

TUTORIAL LETTER 201: ASSIGNMENT 2 – LCP4801 (2023/1)

Write short notes on the following:

a) Forms of jurisdiction that a court could rely on under international law

(10)

Jurisdiction in international law is best described as 'state jurisdiction', meaning '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.'¹

In addition, state jurisdiction "is made up of three, distinct powers or competences, namely: prescriptive, enforcement and adjudicative jurisdiction" discussed in the case of *National Commissioner of the South African Police Service and another v Southern African Human Rights Litigation Centre and another* where the SCA distinguished these powers, stating

"A distinction is generally drawn between three forms of jurisdiction. Prescriptive jurisdiction empowers states to proscribe certain conduct through either their common law or national legislation; enforcement jurisdiction enables states to enforce those prescriptions, including through investigations and prosecutions; and adjudicative jurisdiction is the state's capacity to determine the outcome of a matter pursued through the exercise of enforcement jurisdiction by way of, inter alia, adjudicating what has been prescribed."²

Confusion abounds regarding the categories to which the respective activities belong since the SCA "listed 'investigations' as a form of enforcement jurisdiction, whereas the CC placed investigations in the adjudicative category of jurisdiction." For our purposes, we are primarily "concerned with prescriptive jurisdiction, or 'the geographical reach of a State's laws'".³ This said, the *Lotus* case is an example where a state was afforded a "wide measure of discretion or license in respect of 'exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad.'"⁴

Further to the preliminary discussion above, the six forms of jurisdiction that a court could rely on are:

1) "The principle of territoriality

In terms of the principle of territoriality:

All crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens."⁵

"This principle is 'universally recognised' and, as a matter of practice, states routinely assert jurisdiction over criminal acts that occur within their territory and over the persons responsible for such acts. It is, according to Abbas, 'the most visible way through which a state demonstrates its sovereignty'. Moreover, it is 'a logical manifestation of a world order of independent states'."⁶

There are "two approaches to territorial jurisdiction:

1. Under the subjective approach, "a State can exercise territorial jurisdiction over a crime that commences on its territory, regardless of whether the crime is actually completed on its territory or elsewhere" (the 'initiator theory').
2. Under the objective approach, "a State is able to exercise jurisdiction if an offence is completed on its territory, regardless of where the offence is initiated" (the 'terminator theory')."⁷

¹ Hennie Strydom (ed) *International Law* 2 ed (2020) Oxford University Press 266 (para 6.1).

² Strydom *International Law* 267 (para 6.1).

³ Strydom *International Law* 267 (para 6.1) fn 14.

⁴ Strydom *International Law* 269 (para 6.2.1) citing *The Case of the SS 'Lotus' (France v Turkey)* (Judgment) PCIJ (7 September 1927).

⁵ Strydom *International Law* 274 (para 6.4.1).

⁶ Strydom *International Law* 275 (para 6.4.1).

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