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JURISDICTION OVER PRIVATE EXTRA TERRITORIAL ACTIVITIES UNDER THE PROJECTED CHEMICAL WEAPONS CONVENTION

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1. The Convention on Chemical Weapons, currently being negotiated under the auspices of the United Nations, aims to prohibit completely and effectively the development, production and stockpiling of chemical weapons as well as to destroy existing weapon stocks. The attainment of this objective requires imposing specific restrictions on the contracting states, id est the relative governing bodies, and entails an expectation of an obligation to control activities carried out by private persons.

A thorny issue is that of the territorial scope of the obligation to control private activities: it must be determined whether such an obligation shall have an exclusively territorial dimension or whether the CW Convention shall provide some form of extra-territorial application of State controls.

The problem acquires particular importance in light of the possibility that states pursuing a policy of chemical armament do not become parties to the Convention. In fact, it will be necessary to find adequate juridical mechanisms for preventing natural persons or legal entities that belong to a contracting state from aiding third states in the production of chemical weapons (1).

2. In the framework of the Draft CW Convention elaborated by the Conference on Disarmament, the issue of State control over private activities is regulated by art. VII (2).

According to par. 1 of this provision, each State party shall adopt the necessary measures to implement its obligations under the Convention, and in particular:

" a) to prohibit natural and legal persons anywhere on its territory or in other places under its jurisdiction as recognized by international law from undertaking any activity that a State party to this Convention is prohibited from undertaking by this Convention".

Ratione personae, the provision applies both to natural persons and to legal persons, regardless of nationality. Ratione loci, it applies to the territory of a State party and any other place under its jurisdiction. One has to ask which situations the principle refers to in using the phrase "any other place under its jurisdiction". There is no doubt that this provision is to be interpreted in light of the fundamental principle of flag state jurisdiction: every state contracting to the Convention shall therefore be obliged to prohibit the commission of the prohibited activities on private national ships and aircraft.

In virtue of the principles of the international law of the sea, the phrase "place under jurisdiction" certainly refers to internal waters, fully incorporated in the territory of the state, the territorial sea, and the archipelagic waters, over which the sovereignty of the coastal state extends. The legislative dispositions adopted by the states ex article VII could therefore (rectius they must) apply also to those areas.

As regards, however, territorial and archipelagic waters, we should take into account the principle that acknowledges the right of innocent passage for foreign private ships and the corresponding obligation of the coastal state to abstain from exercising its jurisdiction over the ships in passage in relation to the ship's internal affairs. Thus, one might raise the question whether the coastal State could stop or divert a foreign merchant ship passing through the territorial sea for the purpose of exercising jurisdiction in relation to activities forbidden by the CWC, for instance carriage of chemical substances to be used in a third State for production of chemical weapons.

Art. VII par. 1 b) of the Rolling text provides that each State party shall "...not to permit any activity as referred to under a) in any place under its control". The meaning of the phrase "any place under its control" is not defined in the text. It is therefore not clear where the duty not to permit illicit private activities applies; however, it would seem to refer to situations in which a State exerts de facto control over a place, such as territories under military occupation or military bases abroad. A similar wording is in art. I of the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in the Outer Space and Under Water (3) .

3. The first two letters of the article VII paragraph 1 just examined contemplate forms of jurisdiction by the state parties that are established over a solid territorial base. This also goes for letter b), as is evident from the fact that the rule singles out "a place" as the object of the situation of control, i.e. a part of the territory. According to the working paper on "Jurisdiction and control", which is annexed to CD/1108 and reflects the results of the consultations held on the issue by the Chairman of the Ad Hoc Committee, the consultations showed that, while the territorial basis for assuming jurisdiction over all natural persons and legal entities was generally recognized, there were different views among the delegations with respect to the exercise by States parties of forms of extraterritorial jurisdiction.

