
International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition Oxford University Press, 2022)

Chapter 8, Jurisdiction

Question 1. *'The notion of "territorial link" has become so elastic that a State may justify virtually any exercise of jurisdiction with a tenuous link to its territory'. Discuss.*

The territorial principle, according to which a State may extend its jurisdiction over acts occurring over its territory, is simple in theory but can be faced with difficulties in practice. 'Subjective' territorial jurisdiction allows a State to extend jurisdiction over acts initiated in its territory, even if they extend or are concluded beyond its borders. 'Objective' territorial jurisdiction would allow a State to exercise jurisdiction over acts initiated outside their territory but that concluded within it. The *Lotus* judgment was an example of the latter, as the bullet was fired from the French vessel and killed a Turkish soldier on the Turkish vessel. The best answers would recall how in *Lotus*, it was stated that a State is not prohibited from exercising its jurisdiction extra-territorially unless a specific rule exists.

Objective territorial jurisdiction also denotes a more controversial extension of jurisdiction called the 'effects' doctrine, where the entirety of the act is committed abroad, but 'effects' are suffered on the State's territory. The US has asserted 'effects' jurisdiction in relation to antitrust litigation (see *US v Alcoa*), as well as in relation to the activities of non-US nationals in Cuba that undermine the US embargo in that State (see e.g. the Helms-Burton Act). A great answer would also consider the *Intel v European Commission* judgment of the ECJ which took a similarly expansive view as to effects.

Finally, there is a doctrine called the 'protective principle' whereby a State may defend its 'vital interests', and where there is a degree of State practice. Where such practice links to territory is that the vital interest seems to be of a territorial nature (e.g. against counterfeiting currency, drug smuggling, human trafficking) where the effects of the crime committed abroad would be felt in a State's territory. There seems to be more practice to support the exercise of protective jurisdiction than the assertion of jurisdiction based on 'effects'.

Finally, nationality and the passive personality principles do not depend on any link to territory of course, being based on the nationality of a perpetrator and a victim, respectively.

Question 2. *'It is clear that States have broader jurisdiction over the commission of international crimes than in respect of domestic law crimes'. Assess critically.*

The notion that some crimes are of such gravity and magnitude that any State might exercise jurisdiction, irrespective of any link with that State, its territory, or its nationals, is known as the 'universality' principle. It is true that the obligation or right to enact legislation enabling States to exercise universal jurisdiction is found in some treaties (such as Article 101 UNCLOS (piracy), across the four Geneva Conventions (war crimes), Article 1 of the Genocide Convention, Article 5(2) of the Torture Convention). These examples seem to be a form of 'universal jurisdiction *inter partes*' that codifies the principle of *aut dedere aut judicare* (the obligation to extradite or to prosecute offenders of a given crime). Students might also want to consider the recent ILC Draft Convention on Crimes against Humanity.

However, pure universal jurisdiction remains controversial as a principle of customary international law, in the absence of a relevant treaty provision. For example, Belgium had universal jurisdiction in relation to war crimes, genocide and torture in 2000 and within a few years had amended its position to require a minimal link. In relation to customary international law, students might wish to

focus instead on 'passive personality' jurisdiction, which is exercised when the victims are nationals of the State asserting jurisdiction.

In relation to serious international crimes most States assert passive personality jurisdiction instead of universal jurisdiction (see e.g. Belgium's claims in *Obligation to Prosecute or Extradite*, but also the practice of Spain, the UK and the Netherlands).

In addition to serious international crimes, some treaties allow for passive personality jurisdiction (Art 9 Hostages Convention, Art 4(b) Hijacking Convention, Art 7(2)(a) Terrorism Financing Convention). Finally, though there is some practice relating to offences such as drug trafficking and potentially terrorism, these have little basis as serious international crimes.