3 Jurisdiction

Cedric Ryngaert, Harmen van der Wilt, Juan Santos Vara

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I. Introduction

The law of jurisdiction is concerned with the delimitation of states' powers to adopt and enforce their laws regarding situations beyond, or partly beyond, their own borders.

Domestic courts have played a particularly prominent role in the law of jurisdiction. Frequently, they have been requested to review the reach of domestic laws in light of international law; in so doing, they have contributed to the crystallization of norms of customary international law on jurisdiction. In fact, *international* courts have offered only scant guidance as to the law of jurisdiction: the 1927 Permanent Court of International Justice's *Lotus* judgment still stands as an authoritative decision, despite its obvious flaws.[1] By and large, domestic courts have not followed the liberal *Lotus* rule of jurisdiction, pursuant to which any jurisdictional assertion is presumptively lawful, absent evidence of a prohibitive rule to the contrary. Instead, they have tended to apply the Draft Convention on Jurisdiction designed at Harvard in 1935.[2] This convention rejects the *Lotus* approach and only allows the exercise of jurisdiction if the asserting state grounds its jurisdictional assertion on a *permissive* principle of jurisdiction: territoriality, nationality/personality, security, or universality.

The law of jurisdiction has been developed in particular in criminal law and, to a lesser extent, in economic law (antitrust and competition law in particular). Section II discusses a number of recent criminal cases, with a particular focus on the contentious universality principle (which does not require a nexus with the state exercising jurisdiction)—although it starts with two cases that gave an expansive interpretation to the territoriality and personality principles. Section III discusses the reach of states' economic laws, the enforcement of which is often quasi-criminal and thus considered as subject to public international law rules of jurisdiction developed in the field of criminal law.

II. Criminal Jurisdiction

Traditionally, criminal jurisdiction is strongly wedded to the state's territory, because criminal law is an asset of sovereignty. The exercise of extraterritorial jurisdiction easily generates conflicts (p. 78) between states and is therefore suitable for international legal regulation. Universal jurisdiction, which does not require any links between the crime/offender and the forum state, is a particularly sensitive issue. In this survey, case law of the Western European states that have been most active in the realm of universal jurisdiction features prominently.

Al-Shami v Ayalon, Appeal Judgment, No K08/0386 Rechtspraak.nl: BK7374 (translation of BK1478), ILDC 673 (NL 2009), 26 October 2009, Netherlands; The Hague; Court of Appeal

On 16 May 2008, counsel for Al-Shami, a resident of the Occupied Palestinian Territory of Gaza, registered a complaint of torture at the National Public Prosecutor's Office allegedly committed in the period from 31 December 1999 until February 2000 by Ayalon, who at the time was head of Shin Bet, the Israeli Security Agency. Ayalon was present in the Netherlands between 16 and 20 May 2008.

The complaint of 16 May 2008 included evidence of the alleged torture and made reference to state obligations in terms of the Convention Against Torture and Cruel, Inhuman and Degrading Treatment. Al-Shami's counsel requested the public prosecutor to inform her as

soon as possible as to whether a criminal investigation against Ayalon would take place, stressing the urgent nature of the complaint.

The public prosecutor decided not to start criminal proceedings, after which Ayalon had left the country, whereupon Al-Shami lodged a complaint with the Court of Appeal in order to challenge the Prosecutor's decision.

The question to be decided was whether the Netherlands had jurisdiction, following Ayalon's departure from the Netherlands, in respect of the offences allegedly committed by him.

> **11.** The question to be decided by the Court of Appeal is whether the Netherlands now has jurisdiction — following the complainee's departure from the Netherlands — in respect of the offences allegedly committed by him. To answer this question, it may be relevant in certain circumstances to know whether the Netherlands had jurisdiction at the time of the complainee's stay in the Netherlands. […]
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> **12.1** The Court of Appeal cannot determine with sufficient certainty from the information and the accompanying explanatory notes whether the complainee was classified as a suspect at the time of his stay in the Netherlands. Indeed, in view of the submissions and the available data, it may even be doubted whether there was the slightest suspicion against the complainee. Nor is this altered by the documents accompanying the information, which quote statements by the complainee to the effect (in essence) that, generally speaking, he approved of the interrogation methods used by his service.
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> The Court of Appeal considers the classification as a 'verdachte' (suspect) to be of importance since under the Torture Convention (and, by extension, section 2 of the International Crimes Act) there has to be a suspect if jurisdiction is to be established. In the Bouterse judgment the Supreme Court used the term 'vermoedelijke dader', which was evidently based on the English text of the Convention. Articles 5 (2) and 6 (1) of the English text refer to the 'alleged offender' and 'a person alleged to have committed any offence' respectively. The French text of the Convention uses the term 'une personne soupçonnée'.
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> In the opinion of the Court of Appeal this disparity with the English text is of relatively minor importance since article 6 (1) also provides that the custody and other legal measures 'shall be as provided in the law of that State'. The Court of Appeal assumes that custody and other legal measures are possible in the Netherlands only if there is a person who can be treated as the suspect, certainly in cases not involving extradition. In the opinion of the Court of Appeal the terms 'alleged offender' and 'vermoedelijke dader' can to this extent — and in so far as relevant here — be equated with the term 'verdachte' as used in the Dutch translation of the Torture Convention, which corresponds with the French text.(p. 79)
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> Article 6 (1) of the Torture Convention also provides that a State Party should take a suspect into custody or take other legal measures to ensure his presence once it is satisfied, after an examination of information available to it, that the circumstances so warrant. The Court of Appeal considers — to put it mildly — that the possibility cannot by any means be excluded that further investigation was needed if the complainee was to be treated as a suspect, i.e. as someone reasonably suspected of an offence. The Court of Appeal is not aware of any such investigation. The Court of

Appeal therefore doubts whether the complainee was already a suspect and could have been interviewed or arrested as such in the Netherlands. […]

15. In the opinion of the Court of Appeal the Netherlands does not now have jurisdiction over the complainee since the Public Prosecution Service carried out no investigation whatever into the complainee's alleged role or share in the torture of the complainant (and was indeed unable to carry out an investigation given the shortness of the complainee's stay in the Netherlands) and also since the complainee was not arrested at that time and is no longer in the Netherlands. The Court of Appeal also notes here that the wording used in the Convention and the Act is 'is present', not 'was present' or 'has been present'. Nor, by the way, does the Court of Appeal consider it likely that the complainee will return to the Netherlands at some time in the future.

16. The Court of Appeal refers in this connection to the Explanatory Memorandum to the International Crimes Bill, which also used that wording: 'There are good reasons for limiting universal jurisdiction to suspects present in the territory of the state. First, trial in absentia, without any connection with the case […], is generally seen as inappropriate. And, second, trial in absentia can easily give rise to conflicts of jurisdiction […].' The Court of Appeal therefore notes that it was, above all, the wish to prevent trials in absentia (and such a trial would almost certainly have occurred in the present case if proceedings had been instituted by the Public Prosecution Service) which was decisive in the inclusion of a provision in the Act limiting universal jurisdiction to cases in which the person concerned is present in the Netherlands.

17. As regards the expediency of prosecuting the complainee in the Netherlands, the Court of Appeal would observe for the record that, quite apart from the lack of jurisdiction, the further investigation that would be necessary in Israel would not seem possible at first sight since it is unlikely that the Israeli authorities would consent to this.

18. In view of the above, the Court of Appeal considers that it was reasonable for the public prosecutor to decide not to institute criminal proceedings against the complainee after he left the Netherlands.

In this case, the Court of Appeal was confronted with one of the dismal consequences of the familiar construction under international law, requiring the presence of the suspect as a prerequisite for the exercise of universal jurisdiction. The pertinent question was whether jurisdiction would *persist* when the suspect had left the territory of the state. Logic dictates that the court would first inquire whether the Netherlands had ever possessed jurisdiction when the suspect still resided in the Netherlands. However, an affirmative answer was dependent on the question of whether Ayalon could be qualified as a suspect. This line of reasoning—dictated by the UN Convention against Torture itself—inevitably drew the court into a vicious circle. For, in order to exercise jurisdiction, one must have a suspicion. However, to buttress a suspicion, one usually requires criminal jurisdiction, because only in that case can enforcement measures, including the arrest of the suspect, be taken.[3](p. 80)

United States v Ali, Appeal judgment, 718 F3d 929 (DC Cir 2013), No 12-3056, ILDC 2265 (US 2013), 11th June 2013, United States; Court of Appeals (DC Circuit) [DC Cir]

The *CEC Future*, a Danish ship carrying the cargo of a US Corporation, had been captured by Somalian pirates and had been forced to change course and enter Somalia's territorial waters. Ali Mohamed had boarded the ship, had assumed the role of interpreter, and had negotiated with the owners for the release of the ship, its crew, and its cargo. In 2011, US prosecutors had lured Ali into US territory where he was arrested on charges of conspiracy

to commit piracy and aiding and abetting piracy and conspiracy to commit hostage taking and aiding and abetting hostage taking. The intriguing question was whether the US courts could exercise (universal) jurisdiction, now that Ali had not performed his criminal activities on the high seas but in Somalia's territorial waters:

