Matthieu J.L. Decroos[1]

CRIMINAL JURISDICTION OVER TRANSNATIONAL SPEECH OFFENSES

From Unilateralism to the Application of Foreign Public Law by the National Courts

1. THE INTRODUCTION

Over the past few years one has been able to observe a steady increase in the number of criminal proceedings regarding transnational speech offenses, a trend that will most likely persist in the years to come. The expanding use of interactive computer services and the increased globalization of our society, undoubtedly plays a decisive role in this evolution by rendering 'geographical boundaries increasingly porous and ephemeral'.[2] By and large, the fact that illicit speech has connections with more than one legal order will not result in any negative consequences, at least not as long as the interstate disparities in substantive criminal law are not excessive. However, if criminal legislations are too far removed from one another, then problems may arise. This is notably the case when comparing US and European legislation with respect to defamation[3] and hate speech,[4] with the US being on average more protective of the right to freedom of speech – except in the case of adult pornography where the reverse is true.

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[1] Research Assistant, Centre for Enforcement of European Law (CEEL), Utrecht University. This article was written with the support of the Netherlands Organization for Scientific Research (NWO).

[2] D.L. Burk, 'Jurisdiction in a World Without Borders', 1 *Virgiania Journal of Law and Technology* 3 (1997) at par. 2.

[3] Defamation can be defined as the injuring of a person's honour and good name by the making of a particular derogatory statement.

[4] Hate speech can be defined as the insulting or threatening of a group of persons on grounds of their race, religion or personal beliefs, their sexual orientation, and/or any other group characteristic; here it includes acts of revisionism or apologia in the case of crimes against humanity.

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A recent illustration of the negative consequences of interstate substantive law disparities in the context of transnational speech is offered by the controversy between *Yahoo!* and several French interest groups which took place before the French and US civil courts.[5] Although the dispute concerned tort litigation, the main point related to the fact that French law penalized certain conduct which was deemed to be constitutionally protected by the US legislator and the courts.[6] The case originated in France when a French court issued a court order instructing *Yahoo!*, a California-based Internet service provider, to impede the accessibility in France to auction sites for World War II Nazi paraphernalia.[7] Although *Yahoo!* ultimately amended auction policy, it opposed the French court order by seeking a declaration from the US courts that the order was unenforceable in the US. Declaratory relief was granted by the California District Court.[8] In its reasoning, the California District Court expressed the utmost respect for the underlying motivations of the French Republic for enacting and enforcing laws penalizing revisionist speech. At the same time, however, the District Court endorsed the view that the French order violated the protection of the US First Amendment by chilling speech originating within US territory, by a US resident. The Court argued that in a world in which radically divergent cultures and value systems are brought together by a medium transcending borders and physical distance, it is to be expected that US resident internet users routinely engage in speech that violates, for instance, 'China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of press'.[9] Clearly, so it was argued, the protection of free speech embodied

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5 The *Yahoo!* case caused some reverberations among legal scholars, *see inter alia* P.S. Berman, 'The Globalization of Jurisdiction', 151 *University of Pennsylvania Law Review* 311 (2002) pp. 337-42 and 516-26; E.A. Okoniewski, 'YAHOO!, Inc. v. LICRA: the French Challenge to Free Expression on the Internet', 18 *American University International Law Review* 295 (2002); J.R. Reidenberg, 'YAHOO and Democracy on the Internet', 42 *Jurimetrics Journal* 261 (2002); B. Earle & G.A. Madek, 'International Cyberspace: From Borderless to Balkanized???', 31 *Georgia Journal of International and Comparative Law* 225 (2003) pp. 230-5; B. Groote, de & J.-F. Derroitte, 'L'Internet et le droit international privé: un mariage boiteux? À propos des affaires Yahoo! et Gutnick', 16 *Revue Ubiquité Droit des Technologies de l'information* (2003) pp. 61-82; P.G. Smith, 'Free Speech on the World Wide Web: a Comparison between French and United States Policy with a Focus on UEJF v. YAHOO! Inc.', 21 *Penn State International Law Review* 319 (2003).

6 The *Yahoo!* case also had a criminal law counterpart; this will be discussed further (*see infra* sect. 4)

7 *See* TGI Paris, 22 mai 2000, *D.* 2000.IR.172; TGI Paris, 20 novembre 2000 (N° RG 00/05308).

8 *See Yahoo! Inc. v. LICRA, et al.*, 145 F.Supp.2d 1168, N.D.Cal., June 7, 2001; *Yahoo! Inc. v. LICRA, et al.*, 169 F.Supp.2d 1181, N.D.Cal., Nov. 7, 2001 (the case is presently the subject of an appeal before the US Ninth Circuit).

9 *Yahoo! Inc. v. LICRA, et al.*, 169 F.Supp.2d 1181, at 1186-7, N.D.Cal., Nov. 7, 2001.

in the US Constitution would be seriously jeopardized by the recognition of foreign judgments granted pursuant to standards deemed to be appropriate in another State but considered antithetical to the First Amendment.

Given such constitutionally-embedded disparities in substantive law, it appears vital that a proper distribution of criminal jurisdiction is ascertained, that States clearly define the ambit of domestic competence. Yet, it is a key observation that most domestic legislators and courts apply rather comprehensive criteria, when deciding on the minimal conditions for asserting criminal jurisdiction. This may lead to importunate conflicts of law, putting at risk the interests of the parties and States involved as well as the prospects of international intercourse. In this article, I will discuss the way in which rules for asserting criminal jurisdiction over transnational speech litigations, particularly defamation and hate speech, may be adjusted in order to obtain a more proper administration of justice. The focus will be on a comparison between the US and Europe. Next to differences in substantive criminal law, this choice is justified by the observation that quite a few international publishers and internet service providers have their seat in and operate from US territory. The positions of both natural persons and legal entities as the authors or distributors of illicit speech will be discussed. Due attention will be given to the contemporary international and regional initiatives as well.

2. THE INTERSTATE DISPARITIES IN SUBSTANTIVE CRIMINAL LAW

Within every legal order there are particular categories of speech that are penalized because of their illicit content or nature. In addition, most State legislators have penalized the dissemination of publications or pictures containing these penalized expressions, as well as acts that contribute to their circulation, e.g. preparatory acts such as the temporary storing of the iniquitous information.[10] There is but little international consensus, however, about the precise delineation of what speech should be penalized and under which circumstances. This divergence is to a large extent attributable to interstate disparities in balancing the right to freedom of speech against the different rationales for criminalizing speech, such as the protection of the reputation of the injured party or the prevention of public disorder. Deeply entrenched historical, cultural and socio-legal factors account for these different outcomes. This is certainly the case should one compare US and European substantive law on defamation and hate speech.

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[10] *See* C.B. v. d. Net, *Grenzen stellen op het Internet. Aansprakelijkheid van Internet-providers en rechtsmacht* (Arnhem 2000) pp. 3-4.

In the US, less than half of all the States and territories maintain statutes allowing for the prosecution of some form of criminal libel and/or slander.[11] Moreover, criminal prosecutions for defamation have always been extremely rare in the US.[12] This paucity of criminal prosecutions, and the near desuetude of private law libel litigations has much to do with constitutional imperatives. Already in 1973, the US Eighth Circuit Court found that in light of preceding US Supreme Court decisions 'a strong argument may be made that there remains little constitutional vitality to criminal libel laws'.[13] Among other things, the shifted rationale for rebuking defamation may explain this.[14] Rather than preventing an imminent breach of the peace, that is the common law rationale, protection of an individual's dignity has become the first and most important basis for proceeding in law against libelous speech. It is thought that such personal calumny, in the absence of any flagrant disturbance of the public order, provides but a weak and questionable basis for penal control. In particular, the potential 'chilling' effect that even the mere possibility of governmental intrusion could have on First Amendment freedoms has led to the belief that the remedy of criminal prosecution is inappropriate. The same holds true with respect to hate speech. Although in *Beauharnais v. Illinois*[15] the US Supreme Court upheld a State group libel law that made it unlawful to defame a race or class of people, it is generally accepted nowadays that subsequent (First Amendment) developments have substantially undercut its determinations.[16] For one

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11 See the Media Law Research Center's Bulletin, *Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison* (2003:1) WWW <http://www.ldrc.com/Press_Releases/bull2003-1.html> 7 May 2004; M.J. Polelle, 'Racial and Ethnic Group Defamation: a Speech-friendly Proposal', 23 Boston College *Third World Law Journal* 213 (2003) pp. 254-5.

12 A recent study found, for instance, just three reported criminal defamation cases between 1986 and 2001, confirming a steady decline in the number of criminal prosecutions with 16 reported cases between 1956 and 1966, 14 between 1966 and 1976, and 5 between 1976 and 1986 (M.J. Polelle, *loc. cit.*, p. 256).

13 *Tollett v. U.S.*, 485 F.2d 1087, at 1094, 8th Cir. (Ark.), Oct. 2, 1973. *See* also *Ashton v. Kentucky*, 384 U.S. 195, U.S.Ky., May 16, 1966; M.T. Gibson, 'The Supreme Court and Freedom of Expression', 55 *Fordham Law Review* 263 (1986); S.W. Brenner, 'Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?' 13 *Albany Law Journal of Science and Technology* 273 (2003) p. 292.

14 *People v. Quill*, 11 Misc.2d 512, at 514, N.Y.Co.Ct., Jan. 14, 1958; *State v. Browne*, 86 N.J.Super. 217, at 224, N.J.Super.A.D., Jan. 20, 1965; *Tollett v. U.S.*, 485 F.2d 1087, at 1095, 8th Cir. (Ark.), Oct. 2, 1973; *Fitts v. Kolb*, 779 F.Supp. 1502, at 1509, D.S.C., Nov. 20, 1991; American Law Institute, *Model Penal Code, Tent. Draft No. 13* (1961) s. 250.7, Comment 44.

15 343 U.S. 250, U.S.Ill., Apr. 28, 1952.

16 D.B. Dobbs, *The Law of Torts* (St. Paul, Minnesota 2000) pp. 1136-7; Y.A. Timofeeva, 'Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany', 12 *Journal of Transnational Law and Policy* 253 (2003) p. 271; and *see* the dissenting opinion by

thing, it is settled case law that a State may only penalize provocative speech insofar as such speech advocates the use of force or violence which is directed towards inciting or producing imminent lawless action and is likely to incite or produce such action.[17] Clearly, this modern version of the 'clear and present danger' test sets the burden high for instituting a successful criminal prosecution in the case of incitement to hatred or violence. Moreover, under the tenet of 'content neutrality' it has been accepted that even though a State may place restrictions upon speech in a few limited areas which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality', it may not further discriminate as to the content, thereby prohibiting only certain disfavoured messages offensive speech which is directed against a group of persons on the ground of their race, for instance.[18]

In contrast, most European States have adopted legislation penalizing defamation[19] and hate speech.[20] Moreover, within the context of achieving an integrated EU area of freedom, security and justice the Commission has recently made a proposal which *inter alia* aims at the further approximation of the Member States' substantive criminal law regarding racially biased hate speech.[21] In view of the fact that racism

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Justice Douglas in *Garrison v. Louisiana*, 379 U.S. 64, at 82, U.S.La., Nov. 23, 1964 ('[*Beauharnais*] a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment').

17 *Brandenburg v. Ohio*, 395 U.S. 444, at 447, U.S.Ohio, June 9, 1969.

18 *R.A.V. v. City of St. Paul*, 505 U.S. 377, at 383, U.S.Minn., June 22, 1992 (quoting *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, at 572, U.S.N.H., March 9, 1942); critical, *see* E. Chemerinsky, 'Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application', 74 *Southern California Law Review* 49 (2000) pp. 61-4; A. Tsesis, 'Prohibiting Incitement on the Internet', 7 *Virginia Journal of Law & Technology* 1 (2002) pp. 34-44; A. Tsesis, *Destructive Messages. How Hate Speech Paves the Way for Harmful Social Movements* (New York 2002) pp. 140-7.