As is well known, in the history of international relations, numerous conflicts have occurred in relation to claims by individual states to extend the application of their own laws to events that occurred outside their national territory. The most delicate questions have arisen in the area of competition law, where several states have tried to apply their own anti-trust laws to enterprises operating on foreign territory. The second sector in which the most important controversies have arisen among states over extra-territorial application of national laws regards export controls, especially in situations where these controls reflect political goals (embargoes or economic boycotts against certain States) (4).

In the Chemical Weapons Convention, the problem of the extra-territorial dimension of state controls assumes, as has been observed, very peculiar aspects with respect to traditional assumptions about the extra-territorial application of jurisdiction. In fact, in this case, it must be established to what extent the contracting states to the Chemical Weapons Convention shall be obligated to extend their own jurisdiction in relation to private activities conducted outside their own territory (5). This would explain the particular delicacy of the problem. On the one hand, in fact, the effective achievement of the aims of the Convention would

probably require state parties to press their claims to extraterritorial jurisdiction even beyond generally accepted principles. On the other hand, however, the codification of the extended extraterritorial jurisdiction of states in the convention is problematic for those nations that traditionally have been opposed to the recognition of extraterritorial jurisdiction in sectors of vital economic importance, such as competition law, export controls, and the application of commercial sanctions.

To address the question adequately, it would be best to proceed firstly with a brief explanation of the principles of international law that govern the exercise of forms of extraterritorial jurisdiction by states.

In light of these principles it will therefore be possible to evaluate the provisions of the draft Convention regarding the control over the activities of private persons, to verify how far the drafters of the treaty have intended to extend the jurisdiction of the contracting states.

With the aim of reconstructing the international rules in force regarding the exercise of territorial jurisdiction, the fundamental distinction must be raised between

a) legislative jurisdiction, that is, the authority to enact rules of law applicable to persons, actions or things;

b) enforcement jurisdiction, that is, the power to take coercive action in order to compel compliance with rules of law.

Enforcement jurisdiction is strictly territorial. A State is not allowed to take enforcement measures in the territory of another State without the consent of the latter (6).

As far as legislative jurisdiction is concerned, territoriality "is not an absolute principle of international law", as stated by the Permanent Court of International Justice in its judgment on the Lotus case (1927) (7).

Some authors even go so far as to assert that the exercise of legislative jurisdiction by states, even outside their own territory, would leave general international law completely indifferent, because general international law would not place any limits on such an extension of the mere power of command, when not followed by acts of authoritative enforcement. According to Conforti, for example, "general international law takes no interest in the power of government as mere power of command; the state can pass laws and regulations of any kind and form and direct orders to anybody whatsoever, without raising any problem of general international law. It is in the moment in which it claims to act coercively to enforce those orders that it is necessary to verify whether its action is permissible."[trans](8).

The majority of writers, however, reject this point of view and maintain that international law does put limitations on the legislative jurisdiction of States, with the aim of assuring the orderly co-existence of the legal orders of sovereign and independent states. In this connection, it must be pointed out that State practice seems to support the majority view and demonstrate that the suggestion that there is no limitation on the legislative jurisdiction of States is untenable. In fact, extravagant claims to extra-territorial jurisdiction, not founded on any of the

generally recognized bases of legislative authority, have generally raised diplomatic protests from other States (see for some examples infra, par. 5) .

Even the Permanent Court of International Justice, in its judgement on the *Lotus* case, ended, as Mann points out, by referring to "the limits which international law places upon State jurisdiction" and which a State "should not overstep": thus, it seems possible to believe that the Court did not intend to deny the existence of restraints upon State legislative jurisdiction but only to reject the test of strict territoriality of criminal jurisdiction (9).

If the proposition that no limits exist on the legislative jurisdiction of states is therefore contradicted by state practice and rejected by the majority doctrine, it does cause some difficulties in concretely specifying the criteria on which international law is based in regulating such jurisdiction.

In this regard, two different schools of thought can be distinguished. One part of the doctrine, starting from the general affirmation of the principle that "restrictions upon the independence of states cannot be presumed" (10), affirms that international law leaves states wide discretion as to the exercise of legislative jurisdiction, which is limited only by specific prohibitive rules (11). This doctrine relies on several assertions contained in the Lotus decision. In the words of the Permanent Court, customary international law
"far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, ..leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules" (12) .

