Jurisdiction: Territorial, Personal and Universal

Introduction:"Jurisdiction" is arguably the most versatile term in current international law. Frequently used in international legal instruments and yet never defined, the term can have different meanings in different contexts. Depending on the circumstances, jurisdiction may refer to the totality of the power or authority that a state has or exercises, in which case it is fully identifiable with "sovereignty," another often-used but likewise never clearly defined term in international law. The term may also simply denote the power or authority of a state in a specific field, such as the levy of taxes or the adjudication of cases by courts or other judicial authorities. Despite the fuzziness of its contours, jurisdiction should be considered a central concept of international law. The reason for this is that it signifies not only the endowment of each and every state with the internal capacity to govern and the external standing to enter into international intercourse with other states, but also the parameters, under international law, for the actual realization of such endowment. In a word, jurisdiction describes, with varying degrees of precision in diverse situations, what a state can do and what a state does. In this sense, jurisdiction can justifiably be regarded as the dynamic aspect of the idea of sovereignty; it is what makes the notion of sovereignty visible and describable in strictly legal (i.e., technical) terms. Through the concept of jurisdiction, sovereignty, otherwise an elevated but amorphous notion, can now be assessed more or less accurately—both qualitatively and quantitatively. However, it must be borne in mind that jurisdiction does much more than simply give substance to the idea of sovereignty; it may also refer to those situations in which sovereignty is restricted, reduced, or nonexistent. Moreover, jurisdiction may be subject to various conditions and restrictions under international law, the most notable among these being sovereign or state immunity.

General Overviews: It is not easy to provide a general overview of the notion of jurisdiction without leaning too much toward either the theoretical or the practical side. Although earlier authors may have found it justifiable to resort to purely doctrinal ruminations, it has become increasingly necessary to discuss jurisdiction in the light of concrete instances of the exercise of jurisdiction or even within the limited context of, say, criminal jurisdiction. Mann 1964 conceptualizes jurisdiction as an inherent power or "right" of a state to regulate conduct, such power therefore comprising the authority to legislate and the authority to enforce. Jurisdiction is thus a concept at the same level as sovereignty. Mann 1984 reaffirms this general doctrinal position. In contrast to Mann's more doctrinal treatment of the subject, Akehurst 1975 presents a more pragmatic view of jurisdiction and discusses various instances in which a

state actually claims and exercises jurisdiction, without much probing as to the philosophical underpinnings. The Mann and Akehurst articles are of seminal significance in the English language on this particular issue. Partly because of the development and accumulation of state practice, later writers engage less in theoretical speculations but refer more to practical matters. Bowett 1982 explores the theoretical and practical grounds for a state's entitlement to establish rules of behaviour (jurisdiction to prescribe) within the limits allowed by international law. Ryngaert 2008 provides a well-balanced general view of jurisdiction and follows very much a classical approach, starting with the Lotus Case (see the Case of the S.S. "Lotus" under the Territoriality of Jurisdiction) and the territoriality principle, and then discussing the exercise of extraterritorial criminal jurisdiction before exploring the doctrinal basis of jurisdiction. Because jurisdiction in its practical sense from the perspective of public international law concerns primarily international criminal matters, it is always useful to see how the issue of jurisdiction is approached in the context of international criminal law, which, given the rapidly growing case law and literature, can now rightfully be regarded as a full discipline of law in its own right. Cassese 2007 treats the issue of jurisdiction as essentially one of competing assertions made by national and international tribunals, whereas Bantekas 2010 views both national and international courts as cooperative and complementary enforcers of the law.

Like every concept, jurisdiction may have different meanings. The word comes from Latin roots: *jus* or *juris* means "law," and *dicere* means "to say" or "to read." Therefore, "jurisdiction" can be understood to mean; "to say the law" and, as a derivative, "the power to say the law." Presently, jurisdiction is understood as the legislative, adjudicative, and executive power that provides, respectively, the competence to prescribe, adjudicate, or execute the law. In particular, it refers to the territorial competence of courts. Jurisdiction in criminal matters may be considered either as substantial or procedural law.

