

Topic 7 – State Jurisdiction

(1) Jurisdiction

- State Jurisdiction refers to the power of a state to affect persons and property by prescribing, applying and enforcing its laws
- Jurisdiction can be classified as legislative/prescriptive (the power to make laws), judicial/adjudicative (the power to hear and adjudicate cases) and executive/enforcement (the power to punish or ensure compliance with the law)
- State Jurisdiction is an important attribute of sovereignty – ‘each state possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory’ (ICJ in *Germany v Italy*)
- A state may not exercise its power in another state, without that state’s consent
- ****Key Authority: *The Lotus Case (1927)***
 - L was French Ship which collided on the high seas with B, a Turkish ship
 - B sank and 8 Turkish lives were lost; when L arrived in Constantinople, the French officer in charge was arrested and charged with manslaughter
 - France argued that Turkey did not have jurisdiction to prosecute a French national for a crime committed on the high seas
 - Turkey argued that it was free to exercise jurisdiction unless there was a principle of IL preventing it
 - HELD the Court agreed with Turkey that states are free to act, unless there is a rule of IL prohibiting the action – the ‘Lotus Principle’

(2) Types of Jurisdiction

CIVIL JURISDICTION:

- Regulation of all non-criminal matters, from marriage and nationality to torts and contracts
- Two opposing views:
 - (1) no substantive difference between civil and criminal jurisdiction; excessive civil jurisdiction might be just as much of a violation of another state’s sovereignty as excessive criminal jurisdiction, and many enforcement measures are still coercive in nature (e.g. fines, seizure of property)
 - (2) no limits; cases involving a foreign element are resolved according to the rules of private IL or conflict of laws, and states rarely lodge diplomatic protests complaining of excessive civil jurisdiction
- Most states require some connection with the state, e.g.:
 - Defendant’s presence within jurisdiction at time of service of writ
 - Defendant has assets within the jurisdiction
 - Plaintiff’s nationality or domicile
 - Subject-matter

CRIMINAL JURISDICTION:

- Generally accepted that a state can exercise criminal jurisdiction on one of 5 bases: territory, nationality, passive personality, protection/security of the state, and universality
- Not mutually exclusive – one state might have jurisdiction over the same crime on two or more bases
- States who have it in their domestic laws, can prosecute the accused not in their country if trials *in absentia* are permitted; if not they can request extradition
 - **Rule of thumb is that state who has custody of the offender will have the stronger claim; but this can be challenged
- Rule of double jeopardy applies – if charged/served time in one jurisdiction, cannot be tried for the same offence in another jurisdiction
- Foreign sovereign compulsion defence – Local Court may excuse breach of law (e.g. failure to produce certain documents) if it would involve violation of a foreign law (e.g. where production of those documents is prohibited)

(3) Bases of Criminal Jurisdiction

(a) Territory

- Every state claims jurisdiction over crimes committed in its own territory, including by non-nationals
- Australia has *territorial* jurisdiction over the land which all consulates/embassies are on, but they do not have *enforcement* jurisdiction (due to diplomatic immunity)
- Examples:
 - *R v Turnbull; ex parte Petroff*: grounds of the USSR Embassy in Canberra held to be Australian territory for the purposes of criminal jurisdiction
 - *R v Dinsun; R v Nardin*: MV Tampa was in Australian territorial waters and therefore in Australian territory (not Norwegian territory), *Extradition Act 1988* did not apply
- Crime can begin in one state and be completed in another – e.g. shot fired in State A and kills person across the river in State B, State A (where offence began) has jurisdiction based on subjective territoriality and State B (where offence completed) has objective territoriality
 - Subjective = offence commenced within the state but completed abroad
 - Objective = offence commenced abroad but completed within the state – e.g. *Ward v R; The Lotus Case*

Extended Territoriality and the 'Effects Doctrine'

- Territorial principle progressively extended in legislation; 3 categories of offences:
 - (i) Offences committed wholly or partly on the territory of the prosecuting state
 - (ii) Offences committed wholly outside the state, but which have an actual effect in the state
 - (iii) Offences committed wholly outside the state which may have an effect in the state
 - 'Effects doctrine' comes in here – economic rather than physical effects felt (e.g. securities law), e.g. *Westinghouse Litigation*

