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State's Jurisdiction: Prescription on Territoriality and Nationality

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Abstract

This paper discusses the rules under which state's prescriptive jurisdiction is limited and the grounds for which states legislate on matters with considerations on where the offence occurred, whether in its territory or extraterritorial, and the nationality of persons involved. The author discusses the debatable, recognised and exceptional grounds under the international law, in the exercise of state's jurisdiction.

Introduction

Jurisdiction refers to the states' power under international law to institute regulations on situations, property and people in lieu with the guidance of the basic principles of state sovereignty, independence, non-domestic interference and state-quality.^[1]

State jurisdiction is the control that a state possesses, to legitimately formulate (*make*) and implement (*enforce*) law (*rules*).^[2] The capacity to make law is referred *as prescriptive jurisdiction* while the capacity to ensure compliance is referred to as *enforcement jurisdiction*. Thus, the major concern of this discussion on the capacity of states to make laws that governs situations, people and property residing within or outside the state's territory. Therefore, what comes to question and debate is the bases for proscription of laws is not only on whether it is within and outside state's territory, but also the bases for nationality (*whom*) or place for which the law covers (*territory*); and the bases of the law's legality under the framework of international law.

While states may prescribe, there are limitations to the enforcement of the law. Most importantly is the '*Territorial limitation*' in *enforcement jurisdiction*. In this case states can try an offence committed in their territory by suspect (citizen and foreigners) but cannot enforce if the suspect is abroad. And the pathway to trial is through extradition to bring the suspect back to the state. Another is '*Jurisdictional limitation*' in *enforcement*. In this, state can apprehend suspect residing in their territory for offence committed outside their territory but cannot try them in their territory because the suspect is her citizen and did not commit the crime in her territory.

Domestic jurisdiction

This is the supremacy of states over its own territory. And cannot interfere in the domestic affairs of other state. This limits states from infringing on the international law by the principle of non-interference. Although unlike in traditional times, issues like human rights and war crimes, through international law, have made domestic jurisdiction to be relative in some extent. Thus, municipal laws neither be used as a justification for the breach in the exercise of government function between states (public international law) nor in conflict of law cases (private international law). In the exercise of domestic jurisdiction, the organs of the state have its limitation as to executive judicial and legislative jurisdiction.^[3]

The legislators are to make laws that are binding within its own territory and may legislate certain laws on her element abroad if it does not undermine the international law and the municipal laws of the country abroad.

For example, state may legislate compulsory tax her citizen abroad or foreigners within but cannot legislate compulsory use of products made in its country on her citizen abroad or foreigners within its territory. The

* Julius has background in conflict and disaster management, with an interest in global governance and security.

[1] Shaw, 'Jurisdiction', 645.

[2] Oxman, 'Jurisdiction of States', 546.

[3] Shaw, 'Jurisdiction', 646-47.

executive carryout state functions within its territory (maybe outside its territory without the consent of the host state).^[4] However, apprehension of suspects and illegal entry either by the security agents or government personnel contravenes international law. An example of this is the Umaru Diko's abduction by the Nigerian security services in 1984 in London.

Regarding the power of a state to institute a trial wherein the presence of a foreigner has faced contestation especially in cases of criminal jurisdiction. More often, the contestation of jurisdiction is on cases that has to do with criminal law than civil law. Relatively, international law deals with territorial contestation of criminal jurisdiction while civil jurisdiction is under the national control of states. This is usually so because states consider cases of crime as more audible, denting and implicative when tried outside its territory while civil cases do less harm to states' image or branding. Thus, the emphasis of this research will be on the limitations of prescriptive criminal jurisdiction of states.

ICC and Territorial Jurisdiction

The ICC (hereinafter as 'the Court') in some cases exercise jurisdiction over cases on the provision that the state 'where the offence occurred' is a party to the Statute, as guided by the Rome Statute.^[5] Vagias noted that most of the criminal prosecutions in the Court relied on the basis of territoriality^[6] but there is limited jurisdiction of the ICC's territorial jurisdiction. The Court's argument is based on not only territoriality but also nationality^[7]; as observed in cases of crimes on *Bemba Gombo*. The binding decision^[8] on Gombo is on the bases that the crime was committed on a state's 'Central African Republic' territory that is a party to the Court and the suspect is a national of a state 'DRC' that is also a signatory.

