

TOPIC 5 - JURISDICTION

Jurisdiction: can be exclusive, concurrent, civil or criminal. Criminal = prohibiting certain conduct by making it a criminal offence, prosecuting and punishing offenders. Civil = everything else. Three kinds: Legislative/prescriptive – power to make laws. Judicial – power of municipal courts to try a case with a foreign element. Executive/enforcement – power to ensure compliance with laws.

Civil Jurisdiction – permit a municipal court to exercise jurisdiction over proceedings with a foreign element?

Most states require some connection with the state; defendant's presence within jurisdiction at time of service of writ, defendant has assets within the jurisdiction, plaintiff's nationality or domicile, subject-matter. Usually non-issue in practice. *Brownley* – same as crim. *Oppenheim* – sufficiently close connection w/subject matter. *Mahn* – substantial connection. *Akhurst* – 'acid test': presence/absence of diplomatic protest.

Alien Torts Claims Act (ATCA) means US courts have jurisdiction in *any civil action* by non-nationals for violations of international law. 'official torture' (*Filartiga*), genocide, war crimes, crimes against humanity (*Koadic*). More recent: Most serious international crimes (*Sosa*) Presumption against extra-territoriality – does not apply for wrongs committed outside US (*Kiobel*)

Criminal Jurisdiction

Basic principle: no state may exercise its jurisdiction in the territory of another state unless permitted to do so by a rule of IL.

Concurrent jurisdiction – Who has the best claim? 'first bite of the cherry' (state that has custody of offender), rules against double jeopardy, foreign sovereign compulsion defence – local court may excuse breach of law if it would involve a violation of a foreign law.

Territoriality Principle: Every state claims jurisdiction over crimes committed on its own territory (including by non-nationals). Subjective → commenced within state, but completed abroad. Objective → commenced abroad but completed in state (*Ward v R, Lotus*). Prescriptive jurisdiction exercised by the state in which criminal offence was completed, or where the constituent effects of the offence took place (*Lotus*). Embassy is territory of receiving not sending state (*R v Turnbull*). Boat/ships not necessarily floating islands of the country – in territorial waters subject to jurisdiction of the state (*Disun, Nardin*). Extra-territoriality: on the territory, outside but actual effect on state, outside but MAY have an effect on state (Effects Doctrine). NSW Crimes Act 10B,C → US Sherman Act: securities and anti-trust law.

Nationality Principle: A state has jurisdiction over its nationals for crimes wherever committed.

Specific law which apply to citizens wherever they are (*X v Commonwealth*), *Crimes (Child Sex Tourism)*, *Crimes (Aviation) Cth*

Passive Personality Principle: A state may exercise jurisdiction over crimes committed abroad where its national is the victim. "bubble effect" – not considered in Harvard Draft. Huge infringement on state sovereignty, open to abuse, may subject a domestic person to a foreign law in their own country that they weren't aware of. Usually confined to most serious offences: terrorism & drug trafficking. Conspiracy to murder US govt agent (*Benitez*) Aircraft hijacking (*Yunis*) Offences Against Aus Cth 2002. Growing trend in treaties (*Int Convent. On Taking of hostages 1979*), domestic legislation and state practice.

Protective Principle: States may punish acts which threaten or injure their national interest or security, even when committed outside the state by non-nationals. Controversial, limited to offences which involve infringements on vital state interests. Treason (*Joyce v DPP*), Crimes against Jewish people/humanity (*Eichmann*), conspiracy to murder a DEA agent (*Benitez*). Confined to grave offences against international law, inadequacy of domestic legislation inclusion. Issues where competing jurisdiction & national interests – also open to abuse.

Universality Principle: No need to establish nexus between state, victim and/or accused. Seriousness and risk of unpunished. So serious they pose a threat to international order as a whole – in practice only exercisable with custody (*Arrest Warrant*). No definitive list SP/QJ not extensive nor uniform. Fear of impunity otherwise. Is an 'offer' to exercise jurisdiction – may depend on peculiar constitutional arrangements and being crime in the domestic law (*Nulyarimma*). Belgium/Spain: some connection required.

Piracy: illegal acts of violence or detention or depredation committed for private ends on the high seas (2 ship req.). US: Attempted/frustrated robbery sufficient (*Dire v US*), US: Ramming ships was piracy and private = anything but governmental purposes (*Sea Shepherd*). Commentators → political motivations not piracy. Attacks from on board and for political motivations = maritime terrorism (*Santa Maria, Achille Lauro incidents*)

Aircraft hijacking: Any person on board aircraft who by force or intimidation attempts to unlawfully take control of the aircraft, no nexus necessary (*US v Yunis*)

State Torture: severe mental/physical pain or suffering, intentionally inflicted, obtaining from him or 3p info, confession, punishing, intimidating, coercing for any reason based on discrim. of any kind by public official or other person acting in an official capacity. (1984 Convention Against Torture, Art 1(1)). – No nexus, *Pinochet*. RS ICC art 7.

War Crimes: violations of war customs (*Nuremburg 1945*), grave breaches of 1945 Geneva Convention, unnecessary suffering, wilful killing, torture, hostages. (Rome Statute of ICC art 8) Huge variety → not yet settled. Certainly most serious. Criminal Code 1995 (Cth) implementing Rome Statute (1998).