A second school of thought does not share the general views on jurisdiction expressed in the Lotus judgment and its emphasis on State discretion (13). According to the authors that agree with this position, every exercise of extraterritorial jurisdiction by states presupposes the existence of a solid basis for jurisdiction recognized by international law. In the absence of such a basis for extraterritorial jurisdiction, the jurisdiction of the territorial state should be considered exclusive (14).

On the practical level, the differences between these two positions tend to diminish, in that both end up by admitting the exercise of extraterritorial jurisdiction by states in specific situations (15). Moreover, even states that usually advance the most extensive claims for jurisdiction generally justify those claims by referring to typical motives.

What, then, are the various principles which in State practice are normally held to found extra-territorial legislative jurisdiction?

The most important basis of extra-territorial jurisdiction is *the principle of nationality*. Under it, a State is allowed to enact rules of law applicable to its nationals, wherever they are. The validity of this principle has been generally recognized (16). It must be pointed out, however, that it is commonly held that limitations exist on the principle of nationality as a basis for claiming extra-territorial jurisdiction (17).

Besides the nationality principle, other bases have been invoked in order to justify extra-territorial jurisdiction. In particular, we have to consider:

a) *The protective principle*, which would allow a State to prescribe rules of law to conduct outside its territory that threatens its security (such, for instance espionage or acts of insurrections) or the operation of its governmental functions (such as counterfeiting of currency, perjury before consular officers etc.).

Unlike the principle of nationality, the protective principle has not found universal acceptance in State practice, as its suitability for establishing the extraterritorial extension of state jurisdiction has often been contested. Moreover, if the majority of authors acknowledges the principle in the abstract, its concrete applications, beyond the typical cases cited above, are controversial.

b) *The passive personality principle*

Another basis to which States sometimes refer in order to assert extra-territorial jurisdiction is the passive personality principle, under which a State claim the right to exert jurisdiction with respect to acts harmful to its nationals, wherever committed. Even the passive personality principle has found less than general acceptance in State practice, and its validity as a general basis of legislative jurisdiction is questionable. The principle was invoked by Turkey in the Lotus case in order to justify its right to exercise criminal jurisdiction with respect to a collision in the high seas, between a french and a turkish ship, which determined the death of turkish nationals. The Permanent Court of International Justice, however avoided dealing with the legal soundness of the passive personality principle and preferred to found its decision on the application of the territorial principle, by way of assimilation of the Turkish vessel to the Turkish soil.

The passive personality principle is often contested on the ground that it may be easily abused. Anyway, it does not seem that the passive personality principle could serve as a general basis for the extension of the jurisdiction of States parties under the Convention on Chemical Weapons.

c) *The universality principle*

Under the universality principle every State has the right to prescribe rules for the repression of certain criminal acts that are considered harmful to fundamental interests and values of the whole international community, such as piracy, slave trade, genocide. In the light of the current situation of international law in the field of Chemical Weapons, it does not seem realistic to think that the principle of universality could be relied upon in order to extend legislative jurisdiction of the States parties to the CW Convention with respect to private activities undertaken in third countries and violating the provisions on development or production of such weapons. On this point, it is sufficient to remember that these activities are currently completely permissible on the basis of customary international law.

In fact, the examination of the preparatory work of the CW Convention demonstrates that the only form of extraterritorial jurisdiction on which there could be a general consensus of the states is tied to the principle of nationality. As we will see immediately, an additional critical question is that of the concrete application of this principle, especially as regards juridical persons.

4. According to the above mentioned working paper on "Jurisdiction and control", consultations on the issue showed that the various delegations had different opinions with respect to "the extent to which States parties are able and/or willing to enact penal provisions with respect to their nationals (both natural persons and legal entities) abroad". Indeed, the 1990 version of the Rolling Text contained no provision on this point.

