1. International jurisdiction law

Cedric Ryngaert

INTRODUCTION

This chapter presents what Kenneth S. Gallant terms "the standard model" of the law of international jurisdiction.[1] This model comprises the principles of jurisdiction on which States actually rely in their legal practice.

The law of international jurisdiction is concerned with delimiting the geographical reach of a State's authority. Jurisdiction is the legal mirror image of the principle of sovereignty: the latter is iteratively instantiated by its jurisdictional assertions over specific persons, items, and events. As in the current international system of States, sovereignty is grounded on territory,[2] and territoriality is the basic principle of the law of jurisdiction. This implies that a State *prescribes* laws for activities on its territory, and *enforces* its laws there. Nevertheless, international law allows for limited forms of extraterritorial jurisdiction, especially as to prescriptive jurisdiction: a State has the authority to prescribe laws to govern conduct of its nationals abroad, conduct abroad that threatens its security, or even globally reprehensible conduct abroad. As to enforcement jurisdiction, extraterritoriality is generally considered as off-limits: States can only enforce their laws on their territory. This means that, in some instances, they may have to rely on international cooperation if their jurisdiction to prescribe is not to remain dead-letter. Recently, however, strict enforcement territoriality has come under pressure, notably in cyberspace.

The international law of jurisdiction is customary in nature. There is no overarching treaty on jurisdiction, although some sectoral conventions have codified principles of jurisdiction in relation to specific (transnational) offenses. Going by the practice of States, there is consensus on the grounds of jurisdiction that can be validly invoked. However, the exact scope and limitations of these grounds are still open to contestation.

This chapter uses the criminal law as its starting point, given that the international law of jurisdiction finds its origins there. However, it also examines how the law of jurisdiction is applied to assertions in other fields of national public law, in particular economic regulation, as well as in private (international) law. Most jurisdictional conflicts between States in fact concern the geographical reach of a State's regulatory laws. In contrast, jurisdictional grounds in private international law, while extremely diverse, have hardly led to jurisdictional conflict. This raises the question whether jurisdiction in private law cases, denoted here as adjudicative jurisdiction, is subject to public international law constraints in the first place.

[1] Kenneth Gallant, *International Criminal Jurisdiction* (OUP 2021) Part 2.

[2] See for a political history: Stuart Elden, *The Birth of Territory* (University of Chicago Press 2013).

PRESCRIPTIVE JURISDICTION

Jurisdiction to prescribe is concerned with a State's authority to apply its laws to persons, things, and events. While prescriptive jurisdiction is primarily territorial, States are not barred from exercising extraterritorial jurisdiction. In the 1927 *Lotus* case, the Permanent Court of International Justice (PCIJ) famously held: "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."[3] This liberal approach to prescriptive jurisdiction does not fully reflect State practice, however. Practice rather tends to be based on the 1935 Harvard research project on jurisdiction, which sets forth that States can only exercise prescriptive jurisdiction on the basis of a permissive principle.[4] Five main principles of prescriptive jurisdiction can be discerned: territoriality, nationality (active personality), passive personality, security (protection), and universality. They will be discussed in turn below. The list of permissive principles is not a closed one. Depending on State practice, new principles can develop and may already have developed. As there is no formal hierarchy among the permissive principles of jurisdiction, jurisdictional overlap and tension may arise. This has sparked a—still ongoing—quest for limiting principles.

While the discussion in this section pertains to principles of *prescriptive* jurisdiction, where possible parallels are drawn with principles of adjudicative jurisdiction or jurisdiction in private international law, which may resemble, or even have their roots in such principles as, territoriality or nationality.[5] Jurisdictional principles of private international law are in themselves not *prescriptive*, however, as they only aim to identify the competent forum State, that is, the court which can hear the (transnational) dispute.

Territoriality

Territoriality can be considered as the cornerstone of the international law of prescriptive jurisdiction, given its strong connection with the basic global ordering principle of territorial sovereignty. Territorial jurisdiction is normatively justified on the grounds that crime or other deviant activity primarily threatens the public order of the State on whose territory it occurs. In addition, such activity is likely to leave evidentiary traces in the territorial State rather than elsewhere. Accordingly, territoriality is less likely to be controversial or contested in application. Doctrinally speaking, territoriality is nevertheless not hierarchically superior to other permissive principles of prescriptive jurisdiction.[6] The principle of territorial jurisdiction has its roots in the criminal law, but it is routinely applied in other fields of public law, such as

---

[3] *S.S. Lotus (France v Turkey)* PCIJ Rep Series A No 10, 19.