Crimes against humanity: widespread or systemic attacks directed against any civilian population (RS.7) Torture, rape, forced prostitution, forced disappearance, apartheid. No single exhaustive definition. ALSO: Slavery included in this definition?? (Princeton Principles 2001)

Genocide: Acts committed with intent of destroying in whole or in part a national/ethnic/religious group (Genocide Convention Art 2). Israeli state/Jewish people (*Eichmann*) CF Serbian killing of Bosnian Muslims in 1995 – objective wasn't intent to destroy the group in whole or part.

TOPIC 9 - DISPUTE RESOLUTION

UN Charter Article 1 (1): Maintain international peace and security, and to that end...to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

UN Charter Article 2(3): All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

UN Charter Article 33(1): any dispute...endanger the maintenance of international peace and security...first seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. (2) SC...call upon parties to settle their dispute by such means.

International Arbitration: 'settlement of differences [disputes] between States by judges of their own choice, and on the basis of respect for law' (*Hague Convention 1899*) "a procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted [and by] arbitrators (not necessarily judges)...freely selected by the parties (*ILC definition 1953*). Panel of 3 common. Each select 1 and 2 arbitrators choose a referee. Proceedings and award are confidential unless agree otherwise. Binding on the parties and constitutes *res judicata* unless otherwise agreed (*Maritime Delimitation Qatar v Bahrain*). Permanent Court of Arbitration in peace palace, more a facility can provide arbitrators/help select. Includes entities other than states.

International Court of Justice (ICJ): Principal judicial organ of the UN (*Statute of ICJ Art 1*) 15 judges no more than 1 from each nation (3.1) 9 year terms (4.1), one from each of P5 of SC.

Only states can be parties (34), decision is binding only on parties and not precedent (59) all UN ipso facto parties to ICJ statute (93) but can't hear a case unless consented to jurisdiction; in a treaty, optional clause declaration (36.2), special agreement (compromis) in relation to specific dispute, unilateral application (40) – other must then consent (38.5)

Optional clause (36.2) declarations: unconditional, without limit for duration or qualified with reservations (*Nicaragua*)

Reciprocity: either party, whether or not they made the reservation in their declaration, may rely on narrower reservation to exclude or restrict jurisdiction (*Norwegian Loans; Interhandel Case*) 1. Find common ground, 2. Lesser of the two submissions. Can't force your reservation on the other party. **Self-judging?** Contrary to 36(6) – ICJ determines if they have jurisdiction.

Criticised heavily by; *Lauterpacht* and *Guerrero (NL)* can be severed only if not essential to party's consent (*IHI; NL*). In practice they stand; evidence of state practice/opinio juris (*Schwebel – Nicaragua*)

Take effect immediately, terminated within their terms, reasonable notice usually required – 3 days insufficient (*Nicaragua*)

Forum Prorogatum: if a state has not recognised ICJ jurisdiction at the time an application was filed against it, can still accept jurisdiction (*Corfu Channel*)

Procedure: parties submit written pleadings/memorials, counter-memorials etc, make oral submissions (43). Generally public, usually *en bloc* all 15 plus ad hoc if no nationality judge of a state party.

Admissibility: whether claim is inadmissible on some other ground other than its ultimate merits (failure to exhaust local remedies/those provided in treaty (*Georgia v Russian Federation*) nationality of claims), moot/hypothetical, non-justiciable (political not legal), applicant has no standing etc.

Absent Parties – not a bar to proceedings (*US in Nicaragua, France in Nuclear Tests*)

Third States: Absence of interested state essential to case, rights & obligations very subject matter = indispensable 3rd party (*Monetary Gold, Indonesia in East Timor Portugal v Aus*). Legal interests merely affected and not subject matter = admissible (*Certain Phosphate Lands in Nauru*).

State with legal interest may ask to intervene (62, *Greece – Germany v Italy*), or concerns interpretation of a treaty to which it is party, decision then binding on that party (63).

Provisional Measures: (41) may be issued by ICJ in relation to contentious jurisdiction. They are binding (*LaGrand*), preserve rights of either party, to prevent irreparable injury (*Genocide Convention cases, LaGrand, Avena, Belgium v Senegal*). Very rare in practice and high threshold to satisfy – urgency and irreparable damage, usually some human rights issue (execution).

Effect: binding on parties only (59), no right of appeal (60), only seek interpretation (60) or revision if new evidence (61).

Transferred PCIJ jurisdiction: Available under *jurisdictional clause* (37) and under *optional clause declaration* (36.5) provided the acceptance of PCIJ jurisdiction is still in force. Confirmed in *Nicaragua*.

Advisory Jurisdiction – Not binding, but AO as influential as other ICJ decisions.

ICJ has advisory jurisdiction on any legal question at request of authorised UN Bodies (65.1) – UN Organs (UNGA, UNSC, Economic & Social Council), Specialised agencies (World Health Organisation etc.) GA and SC can request on any legal question (96). Discretion to, but can only refuse for 'very compelling reasons' (*Legal consequences of construction of wall in occupied Palestinian territory*). In practice has never refused, except for lack of jurisdiction (WHO request nuclear weapons).

No power to review SC decisions – but can determine if SC resolution is beyond power *ultra vires*.

No general power of review (*Lockerbie*) – may incidentally review legality of decisions of UN organs when raised in proceedings.