Legal Research Development
An International Refereed e-Journal
(Peer Reviewed, Refereed & Open Access, Indexed, Journal of Law)
Web: www.lrdjournal.com; Email: journal1257@gmail.com
ISSN: 2456-3870
Vol. 3, Issue-IV June 2019
e-ISJN: A4372-3116
Impact Factor : 4.457 (SJIF: 2016)
Vol.3, Issue-IV, June 2019

JURISDICTION ISSUE IN CYBERSPACE AND INTERNATIONAL PRINCIPALS

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Abstract

This paper tried to emphasis on the most crucial issue in cybercrime, which is jurisdiction. Exponential growth of cybercrime is a big problem for any developed or developing nation these days but the most problematic area is there jurisdiction. This research paper is an ex-post facto research and based on various theories and judgments take in international platform related to jurisdictional Issue. Recently in the case of Kulbhushan Jadhav, this issue was raised in international corridor that weather Pakistan got jurisdiction to heard and decide this case or not. In this case International court of justice hold the decision of the Pakistan Supreme Court. This paper is not concern about Kulbhushan case but only focusing on the fundamentals which work behind the jurisdictional issues in cyberspace. This paper is the attempt of an outcome to gauge the scope of state and international Jurisdiction in cyber space.

Key word: Jurisdiction, Cybercrime, Jurisdictional Enforcement.

Introduction

Jurisdiction is the power of a judicature to decide a case and resolve a dispute involving person, property and subject matter. These principles of jurisdiction are enshrined in the Constitution of a State and part of its jurisdictional sovereignty[1]. All sovereign independent States, possess jurisdiction over all persons and things within the territorial limits and all causes, civil and criminal, arising within these limits[2].

The Issue of Jurisdiction

The issue of jurisdiction has to be looked into from three perspectives: (a) Prescriptive jurisdiction and (b) Enforcement jurisdiction (c) Judicial Jurisdiction

[1] Apart from judicial activity, a State's administrative, executive and legislative activity is also part of its jurisdiction sovereignty.
[2] Lord Macmillan in Campania Naviera Vascogado v. Steamship, 'Cristina', [1938] AC 485.

Prescriptive Jurisdiction

This principal describes a State's competency to define its own laws in respect of any matters State wants. As a general rule, a State's prescriptive jurisdiction is unlimited and a State may make law for a subject matter irrespective of where it occurs or the nationality of the persons involved.

Enforcement Jurisdiction

A State's ability to enforce those laws is necessarily dependent on the existence of prescriptive jurisdiction.

However, the sovereign equality of States means that one State may not exercise its enforcement jurisdiction in a concrete sense over persons or events actually situated in another State's territory irrespective of the reach of its prescriptive jurisdiction. That is, a State's enforcement jurisdiction within its own territory is presumptively absolute over all matters and persons situated therein[3].

Hence; the State legislative enhancements primarily reflect its prescriptive jurisdiction. For example, the Information Technology Act, 2000 provides for prescriptive jurisdiction. Its section 75 states[4]:"75 Act to apply for offence or contravention committed outside India. –

(1) Subject to the provisions of sub-section (2), the provisions of this act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

(2) For the purpose of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act ro conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

It is the legislative function of the Government to enact laws and judicial function (and/or administrative) to enforce those laws. It is important to note that the principles of jurisdiction followed by a State must not exceed the limits which international law places upon its jurisdiction.

Judicial Jurisdiction

This is the ability of judicial system of a country to try and decide a case. Judicature can try only those cases in his court, for which they have territorial jurisdiction. The similar issue was recently raised in International court of Justice in the case of Kulbhushan Jadhav. International court holds the decision passes by Pakistan court by saying that Pakistan court does not have jurisdiction to decide the case of Kulbhushan Jadhav, although it's a matter of territorial jurisdiction but the same principal will also be implemented in cyberspace.

[3] Vakul Sharma information Technology Law and practice- Cyber Laws and Laws regulating cyberspace, 5th edition- Universal publication, 2015

[4] Information technology Act, 2008

International Law

International law governs relations between independent sovereign States. It is the body of rules, which are legally binding on States in their intercourse with each other. The rules are not only meant only for the States but also for international organizations and individuals. Furthermore, it attempts to regulate to extent to which one State's enforcement jurisdiction impinges or conflicts with others.[5]

International law is also referred to as 'public international law' as it governs the relations of States. And in case of a private dispute, if any, settlement mechanism is increasingly being provided by the 'private international law'.

