
2. The concept of jurisdiction in international law*

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In this chapter, the concept of jurisdiction as exercised by states (or regional organizations such as the European Union) is analysed. Such jurisdiction is concerned with the reach of a state's law: what link, if any, is required for a state to apply its laws to situations and persons? Jurisdiction is an aspect of a state's sovereignty, as the right to prescribe and enforce laws is an essential component of statehood. In the classic Westphalian understanding, this right has been limited to a state's territory, a limitation that at the same time ensures that no state intervenes in another state's affairs (2.1). This idea is no longer strictly applied, if it ever was. Exceptions that allow for limited extra-territorial jurisdiction have been carved out, and, moreover, the territoriality principle has been construed rather liberally (2.2). To be true, some states employ a rather strict presumption that the legislature does not normally intend to apply its laws extra-territorially, but such a presumption does not limit the discretion of the legislature to do just that if it so desires (2.3).

The overlapping assertions that result from multiple states' invocation of permissive principles of jurisdiction may almost unavoidably result in international friction. This friction may be mitigated by a 'rule of reason', which instructs courts and regulators to balance the interests and connections of the case with the different states involved (2.4). This rule of reason has obvious drawbacks, notably the impropriety of unelected courts weighing political and economic interests, and the pro-forum bias which they may exude. Still, when transnational networks of judges and regulators are established, the ensuing mutual understanding may positively impact on the application of the rule of reason (2.5). It is further proposed in this chapter to infuse the rule of reason with a subsidiarity dimension: 'bystander' states should only exercise jurisdiction by default, i.e., where the state with the

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strongest nexus fails to assume its regulatory responsibilities to the detriment of the global interest (2.6).

2.1 NATURE OF JURISDICTION

In public international law, the concept of jurisdiction has traditionally had a strong link with the notion of sovereignty. Jurisdiction allows states to give effect to the sovereign independence which they are endowed with in a global system of formally equal states, through stating what the law is relating to persons or activities in which they have a legal interest. Sovereignty, however, not only serves as an enabling concept with respect to the exercise of jurisdiction, but also as a restraining device: it informs the adoption of international rules *restricting* the exercise of state jurisdiction. States may well adopt laws that govern matters that are not exclusively of domestic concern, and thereby impinge on other states' sovereignty. In essence, the laws of jurisdiction delimit the competences between states,¹ and thus serve as the basic 'traffic rules' of the international legal order.

When delimiting competences, the law of jurisdiction has mainly relied on the *territorial* dimension of sovereignty when devising permissive and prohibitive rules: a state's jurisdictional assertions that pertain to acts carried out *in its territory* are in principle lawful, while assertions that pertain to acts done *outside its territory* are suspect, and even presumptively unlawful. This emphasis on territoriality is a reflection of the persistent Westphalian bent of the international legal order: a system of territorially delimited nation-states that have full and exclusive sovereignty over their own territory, and no sovereignty over other states' territory. The centrality of territoriality in the law of jurisdiction, however, need not be a logical necessity. Ultimately, territoriality is historically contingent. It only rose to prominence in the seventeenth century owing to the centralization of administrative power within the state, as well as the rise of the science of

¹ F.A. Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *RCADI* 1 at 15 (stating that '[j]urisdiction ... is concerned with what has been described as one of the fundamental functions of public international law, *viz.* the function of regulating and delimiting the respective competences of States'). Also A.F. Lowenfeld, 'International Litigation and the Quest for Reasonableness' (1994-I) 245 *RCADI* 9 at 29 ('I believe that while we will not here address the cosmic issues of war and peace, of nuclear weapons and terrorist assaults, we will deal with legitimate and serious concerns of private persons and of States, and surely of lawyers, embraced within what Story calls the comity of nations').

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cartography that allowed for more certain borders to be drawn.² In pre-modern times, sovereignty was conceived of in a more tribal or community sense: people were subject to the laws of the community or tribe to which they belonged, rather than those of the territory on which they resided at a given moment.³ Community-based conceptions of jurisdiction have recently made a normative return in the literature, especially in the work of Paul Schiff Berman, who has drawn attention to individuals' identification with transnational communities rather than with territorially-bound states, and who on that ground advocated an overhaul of the obsolete territory-based jurisdictional scheme.⁴ While it is true that the steady increase in global communication, and especially the explosion of the Internet, has allowed spatially remote individuals to connect, and has restricted the role of the state, it remains no less true, however, that states have not surrendered just yet. States continue to consider territoriality as the most straightforward and certain way of delimiting competences between them.⁵ As a result, jurisdictional analyses remain centred on territorial connections, even where such connections become increasingly artificial, for example, in the case of essentially non-territorial cyberspace,⁶ or global climate change.⁷

² See notably R.T. Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Mich. L Rev.* 843.

³ S Kassan, 'Extraterritorial Jurisdiction in the Ancient World' (1935) 29 *Am. J Int'l L* 237 at 240.

⁴ See, for example, P.S. Berman, 'Global Legal Pluralism' (2007) 80 *Cal. L Rev.* 1155.

⁵ See H.L. Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 *Am. J Comp. L* 631.

⁶ Convention on Cybercrime, Council of Europe, 185 European Treaty Series (23 November 2001) ('Cybercrime Convention') sets forth territoriality as the main jurisdictional principle (see Article 22(1) of the Cybercrime Convention, which states that 'Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence ... when the offence is committed: a. in its territory') and several EU legal instruments addressing Internet-based criminality cite the constituent elements approach (see, for example, Council Framework Decision 2004/68/JHA, art. 8(1)(a); Council Framework Decision 2008/913/JHA, art. 9(1)(a); Council Framework Decision 2005/222/JHA, art. 10(1)(a), basing jurisdiction on the commission of the offence 'in whole or in part' on the territory of an EU Member State). Territoriality is also relied on in various shapes and colors in domestic criminal laws (see for an early survey: B.J. Koops and S.W. Brenner (eds), *Cybercrime and Jurisdiction: A Global Survey* (2006); S.W. Brenner, 'Approaches to Cybercrime Jurisdiction' (2004) 4 *J High Tech. L* 1 and for a later survey, A. Klip, 'International Criminal Law Information Society and Penal Law General Report' (2014) 85 *Revue Internationale de Droit Pénal* 381). Just a few states provide for

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Given its roots in the Westphalian international legal system, the law of jurisdiction forms part of the traditional ‘negative’ international law of state co-existence, which mainly contains ‘do not’ obligations, or prohibitions, aimed at defending the sovereignty of all states, whether or not strong or powerful. For the law of jurisdiction, this means that states are in principle not allowed to assert jurisdiction over affairs which are in the domain of other states – typically acts that take place extra-territorially – as such would violate the sacrosanct principles on non-intervention and the sovereign equality of states.⁸ In more recent times, however, the ‘positive’ dimension of jurisdiction has come to the fore somewhat more, reflecting the evolution of international law towards a law of cooperation rather than just co-existence between states. A positive understanding of jurisdiction implies that states may sometimes be *obliged to* exercise jurisdiction (rather than just being allowed to, let alone being precluded from doing so), especially in respect of values dear to the international community. Thus, a number of Conventions provide for a state’s obligation to establish its criminal jurisdiction over the presumed offender of a particularly grave crime (for example, a war crime, an act of torture or an act of terrorism), provided that this person is present on the territory, and

technology-specific jurisdiction, see, for example, UK Computer Misuse Act 1990, ss. 4–5 (requiring a ‘significant link with domestic jurisdiction’); 18 U.S.C. s. 1030(e)(2)(b) (US Computer Fraud and Abuse Act) (basing jurisdiction on the use of a computer, even if located outside the United States, ‘in a manner that affects interstate or foreign commerce or communication of the United States’), applied in *United States v Ivanov*, 175 F.Supp.2d 367, 367–70 (D. Conn. 2001); US Patriot Act (basing jurisdiction on the involvement of an access device relevant for entities in the United States); Danish Penal Code, art. 9a (establishing jurisdiction over an online criminal act that has a relation to Denmark).