[4] Harvard Research, 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law* 439–42.

[5] After all, jurisdiction in public and private international law have the some historical roots. See Alex Mills, 'Private Interests and Private Law Regulation' in Stephen Allen et al. (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 339.

[6] In the practice of criminal law, however, the territorial State will often have first right of way as it may more easily obtain custody of the offender (who may remain present on the territory after the offence). The territorial State can then decide to extradite the person or to prosecute him before its own courts.

economic regulation, as well as private international law. In fact, a large number of jurisdictional connecting factors in private international law are rooted in the territoriality principle.[7]

The principled validity of territorial jurisdiction is uncontested. However, it remains unclear what territorial connections precisely suffice for the valid exercise of territorial jurisdiction. The question arises notably whether a tenuous, fleeting or entirely fortuitous connection of a transnational offense or other activity to a State's territory can validly ground territorial jurisdiction over the offender. If even a *de minimis* territorial impact is sufficient, territorial bases of jurisdiction can swallow all other forms.[8] Territoriality then becomes a vessel for extraterritoriality.

International criminal law traditionally addresses this problem of localizing transnational crime by using "ubiquity": States have exercised territorial jurisdiction when one of the constituent elements can be tied to their territory.[9] Legal doctrine differentiates between subjective and objective territoriality: the former refers to the initiation of the offense, the latter to its completion. International law itself does not define the constituent elements of offenses. This is left to States, which have adopted their own criminal laws and legal definitions.

However, it is arguable that international law draws the outer contours of what is permissible. It would not be permissible for a State to define or interpret the constituent elements of an offense in such a manner that they allow for the exercise of territorial jurisdiction absent a genuine connection of the offense to the State, for example, in case a State exercises territorial jurisdiction on the basis of a mere territorial 'effect' of extraterritorial conduct.[10] Also, from the individual rights perspective of proper notice, the absence of such a connection may catch the defendant unawares, as he may not reasonably be able to foresee the application of a State's criminal laws. For instance, the exercise of territorial jurisdiction over illegal or defamatory internet content that is *accessed* by users in the territory, while that content has not been specifically *targeted* at those users, may be problematic: the person who produces or uploads the impugned content cannot possibly be aware of all criminal laws in the world.[11] Also, a State's exercise of territorial jurisdiction over otherwise extraterritorial activity, simply on the basis of a fleeting connection like sending an email through a server located in the territory[12] or the clearing of a currency transaction through a local correspondent bank,[13]

---

[7] Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) *British Yearbook of International Law* 187, 203–4.

[8] On the 'vanishing difference between strict territoriality and effects jurisdiction' see Peter Szigeti, 'The Illusion of Territorial Jurisdiction' (2017) 52 *Texas International Law Journal* 369, 372–81.

[9] Cedric Ryngaert, 'Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law' (2009) 9 *International Criminal Law Review* 187.

[10] See also Austen L. Parrish, 'Evading Legislative Jurisdiction' (2011–12) 87 *Notre Dame L. Rev.* 1673, 1680 (historically reconstructing territoriality and concluding as follows: 'Simply that a crime's effects were felt within a state, however, was insufficient').

[11] Julia Hörnle, *Internet Jurisdiction: Law and Practice* (OUP 2021) 143–44 (describing how German and English legal practice adopts a variation of the targeting test in these cases). See also Dan Svantesson, 'Global Speech Regulation', Chapter 27, this volume.

[12] *SEC v Straub*, 921 F Supp 2d 244, 262–64 (SDNY 2013) (US court establishing territorial jurisdiction in the context of a prosecution for foreign corrupt practices, on the mere basis that emails were routed through a US server).