In the most general terms, private international law is that body of law, which comes into operation whenever a domestic (municipal) court is faced with a claim that contains a foreign element. The resolution of such private disputes is resolved through the law of 'conflict of law' – it is that part of the private law of a country, which deals with cases having a foreign element. It is a necessary part of the law of every country because different countries have different legal systems containing different rules. The rules of the conflict of laws are expressed in terms of judicial concepts or categories and localizing element or connecting factors.[6]

Hence, the public international law reflects the juxtaposition of States (as a legal person) and subject their jurisdiction sovereignties to certain limitations, i.e., there is a 'general prohibition in international law against the extra-territorial application of domestic laws[7]

Nevertheless, it has been recognized under international law that a State may assert extra-territorial jurisdiction under certain circumstance. The sources of these extra-territorial jurisdiction are: (a) Territorial Principle (b) Nationality Principle (c) Protective Principle (d) Passive Personality Principle (e) The 'Effects Doctrine' and (f) Universality Principle[8].

Territorial Principal

A State's territory of jurisdiction purposes extends to its land and dependent territories, airspace, aircraft, ships, territorial sea and, for limited purposes, to its contiguous zone, continental shelf and Exclusive Economic Zone (EEZ). The principle as adopted by the national courts has been that all

[5] Supra note3 ,
[6] Ibid
[7] In the absence of municipal laws, international treaties ratified by India can be taken into account for framing guidelines in respect of enforcement of fundamental rights [Vishaka v. State of Rajasthan, (1997) 6 SCC 241: 1997 SCC (Cri) 932; Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244 (para 10)].
[8] Ibid

people within a State's territory are subject to national law, save only for those granted immunity under international law.

The territorial principle has two variants: (i) 'objective' territorial principle, where a State exercise its jurisdiction over all activities that are completed within its territory, even though some element constituting the crime or civil wrong took place elsewhere; and (ii) 'subjective' territorial principle, where a State asserts itsjurisdiction over matters commencing in its territory, even though the final event may have occurred elsewhere[9].

In *S.S. Lotus case (France v. Turkey)*[10], it was held by a Permanent Court of International Justice that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention".

The chances are that in view of components of acts involving territories of two or more States, the only way out to resolve the issue is through mutual negotiation, extradition to the most affected State (if extradition treaty exists between them) or simply by an exercise of jurisdiction by the State having custody of the accused.

Nationality Principle

It is for each State to determine under its own law who are its nationals. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State. Nationality serves above all to determine that the person upon whom it is conferred, enjoys the rights and is bound by the obligations, which the law of the State in question grants to or imposes upon its nationals[11]. Under this principal a State can exercise its jurisdiction over its national irrespective of territory.

Protective Principle

Under this principal every state got right to protect his national security and peace. A state has all the right to protect itself from acts of international disturbance, terrorism and abuse etc**.**

In the case of Attorney-General of the Government of Israel v. Eichmann[12], the District Court of Jerusalem held:"The State of Israel's right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to

[9]Supra note3
[10] PCIJ, SerA No. 9 (1927).
[11]Nottebohm case (Liechtenstein v. Guatemala) (Second Phase), ICJ Rep 1955 4.
[12](1968) 36 ILR 5.

prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence".

Passive Personality Principle

This principal believes that every national of a state carries the rights of its native country, wherever he/she may be. When a citizen visited another country he/she takes with him for his "protection" the law of his own country and subjects those, with whom he comes into contact, to the operation of that law.

The jurisdiction aspect of 'passive personality' has been elaborated further in the case of United States v. Yunis[13], where the US District Court, District of Columbia held: "This [passive personality] principle authorized States to assert jurisdiction over offence committed against their citizens abroad. It recognizes that each State has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries. Because American nationals were on board the Jordanian aircraft, the government contends that the Court may exercise jurisdiction over Yunis under this principle."

Although the principle is bit controversial one, as it extends the extra-territorial jurisdiction even in the foreign territories'. Nevertheless, the principle has been adopted as a basis for asserting jurisdiction over hostage takers[14].

The 'Effect Doctrine'

'The 'effects doctrine' is primarily a doctrine to protect American business interests and is applicable where there are restrictive tradeor anti-competitive agreements between corporations. In Hartford Fire Insurance Co. v. California[15], the question was whether the London insurance companies refusing to grant reinsurance to certain US businesses, except on terms agreed amongst themselves are violative of the US anti-trust and tried in the United States. The US Supreme Court held that eh US court did have jurisdiction and the there exists no conflict between domestic and foreign law and "where a person subject to regulation by two State can comply with the laws of both."