The 1991 version of the Rolling Text, on the other hand, introduced a new provision which makes specific reference to this problem. In particular, on the basis of Art. VII par. 1 c), each State party shall:

> enact penal legislation, which shall extend to such activities as referred to under a) (id est any activity prohibited by the Convention) undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

The obligation imposed on States parties by this provision has a clear extra-territorial scope. The penal legislation, which States parties will be obliged to enact, will have to cover "activities undertaken anywhere" by State nationals. That is to say, activities conducted not only within the territory of the State, or in other places under its jurisdiction, but also activities undertaken by State citizens in areas beyond national jurisdiction or in the territory of other States, even not parties to the Convention. However, it has to be noted in this connection that ratione personae the provision of art. VII par. 1 c) applies only with respect to natural persons.

As far as juridical persons are concerned, they are considered under a) and b) of art. VII, which are applied exclusively on a territorial basis. *The current version of the Rolling Text, therefore, makes no provision for control by States parties of activities undertaken by legal entities abroad and, particularly, in third States.*

Given this lacuna in the Convention, it would be possible for companies of States parties to circumvent the Convention engaging in illicit activities in third States. This is not a remote possibility. It will suffice to mention that a number of companies operating in developing countries (particularly India), but controlled by nationals of western countries, were reported to have in recent years sold large quantities of chemical weapons material to Iraq and other Middle Eastern States.

It is therefore reasonable to consider whether a future convention should include a special provision requiring Contracting States to control activities undertaken by transnational corporations abroad, and particularly in the territory of States not parties to the Convention. To this end, it is necessary to examine the legal bases for a mechanism of State control over the activities of juridical persons. In this connection, two different situations can be identified.

The first one is given by a company, incorporated under the laws of a State party, which operates abroad through a branch not having a separate personality.

It is submitted that the principle of nationality could justify the assertion -by the State of incorporation of the parent company- of extra-territorial legislative jurisdiction over the branch operating abroad. Indeed, according to the general principles of law, the parent company ant its branches are "a single unit" (Mann). In the 1970 judgment on the Barcelona Traction the International Court of Justice made the following considerations:

In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.

The International Court of Justice has thus recognized that for purposes of international law (at least in the field of diplomatic protection) a corporation is considered to have the nationality of the State under whose laws is incorporated and in whose territory it has its registered office. Given these circumstances, it is submitted that the Convention on chemical weapons should contain a provision which calls for the duty of each State party to enact appropriate legislation prohibiting all corporate entities incorporated under its laws from undertaking anywhere activities incompatible with the Convention. Such an assertion of extra-territorial jurisdiction would rest on the nationality principle and should not raise special objections.

5. A multinational company which operates abroad through a subsidiary incorporated under the laws of a foreign State represents a different case. According to the general principles of corporate law, the parent company and the foreign subsidiary are separate entities, even if the subsidiary is wholly owned by the parent. Applying the doctrine elaborated by the International Court of Justice in the *Barcelona Traction* case, according to which a corporate entity is a national of the State under whose laws it is incorporated, the subsidiary should be considered as a national of the local State. Therefore, the nationality principle would not seem prima facie to justify the assertion by the State of the parent of any form of extra-territorial jurisdiction over the foreign subsidiary.

However, an examination of State practice demonstrates that it is not possible to limit consideration to the general assertion founded on the principles of corporate law and on the doctrine on nationality of corporations elaborated in the Barcelona Traction. Indeed, account must be taken of a number of precedents in which States have seek to overcome the principle of the separate personality of parent and subsidiary in order to assert jurisdiction over the whole multinational group.

In this connection, the most numerous and important examples may be drawn from United States practice: on many occasions, since the 1950s, the U.S. has claimed jurisdiction to apply its laws to corporations organized under the laws of a foreign State but substantially owned or controlled by american nationals.