[13] *United States v Zarrab*, No 15-cr-867, 2016 WL 6820737 (SDNY 2016), 15 (US court considering the use of a US correspondent bank account as an export of services from the US, which is covered by the principle of territoriality – in the context of the criminal enforcement of US sanctions regulations); *Licci*

appears to be problematic: given the complexity of the organization of the international communications and financial system, individuals may not be able to foresee the application of that State's laws. Problems of proper notice of the defendant may also arise in respect of territorial jurisdiction over various forms of participation and inchoate offenses, national approaches to which vary widely among States.[14] That being said, international protest against these jurisdictional assertions has hardly arisen.

While traditional assertions of territorial jurisdiction in the criminal law have met with little to no international protest, this is certainly different in the field of economic regulation. When States use a territorial "hook" to assert territorial jurisdiction over an otherwise transnational or even global business activity, other States may well perceive such assertiveness as encroaching on their own prerogatives to regulate socio-economic affairs on their territory.

The classic example is antitrust or competition law. States of exportation may condone restrictive business practices as long as these increase national welfare, whereas States of importation may clamp down on such practices because they raise prices and decrease national welfare. The latter States may embrace expanded versions of the territoriality principle, such as the territorial effects or implementation doctrines,[15] to vest their jurisdiction over cartels which adversely affect their consumers and economy. A clash of jurisdiction—in fact, a clash of economic interests and values—may then appear inevitable.[16] Such clashes were rife in the latter half of the twentieth century, especially between the US and the EU.[17]

In the same broad field of economic regulation, (Western) States have recently started to leverage *territoriality* to effect *extraterritorial* change. Terms such as "territorial extension,"[18] the "Brussels Effect,"[19] or "internal measures with extraterritorial impact"[20] are used to denote this phenomenon, which uses a territorial hook (such as the importation of a product into the territory or the provision of services on the territory) to domestically regulate a transnational business activity. Countries or regional organizations with large consumer markets, such as the EU and the US, can rely on this regulatory technique to impact global or overseas activities. For instance, the EU has required global data controllers (in practice, US tech giants) wishing to access the EU market to comply with stringent EU data protection regulations, thereby in

---

v Lebanese Canadian Bank, No 15-1580 (2d Cir 2016), at 25 (US courts finding territorial jurisdiction in the context of a prosecution for aiding and abetting terrorist activities, on the mere basis that a Lebanese bank cleared US dollars through a correspondent bank account in New York).

[14] Gallant (n 1) 309–14; Andrés Payer, *Territorialität und grenzüberschreitende Tatbeteiligung* (Dike 2021).

[15] See for the effects doctrine: *United States v Aluminum Corp of America* 148 F 2d 416, 443 (2d Cir 1945); *Hartford Fire Ins. Co. v California* 509 US 764, 798 (1993); Case C-413/14 P *Intel Corp. v European Commission* [2017] ECLI:EU:C:2017:632, paras 40–60. See for the implementation doctrine: Case C-89/85, *Ahlstrom Osakeyhtio and others v Commission of the European Communities* [1988] ECR 5193, paras 16–17.

[16] See also Marek Martyniszyn, Chapter 23, this volume.

[17] See at length Cedric Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Intersentia 2008).

[18] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62(1) *American Journal of Comparative Law* 87.

[19] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

[20] Ioanna Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) 2(2) *European Papers* 519–42.

effect setting the gold standard for global data protection.[21] Both the EU and the US have also conditioned the importation of consumer goods on compliance with sustainability and human rights standards, aiming to raise such standards worldwide.[22] Furthermore, both of them hope to stem the flow of conflict minerals by either prohibiting the importation of such minerals or imposing reporting requirements on domestic issuers engaged in the minerals trade.[23] When so doing, they unilaterally leverage territoriality (constituted by the territorial importation of goods and services) to govern globally. These governance techniques raise acute jurisdictional concerns, as they may be viewed as amounting to the hegemonic imposition of the life-projects of economically advanced nations on less developed ones, thereby raising the colonial specter of the West's civilizing mission.[24] They have led to some international protest,[25] although perhaps less than could be expected given the potentially intrusive nature of said regulation. This relative absence of international protest may be attributable to the global interests arguably served by this regulation,[26] coupled with their "considerate design" (which may include exemptions and deference to local regulations).[27]

Nationality Principle

The active personality or nationality principle is a principle of extraterritorial jurisdiction pursuant to which a person's national laws govern her conduct abroad. It is a classic principle of international law, and is largely uncontested.