⁷ C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change (ATA)*, Judgment of 21 December 2011, [2012] OJ C49/7, 18 February 2012, para. 151 (‘In general, the European Union may require all undertakings wishing to provide services within its territory to comply with certain standards laid down by EU law. Accordingly, it may require airlines to participate in measures of EU law on environmental protection and climate change – in this case the EU emissions trading scheme – whenever they take off from or land at an aerodrome within the territory of the European Union’).

⁸ R.L. Muse, ‘A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)’ (1996–97) 30 *Geo. Wash. J Int’l L and Econ.* 207 at 241–2; A. Bianchi, ‘Extraterritoriality and Export Controls: Some Remarks on the Alleged Antinomy Between European and U.S. Approaches’ (1992) 35 *GYIL* 366.

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the state does not extradite him (the *aut dedere aut judicare* clause).⁹ In the field of international human rights law, the concept of jurisdiction has similarly acquired an obligatory dimension, in that states that are contracting parties to human rights treaties are *required* to secure the rights to individuals falling within their jurisdiction,¹⁰ even if these individuals find themselves outside their territory.¹¹

2.2 FORMS OF JURISDICTION: PRESCRIPTIVE, ENFORCEMENT, ADJUDICATORY AND FUNCTIONAL

In the law of jurisdiction, most attention has been devoted to ‘prescriptive’ or ‘legislative’ jurisdiction. Such jurisdiction refers to the power of a state ‘to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by

⁹ See, for example, Article 4(b) of the Convention on Offences Committed on Board Aircraft, Tokyo, 14 September 1963, 220 UNTS 10106; Article 6(2)(b) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, 10 March 1988, 222 UNTS 29004; Article 5(1)(c) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1465 UNTS 85. See also ICJ, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, paras 92–5.

¹⁰ See, for example, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966; Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950.

¹¹ Courts have indeed held that states have extra-territorial human rights obligations towards individuals who find themselves within the states’ power or control, see *Al-Skeini and others v United Kingdom*, Application No. 55721/07, ECtHR, Judgment of 7 July 2011, para. 135; *Banković and others v Belgium and others*, Application No. 52207/99, ECtHR, Judgment of 12 December 2001, para. 71; *Loizidou v Turkey*, Application No. 15318/89, Preliminary Objections, ECtHR, Judgment of 23 March 1995, para. 62. See on state agent control: *Ilascu and others v Moldova and Russia*, Application No. 48787/99, ECtHR, Judgment of 8 July 2004, paras 392–4; *Khavara and others v Italy and Albania*, Application No. 39473/98, ECtHR, Judgment of 11 January 2001; *Medvedyev v France*, Application No. 3394/03, ECtHR, Judgment of 10 July 2008, para. 50, and Grand Chamber, Judgment of 29 March 2010, paras 62–7; *Öcalan v Turkey*, Application No. 46221/99, ECtHR, Judgment of 12 May 2005, para. 91.

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determination by a court'.¹² Under the principle espoused by the Permanent Court of International Justice in the 1927 *Lotus* case, states are in principle free to exercise prescriptive jurisdiction over a given situation as they please, unless a prohibitive rule to the contrary could be identified.¹³ After *Lotus*, however, starting with the Harvard Research on International Law's 'Draft Convention on Jurisdiction with respect to Crime',¹⁴ it appears that the international community has embraced a more restrictive approach, by requiring that the asserting state rely on a permissive principle for the exercise of jurisdiction to be lawful.¹⁵ In this chapter, we will primarily focus on prescriptive jurisdiction, although in this section the related forms of jurisdiction known as 'enforcement', 'adjudicatory' and 'functional' jurisdiction will be clarified.

The most uncontested permissive principle of prescriptive jurisdiction, in light of the Westphalian underpinnings of the law of jurisdiction, may appear to be the territoriality principle. Pursuant to this principle, acts carried out in a state's territory fall within that state's jurisdiction. On closer inspection, however, territoriality is not as simple in application as it might seem, as crimes or other acts over which a state may desire to exercise jurisdiction may straddle borders: the act may be initiated in one state ('subjective territoriality'), but be completed, or cause effects in another ('objective territoriality'). The criminal law's classic approach to dealing with transboundary crime is to allow the exercise of jurisdiction by a state as soon as one of the constitutive elements of the crime has taken place in its territory.¹⁶ This may seem to be straightforward enough, but where crime has become de-territorialized, such as in

¹² Restatement (Third) of US Foreign Relations Law, s. 401(a).

¹³ *SS Lotus* (1927) PCIJ Reports, Series A, No. 10, 18–19.

¹⁴ Harvard Research on International Law, 'Draft Convention on Jurisdiction with respect to Crime' (1935) 29 *Am. J Int'l L* 439.

¹⁵ C.A. Bradley, 'Universal Jurisdiction and U.S. Law' (2001) *U Chi. Legal F* 323 (characterizing this as 'the conventional view'); also *Arrest Warrant (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep. 3, Separate Opinion of Guillaume, para. 4 ('Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.').

¹⁶ What constitutes a constitutive element of a crime is essentially a matter of domestic law. See at length C. Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 *Int'l Crim. L Rev.* 187.

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cyberspace, the use of the constitutive elements-based territoriality principle becomes particularly challenging.¹⁷ Territoriality has also been relied on outside the criminal law, notably in competition law, where objective territoriality came to be known as the ‘effects doctrine’.¹⁸ The requirements of the territoriality principle have also been considered to be met where foreign airlines were obliged to surrender emissions allowances in respect of non-territorial air mileage on the ground that the relevant aircraft departed from, or landed at a territorial airport.¹⁹ These liberal interpretations of territoriality in economic and environmental law

¹⁷ Under the territoriality principle as applied to cybercrime, the odds of there being more than one *locus delicti* are high (criminal content may be accessed in multiple jurisdictions), and accordingly, the risk of jurisdictional conflict looms large. This is further compounded by the fact that cybercrime is rarely a single crime, but rather a conglomerate of criminal acts that are all more or less related to each other. In addition, as long as cybercrime is underregulated, the exercise of Internet jurisdiction may possibly raise *human rights* rather than jurisdictional concerns: individuals may not have expected to be subjected to foreign legislation and law enforcement, especially when they have not specifically *directed* content at users located in the foreign state, and when the production of such content was lawful under the law of their home state (see A Klip, ‘International Criminal Law Information Society and Penal Law General Report’ (2014) 85 *Revue Internationale de Droit Pénal* 381). Indeed, a person cannot be expected to know the laws of all states, and it does not appear as acceptable that in practice he will be subjected to the strictest applicable law, or will have to modify the content he offers depending on the place where it is downloaded. See in this regard P.S. Berman, ‘A Pluralist Approach to International Law’ (2007) 32 *Yale J Int’l L* 301 at 317 (submitting that ‘though geographical tracking software might seem to solve the problem by allowing websites to offer different content to different users, such a solution is probably illusory, because it would still require the sites to analyze the laws of all jurisdictions to determine what material to filter for which users’).