> **20.** Explicit geographical limits—"on the high seas" and "outside the jurisdiction of any state"—govern piratical acts under article 101(a)(i) and (ii). Such language is absent, however, in article 101(c), strongly suggesting a facilitative act need not occur on the high seas so long as its predicate offense has. *Cf. Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)). So far, so good; *Charming Betsy* poses no problems.
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> **21.** Ali endeavors nonetheless to impute a "high seas" requirement to article 101(c) by pointing to UNCLOS article 86, which states, "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State." 1833 U.N.T.S. at 432. Though, at first glance, the language at issue appears generally applicable, there are several problems with Ali's theory that article 86 imposes a strict high seas requirement on all provisions in Part VII. For one thing, Ali's reading would result in numerous redundancies throughout UNCLOS where, as in article 101(a)(i), the term "high seas" is already used, and interpretations resulting in textual surplusage are typically disfavored. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 698 (1995). Similarly, many of the provisions to which article 86 applies explicitly concern conduct outside the high seas. *See, e.g.*, UNCLOS, art. 92(1), 1833 U.N.T.S. at 433 ("A ship may not change its flag during a voyage or while in a port of call . …"); *id.* art. 100, 1833 U.N.T.S. at 436 ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."). Ali's expansive interpretation of article 86 is simply not plausible.
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> **22.** What does article 86 mean, then, if it imposes no high seas requirement on the other articles in Part VII of UNCLOS? After all, "the canon against surplusage merely favors that interpretation which *avoids* surplusage," not the construction substituting one instance of superfluous language for another. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012). We believe it is best understood as definitional, explicating the term "high seas" for that portion of the treaty most directly discussing such issues. Under this interpretation, article 86 mirrors other prefatory provisions in UNCLOS. Part II, for example, concerns "Territorial Sea and Contiguous Zone" and so opens with article 2's explanation of the legal status of a State's territorial sea. 1833 U.N.T.S. at 400. And Part III, covering "Straits Used for International Navigation," begins with article 34's clarification of the legal status of straits used for international navigation. 1833 U.N.T.S. at 410. Drawing guidance from these provisions, article (p. 81) 86 makes the most sense as an introduction to Part VII, which is titled "High Seas," and not as a limit on jurisdictional scope. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)).

In this case, the US court harbours an expansive interpretation of criminal universal jurisdiction in respect of persons who aid and abet the crime of piracy. As long as the predicate offence is committed on the high seas, jurisdiction extends over acts performed by accessories in the territorial waters of another state. The District Court reaches this conclusion by an *a contrario* interpretation of the relevant provision of the UN Convention on the Law of the Seas which is, though bold, acceptable under the Vienna Convention on the Law of Treaties, as the commentator correctly observes.[4] The decision deviates from previous US case law that required both the predicate and the ancillary offence to have been committed on the high seas.

H v Public Prosecutor, Judgment on Merits, Case No 07/10063 (E), Decision No LJN: BG1476, ILDC 1071 (NL 2008), 8th July 2008, Netherlands; Supreme Court [HR]

The defendant, who in the 1980s was a high-ranking Afghan officer in Kabul, had sought asylum in the Netherlands. His application was rejected on the basis of the exclusion clause in Article 1F of the Convention relating to the Status of Refugees, and the matter came to the attention of the public prosecutor. The defendant was charged with co-perpetration of war crimes and torture and with superior responsibility in respect of war crimes.

The Dutch courts—in three instances—had to answer the question of whether the Netherlands was allowed to exercise universal jurisdiction over war crimes committed in a non-international armed conflict.

> **6.1.** The ground of appeal is directed against the rejection of the defence that the Dutch courts have no jurisdiction in respect of the offences in count 3.
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> **6.2.** It should be noted at the outset that since the entry into force of the Convention, acts in breach of article 3 of the Convention have constituted the crime described in section 8 of the Wartime Offences Act and that in such a case […] the Dutch courts are entitled under section 3 (old) of the Wartime Offences Act to exercise what is termed universal jurisdiction.
>
> **6.3.** The defence and the ground of appeal are essentially based on the position that the Dutch courts, which do not have primary jurisdiction in respect of the charges in count 3, also do not have secondary jurisdiction based on the principle of universality in this respect. This position is based on the view that since this concerns an offence committed in an armed conflict which, at the time of the acts of which the defendant is accused (1985–1988), was not of an international character (referred to below as an internal armed conflict) and that at that time there was no — written or unwritten — mandate under international law to create universal jurisdiction with regard to such offences, section 3 (old) of the Wartime Offences Act should not be applied in the absence of such a mandate.
>
> **6.4.** Article 94 of the Constitution provides that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of decisions of international organisations. It is implicit in this provision that the courts should determine whether statutory regulations are in compliance with treaties and decisions of international organisations, but may not test them for compliance with unwritten international law […].(p. 82)
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> **6.5.** In view of the above finding at 6.4, the Court of Appeal was correct to hold that it was not competent to test the jurisdictional provision of section 3 (old) of the Wartimes Offences Act for compliance with unwritten international law.

> **6.6.** Contrary to what was submitted at the appeal hearing and in the ground of appeal, article 8 of the Criminal Code provides no basis for not applying the jurisdiction provision of section 3 (old) of the Wartime Offences Act on these international law grounds. Although article 8 of the Criminal Code does indeed provide that the applicability of the Dutch provisions on jurisdiction is limited by the exceptions recognised in international law, this does not amount – partly as a result of the legislative history of this provision […] – to more than a statutory recognition of immunity from jurisdiction derived from international law.

In this case, defence counsel argued that the establishment and exercise of universal jurisdiction in non-international armed conflicts required an explicit mandate under international law. The Supreme Court—in full agreement with the Court of Appeal—interpreted this defence as a claim to a rule of customary international law, prohibiting states to create universal jurisdiction without such a mandate, and they found that Article 94 of the Dutch Constitution implicitly precluded courts from testing Acts of Parliament against rules of customary international law. An appeal to Article 8 of the Dutch Criminal Code which introduces international law as a check on jurisdictional over-expansion by the back door did not help defence counsel either, as the Supreme Court gave a restrictive interpretation of this provision. It only served to remind states of their international obligations to observe immunities.[5]

KS and PC v RT and RD, Appeal Judgment, Case No P.07.0216.F, ILDC 1118 (BE 2008), 30th May 2007, Belgium; Court of Cassation

Criminal proceedings were brought in Belgium against two foreign nationals, RT and RD, on the basis of a civil party petition by two minors of foreign nationality, KS and PC. KS and PC had been the victims of alleged sexual offences committed outside Belgium by RT and RD. Article 10ter, para 2, of the Preliminary Title of the Code of Criminal Procedure allowed for the exercise of extraterritorial, universal jurisdiction over persons who had committed sexual offences against minors. Article 12(1) of the Preliminary Title provided that prosecution of these persons could only take place when the accused were found in Belgium. The legal issue before the court was whether this implied that the accused had to be present in Belgium at the time criminal proceedings were initiated against them.

> **14** Article 10ter, 2 of the preliminary title of the Code of Criminal Procedure allows the prosecution in Belgium of every person who has allegedly committed, outside the territory of the Kingdom, one of the offences which are provided in articles 372–377 and 409 of the Penal Code against a minor. However, such prosecution will only take place, by virtue of Article 12, 1st part, of the preliminary title, if the accused is found in Belgium.
>
> **15** It is not required that, the suspect being on the territory at the beginning of the prosecution, he still resides there at the moment of the judgement. It suffices, but is also mandatory, that after having committed the crime of which he is suspected, the perpetrator has come to Belgium, even if he has left the territory before the first acts of the procedure have started.
>
> **16** This condition, being linked to the admissibility of public action, must be complied with at the moment on which such action is put in motion. Later presence of the suspect on Belgian territory cannot have the effect of making admissible a prosecution that was not allowed at the moment that it started.

(p. 83) The interesting aspect of this judgment was that universal jurisdiction in Belgium is apparently not restricted to international crimes *stricto sensu*, but applies to sexual offences against minors as well. The Court of Cassation found that the suspect need not be present on Belgian territory at the time of the judgment (corroborated in *FE alias NY v DS*,

ILDC 1117 (BE 2007)). However, the court specified that the presence of the suspect was required at the time of the initiation of criminal proceedings, thus flouting the broader interpretation of the Advocate General Vandermeersch that presence at any moment would suffice.

Niyonteze and Military Prosecutor of the Military Tribunal of First instance 2 v Military Appeals Tribunal 1A, Cassation judgment, ILDC 349 (CH 2001), 27th April 2001, Switzerland; Military Supreme Court

Starting on 3 July 1996, criminal investigations were undertaken in Switzerland against Fulgence Niyonteze, a Rwandan citizen then residing in Geneva as a refugee, for acts allegedly committed in Rwanda during the civil war in 1994.

On 30 April 1999, the Military Tribunal of First Instance found Niyonteze guilty of homicide, instigation of homicide and attempted homicide, as well as of serious violations of international treaty provisions regarding warfare and the protection of persons and goods, and sentenced him to life in prison.

