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APPLICATION OF EXTRA-TERRITORIAL JURISDICTION.

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Abstract

In this Globalize world, International law and Municipal law are two sides of a coin namely welfare and modern state. There is a lot of confusion to understand extra territorial jurisdiction under Municipal law and International law. In this article, I have given the actual sense of extra territorial jurisdiction under International law with Municipal law. There are so many views about the extra-territorial jurisdiction but a few describe about its application. So, I have also tried to give a brief about the application of extra-territorial jurisdiction. There are so many countries in the world which have laws related to extra territoriality (e.g.- United States of America has United States Alien Tort Claim Act, Australia has Statute of Westminster-1931, United Kingdom has Sexual Offences Act-2003 etc.) but it is quite necessary to know what is the position and application of extra territorial jurisdiction in International law.

Introduction-

This is a globalized world. Every country is trying to expand its jurisdiction and wants to exercise it also. There are so many countries in the world who talk about extra-territorial jurisdiction in their constitution. There is a lot of discussion about what should be the limit of extra-territorial jurisdiction and its application. The United Nations has organized so many conferences about extra-territorial jurisdiction to define its application. A Supranational Union¹ was also tried to define its application and its meaning. There are too many countries which have implemented laws which allow their nationals to be prosecuted by their courts for crimes such as war crimes and genocide even when the crime is committed extra-territorially.

Jurisdiction-

The word “Jurisdiction” is a legal term for power, literally the power to “speak the law.”² It derives from the Latin *jus* or *juris* (law) plus *dicere* (to speak).³ Jurisdiction is not a monolithic concept. The term jurisdiction basically defines the territory of a country in which it can exercise its jurisdiction. In this territory, the related country has full sovereignty to regulate its law without any international restrictions. There are four chief elements of a country namely population, territory, government and sovereignty. In these elements sovereignty and territory are correlated with each other. Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.⁴ This is a well-known principle of International Law that a country can exercise its power and laws within its territory. Article 2(1) is also talked about sovereign equality among the nations. The literal interpretation of article 2(1) is no country can infringe others' sovereignty. This sovereignty can be related with territory, laws etc. There are two Competing General Rules of Jurisdiction:

¹ The term is sometimes used to describe EU as a new type of political entity. Kiljunen, Kimmo, *The European Constitution in the Making* 21-26, ISBN- 978-92-9079-4936.

² Costas Douzinas, *The Metaphysics of Jurisdiction*, in *Jurisprudence of Jurisdiction* 21, 22 (Shaun McVeigh ed., 2007).

³ *Shorter Oxford English Dictionary On Historical Principles* 1472 (5th ed. 2002).

⁴ Malcom N. Shaw, *International Law* 645, 6th Edition, Cambridge University Press.

- A. A state may not exercise its power of jurisdiction in the territory of another state.⁵
- B. A state is free to project its jurisdiction outside its territory, so long as it is not prohibited by a contrary rule of international law in a specific case.

Extra Territorial Jurisdiction -

As the word denotes extra-territorial jurisdiction means the jurisdiction which is beyond once territory. In modern sense we can say that Extra-territorial Jurisdiction is the legal right of a sovereign to exercise its authority beyond its normal boundaries. Claims have arisen in the context of economic issues where by some states, particularly the United States, seek to apply their laws outside their territory in a manner which may precipitate conflicts with other states.⁶ Many constitutions describe this kind of power. These are some examples of it-

- A. India-India is one the pioneer countries which has the laws or code related to extra territorial jurisdiction. In Indian Constitution it is stated that no law made by parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.⁷ In Indian Penal Code it is also mentioned that this code has extra-territorial extension.⁸
- B. Australia-Australia, the land of tourist has also the law which is related to extra territorial jurisdiction. Statute of Westminster-1931 authorizes state parliaments to exercise extra-territorial jurisdiction.⁹
- C. United Kingdom-The land of precedents has also the law which is related to extra territorial jurisdiction. Sexual Offences Act-2003 authorizes British Parliament to exercise its extra-territorial jurisdiction¹⁰ in the matter of sexual offences committed against children outside its territory.
- D. United States of America-The country which is known as super power of the world is pioneer in the matter of extra territorial jurisdiction. Even, when the first written constitution was being written, the matter of extra territoriality was raised. After that, United States of America adopted the law of extra territorial jurisdiction. Currently this

⁵ S.S. Lotus (France v. Turkey), 7th September 1927.

⁶ Malcom N. Shaw, International Law 688, 6th edition, Cambridge University Press.

⁷ Article 245(2) of Indian Constitution.

⁸ Section 4 of Indian Penal Code-1860.

⁹ Section 2 of Statute of Westminster-1931.