Prescriptive jurisdiction basically depends upon the enactment of laws by individual states, or by the state's adoption of international conventions. In the case of genocide, most states have become parties to the 1948 Genocide Convention, and the majority of states have incorporated the convention into their internal legal order. No international convention yet exists on crimes against humanity, except for where they may be found within the conventions that create international criminal tribunals. Executive power, in criminal law, is one of the forces (such as the police) that is permitted to intervene to enforce a search or arrest warrant. In principle, no state is allowed to exercise executive power on the territory in

other states. The courts within a particular state exercise adjudicative jurisdiction, which is the authority to render a decision on a case.

Adjudicative Jurisdiction: Adjudicative jurisdiction can be discussed on a material, personal or territorial level. With genocide, the material jurisdiction is given by the crime itself, which has been largely uniformly understood and defined worldwide since the 1948 Genocide Convention. On the personal level, there is an onus in criminal law that every natural person over a certain age can be prosecuted for a crime, which is committed within the boundaries of a state's borders. For personal jurisdiction, therefore, it is more a question of defining the exceptions than of defining the rule. For instance, there are exceptions for some persons under a certain age; persons eligible for or having been granted immunities; or persons of a certain status, such as military persons serving duty in foreign states, when the state they serve has signed specific conventions with the state in which they committed the act.

The most controversial question debated in recent years is the extent the courts of a particular state can adjudicate crimes which have been committed outside the territory of that state. In criminal law there are different means of jurisdiction over an accused; but the means are not recognized equally by all states. The most easily recognizable and applicable basis of jurisdiction is the *territorial principle*, whereby persons may be tried and punished for crimes committed on the territory of the state that seeks to prosecute them. Further, persons may be prosecuted by their state of nationality for a crime no matter on which territory they commit it. This is called the *active personality principle*. In the first means of claiming jurisdiction, the primary interest of a state is to maintain law and order in its territory, which is the most basic duty and prerogative of states. In the second case, states may be interested in maintaining a certain level of morality among their citizens, even when those citizens act abroad. More controversial is the right for states to adjudicate crimes that have been committed abroad by foreigners but against their own citizens. This is the *passive personality principle*. Normally, it should be in fact the duty of the state where the crime has been committed, or even the state of the nationality of the author of the crime, to prosecute the person who has committed the crime. Yet, most states still maintain the prerogative to exercise the passive personality principle, if only to avoid a denial of justice if the territorial or the national states do not proceed against the author of the crime.

Universal Jurisdiction: One even more controversial issue is whether states are allowed to judge foreign persons who have committed crimes abroad against other foreigners. In this case, the state doing the judging has no connecting link with the persons or the crimes, except

for the fact that the suspects are possibly present on their territory. This principle is usually known as the *universality principle*, or as *universal jurisdiction*.

One view is that this principle is recognized when states expressly or tacitly allow other states to proceed against their own citizens, or permit another state to prosecute individuals for crimes that have been committed on their own territory. In such cases, jurisdiction may be transferred to another state through ad hoc agreements, bilateral treaties, or through multilateral treaties. Customary law may also allow the application of this principle, as is historically the case with piracy. Universal jurisdiction, therefore, is not new. During the Middle Ages, it was primarily applied by small states in Europe when they were fighting gangs of international thieves.

Among the many multilateral treaties which allow adjudicative jurisdiction to be delegated in such a way, are those intended to fight transnational criminality such as terrorism, narcotics, or in certain fields of international humanitarian law and human rights (torture, for example). Indeed, states consider that serious transnational crimes and criminals can only be dealt with by promoting transnational accountability and mutual assistance in criminal matters, including allowing all the states party to certain treaties to prosecute the criminals where they can catch them.

Of course, this kind of jurisdiction implies that states agree on the definition of the crimes that can be prosecuted, and that they trust each other's respective legal systems. At the very least, the states must agree that the possible evil of the prosecution by dubious foreign judicial systems is matched by the necessity to severely repress certain crimes and criminals. It is a matter of weighing the need for crime control against a possible lack of procedural guarantees.

One other view, more naturalist, and which believes in the existence of a legislative power above the individual states, is that universal jurisdiction applies to crimes that affect the international community and are against international law, and are therefore crimes against mankind. Those who commit such crimes are considered to be enemies of the whole human family (*hostes humani generic*), and should be prosecuted wherever they are. In this view, the international community as a whole delegates to individual states the task of judging certain crimes and some criminals of common concern.

The Lotus Case, 1927: The ambit of the jurisdiction of states in criminal law has been dealt with by numerous specific international treaties, yet no general treaty provides for a comprehensive solution of the jurisdiction of states in criminal cases. The most

comprehensive and authoritative opinion to date was issued by the Permanent International Court of Justice in the *Lotus*Case of 1927.