The following are some of the instances in which the United States has asserted extra-territorial jurisdiction over foreign subsidiaries.

a) Trade embargo on China (1949-1971) and North Korea (1950-)

The *Foreign Assets Control Regulations* (FACR), promulgated under the authority of the *Trading With the Enemies Act* (TWEA), prohibited financial and commercial transactions with China and North Corea by "persons subject to the

jurisdiction of the United States". According to the FACR, were considered subject to the jurisdiction of the United States:

1) Any citizen of the United States whether within the United States or in a foreign country;

2) any person within the United States;

3) any partnership, association, corporation or other organization i) which is organised under the law of the United States; ii) which has its principal place of business within the United States; iii) which is owned or controlled by, directly or indirectly, one or more persons subject to the jurisdiction of the United States as herein defined.

Attempts to apply the trade embargo on China on foreign subsidiaries of U.S. companies raised strong reactions from Canada and France. One such attempt gave rise to a well-known judgment by the Court of Appeal of Paris (*Fruehauf v. Massardy*) (18). The U.S. Government ordered *Fruehauf*, a U.S. corporation, to prevent its french subsidiary (*Fruehauf France*) from complying a contract to supply truck trailers to China. The order was passed by the parent to *Fruehauf France*, sub poena of civil and criminal penalties applying both to the parent and the subsidiary. Three french directors of *Fruehauf France* brought an action before a french court, which appointed a judicial administrator to take temporary control of the company and execute the contract. Following the judgment, the U.S. administration dropped any charge against the companies involved.

b) Trade embargo on Cuba. The *Cuban Assets Control Regulations*, enacted in 1963, prohibited transactions with Cuba by "persons subject to the jurisdiction of the United States". This concept was defined in the regulations in a similar way to the FACR. United States claim to control the activity of foreign subsidiaries met with protests from Canada.

c) Trade sanctions against Rhodesia (1967-1979). The *Rhodesian Transaction Regulations*, issued in 1967 under the United Nations Participation Act, applied inter alia to any corporation organized under the laws of Southern Rhodesia and controlled by U.S. nationals.

d) Export ban against Uganda (1978). Legislation enacted in 1978 prohibited all imports from and exports to Uganda, whose government was held responsible of gross violations of human rights. The export prohibition purported to apply to "foreign corporations, permanent foreign establishments or any other foreign entities...controlled in fact by individual U.S. residents or nationals, wheresoever located".

e) Sanctions against Iran. As it is well-known, in 1979, after the occupation by iranian nationals of the U.S. embassy in Teheran, President Carter issued, under the *International Emergency Economic Powers Act*, regulations that a) blocked all iranian assets within the United States or subject to U.S. jurisdiction b) ordered a trade embargo on Iran. The freezing of assets regulation had an extraterritorial scope: foreign subsidiaries of U.S. banks were ordered to block all Iranian assets held by them. The extra-territorial application of the U.S. measures raised litigations in british and french courts, which were put to an end by the 1981 Algiers Agreement between U.S. and Iran (19).

f) The Siberian Pipeline embargo (20). In 1982, following the imposition of martial law in Poland, the U.S. Administration enacted regulations in order to

prevent the participation of U.S. firms in the construction of a soviet pipeline, designed to bring gas from Siberia to Western Europe. At first the regulations, issued under the authority of the *Export Administration Act* (EAA), applied only to companies incorporated under U.S. laws, but subsequently the Reagan Administration broadened the scope of the ban. Amendments to the EAA, enacted on june 22, 1982, prohibited a) foreign subsidiaries of U.S. companies from engaging in transactions with the Soviet Union concerning oil and gas exploration, transmission or refinement, b) the re-export by foreign subjects of oil and gas equipment utilizing U.S.-origin components, c) the export from third countries of equipment produced abroad by any corporation using american technology.

The 1982 regulations were challenged by diplomatic protests from several european States and the European Economic Community. Great Britain and France enacted statutes prohibiting national companies, including subsidiaries controlled by U.S. parents, from complying with the U.S. regulations. A number of companies eventually fulfilled the contracts previously entered with the Soviet Union and shipped the pipeline equipments to the soviets. The U.S. administration reacted placing the companies on a "denial list", that is denying any export privilege to those companies. This sanction was applied both to foreign firms operating under U.S. licence and to foreign subsidiaries of U.S. parents.