19 *See*, e.g., Artt. 261-271 Dutch Penal Code; Artt. 29 et seq. French freedom of the press Act of 29 July 1881 and Artt. R. 621-1/2 French Penal Code.

20 *See*, e.g., Artt. 137*c*-137*f* Dutch Penal Code; Artt. 32-33 French freedom of the press Act of 29 July 1881 and Artt. R. 624-3 et seq. French Penal Code.

21 Proposal Com(2001) 664 final for a Council Framework Decision on combating racism and xenophobia, *O.J.*, 2002/C 75 E/17, 26 March 2002; *see* also Joint Action 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, *O.J.*, 1996/L 185, 24 July 1996. *Compare* Art. 13 EC Treaty (granting the Community the competence to take legislative action to combat discrimination); Council Directive 2000/42/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *O.J.*, 2000/L 180, 19 July 2000.

and xenophobia are still ominous,[22] and since these are direct violations of the fundamental principles and freedoms upon which the EU is founded,[23] a common EU criminal approach is required. As for now, the proposal has been amended by the European Parliament[24] and is under discussion by the competent Council bodies. A similar objective, though specific to the Internet, was originally envisioned by the Council of Europe when drafting the Cybercrime Convention.[25] However, due to the resistance of the US, one of the 'observer' States involved in the drafting, the provisions designed to eliminate racist Internet sites were postponed to an additional protocol.[26] This additional protocol was enacted in January 2003,[27] and contains several provisions on the harmonization of the Member States' substantive criminal law regarding on-line hate speech.[28] A demerit of the Cybercrime Protocol is that it contains abundant possibilities to make reservations not apply – in whole or in part – to certain provisions purporting substantive law harmonization[29] or to restrict their scope (*inter alia* for reasons of incompatibility with established principles in a State's legal system concerning freedom of expression).[30] Moreover, since the US is

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22 *See*, e.g., the annual reports published by the European Monitoring Centre on Racism and Xenophobia (EUMC), the European Community's expert body entrusted with the task of combating racism (to be consulted via WWW <http://www.eumc.at/eumc/index.php> 7 May 2004); and the country reports published by the European Commission against Racism and Intolerance (ECRI), the corresponding Council of Europe's expert body (to be consulted via WWW <http://www.coe.int/T/E/human_rights/Ecri/> 7 May 2004).

23 Com(2001) 664 final of 26 March 2002, at (1) (*see supra* note 21).

24 Report A5-0189/2002 final 24 May 2002 of the European Parliament on the proposal for a Council framework decision on combating racism and xenophobia

25 Convention 23 November 2001 on Cybercrime, Budapest, *E.T.S.*, no. 185 (further: Cybercrime Convention).

26 *See* Council of Europe, Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 7 November 2002, WWW <http://conventions.coe.int/Treaty/en/Reports/Html/189_htm> 7 May 2003; J. Donselaar, van & P.R. Rodrigues, *Monitor racisme en extreem-rechts: vijfde rapportage* (Amsterdam/Leiden 2002) pp. 92-3; S.D. Murphy, 'Hate-Speech Protocol to Cybercrime Convention', 96 *American Journal of International Law* 973 (2002).

27 Additional Protocol 28 January 2003 to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, *E.T.S.*, no. 189 (further: Cybercrime Protocol).

28 Artt. 3 through 6 Cybercrime Protocol (*see supra* note 27); *compare* Recommendation No. R (97)20 of 30 October 1997 of the Committee of Ministers to Member States on 'hate speech'.

29 *See* Artt. 5, par 2(b), and 6, par. 2(b), Cybercrime Protocol (*see supra* note 27).

30 *See* Artt. 3, par. 2-3, 5, par. 2(a), and 6, par. 2(a), Cybercrime Protocol (*see supra* note 27).

not expected to sign the Cybercrime Protocol, its international value is doubtful, at best. Next to the European harmonization initiatives, reference must be made to the case law of the European Court of Human Rights (ECHR) with respect to the right to freedom of speech (Article 10 ECHR).[31] On several occasions, the Strasbourg Court has emphasized the importance of the right to freedom of speech, considering it 'one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment … [and that] it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'.[32] At the same time, the ECtHR has pointed out that this freedom implies certain duties and responsibilities, and may be subjected to certain strictly construed exceptions. Although the ECtHR has found, on several occasions, a criminal conviction for defamation[33] or hate speech/revisionism[34] to be in violation of Article 10 ECHR. It has held in several cases that there was no violation of Article 10 ECHR, even when it involved information on matters of public interest.[35] Moreover, the ECtHR has repeatedly endorsed the view that some categories of speech fall well and truly outside the protection afforded by Article 10 ECHR.[36]

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31 For a good introduction, *see* F. Tulkens, 'Freedom of expression and information in a democratic society and the right to privacy under the European Convention on Human Rights: a comparative look at Articles 8 and 10 of the Convention in the case law of the European Court of Human Rights', in Council of Europe, ed., *Conference on freedom of expression and the right to privacy done at Strasbourg, 23 September 1999. Conference Reports* (Strasbourg 1999) pp. 17-36.

32 ECtHR, *Handyside v. U.K.*, 4 Nov 1976, [1979-80] 1 E.H.R.R. 737, at 754, par. 49.

33 *See*, e.g., ECtHR, *Lingens v. Austria*, 8 Jul 1986, [1986] 8 E.H.R.R. 407; ECtHR, *Oberschlick v. Austria*, 23 May 1991, [1995] 19 E.H.R.R. 389; ECtHR, *Castells v. Spain*, 23 Apr 1992, (1992) 14 E.H.R.R. 445; ECtHR, *Colombani and others v. France*, 25 Jun 1999, App. No. 51279/99; ECtHR, *Perna v. Italy*, 25 Jul 2001, App. No. 48898/99; ECtHR, *Scharsach and News Verlagsgesellschaft v. Austria*, 13 Nov 2003, App. No. 39394/98.

34 *See*, e.g., ECtHR, *Jersild v. Denmark*, 23 Sep 1994, [1995] 19 E.H.H.R. 1; ECtHR, *Lehideux and Isorni v. France*, 23 Sep 1998, [2000] 30 E.H.R.R. 665; ECtHR, *Skalka v. Poland*, 27 May 2003, [2004] 38 E.H.R.R. 1; ECtHR, *Müslüm Gündüz v. Turkey*, 4 Dec 2003, App. No. 35071/97.

35 *See*, e.g., ECtHR, *Cumpana and Mazare v. Romany*, 10 Jun 2003, App. No. 33348/96; ECtHR, *Pederson and Baadsgaard v. Denmark*, 19 Jun 2003, App. No. 49017/99.

36 *See*, e.g., ECtHR, *Jersild v. Denmark*, 23 Sep 1994, [1995] 19 E.H.H.R. 1, at 28, par. 35 ('[T]here can be no doubt that the remarks in resepct of which the Greenjackets were convicted [*constituting hate speech*] … did not enjoy the protection of Article 10'); ECtHR, *Lehideux and Isorni v. France*, 23 Sep 1998, [2000] 30 E.H.R.R. 665, at 703-4, par. 53 ('[T]here is no doubt that … the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10'); *see* also ECtHR, *Roger Garaudny v. France*, (admissibility decision) App. No. 65831/01 (the applicant's complaint under Art. 10 ECHR against his criminal conviction on account of revisionism and hate speech was found to be inadmissible).

There is an unequivocal difference between the US and European positions regarding the right to freedom of speech. The US First Amendment imposes severe constraints on State action that restrains or punishes speech based on its content. In contrast, in most European systems criminal law penalizing speech has withstood constitutional scrutiny. In particular, with respect to banning hate speech an integrated European approach is being set up providing *inter alia* for uniform penalizations. Because of this difference, it will remain appealing for certain groups and individuals to disseminate defamatory or discriminatory materials from US territory to Europe since they are assured that there will be no American criminal prosecution or American legal assistance. On the other hand, for the unheeding American author the confrontation with a European criminal prosecution may come as a total shock.

3. CRIMINAL JURISDICTION IN GENERAL

3.1. Conceptualization

The notion of jurisdiction is closely intertwined with such concepts as sovereignty and territoriality.[37] One feasible definition – though numerous definitions have been provided making the term undoubtedly one of the more illusive ones in legal discourse – is to depict jurisdiction as the *prima facie* exclusive power of the sovereign State over a territory and the permanent population living there.[38] In the context of this article, the focus rests on the ambit and limitations of the competence to prosecute and punish crime in a transnational setting. In principle, every State is free to decide on the scope of its criminal law, to confer jurisdiction on its criminal courts, or to induce compliance with its criminal laws. Yet, since the unlimited allocation of criminal jurisdiction by singular States would impede the proper administration of justice it appears to be accepted, as a principle of universal application, that criminal jurisdiction does not only implies a State's right to affect legal interests or the rights of certain persons, it equally embraces the duty to recognize the same rights of

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37 *See* I. Brownlie, *Principles of International Public Law* (Oxford 2003) pp. 105-6.

38 *See* D.W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', *British Yearbook of International Law* (1983) p. 1; F.A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years. Chapters I-V', in W.M. Reisman, ed., *Jurisdiction in International Law* (Ashgate-Dartmouth 1984) p. 140; I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot 1994) p. 3; H.W. Baade, 'The Operation of Foreign Public Law', 30 *Texas International Law Journal* 429 (1995) p. 441; C.L. Blakesley, 'Extraterritorial Jurisdiction', in: M.C. Bassiouni, ed., *International Criminal Law. 2nd edition. Volume II. Procedural and Enforcement Mechanisms* (Ardsley, New York 1999) p. 36; I. Brownlie, *op. cit.*, p. 297; N.N. Shaw, *International Law* (Cambridge 2003) p. 572.

other States.[39] This double-edged conceptualization was confirmed by the Permanent Court of International Justice (PCIJ) in its yardstick *S.S. Lotus* ruling,[40] and has been incorporated in such basic principles of public international law as the equality of States, non-intervention, territorial integrity, and international comity.[41]

In older readings on jurisdiction often the differentiation was made following the source that exercised jurisdiction, as jurisdiction could either be exercised by the State legislator (legislative jurisdiction), the executive (executive jurisdiction) or the courts (judicial jurisdiction).[42] Today, there seems to be some agreement that it is not the organs exercising the power or competence that are of importance but the substance of the power so exercised, and as such, the differentiation is made between prescriptive, enforcement and adjudicative jurisdiction.[43] The jurisdiction to prescribe refers to the competence of a State to make its law applicable to persons or legal interests, and although this is usually done by legislation, it can just as well be made applicable by an executive act or order, by an administrative rule or regulation, or by the determination of a court.[44] In the context of criminal law, it refers to the competence of the legislator to decide on the scope of criminal law. The jurisdiction to adjudicate refers to the authority of a State to subject persons or things to the process in its courts or administrative tribunals.[45] As far as criminal law is concerned, the issue under which circumstances a State might subject persons or things to its criminal courts will virtually collide with, or, rather depend upon, the

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39 *Compare* F.A. Mann, *loc. cit.*, p. 20.

40 PCIJ 7 Sept. 1927, Series A, no. 10, *S.S. Lotus*, at p. 19 ('all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'); on the *SS Lotus* case, *see* J.H.W. Verzijl, *The Jurisprudence of the World Court. A Case by Case Commentary* (Leiden 1965) pp. 73-98.

41 *See* D.W. Bowett, *loc. cit.*, pp. 14-18; N.N. Shaw, *op. cit.*, p. 572; *compare* H.W. Baade, *loc. cit.*, pp. 442-5.

42 *See* M. Akehurst, 'Jurisdiction in International Law', *British Yearbook of International Law* (1974) pp. 145-212; *compare* S.Z. Feller, 'Jurisdiction over Offences with a Foreign Element', in M.C. Bassiouni & V.P. Nanda, eds., *A Treatise on International Criminal Law. Volume II. Jurisdiction and Cooperation* (Springfield, Illinois 1973), pp. 9-10; COUNCIL OF EUROPE, CDPC (European Committee on Crime Problems), *Extraterritorial jurisdiction* (1990) pp. 7 and 18.

