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A STUDY OF DIFFERENT PRINCIPLES FACILITATING EXERCISE OF EXTRA-TERRITORIAL JURISDICTION UNDER INTERNATIONAL LAW[*]

ABSTRACT

Jurisdiction as has been understood, pertains to exercise of authority by a state in various, Judicial, regulatory and legal matters. Further, extra-territorial jurisdiction refers to exercising this jurisdiction over occurrences and actors that are situated outside and beyond the territorial limits of a particular state.[1] A state, thus, can exercise extraterritorial jurisdiction in three ways:

1. **LEGISLATIVE-** This is also called the prescriptive jurisdiction, which deals with the ability of a state to prescribe laws for actors and conducts abroad[2];
2. **ENFORCEMENT-** It concerns with the ability of a state to ensure compliance of its laws[3]; and
3. **JUDICIAL-** Also called as the adjudicative jurisdiction, it empowers the courts of a state to adjudicate and resolve private disputes with a foreign element.[4]

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[1] Danielle Ireland-Piper, *Prosecutions for Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine*, 9(4) UTRECHT L. REV. 74, 68 (Sept. 2013) [hereinafter "*Piper*"]; J.A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Corporate Social Responsibility Initiative Working Paper No. 59, at p. 13 (Harvard University 2010) [hereinafter "*Zerk*"].

[2] *Piper*, 69.

[3] G.D. TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES 344 (2006) [hereinafter "*Triggs*"].

[4] *Zerk*, 13.

In this research article, only adjudicatory or judicial exercise of extra-territorial jurisdiction will be dealt with. Extra-territorial jurisdiction can be exercised by a state on the basis of different principles that exist under International Law. The different principles that can be exercised under the Customary International Law are based on Territoriality, Nationality and Universality.[5]

Keywords: Extra-territorial, Jurisdiction, Territoriality, Nationality, Universality.

[5] *Piper*, 68.

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The decision of the Permanent Court of International Justice (PCIJ) in the *Lotus*[6] case was a landmark pronouncement and changed the whole jurisprudence of the concept of jurisdiction under International law.[7] The Court in a way marked a beginning of the much contested extra-territorial exercise of Jurisdiction by Courts of a state in the absence of any prohibitive rule, when it ruled that: "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 or 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.[8]

The above quoted passage from the judgment of the PCIJ has been termed and described as the much famous, 'Lotus Principle'.

TERRITORIALITY PRINCIPLE

Territoriality principle has been the accepted and common basis to exercise jurisdiction by states.[9] It has been regarded as a manifestation of the sovereignty of a state.[10] As the main objective and task of a state is to maintain law and order within its own territory and ensure there

[6] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) [hereinafter "*Lotus case*"].

[7] *Piper*, 69.

[8] *Lotus case*, 19.

[9] *Zerk*, 18; *Piper*, 72.

[10] A. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, 56 (2010).

is no untoward incident happening in the territorial limits of the state, therefore, the territorial principle is the most frequently invoked ground for criminal jurisdiction.[11]

Even the PCIJ, in the *Lotus case*, while observing that 'jurisdiction is certainly territorial', had found: "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition.'[12]

Territoriality Jurisdiction can be further classified into subjective and objective territoriality. Subjective territoriality is exercised when the conduct occurs entirely within the territorial limits of a particular state. Whereas, under objective territoriality, jurisdiction is exercised over conduct that occurs within the territorial limits of that particular state only partially.[13]

NATIONALITY PRINCIPLE

Nationality principle authorizes a state to exercise jurisdiction over the acts of its nationals even when the act is committed extra-territorially. Again, there are two important classifications in this form also, viz., active nationality principle and the passive nationality principle. In a particular criminal incident, when the state of the perpetrator exercises jurisdiction over the accused then it is termed to exercise of active nationality principle. On the other hand, the jurisdiction is exercised by the state of which the victims were nationals, then it would be a case of exercising passive nationality principle.[14]

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[11] M. Akehurst, *Jurisdiction in International Law*, 46 BRITISH YEARBOOK OF INT'L L. 145, 152 (1972-1973) [hereinafter "*Akehurst*"].

[12] *Lotus case*, 18.

[13] *Piper*, 72.

[14] *Piper*, 73.