After appellate proceedings, the case reached the Military Supreme Court, where Niyonteze claimed in particular that there was no sufficient link between the acts he was charged with and the conflict in Rwanda and therefore these acts could not be judged as violations of international humanitarian law. For the purpose of the topic under scrutiny, it was relevant that the Military Supreme Court addressed the issue whether Niyonteze could be prosecuted on the charge of serious violations of international humanitarian law allegedly committed in a non-international armed conflict.[6]

> **3.c)** […] Nor is there any doubt that a foreign perpetrator of violations of the laws on war, who acted against foreign persons within the context of a non-international conflict in a foreign territory, can be prosecuted under the Swiss jurisdiction under Article 109 CPM, as ordinary Swiss criminal law does not contain comparable legislation. This extension of the territorial application of the criminal law in Switzerland is a consequence of Article 2(9) CPM, which determines that “civilians (to be understood as persons not subject to military service in Switzerland) are subject to the military criminal code if, during an armed conflict, they are found guilty of offences under the law (Articles 108 to 114)”; this standard must be applied in conjunction with Article 9 CPM, which states that the CPM is applicable “to offences committed in Switzerland, and those committed abroad” […]. The Military Tribunals are competent, since Article 218 CPM provides that any person to whom military law is applicable is subject to the military tribunals (paragraph 1), including when the offence was committed abroad (paragraph 2). […]
>
> **d)** Moreover it was not in dispute in the exchanges between the parties that in Rwanda, during the months of April to July 1994, a non international armed conflict within the meaning of Common Article 3 took place in the territory of that country involving the government army (the Rwandan Armed Forces — FPR). This conflict also falls under the definition of Article 1 of Protocol II. The Court of Appeal arrived at this conclusion by referring to the case law of the International Criminal Tribunal for Rwanda (or the International Criminal Tribunal for the Prosecution of Persons Responsible for (p. 84) Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994; hereafter ICTR). Indeed in decisions of its trial chambers where the issue had to be resolved, the ICTR has accepted that the events or massacres of the population in Rwanda

> between April and July 1994 fell within the context of an internal armed conflict covered by Common Article 3 and Protocol II […]

Like their Dutch colleagues in the cases against Afghan asylum-seekers,[7] the Swiss (military) courts took for granted that their domestic law provided for universal jurisdiction in respect of suspects of war crimes committed in a non-international armed conflict. However, unlike the Dutch courts, the Swiss Military Court did not explicitly predicate this jurisdictional authority on Common Article 3 of the Geneva Conventions.

The commentators suggested that customary international law could be invoked as an adequate source for this position: 'Although the concept of grave breaches does not extend to armed conflicts not of an international character and hence does not apply to violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II, one can argue that customary international law requires, or at least allows, states to exercise universal jurisdiction also in regard to serious violations of the law applicable to non-international armed conflicts'.[8]

Jorgic Case, J (a bosnian Serb), Individual Constitutional Complaint, 2 BvR 1290/99, ILDC 132 (DE 2000), 12th December 2000, Germany; Constitutional Court [BVerfG]

In the *Jorgic* case, the complaint, lodged at the Constitutional Court, concerned the conviction by a German court of a Bosnian Serb—Jorgic—for various crimes, including genocide, committed during a Serbian ethnic-cleansing campaign in the newly independent Bosnia and Herzegovina in 1992. Before the Constitutional Court, Jorgic argued that certain constitutional rights under the Basic Law had been violated, which also applied to foreign nationals. Among other things, he claimed that the lower courts had overstepped constitutional boundaries by applying the principle of universality to the allegations against him.

> **37 6.** The challenged decisions do not violate the constitution by assuming the applicability of German criminal law pursuant to § 6 Number 1 of the German Criminal Code in conjunction with Article VI of the Genocide Convention, to the charged actions of the complainant. […]
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> **38 a)** Out of respect for the prohibition on interference with state sovereignty that is anchored in customary and treaty law (Article 2, Number 1 of the UN Charter), the Federal Constitutional Court has required some sensible nexus with Germany when subjecting acts to German law that have occurred in a foreign territory and therefore outside the German territory […]. What constitutes a sensible nexus is dependent on the particular nature of the subject of regulation. […]
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> […] For criminal law, the principle of universal or world jurisdiction constitutes such a sensible nexus, along with the principles of territoriality, protection, active and passive personality, and the principle of the substituting criminal law jurisdiction […]. Universal jurisdiction applies only to specific crimes which are viewed as threats to the legal interests of the international community of states. It is distinguishable from the principle of the substituting criminal law jurisdiction, codified in §7.2 Number 2 of the German Criminal Code, in that it is not dependent on whether the (p. 85) act is punishable in the territory where it occurs or whether or not there is a possibility for extradition. […]
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> **39 b)** Whether the Genocide Convention contains such a rule providing for universal jurisdiction must be determined by interpretation of the Convention. Treaties in international law are generally interpreted in accordance with the ordinary meaning of the terms of the treaty, in light of the treaty's object and purpose, and with consideration given to general international law […]. The courts'

interpretation and application regarding the field of application of the German provisions concerning genocide found in § 6 Number 1 of the German Criminal Code in conjunction with Article VI of the Genocide Convention, are, in any event, neither obviously untenable […] nor arbitrary, in that, pursuant to no conceivable aspect, they can be considered legally justifiable […].

40 aa) In the course of interpreting the treaty in accordance with the meaning of its terms, courts have concluded, with no reservations concerning possible constitutional law violations, that Article VI of the Genocide Convention in no case contains a ban on the application of the German criminal jurisdiction. The Convention's explicit treatment of the jurisdictional element is, however, not exhaustive because the active or passive personality principle as the basis for criminal jurisdiction is also not identified. […] Pursuant to its object and purpose, the courts have interpreted Article I of the Genocide Convention such that the Convention strives for effective criminal prosecution of genocide. Therefore, the absence of a rule concerning universal jurisdiction only means that the states that are parties to the Convention are under no obligation to prosecute, although they have the opportunity to pursue criminal prosecutions on this basis. There is no reservation when, in justifiable cases, priority is given to the systematic-teleological interpretation of international treaties over the interpretation of a treaty in accordance with the meaning of its terms […]. This is especially the case with respect to prosecution of foreign criminal acts on the basis of international treaties, which often do not clearly identify which jurisdictional nexus will be regulated. Genocide is, as the most severe violation of human rights, […] the classic case for application of universal jurisdiction, the purpose of which is to make possible the most thorough prosecution of crimes perpetrated against the especially important legal interests of the international community of states.

41 bb) Furthermore, on the basis of Article 31.3, Letter b of the Vienna Convention on the Law of Treaties, the Federal Court of Justice relied upon the Rome Statute of the International Criminal Court, which has not yet come into force and has not yet been ratified by Germany. The Rome Statute, however, addresses only the jurisdiction of the International Criminal Court. The national courts only come into consideration in so far as the relationship between the national court with presumptive jurisdiction and the International Criminal Court is at issue. With respect to the jurisdiction of the national courts over genocide, the Rome Statute also raises questions because it requires, for the jurisdiction of the International Criminal Court, the ratification of the Statute by the State where the crime occurs or the State of the perpetrator. This contradicts the idea behind universal jurisdiction, which does not require such a nexus. Germany failed, during the negotiations over the Rome Statute, in its attempt to derive the automatic jurisdiction of the International Criminal Court from the national courts' jurisdiction over the relevant crimes, a competence which has universal jurisdiction as its basis. This proposal was founded on the competence of all states, which can transfer to the international court the authority to prosecute to which they are entitled pursuant to universal jurisdiction. The German proposal was, however, rejected on the basis of the *pacta tertiis* argument (cf. Article 34 of the (p. 86) Vienna Convention on the Law of Treaties) and not because the applicability of universal jurisdiction to the crimes identified in Article 6 et seq. of the German Criminal Code should be called into question. […]

The Constitutional Court thoroughly substantiated its opinion that international law in no way precluded Germany's universal jurisdiction over the crime of genocide. It probably could have sufficed by declaring that it adhered to the well-known *Lotus* formula, observing that the jurisdiction clause in the Genocide Convention was not exhaustive and that international law, absent an explicit prohibition, left states a margin of appreciation to establish and exercise extraterritorial jurisdiction. However, the court took pains to elaborate on the wording and history of both the Genocide Convention and the Rome Statute. With respect to the latter, the court suggested that, while universal jurisdiction for the International Criminal Court itself had been unattainable, the Rome Statute did by no means preclude states from exercising universal jurisdiction.[9]

Guatemala Genocide Case, Menchú Tumn (Rigoberta) and ors v Two Guatemalan Government Officials and Six members of the Guatemalan Military, Constitutional Appeal, Case No 237/2005, ILDC 137 (ES 2005), 26th September 2005, Spain; Constitutional Court

On 2 December 1999, Rigoberta Menchú and a group of non-governmental organizations filed a suit before the National Court (*Audiencia Nacional*) against eight senior Guatemalan government officials. The complaint charged the defendants with terrorism, genocide, and systematic torture committed during the Guatemalan civil war, which lasted from 1978 to 1986. The criminal proceedings were based on Article 23(4) of the former Organic Law of the Judicial Power (*Ley Orgánica del Poder Judicial*, OLJP).

