

ASSIGNMENT
OF
PUBLIC
INTERNATIONAL LAW
ON
“STATE JURISDICTION”

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INTRODUCTION

The **territorial principle** (also **territoriality principle**) is a principle of public international law under which a sovereign state can prosecute criminal offences that are committed within its borders. The principle also bars states from exercising jurisdiction beyond their borders, unless they have jurisdiction under other principles such as the principle of nationality, the passive personality principle, the protective principle, and possibly universal jurisdiction.

The Lotus case was a key court ruling on the territoriality principle. In 1926, a French vessel collided with a Turkish vessel, causing the death of several Turkish nationals. The Permanent Court of International Justice ruled that Turkey had jurisdiction to try the French naval lieutenant for criminal negligence, even though the incident happened beyond Turkey's boundaries. This case extended the territoriality principle to cover cases that happen outside a state's boundaries, but have a substantial effect on the state's interests or involve its citizens.

Questions have surfaced regarding how the territoriality principle applies, with the rise of globalization and the Internet. The applicability of this principle also was in question, with the case against Augusto Pinochet and other cases of transnational justice.

WHAT IS TERRITORIAL JURISDICTION?

National courts will always have jurisdiction over offenses that took place in its territory. This is called “**territorial jurisdiction**”. For example, if Kithmini shot and injured Liam Fox in SL: the SL Police can enter BCIS, arrest her and take her to a SL Court. This situation is called as objective territoriality.

Consider another situation:

What if Kithmini (in SL) sends a parcel bomb to Fox in UK?

In this case, the bomb exploded, or the crime happened, outside SL. Kithmini is in SL: does the SL courts still have jurisdiction?

Answer-They can; because, a vital element of the crime took place in SL/ the crime began in SL: Kithmini posted the bomb from SL. This situation is called as subjective territoriality.

There is no problem in enforcing the law in Kithmini’s case (arresting and taking her to Court and punishing her under SL law) because she is in SL. The situation becomes complicated if, say, she had escaped to Namibia and was living there.

STATE AS AN INTERNATIONAL LEGAL PERSONALITY

International legal personality refers to the entities or legal persons that can have rights and obligations under international law.

States

A *State* has the following characteristics:

- (1) a permanent population;
- (2) a defined territory;
- (3) a government; and
- (4) the capacity to enter into relations with other States.

Some writers also argue that a State must be fully independent and be recognized as a State by other States. The international legal system is a horizontal system dominated by States which are, in principle, considered sovereign and equal. International law is predominately made and implemented by States. Only States can have sovereignty over territory. Only States can become members of the United Nations and other international organizations. Only States have access to the International Court of Justice.

Jurisdiction over offenses that took place wholly outside the State’s territory

The second principle in the Lotus Case – International law doesn’t prohibit a State from exercising jurisdiction in its territory over acts that took place abroad. If the person who committed the crime is present in that State, the State can arrest her and try her in court (enforce its jurisdiction) even if there is no rule in international law expressly permitting the States to do so.

Nationality Principle

States have jurisdiction over their nationals over crimes specified in their national law. For example: the Suppression of Terrorist Bombing Act of Sri Lanka gives the High Court the jurisdiction to try a Sri Lankan national who blasts a bomb in a foreign country – even if his only connection to SL is the fact that he is a Sri Lankan. In the *Trail of Earl Russel* a UK national was convicted of bigamy even though the second marriage took place outside UK. (This is also an example of subjective territoriality principle because the first marriage took place in UK). It becomes complicated when a person is a dual national, let's say of Australia and SL, and both countries want to enforce their jurisdiction based on nationality. In this case, jurisdiction goes to the country where the person has a genuine link (Nottebohm Case); i.e., where is he living and working, where his home is and his family.

Passive Personality Principle

In this situation, the crime was committed abroad and the person who committed the offense was not a national of that State. In this situation, only the victim is a national of the State which claims jurisdiction. In the *Yunis case*, US courts decided that they had jurisdiction over Yunis (a Lebanese national) based on the passive personality principle because two US nationals were aboard the Jordanian airline that Yunis hijacked.