It is said that nations following Civil law systems rely on the nationality principle to a 'far greater extent' than the common-law countries.[15]

States are often described as having 'an unlimited right to base jurisdiction on the nationality of the accused.'[16] However, there remains some level of uncertainty regarding the manner in which nationality is to be defined. The earlier and traditional notions of citizenship and nationality have been modified by rapid and dynamic evolution of globalization[17] and the increased movement of people across borders. May articulates this difficulty when he asserts that it is a 'mistake to say that there are citizens and yet for it be unclear what political community these citizens are connected to.'[18]

One of the major factors of that contribute to the strengthening of nationality principle is the intolerance of the idea that an individual may be subject to the laws of multiple states in all places, and at all times.[19]

"French criminal law is applicable to any felony, as well as to any misdemeanour punishable by imprisonment, committed by a French national or by a foreigner outside the territory of the republic when the victim is of French nationality at the time of the offence."[20] The above stated provision from the French Penal Code is an example of both the passive as well as the active nationality principle.

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[15] *Akehurst*, 152.

[16] *Akehurst*, 156.

[17] K. Rubenstein, *Citizenship in an Age of Globalisation: The Cosmopolitan Citizen?*, 25 LAW IN CONTEXT, no. 1, p. 88 (2007).

[18] L. May, *Global Justice and Due Process*, 198 (2011).

[19] *Akehurst*, 165.

[20] French Penal Code, Articles 113-6 and 113-7.

As regards jurisdiction upon vessels on high seas, it depends upon the nationality of the vessel at times, i.e., upon the flag of the state which a vessel flies. The Privy Council while deciding an appeal from the Australian Supreme Court had held that "The legal order on the high seas is based primarily on the rule of international law which requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one state; by this means a vessel, and persons and things aboard, are subjected to the law of the state of the flag, and in general subject to its exclusive jurisdiction."[21]

Thus, Jurisdiction on the high seas is dependent upon the maritime flag which vessels sail, because, since no state may extend its territorial jurisdiction on the high seas,[22] jurisdiction accordingly cannot be based upon a territorial principle.

- ***Active Nationality***

A report for the Harvard Corporate Social Responsibility Initiative suggests that states regard the active nationality principle as the strongest basis for direct extraterritorial jurisdiction.[23] Arnell argues that nationality principle is symbolic of an evolution from narrow, self interested territorial interests to a broader collective interest in the conduct of nationals overseas.[24]

Arnell justifies greater reliance on the active nationality principle on three grounds. First, he states that given that the conduct of the people when they are overseas is already regulated on an ad-hoc basis, a common or universal framework should be developed to govern its use more

[21] *Oteri & Oteri* v. *Regina*, (1976) ALR, 11, p. 142.

[22] *Lotus Case*, 25: 'Vessels on the High Seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty on the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.'

[23] *Zerk*, 13.

[24] P. Arnell, *The Case for Nationality Based Jurisdiction*, 50 INT'L AND COMP. L. QUARTERLY, no. 4, p. 961 (2001) [hereinafter "*Arnell*"].

broadly.[25] Thus, A standardized framework would allow for greater transparency and consistency in the employment of the nationality principle. Second, he argues that exercises of jurisdimction on the basis of nationality can be used to ensure that the accused receives a fair trial.[26] This would certainly ensure the rights to fair trial, liberty and freedom from retrospective legislation and such other ancillary rights.[27] Finally, Arnell is of the opinion that the constatnt movement of people across borders has changed the dynamics of relationship between the state and its citizens to the extent where territorial boundaries have become immaterial, and therefore, such a relationship has to be governed by the nationality principle.[28]

- ***Passive Nationality***

Passive Nationality Principle, also referred to as the Passive Personality Principle, is exercised by a state when its national is a victim of an extraterritorial conduct of a foreign national and therefore, in consequence of which it exercises jurisdiction over that perpetrator.[29]

The justification for exercising the same in national *fora* has to do with each country's interest in protecting the welfare of its nationals abroad, where the *locus delicti* state either neglects, refuses, or is unable to initiate prosecution. In this context only passive personality principle may be deemed as lawful but auxiliary, form of jurisdiction.[30] The passive personality principle is

[25] *Id.* 959.

[26] *Id.* 955.

[27] *Piper*, 75.

[28] *Arnell*, 960.

[29] *Piper*; MALCOLM N. SHAW, INTERNATIONAL LAW 664 (6th ed. 2008); John G. McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT'L L. J., Issue 3, No. 3, p. 300-301 (1989) [hereinafter "*McCarthy*"].