¹⁸ In US antitrust law, this ‘effects doctrine’ has been accepted as early as 1945, see *United States v Aluminium Corp. of America*, 148 F.2d 416 (2d Cir. 1945). The EU (then EC) followed suit in 1988, when the European Court of Justice adopted the ‘implementation doctrine’ in competition law, pursuant to which foreign anticompetitive practices that are implemented in the EU, notably through direct sales, are subject to EU territorial jurisdiction. See Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 A. *Ahlstrom Osakeyhtio v Commission* [1988] ECR 5193 (‘Wood Pulp’).

¹⁹ See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3, upheld in C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change (ATA)*, Judgment of 21 December 2011 [2012] OJ C49/7, 18 February 2012.

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have given rise to substantial international tension. Foreign nations adopted 'blocking laws' to prohibit their corporations from complying with discovery requests concerning alleged 'extra-territorial' anti-competitive acts,²⁰ and threatened with legal action at the World Trade Organization.²¹

Apart from territoriality, the law of prescriptive jurisdiction features a number of principles that allow states to exercise jurisdiction on an extra-territorial basis, especially in the criminal law. These principles are usually premised on a link with the asserting state, notably nationality (the active and passive personality principles, which tie jurisdiction to the nationality of the perpetrator or respectively the victim), or political independence (the protective or security principle). The universality principle, in contrast, premises jurisdiction on the nature (gravity) of the crime rather than on a particular nexus with a state, although in practice universal jurisdiction is often only exercised when the alleged perpetrator is present on the state's territory.²²

Where a state imposes its laws, possibly extra-territorially, logically it also wants to have these laws enforced. *Enforcement jurisdiction* then refers to a state's jurisdiction 'to enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action'.²³ The rules of enforcement jurisdiction are far stricter than the rules of prescriptive jurisdiction. As the Court held in the *Lotus* case, states are not entitled to enforce their laws outside their territory, 'except by virtue of a permissive rule derived from international custom or from

²⁰ See K.A. Knapp, 'Enforcement of U.S. Electronic Discovery Law against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?' (2010) 10 *Rich. J Global L and Bus.* 113 at 123.

²¹ Note that the World Trade Organization's dispute settlement mechanism has been reluctant to support territorial extension-based unilateral trade measures that purport to regulate conditions in other states. GATT and WTO Panels and the Appellate Body have long attempted to skirt the vexing jurisdictional issue, deciding cases before them narrowly, notably by finding that there was a sufficient nexus between the regulator and the object of regulation. See, for example, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998, where the Appellate Body found that a US import ban on shrimp harvested in ways that killed sea turtles was adequately based on a US nexus, as sea turtles traversed waters subject to US jurisdiction.

²² See on universal criminal jurisdiction L. Reydams, *Universal Jurisdiction* (2003).

²³ Restatement (Third) of US Foreign Relations Law, s. 401(c).

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a convention',²⁴ even where they have jurisdiction to prescribe their laws extra-territorially. Accordingly, enforcement can only happen through territorial measures, for example, by arresting a person who is voluntarily present on the territory, or by seizing property of the defendant located in the territory. Often, international cooperation will be required, for example, to bring about the presence of the presumed perpetrator by means of extradition, or to have a domestic court order enforced against assets located abroad. Such cooperation is not always forthcoming, which explains why states have sometimes resorted to extra-territorial enforcement measures, arguably in violation of international law.²⁵ It is not fully settled yet whether the prohibition of extra-territorial enforcement also applies to technological remote searches on computer networks located abroad.²⁶

The jurisdiction exercised by the judiciary is typically denoted by the terms 'adjudicative' or 'adjudicatory' jurisdiction, which refer to a state's jurisdiction 'to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings'.²⁷ Adjudicative jurisdiction thus refers to the jurisdiction of the courts rather than to the reach of a state's laws, and pertains to the defendant's anticipation of being hauled before the courts of the state in question. As prescriptive and adjudicative jurisdiction do not coincide, states may have legitimate prescriptive jurisdiction over a situation on the basis of a permissive

²⁴ *Lotus*, n. 13 above, 18–19. A general permissive rule of extra-territorial enforcement jurisdiction may possibly be the rule which entitles the parties in an international armed conflict to wage war in the other party's or parties' territory.

²⁵ For example, Adolf Eichmann was kidnapped in Argentina by Israeli secret agents, without the consent of the territorial state, and charged with 'crimes against the Jewish people' and 'crimes against humanity' under the Nazis and Nazi Collaborators (Punishment) Law of 1 August 1950, but such actions have usually met with considerable protest by other states.)

²⁶ Remote searches carried out by a state with respect to information held on websites, computers or servers located outside its territory are not contested where the information is publicly accessible (see Article 32 of the Cybercrime Convention 2001), the territorial state allows such searches, or the information-holder gives its consent. Some states, however, also carry out remote searches on foreign servers without relying on mutual legal assistance, or without seeking the consent of the territorial state (see, for example, Belgian Code of Criminal Procedure, art. 88ter, allowing an investigating judge to order the copying of data located abroad provided that the territorial state is informed). Such action appears to be in tension with the *Lotus*-based prohibition on extra-territorial enforcement jurisdiction.

²⁷ Restatement (Third) of US Foreign Relations Law, s. 401(b).

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principle, but lack adjudicative jurisdiction, for example, because the defendant has no contacts with the state, or because the parties to a private contract have chosen another adjudicative forum. The principles of adjudicatory jurisdiction have been well-developed in the conflict of laws (private international law). In Europe, in civil and commercial matters, adjudicatory jurisdiction is mainly tied to the place of domicile or residence of the defendant.²⁸ The United States, for its part, historically had more liberal rules of adjudicatory jurisdiction. ‘Minimum contacts’ of the defendant with the forum sufficed for a finding of personal jurisdiction,²⁹ and even ‘tag’ jurisdiction, on the basis of the defendant’s transitory presence in the forum, was accepted.³⁰ More recently, however, the US Supreme Court has required that the defendant be essentially ‘at home’ in the forum state,³¹ thereby narrowing the gap with Europe.

‘Functional jurisdiction’, finally, is a term that is mostly used in the law of the sea, where, in essence, it refers to coastal states’ limited jurisdiction over the activities in ‘their’ maritime zones (the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf),³² and, to a limited extent, to any state’s jurisdiction over certain activities on the high seas, such as piracy and the trade in slaves.³³ Such jurisdiction is in the first place geared towards protecting coastal states’ own legitimate interests,³⁴ although exceptionally also towards

²⁸ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

²⁹ *International Shoe Co. v Washington*, 326 U.S. 310, 316 (1945).

³⁰ *Burnham v Superior Court*, 495 U.S. 604 (1990).

³¹ *Goodyear Dunlop Tires Operations v Brown* 131 S. Ct 2846, 2851 (2011) (holding that general jurisdiction exists over foreign corporations ‘when their affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum State’) and at 2856 (adding that ‘continuous activity of some sort within a state ... is not enough to support the demand that the corporation be amenable to suits unrelated to that activity’).

³² See for the detailed legal regimes United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, 10 December 1982.

³³ UNCLOS, Arts 99–107.

³⁴ See, for example, in respect of pollution UNCLOS, Art. 220 (allowing a coastal state, when a vessel is voluntarily within its port, to ‘institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State’).