Another instance, where the Court was challenged based on territorial jurisdiction was the *Callixte Mbarushimana* case^[9]; wherein DRC filed referral to the Office of the Prosecutor with the intent of disallowing investigations into all-encompassing crimes committed within the region. Thus, State's cannot limit the Court's investigation to only certain crime wherein the offending took place, on the provision that the court is acting based on the crisis situation as a whole.^[10]

Grounds of Jurisdiction

The grounds that have not been debated upon is that state can exercise jurisdiction within its territory over any offence.^[11] Another is that state can exercise jurisdiction over its citizen abroad^[12]. Based on the Convention on the Rights and Duties of States^[13], states' primary possession are nationals and territory. Thus, both are grounded on the bases of sovereignty^[14], and preconditional jurisdictions in the Rome statute.^[15]

Territorial Jurisdiction

In *Schooner Exchange* and the *Island of Palmas*, jurisdiction of state over its territory was noted to be absolute and exclusive.^[16] However, the International Covenant on Civil and Political Rights and African Charter on Human and Peoples' Rights has challenged such territorial jurisdiction especially on the basis

^[4] Shaw, 650.

^[5] International Criminal Court, Rome Statute of the International Criminal Court, pt. Article 12(2)(a).

^[6] Vagias, 'The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC', 54.

^[7] International Criminal Court, Rome Statute of the International Criminal Court, pt. Article 12(2)(b).

^[8] International Criminal Court, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo at 15.

^[9] International Criminal Court, Warrant of Arrest for Callixte Mbarushimana at 10.

^[10] International Criminal Court, Defence Challenge to the Jurisdiction of the Court at 15, 27.

^[11] Simpson, 'The Ideal of the Rule of Law: Regina v. Keyn (1876)'.

^[12] United Kingdom Supreme Court, R (Smith) v Oxfordshire Assistant Deputy Coroner, 1 AC 65 at 238 per Lord Collins.

^[13] Pan American Union, Montevideo Convention on the Rights and Duties of States, 165 LNTS 19 Article 1.

^[14] United States Supreme Court, The Schooner Exchange v McFaddon, 11 US 116 at 136 per Marshall CJ.

^[15] International Criminal Court, Rome Statute of the International Criminal Court, pt. Article 12(2).

^[16] United States Supreme Court, The Schooner Exchange v McFaddon, 11 US 116 at 136 per Marshall CJ; Permanent Court of Arbitration, Island of Palmas (Netherlands v United States of America), II at 838.

of human rights related issues^[17] as observed in some cases^[18]. Of importance is to note that states jurisdiction over their territory is not absolute as in the case of *Mr. Gabriel Inyang & Anor v. Fed. Republic of Nigeria*, wherein the ECOWAS Community Court of Justice ruled Nigeria to be in breach of Article 7(1)(a) and (d) of the African Charter^[19].

Similarly, the East African Court of Justice ruled in the case of *Minani Evarist v. United Republic of Tanzania* that Tanzania violated Article 7 and calls for compensation to the plaintiff but did not up-turn the 30 years imprisonment decision of the defendants' court^[20]. And in the case of *African Commission on Human and Peoples' Rights V. Republic Of Kenya* the court declared that the respondent state Respondent has violated Articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the Charter and ordered redeeming measures^[21]. Thus, while decision at the apex national court of states may not be admissible, appealed or adjudicated at the international courts^[22], it can, however, be challenged at the regional or international courts on the provision of breach of human rights.

Human rights laws create an extent of detachment of states' jurisdiction on territorial jurisdiction. In cases wherein, states do not possess legal title over the territory which they have control on, the state is, still, assumed to have jurisdiction over such territory.^[23] Similarly, the European Court of Human Rights, in 2004 over *Issa v Turkey* case, reiterated the fact that state' jurisdiction is primarily territorial but persons (of any national) are within the state's jurisdiction wherein the state have control of its territory.^[24]

Persons within the control of state authority is under the territorial jurisdiction of the state even if they are not within the state's territorial control.^[25] This is in agreement with the argument of Mann whose advocacy was on the premise that what 'legally' belongs to the state is under state's jurisdiction.^[26] Nevertheless, in criminal law, jurisdiction remains intrinsically territorial^[27]. This exception of international criminal offences makes territorial jurisdiction relative^[28].