In the note of protest sent to the U.S. government on August 12, 1982, the European Community stated:

"..The U.S. measures...are unacceptable under international law because of their extra-territorial aspects. They seek to regulate companies not of U.S. nationality in respect of their conduct outside of the U.S. and particularly the handling of property and technical data of these companies not within the U.S.".

With respect to the claim to subject to U.S. jurisdiction foreign subsidiaries under the control of U.S. citizens, the E.C. note points out that

"in the Barcelona Traction Case the International Court of Justice declared that the two traditional criteria for determining the nationality of companies (i.e. the place of incorporation and the place of the registered office of the company concerned) had been 'confirmed by long practice and by numerous international instruments'. The Court also scrutinized other tests of corporate nationality, but concluded that these had not found general acceptance..This decision was taken within the framework of the doctrine of diplomatic protection, but reflects a general principle of international law."

Moreover, according to the European Community, the U.S. measures "insofar as.... tend to enlist companies whose main ties are to the E.C. Member States for purpose of American trade policy vis-à-vis the U.S.S.R., they constitute an unacceptable interference in the independent commercial policy of the E.C."

The siberian pipeline embargo gave also rise to litigations in U.S. and European courts. It is worth mentioning the judgement by the District Court at The Hague in *Compagnie Europeenne des Petroles S.A. v. Sensor Nederland* (September 17, 1982). The dutch Court ordered *Sensor Nederland B.V.*, a

subsidiary of a U.S. company (*Geosurce Inc.*), to fulfill a contract for supply of equipment destined to the siberian pipeline. The District Court at The Hague maintained that the extra-territorial application of the U.S. embargo had no basis in international law. In particular, in the Court's view the assertion of U.S. jurisdiction could not be based on the nationality principle, since

"under international law as commonly interpreted, Sensor Nederland B.V. has Netherlands nationality, having been organized in the Netherlands under Netherlands law and both its registered office and its real centre of administration being located within the Netherlands".

The review of practice concerning the assertion by the United States of extra-territorial jurisdiction over subsidiaries incorporated under the laws of foreign States shows that such a claim met with strong and constant opposition from several States, including some traditional U.S. allies. In a speech given in 1984 in Washington D.C., the British Secretary of State for trade and the Industry stated that the U.S. claim to extraterritorial jurisdiction represented "the most persistent source of tension between the U.S. and the U.K."(21).

From a political point of view, in the light of the above precedents it is difficult to imagine that States which have traditionally opposed U.S. extraterritorial claims in areas such as export controls (22) or competition regulations would be willing to accept the codification of similar forms of extraterritorial within the framework of the Convention on Chemical Weapons.(23)

From a legal point of view, the survey of U.S. practice, and of the reactions it raised, seems to support the opinion, enunciated in *Barcelona Traction* case, that legal entities have the nationality of the State under whose laws they are incorporated and that the separate legal personality of the foreign subsidiary is a bar to any control by the State of the parent.

However, it is difficult to say whether this is considered a rule that admits no acceptions, or whether international law admits, at least in exceptional circumstances or in certain fields, the possibility of lifting the corporate veil in order to subject to the authority of one State the whole multinational enterprise.

The problem takes on significance in the context of the control of chemical weapons since it is evident that strict adherence to the principle of separateness of the foreign incorporated subsidiary could frustrate the aim of the CW convention. Thus, one might raise the question whether, given the importance of the interests at stake, States should not be required to lift the corporate veil in order to prevent the circumvention of the obligations stemming from the CW Convention by foreign incorporated subsidiaries of national companies .

While a definitive answer to this question is beyond the scope of this draft paper, it has to be mentioned that the International Court of Justice recognized, in the Barcelona Traction judgement, that in municipal law the corporate veil is often pierced "to prevent the misuse of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as creditors or purchasers or *to prevent the evasion of legal requirements or obligations*", and that the principle of "piercing the veil" could "play a similar role in international law".