It is an extra-territorial application of national laws where an action by a person with no territorial or national connection with a State has an effect on that State. The situation is compounded if the act is legal in the place where it was performed

Universality Principle

The canvass of the universality principle is quite vast. A State has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern.

[13] 681 F Supp. 896 (1988).
[14] See, International Convention Against The Taking of Hostage, 1979.
[15] 113 S. Ct 2891 (1993).

It includes acts of terrorism, attacks on a hijacking of aircraft, genocide, war crimes, etc.

A State may assert its universal jurisdiction irrespective of who committed the act and where it occurred. The perspective is broader as it was deemed necessary to uphold international legal order by enabling any State to exercise jurisdiction in respect of offences, which are destructive of that order.[16]

The principles of jurisdiction of international law take cognizance of both State and international laws. If on one hand the objective of State (or municipal or domestic) law is not only to ascertain the supremacy of its judicial sovereignty domestically but also extra-territorially, then on the other the international law itself imposes general prohibition against the extra-territorial application of domestic laws.

INTERNATIONAL LAW AND STATE LAW

This dichotomy underlines the fat that there is a 'tug-of-war' between the State law and the international law. Opposed to this 'dualistic' view is the 'monistic doctrine', which States that it is international law, which determines the jurisdiction limits of the personal and territorial competence of States.

Application of International Law by Courts

In practice, it is the application of 'statutory elements' of both the State and international laws, which help the domestic (or municipal) courts to arrive at a decision.

In *R. v. Bow Street Metropolitan Stipendiary Magistrate*, ex parte Pinochet Ugarte (No. 3)[17] the House of Lords examined where Augusto Pinochet, the ex-President of Chile, who ruled Chile from September, 1973 to March, 1990 wa eligible under State Immunity Act, 1978 as the Kingdom of Spain had asked for his extradition. Against the Division Court order, the Crown Prosecution Service and the Kingdom of Spain appealed in respect of the determination that Pinochet was entitled to immunity from proceedings as a former Head of State.

Earlier, in the House of Lords in Ex parte Pinochet did not enjoy immunity from extradition proceedings because no immunity arose under customary international law in respect of acts of torture and hostage taking and also no personal immunity arose under Pt III of the State Immunity Act, 1978.[18]

However, this judgment was set aside by the House of Lords in Ex parte Pinochet Ugarte (No. 2), WLR 272 and the entire case was reheard in the House of Lords again Ex parte Pinochet Ugarte (No. 3), [1999] 2 WLR 827 and it ruled by a majority of six to one (Lord Golf dissenting) that in principle a head of State had immunity from the criminal jurisdiction of United Kingdom for acts done in his official

[16] *Supra note3*
[17] [1999] 2 WLR 827 (HL).
[18] Ibid

capacity as head of State by the virtue of section 20 of the State Immunity Act, 1978 when read the article 39(2) of Sch. 1 to the Diplomatic Privileges Act, 1964. Also, that section 2 Extradition Act, 1989, required that the alleged conduct, that was the subject of the extradition request, should be a crime in a United Kingdom at eh time of offence was committed.[19]

The House of Lords observed that the extra-territorial torture did not become a criminal offence in the United Kingdom until section 134 of the Criminal Justice Act, 1988 came into effect on 29 September, 1988; it therefore followed that all allegations of torture prior to that date which did not take place in Spain were not extraditable offences. That is, under the ordinary law of extradition, Senator Pinochet cannot be extradited to face charges in relation to torture occurring before 29 September, 1988.[20]

Application of International Law by International Tribunals

The International Tribunals have travelled a long way from the time of International Military Tribunals (IMT) at Nuremberg and Tokyo after the Second World War toe establishment of International Criminal Tribunal for the former Yugoslavia (1993) and Rwanda (1994).

Nuremberg and Tokyo stood as symbols and signposts of change from the national State of the nineteenth century to certain of a supranational body. It announced for the first time that States were accountable to the world community and that international tribunals had jurisdiction over individuals for their violations of international law. But the major indictment of MT Code was that it was an ex post facto law[21]

As the Justice RadhaBinod Pal in his dissenting judgment[22] had opined that:

> "Victory does not invest the victor with unlimited and undefined power. International laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. Victor nation, under the international law, is competent to set up the tribunal for the trial of war-criminals, but such a conqueror is not competent to legislate an international law."