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protecting common concerns.³⁵ It involves both a prescriptive and an enforcement component, which, however, do not necessarily coincide, for example, the coastal state may adopt laws and regulations relating to innocent passage through the territorial sea in respect of a considerable number of activities,³⁶ but it may only enforce those laws there (whether criminally or civilly) in limited circumstances.³⁷

2.3 PRESUMPTION AGAINST EXTRA-TERRITORIALITY

The international law of jurisdiction is mainly developed through and applied by domestic courts and regulators, with little guidance having been given by international courts. In some jurisdictions, the international law of jurisdiction has played a rather limited role in circumscribing the reach *ratione loci* of domestic laws. This is especially so in the United States, where courts hardly rely on international norms of prescriptive jurisdiction, but rather on the presumption against extra-territoriality. This presumption is a canon of statutory construction pursuant to which Congress normally intends to regulate domestically. It can only be rebutted by a clear Congressional statement to the contrary.³⁸ Like the international law of jurisdiction, the presumption appears to be equally

³⁵ Apart from states' jurisdiction to tackle piracy and the slave trade, also the exercise of port state jurisdiction, in other words, jurisdiction exercised by the state in whose port a foreign-flagged vessel docks, with a view to tackling global governance challenges relating to fisheries, pollution, dumping, and employment conditions may be cited. See, for example, in respect of dumping UNCLOS, Art. 218. See more generally E.J. Molenaar, 'Port State Jurisdiction' (2014) *Max Planck Encyclopedia of Public International Law*, mpepil.com.

³⁶ UNCLOS, Art. 21(1).

³⁷ *Ibid.* Arts 27–28.

³⁸ *Foley Bros, Inc. v Filardo*, 336 U.S. 281, 285 (1949); *De Atucha v Commodity Exchange, Inc.*, 608 F.Supp. 510, 519 (D.C.N.Y. 1985) ('the laws of any jurisdiction apply only to activities within its borders unless there is some indication to the contrary'); *EEOC v Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 251 (1991) ('The intent of Congress as to the extraterritorial application of the statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas'); *Hartford Fire Insurance Co. v California*, 509 U.S. 764, 814 (1993) (Scalia J, dissenting); *Kollias v D & G Marine Maintenance*, 29 F.3d 67, 70 (2d Cir. 1994); *New York Central R.R. v Chisholm*, 268 U.S. 29, 31 (1925) ('Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction'); *Morrison v National*

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geared toward protecting, in the words of the US Supreme Court, ‘against unintended clashes between [US] laws and those of other nations which could result in international discord’.³⁹ In reality, however, the presumption is mainly a matter of judicial deference to the foreign policy prerogatives of the political branches,⁴⁰ as Congress rather than the judiciary ‘is likely to have superior informational and technical expertise on how to make [a] determination’ whether a statute should have extra-territorial application.⁴¹ This implies that the presumption is informed by constitutional law considerations regarding the separation of powers between the judiciary, on the one hand, and the legislature, on the other hand. In practice, the presumption has not been applied very consistently, with US courts sometimes conjuring up Congressional intent where in reality such intent was doubtful. This has made the outcome of particular cases difficult to predict. The doctrine has not failed to criticize this state of affairs, and some authors have advanced an increasing role for international law principles of jurisdiction in determining the reach of US law,⁴² so far to little practical effect, however. In recent years, a rather strict interpretation of the presumption against extra-territoriality has led the US Supreme Court to hold, in *Kiobel*, that the Alien Tort Statute,⁴³ a statute that on its face allows foreigners to file civil claims against other foreigners in US federal court, only applies to cases that ‘touch and concern’ the United States,⁴⁴ and to hold, in

Australia Bank Ltd, 561 U.S. 247, 248 (2010) (‘[w]hen a statute gives no clear indication of an extraterritorial application, it has none’).

³⁹ *EEOC v Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (Congress later overruled the Supreme Court by adopting 42 U.S.C. s. 2000(e) (Supp. V 1993); *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct 1659, 1668–9 (2013) (submitting that recognizing a ‘cause of action for conduct occurring in the territory of another sovereign’, may result in ‘diplomatic strife’).

⁴⁰ See also *Kiobel*, n 39 above, 1664 (warning, in the context of the presumption against extra-territoriality, of the ‘danger of unwarranted judicial interference in the conduct of foreign policy’).

⁴¹ J.G. Ku, ‘*Kiobel* and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute’ (2013) 107 *Am. J Int’l L* 835, 840.

⁴² A.J. Colangelo, ‘A Unified Approach to Extraterritoriality’ (2011) 97 *Va. L Rev.* 1019 at 1108; J.H. Knox, ‘A Presumption Against Extrajurisdictionality’ (2010) 104 *Am. J Int’l L* 351 at 372–3.

⁴³ 28 U.S.C. s. 1350.

⁴⁴ *Kiobel*, n 39 above, 1669 (‘[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application’, and holding that, in the case, the corporate presence of the defendants in the United States did not suffice to displace the presumption).

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Morrison, that the US Exchange Act did not apply to foreign securities fraud where the link with the United States was only tenuous (thereby apparently overruling some long-standing contrary Circuit practice).⁴⁵

2.4 JURISDICTIONAL REASONABLENESS

As can be collected from the overview of permissive principles of prescriptive jurisdiction, states can invoke a variety of jurisdictional grounds to address one and the same situation. Moreover, a multitude of states can potentially claim jurisdiction on the basis of the perceived transboundary effects of just one act. Inevitably, this may give rise to international friction. Unfortunately, international law has not (yet) come up with a rule that could resolve conflicts arising from overlapping, *prima facie* lawful jurisdictional claims. There is no rule giving priority to the ‘most interested’ or ‘affected’ state, although it may appear logical to give the territorial state (given the territorial anchoring of the law of jurisdiction) first right of way.⁴⁶ But even if such a rule were to be accepted, the question arises what state precisely qualifies as the territorial state. In transnational competition law, is it the state where participants entered into the price-fixing cartel, or is it the state where the adverse effects are felt? And what if the cartel is global in nature, involving a number of international participants and causing effects worldwide, such as the worldwide *Vitamins* cartel which led to the

⁴⁵ *Morrison v National Australia Bank*, 561 U.S. 247 (2010). See on earlier (contrary) practice at length G. Schuster, ‘Extraterritoriality of Securities Laws: An Economic Analysis of Jurisdictional Conflicts’ (1994) 26 Law and Pol’y Int’l Bus. 165.

⁴⁶ See arguing pro: for example, F.A. Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 *RCADI* 1 at 90; J.H. Beale, ‘The Jurisdiction of a Sovereign State’ (1923) 36 *Harv. L Rev.* 241 at 252; G. Fitzmaurice, ‘The General Principles of International Law’ (1957-II) 92 *RCADI* 1 at 212; A.V. Lowe, ‘Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980’ (1981) 75 *AJIL* 257; G.R. Watson, ‘The Passive Personality Principle’ (1993) 28 *Tex. Int’l LJ* 1 at 17; *Bankovic and others v Belgium and 16 Other Contracting States*, Application No. 52207/99, ECtHR, 12 December 2001, para. 60 (‘[A] State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence’); *Laker Airways Ltd v Sabena*, 731 F.2d 909, 935–6 (D.C. Cir. 1984) (‘The purported principle of paramount nationality is entirely unknown in national and international law. Territoriality, not nationality, is the customary and preferred base of jurisdiction’).

