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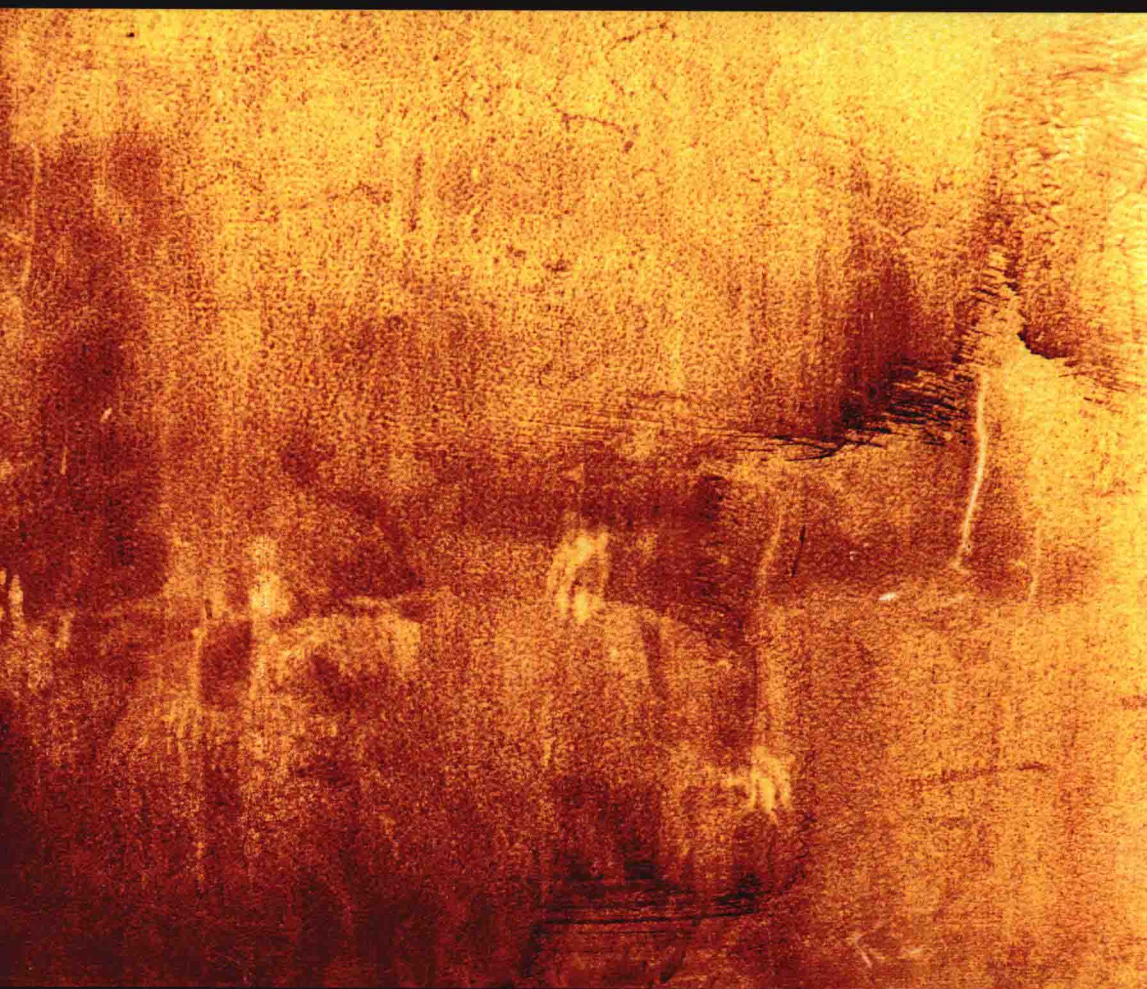
RESEARCH HANDBOOK ON Jurisdiction and Immunities in International Law

Edited by
Alexander Orakhelashvili



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RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW

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Research Handbook on Jurisdiction and Immunities in International Law
Edited by Alexander Orakhelashvili

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Preface

It is the basic truth that the assertion of, or the refusal to exercise state jurisdiction, for whatever reasons, is a matter of the domestic law of the state in the first place. However, the ultimate framework of the legality of national jurisdictions rests with the system of public international law which independently, and through the network of customary and conventional rules, suggests the criteria for the initial basis and ultimate legality of national jurisdictions, as well as determines the implications of the improper exercise of, or the improper failure to assert, the national jurisdiction. Much of the jurisdiction-related ground is a matter of private international law too, but public international law is the ultimate governing framework. Therefore, this *Research Handbook* presents the issues of state jurisdiction and state immunity from the overarching perspective of public international law in the first place, though also encompassing some issues of private international law and of national laws as they bear on those issues.

