instructions, Direction or Control (art 8):**

- ❖ Conduct shall be considered an act of the State if the person or group is in fact acting on the instructions or under the direction/control of the State in carrying out the conduct.
- ❖ State not responsible for private individuals, mobs or entities (*Zafiro Case* (1925) RIAA).
- ❖ Instructions.
  - Must be given in respect of each operation in which violations occurred, not generally in respect of the overall actions taken by the person or group (*Genocide Case* [2007] ICJ).
- ❖ Direction or Control.
  - Effective Control Test (*Nicaragua* [1986]): US participation in financing, organising, training, supplying & equipping contras, selection of targets & planning the whole operation is insufficient in itself to attribute conduct to US (general overall control insufficient).
  - Overall Control Test (*Tadic* [1999]): degree of control may vary according to the factual circumstances of each case.
  - Genocide Case [2007]: **overall control test stretches the connection which must exist between the conduct of a State's organs & its international responsibility too far**, only attributable under art 8.

**Absence of Government (art 9):**

- ❖ Conduct of a person/group shall be considered an act of a State if they are exercising elements of the governmental authority in the absence/default of the official authorities & in circumstances such as to call for the exercise of those elements of authority.
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### **Insurgency Movements (art 10):**

- ❖ Conduct of insurrection that becomes the new government shall be considered an act of that State.
- ❖ Conduct of an insurrection that succeeds in establishing a new State in part of a territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State.
- ❖ Article operates without prejudice to attribution under arts 4 to 9.
- ❖ Members of insurrectionist movements are like private persons.
- ❖ Well-established principle that no government can be held responsible for the acts of rebellious bodies committed in violation of its authority where it is itself guilty of no breach of good faith or negligence in suppressing the insurrection (*Home Missionaries Society* (1920) RIAA) [**State is under a duty to exercise due diligence**].

### **Adoption (art 11):**

- ❖ If the State acknowledges & adopts conduct as its own then it shall be attributed to it.
- ❖ Policy of maintaining occupation of the Embassy & detention of its inmates as hostages for the purpose of exerting pressure on US government was complied with & endorsed by Iranian authorities; **decision to approve & perpetuate this policy meant that the militants had now become agents of the Iranian State** & therefore their conduct was adopted by it (*Tehran Hostages* [1980] ICJ).

### **BREACH**

- ❖ Primary content of obligations determined elsewhere (*Gabcikovo-Nagymaros* [1997] ICJ).
- ❖ Breach when an act of a State is not in conformity with what it required by that obligation (art 12).
- ❖ Act of a State does not constitute a breach of international obligation unless the State is bound by the obligation in question at the time of the act (art 13).

### **Composite Act (art 15):**

- ❖ Breach of an international obligation by a State through a series of actions/omissions defined in aggregate as wrongful occurs when the action/omission occurs which when taken with other actions/omissions is sufficient to constitute a wrongful act (1).
- ❖ In such a case the breach extends over the entire period starting with the first of the actions/omissions of the series & lasts for as long as they are repeated & remain not in conformity with international obligations (2).

### **Subjective vs. Objective Responsibility:**

- ❖ Objective theory = liability of a State is strict [**ARSIWA & general doctrine/practice lean towards**].
- ❖ Subjective theory = emphasises element of intentional or negligent conduct

### **Serious Jus Cogens Breach:**

- ❖ Serious if it involves gross/systematic failure by the responsible State to fulfil the obligation (art 40(2)).
  - ❖ States shall co-operate to bring a lawful end to any serious breach within meaning of art 40 (art 41(1)).
  - ❖ No State shall recognise as lawful a situation created by a serious breach within the meaning of art 40 not render aid/assistance in maintaining that situation (art 40(2)).
  - ❖ Without prejudice to the other consequences that a breach may entail under IL (art 40(3)).
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**DEFENCES OR CIRCUMSTANCES PRECLUDING WRONGFULNESS**

- ❖ Valid consent precludes wrongfulness in relation to the State that gives it (art 20).
- ❖ Lawful measure of self-defence IAW UNC (art 21).
- ❖ Countermeasures (art 22).

**Force Majeure (art 23):**

- ❖ Irresistible force or unforeseen event beyond State control so performance is impossible.
- ❖ Does not apply if:
  - The situation of force majeure is due in part/whole to the conduct of the State.
  - The State has assumed the risk.

**Distress (art 24):**

- ❖ No other reasonable way to save their own life or the lives of others entrusted to their care.
- ❖ Does not apply if:
  - Situation of distress is due in part/whole to the conduct of the State.
  - The act is likely to create a comparable or greater peril.

**Necessity (art 25):**

- ❖ Can only invoke if the act:
    - Is the only way to safeguard an essential interest against grave/imminent peril.
    - Does not seriously impair an essential interest of State/s or international community.
  - ❖ Does not apply if:
    - International obligation excludes the possibility of invoking necessity.
    - The State has contributed to the situation of necessity.
-