¹⁰ Section 72 of Sexual Offences Act-2003.

law is known as United States Alien Tort Claim Act¹¹. This law (United States Alien Tort Claim Act) is now the pioneer law of extra territorial jurisdiction in civil matters. This law is the inspiration for other countries in the world how to legalize the extra territorial jurisdiction. United States Code gives the power to exercise its extra-territorial jurisdiction in some matters which is given in it.¹² There are many states in America which have power to exercise extra-territorial jurisdiction. I am giving an example of a state namely Alaska.¹³It is key point to be noted that United States Alien Tort Claim Act impowers the United States federal courts to exercise original jurisdiction over any civil action brought by an alien (a foreign national) for a tort in violation of International Law or a treaty which was done by United States. While, United States code 1948 empower federal court to exercise original jurisdiction over any criminal action brought by an alien (a foreign national) for an offence of International Law or municipal law when the alien in high seas or any other place where there is not the jurisdiction of any state expressly. Field of applicability is the main difference between these laws.

- E. Canada-The country which is well known for giving special status to its states also has the laws or rules to define extra territorial jurisdiction. R.S.C. 1985 of Canada gives the power of extra-territorial jurisdiction in the offences committed on aircraft.¹⁴

Application of ExtraTerritorial Jurisdiction-

The most important part of this writing is application of extra territorial jurisdiction. Even, application of every topic or research is highly important point of the concern topic or research because of application we can understand the real impact of the concern topic or research. There are two fields in which the extra-territorial jurisdiction is applicable. These are civil extra territorial jurisdiction and criminal extra territorial jurisdiction. These are given below-

A. Civil Extra-Territorial Jurisdiction-

As the words of the heading say where the matter of extra-territorial jurisdiction is related to civil matters, it`s known as civil extra-territorial jurisdiction. There are so many acts, conferences and declarations are related to civil extra-territorial jurisdiction. In all of them United States Alien

¹¹ A provision of the Judiciary Act of 1789 of United States of America.

¹² Section 7 of Title 18 of United States Code-1948.

¹³ Section 29.35.020 of Municipal Government, Alaska Statutes Title 29.

¹⁴ Section 7 of c. C-46 of R.S.C.-1985 of Criminal Code.

Tort Claim Act¹⁵ which is also known as United States Alien Tort Claim Statute and Brussels Declaration are very important. I will give a brief about United States Alien Tort Claim Act which is given below-

I will start with text of United States Alien Tort Claim Act- 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of law of nations or a treaty of the United States'¹⁶. It is also empower a foreign to file a suit if its concern government is doing or has been done wrong with him. Basically, this wrong would be a human rights violation.¹⁷

When we talk about its history United States Alien Tort Claim Act was a part of Judiciary Act of 1789.¹⁸ The main purpose of this act is uncertain but according to some historians and jurists this act was enacted because United States wanted to protect its customary rights, wanted to show it was different from other countries and showed itself as a powerful country. Basically, it was done because many constitutionalists of United States were strong believer of international law and their aim was to 'make America great'. Because of king's loyalty and the British era, U.S. Alien Tort Claim Act didn't get the more importance as like today at that time. From 1789 until 1980, only two courts were empowered to exercise the jurisdiction which is mentioned in United States Alien Tort Claim Act.

When we go through the case laws, we find a development in United States Alien Tort Claim Act. I will start with a most prominent case of the United States Alien Tort Claim Act which is *Filartiga v. Pena-Irala*¹⁹. This case was decided by U.S. Court of Appeals for the second circuit in 1980. I will discuss the fact of this case in short. The fact of this case is given below-

In *Filartiga*, two Paraguayan citizens who were resident in the United States, represented by the Centre of Constitutional Rights, brought suit against a Paraguayan former police chief officer who was also living in the United States. Main contention of the plaintiff was that the defendant had tortured and murdered a family member who was belong to them. They also asserted that

¹⁵ Supra note 11.

¹⁶ 28 USC § 1350.

¹⁷ Haberstroh & John, A Paquete Habana Approach to the Rescue 231,239-41, 32 Denv Journal of International Law & Polity.

¹⁸ 1 Statute 73, §9, Chapter 20.

¹⁹ 630 F.2d 876, 885 (2d Cir. 1980).

U.S. federal courts had jurisdiction over their suit under the United States Alien Tort Claim Act. At the first instance the case was dismissed by the district court for lack of subject matter of jurisdiction, holding that the 'law of nations' does not regulate a state's treatment of its own citizens.