In *Farrendon* case, Farrendon -a British soldier was shot by an Irish within the boundary of Northern Ireland and Irish Free State (in UK). The discourse was the territory where the offence will be applicable, considering the shot was fired from Irish Free State and injured someone in Northern Ireland. The ruling was objective that the crime was committed both in Irish Free State and injured someone in Northern Ireland.^[29] Thus, in any scenarios like the Farrendon case, where crime transcends from one country to the other, territorial jurisdiction can be claimed by both states on crime committed in their territory.

The territorial jurisdiction of a state pertaining to crime partially committed in its territory is founded on the principles of subjective and objective territoriality. The former recognises that the state has territorial jurisdiction of an offence was started in its territory even if the crime was finally completed or ended in another state's territory.^[30] While the latter recognised states' claim to territorial jurisdiction on the basis

^[17] United Nations, International Covenant on Civil and Political Rights, pt. Article 2.; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter') Article 12, paragraph 4.

^[18] United States Supreme Court, *Kiobel v Royal Dutch Petroleum Co*, 569 US 108; International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* | International Court of Justice; ECOWAS Community Court of Justice, *Wing Commander Danladi A Kwasu v. Federal Republic Of Nigeria*, ECW/CCJ/JU.

^[19] ECOWAS Community Court of Justice, *Mr. Gabriel Inyang & Anor v. Fed. Republic of Nigeria*, ECW/CCJ/JU.

^[20] African Court on Human and People's Rights, *Minani Evarist v. United Republic of Tanzania*, ACHR/APP/0 at 16, 19.

^[21] African Court of Human and People's Rights, *African Commission on Human And Peoples' Rights v. Republic Of Kenya*, 006/2012 at 68.

^[22] East African Court of Justice, *East African Civil Society Organization Forum v The Attorney General of the Republic of Burundi & 2 Others*, 5 of 2015 at 11; ECOWAS Community Court of Justice, *Musa Leo Keita v. Mali* at 65; ECOWAS Community Court of Justice, *Sikiru Alade v. Federal Rep. Of Nigeria*, ECW/CCJ/AP; ECOWAS Community Court of Justice, *Madam Isabelle Manavi Amenganvi v. Rep. Of Togo*, ECW/CCJ/AP.

^[23] European Court of Human Rights, *Al-Jedda v United Kingdom*, 53 EHRR 23 at 85–86.

^[24] European Court of Human Rights, *Issa v Turkey*, 156 ILR 1 at 67.

^[25] European Court of Human Rights, *Öcalan v Turkey*, 156 ILR 30 at 91.

^[26] Mann, 'The Concept of Jurisdiction in International Law', 45.

^[27] Crawford and Brownlie, *Brownlie's Principles of Public International Law*, 457.

^[28] United Kingdom House of Lords, *Compania Naviera Vascongado v SS Cristina* at 496–497 per Lord Macmillan.

^[29] Northern Ireland Court of Appeal, *County Council of Fermanagh v Farrendon*, 2 IR 180 at 496–97.

^[30] Netherlands Supreme Court, *Public Prosecutor v DS*, 26 ILR 209.

that (*although the crime started in another state but*) crime were committed or finalised in its own state. And this objective jurisdiction has being globally applied without dispute^[31].

Thus, states have territorial jurisdiction wherein any constituent part of a crime was committed in its territory^[32]. In the determination of the extent to which constituent part of a crime was committed in one territory or not, the court has the jurisprudence for determination on the basis that there is a 'substantial and real link'^[33].

Nationality Jurisdiction

Nationality jurisdiction is state's jurisdiction over its own nationals living or staying abroad. And just like the territorial jurisdiction, it has not been disputed^[34]. For example, in a case of *Guinea v DRC*; Guinea laid nationality claim against DRC in 1998, on Ahmadou Sadio Diallo who was unjustly imprisoned in DRC and ICJ held that unlawful arrest, detention and expulsion of a foreigner is injurious to the suspect's state^[35].