As a matter of fact, one may trace in the practice of States other examples, besides those drawn from U.S. legislation, in which international subjects have

ignored the principle of the separateness between the parent company and the subsidiary.

- In the field of anti-trust law, the E.C. Commission and the European Court of Justice have often applied the competition rules of the E.E.C. treaty to conduct undertaken in third countries by non-E.C. parent companies controlling E.C. subsidiaries. In order to do so, the Commission and the Court of Justice have relied on the theory that the non-E.C. parent company and the E.C. subsidiary which it controls are a single economic entity (24).

- In time of war, States have relied on the principle of "piercing the corporate veil" for the purpose of extending enemy treatment to locally incorporated subsidiaries controlled by parent companies of an enemy State (25). The same principle has also been largely applied in the framework of peace treaties concluded after the two world wars in order to identify enemy property.

- As far as the application of economic sanctions is concerned, the U.S. is not the only State to claim form of extra-territorial jurisdiction. Sweden, for instance, has included foreign incorporated subsidiaries of swedish companies in the scope of application of the prohibition of investments in South Africa, provided by a 1979 law; similar legislation has been adopted by Denmark.

NOTES

1) See generally BUDENSIEK, "A New Chemical Weapons Convention: Can It Assure the End of Chemical Weapons Proliferation?", 25 *Stanford Journal of International Law* 647 ff. (1989); RONZITTI, "Le Desarmement Chimique et le Protocole de Genéve de 1925", 35 *Annuaire Francais de Droit International* 152 (1989); KOPLOW, "Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention", 15 *Yale Journal of International Law* 66-67 (1990).

2) See Conference on Disarmament, *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament* (CD/1108, 27 august 1991), Appendix I, which represents the present stage of elaboration of the provision of the Draft CW Convention.

3) See RAO, "The Test Ban Treaty, 1963:Form and Content", 3 Indian Journal of International Law 317 (1963); SCHWELB, "The Nuclear Test Ban Treaty and International Law", 58 *American Journal of International Law* 648 (1964); STEIN, "Legal Restraints in Arms Control Agreements", 66 *American Journal of International Law* 271 (1972)

4) See generally MANN, "The Doctrine of Jurisdiction in International Law", 111 *RdC* 1-158 (1964-I); LUZZATTO, *Stati Stranieri e Giurisdizione Nazionale* (1972); LOWE, *Extraterritorial Jurisdiction* (1983); MANN, "The Doctrine of International Jurisdiction Revisited After Twenty Years", 186 *RdC* 9-116 (1984-I); International Chamber of Commerce, *The Extraterritorial Application of National Laws*, ed. by Lange and Born (1987); PICONE-SACERDOTI, *Diritto Internazionale dell'Economia* 868 ff. (1987); NEALE and STEPHENS, *International Business and National Jurisdiction* (1988); DE MESTRAL and GRUCHALLA-WESIERSKI, *Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.* (1990).

5) KOPLOW, "Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention", 15 *Yale Journal of International Law* 66-67 (1990).

6) See Permanent Court of International Justice, the *Lotus* case (*France v. Turkey*), P.C.I.J., *Series A*, no. 10 (1927), pp. 18-19:
"the first and foremost restriction imposed by international law upon a State is that -failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissible rule derived from international custom or from a convention". MANN, "The Doctrine of Jurisdiction in International Law", 111 *RdC* (1964-I) 126 ff. HENKIN, p. 279, 308 ff. BROWNLIE, 307

7) The *Lotus*, p. 18

8) Conforti: "il diritto internazionale generale si disinteressa del potere di governo come mera potestà di comando; lo Stato può fare leggi e regolamenti di qualsivoglia genere e natura, può indirizzare comandi a chicchessia, senza sollevare alcun problema di diritto internazionale generale. E' nel momento in cui esso pretende di agire coercitivamente per l'attuazione di siffatti comandi, che occorre verificare se la sua azione sia lecita", *Diritto Internazionale*, Naples, 1987, p. 190. See also QUADRI, *Diritto Internazionale Pubblico*, Naples, 1968, 636; GIULIANO, SCOVAZZI, TREVES, *Diritto Internazionale*, volume II, Milan.
9) MANN, "The Doctrine" cit., 33 ff.