Several themes have dominated the discourse on state jurisdiction over the past two centuries. One issue is consular jurisdiction that European states exercised in non-European parts of the world on the basis of treaties concluded with non-European states and which extended, as Oppenheim described it, both to the cases arising as between expatriates, as well as to mixed cases involving native subjects (L. Oppenheim, *International Law* (2nd edn, 1912), vol. I, p. 498). Though advancing extra-territoriality, consular jurisdiction was essentially (in the background) the confirmation of the territorial supremacy of states and of the principle that the territorial jurisdiction of states is unlimited unless superseded, to the relevant extent, by a clear rule under conventional or customary international law. The early twentieth century saw the emphasis on the concurrence of state jurisdictions, culminating in the decision in the *Lotus* case rendered in 1927 by the Permanent Court of International Justice. The period after the Second World War saw the growth of inter-state agreements on the deployment of foreign armed forces on state territory, and on the allocation of jurisdictional competences accordingly. From the 1950s onwards, the assertion of extra-territorial jurisdiction by American courts in economic matters has generated jurisdictional controversies between the United States and the United

Kingdom, lasting over several decades. An even more extreme assertion of the American extra-territorial jurisdiction has taken place through the 1992 US Helms-Burton Act, as an instance of the use of extra-territorial jurisdiction as a tool for political pressure. And then, not to forget, there is a phenomenon of universal jurisdiction in civil and criminal proceedings, to be exercised over core international crimes and serious violations of human rights as well as of the laws of war.

In relation to immunities, the past century has witnessed the transition from the absolute to the restrictive doctrine of state immunity, and the growth of regulation of state immunity via national legislation as well as nascent international treaties. The growth of state involvement in commerce was then followed by the increasing potential of transnational human rights litigation which impacts the doctrine of immunity as it does in relation to the doctrine of jurisdiction. In relation to civil as well as criminal jurisdiction, the discussion of the immunity of states, as well as that of their individual officials, has acquired greater significance. Last but not least, more specialized areas such as the immunity of international organizations have been gaining in importance.

Each of these above developments has generated heavy discussions in the circles of scholars and of practitioners. There have been some great generalist analyses of jurisdiction and immunity by various prominent authors, such as Mann, Akehurst, Bowett, Jennings, Higgins and Crawford. But most of the time over the more recent decades (with very few exceptions such as the monograph by C. Ryngaert), the discussion of jurisdiction and immunities as a matter of public international law has been rather sectoral, restricted to a particular area such as antitrust or international crimes. What, however, is fascinating about state jurisdiction and state immunity is that, while they draw on important controversial aspects of the international legal system, they also relate to more fundamental categories of the international legal system, such as the doctrine of sovereignty, the doctrine of the sources of international law, and more broadly the relationship between legal reasoning and political ideologies. So far, there has been no comprehensive treatment of the matters of jurisdiction and immunities in a way that could benefit both the academic and practical elements of the legal profession.

Consequently, to remedy the gap created over the past few decades through the lack of comprehensive analysis of jurisdiction and immunity issues, this *Research Handbook* brings together a group of scholars who have distinguished themselves not only as recognized experts in the area of jurisdiction and immunities, but also through their scholarly and academic integrity, to provide impartial scholarly analysis of the underlying issues of jurisdiction and immunity, focusing on explaining and

understanding the relevant legal issues as they are, without being affiliated to any agenda held in certain governmental or other quarters, or otherwise to any political ideology.