Protective Principle

In this situation, the crime was committed abroad and neither the person who committed the crime, nor the victims, were nationals of that State. In this case, jurisdiction is asserted on the basis that the security or the interests of the State is affected by an act committed abroad. In *Eichmann's case*, the Israeli Court based its jurisdiction on the protective principle and said that the crimes committed by Eichmann against the Jewish people affected the 'vital interests' of Israel.

Both passive personality and protective principles are among the less accepted basis of jurisdiction; although, they are increasingly used to get jurisdiction over acts of terrorism committed abroad against nationals (passive personality principle) and against the interests of the State (protective principle).

SOVEREIGNTY OF STATES OVER TERRITORY

Sovereignty is the exclusive right to exercise supreme political authority over a defined territory (land, airspace and certain maritime areas such as the territorial sea) and the people within that territory. No other State can have formal political authority within that State. Therefore, sovereignty is closely associated with the concept of political *independence*. Classical international law developed doctrines by which States could make a valid claim of sovereignty over territory. The doctrines included *discovery* and *occupation* and *prescription*. During the period of Western colonial expansion new territories and islands were subject to claims of sovereignty by discovery and occupation. Sovereignty could also be transferred to another State by *conquest* (use of force) or by *cession* where the sovereignty over the territory would be ceded by treaty from one State to another.

Since a State has sovereignty over its territory, the entry into its territory by the armed forces of another State without consent is a *prima facie* breach of international law. Among the attributes of sovereignty is the right to exclude foreigners from entering the territory, which is traditionally referred to as the right to exclude aliens. Since a State has sovereignty within its territorial sea (with some exceptions such as the *right of innocent passage*), it has the exclusive authority to exercise police power within its territorial sea. For example, if foreign ships are attacked by “pirates” in the territorial sea of a State, the only State that can exercise police power and arrest the pirates in the territorial sea is the coastal State.

State Jurisdiction in the Area of International Criminal Law

State jurisdiction is one of the most important and ongoing topics of contemporary international law. The significance of this issue and its direct effect in the international relations has increased international interest in state jurisdiction. Moreover, this increment of interest has created a new and modern understanding of each principle of state jurisdiction reflecting universal character rather than national peculiarity.

Historically, it is clear that the existence of state jurisdiction in its basic utilization represented by territoriality was concurrent with the emergence of international law in its classic concept. Furthermore, since it was necessary for the neonate international law to learn its credibility and support in states, it had to prove its effectiveness as the regime looking after international relations and emphasize its ability to provide stability and safety. Therefore, it was the main and most significant policy beyond the establishment of classic international law to provide the states with the elements that were necessary for their existences and securities. Moreover, in order to reach this goal classic international law recognized and granted two principles for all states that were members of international society as the most significant and fundamental principles of international law. These two principles are the principle of sovereignty and the principle of equality.

According to the principle of sovereignty, within its territory the state has the legal capacity to enact and enforce any law that is necessary for its existence and safety and prosecute who violates these laws. The principle of equality obligates the state during its practice of such rights to respect the sovereignty of other state and to guarantee the equal rights to do the same.

Accordingly, it can be concluded that classic international law recognized territoriality as the basis of state jurisdiction by providing states with the legal tools that could justify the application of territoriality as a domestic matter. In other words, classic international law did not provide any regulation or legal project to organize the application of state jurisdiction, and it considered state jurisdiction a national affair governed by domestic laws.⁴ However, this nature of state jurisdiction had to change to meet new conditions in the international society. The most important of these conditions includes change in the nature of incriminating activities nature and the existence of domestic or international non-governmental organizations (NGO) concerning human rights.

Even though the classic understanding and use of state jurisdiction was effective against simple crimes in which all the elements of the incriminating action take place in one territory, this classic concept of state jurisdiction created many legal problems because of its narrow application. Improvement in the communications' methods and the creation of more rapid means of transportation engendered new type of crimes taking place in more than one territory. These

kinds of crimes are called trans boundary offenses, and it is impossible to prosecute them by applying territoriality in its basic concept.