The Supreme Court had previously held that a connection with a national interest was necessary to permit the extraterritorial extension of Spanish jurisdiction (ie the nationality of the victims, the presence of the accused in Spanish territory or any other direct connection with national interests). The judgment of the Supreme Court thus allowed investigations for the torture and killing of Spanish citizens in Guatemala but threw out the claims concerning Guatemalan victims.

The claimants filed a constitutional appeal (*recurso de amparo*) against the judgment of the Supreme Court, challenging the restrictive interpretation of the principle of universal jurisdiction as provided for in Article 23(4) of the OLJP.

> **8.** Together with the presence on national territory of the assumed perpetrator, the Ruling under appeal introduces two further connecting links: that of the personality of the victim, so that universal competency depends on the Spanish nationality of the victims; and that of the connection of the crimes committed with other relevant Spanish interests, which is nothing more nor less than a generic reformulation of the so-called real principle of protection or defence. These restrictions appear to have been drawn once again from international customary law, referring, without further details, (p. 87) to the fact that "a significant part of legal doctrine and some national courts" have tended to recognise the relevance of certain connecting links.
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> **9.** In this way the restriction based on the nationality of the victims incorporates an additional requirement not contemplated in the law, which furthermore has no teleological basis and therefore, in particular with regard to genocide, contradicts the nature of the crime itself and the shared aspiration to achieve universal prosecution, something which would effectively be curtailed by such a restriction. As stipulated by art. 607 of the Criminal Code the legal nature of genocide is characterised by the membership of the victim or victims of a national, ethnic, racial or religious group, together with the fact that the acts perpetrated have the specific aim of destroying this group, precisely with regard to their links of belonging. The exegesis employed by the Ruling of the Supreme Court would imply, as a result, that the crime of genocide would only be of relevance to the Spanish Courts when the victim was of Spanish nationality and, furthermore, when the conduct was motivated by the aim of destroying the Spanish national group. The improbability of

this possibility should be sufficient to show that this was not the purpose which the Legislator sought with the introduction of universal jurisdiction in art. 23.4 OLJP and that this interpretation cannot be in accordance with the purpose in establishing this institution.

And the same must be concluded with relation to the criterion of national interest. Apart from the fact, noted by the Public Prosecutor in his report, that the reference to the national interest in the Ruling under appeal is nominal, and lacks even the minimum elaboration which would make it possible to specify its content, what is clear is that the inclusion of paragraph 4 of Article 23 OLJP renders it practically bereft of content, by referring back to the rule of jurisdictional competency contained in the preceding paragraph. As has already been stated, the decisive issue is that submitting competency for the adjudication of international crimes such as genocide or terrorism to competition between national interests, in the terms proposed in the Ruling, is not fully reconcilable with the basis of universal jurisdiction. The international and cross-border prosecution which the principle of universal justice seeks to impose is based exclusively on the specific characteristics of the crimes which are subject to it, where the damage (typically in the case of genocide) transcends the specific victims and affects the international community as a whole. Consequently, the prosecution and punishment of these constitute not just a shared commitment but also a shared interest of all the States (as we had occasion to affirm in the Constitutional Court Ruling 87/2000, of 27 March, FJ 4), and the legitimacy of this, as a consequence, does not depend on further particular interests of each of the States. By the same token, the concept of universal jurisdiction in current international law is not configured around links of connection founded on particular state interests, as shown by art. 23.4 OLJP, the aforementioned German Law of 2002 or, to give yet more examples, the Resolution adopted by the Institute of International Law in Krakow on 26 August 2005, in which, after setting out the aforementioned commitment of all States, universal jurisdiction in criminal affairs is defined as “the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.”

In this interesting case, the Spanish Constitutional Court gave a wide understanding of the universal jurisdiction principle. The judgment of the Constitutional Court dismantled the prior doctrine of the Spanish Supreme Court and thereby eliminated the previously existing limitations to the application of the principle of universal jurisdiction. The decision stated that Spanish Courts have jurisdiction over crimes of international significance, regardless of the (p. 88) nationality of the victims and perpetrators. Such crimes include torture, crimes against humanity, and genocide.

The *Guatemala* decision has had important consequences over the last years. As a result of the *Guatemala* decision, the Spanish National Court has initiated investigations regarding international crimes committed in different regions of the world (Tibet, China, Iraq, Gaza, El Salvador, and Rwanda). From a political point of view, the wide understanding of universal jurisdiction has triggered diplomatic conflicts between Spain and the countries concerned. As a result, Spain decided in 2009 to amend Article 23(4) of the LOPJ reducing the scope of universal jurisdiction (Organic Law No 1/2009). Furthermore, Organic Law No 1/2014 introduced a very restrictive approach to the concept of universal jurisdiction.[10]

Jiménez Sánchez and ors v Gibson and ors, Appeal Judgment, Case No 1240/2006, ILDC 993 (ES 2006), 11th December 2006, Spain; Supreme Court

The *Couso* case deals with the exercise of universal jurisdiction by Spanish courts over crimes of war committed during the Iraq war. On 23 April 2003, a US tank fired on the Palestine Hotel in Baghdad from where several international journalists were reporting on the Iraq war. As a result, José Couso, a Spanish cameraman who was filming from the hotel, was severely wounded and died in hospital a few hours later. A Reuters cameraman, Taras Protsyuk, was also killed and others journalists were injured. A few weeks later, José Couso's family and the Free Association of Lawyers and the Association of Television and Video Cameramen brought criminal charges for war crimes and murder against three US officers involved in Couso's death (Sergeant Thomas Gibson, Captain Philip Wolford, and Lieutenant-Colonel Philip de Camp). The US authorities maintained that the attack had been in response to a previous attack originating from the area where the Palestine Hotel was located and denied any fault on the part of US soldiers.

In October 2003, the complaint was accepted by the Central Judge nº 1 of the Spanish National Court (*Audiencia Nacional*), who issued international arrest warrants for the three US officers, requesting their extradition to Spain. However, on 8 October 2006, the Criminal Chamber of the National Court overruled the decision of the Central Judge and stated that the Spanish courts had no jurisdiction to investigate the facts and set aside the international arrest warrants for the US officers. Couso's family and the other claimants appealed against the National Court's ruling before the Supreme Court, claiming that it had infringed the right to effective judicial protection.

> **EIGHT.** At this point, it is necessary to highlight the serious problems that may arise in the interpretation and application of the law called into question in this appeal (Article 23.4 of the OLJP). To do this, it is necessary to highlight the scope of the terms that define the ambit of Spanish jurisdiction in areas such as terrorism, counterfeiting, drug trafficking and, in particular, reference to any other crime that, under the terms of international treaties and conventions, must be prosecuted in Spain [letter h) of the abovementioned Article in the OLJP]. Without doubt, this was the main reason for the demarcation carried out by this court in the judgments handed down on 25 February and 20 May 2003 (on the so-called Guatemala Case and Peru Case, (p. 89) respectively) which, in short, merely served to highlight the need for a legitimating point of connection, without which one could with some justification refer to a disproportionate expansion of the national criminal jurisdiction, in particular if one considers that the principle of opportunity is not recognised in our legal system. At the same time, popular action is recognised free of any particular limitation (see Article 125 C.E. and Articles 100, 101 and 270 LCP).
>
> In any event, the intervention of the Spanish courts in respect of acts committed outside Spain can give rise to unquestionable disputes from an international relations perspective for Spain (a competence that belongs to the government) (see Article 97 C.E.), a matter that is thus beyond the judiciary but of which the courts, no doubt, cannot be totally unaware.
>
> […] In a specific reference to the interpretation of the rule that attributes jurisdiction in Article 23.4 of the OLJP, the Constitutional Court states that "the ultimate foundation of this rule attributing jurisdiction lies in the universalisation of the jurisdiction of states and their bodies for knowledge of certain acts in whose prosecution and ruling all states have an interest … ". In this regard, it has declared that "in principle, Article 23.4 of the LOPJ grants very broad scope to the principle of universal justice, given that the sole express limitation to the same is the principle of *res judicata*." The Constitutional Court — the last word on constitutional

> guarantees (see Article 123 C.E.) — also concludes that “the OLJP establishes a principle of absolute universal jurisdiction” (see STC 237/2005; FJ 3.).
>
> The weight of the conclusion reached above by the Constitutional Court and the irregular legal basis of the resolution which is the object of the appeal on the specific issue of the scope of Spanish jurisdiction in relation to the matter, provide resounding justification for the finding of a breach of the law cited on the grounds specially cited, despite the founded observations made in the first legal grounds of this resolution.

In this case, the Supreme Court accepted the line of argument developed by Couso’s family and the other claimants in the sense that the Fourth Geneva Convention and Article 23(4) of the OLJP granted universal jurisdiction to Spain’s judges and courts to investigate and judge the facts.

