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AN EXTRATERRITORIAL JURISDICTION IN CASES OF ILLEGAL ARMS TRADE — A POLISH AMERICAN DISPUTE

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An origin of the dispute is connected with an official contract of sale of weapons by the Polish state enterprise to the government of the Philippines, signed in Warsaw on January 23, 1992 and approved by the Polish governmental authorities. The contract was concluded with an American company acting officially as a representative of the Philippines government.

The technical and organizational implementation of the contract was turned over by the Polish state enterprise to a Polish company, and six Polish nationals (five of them being representatives of the private company and one of the state enterprise) went to Frankfurt/Main, FRG, in order to negotiate the details of the deal with the American partners. On March 10, 1992 they were arrested on a charge of an illegal transaction of arms to Iraq subjected to the UN embargo. The warrant was issued by the New York court. The US authorities demanded extradition on a charge of violations of the American Arms Export Control Act. On May 14, 1992, the Upper State Court of Hessen in Frankfurt/Main decided that no penal proceeding against the Polish nationals was instituted in Germany, the decision being the necessary requirement of an extradition to the US. Though Polish authorities consequently argued in their negotiations with the US Department of State and with the German Foreign Office that American courts had no jurisdiction in the case, the German Court in Frankfurt/Main approved the extradition in August 1992. The decision was subsequently accepted by the Federal Constitutional Court. Five representatives of the private company were extradited on November 25, 1992, while the representative of the state-owned firm was released because of a disease and sent to Poland (thanks to the diplomatie efforts of the Polish government). In September 1993, the judicial proceeding started. The Polish government passed two *amicus curiae briefs* requesting a dismissal of the accused. On October 15, 1993, they were acquitted by the Grand Jury (1).

(1) Case *US v Hendron et al.*, 92 CR 424 (EHN), the US District Court, Eastern District of New York.

In April 1992, competent Polish authorities decided to investigate whether the persons detained by the Germans committed any offence against Polish law (false statement, forgery of an end-user certificate). The inquiry lead by the public prosecutor was discontinued because of the lack of any feature of a criminal offence. The prosecutor decided that the producer of the arms was licensed to export his products by the state, the contract concluded was a typical one, the end-user certificate was drawn up by the Ministry of Defence of the Republic of Philippines and aroused no doubt as to its authenticity, finally at no stage of negotiations the Polish nationals involved were aware that the arms were destined for Iraq. The conclusion was that all documents dealing with the transaction including the end-user certificate were forged by one Mr. Hendron, involved in the activities of the US customs service.

Finally it became clear that the affair was a provocation organized by American customs agents who undertook great efforts to manufacture the US jurisdiction. The action by the US officers violated the Polish-American treaty of 1990 on cooperation and mutual assistance in customs matters and the Polish penal code.

The fundamental condition of the extradition of the group of Polish nationals arrested in Germany was fulfilled, as the activities under charge were punishable under American, German and Polish laws. However, the US Attorney failed to prove neither that at any moment the accused knew that the documents presented by their American partners including the end-user certificate were forged nor that they knew that the weapons were destined for Iraq.

The most important issue of the case from the point of view of international law is its impact upon the state practice concerning extraterritorial jurisdiction of the US authorities in respect of foreign nationals accused of having violated American laws outside the territory of the United States.

The problem of the extraterritorial jurisdiction was first dealt by the Permanent Court of Justice in the *s/s Lotus case* (2). The basic question of the case was whether the Turkish court had criminal jurisidiction with respect of the officer of the French ship who was guilty of an accident (a collision of two vessels) on the high sea, in effect of which a Turkish national was killed. The Hague Court decided that the Turkish legislation providing for the competence of Turkish court with respect of the offences, effects of which occured in the Turkish territory and touched Turkish nationals. Finally, it decided that the passing by a state an extraterritorial legislation (as well as any other internationally relevant act) did not require any particular foundation in international law (unless specific prohibiting rule exist, the state sovereignty is unlimited). It should be noted, however,

(2) PCIJ Publ., Series A, N° 10 (1927).

that the judgment was passed by 8:7 votes, and all the dissenting opinions referred with a criticism to the problem of the extraterritorial jurisdiction as decided by the majority.

Further developments led to the establishing of several premises concerning the scope of the jurisdiction of particular states in international law. Some of them are generally accepted, while the others meet a strong opposition. However, it should be stressed that any kind of eventual extraterritorial jurisdiction is strictly limited to a prescriptive jurisdiction, i.e. to a legislation, and excludes every form of an executive jurisidiction, consisting in the executing of any form of constraint against persons committing criminal acts forbidden under the law of a state outside its territory.

The territorial principle of jurisdiction belongs certainly to the first group. It is strictly connected with the state territory being one of the attributes of statehood in international law. According to this principle, every state has full jurisidction with respect to offences committed in its territory, notwithstanding the nationality of the offenders.