---

[21] Cedric Ryngaert and Mistale Taylor, 'The GDPR as Global Data Protection Regulation' (2020) 114 *American Journal of International Law Unbound* 5–9.

[22] See, e.g., Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market; Sec. 307 Smoot-Hawley Tariff Act of 1930, Pub. L. 71-361, 19 U.S.C. § 1307 (concerning the importation of goods produced with forced labor). See also Ioanna Hadjyianni, 'The Extraterritorial Reach of Environmental Law', Chapter 22, this volume.

[23] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, *OJ* L 130/1 (2017); Section 1502 Dodd–Frank Wall Street Reform and Consumer Protection Act, amending Securities and Exchange Act (2010).

[24] See also Nico Krisch, 'Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance' (2022) 33 *European Journal of International Law* 481–514. See for a similar critique in relation to extraterritorial conflict minerals regulation: Phoebe Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' (2020) 69 *International & Comparative Law Quarterly* 685.

[25] Notably the extraterritorial impacts of the EU Aviation Directive (which nevertheless used territorial landing and departing as the jurisdictional hook) led to substantial international pushback, although the EU's regulatory efforts eventually pushed the envelope internationally. See for a discussion Natalie Dobson, 'Competing Climate Change Responses: Reflections on EU Unilateral Regulation of International Transport Emissions in Light of Multilateral Developments' (2020) 67 *Netherlands International Law Review* 183–210.

[26] Cedric Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (OUP 2020).

[27] This notion of considerate design, which aims to find 'a better balance between regulatory autonomy, development needs and the protection of common concerns' is further explored in the context of climate change extraterritoriality by Natalie Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law* (Bloomsbury/Hart 2021).

In the criminal law, most States limited the reach of nationality jurisdiction, notably by restricting the principle to more serious offenses (in particular in common law countries) or by requiring double criminality (that is, criminalization in the State of nationality and the territorial State). There is no indication that these limitations are required by international law. The nationality principle is traditionally justified on the ground that some States do not extradite their own nationals, due to constitutional constraints. This may create an impunity gap, where criminals return to their home country without being exposed to prosecution. This justification does not, as such, explain why home States have an *interest* in exercising their jurisdiction over acts of their nationals abroad. The main justification appears to be that nationals have a duty of loyalty or allegiance to their State of nationality. As States can exercise diplomatic protection over their nationals against whom internationally wrongful acts are committed, these nationals arguably have reciprocal duties toward their home States, including respect for the latter's laws when acting abroad.[28] Emphasizing this duty of allegiance only takes us so far, however, as crimes committed abroad by one's own nationals do not necessarily affect the public order of the home State. This has led some authors to reject the nationality principle.[29] An outright normative rejection of the principle is unwarranted, however. While, in itself, the duty of allegiance may not ground nationality-based jurisdiction, there are other rationales militating in favor of the principle. For one thing, persons who commit crimes abroad may have a propensity to repeat criminal behavior in their home State. For another, the territorial State may have an expectation that the State of nationality assumes its responsibility for the acts of their nationals abroad; exercising nationality jurisdiction is then a matter of good neighborliness.[30] Also, as Frédéric Mégret has recently argued, nationality jurisdiction might have a cosmopolitan rationale, in the sense that it may be grounded on human rights duties which States of nationality have *vis-à-vis* victims abroad, as well as on "a minimal penal obligation under international law to maintain order and justice, with a view to minimising crime generally."[31] It is indeed the case that quite a number of transnational criminal law treaties provide for nationality jurisdiction,[32] either as an obligation (for example, with respect to crimes of torture)[33] or as an option (for example, with respect to corruption).[34]

The nationality principle is relied on in fields other than the criminal law as well. Especially in economic law, States use it to regulate the extraterritorial activities of locally incorporated firms. Most conspicuously, as a form of home State control or regulation, a number of States have imposed due diligence obligations on such firms with respect to human rights and envi-

---

[28] Harvard Research (n 4) 519–20.

[29] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010) 60–61.

[30] Gallant (n 1) 354.

[31] Frédéric Mégret, '"Do Not Do Abroad What You Would Not Do at Home?": An Exploration of the Rationales for Extraterritorial Criminal Jurisdiction over a State's Nationals' (2019) 57 *Canadian Yearbook of International Law* 1, 40.