The main problem that may occur as a result of narrow application of state jurisdiction is the legal conflict between two or more jurisdictions. This conflict can be either positive or negative. On the one hand, positive conflict appears when two or more states assume jurisdictions over the same crime. On the other hands, negative conflict can occur when none of the involved states practices its right and assert jurisdiction to prosecute the criminals. Also, the importance of state jurisdiction principles can be explained by examining two other respective related to the individuals involved in the crime, the criminal and the victim. These two respective can be linked to the existence of international organizations. Determining which law should be applied is a significant consideration for the criminal being prosecuted for two reasons. First, knowing the law that governs the offender's action helps him to recognize the gravity of his act. Second, deciding the governing law according to state jurisdiction rule allows the criminal to know the legal tools that are available for him to defend himself. Using state jurisdiction to decide the applicable law is a considerable subject for the states and some international organizations willing to know whether they have the legal capacities to enforce their laws over illegal activities. In other words, determining the applicable law according to state jurisdiction rules is a very important step in order to allow international society's members to enjoy one of the most fundamental rights granted by international law the right of full sovereignty over individuals or territories.¹ For these reasons, it is clear that in order to gain the maximum possible benefit of the state jurisdiction it was very important to consider the universal need for more cooperation in order to establish clear rules of its application. Even though the necessity of determining state jurisdiction has been recognized by international society, the practical applications of its principles have been a serious universal legal problem. This problem always results from the modern state jurisdictions' principles' generality and the ambiguity between their functions and applications' limits.

TERRITORIAL JURISDICTION

Basically, it can be stated that the territorial principle, especially in its traditional application, is the most respected and accepted basis for a state's jurisdiction. This credibility and trust can be justified through two main traditional principles of international law utilized to establish the territoriality in its initial application. These two principles are: the principle of sovereignty and the principle of equality. According to the principle of sovereignty, the state is authorized to enact laws that are necessary for its existence in order to organize the activities within its borders². According to the equality principle, a state is obligated to conform to other states' territorial sovereignty while exercising its sovereignty by enacting its domestic laws.⁸ As a result, the principle of territoriality can be defined as an absolute right which allows states to prosecute crimes starting and producing their effects within the states' territories. Therefore, it can be concluded that in order to assume jurisdiction, according to the territoriality, all the crimes' elements must occur within the claimant state's territory³. Even though the strict interpretation of territoriality has been used as an effective method to prevent crimes in their

¹ ROTHMAN

²ROTHMAN

³ ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRMINAL LAW 144 (Cavendish Publishing 2003) (2001).

simple structure, it evacuated the principle from its privileges in facing some modern crimes. Accordingly, states found it necessary to create new concepts of territoriality that fill in the gap resulting from the classic concept of the territoriality and to also provide them with extra legal methods which fit the states' needs. The most important and recent concepts of the territoriality that have been highly respected and applied by the society include subjective territoriality and objective territoriality.

SUBJECTIVE TERRITORIALITY:

One of the most important developmental aspects of territoriality in its traditional meaning is subjective territoriality which resulted from society's efforts to extend the states' jurisdictions in order to reach two goals. The first of these goals is to emphasize the idea of sovereignty and territorial integrity.⁴ This could be achieved by providing the states with a legal method to assume jurisdiction over offenses that may affect the states' interests and cannot be prosecuted by applying the strict interpretation of territoriality⁵. The second goal is to obligate the states by inviting them to enter into treaties to participate in the security of international society against modern organized crimes in which the criminal conduct breaks down into many portions, each one of them taking place in different territories⁶. Therefore, according to the subjective territoriality principle a state has the legal capacity in reliance on its sovereignty and international law to assert jurisdiction over crime when the incriminating action starts within its territory, regardless of the criminal consequence's place⁷. As a result, in response to the policy beyond the creation of this principle and the special nature of the organized crimes, the scope of subjective territoriality does not limit itself to the situation where the criminal action is committed in the prosecuting state. Rather, it can be utilized to institute jurisdiction for every state in which part of the incriminated action takes place.

However, applying the subjective territoriality, according to this broad universal interpretation, could cause conflicts between two or more jurisdictions. This conflict could be negative or positive. On the one hand, negative conflict could exist when the criminal conduct breaks down into many small parts, none of which cause any harm to the state in which it appears, and as a result does not bring the state's attention and interest in prosecution⁸. However, when it is considered as one entity, this kind of crime could cause serious to international society. Therefore, it is essential to create legal methods that encourage the states to participate in the protection of the international society as a whole and maintain the primary principles of international law.