Even though the Supreme Court accepted the possibility for Spain to investigate the facts, it criticized the broad interpretation of the principle of universal jurisdiction made by the Spanish courts. The Supreme Court highlighted the problems that could arise within the sphere of international relations as a result of the involvement of Spanish courts in events occurring beyond Spain’s borders. There was no doubt, though, that the basic reason why the Supreme Court had accepted jurisdiction in this case was due to the fact that one of the victims was a Spanish national.[11]

III. Jurisdiction in Economic Matters

Jurisdictional issues do not only arise in criminal matters but also in economic matters, in particular in the law of restrictive business practices—which is termed ‘antitrust law’ in the United States and ‘competition law’ in Europe.[12]

(p. 90) The United States has been the first state to extend the long arm of its antitrust statutes (*Alcoa*, 1945). The exercise of jurisdiction over foreign conspiracies, and any limitations on such exercises, have been justified on various grounds, such as economic necessity, legislative intent but also international law. The analysis in this section will concentrate on the international law issues raised by a number of leading judgments in the field, of both US and European courts.[13] No relevant non-Western judgments have been identified. This may, at least in part, be attributed to the absence of a strong antitrust competition law framework or its timid enforcement outside the US and Europe.

United States v Aluminium Corp of America, 148 F2d 416 (2d Cir 1945) (Alcoa) (not in ILDC)

In *Alcoa*, foreign aluminium companies had formed a cartel in Switzerland by agreeing to pay royalties to each other if their aluminium production exceeded a certain level. This arrangement could have had an inflationary effect on aluminium prices and caused aluminium import shortages in the United States. The question arose whether the United States could exercise jurisdiction over a wholly foreign conspiracy affecting the American market. The Court answered as follows:

> [I]t is settled law […] that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize […]

Alcoa is the seminal judgment introducing the ‘effects doctrine’ in antitrust matters. Pursuant to this doctrine, which is a variation on the objective territoriality principle, states have jurisdiction over foreign anti-competitive conduct that produces adverse effects within their territory. As the quotation above makes clear, the *Alcoa* principle is not only the result of statutory construction, guided by the presumption against Congress legislating

extraterritorially, but is also determined by international law. Indeed, the court unambiguously cites the 'limitations customarily observed by nations upon the exercise of their powers', which suggests that *international law* regulates states' jurisdictional assertions. It is not fully clear, however, whether the requirement that US antitrust law only extends to agreements that actually produce adverse effects, and not to agreements that only intend to produce such effects, flows from statutory interpretation, international law constraints or a combination of both.

Ölfeldrohre, WuW/E BGH 1276, Bundesgerichtshof (BGH), 12 July 1973 (not in ILDC)

In Europe, the effects doctrine in competition matters came to fruition in Germany. Admittedly, in the early days of competition law, the German Federal Cartel Office, which administers the German Competition Act, was reluctant to assert its jurisdiction over foreign members of international conspiracies. Instead, it only focused on the German members. German law scholars nevertheless argued that international law authorized the exercise of effects-based jurisdiction over foreign-based conspiracies as early as 1965.[14] In the 1973 *Ölfeldrohre* judgment, the German Supreme Court (*Bundesgerichtshof*) eventually held that § 130 (2), then § 98 (2), (p. 91) GWB authorized effects-based jurisdiction but only if the foreign restrictive practices concerned violated 'the area of protection of the particular substantive rule [at issue]':

> In light of the variety of conceivable effects of foreign restraints on competition on the domestic market, a limitation and concretization of the concept of domestic effects is required in order to prevent the unlimited expansion of the international application of the substantive rules. […] As § 98 (2) is not a substantive law rule, but rather a conflict of laws principle, […] clarity concerning […] which foreign-related effects fall within the [German Competition Act] can only be achieved by construing § 98 (2) in relation to the general protective purpose of the statute as a whole and the protective purpose of the relevant substantive rules. Thus, the consequences of foreign-related restraints on competition can be viewed as "domestic effects" only when they constitute a domestic violation of the area of protection of the particular substantive rule.[15]

Accordingly, the German Supreme Court required there to be a violation of the protective purpose (*Schutzzweck*) of a particular GWB provision before § 98 (2) GWB could apply. If jurisdiction is tied to the protective purpose of a substantive antitrust provision, the jurisdictional threshold for one provision (eg pre-merger notification) could be higher than for another (eg merger prohibition). The *Ölfeldrohre Schutzzweck* doctrine enabled the Federal Cartel Office and the courts to shape the effects principle in particular cases by defining its specific elements in relation to the protective purpose of a specific provision.[16]

Timberlane Lumber Co v Bank of America, 549 F 2d 597 (9th Cir 1976) (not in ILDC)

In *Timberlane*, the plaintiff, the American lumber company Timberlane, sued defendants in Honduras and the Bank of America, alleging that all the defendants had conspired to prevent it from exporting to the United States. The case could have been perfectly dealt with under the *Alcoa* effects doctrine, but the court saw the drawbacks of the doctrine and chose another avenue.

> What we prefer is an evaluation and balancing of the relevant considerations in each case in the words of Kingman Brewster, a "jurisdictional rule of reason." Balancing of the foreign interests involved was the approach taken by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), where the involvement of the Canadian

> government in the alleged monopolization was held not to require dismissal. The Court stressed that there was no indication that the Canadian authorities approved or would have approved of the monopolization, meaning that the Canadian interest, if any, was slight and was outweighed by the American interest in condemning the restraint.[FN30] Similarly, in Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), the Court used a like approach in declining to apply the Jones Act to a Danish seaman, injured in Havana on a Danish ship, although he had signed on to the ship in New York.[17]

Under *Timberlane*, the interest-balancing test is an integral part of the jurisdictional analysis.[18] Interest-balancing does not merely mitigate pre-existing effects-based jurisdiction: it is instead (p. 92) constitutive of such jurisdiction. This test was later laid down as a 'rule of reason' in Section 403 of the Restatement (Third) of US Foreign Relations Law, the drafters of which believed that it constituted international law.

Hartford Fire Insurance Co and ors v California and ors, Decision not subject to appeal, 509 US 764 (1993), ILDC 1448 (US 1993), 28th June 1993, United States; Supreme Court [US]

In *Hartford Fire Insurance v California*, a case concerning a London-based reinsurance cartel affecting the US market, the lower court had, along the lines of *Timberlane*, declined to exercise jurisdiction under the principle of international comity. It believed that 'application of [American] antitrust laws to the London reinsurance market would lead to significant conflict with English law and policy' and that '[s]uch a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction'.[19] The US Supreme Court, however, unambiguously rejected the application of *Timberlane* in this case.

> **41.** […] international comity would not counsel against exercising jurisdiction in the circumstances alleged here.
>
> **42.** The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 107 S.Ct. 2542, 2562, 96 L.Ed.2d 461 (1987) (BLACKMUN, J., concurring in part and dissenting in part). […] We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

Under the *Hartford Fire* standard, if a foreign country merely allows anti-competitive conduct adversely affecting the US market, the Sherman Act would apply—as there is no 'true conflict'.[20] A true conflict, barring application of the Sherman Act, will only arise if the foreign state requires an activity which the US prohibits or, conversely, when the foreign state prohibits an activity which the US requires. There are few, if any, references to international law in *Hartford Fire*. To be true, there are references to the US Restatement of Foreign Relations, but it is unclear whether the relevant provisions of the Restatement (on sovereign compulsion) also constitute international law. Of note is, in any event, that the Supreme Court in *Hartford Fire* abandoned *Timberlane*'s wide concept of comity, a concept requiring the balancing of various interests, including governmental interests. In practice, almost inevitably, application of the 'true conflict' doctrine as espoused by the Supreme Court risks encroaching to a much greater extent on the interests of other nations, and thus possibly violates the international law principle of non-intervention.(p. 93)

Wood Pulp, Osakeyhtiö and ors v Commission of the European Communities, Final judgment, 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, (1988) ECR 5193, ILEC 035 (CJEU 1988), 27th September 1988, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]

In the *Wood Pulp* case, the European Commission had imposed fines on 41 foreign suppliers of wood pulp, as well as two of their trade associations, on the ground that they had fixed the price of wood pulp sales to purchasers in the Common Market. The undertakings concerned were not established in the EC, nor was their cartel agreement concluded there. In the Commission's view, the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the Community was not only substantial but also intended, and was the primary and direct result of the agreements and practices. On the basis of these direct, substantial, and reasonably foreseeable *effects* on sales to customers in the Common Market, the Commission established its jurisdiction over the foreign companies (ie the 'effects doctrine' as set out in the *Alcoa* case discussed above). The wood pulp conspirators thereupon challenged the Commission's exercise of jurisdiction before the European Court of Justice (ECJ) on the grounds that it would violate international law.

> **17** The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.
>
> **18** Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.