43 *See* American Law Institute, *Third Restatement of the Law. The Foreign Relations Law of the United States* (St. Paul, Minnesota 1986) pp. 230-231 (further: Third Rest.); I. Cameron, *op. cit.*, p. 4.

44 Third Rest., § 401 (a).

45 Third Rest., § 401 (b).

assertion of prescriptive jurisdiction.[46] For this reason, it is contended by some that the jurisdiction to adjudicate refers to the competence of a State to subject particular persons or things to its judicial process, not for reasons of enforcement – at any rate not in the strict meaning of the word – but rather for a declaration of private rights and a vindication of private interests.[47] In other words, adjudicative jurisdiction would only have relevance in matters of private international law. Further, I will show that the jusitification(s) for the concurrence of prescriptive and adjudicative jurisdiction in matters of criminal law is at least contestable (*infra* subsect. 5.4.1). Finally, the criminal jurisdiction to enforce relates to a State's authority to carry out acts of policy and investigation with a view to inducing compliance with – or as sanctions for the violation of – domestic criminal law. This article does not adress the specific issue of enforcement jurisdiction since this would require, an analysis of a rather different set of legal rules, instruments and doctrinal tenets.

3.2. The Principle of and the rules for asserting criminal jurisdiction

As stated earlier, jurisdiction is closely linked to the concept of territoriality. As such, the territoriality principle has been accepted by every State[48] and, in international rulings,[49] as the first and most important ground for asserting criminal jurisdiction. According to the territoriality principle, a State has jurisdiction to prescribe its criminal law with respect to any offense that has occurred within its territory. Next to the difficulty of defining the precise contours of a State's territory, an important intricacy concerns the determination of the *locus delicti*, i.e. the place where the offense has *actually* occurred.[50] This issue has turned out to be a rather convoluted one, as most State practices show an – increasing – propensity to formulate these

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46 P. Bouzat, 'Tome II. Procédure Pénale. Régime des mineurs, Domaine de lois pénales dans le temps et dans l'espace. 2nd ed.', in P. Bouzat & J. Pinatel, eds., *Traité de Droit Pénal et de Criminologie* (Paris 1970) p. 1627; S.Z. Feller, *loc. cit.*, p. 10; Council of Europe, CDPC (European Committee on Crime Problems), *op. cit.*, p. 20; F. Desportes & F. Le Gunehec, *Le nouveau droit pénal. Tome 1. Droit pénal general. 7th ed.* (Paris 2000) pp. 310-1; J. Pradel, *Droit Pénal Général* (Paris 2002) p. 204.

47 Third Rest., p. 231; I. Cameron, *op. cit.*, pp. 4-5.

48 *See*, e.g., Art. 2 Dutch Penal Code; Art. 113-2 French Penal Code; Art. 3 Belgian Penal Code.

49 *See*, e.g., PCIJ 7 Sept. 1927, Series A, no. 10, *S.S. Lotus*, at pp. 18-19 ('the first and foremost restriction imposed by international law upon a State is that … 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 permissive rule derived from international custom or from a convention').

50 Commission of the European Communities, Directorate-General JHA (UNIT B/3), *Mutual Recognition of Decisions in Criminal Matters among the EU Member States and Jurisdiction.*

criteria in a comprehensive manner, rendering concurrence and the risk of conflicts of jurisdiction unavoidable.

In continental Europe, the main doctrine seems to be the ubiquity doctrine whereby which both the criminal conduct and the effect may independently provide for a sufficient territorial connection, whether or not subject to the condition that the nexus is a constituent element of the offense. According to the second prong of Article 113-2 of the French Penal Code, for instance, an offense may be localized within the territory of the Republic if one of its constituent factors (*faits constitutifs*) took place within the territory. Since the French Penal Code lacks a definition of what is a constituent factor, it was left to the case law (and doctrine) to define the notion. From this, it appears that a rather broad interpretation has been given to what constitutes a *fait constitutive*, including the effect of the offense irrespective of whether it constitutes a constituent element or not.[51] Similarly, according to Belgian case law and doctrine an offense may be localized within Belgian territory if one of the constituent elements occurred within the territory.[52] Under Dutch law, the situation appears to be different at face value. On the one hand, it seems generally accepted that the place where the perpetrator acted and the place where the instrument utilized by the perpetrator had its direct effect (the so-called doctrine of the instrument) [53] provide for a sufficient territorial nexus. On the other hand, some of the case law[54] has been interpreted as supporting the inclusion of the place where the constituent effect occurred as a sufficient territorial nexus.[55] Moreover, it has been argued that a generous interpretation of the doctrine of the instrument *de facto* implies the recognition of the place of the – constituent – effect as a sufficient territorial connection.[56] Under US law it appears

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Discussion Paper with Questions for Experts, 14 December 2001, at 10 (further: Discussion Paper Commission).

51 See R. Merle & A. Vitu, *Traité de droit criminel. **Tome I. Problèmes généraux de la science criminelle. Droit pénal général*** (Paris 1997) pp. 404-6; F. Desportes & F. Le Gunehec, *op. cit.*, pp. 322-3.

52 C. Van den Wyngaert, *Strafrecht en strafprocesrecht in hoofdlijnen* (Antwerp 1999) pp. 121-122; T. Vander Beken, *Forumkeuze in het internationaal strafrecht. Verdeling van misdrijven met aanknopingspunten in meerdere staten* (Antwerp 1999) p. 54; D. De Clerck, *Beginselen van strafrecht en strafvordering. Deel 1: strafrecht* (Leuven 2001) p. 29.

53 HR 6 April 1915, *NJ* 1915, 427.

54 *See* HR 6 April 1954, *NJ* 1954, 368; HR 4 Feb. 1958, *NJ* 1958, 294; HR 27 April 1993, *NJ* 1993, 744; *compare* HR 2 Jan. 1923, *NJ* 1923, 433.

55 Y, Buruma, *Introductie internationaal strafrecht* (Nijmegen 1994) p. 11; H.D. Wolswijk, *Locus delicti en rechtsmacht* (Deventer-Utrecht 1998) pp. 92-5; G.J.M. Corstens, *Het Nederlandse strafprocesrecht* (Deventer 1999) p. 183; T. Vander Beken, *op. cit.*, pp. 66-7; *compare* M.T. Gerritsen, 'Jurisdiction', in B. Swart & A. Klip, eds., *International Criminal Law in the Netherlands* (Freiburg 1997) p. 53.

56 H.D. Wolswijk, *op. cit.*, p. 94.

to be generally accepted that a State may assert territorial jurisdiction when either the conduct wholly or in substantial part (subjective territoriality) or the substantial effect or intended effect (objective territoriality or effects doctrine) occured within its territory.[57] Although in the often cited *Strassheim v. Daily* case, the US Supreme Court stated that '[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm',[58] thus requiring intent and actual occurrence of the effects, subsequent US court decisions have applied the territoriality principle more expansively.[59] The assertion of criminal jurisdiction on the ground of the objective territoriality principle or effects doctrine has for instance been found legitimate even where the offensive conduct did not produce any actual adverse effects in the US, though such was intended.[60]

Although jurisdiction is closely linked with territory, it is not exclusively tied to it. Most States accept extraterritorial grounds for conferring criminal jurisdiction. (In addition, though this will not be discussed here, certain persons, property and situations are immune from territorial jurisdiction in spite of the incidence of a territorial nexus).[61] One essential distinction between the exercise of territorial versus extraterritorial jurisdiction is that in most States the former has a mandatory character, whereas in the case of the latter the public prosecutor enjoys discretionary powers, or special conditions must be met.[62] The extraterritorial nexus may relate either to the personal status of the offender (active-personality principle) or the injured party (passive personality principle), the protection of the fundamental interests or functions of a State (protective principle), or the penalization of international crimes, or offenses that are deemed extremely outrageous and shocking by all members of the international community (universality principle).[63] Further, one can mention the flag principle, according to which a State may claim jurisdiction over offenses committed on board vessels or

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57 C.L. Blakesley, *loc. cit.*, pp. 45 et seq.

58 221 U.S. 280, at 285, U.S.Ill., May 15, 1911.

59 *See* L. Sarkar, 'The Proper Law of Crime in International Law', in G.O.W. Mueller & E.M. Wise, eds., *International Criminal Law* (New York 1962) p. 57; Third Rest., § 402; C.L. Blakesley, *loc. cit.*, p. 52.

60 *U.S. v. Best*, 172 F.Supp.2d 656, at 660, D.Virgin Islands, Oct. 26, 2001.

61 An important mitigation is that the general tenet of immunities does not impede the assertion of prescriptive jurisdiction, rather it excludes the adjudication and enforcement of a criminal proceeding (*see*, e.g., C. Van den Wyngaert, *op. cit.*, p. 584).

62 Council of Europe, CDPC (European Committee on Crime Problems), *op. cit.*, p. 10; Discussion Paper Commission, at 8.3 (*see supra* note 50).

63 In general, *see* Harvard Law School, 'Draft Convention on Jurisdiction with Respect to Crime', 29 *American Journal of International Law* 439 (1935) pp. 445 and 519 et seq.; Council of Europe, CDPC (European Committee on Crime Problems), *op. cit.*, pp. 9 et seq.

aircraft flying under its national flag,[64] and the possibility of obtaining subsidiary jurisdiction, i.e. a State derives jurisdictional authority from a State that has primary jurisdiction on the ground of one of the classic jurisdictional bases, which may be further partitioned into two subgroups: the principle of representation – based on the *aut dedere, aut iudicare* principle – and the transfer of criminal proceedings.[65]

4. CRIMINAL JURISDICTION OVER TRANSNATIONAL SPEECH OFFENSES

On the European level, several steps have been taken advocating the harmonization of jurisdictional rules with respect to prosecuting transnational speech offenses. In particular, in the field of combating racially biased hate speech initiatives are blooming see, for example the proposal by the Commission to enact a Framework Decision on combating racism and xenophobia.[66] Pursuant to Article 12 of the Commission's Proposal, each Member State shall establish jurisdiction with regard to the envisioned offenses where the offense has been committed in whole or in part within its territory (territoriality principle); or by one of its nationals and the act affects individuals or groups of that State (active and passive personality principle); or for the benefit of a legal person that has its head office in the territory of that Member State.[67] Further, with regard to offenses committed by means of an information system and when asserting jurisdiction on the ground of the territoriality principle, each Member State shall ensure that its jurisdiction extends to cases where either the offender commits the offense when physically present in its territory, or the offense involves racist material hosted on an information system in its territory. It is noticeable that the Commission's Proposal provides for a very comprehensive set of jurisdictional connections. Rather than putting forward a system in which competing jurisdictional claims are conciliated, the primary objective seems to have been the forestalling of impunity by giving States maximum jurisdictional competence.

Apart from these sporadic international 'regional' initiatives, the more important source to consider is the domestic case law. Recently, there have been several

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64 Observe that the flag principle may be considered a fictional extension of the territoriality principle based on the premise 'ship equals territory' (Council of Europe, CDPC (European Committee on Crime Problems), *op. cit.*, pp. 11-12).

65 *See* T. Vander Beken, *op. cit.*, pp. 183 et seq.