[30] STARKE'S INTERNATIONAL LAW 211 (I. A. Shearer ed., 11th ed., OUP 1994) [hereinafter "*STARKE*"].

based on the duty of a state to protect its nationals abroad.[31] Under this principle, the sovereign asserting jurisdiction is concerned with the crime's effect, rather than where it occurs.[32]

In Demjanjuk v. Petrovsky,[33] reference was made to universal jurisdiction over crimes of genocide and crimes against humanity, but reliance was placed on the an Israeli law that was based on the theory of passive personality. The fact that Demjanjuk was charged with committing the acts in Poland was not held to deprive Israel of authority to bring him to trial.[34]

In his dissenting judgment in the *Lotus* case, Judge Moore expressed his reservation on the passive nationality principle.[35]

The judgment of the PCIJ in the *Lotus case,* one of whose possible effects was to subject seamen to foreign criminal law of which they may have no knowledge, met with widespread criticism. A contrary rule was adopted in the matters of collisions or other accidents of navigation[36], in international conventions,[37] and in so far as the judgment in the *Lotus* case, suggested otherwise, it is stated by some of the jurists that it must now be regarded as no longer acceptable.[38]

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[31] *McCarthy*, 301.

[32] *United States* v. *Aluminum Company of America*, 148 F.2d 416, at pp. 443-44 (2nd Cir. 1945).

[33] 776 F.2d 571, 582-83 (6th Cir. 1985).

[34] *Id.* at 582.

[35] *Lotus case* cited in *Triggs*, 355.

[36] 1952 International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collision or Other Incidents of Navigation, art. 1, May 10, 1952, 429 U.N.T.S. 233 [hereinafter "*Brussels Convention*"].

[37] Geneva Convention on the High Seas, art. 11, Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force Sept. 30, 1962) [hereinafter "*HSC*"]; U.N. Convention on the Law of the Sea, art. 97, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter "*UNCLOS*"].

[38] 1 OPPENHEIM'S INTERNATIONAL LAW 479 (Robert Jennings & Arthur Watts eds., 9th ed. 1955).

Nonetheless, examples of state practice indicate the international community is increasingly willing to accept assertions of extraterritorial jurisdiction on the basis of the passive nationality principle.[39]

UNIVERSALITY PRINCIPLE

Universality Principle authorizes the exercise of jurisdiction by courts of state over crimes that are of very serious nature irrespective of where it was committed or nationality of the perpetrator and the victim.[40] Universal Jurisdiction has been held to be validly applied in cases involving crimes of extremely nature, such as, piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.[41]

In earlier times, the reach of extraterritorial jurisdiction on the basis of universality was limited to piracy and the slave trade.[42] For instance, international law granted every state the authority to assert jurisdiction over piracy and slave trading because those crimes were 'prototypal offences that have long been considered the enemies of humanity.'[43] However, the notion has expanded post World War II, and as a result there is no firm consensus as to what crimes are subject to universal jurisdiction.[44] Prosecutions over war crimes and crimes against humanity in the post-World War II era also relied heavily on the universality principle.[45]

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[39] *Piper*, 76; *Triggs*, pp. 355-356.

[40] *Piper*, 76; *Zerk*, 20.

[41] *The Princeton Principles on Universal Jurisdiction*, p. 29, PROGRAM IN LAW AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY (2001).

[42] *Piper*, 76.

[43] K. C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 788 (1988) [hereinafter "*Randall*"].

[44] *Piper*, 76.

[45] *Randall*, 788.

In the infamous Eichmann case, the Supreme Court of Israel explained that when the national courts try persons for crimes committed under the international law, they are not only enforcing their own law, but they also act as agents of the international community for enforcement of international law. The Court stated:

"Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed."[46]

Piracy has long been held to be crime against the humanity and it entails universal jurisdiction. According to international law, a pirate is always considered as an outlaw, a *hostsis humani generis*. The act of piracy makes a pirate lose the protection of his home state and thereby national character, and his vessel or aircraft, although it may formally have possessed a claim to sail under a certain flag, losses such claim.[47]

PROTECTIVE PRINCIPLE

Protective principle is generally invoked in order to justify claims of extraterritorial jurisdiction by a regulating state with respect to offences committed against its national interest.[48] This might include the security, integrity, sovereignty or government functions of that state.[49] On many occasions, a state would invoke the protective principle in the situations when the acts that

[46] *Attorney-General of the Government of Israel* v. *Eichmann*, 36 Int'l L. Rep. 277 (1968).

[47] *STARKE*, 746; *Lotus case*, 70 (dissenting opinion of Judge Moore).

