Extraterritoriality in East Asia: extraterritorial criminal jurisdiction in China, Japan, and South Korea.

ARNELL, P.

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Extraterritoriality in East Asia – Extraterritorial Criminal Jurisdiction in China, Japan, and South Korea, by Danielle Ireland-Piper, Edward Elgar, Cheltenham, 2021, 168 pp., £75 (hardback), ISBN 9781788976657; £25 (eBook), ISBN 9781788976664

Extraterritorial criminal jurisdiction is a seemingly novel, arcane subject. Belgium's efforts in relatively recent years to try and punish persons accused of some of the most serious crimes may help create this impression.[1] It is, however, only partially true. Jurisprudentially and academically the topic is arguably approaching its centenary, whereas the subject's practical importance and relevance have today never been greater. Together, these facts underlie Danielle Ireland-Piper's book on extraterritorial criminal jurisdiction in East Asia.[2]

The pedigree of international criminal jurisdiction is illustrated by the leading international precedent dating from 1927: the *Lotus Case*.[3] Here the Permanent Court of International Justice considered Turkey's institution of criminal proceedings against a French citizen following a collision between vessels on the high seas. In a much analysed and criticised judgment it was held that the rules of jurisdiction in international law gave states a wide margin of discretion which is only limited in certain cases by prohibitive rules.

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[1] Discussing the rise in assumptions of universal jurisdiction, in spite of the narrowing of the law in Belgium and Spain, are Maximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) European Journal of International Law 779.

[2] Ireland-Piper is an Associate Professor at Bond University in Australia, who has published widely in the area of criminal jurisdiction.

[3] SS Lotus (France v Turkey) (Merits), 1927 PCIJ (Ser A) No 10. Ireland-Piper discusses the Lotus Case at p 17.

Not long after the *Lotus Case* the *Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935*[4] was published. It was a leading early authority on the subject, digesting state practice from a number of countries. It remains the seminal work in the area and set out the principles or bases of criminal jurisdiction upon which countries did, and could, lawfully take cognisance of persons, acts and circumstances outside their territory. The Draft Convention never entered into force.

A significant early municipal case is *In Piracy Jure Gentium*[5], reported in 1934. Here the UK's Privy Council held that a frustrated attempt to commit piratical robbery was itself piracy. Discussing jurisdiction, the Privy Council stated:

> whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma… it is also recognized as extending to piracy committed on the high seas by any national on any ship.[6]

Whilst different, all of these authorities contributed to the formation and solidification of the rules of criminal jurisdiction in international law. Following the Second World War the nature and pace of developments changed. Of particular note has been the conclusion of a considerable number of criminally related treaties containing jurisdictional provisions and the emergence of new realms of international intercourse, particularly cyberspace and outer space.

Alongside a burgeoning of state practice has been significant growth in related academic literature. Notable works, amongst many others, include Akehurst's *Jurisdiction in*

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[4] (1935) 29 American Journal of International Law 435 (Supp).

[5] [1934] AC 586.

[6] Ibid 589.

International Law[7] and Mann's *The Doctrine of Jurisdiction in International Law*.[8] More recently is Ryngaert's *Jurisdiction in International Law*.[9] Ireland-Piper has added to the literature in 2017, with her book *Accountability in Extraterritoriality: A Comparative and International Law Perspective*.[10]

As with other internationally related legal topics, the (English language) coverage of extraterritorial criminal jurisdiction is weighted towards North America, Western Europe and other English language jurisdictions. This is down to, it appears, English being a leading language of international legal writing, the number of academics in these jurisdictions taking an interest in the subject, a lack of readily accessible materials and academic partners in under-represented jurisdictions and, most probably, a degree of national legal chauvinism. *Extraterritoriality in East Asia – Extraterritorial Criminal Jurisdiction in China, Japan, and South Korea* is a particularly welcome addition to the literature because it helps to address this inequality of academic scrutiny and analysis.

Extraterritoriality in East Asia is comprised of five substantive chapters and an introduction. Ireland-Piper is sole author of the Chapter 1 (the introduction), Chapter 2 titled 'Recapping Principles of Jurisdiction in International Law' and the concluding Chapter 6, titled 'Convergence and Divergence in the Regulation of Extraterritorial Criminal Jurisdiction in

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[7] Michael Akehurst, 'Jurisdiction in International Law' (1972-1972) British Yearbook of International Law 145.

[8] Frederick A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Collected Courses of the Hague Academy of International Law 1.

[9] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015).

[10] Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Edgar Elgar 2017).