The overall result, we believe, is the most up-to-date, impartial and comprehensive work so far published examining these controversial issues. This *Research Handbook* is therefore a collective effort by a group of scholars with expertise in the areas of jurisdiction and immunities. What unites the individual contributions in the methodological sense is their reliance on the legal positivist method as the mainstream language for international legal discourse. At the same time, individual chapters allow the contributors also to offer their individual expertise to readers. Consequently, no attempt has been made to harmonize or unify the methods, opinions and approaches adopted by the various contributors. And this also reflects the idea behind such a *Research Handbook*, which is to provide a platform to assist in the conducting of research, rather than presenting a unified or harmonized perspective on the area of law dealt with here, which is especially inhospitable to preconceived attitudes and blanket solutions.

A. Orakhelashvili
Birmingham, 17 April 2015

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1. State jurisdiction in international law: complexities of a basic concept

Alexander Orakhelashvili

1.1 MEANING OF STATE JURISDICTION

Jurisdiction is the principal tool of the assertion by states of their public and sovereign authority, possessing which distinguishes the state from the entities that operate under private law. Any exercise of public authority by the state, whether prosecuting a crime, expropriation of property, regulation of trade or taxation, or anything else, and whether lawful or unlawful under international law, involves the exercise of state jurisdiction. The exercise of state jurisdiction takes place in the context that rights may be acquired by individuals and other private entities outside the forum state's boundaries, which is a matter that could fall within the jurisdiction of more than one state. Similarly, the interest of individuals and corporations could also vary: some national legal systems could provide a better procedural standing, more effective remedies, or better access to the object of the relevant litigation, or otherwise confer advantages attractive to litigants and influence their choice as to in which legal system they should pursue litigation.

Under public international law, states are independent from, and unsubordinated to, each other. Absent special agreements, there is no centralized mechanism or arrangement for distributing jurisdictional entitlements among states, or determining their priority. Instead, jurisdictional relations operate, as it were, on an inter-state interactional plane. In the first place, there is an initial entitlement of, or claim by, the state to exercise jurisdiction over a particular person or matter. Then, there is an issue of whether that jurisdiction will be recognized as lawful, or otherwise accepted and accommodated, by other states, and accorded any effect within those states' territories, with or without inherently prejudicing the initial lawfulness of that exercise of jurisdiction. These factors are relevant not just in relation to controversial cases of the exercise of jurisdiction, but also in relation to most obvious and undisputed cases of state jurisdiction. This is so, if for no other reason, than because whichever kind of jurisdiction is asserted by the state, territorial or

extra-territorial, the reach of that assertion is bound to be limited to the territory of that state.

There is no analytical or practical limit on the range of acts through which state jurisdiction can be introduced or asserted: any legislative, executive or judicial act of the state will in principle do. One way through which state jurisdiction can be asserted relates to national systems of private international law. Any national enactment of a 'conflict of law' rule in essence constitutes the relevant state's unilateral determination of the scope of its laws and, this way, inevitably constitutes an assertion of jurisdiction. According to Dicey, in this area an English court has to answer two questions, one regarding whether it has jurisdiction to determine the cases of the relevant kind; and, if the first question is answered in the affirmative, what law must be chosen to apply to those cases.[1]

International comity accounts for the development of some patterns in this area. On the one hand, comity could lead the forum state to recognize and apply foreign private laws, thereby in effect recognizing the competence of the foreign state to legislate with the extra-territorial effect. Curiously enough, the application of foreign laws in the conflict of law framework involves both the exercise of the territorial jurisdiction by the forum state, and the recognition by that state of (at times extra-territorial) jurisdiction of the state that authors the foreign rule in question.

On the other hand, as Savigny observed in the nineteenth century, no state can require the recognition of its laws beyond its own territory.[2] By and large English courts have taken the same approach. To illustrate, the UK House of Lords emphasized in *Government of India v Taylor* that foreign public and revenue laws would not be recognized or enforced in the English legal system.[3] What we see here is the obvious manifestation of a territorial jurisdiction of a state, perfectly lawful under international law on territoriality grounds, yet not given any effect by another state, without this inherently amounting to the United Kingdom taking the

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[1] A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896), pp. 1–2; see also A. Lowenfeld, 'The Limits of Jurisdiction to Prescribe' in A. Lowenfeld, *International Litigation and the Quest for Reasonableness* (1996), p. 15 at 16.