In *Wood Pulp*, the court distinguished between the *extraterritorial* formation of the pricing agreement, and the *territorial* implementation thereof.[21] The court did not clarify the term 'implementation', which is not based on previous case law or legal doctrine, but it is clear that it refers to the sales through which the conspirators put their agreement into effect. As, for jurisdictional purposes, it suffices that the undertakings make sales in the Community, '[i]t is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community'.[22] Importantly, from the viewpoint of international law, the court held that, since the implementation was territorial, the anti-competitive conduct 'is covered by the territoriality principle as universally recognised in public international law'.[23]

It is conspicuous that, unlike the Commission, the ECJ refused to adopt the *Alcoa* effects doctrine in competition matters, apparently believing that this doctrine was 'extraterritorial' in nature, and thus impermissible under international law. In the court's view, jurisdiction should be based on territorial 'implementation' for there to be legitimate jurisdiction under the territoriality principle, a traditional ground of jurisdiction under public international law. It remains somewhat elusive, however, to what extent the implementation doctrine differs from the effects doctrine in practical terms.(p. 94)

Gencor Limited v European Commission, Application for annulment of Commission Decision, Case T-102/96, ECLI:EU:T:1999:65, [1999] ECR II-753, ILEC 077 (GCEU 1999), [1999] All ER (EC) 289, [1999] 4 CMLR 971, 25th March 1999, Court of Justice of the European Union [CJEU]; General Court of the European Union [EGC]; General Court (5th Chamber)

In 1996, the European Commission had determined that a concentration between the South African platinum mining companies Gencor and Lonrho would be incompatible with the Common Market.[24] Although the South African competition authorities did not object to the merger,[25] the Commission found that it would create a position of collective dominance between Gencor and Lonrho, and Anglo American Corporation (another competitor in the platinum market). Thereupon, Gencor brought an action for annulment of the decision, alleging that the Merger Control Regulation only concerned concentrations which take effect within the Common Market and, accordingly, not the concentration at issue, which related to economic activities conducted within South Africa, outside the Common Market.

Assessing the territorial scope of the Merger Control Regulation, the European Court of First Instance (CFI) in *Gencor Ltd v Commission of the European Communities* confirmed that 'Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within Community territory'.[26] Accordingly, the Regulation could have an extraterritorial scope, and apply to foreign undertakings having sales within the Community, if the proposed merger at least met the substantive turnover criteria of Article 1 (2) of the Regulation (which it did in this case).[27] The question arose whether this would be in accordance with public international law and, in particular, with the ECJ's interpretation of the territoriality principle in the 1988 *Wood Pulp* case.

> **90** Application of the [Merger] Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.
>
> **91** In that regard, the concentration would, according to the contested decision, have led to the creation of a dominant duopoly on the part of Amplats and Implats/LPD in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market within the meaning of Article 2(3) of the Regulation. […]
>
> **101** It follows that the application of the Regulation to the proposed concentration was consistent with public international law.
>
> **102** It is necessary to examine next whether the Community violated a principle of non-interference or the principle of proportionality in exercising that jurisdiction.
>
> **103** The applicant's argument that, by virtue of a principle of non-interference, the Commission should have refrained from prohibiting the concentration in order to avoid a conflict of jurisdiction with the South African authorities must be rejected, without it being necessary to consider whether such a rule exists in international law.

(p. 95) In *Gencor*, the court found that the defendants sold goods in the Community, and as sales amount to implementation, the Commission would have jurisdiction under the *Wood Pulp* jurisdictional standard, which the ECJ held to be compatible with public international law.[28] It is conspicuous, however, that the CFI, unlike the ECJ in *Wood Pulp*, seemed to embrace the American effects doctrine, pursuant to which jurisdiction obtains as soon as substantial, direct, and reasonably foreseeable effects on domestic commerce could be established.[29] The effects doctrine as espoused by the CFI in *Gencor* may not necessarily have supplanted the implementation doctrine established by the ECJ in *Wood Pulp*, however. International mergers differ from international cartels (*Wood Pulp*); the former

almost inevitably have repercussions within the Community as part of the worldwide market in which the merging companies trade.

E*** v Bundeskartellanwalt and Bundeswettbewerbsbehörde, Appeal judgment, 16 Ok 49/05, ILDC 1593 (AT 2006), 27th February 2006, Austria; Supreme Court of Justice [OGH]**

Not only EU competition law but also EU member states' competition laws may apply to cross-border mergers, thereby raising issues of possibly *extraterritorial* merger control. As domestic competition laws, like EU competition law, ordinarily remain silent on their territorial scope, courts have further developed the reach of those laws in light of international law, in particular the 'effects principle'. A fine example is offered by the following Austrian judgment in *Re Erste Bank*, which precluded the application of Austrian merger control law to a proposed merger on the grounds that the requirements of direct and substantial anti-competitive effects were not satisfied:

> **H1** The 1988 Cartel Act did not provide a clear rule on its territorial scope of application. However, domestic legislation could be said to have applied a modified version of the 'effects principle'.
>
> **H2** The purpose of Austrian merger control legislation was the protection of the domestic market. Assuming overly broad jurisdiction in matters of merger control would be questionable on grounds of international law. Therefore, it was only applicable when the circumstances restricting competition produced their effects within Austrian territory.
>
> **H4** The fact that the financial position of a domestic undertaking had improved due to the acquisition of the foreign undertakings did not have an immediate or direct effect on the domestic market. Rather, the acquisitions could only have had a very indirect effect.

F Hoffmann-La Roche Ltd et al v Empagran SA et al, 124 S Ct 2359 (2004) (not in ILDC)

Empagran, a case decided by the US Supreme Court in 2004, concerned the question of whether foreign plaintiffs had standing in US courts for foreign harm caused by a global vitamins producers' cartel that also caused some domestic harm. The question had major international law significance. As the situation had only a tenuous nexus with the United States, exercising jurisdiction could boil down to a regulation of the competitive conditions of other nations. Thus, it could possibly violate the international law principle of non-intervention.

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial (p. 96) affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.
>
> But why is it reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim? Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate

> its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial.

In *Empagran*, the US Supreme Court prevented US courts from being overwhelmed by antitrust suits filed by foreign-based plaintiffs, and from upsetting foreign governments, by giving a restrictive interpretation to relevant provision of the Sherman Antitrust Act. The court ultimately held that US courts did not have jurisdiction over significant foreign anti-competitive conduct causing adverse domestic effects and independent foreign harm, where the plaintiff's claim rests solely on the independent foreign harm.[30]

The Supreme Court in *Empagran* relied heavily on considerations of reasonableness and international comity, which caution jurisdictional restraint. The court construed the legislative intent underlying the applicable legislation (the Foreign Trade Antitrust Improvements Act) not only in light of its language and history but also in light of international law: referring to the *Charming Betsy* doctrine of consistent interpretation,[31] it pointed out that it should be assumed that 'Congress ordinarily seeks to follow […] the principles of customary international law'.[32] In particular, it paid close consideration to the customary international law principle of non-intervention in the internal affairs of another state, stating that it is to be assumed that Congress takes 'the legitimate sovereign interests of other nations into account'[33] when assessing the reach of US law and avoids extending this reach when that would create a 'serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs'.[34] By emphasizing the role of the customary international law principle of non-intervention and the jurisdictional rule of reason, the Supreme Court apparently reversed the very narrow interpretation it had given to the rule of reason in its 1993 *Hartford Fire* judgment (the 'true conflict' doctrine), and it returned to the *Timberlane* approach.(p. 97)

Morrison and ors v National Australia Bank Limited and ors, Appeal judgment, 130 S Ct 2869, 177 L Ed 2d 535 (US 2010), ILDC 1567 (US 2010), 24th June 2010, United States; Supreme Court [US]

Questions of international jurisdiction do not only arise in antitrust/competition matters but also in securities (financial) law. Traditionally, lower US courts had liberally established US jurisdiction over transnational securities transactions by requiring proof of some effect or conduct in the United States. This liberal approach was repudiated, however, by the 2010 judgment of the US Supreme Court in *Morrison*.

In this case, Australian shareholders sued National Australia Bank (National), an Australian bank whose 'ordinary shares' were not traded on any exchange in the United States. The only link with the US was that National had purchased HomeSide Lending, a Florida-based company, after which National's share prices had fallen. The plaintiffs alleged that HomeSide's officers had manipulated financial models, conduct which violated US securities legislation, and that National and its chief executive officer were aware of this deception, notably §10(b) of the 1934 Securities and Exchange Act. The question arose as to whether US courts had jurisdiction over such a situation which had only tenuous links with the United States.