Under the international law and as recognised in the case of *Benson Olua Okomba v. Republic. Of Benin*, states can be held responsible for internationally wrongful acts committed by their national as entailed by the state's jurisdiction on internal responsibility and in conduct of an act or omission.^[36]

A recent case of *Anudo Ochieng Anudo v. Republic of Tanzania* held that the right to a nationality of a suspect (foreigner) is not questionable in the exercise of territorial jurisdiction of states abroad wherein the suspected offender occupied.^[37]

The justification of nationality jurisdiction is on the basis to disallow a State from "transforming into a safe refuge for its own nationals who have committed crimes outside its frontiers".^[38] Furthermore, additional consideration is on the bases that nationality is a "legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."^[39]

While international law approves the claim of nationality jurisdiction, it however does not compel the exercise.^[40] And thus the question of at what point should a suspect be considered a national of a state for jurisdictional basis? 'Prior, at the time of offence or after the offence'. It is argued that consideration for after offence violates the accused rights not be subjective to retrospective criminalization^[41]. Under diplomatic norm, nationality claims that are exclusive of 'prior to the offence' is not supported^[42]. However, international law does not disapprove granting of nationality status after the offence was committed^[43] as such right is on states domestic affairs and prerogative. Example of this is the granting of nationality to whistle blowers which is common in recent times.

Principles of Jurisdiction

The principles of protection, passive personality and universality are accepted grounds under which states can claim jurisdiction. Even though States cannot generally exercise jurisdiction over foreigners for

^[31] Cedric, 'Territorial Jurisdiction Over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law', 298–202.

^[32] Crawford and Brownlie, *Brownlie's Principles of Public International Law*, 458.

^[33] Israel Supreme Court, *Rosenstein v Israel*, ILDC 159 at 46.

^[34] Sri Lanka Court of Appeal, *Ekanayake v Attorney-General*, 87 ILR 296 at 300–301.

^[35] International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* | International Court of Justice.

^[36] International Law Commission, UN Draft Article on Responsibility of States for Internationally wrongful acts Article 122 ; ECOWAS Community Court of Justice, *Benson Olua Okomba v. Republic. Of Benin*, ECW/CCJ/JU at 20–21.

^[37] African Court on Human and People's Rights, *Anudo Ochieng Anudo v. Republic of Tanzania*.

^[38] Mexico Supreme Court, *Re Gutierrez*, 24 ILR 265 at 266.

^[39] International Court of Justice, *Nottebohm Case (Liechtenstein v Guatemala)*: Second Phase Judgment, 4 at 23; Oliver, 'Nationality', 1–3.

^[40] Zimbabwe Supreme Court, *S v Mharapara*, 1 SA 556 at 559.

^[41] Roger, 'Universal Jurisdiction: Clarifying the Basic Concept', 742–742.

^[42] United States International Claims Commission, *Kren Claim*, 20 ILR 233 at 234.

^[43] Gillian, *International Law: Contemporary Principles and Practices*, 439.

conduct committed outside their state,^[44] the principles of protection, passive personality and universality creates a base for jurisdictional claim on such foreigner.

The Protective Principle

Protective principle allows states to claim jurisdiction over extraterritorial actions that threatens its own state security.^[45] States enjoy such window for jurisdictional claim,^[46] as a protection from issues that can undermine the national security of the state.^[47]

For instance, the use of protective principle regarding the state's proscriptive jurisdiction, is the legislation on the listing or proscription of an organizations in or outside its own territory as terror organization. Thus, apart from legislative jurisdiction which is the concern of this study, states can hold executive and judicial jurisdiction based on right to self-defence but must be in certain considerations (*pursuant to UNSC decision, international humanitarian laws, 1949 Geneva convention, 1979 Hostage Convention, 1970 Hague Aircraft Hijacking Convention, but with strict regards for issues like rights of war prisoners/criminals*) especially in cases of international terrorism. An example of this is the US and ally's involvement in the 1990 to 1991 Persian Gulf War among other military interventions.

Passive Personality

This allows states the use of jurisdiction on the basis that the suspect staying in its territory, said to have committed offence abroad, and it (*the offence*) has effect on its own citizen or national.^[48] While this is internationally accepted especially in international crime^[49]; Judge Moore's position on Lotus case challenges passive personality on the basis that such principle would permit such citizen of state to carry with them their own state laws into other state abroad such that those (persons abroad) that associate with such citizen will binding on the law that such a citizen is carrying^[50]. This was heavily critiqued by the Cutting case on the basis that it would create confusion and destruction to liberty^[51]. However, under certain international conventions like Hostages Convention, the passive principle is valid^[52].