Thus to have a wider acceptance the International Criminal Tribunals (ICT) for former Yugoslavia and Rwanda have been established by the Security Council Resolutions 827 (1993) and 955 (1994)

[19] *Supra note3*
[20] Ibid
[21] The Charter [of MT], which was in itself influenced by the American Constitution, went against the spirit of that very constitution, in as much as there is a specific prohibition in it against ex-post-facto laws. Section 9 and 10 of article 1 of the American Constitution provide that …… "No ex post facto law shall be passed by the Congress and on Stat shall pass any ex-post-facto law". Similarly, the General Assembly of the United Nations on December 9, 1948 adopted the "Declaration of Human Rights", of which the article 11(2) provides that: "No man shall be held guilt of any penal offence on account of any act or omission which did not constitute a penal offence under a national or international law, at the time when it was committed".
[22] Nuremberg and Tokyo Trials, Vol. 2.

respectively. The ICT for former Yugoslavia charged the individuals with 'crimes against humanity and violations of the laws or customs of war.'[23]

The need for having a permanent criminal court under international law was partially fulfilled when at a conference in Rome in 1998, 120 States voted in favor of the Rome Statute for the International Criminal Court[24]. In their foreword to the book 'Crimes Against International Law', authors Keenan and Brown write[25]: "It is the authors' contention that the Tokyo and Nuremberg War Crimes Trials were a manifestation of an intellectual and moral resolution that will have a profound and far-reaching influence upon the future of world society….. the authors maintain that the international moral order must be regarded as the cause, not the effect, of positive law; that such law does not derive its essence from physical power, and that any attempt to isolate such law from morals is a symptom of jurisdiction schizophrenia caused by the separation of the brain of the lawyer from that of the human being".

International law has turn more a dynamic law. It has evolved over a period of time and is far more international community centric now than it was fifty year ago. The traditional principles of international jurisdiction that have developed and adopted over a period of time are now being extended over to cyberspace to continuity of established law and practice of world over.

JURISDICTION IN CYBERSPACE

Cyber jurisdiction in the extension of principles of international jurisdiction into the cyberspace. Cyberspace has not physical (national) boundaries. It is an ever-growing exponential and dynamic space. With a 'click of a mouse' one may access any website from anywhere in the world. Since the website come with 'terms of service' agreements, privacy policies and disclaimers – subject to their own domestic laws, transactions with any of the websites would bind the user to such agreements. And in case of a dispute, one may have recourse to be 'provide international law'. In case the "cyberspace offences" are either committed against eh integrity, availability and confidentiality of computer systems and telecommunication networks or they consist of the use of services of such networks to commit traditional offences, then one may find oneself in the legal quagmire[26].

The question is not only about multiple jurisdictions but also of problems of procedural law connected with information technology. The requirement is to have a board based convention dealing with criminal substantive law matters, criminal procedural questions as well as with international criminal law procedures and agreements.

[23] *Supra note3*
[24] The Statue (treaty) is in force (more than 66 nations have already ratified it).
[25] Kennan and Brown, Crimes Against International Law.
[26] Ibid

Convention on Cyber Crime

The Convention on Cyber Crime[27] was opened at Budapest on 23 November, 2001 for signatures. It was the first ever-interracial treaty on criminal offences committed against or with the help of computer networks such as the Internet.

The convention deals in particular with offences related to infringement of copyright, computer-related fraud, child pornography and offences connected with network security. It also covers a series of procedural powers such as searches of and interception of material on computer networks. Its main aim, as set out in the preamble, it to pursue "a common criminal policy aimed at the protection from society against cybercrime, inter alia by adopting appropriate legislation and fostering international co-operation."[28]

Extraditable Offences

Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of specially protects the accused from being tried for any crime other than that for which he was extradited.

Similar views were expressed by the Supreme Court in *Daya Singh Lahoria v. Union of India*[29]"A fugitive brought into this country under and Extradition Decree[30] can be tried only for the offences mentioned in Extradition decree and for no other offences and the criminal courts of India will have no jurisdiction to try such fugitive for any other offence."

"There is no rule of international law which imposes any duty on a State to surrender a fugitive in absence extradition treaty. The law of extradition, therefore, is a dual law. It is ostensibly municipal law; yet it is a part of international law also, inasmuch as it governs the relations between two sovereign States over the question of whether or not a given person should be handed over by one sovereign State to another sovereign State.This question is decided by national courts but on the basic of international commitments as well as the rules of international law relating the subject."

[27] Ministers or their representatives from the following 26 Members States signed the treaty: Albania, Armenia, Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, "The Former Yugoslav Republic of Macedonia", Ukraine and the United Kingdom. Other 4 members, Canada, Japan, South Africa and the United States, that took part in the drafting, also signed the trety.