66 Com(2001) 664 final of 26 March 2002 (*see supra* note 21).

67 *Compare* Art. 8 Cybercrime Protocol (*see supra* note 27) following which the provisions of Art. 22 Cybercrime Convention (*see supra* note 25) on jurisdiction are made applicable to on-line hate speech, allowing competence on the ground of the territoriality, flag, and active-personality principle.

interesting cases. A common element in all these cases is that the incidence of a territorial connection based on the prevalence of the 'imminent' effect, i.e., damage to reputation or a breach of the peace was deemed sufficient in order to assert criminal jurisdiction.[68] In a first case, the criminal division of the German *Bundesgerichtshof* ruled that an Australian citizen could be prosecuted under German criminal law on charges of *Volksverhetzung* (§ 130 StGB) for uploading certain revisionist material on his website in his home country, which was accessible to Internet users in Germany.[69] The *Bundesgerichtshof* decided that, though the accused acted from within the territory of a foreign State, the German criminal law was applicable since the constituent effect of the offense of *Volksverhetzung* i.e. the aptitude to cause a breach of the peace on German soil following the accessibility of the offensive statements in Germany occurred within German territory. This was decided on the ground of § 9 StGB following which an offense can be localized in the place of acting or omission, the place where the constituent effect of the offense occurred, or the place where the offender thought that the effect would occur. Important in this case was that the challenged revisionist speech was not penalized under Australian law, i.e. the *lex loci delicti commissi*. A rather similar case occurred in Italy, where the Court of Cassation ruled that the Italian courts could assert criminal jurisdiction over defamatory contents placed on a website which was uploaded from abroad.[70] The allocation of criminal jurisdiction was justified by referring to Article 6, paragraph 2, Italian Penal Code following which an offense is deemed to be committed within Italian territory when the act or omission or even the effects of said act or omission have taken place in full, or even in part, on Italian territory. In its reasoning the Court of Cassation argued that since the effect of the offense i.e. the injuring of a person's honor subsequent to the perceiving of the offensive speech by third parties occurred within Italian territory, the exercise of criminal jurisdiction was proper. By the same token, the French courts have applied French criminal law in a generous manner. In the criminal counterpart of the *Yahoo!* case (*see supra* sect. 1), the *Tribunal de Grande Instance de Paris* decided that French criminal courts could assert territorial jurisdiction over the challenged

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68 *Compare* however HR 25 Nov. 1997 (*NJ* 1998, 261) where the Dutch Supreme Court – seemingly – rejected the exercise of territorial jurisdiction on the basis of the localization of the effect within Dutch territory (the case concerned the posting of anti-Semitic pamphlets from abroad to persons living in the Netherlands). Rather the Dutch Supreme Court considered the actual receipt of the offensive leaflets as an indissoluble part of the act of the perpetrator, hence allocating territorial jurisdiction on basis of the occurrence of the act within Dutch territory.

69 BGH, Urteil vom 12. Dezember 2000, 1 StR 184/00.

70 Cass., 27 December 2000 (*see* WWW <http://www.cdt.org/speech/international/001227italiandecision.pdf> 7 May 2004, for an English translation).

revisionist auction sites.[71] The Court argued that on the ground of Article 113-2 of the French Penal Code (under which an offense may be localized within the territory of the Republic if one of its *faits constitutifs* occurred within France), in conjunction with the postulation that in matters of the press the fact of publicity is a constituent element, '*et même la caractéristique essentielle des infractions prévues et réprimées par la loi de 29 Juillet 1881 [sur la liberté de la presse]*', French criminal law was applicable since the act of disclosure occurred within French territory.[72] In effect, the French decision does not differ much from the German and Italian rulings insofar as with the disclosure of the offensive speech on French territory the 'imminent' effects thereby set in. Seemingly in part to avoid or to mitigate the peril of conferring universal competence on the French courts over the content of the Internet, it was appended that in order to be reprehensible the disclosure in France may not be the result of circumstances which are exterior, or independent, to the author's intent.

As for the US law, it has already been revealed that the number of cases involving a criminal prosecution for defamation (or hate speech) is, to use an euphemism, not spectacularly high. If one would, however, consider the earlier criminal case law, one would find that things were not so unequivocal. Though there have been several rulings which favored a very strict territorial competence, allowing jurisdiction only in the place where the challenged speech was issued,[73] by far the majority of these rulings advocated more generous determinations, in line with the common law tenet, allowing prosecutions in the jurisdiction(s) where the speech was sent, circulated or received, or even where the libeled person resided, regardless of where the libelous speech was written or printed.[74] Perhaps more relevant than the US practice for exercising

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71 TGI Paris, 17e ch. de la presse, 26 février 2002 (dec. n° 0104305259). The case originated from the criminal complaint lodged before the *Tribunal Correctionnel de Paris* by some French interest groups against the former president of *Yahoo!* on charges of condoning war crimes and crimes against humanity. Deciding on the merits, the French criminal court eventually ruled that justifying war crimes meant glorifying, praising, or at least presenting the crimes in question favorably, and that *Yahoo!* manifestly did not fit that description (*see* The Guardian, Feb 12, 2003).

72 *Compare* TGI Paris, 17e ch. correct., 13 novembre 1998 (affaire *Faurisson*); *see* also J. Pradel & M. Danti-Juan, *Droit pénal spécial* (Paris 2001) p. 348; M.-L. Rassat, *Droit pénal spécial. Infractions des et contre les particuliers* (Paris 2001) pp. 457-8; C. Féral-Schuhl, *Cyberdroit. Le droit à l'épreuve de l'internet* (Paris 2002) pp. 302-3; M. Véron, *Droit pénal spécial* (Paris 2002) p. 148.

73 *U.S. v. Smith*, 173 F. 227, D.Ind., Oct. 28, 1909; *State v. Moore*, 140 La. 281, 72 So. 965, La., Oct. 30, 1916.

74 *Palisser v. U.S.*, 136 U.S. 257, U.S.N.Y., May 19, 1890; *Shields v. Commonwealth*, 55 S.W. 881, Ky., March 17, 1900; *State ex rel. Taubman v. Huston*, 104 N.W. 451, S.D., Aug. 2, 1905; *State v. Piver*, 74 Wash. 96, Wash., June 13, 1913; *State v. Levand*, 37 Wyo. 372, Wyo., Dec. 19, 1927; *Leavy v. State*, 165 S.E. 470, Ga.App., Sept. 1, 1932; *People v. Quill*, 2 Misc.2d 72, N.Y.Co. Ct., March 14, 1956. *Compare* also the private law litigations *Calder v. Jones*, 465 U.S. 783, at 789, U.S.Cal., March 20, 1984 ('[I]n sum, California is the focal point both of the story and of the

criminal jurisdiction regarding speech offenses is the US approach to the protective reach of the First Amendment. After all, the real quandaries will occur when there is an interstate conflict between criminal law penalizing speech and constitutional imperatives protecting the free flow of information. In this respect, one may refer to the reaction from the US Department of Justice to a report of the Council of Europe committee of experts which was established with the task of drafting the Cybercrime Protocol. In short, the US Department of Justice asserted that the First Amendment affords protection to all speech, even to speech that originates outside the US to the speech, or that originates in the US but that has a primarily foreign audience.[75] Hence, from the US point of view the ubiquitous ambit of the First Amendment – and not that of the US criminal speech legislation – plays a decisive role with respect to (the protection of) transnational speech (offenses).

In sum, one may conclude that most States apply very comprehensive rules for allocating criminal jurisdiction over offensive speech. This is done in particular by localizing the 'imminent' effect, or, as the case may be, the disclosure, within their own territory. This practice is not without criticism. First, the doctrine of ubiquity, or the effects doctrine, may lead to the imposition of *de facto* universal jurisdiction by singular States. In particular, when it comes to on-line publications there is the peril that the author finds himself subjected to the criminal law of each State on whose territory one can gain access to the Internet.[76] But also where it concerns off-line publications, e.g. in the case of printed publications with international circulation or global satellite broadcasting, a territorial nexus may be vested wherever a copy may find its way. This carries with it the danger of bringing about the unilateral supremacy of the criminal law of the most speech-hostile State when it comes to transnational publications. A second, related, criticism has to do with the dictum *nullum crimen, nulla poena, sine lege*. Clearly, when facing possible worldwide liability claims this principle becomes seriously entangled. Consider the situation where a US citizen uploads a newsletter for a local discussion group; can he be prosecuted under, say, Saudi law for statements made that are in violation of Saudi laws? A final criticism concerns the obvious problem of enforcement. Would a State, say the US for example,

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harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California'); *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, U.S.N.H., March 20, 1984.

75 Letter from U.S. Dep't of Justice Assistant Attorney Generals Ralph F. Boyd, Jr., and Michael Chertoff to the Chairman of the Council of Europe PC-RX Committee, Dec 13, 2001 (quoted in S.D. Murphy, *loc. cit.*, p. 974).

76 A mitigating factor is that in case of defamation the applicability of a State's criminal law may further depend on the condition that the person defamed has in that place a reputation which is thereby damaged (*compare*, e.g., *Dow Jones & Company v. Gutnick*, [2002] HCA 52, 10 December 2002, at par. 44).

enforce a European criminal conviction following an illicit publication which causes harm in Europe but originates from within the US where the speech in question is deemed to be constitutionally protected? This seems unlikely, especially if the European procedure on the merits would reveal little preoccupation with American free speech imperatives.

In response to these criticisms, it has been suggested that more than the mere publication of offensive speech within a State's territory should be required in order to assert criminal jurisdiction. More precisely, in the French criminal case discussed above, and in US case law, some form of *mens rea* to disclose within a particular State's territory was required as a prerequisite to prosecution.[77] At first glance this may seem a feasible remedy. A closer look, however, reveals that, it is not a foolproof solution. The principal difficulty is probably that it would be up to individual State legislators or domestic courts to substantiate and interpret the precise level of *mens rea* that is required to find a sufficient territorial nexus. Insofar as States would be inclined to give a generous interpretation, *de facto* universal jurisdiction and legal uncertainty would for the most part remain unaffected. In the French criminal *Yahoo!* case, for example, the mere provision of a link 'search' to a Nazi auction site, which could be accessed within French territory, was deemed sufficient to reveal that the publication was intended to occur within France. More generally, with respect to on-line publications one could hold that the simple use of the Internet implies that one has knowledge about its worldwide range, and thus about the possibility of worldwide liability.

5. TOWARDS A MORE PROPER DISTRIBUTION OF CRIMINAL JURISDICTION

Given the peril of rendering domestic criminal law universally applicable, of overriding the dictum *nullum crimen, nulla poena, sine lege*, and the inherent intricacy of enforcement when asserting criminal jurisdiction over transnational speech offenses on the ground of the doctrine of ubiquity, several remedies have been proposed. These remedies can be subsumed under two headings: (1) the restriction of the statutory grounds for asserting criminal jurisdiction (subsect. 5.1) and (2) the *ad hoc* designation of the more proper forum and/or applicable law on the ground of balancing the underlying interests (subsect. 5.2).

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77 *Compare* C.B. Net, van der, *op. cit.*, pp. 184-5. *See* also § 9 StGB following which, amongst other things, the place where the offender thought that the effect would occur may count as the place where the offense can be localized.

5.1. Restricting criminal jurisdiction

A first line of remedies concerns the restriction of the statutory grounds for allocating criminal jurisdiction. This means that singular States decide to restrain the reach of their criminal competence, unilaterally or otherwise. Without claiming to be exhaustive, this can either be done by further delineating the territoriality principle (subsect. 5.1.1), or by substituting the territoriality principle by some other principle that has a less comprehensive reach (subsect. 5.1.2). It should be noted that the above-proposed solution of requiring some form of *mens rea* to disclose within a particular State's territory as a prerequisite to prosecution can also be considered to be a way of restricting the statutory scope of criminal competence.

5.1.1. The assertion of exclusive jurisdiction: A third pillar EU solution

A first solution can be found within the framework of the EU. In establishing an EU genuine area of freedom, security and justice, several steps have been taken purporting the facilitation of *inter alia* judicial cooperation in criminal matters between the Member States. In particular, the principle of mutual recognition, proclaimed at the *Tampere* summit[78] as the cornerstone of judicial cooperation in both civil and criminal matters within the EU, has given rise to a number of instruments and initiatives.[79] Further, instruments embodying the more classic forms of interstate cooperation,[80] measures

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78 European Council of Tampere 15 and 16 October 1999, *Presidency conclusions* (for the text, *see* WWW <http://www.parliament.cy/parliamentgr/101/conclusion_tampere.pdf> 7 May 2004).