Universal Jurisdiction

This principle was in earlier times, valid on the cases of piracy^[53] but in recent times, applicable to issues related to genocide, slavery, torture, war crimes^[54]. However, Schabas argued that the legality upon the universality of war crimes is yet to be properly established^[55]. Also, the African Union recognised that the court of African states have jurisdiction on trials over international crimes like *war crimes genocide, trafficking in drugs crimes against humanity, piracy and terrorism* committed irrespective of the national of the suspect^[56]. It further stated that the court of the prosecuting state shall accord priority to the state (*and court*) in whose territory the crime was committed (*on extradition consideration and jurisdictional immunity*)^[57].

Nevertheless, several high-level cases of such crimes have being tested under the jurisdiction of the Court (*Rome Statute*)^[58]. For instance, the States that have ratified the universal jurisdiction laws have received

^[44] Brazil Supreme Federal Tribunal, *Brandão & Company v Francisco Canales*, 1 Ann Dig at 108–9.

^[45] United Kingdom Supreme Court, *R (Smith) v Oxfordshire Assistant Deputy Coroner*, 1 AC 65 at 263.

^[46] Crawford and Brownlie, *Brownlie's Principles of Public International Law*, 462.

^[47] Australia Supreme Court, *Giles v Tumminello*, SASR 96 at 102.

^[48] Shaw, 'Jurisdiction', 482; France Court of Appeal, *Gaddafi v. France*, 125 ILR 49 at 496; United Kingdom Supreme Court, *R (Smith) v Oxfordshire Assistant Deputy Coroner*, 1 AC 65 at 263.

^[49] France Court of Appeal, *Gaddafi v. France*, 125 ILR 49 at 496; United States District Court for the District of Columbia, *United States of America v Yunis*, 924 F 2d 1.

^[50] Permanent Court of International Justice, *SS Lotus (France v Turkey) (Judgment)*, series A at 92.

^[51] Mexican Court, *Cutting's Case*, II Moore 2 at 232.

^[52] United Nations, *The International Convention Against the Taking of Hostages Article 9*.

^[53] United Kingdom Court, *Re: Piracy Jure Gentium*, AC 586 at 589.

^[54] Government of Germany, 'The Jurisdiction of the International Criminal Court: An Informal Discussion Paper', 2–3.

^[55] William, *The International Criminal Court: A Commentary on the Rome Statute*, 279.

^[56] African Union, *African Union Model National Law On Universal Jurisdiction Over International Crimes*, 3–4.

^[57] African Union, 3–4.

^[58] Shaw, 'Jurisdiction', 485–86; Jean-Marie and Louise, *Customary International Humanitarian Law: Rules Vol 1 rule 157*.

referrals of cases from the Court^[59]. The inability of some states to prevent impunity and prosecute war crimes makes the exercise of universal jurisdiction appropriate for consideration outside the territory of the state wherein the offence occurred^[60]. For example, the case against Libyan leader Muammar al Gadhafi and Sudanese leader Hassan Al-Bashir on the basis of war crimes and genocide within their respective territories validates the claim of universal jurisdiction^[61]. Africa's regional courts have also received referrals. The case *Dame Hadijatou Mani Koraou V. Republic of Niger* found Niger guilty of slavery^[62].

It is important to note that, upon ratification and enactment of the ICC Act by states, South Africa up-held the universal jurisdiction on investigation without the presence of the accused, provided that such investigation does not infringe on the sovereignty of other state. Uganda and Mauritius, on the other hand enacted jurisdiction to investigate suspects in absentia. The nationalised ICC Act in Mauritius strongly claim that acts committed outside its territory shall be considered to have being committed within its territory provided the accused is present in Mauritius. Kenya having nationalised the ICC Act, provides for not only the elements of universal jurisdiction but also jurisdiction over offence committed during prosecution which includes bribery of official, intimidation of witness, process obstruction and forgery of evidence. Kenya affirmed that in exercise of the universal jurisdiction, the accused must be within Kenyan soil for investigation and prosecution.^[63]

The Effects Doctrine

Vagias argues that the 'effect doctrine' is one of the newest variants of territorial jurisdiction. He stated that this variant is on the basis that States have jurisdiction on actions abroad which have effect within the state's territory. ^[64] The earliest use of the doctrine, or its origin was in the 1945 Alcoa case which of 1945, which appended that states may hold an individual liable for conducts outside its own territory if such conduct has consequences on its territory.^[65]

For example, the US trade law^[66] and common law^[67] upholds jurisdiction over conduct of foreign commerce which have effect on US commerce. The doctrine covers *effects that are intended and substantial*^{[68][69]}. But this have being criticised by Ryngaert in 2015^[70]; and in earlier times, the EU Court^[71] and many states instituted legislation to limit the US jurisdictional claims^[72]. Such legislative action includes but not limited to the 1980 Trade Interest Act of the UK and 1976 Foreign Proceedings Act of Australia^[73].