Another aspect of this principle, called *objective territoriality*, allows the state a prescriptive jurisdiction over persons committing an offence against the state while residing abroad, if the effects of this act have effects in the territory of this state. It is not clear what kind of effects should be present — however, the dominating view is that American doctrine according to which economic effects are sufficient to establish the US jurisdiction is not universally accepted (3). If an offender is foreigner, the possibility of conflicting jurisdiction occurs. Such a conflict should be resolved according to the principle of effectiveness in favour of a party having more legitimate interest in the jurisdiction, even if the notion of interests is not quite clear in international law (4).

According to the nationality principle, a state has prescriptive jurisdiction over all its nationals, regardless of their residence. This kind of jurisdiction corresponds with a population as a constitutive element of a state under international law. Personal jurisdiction over nationals concerns both natural persons and corporations ; however, with respect of the latter the criteria of nationality are not precised by international law but defined by municipal law of interested states (usually referring to a seat of the head office, an incorporation according to the municipal law or a control by

(3) Cf. A.L.C. de Mestral, T. GRUCHALLA-WESIERSKI, *Extraterritorial Application of Export Control Legislation : Canada and the USA*, Dordrecht, 1990, at 20. For the analysis of this issue — see Ch. BLAKESLEY, O. LAGODNY, « Competing National Laws : Network or Jungle ? », in : *Principles and Procedures for a New Transnational Criminal Law*, Freiburg/Br. 1992, at 51 ff.

(4) It is often referred to the arbitral award in the Lac Lanoux case, 24 *ILR*101, at 133-134 (1957). However, in our opinion the formulation of the award does not elucidate the notion of interests very much, except the point that interests should be strictly connected with the implemented right.

nationals of an interested state). This kind of personal jurisdiction serves the strengthening the ties between a natural/corporate person and its state of nationality. It is universally accepted by all legal systems in the world (5).

Finally, there is no doubt as to a prescriptive jurisdiction over offenders having committed a crime subjected to universal repression under the law of nations. Among this kind of offences one can mention piracy, slave trade and the crimes indicated in the Charter of the International Military Tribunal of 1946 (6), as well as some other kinds of crimes including high-jacking of aircrafts and terrorism (7).

International law does not forbid the states to institute a prescriptive jurisidiction in cases involving a protection of their vital interests. The scope of such a legislation is not clear : one can accept the protection of national security and the forgery of money, but it would be difficult to invoke such a jurisdiction with respect to violations of immigration or customs legislation. The doctrine of protective jurisdiction can easily be abused (8). This kind of jurisdiction has been invoked in the referred Polish-American dispute.

An American legislative and judicial practice applies all the forms of prescriptive jurisdiction indicated above, the classical example of the analysis being the case of the *US v. Layton* (9). A certain Layton was charged with conspiracy in murder against the US Congressman and diplomat in Guyana. The Court applied the protective principle. On June 15, 1992 the US Supreme Court confirmed the doctrine of executive jurisdiction of the US authorities with respect of H. Alvarez Machain, an Mexican national charged with the murder against an agent of the American service specialized in the fight against illegal drugs trade. Machain was kidnapped in Mexico by the American special services, transported to the US and arrested. The US Supreme Court confirmed the legality of the kidnapping operation (10). We should finally refer to the notorious case of the US action against the Panama's dictator Norriega amounting in fact to the military aggression against the sovereign state in order to bring its head to trial before the US court.

(5) Cf. H. SCHULTZ, « Compétence des juridictions pénales pour les infractions commises à l'étranger », 22 *Rev. sc. crim. et dr. pénal comp.*, 314 ff (1967).

(6) Though there is a general consensus as to the universal punishment of war criminals, the practice does not confirm such a view.

(7) In our opinion, one should include into this category of acts all crimes codified by the ILC in the draft-code of offences against the peace and security of mankind, based upon the reports of D. THIAM. Cf. Report of the ILC, 43rd Session (1991), p. 198 ff.

(8) In this sense voy. M. VIRALLY, « Panorama du droit international contemporain », 183 *R.C.A.D.I.* 85 (1983) ; M. SHAW, *International Law*, Cambridge 1991, 410.

(9) *US v. Layton* 509 FSupp 212 (N.D. Cal. 1981).

(10) It should be reminded that a similar operation of kidnapping by the French special service of colonel Argoud in FRG in the early 1960s was strongly condemned by the German government and led to important tensions in the mutual relations between the two states.