In order to decrease the possibility of negative conflict, this issue had to bring to the states' attention the enormous risk resulting from overlooking the application of their jurisdictions. In addition, while processing this project, the drafters had to consider the nature of the international community and states' concerns about their sovereignty and equality.⁹ Therefore, the only way to put this legal project in process was to invite the states to enter into

⁴ ROTHMAN

⁵ BARRY E. CARTER ET AL., INTERNATIONAL LAW 651 (Aspen Publishers 2003)

⁶ LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASE AND MATERIALS 1095 (WestGroup 2001) (1980)

⁷ ROTHMAN

⁸ CARTER

⁹ BANTEKAS

treaties tending specific kinds of crimes in which the risk that can affect the society can be shown in greater and clearer ways¹⁰. Thus, the subjective territoriality has been instituted and universally recognized through two treaties, the Geneva Convention for the Suppression of Counterfeiting Currency (1929) and the Geneva Convention for the uppression of the Illicit Drug Traffic (1936).

According to these two treaties all contracting states obligated themselves to extend their jurisdiction to prosecute criminal actions affecting national security and to prosecute incriminating conduct affecting peace and security within the international society.¹⁹ Even though giving states the authority to extend their jurisdictions could contribute to the security of the international society against crimes and decrease negative conflict, it could also create many legal problems.

One of the most important arguments against subjective territoriality is that since it provides the states with legal extension of their jurisdiction, it can be used as a rule of extraterritorial jurisdiction more than a rule of territorial jurisdiction¹¹. This extraterritoriality could create positive conflict which may occur when two or more states where different parts of the incriminating action take place, both assume jurisdiction regarding the same offense. Therefore, states found it very important for their sovereignty and national privacy to establish boundaries for the application of subjective territoriality in a way that does not evacuate it from its special characteristic nor and defend states' sovereignty over their territories. It is undeniable that according to the basic principles of international law, all states recognized as members of the international society are considered equal entities having the same rights and obligations¹². One of the most important rights that is guaranteed for all states is the right of full sovereignty over their territories and citizens. However, it should be understood that the states' rights on full sovereignty are restricted by an equivalent obligation assimilate on their respect of other states' sovereignty resultant from the principle of equality. Therefore, states in practicing their sovereignties by enacting laws and applying them over crimes are obligated by the principle of equality not to extend their application in a manner that disrupts public order or depreciates the sovereignties of other states. Even though the principles of sovereignty and equality are recognized and accepted by the states, voluntarily complementary application of them by the states is rare due to the special nature of the international society. Many international experts agree that the greatest difficulty holding back an active and smooth application of international law similar to that of domestic laws is the absence of a high authority with the power to enforce the laws. Accordingly, even though states participate in the legislation of international law by suggesting legal solutions or a validating legal project recommended by other members in the international society, states are not typically bound to comply with these rules. However, states usually try to show moral respect to these rules, especially in the area of jurisdiction when there is a conflict between two states' interests in order to guarantee similar treatment from other states in other situations. Furthermore, this function can be reached through the application of the comity principle.

International Comity is the most suggested and expected principle utilized to solve existing legal disputes or to avoid an expected dispute. Moreover, international comity can be

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¹² ROTHMAN

defined as an honorary disclaimer from one state to another regarding the same lawful right that both of them are pretending. Therefore, it is obvious that International Comity can be a useful method to solve any positive conflict resulting from the application of subjective territoriality. Furthermore, this usage of International Comity can be explained when one of the states in which two of the incriminating action occur forfeits its right to the other state to assert its jurisdiction. However, in order to guarantee satisfactory abidance of International Comity in solving any positive conflicts, it should be widely interpreted so it may be recognized by all authorities in the state.

The most respective application of International Comity that has been recognized domestically by the authorities in many states is what is so called the comity of court. According to the court comity, positive conflict can be solved when the judge refuses to decide the case before him assuming that the delivery of this case before another court in a different country could provide more justice.³¹ Even though the considering International Comity could avoid existing conflict between two jurisdictions, the International Comity can be utilized, also, to avoid the initial occurrence of the disputes.