[2] Cited in M. Akehurst, 'The Doctrine of Jurisdiction in International Law' (1972–73) *BYIL* 219.

[3] *Government of India v Taylor* [1955] AC 451.

position that the particular assertion of foreign jurisdiction involving the operation of those public or revenue laws is unlawful under international law.

As a flipside, English courts will not enforce contracts that could lead to the violation of foreign law in the foreign state.[4] This is an implication of international comity.[5] The way comity works, and influences litigation outcomes, depends on what kind of prohibition has been enacted in the foreign jurisdiction and whether, then, English courts will consider obedience to that foreign prohibition to be dictated by comity.[6] The ultimate meaning and impact to be accorded to comity is thus dependent on its articulation and recognition in the forum state.

As Husserl suggests, 'Foreign law by itself is powerless to operate beyond the boundaries of its own territory – as is also the domestic law of the forum'.[7] Moreover, as Lorenzen has emphasized, the assertion of territoriality, for instance by subjecting contracts to the law of the place of their performance, essentially asserts that territorial law as extra-territorial.[8]

This demonstrates that jurisdiction is much more complex than its initial territorial basis from which state authority initially derives its existence, more interaction-focused and dynamic, more dependent on contexts premised on state choices and the reconciliation of those choices. 'Territoriality' as much as 'extra-territoriality' thus becomes a matter of degree and characterization. It is true, as Niboyet observes that, 'As territoriality involves the least sacrifice for each nation, it will be the

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[4] *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301.

[5] See also *Driscoll* [1929] KB 470 at 510 (per Lawrence LJ): 'I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed … The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality'.

[6] As was discussed in *Kleinwort* [1939] KB 678 at 688–9 (per Branson J).

[7] G. Husserl, 'Public Policy and *Ordre Public*' (1938) 25 *Virginia LR* 37 at 66.

[8] E.G. Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 *Yale LJ* 736 at 743–4.

easiest principle on which to agree'.[9] Yet this is still subject to the principle that under public international law no state owes another state a duty to recognize the effect of its legislation – territorial or extra-territorial, public or private – in its own courts; and the approach which English courts have declared as embodied in *India v Taylor* is in principle (and subject to treaty obligations to the opposite effect) an option open to any state to elect, either through declining to recognize foreign law, or to use public policy or any comparable domestic doctrine to offset the relevance of that foreign law.

At the crossroads of public and private international law, we can identify the basic position that the laws of the state have no inherent force beyond that state's territory. A lawful exercise of territorial jurisdiction, premised on the exercise of core sovereign powers, could be denied the relevant transnational effect in another state, while jurisdiction that can in principle be contested could, at the end of the day, be given such effect via the route of private international law.

Therefore, the view that the private international law aspects of jurisdiction and applicable law are inherently determinative of the legality of state conduct as a matter of public international law could not be tenable. For any position taken as a matter of private international law is, in essence, a position unilaterally taken by the state. Such position cannot be regarded as self-judging as to its ultimate legality. To the contrary, public international law itself determines the ultimate legality and limit of private international law actions in the transnational field. Public international law is therefore a governing framework for private international law matters, not their mirror-image.

And in some cases, there may be public international law limits on the foreign state's jurisdiction and on the permissible ambit and reach of its laws. The forum state should treat it as subject to such limitation. This was made clear by the English Court of Appeal in *Al-Jedda*, where nationality laws of Iraq had to be applied in the United Kingdom subject to the requirements of international humanitarian law treaties binding on the United Kingdom.[10]

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[9] J.-P. Niboyet, 'Territoriality and Universal Recognition of Rules of Conflict of Laws' (1942) 65 *Harvard LR* 582 at 586, 595.

[10] *Hilal Al-Jedda v Secretary of State for the Home Department* [2012] EWCA Civ 358, CA (Civ. Div.).