79 *See*, e.g., Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J.*, 2002/L 190, 18 July 2002; Commission of the European Communities COM(2003) 688 final, *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, Brussels, 14 November 2003; Commission of the European Communities COM(2000) 495 final, *Communication from the Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters*, Brussels, 26 July 2000; Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *O.J.*, 2001/C 12/10, 16 January 2001; *see* also Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, *O.J.*, 2001/C 278, 2 October 2001; Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on the execution in the European Union of confiscation orders, *O.J.*, 2002/C 184, 2 August 2002. For a critical review of these instruments, *see* S. Peers, 'Mutual Recognition and criminal law in the European Union: has the Council got it wrong?' 41 *Common Market Law Review* (2004) pp. 5-36.

80 *See*, e.g., Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *O.J.*, 2000/C 197, 12 July 2000

of – substantive law – harmonization,[81] and modest schemes of supranationalization[82] complete the picture of EU law enforcement and protection. Notwithstanding this wide spectrum of measures, regulations and initiatives, it is rather striking that the setting up of a system allowing for the proper distribution of criminal competence within the EU has received but little attention to date. At the very most, one could refer to the agreement on the transfer of proceedings drafted within the framework of the EPC,[83] and the relevant provisions in various (crime-specific) instruments fostering some form of coordination – and/or centralization of prosecutions – in case of concurrent jurisdiction.[84] This, in spite of the Article 31(d) TEU following which common action must be taken in order to prevent conflicts of jurisdiction.[85]

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81 *See*, e.g., Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *O.J.*, 2002/L 164, 22 June 2002.

82 *See*, e.g., Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention), *O.J.*, 1995/C 316, 27 November 1995; Joint action 98/428/JHA of 29 June 1998, adopted by the Council, on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network; *O.J.*, 1998/L 191, 7 July 1998; Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *O.J.*, 2002/L 63, 6 March 2002.

83 Agreement 6 November 1990 between the Member States of the European Communities on the transfer of proceedings in criminal matters, WWW <http://ue.eu.int/ejn/data/vol_a/accords_ce/CPEinfractionsen.html> 9 Feb 2004; *compare* European convention 15 May 1972 on the transfer of proceedings in criminal matters, Strasbourg, *E.T.S.*, no. 73 (further: ECP); Treaty 11 May 1974 between the Kingdom of the Netherlands, the Kingdom of Belgium and the Grand Duchy of Luxembourg on the transfer of criminal prosecutions, Brussels, *Trb.* 1974, 184 [in Dutch].

84 *See*, e.g., Art. 6, par. 2, Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, *O.J.*, 1995/C 316, 27 November 1995; Art. 9, Convention 26 May 1997 drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, *O.J.*, 1997/C 195, 25 June 1997; Art. 4, Joint action 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, *O.J.*, 1998/L 351, 29 December 1998; Art. 7, par. 3, Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *O.J.*, 2000/L 140, 14 June 2000; Artt. 6 and 7, Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *O.J.*, 2002/L 63, 6 March 2002; Art. 12, par. 2, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *O.J.*, 2002/L 164, 22 June 2002. Noteworthy is that in the Commission's Proposal for a Council Framework Decision on combating racism and xenophobia (Com(2001) 664 final of 26 March 2002, *see supra* note 21) no such provision is inserted.

85 *Compare* consideration 49(e), Action Plan 3 December 1998 of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, Vienna, *O.J.*, 1999/C 19, 23 January 1999; measure 11, Programme of measures to

Recently, however, a new incentive was provided by the Commission in elaborating the principle of mutual recognition in criminal matters. In arguing that the creation of a system to settle conflicting claims of jurisdiction would greatly foster the willingness of Member States to recognize each other's decisions, the Commission proposed two mechanisms for settling jurisdictional disputes.[86] On the one hand, it was suggested that criteria for ranking claims to jurisdiction be elaborated, with the possibility of charging an existing or yet to be created body with the decisional power to designate the competent Member State on a case-by-case basis. On the other hand, the Commission proposed the creation of rules for allocating *exclusive* criminal jurisdiction. As it was believed that the mechanism of coordination would not really prevent conflicts of jurisdiction, as is demanded by Article 31(d) TEU, but rather to be a way by which to manage them when they occur, the Commission adhered to the second approach.[87] In doing so, the Commission argued that the loss of sovereignty commonly associated with mutual recognition of foreign decisions would be more acceptable if these foreign decisions were based on an exclusive competence established by commonly agreed rules.[88] Further, it was stated that by such a system forum shopping could be avoided, that domestic courts would be able to decide on their competence without any interference from a European authority, and that the risk of *bis-in-idem* situations would be lessened.[89] Next, the Commission pushed forward the territoriality principle as the exclusive ground for exercising criminal jurisdiction.[90] In further delineating the territoriality principle, it was proposed that either the place of the act/omission or the place where the effects of the act/omission were felt could function as the basic rule.[91] Eventually, the Commission expressed its preference for the first option: the Member State on whose territory an act/omission occurred should have exclusive jurisdiction there over.[92] Only where the act/omission took place on the territory of more than one Member State, or on the territory of no Member State, or where the place of the act/omission cannot be identified, should exclusive jurisdiction belong to the Member State on whose territory the effect was felt. Should there remain several

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implement the principle of mutual recognition of decisions in criminal matters, *O.J.*, 2001/C 12/10, 16 January 2001.

86 COM(2000) 495 final of 26 July 2000, at 13 (*see supra* note 79).

87 Commission Discussion Paper, at 5 (*see supra* note 50).

88 *Ibid.*, at 2.3.

89 *Ibid.*, at 2.3.

90 With an exception as to the protective principle (*ibid.*, at 11).

91 *Ibid.*, at 10.

92 *Ibid.*, at 10.4.

Member States that may exercise jurisdiction according to the above criteria, each Member State would be allowed exclusive jurisdiction for the action/omission linked to those effects that were felt on its territory.[93]

If one applies the above scheme to the hypothetical case of the author who disseminates offensive speech from US territory causing harm within Europe, one can see that this solution is not without its problems. Since the act cannot be localized on the territory of a EU Member State, exclusive jurisdiction belongs to the Member State on whose territory the effect was felt. Insofar as the effect is restricted to the territory of one State, territorial competence is plain and exclusive. However, if the effect can be localized within the territory of more than one Member State problems may arise. For one thing, it may thwart the *ne bis in idem* principle as the author may be held criminally liable for the same act in more than one forum in accordance with territorially divided effects. Further, whenever the act occurred outside the territory of a EU Member State, the problem of *de facto* universal jurisdiction, on the basis of the localization of the effect within a Member State's territory, remains unaffected. In general, a system of exclusivity demands a fair amount of mutual trust between States in that they will protect, or look after, each other's interests. At present, it is very much the question whether any State, even within the framework of a EU legal space, is willing to give up its mere statutory possibility of applying its criminal law in a more extensive sovereign manner.

5.1.2. A shift towards extraterritorial jurisdiction: two Internet-based proposals

If a system of exclusivity based on a phased application of the territoriality principle does not solve the predicaments of a too broad jurisdictional competence over transnational speech offenses, an alternative is to look at extraterritorial connections. Such solutions have been explored in the context of the internet in particular.[94] The starting point is that the internet has given the notion of *place* an entirely new connotation. In Cyberspace, the classical role of geographical borders as delineating the territorial scope of application of a State's criminal law has been superseded, rendering the territoriality principle futile as an instrument for organizing a proper distribution of criminal jurisdiction in a transnational context.

A first line of thought involves the application of the active-personality principle as the exclusive ground for asserting criminal jurisdiction. According to the active-personality principle a State may assert jurisdiction over offenses committed by its nationals

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93 *Compare* Case C-68/93 *Fiona Shevill, et al. v. Presse Alliance SA* [1995] ECR I-0415.

94 Y. Buruma, 'Internet en strafrecht', in Nederlandse Juristen-Vereniging, ed., *Recht en Internet. Verkenningen op het gebied van het Internationaal Privaatrecht, het Strafrecht en het Auteursrecht* (Deventer 1998) p. 166-7; C.B. Net, van der, *op. cit.*, p. 173.

(or sometimes residents) and in some legal systems by its 'national' legal entities,[95] even if these offenses have taken place abroad. The active-personality principle may be considered as the second most important of the five principles underlying jurisdiction in terms of its worldwide application.[96] There are, however, substantial differences in its application. In nearly all the European continental States, the active-personality principle figures as a more or less constitutional rule (where it is closely connected to the non-extradition of a State's own nationals).[97] Yet, it is hardly ever applied in an unrestricted manner: often there is the requirement of double criminality,[98] or the need for a complaint by the victim or the competent authorities of the *locus delicti*.[99] In the US, the active-personality principle enjoys a far more limited effect.[100] Although the US Supreme Court has recognized the active-personality principle in several cases, it has never been made a general rule by Congress. Moreover, the active-personality principle has only been used sparingly as the sole basis for asserting criminal jurisdiction, as in many cases jurisdiction was also based on the effects doctrine and/or the protective principle.[101] The application of the active-personality principle over and above that of territoriality has been advocated, in particular, in the context of the Internet.[102] It is thought that allocating jurisdiction on the ground of a personal nexus would be less ambiguous since a person has in principle but one nationality, and more in line with the dictum *nullum crimen, nulla poena, sine lege*: in principle the Internet user knows which rules are applicable to his on-line activities, i.e. that of his nationality State. Further, it is argued that nationality, as a jurisdictional nexus, is technology-independent. Whereas the Internet has abolished geographical boundaries, the active-personality principle is believed to withstand time. These argumentations

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95 It should be noted that before 1990 no Member State of the Council of Europe had taken any statutory measures regarding the applicability of the active-personality principle to legal entities (most European States did not even recognize the possibility of holding legal entities criminal liable). In contrast, under US law it is quite normal to assert – criminal – jurisdiction over corporate bodies which are situated abroad but are regarded as American legal entities (COUNCIL OF EUROPE, CDPC (European Committee on Crime Problems), *op. cit.*, pp. 11 and 28).

96 C.L. Blakesley, *loc. cit.*, p. 61.

97 COUNCIL OF EUROPE, CDPC (European Committee on Crime Problems), *op. cit.*, p. 10.

98 *See*, e.g., Art. 5, par. 2, Dutch Penal Code.

99 *See*, e.g., Art. 113-8 French Penal Code.

100 Third Rest., § 402, reporters' notes 1.

101 Third Rest., § 402, reporters' notes 5; C.L. Blakesley, *loc. cit.*, p. 66.

102 *See* C.B. Net, van der, *op. cit.*, p. 176.

are not irrefutable.[103] An initial criticism is that insofar as the challenged speech is not considered criminal under the law of the nationality State, any other State, which may also have a legitimate interest in applying its criminal law, remains powerless. In other words, whereas the territoriality principle on the ground of the ubiquity doctrine, or some variant thereof, provides authority to the most speech-restrictive State, the active-personality principle carries with it the peril that the law of the most liberal States will govern the content of the Internet. In particular, with respect to the criminal liability of legal entities the active-personality principle may turn out to be problematic in view of the possibilities for a corporation to manipulate its 'nationality', i.e. by shifting the center of its activities towards the most favorable legal order. Moreover, similar to a system of exclusivity based on the territoriality principle it is very much the question whether any State would be eager to restrict its jurisdictional competence in favor of the State whose nationality the author has. A second criticism is that it leads to different regimes between on and off-line speech. Why should the criminal jurisdiction over a printed copy of a newspaper be vested in a territorial connection, while the electronic version of the same paper be subjected to the law of the seat of the publisher, or even the nationality of the editor or journalist?[104]

A rather analogous reasoning – and criticism – applies to the proposal to introduce the flag principle as the dominant jurisdictional ground for asserting criminal jurisdiction over Internet activities.[105] In this view, the Internet is viewed as being similar to the High Seas as a principally law-free area. Yet, just like a State may assert jurisdiction over the vessels carrying its flag, a State should thereby be able to claim jurisdiction over the information which has its flag tagged on to it. Besides the fact that this proposal leads to different regimes between off and on-line speech, the main objection is that it is subject to manipulation. Just as the assertion of jurisdiction over legal entities on the basis of the active-personality principle may lead to the manipulation of a corporation's 'nationality', the flag principle carries with it the risk that information will receive the flag of the State with the most favorable legislation, i.e. a flag of convenience.