It is clear that when the states relied on International Comity to solve positive conflicts occurring between jurisdictions, they did not mean to limit its application to solve existing conflicts, but rather they meant to decrease the possibility of the existence of these conflicts. Thus, in response to this policy, it will be legitimate to extend its use to the court comity, as well as to the law's enactment and interpretative process. However, even though drafters in all states agree on enacting laws consistent with their national interests, they dissent in their evaluation of the limit of their jurisdictions and the conditions satisfied to put their laws in process.³⁵ For instance, in some jurisdictions, legislators provide the existence of two factors in order to allow prosecuting a crime according to subjective territoriality. First, the part of incriminating action appearing in the territory of the prosecuting state should play an important and effective part in the crime.

Hence, according to this condition a state cannot assume jurisdiction over weightless actions unless it is obligated by international law to prosecute. Second, there should be a legitimate and direct relationship between the portion occurring in the territory and the state assuming jurisdiction. As a result, a state does not have a lawful right to assert jurisdiction over an offense when the conduct that the state is willing to. It has been previously explained that states are obligated by international law to extend their jurisdiction not only to prosecute the criminal actions affecting their national security but also to prosecute the conduct affecting the peace and the security of the society.

In addition, according to subjective territoriality, a state will not be eligible to apply its laws over an action when the causation between this action and the crime was disconnected. For example, if an individual made a poison in state A and sent it to another person who had the intent to use it to kill a person in state B but the portion was not enough to kill the victim who later died as a result of the gunshot in state C, state B will not be able to prosecute this conduct as a part of the slaughter crime since there is no link between the conduct and the criminal result. However, it should be understood that state B could apply its criminal law to prosecute the action as a part of attempted murder.

One other hand, drafters in other states formulated the conditions of applying their laws according to the subjective territoriality, on one general principle the affection of the public order. This principle links the application of national laws on the convulsing the public order. However, it should be noticed that this theory is too broad: it can be affected by the political and

economic situations in each state. Even though the application of subjective territoriality could cause many legal problems and disputes between states as a legitimate result of the uncertain requirements of its application, it could be used to serve many positive purposes.

In conclusion, though all those arguments that have been taken against the application of the territoriality in its subjective territoriality, the practical situation makes it clear that subjective territoriality is the best method available to improve the traditional meaning of territoriality in a way that fits states' needs without real violation of international law.

OBJECTIVE TERRITORIALITY:

It has been explained before that the policy beyond the creation of the subjective territoriality was to fill in the gap that could occur as a result of the strict application of the territoriality and to convey the improvements and needs in international society. However, it should be noticed that even though subjective territoriality provides the states and international society with extra protection, the principle overlooking the criminal consequence's location creates some legal problems. One of the most important problems can be explained when the state in which the crime was conducted does not apply its criminal law either because this conduct is not incriminating or because it does not create real risk to national security. As a result, in this situation criminals could escape liability, and the state where the consequence takes place may suffer because it is unable to protect its interests. Therefore, national legislators found it essential to develop a new concept of territoriality that can complement the subjective territoriality and fill in the gaps occurring in their domestic legal systems. This legal project is called objective territoriality.

According to objective territoriality, a state has a lawful right to apply its domestic laws to a crime when the criminal consequence takes place within its territory even if the incriminated conduct is completed in a different state. However, it should be considered that in their efforts to show their sincerity and respect to other states' sovereignty and interest's drafters in many states tried to create boundaries for the applications of objective territoriality. Furthermore, these boundaries have been drawn by requiring certain degrees of gravity that have to exist in order to apply domestic laws. However, even though this condition has been expressed in different ways in many domestic laws, all drafters agreed on formulating this principle in a general way that allows broad interpretation of objective territoriality.

Recurring a certain degree of gravity to apply the objective territoriality is similar to requiring the destruction of public order to apply subjective territoriality. One of the most recent and wide interpretations of objective territoriality is the so called "effective doctrine" which was created by the federal court in the United States.