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Empagran litigation in US courts?⁴⁷ Similarly, as regards Internet activity, a panoply of states could claim territorial contacts and thus jurisdiction, for example, on the basis of where the server is located, where the content is viewed, where the content is uploaded, where the content is deliberately directed to, where effects are felt, etc.⁴⁸

In light of the potential for overlapping and possibly clashing jurisdictional assertions, a meta-rule of jurisdictional restraint or reasonableness may seem to be appropriate.⁴⁹ The drafters of the influential section 403 of the Restatement (Third) of US Foreign Relations Law (1987) have even taken the view that use of the jurisdictional ‘rule of reason’ is required by international law. This rule of reason implies that, while a jurisdictional assertion based on one of the permissive principles is presumptively valid, it will only be lawful if it is exercised *reasonably*, i.e., after state courts and regulators have balanced the different interests involved in a transnational situation before establishing their jurisdiction, and (quite probably) applying their own law.⁵⁰ Ultimately, the rule of

⁴⁷ In *E. Hoffmann-La Roche, Ltd v Empagran S.A.*, 124 S. Ct. 2359 (2004), several companies that were purchasing and reselling vitamins sued several vitamin manufacturers for illegal attempts to raise prices, both within the United States and in foreign countries. The manufacturers asked the district judge to dismiss several of the vitamin purchasers from the case because they only did business in other countries and, the manufacturers argued, could therefore not bring claims under the US Foreign Trade Antitrust Improvements Act of 1982 (FTAIA/Sherman Act). The purchasers countered that the foreign price-fixing attempts were linked to the domestic attempts and could therefore be heard under the exception to the FTAIA. The Supreme Court unanimously ruled that where anticompetitive behaviour, such as a price-fixing agreement, ‘significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect’, plaintiffs who allege that they have been injured by the ‘foreign effect’ cannot invoke the jurisdiction of US antitrust laws or courts.

⁴⁸ P.S. Berman, ‘Globalization of Jurisdiction’ (2002) 151 *U Pa. L Rev.* 311 at 447–58 (identifying eight possible tests).

⁴⁹ H.G. Maier, ‘Jurisdictional Rules in Customary International Law’ in K.M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (1996), pp. 64, 69 (arguing in favour of ‘an accommodation process operating outside the limits of formal international law ... described by the principle of international comity’); A. Bianchi, ‘Reply to Professor Maier’ in *ibid.* 74, 84 (arguing that solutions are developed ‘by resorting to an equitable balance of equally legitimate claims’).

⁵⁰ The rule of reason has its roots in the US antitrust case law of the 1970s, which cushioned the unrestrained application of the effects doctrine. See *Timberlane Lumber Co. v. Bank of America, NT and SA*, 549 F.2d 597, 605–8

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reason aims at identifying the state with the strongest connection, in terms of contacts or interests, with the situation. While the rule of reason has been hailed as a ‘shift from a focus on power to a focus on interests’ as regards extra-territorial jurisdiction,⁵¹ in practice, a rule of reason is difficult to objectively apply. Not only may reasonableness be in the eye of the beholder, and accordingly give rise to pro-forum bias, one may also wonder whether non-elected judges and administrative authorities are well-placed to conduct an interest-balancing test that involves considerations of political economy and may impinge on the political branches’ prerogative to conduct foreign relations.

Given the political sensitivities of the rule of reason, applying a presumption that the political branches do not normally regulate extra-territorially, unless they have evinced a clear intent to do so, may appear to be the more attractive option. Nevertheless, as indicated above, the application of the presumption has been beset by problems as well, with some courts guessing what the intent of the legislature could have been in the absence of clear guidance in the statute’s *travaux préparatoires*. Moreover, the presumption only applies to the judiciary. It does not solve jurisdictional conflicts where the political branches *did* intend to have a statute applied extra-territorially, irrespective of the international friction such application could engender.

2.5 HEEDING OTHER STATES’ CONCERNS

Since the propriety of a jurisdictional assertion is determined by the state itself, with little to no international supervision, it is almost inevitable that the exercise of jurisdiction is prone to subjective, and even parochial interpretations. Still, as thanks to the rise of information and communication technology, regulators and courts have increasing contacts with their counterparts in other states through governmental networks,⁵² it

(9th Cir. 1976); *Mannington Mills, Inc. v Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979).

⁵¹ A.-M. Slaughter, ‘Liberal International Relations Theory and International Economic Law’ (1995) 10 *Am. U J Int’l L and Pol’y* 717 at 735–6 (arguing that ‘[f]rom a Liberal perspective, this focus on interests is likely to be more fruitful than a straightforward assertion of power at resolving the underlying conflict’, while emphasizing the need to untie the rule of reason from territory and physical power).

⁵² On government networks in particular A.M. Slaughter, ‘Governing the Global Economy through Government Networks’ in M. Byers (ed.), *The Role of Law in International Politics* (2000), p. 177.

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may not be wishful thinking to submit that the emergence of this ‘global administrative space’⁵³ may result in greater understanding of all affected states’ legitimate concerns. In the field of antitrust law, the institutionalized contacts and dialogues, setting out duties of consultation,⁵⁴ information-sharing, positive comity⁵⁵ and conditional reciprocity⁵⁶ between transatlantic regulators, have surely contributed to the decrease of regulatory conflicts, although the substantive convergence of antitrust laws may also be an explanatory factor.

Where procedurally possible, states may also wish to file *amicus curiae* briefs with foreign courts to have their jurisdictional views heard. While exact causality cannot be established, these views may well influence the final determination made by the court hearing a transnational dispute. In the *Vitamins* litigation (2004), for instance, the US

⁵³ N. Krisch and B. Kingsbury, ‘Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17 *Eur. J Int’l L* 1 (defining a ‘global administrative space’ as ‘a space in which the strict dichotomy between domestic and international levels has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms’).

⁵⁴ See, for example, OECD, Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, C(95)130/FINAL (27 July 1995), para. 5(a) (‘A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned.’).

⁵⁵ Article 6 of the 1998 Comity Agreement between the United States and the European Union. Whereas negative comity refers to the regulating state refraining from exercising jurisdiction because another state’s interests may be more important (in other words, the traditional comity concept of jurisdictional restraint), positive comity refers to the competition authorities of a requesting party ‘requesting the competition authorities of a requested party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the requested party’s competition laws’.

⁵⁶ Cf. the exemptions from the Sarbanes-Oxley Act granted by the SEC and the PCAOB, and the exemptions to be granted under the EC Statutory Audit Directive. Commonality (full harmonization) in the field of capital markets law has actually been deemed illusory by one of its main advocates, who instead believed that only reciprocity would be feasible. H. Kronke, ‘Capital Markets and Conflict of Laws’ (2000) 286 *RCADI* 245 at 378.

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Supreme Court averred that it is to be assumed that the US Congress takes ‘the legitimate sovereign interests of other nations into account’⁵⁷ when assessing the reach of US law, and avoids extending this reach when this would create a ‘serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs’.⁵⁸ Apparently influenced by a number of *amicus curiae* briefs filed by foreign governments, the Court went on to decline jurisdiction over an antitrust claim alleging separable foreign harm. This is a far cry from the *Hartford Fire Insurance* case (1993), in which the same court had held that foreign policies and laws should not be heeded by US courts when giving extra-territorial application to US antitrust law, unless the foreign state compelled conduct which US law prohibited (or *vice versa*).⁵⁹

Similarly, in the *Kiobel* litigation (2013), the US Supreme Court, while formally relying on the Congressional presumption against extra-territoriality, may well have been influenced by the *amicus* briefs filed by the European Commission and a number of foreign states, when holding that the Alien Tort Statute was not meant to apply to ‘foreign-cubed’ claims (claims filed by a foreign plaintiff against a foreign defendant for acts committed abroad) which do not ‘touch and concern’ the United States.⁶⁰ Indeed, the Commission, while not casting doubt on the legality of the exercise of universal tort jurisdiction as such, had reminded the

⁵⁷ *F. Hoffman-La Roche Ltd and others v Empagran S.A. and others*, 124 S. Ct. 2359, 2366 (2004).