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103 *See ibid.*, pp. 176-8 (in addition referring to the problem of the anonymous Internet user and to the fact that in some cases the principle of territoriality may resurface in the requirement of double criminality).

104 On the premise that on-line should be equated with off-line, *see* C. Paul, 'Du droit et des libertés sur l'internet. **La corégulation, contribution française pour une régulation mondiale. Introduction du** rapport remis au Premier ministre, le 29 juin 2000 (extraits)', in X, ed., *L'internet et le droit. Droit français, européen et comparé de l'internet. Actes du colloque organisé par l'École doctorale de droit publique et le droit fiscale de l'Université Paris I, le 25 et 26 septembre 2000* (Paris 2001) p. 43.

105 *See* C.B. Net, van der, *op. cit.*, pp. 179-80.

5.2. Balancing the interests

In as far as the restriction of the jurisdictional competence of States appears to be unfeasible, an alternative could be to retain the territoriality principle as it is used today but to add the *ad hoc* consideration of other criteria, i.e. underlying interests, which may justify the *de facto* exercise of criminal competence by a particular forum (subsect. 5.2.1). Moreover, one may even consider the limited application of foreign public law insofar as more than one State has a meaningful connection with the case at hand (subsect. 5.2.2). Both solutions have in common that they retain the statutory rules for asserting criminal jurisdiction intact, but require a subsequent analysis with a view to pinpointing the more appropriate forum and/or applicable law.

5.2.1. Refining the jurisdictional claim

In the case of competing jurisdictional claims, a first solution is to designate the more appropriate jurisdiction on the ground of considering the relevant factors of the case. Under paragraph 403 Third Restatement, for instance, it is held that even when one of the classical bases for prescriptive jurisdiction is present, a State may not exercise prescriptive jurisdiction if this would be *unreasonable*.[106] In determining whether a State's jurisdictional claim is unreasonable, one must evaluate all the relevant factors including, where appropriate, the interests of the regulating State or any other State involved,[107] the prerogatives of the parties involved,[108] and international interests.[109] Should this assessment indicate that it is not unreasonable for more than one State to assert prescriptive jurisdiction, and when the prescriptions are in conflict, each State has the obligation to evaluate all the involved States' interests, and, on the basis thereof, to decide whether it should either apply its own law, or defer the case to another State if the latter's interest is clearly greater. Within the European context, more or less comparable criteria, for achieving a proper distribution of criminal proceedings have been agreed on. The European convention on the transfer of proceedings in criminal

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106 On the reasonableness requirement, see D.B. Massey, 'How The American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law', 22 Yale Journal of International Law 419 (1997).

107 Third Rest., § 403 (2), sub a, c, g and h.

108 Third Rest., § 403 (2), sub b and d.

109 Third Rest., § 403 (2), sub e and f.

matters (ECP),[110] for instance, contains a list of conditions[111] and grounds for refusal[112] allowing a Contracting Party to request that proceedings be instigated in another State, or indeed to refuse a request to that end.[113] Taken together, these conditions aim to achieve a proper administration of justice.[114] One important difference between the US Restatement and the European (ECP) approach is that in the latter the conditions allowing for a transfer of proceedings and to a lesser degree the grounds for refusal are, first of all, purported to achieve an effective and efficient organization of criminal law adjudication. In effect they are aimed at the designation of the proper forum in order to exercise an already legitimized competence. In contrast, the US Restatement criteria are placed on a more equal footing with the classical grounds for asserting prescriptive jurisdiction as they, in part, jointly legitimize *ab initio* the application of US criminal law.

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110 See *supra* note 83.

111 Art. 8 ECP (theses conditions relate to (a) the place of residence of the suspect; (b) his nationality; (c) the concentration of sentences; and (d) of proceedings; (e) the finding of the truth, i.e. where is the evidence?; (f) the prospects of social rehabilitation of the person sentenced; (g) avoiding of in absentia procedures; and (h) the guarantee of effective enforcement in case of conviction).

112 Art. 11 ECP (the requested State may refuse the acceptance of a request if (a) the grounds for transfer under Article 8 are unjustified; (b) the suspect is not ordinarily resident in the requested State; (c) the suspect is not a national of the Requested State, nor was he ordinarily residing there at the time of the offense; (d) the offense is of a political nature or a purely military or fiscal one; (e) the request is thought to be motivated by considerations of race, religion, nationality or political opinion; (f) and (g) for reasons of lapse of time; (h) the requesting State has no territorial competence; (i) proceedings would be contrary to the international undertakings of the requested State; (j) or in violation of the fundamental principle of its legal system; (k) a rule of procedure laid down in this Convention was violated).

113 *Compare* measure 11, Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *O.J.*, 2001/C 12/10, 16 January 2001 (a call to draft an instrument enabling criminal proceedings to be transferred to other Member States, encouraging appropriate coordination between the Member States, and referring to the criteria laid down in Art. 8 ECP to help determine jurisdiction).

114 Council of Europe, Explanatory Report to European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, WWW <http://conventions.coe.int/Treaty/en/Reports/Html/073.htm> 7 May 2004. The national implementation of the ECP has not proven to be an unequivocal success as yet. One of the few Contracting Parties which has adopted a – meticulous – regulation is the Netherlands. The enactment of the Statute of 6 March 1985 on the transfer of proceedings in criminal matters (*Stb*. 1985, 131), inserting Artt. 552*t*-552*w* into the Dutch Code for Criminal Procedure, and the more detailed elaboration in the Manual on the transfer of criminal proceedings of 28 June 1989 edited by the procurators general, provided for a system allowing for the transfer of proceedings when the suspect is a non-resident alien and when a foreign prosecution would be a feasible alternative (on the Dutch legislation, *see* Y.G.M. Baaijens-Van Geloven, *Overdracht en overname van strafvervolging* (Arnhem 1996) pp. 142 et seq.; T. Vander Beken, *op. cit.*, pp. 299-301).

Despite this conceptual difference, both approaches have some obvious benefits in common. Probably the most important is that they allow for a more refined designation of the proper forum and, in doing so, are a first attempt to set up a feasible scheme for the interstate distribution of criminal competence, endorsing international comity and cooperation. In particular, when certain *ad hoc* or permanent coordination or consultation arrangements are set up in order to attain consensus as to which State should go ahead with proceedings in situations where jurisdictional claims concur, this approach may be rewarding.[115]

At the same time there are some drawbacks. An open and concrete question is how to operationalize the enumerated criteria, how to balance them against each other. The list of considerations enumerated in Paragraph 403(2) US Restatement is, for instance, not exhaustive, and no priority or other significance is implied in the order in which the factors are listed.[116] It is *de facto* up to the court, or the public prosecutor, to decide on an individual basis whether there are sufficient reasons to decline prosecution and to allow another jurisdiction to exercise its competence, making interstate disparities inevitable.[117] Further, given the propensity to formulate the rules for conferring territorial jurisdiction in a comprehensive manner it seems likely that the weighing of the criteria will not often lead to reneging on competence. Moreover, the number of occasions in which any balancing of the criteria will take place at all, may be *de facto* very limited. In the Dutch Statute implementing the ECP (*see supra* note 114), for instance, the criteria only come into play when the suspect is a non-resident alien.[118] Although under the US restatement approach a State should always evaluate whether the exercise of jurisdiction is reasonable, the denunciation of jurisdiction will only emerge if the jurisdictional claims of two or more States are not unreasonable, but their substantive regulations conflict. And, there is only a conflict when compliance with the regulations of both States is impossible, or when

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115 *Compare* COM(2000) 495 final of 26 July 2000, at 13.1 (*see supra* note 79); Commission Discussion Paper at 5 (*see supra* note 50); *see* also the EU instruments cited *supra* note 84; and for the US, *see* Third Rest., § 403, comm. e. Compare the debate on the 'coordination' of jurisdictional claims between the EU and the US in the field of competition law (from the perspective of the European Commission, *see*, e.g., D.J. Feeney, 'The European Commission's Extraterritorial Jurisdiction over Corporate Mergers', 19 *Georgia State University Law Review* 425 (2002)).

116 Third Rest., § 403, comm. b.

117 Though one could set up a system of preliminary rulings by an international court, or other instance, to assure the emergence of uniform interpretations and practices (*see* Commission Discussion Paper, at 13.2, *see supra* note 50).

118 Art. 552*y*, par. 1, *sub a*, Dutch Code of Criminal Procedure.

one State requires something that the other prohibits.[119] Hence, there is no conflict, and no denunciation, when one State has a strong policy to permit or encourage a certain activity, i.e. free speech under the First Amendment, which another State prohibits, i.e. European laws penalizing defamation or hate speech. Another criticism is that even when the criteria are balanced, or even when a case is deferred, the actual impact of the criteria for allocating the proper court, or the proper law, comes to an end once the forum is actually selected. Thus, even in the case of a touch and go situation, the law which is not chosen, and the prerogatives it aims to protect, remains out of sight when it comes to deciding on the merits.

In sum, though mechanisms for attaining a more attenuated distribution of criminal jurisdiction do have their benefits, they are nevertheless somewhat limited. The operationalization of the criteria, and how to balance them against each other, is not always clearly defined or definable; they presumably result only once in a blue moon in the *de facto* repudiation of the competence of the forum; and they cease to have any effect once the applicable law and the competent forum are selected.

5.2.2. The limited application of foreign public law by the national courts

A second solution, which may be considered in conjunction with the preceding mechanism, is to allow the application of foreign public law by the national courts. Given the ubiquitous and overlapping nature of criminal jurisdictional claims in combination with vast interstate disparities in substantive speech law, when prosecuting an author of illicit speech who has acted from within US territory, an appealing solution is to require the European courts, to apply or to consider aspects of US constitutional law. Vice versa, a US criminal court could be required to apply or at least consider European criminal law in prosecuting an offender who causes harm within European territory. This avenue would allow for a refined and realistic administration of justice as it would allow for the consideration of all the circumstances which are relevant to the conduct of the author, including where the conduct took place and where it caused its adverse effects, and what rules concerning defamation or hate speech are applicable in that place or those places. Criminal courts have consistently refused to apply foreign public law,[120] notwithstanding the fact that the application of foreign

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[119] Third Rest., § 403, comm. e. *Compare* Th. M. Boer, de, *Beyond Lex Loci Delicti. Conflicts Methodology and Multistate Torts in American Case Law* (Deventer 1987) pp. 233 et seq. (discussing the different forms of conflicts from a private international law perspective).

[120] *See supra* note 46; and further J. Le Calvez, 'Compétence législative et compétence judiciaire en droit pénal (La remise en cause du principe selon lequel le juge répressif n'applique que sa loi nationale)', *Revue de Science Criminelle et Droit Pénal Comparé* (1980) pp. 13-4; A. Huet, 'Pour une application limitée de la loi pénale étrangère', 109 *Journal du droit international* (1982) p. 625; R. Merle & A. Vitu, *op. cit.*, p. 385. Specifically on the application of foreign public law in

private law is settled practice in private international law, and in spite of the recommendations to that effect in resolutions emanating from international conferences[121] and in the writings of several legal scholars.[122] This refusal to apply foreign public law is generally referred to as the 'public law taboo'.[123] Hereinafter, I will systematically use the term 'criminal' rather than 'public'. Nevertheless, it is important to keep in mind that ultimately, alongside to the application of foreign 'criminal' law, the possibilities of applying foreign 'constitutional' law i.e. US First Amendment prerogatives in European adjudications – will be examined as well. Further, I will concentrate on the application of foreign criminal law in deciding on the merits of a case,[124] to the exclusion of the enforcement of a foreign criminal *res iudicata*.[125]

The taboo surrounding the fact that a court can not apply foreign public law, or that there is a strict concurrence between prescriptive and adjudicative criminal jurisdiction, is an enduring one – although this has not always been formulated

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private law adjudications, *see*, e.g., R. Rooij, van, *De positie van publiekrechtelijke regels op het terrein van het internationaal privaatrecht* (Groningen 1976); L. Strikwerda, *Semipubliekrecht in het conflictenrecht* (Alphen aan den Rijn 1978); *see* also W.E. Haak, 'Plaats en invloed van 'publiekrechtelijke' regels in het IPR', 5717-8 *Weekblad voor privaatrecht, notariaat en registratie* (1984) pp. 669-74 and 689-95.