China, Japan and South Korea'. She jointly authored the three chapters covering the position in each of the subject countries with academics who specialise in China (Dr Sanzhuan Gu), Japan (Dr Machiko Kanetake) and South Korea (Heetae Bae).

In Chapter 1 Ireland-Piper provides an overview of the subject of the book, including criminal jurisdiction generally, some of the controversial issues in the area such accountability gaps, and the motives spurring states to exercise extraterritorial criminal jurisdiction. She then moves on to provide a justification for the book's focus on Asia, and in particular East Asia. Supporting the point made above, Ireland-Piper notes that in spite of the rise of Asia 'law remains one of the least understood aspects of East Asian traditions'.[11]

In Chapter 2 Ireland-Piper provides what she terms a significant 'recap' of the principles of jurisdiction at international law. Interestingly, it is stated that countries exercise extraterritorial jurisdiction for essentially three reasons: legal obligation, moral obligation and out of political or economic interest.[12] Whilst a useful way of describing the motivations behind recourse to extraterritorial jurisdiction, its generality in a sense clouds the precise reasons a parliament or prosecutor might seek to act in a specific area or case.

The bulk of the recap of the principles of jurisdiction falls under three heads: extraterritorial authority (the principles of jurisdiction), jurisdictional obligations and jurisdictional restraint. Before undertaking the first she notes that, as a matter of international law, there is no meaningful distinction in the principles of extraterritorial jurisdiction as between civil, criminal

[11] At 8, citing Marie Seong-Hak Kim, 'Searching for the Spirit of Korean Law', in MRIE Seong-Hak Kim, (ed) *The Spirit of Korean Law: Korean Legal History in Context* (Brill 2016) 1.

[12] At 13.

and fiscal fields.[13] This merits comment. Whilst it is true that similar constraints apply to states when legislating in an extraterritorial manner in different fields, the principles of jurisdiction in international law, as subsequently covered in the book, have developed in the context of the criminal law. Non-criminal rules, be they civil regulations or human rights norms, were and are generally apart from that development. Indeed, private international law contains specific rules governing the applicability, recognition, and enforcement of contractual and other civil obligations in a transnational context. Further, the European Court of Human Rights, for example, has developed a body of case law governing the question of whether an entitlement under the ECHR applies to an individual or circumstance outside of the state party where the claim is made. Whilst there are undoubted similarities in the jurisdictional restraints upon states across varied fields of law, one must be careful, I think, in conflating them such that the meaningful differences in their nature are over-looked.

That noted, under the head 'jurisdictional authority' the author provides a concise and well-referenced iteration of the commonly accepted bases or principles of jurisdiction and their status. Under the heading 'jurisdictional obligations' Ireland-Piper considers whether human rights obligations follow a state's authority to act extraterritorially. Here, in the context of a description and analysis of criminal jurisdiction, consideration of human rights seems somewhat incongruous. Seemingly in line with this point is the statement that 'there is merit to the argument that the concept of jurisdiction in human rights law should be distinguished from that found in general international law'.[14] The question of obligations should instead, it is

[13] At 19.

[14] At 31, citing Suenghwan Kim, 'Non-Refoulment and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context' (2017) 30 Leiden Journal of International Law 49, 51.

submitted, be directed to the criminal sphere. As mentioned earlier in her book, the question of the nature of conventional obligations as regards sex tourism and bribery is germane. As is the question of the relationship between extradite or prosecute obligations and the principles of jurisdiction.

The section headed 'jurisdictional restraint' addresses the possibility of a hierarchy in jurisdictional claims, the possible effect of the principle of comity, the act of state doctrine, and the abuse of rights doctrine. Whilst interesting, these sections only partially address the issue of what, if anything, can restrain a country from exercising extraterritorial jurisdiction. Here the issue of the forms of jurisdiction arises. The author earlier, and rightfully, explained that in general terms prescriptive and adjudicative jurisdiction can be addressed together. As regards restraint, however, it seems logical to single out adjudicative jurisdiction. This is because it generally requires the presence of the accused and sufficient evidence to take place effectively. Extradition and evidential non-cooperation, therefore, can and indeed do act as effective restraints to what are perceived as egregious assumptions of jurisdiction.[15] Within extradition, double criminality and human rights are amongst the features of the law that can restrain the assumption of adjudicative jurisdiction.[16] A proviso here is that assumptions of adjudicative extraterritorial jurisdiction do not necessarily entail extradition. Chapter 2 ends with a consideration of contemporary challenges to traditional conceptions of jurisdiction, largely focused on the internet and outer space.