> **20** […] The results of judicial-speculation-made-law – divining what Congress would have wanted if it had thought of the situation before the court – demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects. (slip op. p. 12) […]

> **29.** There is no affirmative indication in the Exchange Act that §10(b) applies extraterritorially, and we therefore conclude that it does not. (slip op. p. 16) […]
>
> **35** […] The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures." (slip op. p. 20)

Morrison contains few references to international comity or international law. Instead, the analysis is centered almost entirely on ascertaining the intent of the US Congress. The court presumes that Congress does not legislate extraterritorially, unless a contrary intent appears—ie, the long-standing presumption against extraterritoriality as a canon of statutory construction—but it also notes that this presumption is not 'a limit upon Congress's power to legislate' and that it 'applies regardless of whether there is a risk of conflict between the American statute and a foreign law'.[35] Accordingly, theoretically at least, Congress can go beyond the restraints imposed by international law, at least if there is an explicit statement to this effect ('clear statement rule').[36] Admittedly, towards the end of the opinion, the Supreme Court does refer to the interests of foreign nations (by notably citing a number of their *amicus curiae* briefs which voiced concern over possible conflicts between US and foreign law), without however going as far as invoking the *Charming Betsy* principle of consistent interpretation or raising the specter of US law conflicting with the international law principle of non-intervention.[37](p. 98)

Kiobel v Royal Dutch Petroleum Co., 133 S Ct 1659 (2013) (not in ILDC)

The strict application of the presumption against extraterritoriality in *Morrison* was reaffirmed in *Kiobel*,[38] a seminal case pertaining to the geographic scope of the Alien Tort Statute. The Alien Tort Statute[39] provides that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. In *Kiobel*, the question arose whether, under the ATS, US courts had 'extraterritorial' jurisdiction over cases brought against Shell, an Anglo-Dutch corporation present in the United States, by Nigerian victims in respect of harm done in Nigeria. Relying on the presumption against extraterritoriality rather than international law proper, the Supreme Court refused to give a wide extraterritorial reach to the ATS for the following reasons:

> [A]ll the relevant conduct took place outside the United States. And even 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 […] Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[40]

Kiobel seems to sound the death knell for the 'universal civil jurisdiction' which the ATS had come to epitomize, ie, adjudicatory jurisdiction in tort matters absent a territorial or national link to the forum state.[41] The 'touch and concern' standard espoused by the Supreme Court points to a *US national interest* that needs to be vindicated by offering an ATS remedy.[42] While dissenting Justice Breyer considered not providing a safe harbor for an enemy of all mankind to be a distinct American interest,[43] this argument has not had much traction in the lower courts post-*Kiobel*. At most, probably, the ATS could be resorted to with respect to extraterritorial harm caused by US-based corporations, and even that is hardly certain.[44] Post-*Kiobel* ATS decisions are, in any event, decidedly conservative.

Application of the requirements that the relevant conduct take place in the US and touch and concern the US has typically resulted in the plaintiffs' claim being barred.[45]

IV. Conclusion

Domestic courts have assumed a rather prominent role in the further development of the international law of jurisdiction. They have at times embraced expansive interpretations of jurisdictional principles that have redefined the field. In particular, as regards antitrust or competition law, high courts in the United States and Europe have introduced the effects and implementation (p. 99) doctrines as variations on the territoriality principle, and in so doing redefined transnational competition law (*Alcoa*, US; *Wood pulp*, and *Gencor*, EU).

Domestic courts have also pushed the envelope with respect to universal criminal jurisdiction. The Spanish Constitutional Court, for instance, eliminated all limitations to the application of the universality principle, thereby enabling domestic courts to hear a larger number of international crimes cases (*Menchú Tumn*, Spain). Such bold action has sometimes led to diplomatic conflict and political pushback, to which the legislative rolling back of the universality principle in Spain testifies.

However, domestic courts are not necessarily unaware of the potential for international strife to which their exercise of jurisdiction can give rise. For instance, in an international crimes case, the Spanish Supreme Court highlighted the international problems that could arise in case of Spanish courts' involvement in extraterritorial events (*Jimenez Sanchez*, Spain). Also, some US courts, especially those hearing antitrust cases, have conducted an interest-balancing test, based on international comity or even the principle of non-intervention, to preclude jurisdictional overreach that could upset foreign nations (*Timberlane, Empagran*, US).

Nonetheless, by and large, domestic courts are reluctant to review the reach of domestic law in light of the international law of jurisdiction. Especially in criminal law, domestic courts will not normally review statutory law provisions on jurisdiction in light of customary international law of jurisdiction (*H v Public Prosecutor*, Netherlands; *N v Military Prosecutor*, Switzerland). Still, in case domestic law happens to be in accordance with international law, courts may well embark on justificatory analysis (*Jorgic*, Germany).

In the US, determining the acceptable reach of US law is typically a function of congressional intent rather than of international law. US courts may then review, or rather interpret, statutory law in light of the presumption against extraterritoriality, a US foreign relations-based canon of statutory construction which presumes that Congress only legislates with domestic concerns in mind. On the basis of the presumption, the US Supreme Court has restricted the geographical reach of securities law and the Alien Tort Statute (*Morrison, Kiobel*, US). As it happens, reliance on the presumption may serve the same purpose as reliance on the international law of jurisdiction, namely the prevention of international discord.

Footnotes:

1 PCIJ, *SS Lotus (France v Turkey)* [1927] PCIJ Reports, Series A No 10, p 19: 'It does not […] follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons,

property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable'. The *Lotus* dictum is undesirable, as it allows for an inflation of possible assertions of concurrent jurisdiction by different States. See C Ryngaert, *Jurisdiction in International Law* (OUP 2008).

2 Harvard Research on International Law, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 AJIL 439, 468.

3 For further analysis see also J Handmaker, Analysis, *Al Shami v Ayalon*, ILDC 673 (NL 2009).

4 E Gladman, Analysis, *United States v Ali*, ILDC 2265 (US 2013) A2.

5 For further analysis see C Ryngaert, Analysis, *KS and PC v RT and RD*, ILDC 1118 (BE 2008).

6 For further analysis of the case see M Sassoli, 'Le génocide rwandais, la justice militaire suisse et le droit international' (2002) 12 *Revue Suisse de droit international et européen* 151; L Reydams, 'Niyonteze v Public Prosecutor' (2002) 96 *American Journal of International Law* 231.

7 ILDC Nos 636, 797, and 1071.

8 C Bergmann and A Ziegler, Analysis, *Niyonteze and Military Prosecutor of the Military Tribunal of First instance 2 v Military Appeals Tribunal 1A*, ILDC 349 (CH 2001) A4.

9 For further analyses, compare J E Wetzel, Analysis, *Jorgic Case, J (a bosnian Serb)*, ILDC 132 (DE 2000); K Ambos, 'Case note to the decision of the Federal Court of Justice' (1999) *Neue Zeitschrift für Strafrecht* 404; M Bungenberg, 'Extraterritoriale Strafrechtsanwendung bei Verbrechen gegen die Menschlichkeit und Völkermord' (2001) *Archiv des Völkerrechts* (AVR) 170; S Kadelbach, 'Case note to the decision of the Federal Constitutional Court' (2001) *Juristenzeitung* (JZ) 981; C Hoss and R A Miller, 'German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence' (2001) 44 *German Yearbook of International Law* 576; M Kotzur, 'Weltrecht ohne Weltstaat—die nationale (Verfassungs-) Gerichtsbarkeit als Motor völkerrechtlicher Konstitutionalisierungsprozesse?' (2002) *Die Öffentliche Verwaltung* 195; R Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in the Former Yugoslavia' (2005) 3 *Journal of International Criminal Law* 354; C Kress, 'Versailles-Nuremberg-The Hague: Germany and International Criminal Law' (2006) 40 *International Lawyer* 15.

10 For further analyses see B Montejo, Analysis, *Guatemala Genocide Case, Menchú Tumn (Rigoberta) and ors v Two Guatemalan Government Officials and Six members of the Guatemalan Military*, ILDC 137 (ES 2005); H Ascensió, 'The Spanish Constitutional Tribunal's Decision in Guatemalan Generals Unconditional Universality is Back' (2006) 4 *Journal of International Criminal Jurisdiction* 586; R Bermejo García and C Ruiz Miguel, 'Jurisprudencia en materia de Derecho internacional público: una Sentencia incongruente, restrictiva e irresponsable (nota a la Sentencia 237/2005 del Tribunal Constitucional)' (2005) 57 *Revista Española de Derecho Internacional* 911; N Roht Arriaza, 'Guatemala Genocide Case' (2006) 100 *American Journal of International Law* 207; J Santos Vara, 'La jurisdicción de los tribunales españoles para enjuiciar los crímenes cometidos en Guatemala' (2006) 11 *Revista Electrónica de Estudios Internacionales* 1; H van der Wilt, 'Universal Jurisdiction under Attack: An Assessment of the African Misgivings of

International Criminal Justice, as Administered by Western States' (2011) 5 *Journal of International Criminal Justice* 207.

11 For further analyses see J Santos Vara, M Candela Soriano, Analysis, *Jiménez Sánchez and ors v Gibson and ors*, ILDC 993 (ES 2006); J Santos Vara, 'Crónica sobre la aplicación judicial del Derecho internacional público' (2007) 14 *Revista Electrónica de Estudios Internacionales* 1; H Olásolo Alonso, 'Análisis del caso Couso a la luz del Estatuto de Roma' (2007) 5 *Revista Electrónica del Departamento de Derecho de la Universidad de la Rioja* 1; C Fernández Liesa, 'El asunto Couso en los tribunales nacionales y en las relaciones internacionales' (2011) 63 *Revista Española de Derecho Internacional* 145.