10) The *Lotus*, p. 18.

11) RIGAUX, *Droit Public et Droit Privé dans les Relations Internationales*, Paris, 1977, p. 136.

12) *The Lotus*, p. 19

13) BRIERLY, 58 Rdc (1936-IV), 146-148; FITZMAURICE, 92 RdC (1957-II), 56-57

14) Harvard Research on Jurisdiction with respect to Crime (1935); JENNINGS, "General Course of International Law", 121 RdC (1967-II) 518; O'CONNELL, *International Law*, volume II (1965), 655.

15) HENKIN, "International Law: Politics, Values and Functions", 216 *RdC* (1989-IV) at 281.

16) MANN, "The Doctrine" cit.... ;JENNINGS, "General Course of International Law", 121 Rdc (1967 II) 153; BROWNLIE,.... 303

17) According to Brownlie, a State can lawfully claim extra-territorial jurisdiction only if the following general principles are observed:a) that there should be a substantial and *bona fide* connection between the subject-matter and the source of the jurisdiction;b) that the principle of non-intervention in the domestic or territorial jurisdiction of other States should be observed;c) that a principle based on elements of accommodation, mutuality and proportionality should be applied. Thus nationals resident abroad should not be constrained to violate the law of the place of residence.

18) See GRAIG, "Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflection on Fruehauf v. Massardy", in ..Harvard Law Review, 579 ff. (1970)

19) See LOWENFELD, *Trade Controls for Political Ends* 551 ff. (1983)

20) See generally ERGEC, *La compétence* cit.; BENEDETTELLI, "Sull'applicazione extraterritoriasle delle misure di embargo degli Stati Uniti relative al gasdotto siberiano, Rivista di diritto internazionale 528 ff. (1984);"Extraterritorial Application of US Export Control. The Siberian Pipeline", 77 *ASIL Proceedings* 241 ff: (1983)

21) See LOWE-WARBRICK, "Current Legal Developments", 36 *International And Comparative Law Quarterly*, 398 (1987)

22) In particular, on the Canadian practice see DE MESTRAL and GRUCHALLA-WESIERSKI, *Extraterritorial Application*, cit., 129 ff. See also the letter sent on 14 march 1984 by the Australian Ambassador in Washington to the members of the U.S. House/Senate Committee on the renewal of the Export Administration Act: "we believe that U.S. claims to extraterritorial jurisdiction are substantially unsupported by international law and are contrary to the principles of international comity" (text reprinted in *Australian Yearbook of International Law*)

23) In this connection, it is worth noting that the U.S. administration would seem to follow a more cautious approach in the field of extra-territoriality of national laws. In the framework of a parliamentary hearing on CW proliferation, Amb. Bartholomew, Under Secretary of State, Department of State, seemed to rule out the possibility of extraterritorial application by the U.S. of national legislation providing sanctions on firms that aid CW proliferation: *Chemical and Biological Weapons Proliferation*, Hearing before the Committee on Banking , Housing, and Urban Affairs, U.S. Senate, 101st Congr., 1st sess., june 22, 1989, at 11, 39

24) See, e.g., the following cases: *Imperial Chemical Industries Ltd. v. Commission* ECR (1972) 619 ff.; *Geigy*, ibidem, 787 ff.; *I.C.I and Commercial Solvents Co.v. Commission*, ibidem (1974), 223 ff. Compare FRANCIONI, Imprese Multinazionali cit., 161 ff. It is interesting to note that the U.S. has in various occasions challenged the assertion of extra-territorial jurisidiction by the E.C.:see *Restatement, Third* cit., par. 403, Reporters' note 1.

25) See, generally, DOMKE, "Piercing the Corporate Veil in the Law of Economic Warfare", *Wisconsin Law Review* (1955) 77 ff.; ERGEC, *La competénce extraterritoriale* cit., at 58-59