[28] *Supra note3*

[29] (2001) 4 SCC 516.

[30] Section 21 of the Extradition Act, 1962, provides that if a person is brought into India under an extradition decree, he cannot be tried in respect of an offence, which does not from part of the decree.

It is significant to note that despite the treaty, a State may refuse extradition. In Hens Muler of *Nuremberg v. Superintendent Presidency Jail Cal*[31], the court held that even if there is a requisition and a good cause for extradition, the government is not bound to accede to the request, because section 3(1) of the Indian Extradition Act, 1903 (based on Fugitive Offenders Act, 1881 of the British Parliament) gives the government discretionary powers.

Extradition is usually granted for an extraditable offence regardless of where the act or acts constituting the offence were committed. It is not granted for a political offence; the following shall not be considered to be political offences (and hence are extraditable offences):

Murder or other willful crime against a Head of State or Head of Government or a member of their family, aircraft hijacking offences, aviation sabotage, crimes against internationally protected personals including diplomats, hostage taking, offense related to illegal drugs, or any other offences for which both contracting States have the obligation to extradite the person pursuant to a multilateral international agreement[32].

Cybercrimes – Are the extraditable Offences?

The Convention on Cybercrime has made cybercrimes extraditable offences. The offence is extraditable if punishable under the law in both contracting parties by imprisonments for more than one year or by a more severe penalty (article 24). It echoes the double criminality rule which States that the conduct be an offence in both the requesting State and the requested State[33].

The aforesaid article 24 applies to extradition between parties for the criminal offences established in accordance with articles 2-11 of this Convention, provided that they are punishable under the laws of both parties concerned by deprivation of liberty for a maximum period of at least one year, or by a more severe penalty.

Extraditable Offences under the Convention	Offences
Title 1. Offences against the confidentiality, integrity and availability of computer data and systems	Illegal access (Art.2) Illegal interception (Art.3) Data interference (Art.4) System interference (Art.5) Misuse of devices (Art.6)
Title 2. Computer-related offences	Computer-related forgery (Art.7) Computer-Related fraud (Art.8)
Titile3. Content-related	Offences related to child pornography (Art.9)
Title4. Offences related to infringements of copyright and related rights	Offences related to infringements of copyright and related rights (Art.10) Attempt and aiding or abetting (Art. 11)

Table 34.1: The Extraditable Offences under the Convention

[31] 1955 AIR 367, 1955 SCR (1) 1284
[32] *Supra note3*
[33] Ibid

It is significant to note that almost every kind of cybercrimes have been made extraditable under the Convention. Moreover, the Convention has the force of international law behind it. In other words, to investigate, search, seize, arrest, prosecute and extradite cyber criminals for cybercrimes, a proper legal framework is already in place[34].

India is still not a signatory to the Cyber Crime Convention and the bilateral extradition treaties, which it has signed with around 50 countries so far, do not mention 'cybercrime' as extraditable offences. But it may not deter the Indian government from grating extradition, as it was held in *Rambabu Sexena v. State*[35], that "if the treaty does not enlist a particular offence for which extradition was sought, but authorizes the Indian government to grant extradition for some additional offences by inserting a general cause to this effect, extradition may still be granted".

CONCLUSION

We can say that, procedures of 'Letter Regulatory' (section 166A and section 166B of Cr.P.C) that enable investigation of crime in a foreign country are not easy and are hopelessly out of tune with the scope of computer crime and swiftness with which the evidence can be destroyed. It is important to note that about 140 letters regulatory sent to different countries seeking their cooperation in investigations have still remained unanswered. One of the reasons of unanswered letters regulatory is the apprehension at the foreign court's end that the evidence may be used for capital punishment. In certain cases, courts have demanded undertaking that the evidence would not be used to award death sentences to the accused. It is thus imperative that there is a need to sign mutual legal assistance treaties (MLTs) with more number of countries till necessary amendments are made in the Cr.P.C. Currently, Indian has MLTs signed with 19 countries to attain legal compatibility. Even section 188 of Cr.P.C requires prior permission of the Central Government or inquire into or try offences committed outside the country, which puts shackles on the investigating agency's work. As on 2009, the CBI has been struggling to get the extradition clearance for 22 criminals, who have already been located[36].These things are bound to affect the extra-territoriality application of the Information Technology Act, 2000.Though we can say that jurisdiction of Indian courts in cyberspace is prospective and enforcement bothwithin the reasonable limits.

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[34] *Supra note3*
[35] 1950 AIR 155, 1950 SCR 573
[36] Ibid