12 G W Haight, 'International Law and Extraterritorial Application of the Antitrust Laws' (1953–54) 63 *Yale Law Journal* 639; R Y Jennings, 'Extraterritorial Jurisdiction in the United States Antitrust Laws' (1957) 33 *British Yearbook of International Law* 146; C T Oliver, 'Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practice' (1957) 51 *American Journal of International Law* 380; D Rishikesh, 'Extraterritoriality Versus Sovereignty in International Antitrust Regulation' (1991) 14 *World Comp* 33; W D Whitney, 'Sources of Conflict Between International Law and the Antitrust Laws' (1953–54) 63 *Yale Law Journal* 655; J H W Verzijl, 'The Controversy Regarding the So-Called Extraterritorial Effect of the American Antitrust Laws' (1961) 8 *Netherlands International Law Review* 3.

13 The analysis of the majority of cases is, at least in part, drawn from C Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Intersentia 2008).

14 Eg E Rehbinder, *Extraterritoriale Wirkungen des deutschen Kartellrechts* (Nomos 1965) .

15 BGH, July 12, 1973, WuW/E BGH 1276, 1278–1279 (Ölfeldrohre), translation available in D J Gerber, 'The Extraterritorial Application of the German Antitrust Laws' (1983) 77 AJIL 756, 765.

16 D J Gerber, 'The Extraterritorial Application of the German Antitrust Laws' (1983) 77 AJIL 756, 781.

17 *Timberlane Lumber Co v Bank of America*, 549 F 2d 613-14 (9th Cir 1976).

18 For an analysis see L Kestenbaum, 'Antitrust's "Extraterritorial" Jurisdiction: a Progress Report on the Balancing of Interests Text' (1982) 18 *Stanford Journal of International Law* 311; S A Kadish, 'Comity and International Application of the Sherman Act: Encouraging the Courts to Enter the Political Arena' (1982) 4 *Northwestern Journal of International Law & Business* 130; E A Rosic Jr, 'The Use of Interest Analysis in the Extraterritorial Application of United States Antitrust Law' (1983) 16 *Cornell International Law Journal* 147 ; P M Roth, 'Reasonable Extraterritoriality: Correcting the 'Balance of Interests' (1992) 41 *International and Comparative Law Quarterly* 245; M Sornarajah, 'The Extraterritorial Enforcement of US Antitrust Laws: Conflict and Compromise' (1982) 31 *International and Comparative Law Quarterly* 127.

19 Restated in *Hartford Fire Insurance Co and ors v California and ors*, Decision not subject to appeal, 509 US 764 (1993), ILDC 1448 (US 1993), 28 June 1993, United States; Supreme Court [US], 40.

20 For an analysis see D Park, Analysis, *Hartford Fire Insurance Co and ors v California and ors*, ILDC 1448 (US 1993); R P Alford, 'The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California' (1993) 34 *Virginia Journal of International Law* 213; V Gupta, 'After Hartford Fire: Antitrust and Comity' (1996) 84 *Georgetown Law Journal* 2287; A F Lowenfeld, 'Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case' (1995) 89 *American Journal of International Law* 42; J A Trenor, 'Jurisdiction and the Extraterritorial

Application of Antitrust Laws After Hartford Fire' (1995) 62 *University of Chicago Law Review* 1583; R J Weintraub, 'Hartford Fire Insurance Co., Comity and the Extraterritorial Reach of United States Antitrust Laws' (1994) 29 *Texas International Law Journal* 427.

21 For an analysis see J E Ferry, 'Towards Completing the Charm: The Woodpulp Judgment' (1989) 19 *European Intellectual Property Law Review* 21; J J Friedberg, 'The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine' (1991) 52 *University of Pittsburgh Law Review* 289; M Friend, 'The Long Arm of Community Law' (1989) 14 *European Law Review* 169; M Jeffrey, 'The Implications of the Woodpulp Case for the European Communities' (1991) 4 *Leiden Journal of International Law* 75; D G F Lange and J B Sandage, 'The Woodpulp Decision and its Implications for the Scope of EC Competition Law' (1989) 26 *Common Market Law Review* 137; F A Mann, 'The Public International Law of Restrictive Practices in the European Court of Justice' (1989) 38 *International and Comparative Law Quarterly* 375.

22 *Wood Pulp*, para 17.

23 ibid, para 18.

24 Case IV/M619, decision 97/26/EC of 24 April 1996, [1997] OJ L11/30.

25 The clearance by the South African government was obvious as consumption was predominantly abroad and the South African economy would accordingly have gained more than South African consumers would lose. See E Fox, 'The Merger Regulation and its Territorial Reach: Gencor Ltd v. Commission' (1999) *European Competition Law Review* 334, 335. See also *Gencor* (n 24) para 71, addressing the consideration by the Commission that the concentration could be compared to an export cartel.

26 *Gencor* (n 24) para 79.

27 ibid, para 80.

28 For further analyses see M P Broberg, 'The European Commission's Extraterritorial Powers in Merger Control: The Court of First Instance's Judgment in Gencor v. Commission' (2000) 49 *International and Comparative Law Quarterly* 172; G P Elliott, 'The *Gencor* Judgment: Collective Dominance, Remedies and Extraterritoriality under the Merger Regulation' (1999) 24 *European Law Review* 638; A Ezrachi, 'Limitations on the Extraterritorial Reach of the European Merger Regulation' (2001) 22(4) E*uropean Competition Law Review Journal* 137; P J Slot, 'Case T-102/96, Gencor Ltd v. Commission' (2001) 38(6) *Common Market Law Review* 1573; Y van Gerven and L Hoet, '*Gencor*: Some Notes on Transnational Competition Law Issues' (2001) 28(2) *Legal Issues of Economic Integration* 195.

29 *Gencor* (n 24), para 90.

30 For further analysis see S E Burnett, 'US Judicial Imperialism Post "Empagran v. F. Hoffmann-La Roche"?: Conflicts of Jurisdiction and International Comity in Extraterritorial Antitrust' (2004) 18 *Emory International Law Review* 555; H L Buxbaum, 'National Courts, Global Cartels: F. Hoffmann-La Roche Ltd. v. Empagran, S.A.' (2004) 5 *German Law Journal* 1095; L M Donovan, 'Importing Plaintiffs: The Extraterritorial Scope of the Sherman Act after *Empagran*' (2006) 91 *Iowa Law Review* 719; S Fernandes, 'F. Hoffmann-La Roche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: where Comity and Deterrence Collide' (2005) 20 *Connecticut Journal of International Law* 267; S F Halabi, 'The Comity of *Empagran*: the Supreme Court Decides that Foreign Competition Regulation Limits American Antitrust Jurisdiction over International Cartels' (2005) 46 *Harvard International Law Journal* 279; C Ryngaert, 'Foreign-to-Foreign Claims: the US Supreme Court's Decision (2004) v. the English High Court's Decision (2003) in the Vitamins Case' (2004) 25 *European Competition Law Review* 611; C Sprigman, 'Fix Prices Globally, Get Sued Locally? US Jurisdiction Over International Cartels' (2005) 72 *University*

of Chicago Law Review 265; A Stanger, 'Analyzing U. S. Antitrust Jurisdiction over Foreign Parties After Empagran S. A. v. F. Hoffmann-La Roche, Ltd' (2003) *Brigham Young University Law Review* 1453; W Wurmnest, 'Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of US Antitrust Law' (2005) 28 *Hastings International & Competition Law Review* 205.

31 *Murray v The Schooner Charming Betsy*, 6 US 64 (US 1804).

32 *F Hoffmann-La Roche Ltd et al v Empagran SA et al*, 124 S Ct 2359 (2004), 2366.

33 ibid.

34 ibid, 2367.

35 Slip op p 5.

36 ibid, p 20.

37 E Cosenza, 'Paradise Lost: 10 (b) after Morrison v. the Australia Bank' (2011) 11(2) *Chicago Journal of International Law* 343; K M White, 'Is Extraterritorial Jurisdiction Still Alive?: Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of Morrison v. National Australia Bank' (2012) 37(4) *North Carolina Journal of International Law and Commercial Regulation* 1187; M Ventoruzzo, 'Like Moths to a Flame? International Securities Litigation after Morrison: correcting the Supreme Court's "Transactional Test" ' (2012) 52(2) *Virginia Journal of International Law* 405.

38 *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013).

39 28 USC § 1350; ATS.

40 133 S Ct 1669.

41 See C Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations' (2007) 38 *Netherlands Yearbook of International Law* 3.

42 For an analysis see R Altman, 'Extraterritorial Application of the Alien Tort Statute After Kiobel' (2016) 24 *University of Miami Business Law Review* 111; S H Cleveland, 'After "Kiobel" ' (2014) 12(3) *Journal of International Criminal Justice* 551; A Grear and B H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape' (2015) 15(1) *Human Rights Law Review* 21; G L Skinner, 'Beyond Kiobel: providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World' (2014) 46(1) *Columbia Human Rights Law Review* 158.

43 Slip op p 15.

44 See *Mujica v AirScan Inc*, 771 F 3d 580, 594 (9th Cir 2014); *Cardona v Chiquita Brands Int'l Inc*, 760 F 3d 1185, 1189 (11th Cir 2014).

45 See, apart from the aforementioned cases, *Mastafa v Chevron Corp*, 770 F 3d 170, 182 (2d Cir 2014); but see *contra Sexual Minorities Uganda v Lively*, 960 F Supp 2d 304, 312 (D Mass 2013).