121 Association internationale de droit pénal, *Deuxième congrès international de droit pénal à Bucarest de 6-12 octobre 1929. Actes du congrès* (Paris 1930); Association internationale de droit pénal, *Actes du VIIIéme congrès international de droit pénal à Lisbonne de 21-27 septembre 1961* (Paris 1965).

122 H. Donnedieu de Vabres, *Les principes modernes du droit pénal international* (Paris 1928) pp. 171-219; J. Le Calvez, *loc. cit.*, pp. 13-39 and 337-73; A. Huet, *loc. cit.*, pp. 625-59; R. Merle & A. Vitu, *op. cit.,* pp. 411-3; A. Huet & R. Koering-Joulin, *Droit pénal international* (Paris 2001) pp. 181-4 and 188-203; in general, *see* W.S. Dodge, 'Breaking the Public Law Taboo', 43 *Harvard International Law Journal* 161 (2002). For a critical and dissuasive review in Dutch, *see* T. Vander Beken, *op. cit.*, pp. 26-36.

123 A.F. Lowenfield, 'Public Law in the International Arena: Conflicts of Laws, International Law, and Some Suggestions for Their Interaction', 163 *Recueil des Cours* 311 (1979) pp. 322-6

124 Under the application of foreign criminal law I understand the adoption of the statement and particulars of an offense, or the precise penalties (e.g. on the ground of the principles of *lex mitior* or *poena mitior*), or any other legal consequence, or a general disposition of a foreign penal code (J.-M. Bemmelen, 'Rapport général définitif sur la question de l'application de la loi pénale étrangère par le juge national', 31 *Revue Internationale de Droit Pénal* (1960) p. 641; *compare* P. Garraud, 'De l'application par le juge d'un état des lois pénales étrangères', in Association internationale de Droit pénal, ed., *Deuxième congrès de droit pénal à Bucarest de 6-12 octobre 1929. Actes du Congres* (Paris 1930) pp. 207-9).

125 On the enforcement of a foreign criminal *res iudicata* in the EU legal area, *see* S. Peers, *loc. cit.*

equally firmly.[126] In glancing through the legal literature, one can find quite a few arguments sustaining the public law taboo. Since it is not feasible to discuss these arguments here in full, I will restrict myself to what I believe to be the most substantial argumentations. It should be noted that some of these arguments are inferred from the US debate on the non-enforcement of foreign tax, antitrust and securities law. However, they fundamentally all involve the dictum that one sovereign may not apply the criminal, tax, antitrust, or securities law of other sovereigns.

A first line of arguments are of a fundamental nature and are connected with the central role of the State in matters of criminal law. To start with, it is argued that the basic principle of territoriality does not only imply that a State has the competence to prescribe its criminal law with respect to any offense which has occurred within its territory, but by the same token it is thought to entail the obligation for a court to apply only the *lex fori*.[127] In 1825, this view had already been expressed by the US Supreme Court: '[t]he Courts of no country execute the penal laws of another',[128] and it has equally been endorsed by most European legislators and courts.[129] Yet, much like there are circumstances justifying the exercise of extraterritorial prescriptive jurisdiction – e.g. on the ground of the personal status of the offender, or the nature of the infringed interest(s) – the territoriality of criminal law does not carry with it any *prima facie* objection against the application of foreign law by the national courts. Quite the reverse, One could argue that in cases of exercising extraterritorial jurisdiction it would be more in line with the principle of territoriality to apply the 'foreign' *lex loci delicti*.[130] A related argument involves the principle of sovereignty.

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126 *See* H. Donnedieu de Vabres, *op. cit.*, pp. 171-6 (observing that in the relations between the independent North-Italian city states of the 14th century it was allowed for judges to apply the criminal statutes of foreign city states).

127 A. Huet, *loc. cit.*, pp. 627-8; R. Merle & A. Vitu, *op. cit.,* pp. 411-2; A. Huet & R. Koering-Joulin,, *op. cit.*, p. 193.

128 *The Antelope*, 23 U.S. (10 Wheat.) 66, at 123, U.S.Ga., March 18, 1825; *see* also *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, at 289-290, U.S.Wis., May 14, 1888 ('[b]y the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country'); *Huntington v. Atrill*, 146 U.S. 657, at 669, U.S.Md., Dec. 12, 1892; Third Rest., § 422 (1); W.S. Dodge, *loc. cit.*, pp. 165-6.

129 G. Battaglini, 'De l'application par le juge d'un état des lois pénales étrangères', in Association internationale de Droit pénal, ed., *Deuxième congrès de droit pénal à Bucarest de 6-12 octobre 1929. Actes du Congres* (Paris 1930) p. 234. *Compare* H. Donnedieu de Vabres, *op. cit.*, pp. 185-6.

130 *See* P. Bouzat & J-D. Bredin, 'L'application de la loi pénale étrangère par le juge national (rapport particulier de la France pour le VIIIéme congrès international de droit pénal à Lisbonne de 21-27 septembre 1961)', 31 *Revue Internationale de Droit Pénal* (1960) p. 509.

It is reasoned that the exercise of sovereign power by one State within the territory of another, i.e. by applying foreign criminal law, is contrary to all concepts of independent sovereignties.[131] In effect, since both prescriptive and adjudicative criminal jurisdiction are aimed at the protection of States' own public order,[132] and since States should – in principle – not interfere with foreign public interests, it is believed to be a matter of course that criminal courts can only apply the *lex fori*, and should refuse to take notice of foreign criminal law.[133] This explains to a large extent the difference with private international law conflict rules. With respect to the latter it are not the sovereign prerogatives of States, but the interests of private parties that are involved.[134] The 'sovereignty' argument is closely intertwined with that of 'territoriality' as the dictum 'no State shall execute the penal law of another' expresses this unilateral sovereign nature of criminal law enforcement. Advocating against the 'sovereignty' argument is the opinion that there is no rule under international law which prohibits the State where enforcement is sought from giving its consent to the application of foreign criminal law, for instance.[135] Finally, the public law taboo has been connected with the fear of embarrassing foreign States. More than seventy years ago the US Second Circuit Judge Learned Hand stated that in the case of criminal liabilities 'a court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own … [t]o pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor.'[136] In other words, Hand believed that it was safer to refuse to enforce foreign laws altogether than having to

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131 W.S. Dodge, *loc. cit.*, pp. 174-5 (quoting Lord Keith Avonholm in *Government of India v. Taylor*, [1955] A.C. at 511).

132 *Compare* J.-M. Bemmelen, *loc. cit.*, p. 649 ('une legislation pénale, un système pénitentiaire et une organisation judicaire de droit pénal forment ensemble un tout don't il est difficile d'isoler brusquement une partie').

133 H. Donnedieu de Vabres, *op. cit.*, p. 173; J. Le Calvez, *loc. cit.*, p. 339; A. Huet, *loc. cit.*, pp. 636-7. *See* also *British Columbia v. Gilbertson*, 597 F.2d 1161, at 1165, 9th Cir. (Or.), March 23, 1979 ('if the court below was compelled to recognize the [public law] judgment from a foreign nation, it would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do').

134 G. Battaglini, *loc. cit.*, pp. 234-5; J. Le Calvez, *loc. cit.*, p. 352.

135 W.S. Dodge, *loc. cit.*, pp. 217-8.

136 *Moore v. Mitchell*, 30 F.2d 600, at 604, C.C.A.2 (N.Y.), Feb. 4, 1929 (L. Hand, J., concurring); *see* also *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134, at 139-40, N.D.N.Y., June 30, 2000, *aff'd*, 268 F.3d 103, 2nd Cir. (N.Y.), Oct. 12, 2001.

declare them contrary to public policy, which may offend a foreign State.[137] Although one could opt for the automatic application of foreign criminal law without any public policy review, such a rule is unquestionably difficult to validate. It is perhaps more reasonable to ask whether the possibility of holding a criminal law contrary to public policy is *de facto* more offensive than a flat refusal to apply foreign criminal law at all.[138]

A second category of arguments sustaining the public law taboo is of a more procedural nature. These arguments are, in the first place, concerned with the efficacy and efficiency of law enforcement. It is held that the difficulty in fully grasping the nuances and complexities of an unfamiliar foreign body of law would impede its proper application.[139] Also, it is argued that the adjudication of cases involving foreign interests might unduly add to the caseload of an already overburdened national judiciary.[140] Both arguments are not irrefutable. The application of foreign law is common practice in matters of private international law, and there it does not seem to lead to any serious quandaries. It is even very much the question whether the mere difficulty of a task may excuse any court from doing justice. Moreover, the mere ability of a State to enforce its law in a foreign forum may very well lead to many potential offenders ensuring that they comply with that law without the need for litigation.[141]

A third category of arguments is of a more theoretical nature. One argument from this categoryhas to do with the preliminary nature of prescriptive jurisdiction.[142] It is reasoned that since a situation becomes criminally relevant only after a particular behavior is defined as criminal, it is nothing more than logical that the determination of the applicable law precedes the allocation of the competent court. From this it is argued that a domestic prescription *ipso facto* implies a domestic adjudication. Though it may be correct that prescription precedes adjudication, this does not validate a rule following which a court can only apply the *lex fori*. Rather, this interference seems to

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137 W.S. Dodge, *loc. cit.*, p. 173; *see* also J.-M. Bemmelen, *loc. cit.*, p. 648; *compare* H. Gruetzner, *loc. cit.*, p. 408 (reversing this reasoning by stating that the application of foreign criminal law by the national judge may be found to be embarrassing for the forum State).

138 W.S. Dodge, *loc. cit.*, pp. 213-4.

139 *See* H. Donnedieu de Vabres, *op. cit.*, p. 174; G. Battaglini, *loc. cit.*, p. 234; R. Declercq, 'L'application de la loi pénale étrangère par le juge national (rapport particulier de la Belgique pour le VIII^{éme} congrès international de droit pénal à Lisbonne de 21-27 septembre 1961)', 31 *Revue Internationale de Droit Pénal* (1960) pp. 448-9; H. Gruetzner, *loc. cit.*, pp. 409 and 414-6; W.S. Dodge, *loc. cit.*, p. 209.

140 W.S. Dodge, *loc. cit.*, p. 210.

141 *Ibid.*, p. 211.