⁵⁸ *Ibid.* 2367. Subsequent courts have accordingly held that US antitrust law does not reach antitrust claims for several harms caused by wholly foreign transactions. See notably *Empagran v F. Hoffmann-La Roche*, 417 F.3d 1267, 1270–1 (D.C. Cir. 2005); *In re DRAM Antitrust Litigation*, 546 F.3d 981 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535, 538 (8th Cir. 2007).

⁵⁹ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993). Holding otherwise might amount to breaching public international law restraints on the exercise of jurisdiction.

⁶⁰ *Kiobel*, n. 39 above, 1669 (‘[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application’, and holding that, in the case, the corporate presence of the defendants in the United States did not suffice to displace the presumption). Note that the US government did *not* argue in favour of applying the presumption to the Alien Tort Statute. See Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance, at 19–20, *Kiobel*, n. 39 above, (No. 10-1491), 19–20, available at www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_affirmance.amcuusa.authcheckdam.pdf.

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Court to exercise this jurisdiction reasonably.⁶¹ And in a more strongly worded brief, the United Kingdom and the Netherlands argued that the exercise of universal civil jurisdiction risks trampling on a foreign nation's prerogative to 'regulate its own commercial affairs',⁶² and could adversely affect 'much needed direct foreign investment' in host countries.⁶³

2.6 SUBSIDIARITY IN THE LAW OF JURISDICTION

In a variation on the jurisdictional rule of reason, it is suggested here that states, after hearing the views of other states, and arguably also foreign persons and businesses potentially subject to extra-territorial regulation, should refrain from exercising jurisdiction when another state is, in light of its contacts with the situation, better placed to bring its laws to bear, *unless* the latter state's failure to do so harms the *global interest*, and multilateral regulation and supervision are absent. In that case, it is advisable that a 'bystander' state, i.e., a state with a more tenuous nexus, could, and perhaps even should exercise *subsidiary* jurisdiction as a sort of 'trustee of mankind'.

⁶¹ Supplemental Brief of the European Commission on behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel*, n. 39 above, (No. 10-1491), 33, available at [www.sdshlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20\(Revised\).pdf](http://www.sdshlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20(Revised).pdf). ('[The] internationally recognized justifications for universal jurisdiction, although typically articulated in a criminal context, also contemplate and support a civil component where limited, as here, to the circumstances that would give rise to universal criminal jurisdiction') and at 22 (stating that, 'as far as the European Commission is aware, not a single State appears to have objected to the United States' exercise of jurisdiction over the extraterritorial ATS claim brought in *Filartiga* [the seminal ATS case], by an alien against an alien, for the universally condemned crime of official torture, which has occurred in a foreign country'). At 26 *et seq.*, the brief addresses the substantive and procedural limitations imposed by international law on the exercise of universal civil jurisdiction.

⁶² Supplemental Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, *Kiobel*, n. 39 above, (No. 10-1491), 31, available at www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf.

⁶³ *Ibid.* 26.

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This dynamic of subsidiarity is already at work in discrete fields of the law. In the field of international crimes, for instance, subsidiarity has been modelled on the International Criminal Court's complementarity principle, by virtue of which the ICC and *mutatis mutandis* bystander states can exercise jurisdiction if the state with the stronger connection (normally the territorial state or the state of nationality) fails to genuinely investigate or prosecute the case.⁶⁴ Prosecutorial application of subsidiarity is required by law in Belgium,⁶⁵ Spain⁶⁶ and Switzerland.⁶⁷ Subsidiarity is applied as a prudential doctrine by courts in Austria,⁶⁸ and as guiding the exercise of prosecutorial discretion in Germany,⁶⁹ the United

⁶⁴ See Rome Statute of the International Criminal Court, Art. 17. *In extenso* C. Ryngaert, 'Applying the Rome Statute's Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle' (2008) *Criminal Law Forum* 153.

⁶⁵ Article 12*bis* of the Preliminary Title of the Belgian Code of Criminal Procedure (PTCCP) requires, *inter alia*, that the Belgian federal prosecutor inquire as to the quality of the proceedings that could be brought in an alternative jurisdiction.

⁶⁶ Fundamental Law of the Judiciary, art. 23(4) (requiring that Spanish prosecutors inquire whether no proceedings have been initiated in another competent country, leading to an investigation and effective prosecution of the offence). See for applications A.N. Madrid, Sala de lo Penal, Apelacio no. 31/2009, Auto, No. 1/09, 9 July 2009 (dismissing a case brought against seven Israeli officials allegedly involved in the killing of Hamas commander Shehadeh); J.C.I. No. 6, A.N. Madrid, Diligencias previas 134/2009, Auto, 4 May 2009 (judge deciding to send an international rogatory commission to the United States in a case brought against six former Bush administration officials in respect of abuses committed in Guantánamo, with a view to informing his application of the subsidiarity principle). See on the former case also S. Weill, 'The Targeted Killing of Salah Shehadeh from Gaza to Madrid' (2009) 7 *J Int'l Crim. Just.* 617, and on the latter case K. Ambos, 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" be Held Criminally Responsible on the Basis of Universal Jurisdiction?' (2009) 42 *Case Western Re. J Int'l L* 405.

⁶⁷ Amended Criminal Code, art. 264m(2)(a) (providing that a case can be dismissed where an authority of another state is investigating and/or prosecuting the alleged crime(s) and where the suspect can be extradited to such authority).

⁶⁸ Oberster Gerichtshof (OGH) [Supreme Court] 13 July 1994, No. 150s99/94, affirmed; Landesgericht Salzburg (LG Salzburg) [trial court] 31 May 1995, No. 150s99/94.

⁶⁹ Decision of the Federal Prosecutor of Germany, 2 October 2005, JZ 311.

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Kingdom,⁷⁰ Denmark,⁷¹ Norway⁷² and Sweden.⁷³ While it is too early to state that the application of the subsidiarity principle is required by (international) law, it clearly serves as a restraining device, allowing for the exercise of jurisdiction only where the most interested state unduly fails to live up to its responsibilities. Also, in transnational tort litigation regarding gross human rights violations, subsidiarity, through a variety of domestic tort techniques, such as the exhaustion of local remedies requirement,⁷⁴ or *forum non conveniens*,⁷⁵ has come to play an important

⁷⁰ It has been reported by the Crown Prosecution Service (CPS) ‘that there is a clear preference within the CPS for prosecutions in the territorial state’, for example with respect to Rwandan genocide suspects, and that ‘[a]ccordingly, the CPS seeks to ensure the extradition to Rwanda of genocide suspects currently residing in the UK, despite jurisdiction over the genocide’. Crown Prosecution Service, Response to FIDH/REDRESS questionnaire, n. 1307; REDRESS/FIDH, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union* (December 2010), p. 262, n. 1307, referring to Correspondence on file with REDRESS. In a note submitted to the United Nations, the United Kingdom acknowledged that restraints may be called for in the view of competing jurisdictional claims with respect to atrocity cases. See United Kingdom of Great Britain and Northern Ireland, ‘Scope and Application of the Principle of Universal Jurisdiction’, Note submitted to the Office of Legal Affairs pursuant to UN General Assembly Resolution 65/33 of 6 December 2010 (15 April 2011).