In this case, the court had to deal with a case of collision between two ships, one French (*Lotus*) and one Turkish (*Boz-Kourt*), in the Mediterranean high seas, which caused loss of life among the Turkish sailors. On the arrival of the Lotus in Constantinople, the French lieutenant and officer on the bridge at the time of the collision was arrested and prosecuted by the Turkish authorities on a charge of homicide by negligence. The Turks invoked Article 6 of the Turkish Penal Code, which gave the Turkish courts jurisdiction, on the request of the injured parties, to prosecute foreigners accused of having committed crimes against Turkish nationals. The French government protested against the arrest, and the two states agreed to consult the Permanent Court of International Justice to determine whether Turkey had acted in conflict with the principles of international law by asserting criminal jurisdiction over the French officer. France alleged that Turkey had to find support in international law before asserting its extraterritorial jurisdiction, whereas Turkey alleged that it had jurisdiction unless it was forbidden by international law.

In its judgment, the court decided with the thinnest majority that Turkey had not infringed international law. It ruled, instead, that France had not proven its claim that international law provided a restriction of adjudicative jurisdiction. As president of the court Max Huber clearly stated: "restrictions upon the independence of States cannot be presumed." Where international law does not provide otherwise, states are free to adjudicate cases as long as their executive power is not exercised outside its territory:

> 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, and acts outside their territory, it 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.

According to this case, states would be free to adjudicate cases of genocide committed abroad, even by foreigners against foreigners, as long as third-party states cannot prove that this extraterritorial jurisdiction is prohibited. The burden of proof that a state acts in contradiction to international law, at least as far as its jurisdiction is concerned, lies on the plaintiff state. Both treaties and the development of customary law (as evidence of a general practice accepted as law) are, of course, the best sources from which to discover whether

individual states use a recognized principle of jurisdiction or if they trespass the limits and interfere with other states' internal and domestic affairs.

The Nuremberg Statute and the Post–WWII Prosecutions: The Nuremberg Statute of 1945, provided the first express prohibition of crimes against humanity. The term genocide has also been used in several indictments by national courts that have judged Nazis after the end of the war.

Yet, the Nuremberg Statute was only applicable to the crimes committed by the Nazis and their allies, although those crimes may have been committed on non-German territory. In addition, it has been argued that the jurisdiction of the Allies to judge the Nazis for the core crimes of aggression, war crimes, and crimes against humanity either stemmed from Germany's surrender to the Allies, and therefore from the jurisdiction of Germany itself to judge its own nationals, or was derived from the fact of Germany's occupation.

The 1948 Genocide Convention: The clearest ambit of the adjudicative jurisdiction of states for crimes of genocide is provided by Article 6 of the 1948 Genocide Convention, which states that:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted jurisdiction.

The question to be raised is whether states that are parties to this convention allow themselves to prosecute persons who have committed or participated to a genocide in a third country, whether or not such persons are nationals of the state that wants to prosecute them. The text of Article 6 does not say whether the term "shall be tried," provides for compulsory territorial jurisdiction or whether a state may, on the basis of customary international law, bring someone accused of genocide before its own courts on the basis of either extraterritorial jurisdiction or universal jurisdiction.

The Eichmann and Demjanjuk Cases in Israel: In 1961 Adolf Eichmann was abducted in Argentina by Israeli agents and taken to Israel, where he was prosecuted and condemned for his participation in the genocide committed by the Nazis. Argentina strongly protested the abduction, although its opposition to the judgment itself was less vocal. In any case, the German authorities clearly agreed that Eichmann, a German citizen having committed crimes in Germany, should be prosecuted by Israel. The German authorities probably did not feel that they were acting in accordance with customary law. It is likely, instead, that they

approved Eichmann's prosecution in Israel for political reasons and because they did not want to hamper the repression of Nazis.

On the other hand, the Israeli courts did not rely on Germany to assert their competence to judge Eichmann. Instead, they acted on two different grounds. The first was an invocation of the passive personality principle, whereby the state of Israel asserted its legitimacy to judge acts that had been committed against Jews even before the state of Israel existed. The second ground underlying the Israeli courts' claim of jurisdiction was a reference to a mix of international morality and law:

> [T]hese crimes constitute acts which damage vital interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct

The reasoning of the Israeli court was that a crime can be defined by the "international community", and that states are empowered to serve as "executive agents" of that international community, as long as the instruments under international law are not enacted and in force.