After that plaintiff filed this case in the United States Court of Appeals for the Second Circuit. The United States Court of Appeals for the Second Circuit reversed the decision of the district court. This court held that the United States Alien Tort Claim Act allowed the jurisdiction in the federal courts over a suit between two aliens and it was a constitutional exercise of Congress's power, because the law of nations has always been part of the federal common law and thus the statute came under the federal-question jurisdiction.²⁰

After that there were so many cases filed under the United States Alien Tort Claim Act. Some important case laws are given below-

*Sosa v. Alvarez-Machain*²¹ in which the United States Court of Appeal for the Ninth Circuit held that Alvarez's abduction constituted arbitrary arrest in violation of international law. But, this decision was reversed by the supreme court and it also clarified by the supreme court that the United States Alien Tort Claim Act didn't create a cause of action, but instead merely furnished jurisdiction for a relatively modest set of actions alleging violation of the law of nations.

*Kiobel v. Royal Dutch Petroleum Company*²², *Flomo v. Firestone Nat. Rubber Company*²³, *Doe VIII v. Exxon Mobil Corporation*²⁴, *Jesner v. Arab Bank Private Limited Corporation*²⁵, *Alexis HolyweekSarei et al. v. Rio Tinto Private Limited Corporation and Rio Tinto Limited*²⁶, *Rufus Kpadeh et al. v. Charles Mcarthur Emmanuel*²⁷, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*²⁸, *Sinaltrainal v. Coca-Cola Company*²⁹, *Ashcroft v. Iqbal*³⁰, *Bowoto v. Chevron*

²⁰ Ibid.

²¹ 542 U.S. 692, 720 (2004).

²² 621 F.3d 111, 120 (2d Cir. 2010).

²³ 643 F.3d 1013, 1021 (7th Circuit 2011).

²⁴ 09-7125 (D.C. Circuit 2011).

²⁵ 584 U.S.; No. 16-499, at 3 (2018).

²⁶ No. 02-56256 and 02-56390, U.S. District Court for the central district of California, 16 Dec. 2018.

²⁷ No. 09-20050-civ (S.D. Fla. Feb.5,2010).

²⁸ 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

²⁹ 578 F.3d 1252 (11th Cir. 2009).

³⁰ 556 U.S. 662 (2009).

*Corporation*³¹ and *Doe v. Unocal Corporation*³² are the landmark and prominent cases of corporate liability under the United States Alien Tort Claim Act.

When talk about United States Alien Tort Claim Act's power and impact, we can understand it by the case of *Wang Xiaoning v. Yahoo*³³. In this case the Chinese person was punished by Chinese court and the evidence was provided by Yahoo. But, after his punishment his lawyer filed an application to review the judgment. On Hearing, the contentions of applicant lawyer, Chinese court set free, Wang. After all this incident, Wang filed the suit in American court under United States Alien Tort Claim Act. Yahoo was scared to be punished so it settled the case in November 2007 for an undisclosed amount of money and Yahoo was also agreed to pay the plaintiff's legal cost.

By above examples we can understand the impact, power and importance of Civil Extra Territorial Jurisdiction through United States Alien Tort Claim Act.

Besides United States Alien Tort Claim Act we have Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters³⁴. This convention is basically based on human rights.

B. Criminal Extra-Territorial Jurisdiction-

As the words of the heading says where the matter of extra-territorial jurisdiction is related to criminal matters, it's known as criminal extra-territorial jurisdiction. I will give a brief upon the application of criminal extra territorial jurisdiction.

There are four types of criminal extra-territorial jurisdiction which is stated below-

- I. Active Personality
- II. Passive Personality
- III. Protective Principle
- IV. Universal Jurisdiction

³¹ 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

³² 395 F.3d 932, 942-43 (9th Cir. 2002).

³³ Perez & Juan Carlos, Yahoo Settles Chinese Dissident Lawsuit, PC World, IDG News November 14, 2007.

³⁴ OJ L 299, 31.12.1972, page no. 32.

Active Personality-

Active Personality simply assumes that state has a jurisdiction over its citizens by virtue of them being the national of state. In a nutshell it means that every state has jurisdiction over its citizens just because of they are the living being of its territory and it can exercise its extraterritorial jurisdiction over that person. In case of *Vinayak Damodar Manglik v. State of Bombay*³⁵ it is stated that court can exercise its extraterritorial jurisdiction over its citizens because of they are a part of that country. This case is related to subject matter of Indian Constitution which is mentioned in article 245(1) and article 245(2). The judgment of this case is a landmark judgment of the principle of territorial-nexus in respect of Indian Constitution. Brief fact of this case is that Vinayak Damodar Manglik committed an offence of bigamy which is punishable under section 494 of Indian Penal Code. He had a wife in Bombay but when he went to Dubai, he committed second marriage and when he came back to India he was arrested. In spite of committed act was beyond the territory of India, he has been arrested. Because of he committed an offence according to Indian Penal Code. It doesn't matter that he committed an offence within the territory of India or beyond the territory of India.