142 *Compare* J. Le Calvez, *loc. cit.*, p. 351; A. Huet, *loc. cit.*, pp. 630-3; A. Huet & R. Koering-Joulin, *op. cit.*, pp. 195-7.

provide a mere description of the current state of affairs, lacking any sound justification. A second connected argument involves the nonexistence of genuine conflicts of law in matters of criminal law.[143] Though it is quite trivial that there may be a conflict as soon as a situation contains a foreign element, it is reasoned that there is only a genuine conflict of law if the court applies (bilateral) choice of law rules either designating the *lex fori*, or another law as applicable. This is not the case in criminal law: the criminal court must either find the lex fori which is applicable or it must find itself to be incompetent (this corresponds to the unilateral choice of law approach in private international law). From this it is argued that on no account can a court apply foreign criminal law. Again, this argument appears to provide only a description of the law as it stands, lacking any sound justification as to why the unilateral designation – or repudiation – of prescriptive jurisdiction should *a priori* include the exclusion of applying foreign criminal law. Moreover, even in private international law the use of unilateral choice of law rules does not preclude the application of foreign private law,[144] nor does the essentially unilateral nature of mandatory rules of law exclude the application of foreign rules of the same type.[145]

It should be clear that the traditional arguments underlying the public law taboo are not beyond refutation. Yet, this does not justify the *de facto* application of foreign criminal law in domestic adjudications. It merely mitigates the seemingly cut-and-dry juxtaposition between prescriptive and adjudicative criminal jurisdiction. If one is to consider the different schemes regarding the application of foreign criminal law which have been proposed,[146] the following main lines may be distinguished. First and foremost, there seems to be a general consensus about the predominant character of the principle of territoriality: where there is a territorial nexus there should be no room for superseding the applicable criminal law which is both the lex loci delicti and the lex fori. Only when asserting extraterritorial jurisdiction should the forum be allowed exceptionally to apply the lex loci delicti.[147] For some, this reasoning has been extended to require that, in cases of extraterritorial jurisdiction, on the ground of the personality or universality principle, the forum should always apply the *lex*

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143 A. Huet, *loc. cit.*, pp. 633-6; A. Huet & R. Koering-Joulin, *op. cit.*, pp. 197-9.

144 For an illustration, *see* A. Huet, *loc. cit.*, p. 635; A. Huet & R. Koering-Joulin, *op. cit.*, p.p. 198-9.

145 *See*, e.g., on the basis of Art. 7 Convention 19 June 1980 on the law applicable to contractual obligations, *O.J.*, 1998/C 27, 26 January 1998.

146 *See supra* notes 121 and 122.

147 *See* P. Garraud, *loc. cit.*, pp. 218-21; H. Gruetzner, *loc. cit.*, p. 398; J. Le Calvez, *loc. cit.*, pp. 354 et seq.; A. Huet, *loc. cit.*, pp. 647-et seq.; A. Huet & R. Koering-Joulin, *op. cit.*, pp.188-93; *compare* H. Donnedieu de Vabres, *op. cit.*, pp. 174 and 192-209 (advocating the application of foreign 'lois pénales personelles' – e.g., relating to bigamy, or certain family relations – by the 'territorial' competent court).

loci delicti, even in the absence of any penalization under the *lex fori*.[148] There are different justifications for such an approach. First of all, one may assume that much like in matters of private international law, prescriptive and adjudicative jurisdiction do not necessarily envision identical objectives. In some cases it may simply be a matter of achieving a proper administration of justice to allow for the disconnection of both jurisdictional *modi*. It is not unimaginable, for instance, that in view of safeguarding the different interests at stake, the criminal adjudication follows the place where the offender has his usual residence, whereas the applicable law should be that of the *locus delicti* as the place where a legal interest was infringed. Insofar as both *loci* do not concur, it may be justified to apply foreign criminal law. Secondly, it is believed that the application of foreign criminal law is in line with a more present-day interpretation of the principle of international comity according to which it is not so much the adoption of an attitude of moderation and restraint vis-à-vis the interests of other States that is aimed at, but the protection of each other's interests and those of their citizens.[149] After all, no state legislator or domestic court should remain ignorant of infringements against the criminal law of a (friendly) foreign State. Thirdly, it is argued that in requiring the forum to apply the *lex loci delicti* the dictum *nullum crimen, nulla poena, sine lege* is more properly guaranteed. Wherever the criminal adjudication takes place the offender can predict that he will be judged according to the *lex loci delicti*.[150] Fourthly, the application of foreign criminal law is thought to be functional in circumventing impunity. In particular where the minimum conditions to satisfy an extradition request are not met, and in the absence of original jurisdiction in the requested State, the leeway for applying foreign criminal law may turn out to be useful.[151] For one thing, it would allow for the full application of the dictum *aut dedere, aut iudicare*. Finally, it should be noted that even today national courts are not exclusively subordinated to the *lex fori*.[152] In Articles 5 and 6 of the Swiss Penal Code, for instance, the principle of lex mitior is laid down: if jurisdiction is based on the active or passive personality principle the application of the lex loci delicti is given priority if this is more favorable to the suspect. Further, the condition of double

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148 P. Garraud, *loc. cit.*, p. 221. Where jurisdiction is asserted on the ground of the protective principle most authors seem to agree that the *lex loci delicti* should not be applied (*see*, e.g., J. Le Calvez, *loc. cit.*, p. 355). One could argue that the competent court, e.g. the forum *delicti* or *deprehensionis*, should apply the law of the State whose interests were infringed (A. Huet & R. Koering-Joulin, *op. cit.*, pp. 192-3).

149 *Compare* S.Z. Feller, *op. cit.*, p. 13; J. Le Calvez, *loc. cit.*, pp. 354 and 359 et seq.; A. Huet, *loc. cit.*, p. 651.

150 *Ibid.*, p. 652.

151 *See* J.-M. Bemmelen, *loc. cit.*, p. 645.

152 *See* J. Le Calvez, *loc. cit.*, p. 358; T. Vander Beken, *op. cit.*, pp. 33-6.

criminality in order to exercise extraterritorial jurisdiction, or with a view to satisfying an extradition request, as well as the *ne bis in idem* principle, imply some form of consideration of foreign criminal law.

If one is to transpose the preceding reasoning to the case of transnational speech offenses there are two main differences which are noticeable. First of all, where it concerns the transnational diffusion of speech there will often be more than one State with a competing and equally strong territorial claim. There is no principle which may introduce any acceptable priority between their claims.[153] Secondly, in comparing US and European speech legislation no matching incriminations, or even common standards or values are found.[154] Rather than avoiding impunity or enforcing common norms, the issue becomes a situation where one State forbids (defamation or hate speech) that which the other protects (free speech). And, since it cannot be the objective for the forum to further the regulatory policies of a foreign State at the expense of the interests of its own citizen, the public policy exception would frustrate any consideration of foreign public law. Does this mean that the application of foreign public law should be considered to have reached a dead end? No, it does not. The mere fact that States have different, and to some extent competing, interests does not necessarily relieve a State from cooperating in enforcing foreign norms. There is, in my opinion, no compelling reason why US courts should remain oblivious to the fact that a particular form of speech disseminated from US territory may violate European criminal standards. Neither is there a convincing rationale for European courts to ignore the fact that a particular form of speech is not considered illicit by the lex loci delicti commissi. As a minimum it should be made possible for courts to take into account foreign prerogatives insofar as the application of that foreign public law may be deemed to be reasonable. When it concerns, for instance, a US prosecution with respect to defamation, *inter alia*, injuring the reputation of a Dutch citizen in the Netherlands, it is no doubt in the interest of the injured party that the more severe criminal provisions of the Dutch Penal Code are to some point accounted for in the US adjudication. In the long-term this may also be in the interest of the accused because it may encourage the recognition of the negative effect of a res iudicata, and thus shield the accused from double jeopardy. Where US legislation does not provide for incriminations, e.g. in the case of hate speech, it may be appropriate to enhance the possibilities of foreign interest groups to successfully instigate tort claims, for instance by giving more weight to the fact that the challenged speech constitutes a criminal offense under the law of the State on whose territory the effect occurred, for instance. Similarly, when it concerns a European prosecution for speech disseminated from

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153 *See supra* sect. 4; c*ompare*, however, the proposed EU system of exclusive jurisdiction (*supra* subsect. 5.1).

154 *See supra* sect. 2.

within US territory, the adjudicating court should at least consider US First Amendment prerogatives. This may enhance the likelihood that a conviction will de facto have any effect when US cooperation is needed, for example in awarding damages following the joining as a partie civile. Also for the accused it takes the edge off being subjected to a foreign adjudication. This solution does not remedy the fact that most States entertain comprehensive criteria for allocating jurisdiction. It does however balance the jurisdictional matrix with a reality in which more than one State may have a meaningful nexus. In my opinion such a mechanism also more adequately meets the dictum nullum crimen, nulla poena, sine lege since the reasonable expectations of the offender may be calculated in determining the proper law(s). Further, it meets more fully the need for international cooperation and solidarity over and above an attitude of unilateralism. A point of consideration, though, is how to crystallize the application of foreign public law in the case of substantive conflicts. One feasible mechanism would be to allow diverging foreign public law in the domestic procedure as a justification or defense or, as the case may be, as an aggravating circumstance. To end with, it would be apposite that the domestic legislator prescribes the situations in which a court must – or may – consider foreign public law. In my opinion, this offers a sounder basis for applying foreign public law. It would give the domestic courts a clear ground for applying foreign public law, rather than relying on some rule of ius gentium.

6. CONCLUSION

As the law stands, States are inclined to use comprehensive criteria for conferring criminal jurisdiction over transnational speech offenses. This has been increasingly confirmed in some of the recent international agreements on combating hate speech.[155] To some extent this is probably unavoidable. Insofar as transnational speech offenses can be localized within the territory of more than one State, on the basis of the occurrence of the 'act' and/or the 'effect', it seems justified for States to assert criminal jurisdiction (perhaps with the requirement of some level of *mens rea* to publish – cause and effect – within a given territory). However, insofar as there are vast interstate disparities in substantive law this may be harmful to the legal position of the parties involved, the interests of the States involved, and the mere prospect of international intercourse. In this article two corrective mechanisms were found to be feasible. First and foremost, it has to be recommended to fully consider more elaborate criteria for distributing criminal competence. The US Restatement criteria of reasonableness

[155] *See* Art. 12 Com(2001) 664 final of 26 March 2002 (*see supra* note 21); Art. 8 Cybercrime Protocol (*see supra* note 27).

and its ECP counterpart, in combination with interstate consultation or coordination processes, may be indicative in this respect. In elaborating these criteria it may further be useful to clearly draw the distinction between prescription and adjudication. This may be illuminating as to the precise reasons why a specific law or a forum is deemed proper to prosecute and punish an offender. Secondly, it has been proposed to loosen the strict concurrence between prescriptive and adjudicative criminal jurisdiction. As formulated here, this implies that the national court, in deciding on the merits, must consider foreign public law prerogatives insofar as the offense has a meaningful nexus with that other legal order. In doing so the considerations which may have favored the application of foreign law do not cease to have effect once the *lex fori* has been selected. By the same token, it would permit the consideration of *all* the relevant circumstances. In the words of Le Calvaz: *'[I]l n'y a pas d'obstacle théorique lui [le juge national] interdisant de se saisir de l'intégralité de la situation qui lui est soumise, même si certains de ses éléments doivent être empruntés à l'ordre juridique étranger. Ainsi il pourra non seulement rendre une justice plus éclairée, mais également assurer de manière efficace le respect des intérêts dont la protection lui est confiée*'.[156]

To end, an interesting elaboration is to consider the application of foreign public law in the context of the EU third pillar developments. In as much as a system of exclusivity is warranted (*see supra* subsect. 5.1.1) it may be apposite to restrict this to the assertion of prescriptive jurisdiction, and to provide for a flexible system for distributing adjudicative jurisdiction. Such a system would, in my opinion, fit neatly within the idea of achieving a genuine European area of justice wherein national courts are not merely preoccupied with enforcing the *lex fori* but, first and foremost, operate as guardians of European standards and norms. Such a scheme may not only bring about more effective and foreseeable law enforcement, as the applicable law follows the offender wherever he goes, but it may equally maximize the procedural protection afforded to the parties involved in transnational litigation, e.g. by considering their interests when designating the proper forum. Even if the elaboration of a system of exclusivity is not deemed to be realizable, for instance in the light of vast substantive law disparities (e.g. regarding soft drugs, abortion, euthanasia,…), the breaking of the public law taboo may still be rewarding. For one thing, the centralization of proceedings in one forum, in conjunction with the consideration of the relevant public law prerogatives of all Member States which have a meaningful nexus, may pave the way for new ways to deal with conflicts of jurisdiction within the European legal area. I believe that a further inquiry of the propositions which have been made in this article is desirable.

[156] J. Le Calvaz, *loc. cit.*, p. 367.