What is interesting about the Eichmann case is not the declarations of the Israeli courts, but the fact that most other states did not react negatively against the application of universal jurisdiction by Israel for its prosecution of a case of genocide. Even Argentina, which did protest harshly against the abduction of Eichmann from its territory, did not go so far as to lodge a formal complaint against the judgment of the Israeli courts.

Another case concerning the Nazi genocide occurred in 1986, when a US court agreed to extradite John Demjanjuk, alleged to have been a camp warden in Treblinka. By agreeing to the extradition, the United States recognized the jurisdiction of Israeli courts to judge Demjanjuk, who had become a naturalized US citizen after the end of World War II. Demjanjuk was tried in Israel and acquitted on the merits of the case. However, neither the Eichmann case nor the Demjanjuk case can be considered as setting a precedent for other states.

Other Relevant Examples: The jurisdiction of states to judge acts of genocide that have been committed in other states has been considered in various cases arising out of the genocide in

Rwanda, which occurred in 1994. Overall, however, the invocation of universal jurisdiction has been rather heterogeneous and ambiguous.

In 1994, for instance, Austria put the former commander of a Serbian military unit, Dusko Cvjetkovic, on trial for acts of genocide committed in the former Yugoslavia. The defense protested that Austria did not have jurisdiction, but the Appeals Court justified the Austrian court's right to conduct the trial.

In fact, in many cases where universal jurisdiction has been used to judge suspects of the genocide in Rwanda, the prosecuting states have either indicted and sentenced the accused on the basis of national provisions of humanitarian law, or they have enacted a special law on the implementation of the status of the International Criminal Tribunal for Rwanda. Indeed, the states that applied universal jurisdiction for acts of genocide committed in Rwanda were encouraged to do so by the international community, and especially by the UN Security Council. Therefore, it is difficult to draw definitive conclusions on the general acceptance by states of the universal jurisdiction for the crime of genocide.

Modes of Acquisition of State Territories:

Traditional international law asserts several modes of acquiring territory as cession, occupation, prescription, accretion, and conquest.

Cession refers to the transfer of a territory to another state by an agreement or treaty. Traditional international law asserts that a state can acquire sovereignty over another territory in cases where that sovereignty is ceded effectively through agreement or a treaty. It is vital for the state to consult the inhabitants of a territory before ceding sovereignty over it.Consultations are vital because they enhance the legality of territorial acquisition. Cession may be effected through a referendum where inhabitants vote to decide their future.

Effective Occupation-Another significant mode of acquiring sovereignty is effective occupation. According to the traditional international law, occupation is the effective control of a territory exercised by a power that has no sovereign title to the land through either defiance or absence of a proper sovereign. It is worth noting that taking possession of a particular territory is a tangible reason to satisfy occupation and control of that territory. Possession is always taken through an act or a series of acts through which the occupying state takes effective control of the territory with the exclusion of others *terra nullis*.

Prescription is also a vital mode of acquiring a territory under the traditional international law. The traditional international law asserts that prescription is closely related to lawful occupation, and it entails the actual exercise of sovereignty over a territory.Prescription is always assumed to have been effected over a particular period without any objection from

other states. This implies that the controlling sovereign state would hold the territory as one of its own and the law would recognize it. The law requires that the possession of a particular territory should be peaceful enough for it to be recognized. It would be rejected in cases where it involves armed conflict.

Accretion also abounds as another mode of acquiring a territory under the traditional international law. Notably, accretion involves the effect of natural forces such as volcanism. For instance, in cases where natural activities such as volcanism takes place and volcanic islands emerge in a state's territorial waters, it would have the right to acquire territory. A state would acquire a territory formed by natural activities or the one that expands from land due to natural activities. Therefore, it may establish its control of the territory.

Conquest-The last vital mode of acquisition of a territory is conquest. Conquest refers to the acquisition of a territory using force. It involves armed attacks to the territory hence bringing it under the control of a state in a forceful manner. It was historically a recognized as a legal method of acquiring sovereignty. With changes in international law, the mode has become illegal, and it is not recognized any further as the United Nations promotes peaceful negations between all countries all over the globe. The new terms require states to follow the required procedure to be allowed a territory.