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[15] The relatively recent addition to UK extradition law, the forum bar to extradition, exists for exactly that purpose. See Paul Arnell and Gemma Davies, 'The Forum Bar to Extradition – An Unnecessary Failure' (2020) 84(2) Journal of Criminal Law 142.

[16] As to human rights in extradition in the UK context see *Norris v United States* [2010] UKSC 9.

Chapters 3 to 5 form the bulk of the book. In these chapters Ireland-Piper and her co-authors discuss how extraterritorial criminal jurisdiction is regulated and exercised in China, Japan and South Korea. The three chapters each follow a similar format. Following an introduction, there is a historical overview and section discussing the particular constitutional context. Following these, the authors cover extraterritorial criminal jurisdiction legislatively and judicially. The chapters end with observations.

The historical overview sections of the three chapters give a brief but useful summary of the most pertinent facets of the development of the three countries. This is because, as the authors writes as regards China, 'it would be a mistake to try to understand any aspect of law in China today without first understanding something of its history'.[17] Indeed, this observation is at the root of perhaps one of the most important aspects of the book. Namely, giving a perspective of extraterritorial jurisdiction – its nature, motive, limits etc. – from countries with points of view apart from that prevalent in Western Europe, North America and certain other developed states. In this way it acts as a counterpoint to the dominant, at least in Western eyes, understanding of the subject. One useful facet of this is a succinct description of the criminally related treaties each country is party to.

Equally useful are the constitutional context sections of each of the three chapters. The approaches to international law taken by China, Japan and South Korea are authoritatively set out. Of note as regards China is that the PRC Constitution unequivocally asserts the right to protect the legitimate rights and interests of Chinese nationals residing abroad. In chapter 4 the reader is reminded that the Japanese Constitution was modelled upon the US Constitution,

[17] At 49.

coming into effect in 1947. In chapter 5 it is noted that the constitution of South Korea is silent on whether its terms apply extraterritorially.

As regards criminal law and extraterritoriality, the book explains, for example, that Chinese criminal law is explicitly extraterritorial. Articles 7 and 8 of the Criminal Code 1997 assert jurisdiction on the basis of nationality, and protective and passive personality principles respectively. All crimes in the Criminal Code in China are subject to nationality jurisdiction, with discretion for crimes whose maximum punishment is less than three years. In Japan, it is written that territoriality is the basis of its criminal law. However, that maxim has been interpreted in a liberal manner.[18] We are told that Japanese law also provides for active and passive personality and the protective principle of jurisdiction. Somewhat similarly, South Korean law *inter alia* asserts both territorial and extraterritorial jurisdiction – the latter including active and passive personality, the protective principle and universal jurisdiction.

In the observations section pertaining to China it is noted that the dearth of reported cases and practice constrain the analysis.[19] Further, it is noted that ultimately the decision to exercise extraterritorial criminal jurisdiction in China is a policy rather than a legal decision.[20] Japan is noteworthy, the authors write, because of its broad approach to passive personality jurisdiction, as is South Korea.

Ireland-Piper's final chapter, Chapter 6, summarises the content of the book, and discusses the similarities and differences between the three countries. The first similarity, or convergence, is a permissive constitutional context, whereby courts in all three countries are unlikely to strike

[18] At 94.

[19] At 76.

[20] At 76.

down prescriptive assertions of extraterritorial jurisdiction. The second is that passive personality jurisdiction is provided across three states under examination. This is notable, Ireland-Piper rightfully states, because it seems to conflict with the contentious or exceptional nature of the principle in the mainstream Western literature.

The divergences are identified as justiciability, the role of international law, and the approach to double jeopardy and procedural guarantees. As to the first, the power of Chinese courts is notably narrower than Japanese and South Korean courts. Somewhat similarly, the Chinese constitution does not directly refer to international law, whereas Japan and South Korea take a more accepting or accommodating stance towards it.

The book ends with some general observations and comments, one of which is that a decision to prosecute in an individual case will always be as much a political decision as a legal one. This is very true, and illustrative of the reason why the rules of jurisdiction in international law have not evolved in a significant way over the past century. Ultimately, states employ the criminal law to protect and defend themselves and the interests they value. Accepting limits on their ability to do is something that the vast majority of countries will simply not countenance.

Extraterritoriality in East Asia is a well-researched and novel book. It is a very useful resource, addressing an under-represented perspective. It is a welcome addition to the literature and, as the author herself writes, will aid understanding and hopefully help in the necessary task of reforming and refining the principles of international criminal jurisdiction.

Paul Arnell
Reader in Law
Law School
Robert Gordon University
p.arnell@rgu.ac.uk