However, the tendency of the extraterritorial jurisdiction of the American courts was strongly opposed by the other states. In the field of the penal jurisdiction we shall indicate here the decision in the case of *US v. Golitschek* (1986) (11). Golitschek, an Austrian national, was involved in an illegal arms trade to Iran, organized as a ficticious *sting* operation by the American customs agents. The Second Circuit Court reversed the conviction stating *inter alia* that :

> The defendant is an Austrian citizen who never set foot in this country during the entire episode alleged to constitute his offence, and the offence concerns a ficticious sale that was proposed to the defendant by agents of the United States and never consummated ... It is arguable that this prosecution of an Austrian citizen for actions taken in his own country is that rare case where it would be incorrect even to presume that the defendant is aware of the law punishing the offenses for which he is charged ... The issues of jurisdiction and the other contentions that arise because the defendant is an Austrian citizen against whom the Government conducted a sting operation in his own country are matters which we would like to have considered views of the Department of State (because of the implied foreign relations interests — remark by the present author).

Referring again to the Polish-American dispute, let us remind that the Polish nationals were charged agains combining, conspiring, confederating and agreeing to commit following acts :

1. knowingly importing into the US, and then exporting out of the USA defense articles contained on the US Munition List without required licenses ;

2. knowingly conducting a financial transaction involving unlawful activities constituting violations of the Arms Export Control Act ;

3. knowingly exporting munitions from the US to Iraq in violation of the US municipal legislation ;

4. making false, ficticious and fraudulent statements and representations in a matter within the jurisidiction of the US.

The *amicus curiae briefs* of the Polish government (12) analysed together with other arguments against the charges also the problem of the possible scope of extraterritorial jurisidiction of the US with regard to the Polish defendants. It referred to all possible bases of jurisdiction :

1. territorial principle should be excluded as even if certain acts of an alleged conspiracy occured in the US, they were acts between Hendron (American partner of the Polish private company) and federal agents. No Polish nationals were involved in these activities ;

2. objective territorial or effects principle could not apply as the US could hardly complain about the effects of activities by their own federal

(11) 797 F. 2d (2d Cir. 1986).

(12) Two such documents were presented to the Cour, on August 20 and October 9, 1992, respectively. The argumentation concerning the jurisdiction was similar in both acts.

agents. Furthermore, the aim of the ficticious transaction was the transfer of Polish weapons to Iraq and not to engage into any illicite conduct within the US. We should add here that there is no universally recognized universal jurisdiction with respect of violating of the Security Council resolutions establishing an embargo for selling arms to Iraq ; such acts contrary to the said resolutions could involve exclusively an international responsibility of states, not a criminal responsibility of individuals under international law (13).

3. Finally, there was no basis for the exercising of jurisdiction under the protective principle, as the alleged threat to the US interests was manufacturated by the US agents who controlled the planned shipment of arms *via* the US to Iraq. No harm for any American interest could therefore occur.

The Cour pronounced the defendants innocent, taking into account among others all these arguments concerning the jurisdiction, the fact that there was no knowledge of possible violations of the US laws, as well as the clear declaration made by the Assistant US Attorney who publicly admitted that the Poles did not know the weapons should have been sent to Iraq.

Concluding, we can remark that in fact the Polish government did not oppose to the theoretical premises of the US extraterritorial jurisdiction in criminal matters, as formulated in paragraph 402 of the *Restatement 3rd, Foreign Relations Law of the US* (1987). The arguments of the defence proved that the principle of this jurisdiction did not apply to the presented case. However, the Polish authorities stated that in fact the recognition of the US jurisdiction would be unreasonable within the meaning of paragraph 403 of the Restatement 3rd. The collision of jurisdictions should be resolved in favour of Poland, as the case involved Polish nationals who possibly violated Polish legal rules imposing trade embargo upon Iraq according to the UN resolutions. The defendants did not intend to harm directly the US interests, whereas the alleged conduct could bring important harm to the political interest of the Republic of Poland. All these arguments were therefore based upon the American law and did not involve public international legal arguments (14).

The case has had also important political implications. The activities of the Polish Foreign Office have been sharply criticized ; it has been charged with a total dependence of the USA foreign policy. According to some com-

(13) We can hardly accept the direct applicability and direct effect of the Security Council resolutions. Cf. the discussion of this question by F. RIGAUX, *Droit public et droit privé dans les relations internationales*, Paris, 1977, at 12-13. The *amicus curiae brief* stated clearly that :

The respect of the arms embargo against « *Iraq cannot be achieved by the US Customs Service exerting its jurisdiction throughout the world. Rather, a cooperative effort among law enforcing officials in all nations is the best hope for making the embargo effective.* »

(14) We have decided not to deal here with the problem of some other aspects of the extraterritorial jurisdiction like antitrust legislation or export control. The attempts of the US to implement its legislation (in particular so-called pipeline sanctions) met a strong opposition of West European states.

mentators, the aim of the American agents has been to eliminate Polish arms industry of the international arms market. Finally, the harm to the image of the US among the Polish public opinion because of the incident has been more serious than the one done by the communist propogandists.