Conversely, after long period of protest against the doctrine, the EU Court held in *Gencor* case, that the doctrine be applicable to public international law^[74] especially when the effect is immediate and substantial. Similarly, in *Mharapara* case, an employee of the Zimbabwe Mission in Belgium stole money from the mission; considering that nationality jurisdiction is not applicable to the Zimbabwe law, and that

^[59] International Criminal Tribunal for Rwanda, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands at 13–15.

^[60] Spain Supreme Court, Peruvian Genocide Case, 24 ILM 120 at 1205.

^[61] Alexis, Rhoda, and Marjorie, 'International Criminal Court Cases in Africa: Status and Policy Issues'.

^[62] ECOWAS Community Court of Justice, *Dame Hadijatou Mani Koraou V. Republic of Niger*, ECW/CCJ/JU.

^[63] Dube, 'The AU Model Law on Universal Jurisdiction: An African Response to Western Prosecutions Based on the Universality Principle', 466–75.

^[64] Vagias, 'The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC', 24.

^[65] United States Court of Appeal for the Second Circuit, *United States v Aluminum Co of America [Alcoa]*, 148 F 2d 4.

^[66] United States Court of Appeal for the Second Circuit, *Foreign Trade Antitrust Improvements Act* 15 USC § 6a.

^[67] United States Supreme Court, *Hartford Fire Insurance Co v California*, 509 U.S. 7 at 796.

^[68] United States Court of Appeal for the Second Circuit, *National Bank of Canada v Interbank Card Association*, 666 F 2d 6 at 8.

^[69] United States Court of Appeal for the Second Circuit, *Kruman v Christie's International*, 284 F 3d 3 at 390.

^[70] Cedric, *Jurisdiction in International Law*, 83.

^[71] European Court of Justice, *Ahlström Osakeyhtiö v Commission of the European Committees*, C-89/85 EC at 12–14.

^[72] United Kingdom Government, Protection of Trading Interests (US Cuban Assets Control Regulations) Order; United Kingdom Government, 'Note to the United States Department of State Regarding Economic Laws and Regulations (18 October 1982)', 454–55; United Kingdom Government, 'Comments on the Draft "Antitrust Enforcements Guidelines for International Operations (United States Department of Justice and Federal Trade Commission, 1994)" (13 October 1994)', 725; United Nations Delegation of the European Community Commission, 'Letter to the United States Congress Regarding Bill S 2444 (27 April 1990)', 668; Austria Government, 'Austria Presentation for EU at UNGA', 17; Government of Finland, 'Finland Presentation for EU at UNGA', 18.

^[73] Australian Government, Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; United Kingdom Government, Protection of Trading Interests Act.

^[74] European Court of Justice, *Gencor Ltd v Commission*, T-102/96 E. Cedric, *Jurisdiction in International Law*, 83.

territoriality jurisdiction is becomingly unpopular due to globalization, it was held that Zimbabwe could claim jurisdiction based on effect doctrine.^[75]

However, Smith argued that the doctrine is controversial^[76] considering that many countries accept the doctrine^[77] and acknowledge the benefits of the doctrine^[78], other states still oppose and reject the applicability^[79]. Scholars like Krisch oppose the doctrine because it is an unacceptable extremity of territorial jurisdiction^[80], stated that the applicability under international law is uncertain.

Exceptions

Territorial jurisdiction is certain in two circumstances. *First*, in 'Subjective territoriality' -wherein state has territorial jurisdiction for offence that was commenced in its territory and completed abroad. The State abroad can also lay claims of territorial jurisdiction. *Secondly*, in 'Objective territoriality' wherein state has territorial jurisdiction for offence committed within her territory.