The main goal of this doctrine was to extend court authority to apply its laws when an additional effect of the crime takes place directly in the United States territory.

Moreover, the clearest application of this doctrine could be found in the U.S antitrust laws where the courts assert jurisdiction over crimes because negative economic consequences occurs within American territory. However, it should be noticed that this broad interpenetration of the objective territoriality through the creation of the effect doctrine has been denied by other states. Furthermore, this declination has been expressed by arguing that this illegitimate and wide application of objective territoriality would make it rule of the extraterritoriality rather than territoriality. Even though the unreasonable application of the objective territoriality may cause

disputes between states practice proves that objective territoriality is an effective weapon to face some illegal activities committed by neither natural persons nor legal persons.

The necessary use of the objective territoriality can appear when a state tries to prosecute crimes committed by agents or modern technology. In these kinds of offenses the incriminating conduct is usually prepared outside the territory and carried to the territory by a third party or modern communication methods such as phones, fax, or internet. Hence, in this situation the only way not to allow the criminals to escape liability is to allow the application of territoriality in its objective meaning.

In addition, objective territoriality can be utilized as a positive method to prevent some categories of legal persons from escaping liability by taking advantage of their special structures. Moreover, the most apparent example of these legal persons is multinational firms. By nature, the multinational companies are operated in many states. Accordingly, if the state in which each branch of the firm is operated insists on applying the strict interpretation of territoriality, each state will be eligible to regulate the activities of the branch operated within its territory.⁵⁸ As a result, a state will not be authorized to prosecute an offense when the illegal conduct committed by other branches located in other states takes place within its territory and risks its national interest. The situation worsens and produces increased risk to international society when the actions are not forbidden in the states where they were committed when they are taken separately; however, it can create serious problems when taken as one entity. Therefore, the application of objective territoriality is the most suitable method to avoid the existence of negative conflict allowing violated companies to escape liability.

However, the special nature of objective territoriality resulting from its concern about the criminal consequence as a basis for its application could make legitimate arguments that objective territoriality is just a different interpretation of the protective principle. This argument can be retorted by setting forth an important fact. Even though, both principles adopt their validity from the principle of sovereignty, they are different in their ambit over criminals. This diversity can be explained by stating that since the objective territoriality is part of the territorial principle, the appearance of the criminal in the territory of the claimant state is an essential requirement for this principle.

A state will be able to prosecute a crime according to the protective principle even if the criminals are outside its territory. Finally, even though it is undeniable that objective territoriality differs from the protective principle and, therefore, has its own independent characteristic and application, it is not as accepted and respected as neither the protective principle nor the subjective territoriality. As such, there is a significant reason that can be stated to justify this rejection. It is agreed that the protective principle and subjective territoriality earn their credibility and acceptance from the universal nature of their creations. On one hand, international law authorizes states to indirectly or directly apply their national laws to the subjective territoriality. The indirect authorization emerges through the principle of sovereignty allowing states to prosecute crimes that may hurt public interest, and the principle of equality insuring reasonable application of the sovereignty principle. The direct guarantee is instituted by treaties that obligate states to apply their domestic laws over certain crimes which may affect international security.

On the other hand, the protective principle is fully established and recognized by international law. In contrast, it is agreed that the objective territoriality is the fruit of national legislators' efforts to extend their domestic laws, and there is no proof that objective territoriality has been recognized internationally. Hence, the state is not required by any international

agreement or custom to obey other states' interpretations of their national laws when there is no international interest.

IMMUNITY FROM JURISDICTION:

Even though it is undeniable that states have the capacity to assume jurisdiction over individuals and articles located within their territories, nations agree that considering some exceptions regarding certain people and property is necessary. The main purpose beyond making these immunities is to improve relationships between the states. Moreover, this improvement of relationships can be explained by stating that forbidding the authorities from applying national laws to certain people or articles belonging to another state shows the state's respect for other states' sovereignties and privacies. The respect of other states' sovereignties can be explained by clarifying that a state waiving its right of asserting jurisdiction allows other states to exercise extended sovereignties by applying local laws over their national citizens and properties located overseas. Second, the consideration of other states' privacies can be shown by stating that making an exception from jurisdiction over certain people belonging to other states will allow them¹³ to perform their functions with more freedom and confidence. The immunities should not be extended over the policies beyond their creations: there are three immunities that can be considered the most respected and recognized exceptions from the traditional concept of territoriality: the immunity of diplomatic envoys, consular immunity, and immunity for international organizations.