1.2 JURISDICTION IN THE CONTEXT OF PUBLIC INTERNATIONAL LAW

Some basic rules and standards of public international law as to the jurisdictional behaviour of states, especially in relation to the exercise of extra-territorial jurisdiction, raise issues as to those fundamental principles that govern the relations between states, especially the principle of non-intervention. For instance, Oppenheim, presumably illustrating a standard that could form the core of both comity and of international law on the matter, suggests that:

> Personal Supremacy [over nationals] does not give a boundless liberty of action … a State is prevented from requiring such acts from its citizens abroad as are forbidden to them by the Municipal Law of the land in which they reside, and from ordering them not to commit such acts as they are bound to commit according to the Municipal Law of the land in which they reside.[11]

But there also may be many matters that are not subject to strict prohibitions in the relevant foreign country – things and matters in relation to which the forum state may just be asserting its own jurisdiction extra-territorially. Does asserting such jurisdiction *per se* amount to the 'ordering' Oppenheim speaks about? To give an example, under the 1980 British Trading Interests Protection Act, enacted in response to the assertion by the US courts of extra-territorial jurisdiction in relation to economic matters, seen by the British government as excessive, could the United Kingdom be seen as wrongfully ordering its subjects and residents not to do certain things which they would be obliged to do in the United States, namely, comply with the US judicial decisions rendered within the US jurisdictional realm?

There might be a debate as to whether the 1980 Act was itself asserting the extra-territorial jurisdiction, and as to whether it did so rightfully as a reciprocal measure, and the outcome probably is that it was not an exercise of a far-reaching extra-territorial jurisdiction, instead complying with the territoriality and nationality jurisdiction requirements. Blocking orders were enforceable only in respect of the conduct within the UK

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[11] L. Oppenheim, *International Law* (2nd edn, 1912), vol. I, p. 296; D. Bowett, 'Jurisdiction: Changing Pattern of Authority over Activities and Resources' (1982) 53 *BYIL* 1 at 7–8 also speaks of the law of the state of nationality requiring the individual to perform conduct illegal under the *loci delicti commissi*.

territory, or in relation to the conduct of UK citizens anywhere.[12] But even in that case, an example is furnished of one state obstructing the operation of another state's laws within the latter's realm, even without a far-reaching extra-territorial assertion of jurisdiction being expressly involved.

Section 6 of the 1980 Act included provisions on the recovery of 'non-compensatory' elements of US-awarded damages. They did not require proof of the UK jurisdiction over, or of the unlawfulness of the US jurisdiction in, the relevant matter. Instead they presumably infringed on the US jurisdiction exercised under its most traditional headings. The conclusion is advanced that the use of section 6 would have violated US sovereignty. But speaking more broadly, the economic sovereignty argument cuts both ways.[13] So also, presumably, would the non-intervention duty in relation to economic policies that the relevant state chooses to exercise be violated. Akehurst similarly observes that the state's economic policy may be expressed either in directing economic entities to do certain things or leaving them free to do as they think best. In either case, another state would break international law by requiring its nationals in the first state to act in a way thwarting that state's economic policies.[14] Again, such national freedom to direct private entities accordingly is available to any state.

Moreover, unless an obvious case is made as to the unlawfulness of the antecedent US extra-territorial jurisdiction to be exercised by US courts – which case would be difficult to make anyway – could it be a mere matter of appreciation as to whether the 1980 Act was trying to obstruct what was within the rights of US judicial authorities? Even in relation to 'ordering' British citizens to do or not to do certain things, that argument could (in conceptual and analytical terms) be sustainable, if the relevant British citizens had been placing themselves within the US jurisdiction through their presence and business.

And while in the absence of a treaty states are not obliged to enforce each other's economic policies or court judgments,[15] would it not be more analytically convenient to view this entire matter through the prism of parallel state autonomies, especially in terms of a state's own system of 'conflict of law', rather than through the prism that deals with the inherent lawfulness of foreign jurisdiction? Perhaps, then, the greatest

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[12] A.V. Lowe, 'Blocking Extra-territorial Jurisdiction: The British Protection of Trading Interests Act, 1980' (1981) 75 *AJIL* 257 at 274–5.

[13] *Ibid.* 280.

[14] Akehurst, n. 2 above, 189.

[15] Lowe, n. 12 above, 276–7.