However, there are limitations to which state can exercise territorial and nationality jurisdiction. Of importance is the exceptions in form of *jurisdictional immunity*. In this case, limitation can be IGO or diplomatic based. In *diplomatic limitation*, state cannot try suspects (diplomats) because the suspect has immunity from the laws of the country which they reside. Such immunity is covered under international law^[81] and determinant on the level or ranking on the diplomat. While in *IGO limitations*, this is applicable to international governmental organizations like the UN, AU, EU etc. And among others are the Armed forces and Judges of International courts that are covered, from domestic jurisdiction of the states they work in, under certain international conventions^[82], agreements and treaties if the state is a party or signatory.

An example of this is the case of *DRC and Belgium*, wherein Belgium issues an international arrest warrant on a serving Minister of DRC residing in DRC: the ICJ held that the Minister enjoys immunity and Belgium failed in that respect^[83].

This restriction is also applicable to diplomatic documents, archives, bags and official correspondence. And as such, they are inviolable. However, due to abuse of diplomatic packages like travel bag used in drugs transportation, some port authorities of states may, *under provable intelligence and under the only presence of the diplomat (linkable carrier/owner of the package)*, scan the package during port-transit.

Also, under Article 2 of the Vienna Convention, the premises of missions are inviolable, restricted, placed on no unauthorised entry of agents of host state, immune from requisition, search and arrest within the premises.

Nevertheless, while jurisdictional immunity is enjoyed, there are also restrictive immunity i.e. the restriction of immunity. Immunity is valid in cases where the act committed is in line or during execution of government's public function (*jure imperii*) and invalid in cases where the action was during commercial/private function which is not directly linked with the government's public function (*jure gestionis*). Another invalidation of immunity is when diplomat sending state (*or the diplomat*) decide to waive the immunity status, but this must be legally expressed either through an agreement or treaty among the concerned state (*or the accused diplomat as applicable*) and not assumed.

In recent times, there are debates on immunity *vs* impunity. Offenders with impunity end-up not facing prosecution from smaller cases of civil disobedience (*like drunk and reckless driving*) to serious offences like drug, sex, arm, human trafficking and murder. Lately was the case of *Grace Mugabe v. Journalist* in 2009 and *Grace v. Gabriella Engels* in 2017; wherein Grace (*wife of the President of Zimbabwe*), was alleged to

[75] Zimbabwe Supreme Court, *S v Mharapara*, 1 SA 556 at 557–59, 563–64.

[76] United Kingdom Supreme Court, *R (Smith) v Oxfordshire Assistant Deputy Coroner*, 1 AC 65.

[77] Cedric, *Jurisdiction in International Law*, 84.

[78] Singapore Court of Appeal, *Public Prosecutor v Taw Cheng Kong*, 2 LRC 17 at 88..

[79] Nico, *The Decay of Consent: International Law in an Age of Global Public Goods*, 12.

[80] Nico, 12–13.

[81] United Nations, 'Vienna Convention on Diplomatic Relations'; United Nations, 'Vienna Convention on Consular Relations.'

[82] United Nations, 'Convention on the Privileges and Immunities of The United Nations.'

[83] International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*.

have assaulted a journalist in Hong Kong and a model in South Africa respectively, and she was, in both cases not prosecuted (*despite South African court order for her arrest*) due to her immunity status.

However, after term-in-office, immunity from serious offence committed while in-office (*like serious drug, sex, arm, human trafficking and murder*) is stripped off as the 1978 State Immunity Act and 1964 Diplomatic Privileges Act does not extend beyond immunity-after-office. Few examples, the case trial of Augusto Pinochet and Charles Taylor, both former head of state of Chile and Liberia, respectively.

Conclusion

State's prescriptive jurisdiction is not unlimited in its proscription and implementation. **Secondly**, this paper recognises two important limitations which are *Territorial limitation' in enforcement jurisdiction*, and *jurisdictional limitations*. In the former, extradition is usually an option to ensure jurisdiction. While on the latter, jurisdiction is determinant on agreement with state abroad and usually uncompromised unless through immunity abandonment or immunity waiver which is upon legal agreement. **Lastly**, jurisdictional limitations of state come to fore in cases involving gross violation of human rights and war crimes wherein states lack the capacity to prosecute or wherein such case becomes contentious/controversial and falls under the *universal jurisdiction*.

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