(b) Nationality

- State has jurisdiction over its nationals for crimes wherever committed
- Confirmed for Aus in *XYZ v Commonwealth*:
 - XYZ was Aus citizen charged under *Crimes (Child Sex Tourism) Amendment Act 1944* for offences committed in Thailand
 - Challenged constitutional validity arguing a law applying to conduct outside Aus was beyond legislative competence of Parliament
 - HCA rejected this argument; held it was valid
 - '... the nationality principle, which covers conduct abroad by citizens or residents of a state' (Gleeson CJ)
- Premised on the duty of allegiance owed by a national to his/her state
- Widely accepted that permanent residents of Aus are also entitled to nationality
- Extends to both natural (individuals) and legal (corporations, if incorporated in Australia) persons

(c) Passive Personality

- A state may exercise jurisdiction over crimes committed abroad where its national is a victim
- Originally not universally accepted due to 'bubble effect' (alien surrounded by protective and invisible 'bubble' of his/her own national laws)
- But is not included in some treaties and state practice
 - E.g. treaties: *International Convention Against the Taking of Hostages 1979*
 - E.g. state practice: *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth), Division 104 'Harming Australians'
 - E.g. state practice (US): *US v Benitez* for conspiracy to murder US govt agent; *US v Yunis* for aircraft hijacking
 - Confirmed also in *Arrest Warrant Case*: 'passive personality jurisdiction... is now reflected... in the legislation of various countries... and today meets with relatively little opposition'

(d) Protective/Security Principle

- States may punish acts which threaten or injure their national interest or security, even when committed outside the state by non-nationals
- Includes acts against the vital interests of the state, such as treason, counterfeiting, terrorism and espionage
- Controversial as it is limited to offences which involve infringements in vital state interests
- E.g. *Joyce v DPP*: treason; broadcasting pro-German propaganda in Germany during WW2; had fraudulent British passport so argued he was not actually British and thus owed no allegiance; held that holding a British passport meant he did owe allegiance
- E.g. *AG (Israel) v Eichmann*: E in charge of Holocaust; prosecuted in Israel for war crimes against Jewish people; held Israel had jurisdiction under protective principle even though the state of Israel did not exist at the time the offences were committed
- E.g. *US v Benitez*: conspiracy to murder DEA agent
- *Limits/Issues: what is lawful in one state (e.g. free speech) may be a crime against national interest or security in another state

(e) Universality

- Exercise of jurisdiction over particular offences because of their seriousness, or because they may otherwise go unpunished
- No need to establish link between the offender or offence and the prosecuting state, other than the offender being in the state's custody
- Has developed on a case-by-case basis
- Crimes over which universal jurisdiction may be exercised
 - (i) Piracy – attacks on vessels on high seas for private ends
 - *UN Convention on the Law of the Sea*, Art 101: illegal acts of violence or detention or depredation (attacking) committed for private ends, by crew/passengers of one private ship against another on the high seas
 - *Crimes Act 1914* (Cth) Part IV follows the Convention
 - *ICR v Sea Shepherd*: An act is committed for 'private ends' unless the act is committed on behalf of a sovereign state
 - *US v Dire*: actual robbery is not an essential element of piracy, attempted/frustrated robbery will be sufficient
 - (ii) Slavery – exercise of powers of ownership over persons
 - (iii) Genocide – certain acts including murder committed with intent to destroy in whole, or in part, a national, ethnical, racial or religious group
 - *AG v Eichmann*
 - *Nulyarimma v Thompson*
 - (iv) War crimes – serious breaches of the laws of war, e.g. intentional attacks on civilians; and Crimes Against Humanity – acts including murder committed as part of widespread/systematic attack directed against a civilian population
 - *Charter of the International Military Tribunal at Nuremberg 1945*: crimes against peace (i.e. aggression), war crimes and crimes against humanity
 - *War Crimes Act 1945* (Cth) – applies to war crimes committed during WW2, but only applies to Aus citizens/residents
 - (v) Torture – state infliction of pain/suffering to obtain information, etc.
 - *Convention Against Torture 1984*, Article 1
 - *Has to be done by a state official to be a crime under IL
 - *Pinochet (No 3)*: 'the jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed'

(4) Relationship between State criminal jurisdiction, international criminal law, and international criminal courts/tribunals

JURISDICTION OF THE ICC:

- Subject matter jurisdiction = genocide, war crimes, crimes against humanity, aggression (planning, preparation, initiation or execution of an act of aggression)
- Personal jurisdiction (Art 12): crimes committed in territory/by national of a party
- Complementarity (Art 17): 'unwilling or unable genuinely to carry out the investigation or prosecution'
- Individual criminal responsibility (Art 25)
- Irrelevance of official capacity (Art 27)

STATE CRIMINAL JURISIDCTION:

- *Arrest Warrant Case* (ICJ, 2002):
 - Belgium asserted universal jurisdiction in absentia over Minister for Foreign Affairs of DRC; no Belgian victims or other links to accused
 - Can universal jurisdiction be exercised over offence/offender with no connection with the state, and who is not in the custody of the state?
 - HELD: 'a state may choose to exercise a universal criminal jurisdiction in absentia [provided] certain safeguards are in place... [i.e. no violation of immunity, jurisdiction only over 'most heinous' crimes, including war crimes and crimes against humanity]'

DUTY TO PROSECUTE/EXTRADITE:

- Under several treaties, there is an obligation on states to prosecute an offender in respect of certain serious international crimes, or to extradite the offender to a jurisdiction to face trial
- *Belgium v Senegal* (ICJ, 2012): S failed to prosecute or extradite former President of Chad for torture offences; a request for extradition may relieve of the obligation to extradite; S failed in its obligation to prosecute/extradite within a reasonable time

EXTRADITION:

- Extradition = the surrender of persons accused or convicted of offences; process of one state sending to another a person charged with (or convicted of) an offence under the law of the requesting state
- No duty in CIL to extradite, in the absence of an extradition treaty
- 'Double criminality': the crime for which extradition is sought must be a crime in both states at date of commission of offence (*Pinochet (No 3)*)
- *Extradition Act 1988* (Cth):
 - (a) other country sends request to Aus through diplomatic channels
 - (b) goes to AG who 'may in his or her discretion) inform Magistrate that request has been received (s 16)
 - (c) AG must not pass request if of the opinion the person is an 'extraditable person'
 - (d) Magistrate conducts proceedings to determine whether person is eligible for surrender, i.e. that (s 19):
 - (i) double criminality rule is satisfied
 - (ii) there are no 'extradition objections'
 - (iii) guilt or innocence is irrelevant
 - (e) if magistrate is satisfied, AG then decides whether or not to extradite (s 22)

RELEVANCE OF ILLEGALLY OBTAINED CUSTODY:

- Different views on whether illegally obtained custody renders unlawful the exercise of criminal jurisdiction by a domestic/international criminal court

- Domestic courts:
 - *AG (Israel) v Eichmann*: held illegality of arrest irrelevant
 - *State v Ebrahim*: accused abducted; held state had no jurisdiction, to protect rights of individual and respect state sovereignty
 - *Moti v R*: HCA stayed prosecution of former AG of Solomon Islands on child sex offences as he was unlawfully removed from Solomon Islands
- International criminal courts:
 - *Prosecutor v Nikolic*: ‘There is a legitimate expectation that those accused of these crimes will be brought to justice swiftly... this legitimate expectation needs to be weighed against the principle of State sovereignty and the fundamental human rights of the accused’

Problem Question Summary – Jurisdiction

- a) State jurisdiction over cases with an international element can be grounded in five possible bases:
 - a. Territory (including extended territoriality)
 - b. Nationality
 - c. Passive personality
 - d. Protective/security principle
 - e. Universality
- b) Priority is usually given to the State which has custody of the offender
 - a. In the absence of custody, a state may seek to extradite the person in question
 - b. No customary obligation to extradite ° treaty law is typically the only grounds for successful extradition claims

Problem Question Summary – Common Conditions/Grounds for Refusal to Extradite:

- a) Conditions
 - i. Must be minimum penalty or time left to serve
 - ii. Double criminality rule
 - iii. Speciality – person will only be prosecuted for the specified conduct
- b) Grounds for refusal
 - i. Political offences
 - ii. Person will be prosecuted or punished, or prejudiced at trial, on account of his/her race, religion, nationality or political opinions
 - iii. Person will be subjected to torture
 - iv. Person will be subjected to the death penalty
 - v. Offence under military law
 - vi. Person has been punished, acquitted or pardoned in either country for the same conduct
 - vii. Surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, due to e.g. the person’s age or state of health