Will The ICC Undermine Sovereignty Of Nations?

The ICC is meant to be used when national systems do not, or are unable to function. As quoted by the official ICC site:

“the jurisdiction of the ICC will be complementary to national courts, which means that it will only act when countries are unable or unwilling to investigate or prosecute.”

At the beginning of May, 2002, the Bush Administration in the United States announced that it had resolved to “unsigned” the Rome Statute creating the ICC. The U.S. has long been afraid of an international body having jurisdiction over the United States and that cases will be brought against U.S. civilian and military authorities on political grounds. Responding to that announcement, Washington D.C.-based Center for Defense Information (CDI) also pointed out that the concerns of the U.S. are not justified:

Bush administration officials argue that nullifying the U.S. signature means the United States will not be bound by the ICC's jurisdiction or have to follow any of its orders. **But that**

¹³ BANTEKAS

was the case whether or not the U.S. remained a non-ratifying signatory. As already pointed out:

- The United States would pre-empt ICC jurisdiction by investigating any charges against U.S. citizens.
- Moreover, the treaty specifically limits the court's jurisdiction to “the territory of any State Party and, by special agreement, on the territory of any other State” (Article 4)¹⁴.

The ICC has the same flaw as all international institutions. In a world ruled by force, the rich and powerful do pretty much what they like. It's next to inconceivable that the ICC could try, even investigate, Western criminals. Simply look what happened to the World Court and the Security Council when they tried to get the US to call off its terrorist war against Nicaragua. The same was true of Nuremberg. The people sentenced there were some of the worst gangsters in human history, no doubt, but the operational definition of “war crime” was “war crime that they committed and we did not¹⁵.”

And talking of power, Stephen Shalom also notes concerns from history:

“Following World War II, a war crimes tribunal was held in Tokyo to try Japanese political and military leaders. There is no doubt that the defendants were responsible for appalling atrocities, but, as the Indian judge on the tribunal wrote in his dissenting opinion, the victorious allies had themselves committed grave crimes, and the U.S. atomic bombings of Hiroshima and Nagasaki were the most horrific war crimes of the Pacific War. But only the atrocities committed by the Japanese were punished. In short, the war crimes trial represented “victors” justice¹⁶.”

¹⁴ Colonel Daniel Smith, USA (Ret.), Dropping Out - American Style, Center for Defense Information Weekly Defense Monitor, Volume 6, Issue #14, May 16, 2002

¹⁵ Noam Chomsky, Chomsky responses in The ZNet Forum System, June 30, 2002

¹⁶ Stephen R. Shalom, The Milosevic Indictment, ZNet, September 20, 2001

CONCLUSION

To conclude:

- States have jurisdiction over their nationals over crimes specified in their national law.
- Passive Personality Principle and protective Principle are used to determine state's jurisdiction.
- *Sovereignty* is the exclusive right to exercise supreme political authority over a defined territory (land, airspace and certain maritime areas such as the territorial sea) and the people within that territory.
- Since a State has sovereignty over its territory, the entry into its territory by the armed forces of another State without consent is a *prima facie* breach of international law.
- The jurisdiction of the ICC will be complementary to national courts, which means that it will only act when countries are unable or unwilling to investigate or prosecute.

BIBLIOGRAPHY

- ROTHMAN
- E. CARTER ET AL., INTERNATIONAL LAW 651 (Aspen Publishers 2003).
- LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASE AND MATERIALS 1095 (WestGroup 2001) (1980)
- ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 144 (Cavendish Publishing 2003) (2001)
- Colonel Daniel Smith, USA (Ret.), Dropping Out - American Style, Center for Defense Information Weekly Defense Monitor, Volume 6, Issue #14, May 16, 2002
- Noam Chomsky, Chomsky responses in The ZNet Forum System, June 30, 2002
- Stephen R. Shalom, The Milosevic Indictment, ZNet, September 20, 2001