Passive Personality-

Passive Personality as a theory of extraterritorial application states that a nation state may extend its criminal law in an extraterritorial fashion over any person if the interest of its citizen is affected. In the case of *S.S. Lotus*³⁶ in which France and Turkey was the parties, talked about Passive Personality because of in this accident the interest of its citizen was affected. The facts of this case are- S.S. Lotus, a French steamship and a Turkish vessel called Bozkurt were in the high seas. The incident occurred on the high seas, an area outside the executive jurisdiction of any state. When S.S. Lotus arrived at Constantinople, the Turkish authority arrested the officer on duty captain Demons. He was charged with the offence of manslaughter. The Turkish Court ordered a sentence of imprisonment and levied the fine of 80 pounds on captain Demons. While giving the judgment the judges were equally divided over the final verdict. This case required the casting vote of the president of PCIJ. The casting vote favoured Turkey and PCIJ justify the extraterritorial application of Turkish criminal doctrine.

³⁵ AIR 1955, SC 681.

³⁶ France Vs. Turkey, 1927, PCIJ (ser. A) No. 10 (Sept.) 7.

Protective Principle-

According to the Protective Principle a state may extend its criminal law in its extraterritorial fashion if its national interest is affected. There are 2 main trials which are given below to describe this principle-

- i. Eichmann Trial
- ii. Pinochet Trial

*Eichmann Trial*³⁷-

In this incident the court in Israel set another important modern precedent of protective principle. Karl Adolf Eichmann who was born on 1962 in Germany, was a criminal of Nazi war had been apprehended in Argentina by Israeli intelligence agents and brought to trial in Israel. The Israel court in its opinion applied the idea of natural law to describe the protective principle. The court found the crime of “genocide against the Jewish people” to be unequivocally to be a crime against generally accepted international law.³⁸

In an opinion the Israel Court said that “We have said that the crimes dealt with in this case are not crimes under Israeli law alone, but are in essence offences against the law of nations. Indeed, the crimes in question are not a free creation of the legislator who enacted the law for the punishment of Nazis and Nazi collaborators, but have been stated and defined in that law according to a precise pattern of international laws and conventions which define crimes under the law of nations.”³⁹

*Pinochet Trial*⁴⁰-

Augusto Jose Ramon Pinochet Ugarte was a so-called president mainly a dictator of Chile who was born on 25th November 1915. This trial is a kind of bridge between protective principle and universal jurisdiction. There was a most important development in protective principle when Spanish court exerted universal jurisdiction over Chilean dictator Augusto Pinochet. I think the Spanish court applied protective principle but the ratio of its judgment is its municipal law. The

³⁷Eichmann 36 I.L.R. 1 (Dist. Ct. Jerusalem, 1961).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Naomi RohtArriaza, The Pinochet Precedent and Universal Jurisdiction, New England Law Review Vol. 35:2.

court observed that the very legislation which extended jurisdiction over the Pinochet case to the Spanish courts was derived from fundamental principles of international law, and can be seen as doing little more than acknowledging the operation. The Israel court was able to assert universal jurisdiction over crimes of genocide committed by foreigners outside of Spanish territory.

Universal Jurisdiction-

Now basically if we go through analysing, Universal Jurisdiction suggests, jurisdiction based on gravity on crime. This particular concept is based on *out de dere* and *out judicare*. No crime shall go down unpunished. This particular principle has been incorporated in various treaties. If we go by example then for instance in, Constitution against torture, the 4th Geneva Convention (14 August 1949), by this Universal Jurisdiction is not assume on the basis of gravity of the crime. Recently, if we pass by, Belgium has invoked Universal Jurisdiction against Senegal in the case of *Belgium v. Senegal*⁴¹ before the International Court of Justice (hereinafter referred as ICJ). In this particular case, Belgium contended that Senegal had failed to perform its duty under Universal Jurisdiction by not surrendering a famous dictation of Chad. Furthermore, by virtue of Article 105 of United Nations Convention on Law of Seas (hereinafter referred as UNCLOS, 1982), piracy has also been included as an offence under Universal Jurisdiction. Recently the Princeton University, has also come with Princeton principle which act as guidelines for states and it give the description of all the offences that are amenable to Universal Jurisdiction offences of 'genocide, ethnic cleansing, man crime, piracy he included in it. Further, in to this the Princeton principle has also incorporated a modern law of genocide which nation state incorporate in their multiple law.

Conclusion-

In my opinion it is become a political tool. But I consider the real meaning of Criminal Extra-Territorial Jurisdiction as decided by the Federal Court of United States that the presumption against extra-territoriality is absolute unless the text of the statute explicitly says otherwise.⁴²

⁴¹ ICJ GL No 144, ICGJ 437 (ICJ 2012), 20TH July 2012.

⁴² *Morrison v. National Australia Bank*, 561 U.S. 247.