⁷¹ REDRESS/FIDH, n. 70 above (Danish Ministry of Justice stating that ‘[i]n cases of concurrent jurisdiction, the legitimate interest of Denmark in exercising jurisdiction may be balanced against the interest of other states in retaining (exclusive) jurisdiction on the basis of Section 12 of the Criminal Code’).

⁷² Submission by the Permanent Mission of Norway to the United Nations on the issue of Universal Jurisdiction, 7 May 2009, p. 5, available at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Norway.pdf (stating that a Norwegian prosecutor, when exercising universal jurisdiction, is required to assess whether the alternative jurisdiction has a ‘properly functioning legal system’).

⁷³ REDRESS/FIDH, n. 70 above, 246, n. 1225, referring to FIDH/REDRESS, MoJ/MFA Questionnaire (‘The ability or willingness of the state where the alleged crimes were committed to investigate and prosecute the crimes is taken into account in the practical handling of a case’).

⁷⁴ *Sarei v Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated*, 133 S. Ct. 1995 (2013); *Sarei v Rio Tinto, PLC*, 550 F.3d 822, 825–6 (9th Cir. 2008) (en banc); Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (12 March 1992), s. 2(b) (‘A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred’).

⁷⁵ See *Spiliada Maritime Corp. v. Cansulex Ltd* [1987] AC 460, HL; *Connelly v RTZ Corp.* [1998] 1 AC 854, HL; *Lubbe v Cape PLC* [2000] 4 All ER

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restraining role. Exceptionally, considerations of subsidiarity may also *expand* rather than restrain the jurisdictional basis for transnational tort litigation, notably where ‘forum of necessity’-based techniques allow states to affirmatively exercise jurisdiction when justice so demands, especially when the victim does not have reasonable access to another (territorial) forum, and the alleged violations are of sufficient gravity.⁷⁶

In economic law, especially antitrust law, the jurisdictional subsidiarity principle appears to have taken the form of an economic principle that allows for the exercise of extra-territorial jurisdiction when such would increase global welfare, in the face of inaction of states with stronger links, for example, states condoning or even encouraging export cartels or corrupt practices.⁷⁷ Such an approach suggests that the international community has a shared interest in efficient and fair economic regulation – an approach which, given the wide discrepancies of national economic laws, may be open to criticism.⁷⁸ Before the US Supreme Court, the

268, HL; *Bil'in (Village Council) v Green Park Int'l Inc.*, No. 500-17-044030-0, Can. Montreal Sup. Ct, 7 July 2008, paras 326–7 (holding that the plaintiffs engaged in ‘inappropriate forum’ shopping and chose a Québec forum to ‘avoid ... the necessity... of proving [their case in Israel]... thus ensuring for themselves a juridical advantage based on a merely superficial connection of the Action with Québec’); *Bil'in (Village Council) v Green Park Int'l Inc.* [2010] CA 1455, Can. Que., para. 86 (observing that ‘[i]t requires a great deal of imagination to claim that the action has a serious connection with Québec’).

⁷⁶ The European Commission’s *amicus* brief in *Kiobel* indicates that at least ten EU Member States can exercise such jurisdiction. Supplemental Brief of the European Commission on behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel*, n. 39 above, (No. 10-1491), 24, n. 66; *El-Hojouj v Unnamed Libyan Officials*, Case No. 400882/HAZA11-2252 (ECLI:NL:RBSGR:2012:BV9748) (Neth.), Arrondissementsrechtbank Den Haag [District Court of The Hague], 21 March 2012 (applicant claimed to have suffered damages following unlawful imprisonment in Libya for allegedly infecting children with HIV/AIDS); *Anvil Mining Ltd v Canadian Ass'n Against Impunity* [2012] CA 117, Can. Que., paras 96–103.

⁷⁷ As Guzman has observed, this law and economics method searches for rules that ‘permit transactions to take place when the total impact on welfare is positive, and prevent transactions from taking place when the total impact on welfare is negative’. A.T. Guzman, ‘Choice of Law: New Foundations’ (2002) 90 *Geo. LJ* 883 at 896. Condoning export cartels may increase the welfare of the territorial state or certain segments of the territorial state, but will normally decrease overall welfare.

⁷⁸ See in favour, and rather convincingly, H.L. Buxbaum, ‘National Jurisdiction and Global Business Networks’ (2010) 17 *Ind. J Global Legal Stud.* 165 (‘[I]s it always a pretense to suggest that we have a shared community of policy, interest and value, particularly in the area of economic regulation? In a world in

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jurisdictional law and economics argument has possibly most strongly been made by leading economists Joseph Stiglitz and Peter Orszag in their *amicus* brief in the aforementioned *Vitamins (Empagran)* litigation, where they set out to convince the Court to take account of global deterrence arguments in US antitrust litigation, and thus to provide a remedy for antitrust harm suffered in foreign transactions.⁷⁹ The Court rejected this argument, however, declining to exercise jurisdiction over separate foreign antitrust harm, on the ground that the non-economic principle of non-intervention in the affairs of foreign states carried more weight.⁸⁰ This reasoning left foreign plaintiffs in the cold, as they could not recover their damages anywhere, their local courts being inaccessible.⁸¹ From a global efficiency and fairness perspective, this outcome may not be satisfactory. But then, economic fairness is just one jurisdictional parameter, sovereignty and legitimate expectations are others. The Supreme Court's judgment bears testimony to the abiding relevance of territoriality, the limited jurisdictional power flowing from it, and states' reluctance to use their administrative resources to address problems that are ultimately not theirs. The US Supreme Court's judgments in *Kiobel* and *Morrison* have to be seen in the same light: it is not the duty of the United States, as a 'city upon a hill', to stamp out the 'universal evil' of securities fraud,⁸² or to be the '*custos morum* of the whole world',⁸³

which the ongoing incidence of securities fraud is seen to jeopardize the value of billions of dollars in pension funds, in which the activities of price-fixing cartels not only harm consumers worldwide but threaten the economic growth of developing countries. In which national laws, self-regulation and nonbinding codes combined are still perceived as inadequate to stem the misconduct of multinational enterprises?').

⁷⁹ Brief of *Amici Curiae* Economists J.E. Stiglitz and P.R. Orszag in Support of Respondents, *F. Hoffmann-LaRoche Ltd v Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724).

⁸⁰ *F. Hoffmann-LaRoche Ltd v Empagran S.A.*, 542 U.S. 155, 159–65 (2004); Buxbaum, n. 78 above, 175 ('[T]he court retreated into its "natural" space of engagement. It did not really engage the substance of the plaintiffs' argument regarding global under-deterrence').

⁸¹ R. Michaels, 'Global Problems in Domestic Courts' in S. Muller, S. Zouridis, M. Frishman and L. Kistemaker (eds), *The Law of the Future and the Future of the Law* (2011).

⁸² See in this respect J.D. Kelly, 'Let There be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts' (1997) 28 *Law and Pol'y Int'l Bus.* 477 at 491.

⁸³ *Kiobel*, n. 39 above, 1668.