[48] *Piper*, 77.

[49] *Triggs*; *Zerk*, 19.

threaten its security or national interest may not be illegal in the state where they are being performed and the perpetrator may escape unprosecuted.[50]

The protective principle has been used to prosecute extraterritorial offences relating to counterfeiting currency, desecration of flags, economic crimes, forgery of official documents such as passports and visas, and political offences (such as treason).[51] In *Joyce* v. *DPP*[52], an American citizen obtained a British passport by fraudulent means and started working for a German radio during the subsistence of the World War II. It was contended on behalf of the accused that the Courts of the United Kingdom lacked jurisdiction to try a non-national for crimes that were committed outside the British territorial limites. The Court rejected this argument on the basis that:

'No principle of comity demands that a state should ignore the crime of treason committed against it outside its territory. On the contrary a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm should be amenable to its laws.'[53]

EFFECTS DOCTRINE

Commentators on extra-territorial exercise of jurisdiction refer to the effects principle as an additional basis for asserting extraterritorial jurisdiction. The effects principle allows a state to exercise jurisdiction over a conduct occurring outside the territorial limits of the state provided that the conduct has some effect within the territory of the state.[54] The effects principle is at

[50] *Akehurst*, 169.

[51] *Triggs*, pp. 356-357; *Zerk*, 19.

[52] [1946] AC 347.

[53] *Id.* 372.

[54] *Piper,* 78.

times mistaken for objective territoriality. However, it differs from objective territoriality on the point that no constituent element of the offence takes place within the territory of the asserting state in case of effects doctrine, as opposed to objective territoriality, wherein, there is a constituent element of the offence taking place within the territory of the state.[55]

The scope of the effects principle has been controversial, particularly regarding the proposition that only an economic effect would suffice the exercise of effects doctrine.[56] In expanding the jurisdiction of the regulating state, the effects principle fails to provide an effective framework for protecting the interests of other states which might be affected by this expansion.[57]

Akehurst also sees the effects principle as a 'slippery slope' towards universal jurisdiction.[58] He cites the example of a person committing arson and destroying a factory, and, as a result, the company owning the factory becomes insolvent, the effects of which could be felt all over the world.[59] In his view, the effects principle is only workable if jurisdiction is limited to the state where the primary effect is felt, and even then only where the effect is substantial.[60]

[55] R. O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 *Journal of International Criminal Justice*, no. 3, pp. 735-760, at 739 (2004).

[56] *Zerk*, 19.

[57] *Piper*, 78.

[58] *Akehurst*, 154.

[59] *Id.* 154.

[60] *Id.* 154-155.

CONCLUSION

Jurisdiction under International law has been one of the most contested and controversial concepts and subjects. In particular, exercise of extra-territorial jurisdiction by various states has met with much of criticism. However, the extra-territorial exercise of jurisdiction by different states has been a regular feature of International law and thus, there are now different principles in place that facilitate such assertion of extra-territorial jurisdiction.

In view of the increasing terrorist activities and other war related crimes and with the advent of the concept of Human Rights, the exercise of extra-territorial jurisdiction, on the basis of effects doctrine and passive personality principle, has found some legitimacy. Passive Personality Principle, in the present day proves to be an effective way in exercising jurisdiction over perpetrators of terrorist activities, wherein, the victims are of various nationalities.[61]

The effects doctrine is also a contested and debated principle of extra-territorial jurisdiction. India, in the Enrica Lexie case, has invoked the effects doctrine for the acts committed by the Italian Marines to claim jurisdiction for their prosecution.

While invoking the passive personality principle or the effects doctrine to exercise extra-territorial jurisdiction, it has to be kept in mind that the judgment in the Lotus Case which started was primarily based on passive personality and effects doctrine is no longer regarded as acceptable. The *Brussels Convention*[62], *HSC*[63] and *UNCLOS*[64] all had provisions to negate and nullify the effect of the *Lotus Case* with regard to exercise of extra-territorial jurisdiction.

[61] *McCarthy*, 327.

[62] Art. 1.

[63] Art. 11.

[64] Art. 97.

Extraterritorial exercise of jurisdiction can prove to be useful in seeking to regulate transnational crimes, such as child-sex tourism, piracy, money laundering, drug trafficking, human trafficking and migrant smuggling.[65] As these crimes are not limited to the territorial limits of any state, thus the relevant legal frameworks should also not be limited to the territorial limits of the state as these crimes are of universal nature and have to be curbed.

[65] *Piper*, 79.

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