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offering a forum to any victim of human rights violations committed by foreigners against other foreigners.⁸⁴

It is pointed out, however, that where states have already taken the lead to tackle global governance challenges via domestic regulatory measures, they may have an incentive to geographically extend their domestic regulation so as to level the international playing field.⁸⁵ Such territorial extension deprives foreign competitors of the competitive edge they have *vis-à-vis* domestic businesses that results from lax foreign regulation. The long jurisdictional arm of the US Foreign Corrupt Practices Act and its vigorous enforcement, for instance, can be explained by the United States' desire to protect the overseas competitiveness of US firms whose business opportunities could be undermined by the strict anti-corruption rules to which they are subjected under US law, also in their foreign operations.⁸⁶ Along similar lines, the European Union has extended its aviation legislation to foreign airlines so as to protect the business opportunities of EU-based airlines already subject to EU law.⁸⁷ Such legislative extension, however, is not just informed by the desire to protect national or regional trade interests, but also to further global public goods in ways that territorially limited domestic regulation cannot. In climate policy, this phenomenon is known as 'carbon leakage', i.e., an increase in emissions in a state with lax environmental regulation when production moves there because of strict regulation in another state. By

⁸⁴ Note that the US political branches have at times taken this duty upon themselves. See recently, for example, President Obama's authorization to use force to so as to protect the Yazidi religious minority in Iraq from attacks committed by the Islamic State in 2014. On 7 August 2014 the President announced that he authorized two operations in Iraq: targeted airstrikes to protect American personnel, and a humanitarian effort to help save thousands of Iraqi civilians trapped on Mount Sinjar, in order to 'prevent a potential act of genocide'. See White House, Statement by the President, 7 August 2014, available at www.whitehouse.gov/the-press-office/2014/08/07/statement-president.

⁸⁵ See on territorial extension of EU law J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 *Am. J. Comp. L.* 87.

⁸⁶ J. Wouters, C. Ryngaert and A.S. Cloots, 'The International Legal Framework Against Corruption: Achievements and Challenges' (2013) 14 *Melb. J. Int'l L.* 205.

⁸⁷ See Recital 16 in the Preamble to Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3 ('In order to avoid distortions of competition and improve environmental effectiveness, emissions from all flights arriving at and departing from Community aerodromes should be included from 2012').

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the same token, firms incorporated in a state with lax anti-corruption legislation may take the place of firms incorporated in a state with strict legislation, as a result of which corruption overall does not decrease. To counter this phenomenon, states may be inclined to extend their territorial regulation. The cause may be noble and the technique understandable, but such jurisdictional extension may nevertheless be in tension with the classic rules of jurisdiction, which allow for the exercise of universal jurisdiction only for grave international crimes. Still, states may well be able to find some territorial nexus to justify their assertions.⁸⁸ Also the fact that a multilateral solution to address the global governance problem has failed to materialize may increase the legitimacy of the assertion.⁸⁹ Such an assertion then becomes an exercise of subsidiary jurisdiction in the face of a collective action problem.

⁸⁸ As far as climate change legislation is concerned, the EU has found a way around the problem of universality by relying on territorial links constituted by foreign aircraft departing from, or landing at EU airports. See C-366/10 *Air Transport Association of America and others v Secretary of State for Energy and Climate Change (ATA)*, Judgment of 21 December 2011 [2012] OJ C49/7, 18 February 2012, para. 125 (arguing that the extension of the Aviation Directive is in keeping with the public international law principle of territoriality). Accordingly, the Aviation Directive does *not* have universal application, in that it would subject *all* flights to EU law. The United States, for its part, when enforcing its anticorruption legislation (FCPA), has similarly relied on a broad interpretation of territoriality. The FCPA applies to ‘any person’ acting within US territory, notably if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States (FCPA, ss. 78dd-1, 78dd-2, 78dd-3). This provision has allowed the Department of Justice and the Securities and Exchange Commission to bring corruption proceedings against foreign persons whose bribery acts may have had only a tenuous connection with the United States, for example routing payment through US bank accounts or sending an email to a US company (see, for example, *United States v Technip S.A. (Plea Agreement)* (SD Tex, No 4:10-CR-00439, 28 June 2010). The US enforcement agencies could thus bring claims against foreign issuers in respect of the bribery of foreign officials without any nexus with the United States, except their listing of stock on a US exchange (FCPA, s. 78dd-1(g)), and (in respect of foreign bribery) against foreign persons whose stock is not even listed in the United States, on the sole basis that some act furthering bribery has a link with the United States (FCPA, s. 78dd-2(i)).

⁸⁹ See Recital 9 in the Preamble to Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2009] OJ L8/3.

2.7 CONCLUDING OBSERVATIONS

One may be tempted to believe that many jurisdictional problems will lose their salience as soon as transnational or global governance problems are adequately dealt with at a multilateral level, for example, when an international competition law regime is established, or when the International Civil Aviation Organization reaches agreement on aviation emissions caps, thereby obviating the need for unilateral, extra-territorial state action. At a theoretical level, that may well be true. In practice, however, individual states will continue to play the leading role in global governance in the face of the elusiveness of relevant multilateral agreements and centralized institutions.⁹⁰ Even in respect of international crimes, the existing, permanent International Criminal Court can only deal with a small number of atrocity cases.

Accordingly, the unilateral exercise of jurisdiction by states, or regional organizations, will be there to stay, to ‘recast global problems in local terms’ in Buxbaum’s words.⁹¹ One cannot deny that such unilateralism may well lead to abuse by economically and politically powerful states,⁹² who may tend to limit foreign operators’ market access in their own national rather than global interest.⁹³ In addition, it could lead to regulatory chaos where numerous states start to exercise jurisdiction over one and the same situation, thereby increasing transaction costs for transnational operators. Therefore, a rule of reason may be called for, requiring states to defer to other states that have a stronger regulatory

⁹⁰ J.A. Meyer, ‘Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of US Law’ (2010) 95 *Minn. L Rev.* 110 at 123 (observing that ‘nation-state governments will retain for the foreseeable future an essential and primary role in world governance’); G. Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’ (2012) 23 *Eur. J Int’l L* 669 at 675 (noting that ‘we lack legitimate, centralized institutions with general taxing and regulatory powers’).

⁹¹ Buxbaum, n. 78 above, 167 (borrowing the concept of ‘scale’ from political geography as an analytical tool ‘in examining how global economic misconduct is situated before the courts of one particular country’).

⁹² It has been shown that extra-territoriality has been mainly used by the United States, and less frequently by other states, because ‘[t]he size of the U.S. economy and its high (in absolute terms) level of integration into global markets ... give its courts unparalleled enforcement power across numerous issues’ (T. Putnam, ‘Courts Without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere’ (2009) *Int’l Org.* 459 at 483).

⁹³ This is indeed one of the dangers of the territorial extension of economic law. See 2.6 above.

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interest in, or nexus to, the situation. It has been argued in this chapter, however, that such deference should not be unconditional. It should hinge on the ability and willingness of the most interested state to genuinely address the situation in ways that serve the interest of the international community (even if such ways are not exactly those that the extra-territorially regulating state had in mind).⁹⁴ Failure to discharge this burden may legitimately yield to the exercise of subsidiary jurisdiction by bystander states.

⁹⁴ The latter implies that states may want to recognize other states' standards that provide equivalent protection. This process of mutual recognition has been usefully characterized as a mechanism of managing 'hybridity that the movement across territorial borders inevitably creates'. Berman, n. 4 above, 1224.