[32] See also Matthew Garrod, 'The Expansion of Treaty-Based Extraterritorial Criminal Jurisdiction', Chapter 15, this volume.

[33] Article 5(1)(b) UN Torture Convention.

[34] Article 42(2)(b) UN Convention against Corruption. However, Article 42(3) of this Convention provides for *mandatory* nationality-based jurisdiction 'when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals'.

ronmental risk in their global supply chain.[35] Although these initiatives may require major "extraterritorial" structural reforms (for example, reforms outside the regulating State), by and large they have not been met with international protest. This is arguably the case because the values on which they are based are globally shared, and because (victims in) host States may legitimately expect home States to assume some responsibility for the acts and omissions of their corporations ("extraterritorial duty to protect").[36]

In income taxation law, nationality jurisdiction is internationally frowned upon, as States usually only impose taxes on persons residing or acquiring income in their territory. They eschew the imposition of taxes on non-resident nationals. A limited number of States do rely on nationality jurisdiction, however; the US in particular has recently started to more vigorously enforce its legislation in this respect.[37] This practice appears to be grounded on an anti-evasion rationale, but is widely seen as normatively unjustified.[38] It is not clear whether it is internationally unlawful.

In private international law, the nationality principle is rarely relied upon as a ground for jurisdiction.[39] More common is that jurisdiction in private international law is based on the residence or domicile of the defendant. This principle appears to be a mixture of territoriality and nationality, as it does not as such require citizenship.[40] It is even the basic principle of jurisdiction in civil law countries.[41] Somewhat similarly, the US requires that a defendant be "essentially at home" in the US for personal jurisdiction to apply.[42] Some States have also started to use domicile or residence as a jurisdictional connecting factor in the criminal law,[43] a shift which does not appear to have been opposed by other States. Finally, some States extend the nationality principle to foreign persons (firms) *controlled* by nationals, such as foreign subsidiaries of domestic parents. Notably, the US applies the control theory in its international sanctions regulations.[44] This practice has led to international protest,[45] but the US has not withdrawn it.

---

[35] On due diligence, e.g.: EU, Corporate due diligence and corporate accountability, European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)); France, *LOI no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*; Germany, *Gesetzentwurf der Bundesregierung über die unternehmerischen Sorgfaltspflichten in Lieferketten*, 11 June 2021.

[36] See on the latter: Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, paras 30–35.

[37] Foreign Account Tax Compliance Act, 124 Stat. 71, 97–117 (2010); 26 U.S.C. § 1471–1474.

[38] Peter J. Spiro, 'Citizenship Overreach' (2017) 38 *Michigan Journal of International Law* 168; Allison Christians, 'A Global Perspective on Citizenship-Based Taxation' (2017) 38 *Michigan Journal of International Law* 226–30; Ruth Mason, 'Citizenship Taxation' (2016) 89(2) *Southern California Law Review* 237.

[39] E.g., Article 15 French Civil Code.

[40] Note that Alex Mills, above note 7, 204, considers the principle to be a variation of the territoriality principle.

[41] E.g., Article 2 of the EU Brussels Regulation.

[42] *Goodyear Dunlop Tires Operations, S. A. v Brown*, 131 S. Ct. 2846 (2011).

[43] E.g., Article 7(3) Dutch Penal Code.

[44] E.g., US Cuban Asset Control Regulations, 31 C.F.R. § 515.329.

[45] E.g., European Community: *Note and Comments on the Amendments of 22 June 1982 to the Export Administration Act*, 12 August 1982, 21 ILM (1982) 891, 893–94.

Passive Personality Principle

Pursuant to the passive personality principle, States can exercise extraterritorial jurisdiction on the basis of the nationality (or permanent residency) of the victim. It is arguably the most controversial principle of jurisdiction, as it is not clear whether the nationality of the victim always amounts to a genuine connection to (relevant interests of) the State. Common law countries have traditionally opposed passive personality.[46] In recent decades, however, they have supported it in relation to terrorist offenses or offenses that were committed against persons because of their nationality.[47] In addition, they have lately not protested the exercise of passive personality jurisdiction by other States in respect of non-terrorist offenses.[48] This may be the case because these other States, mostly civil law countries, reserve passive personality to more serious offenses and tend to require double criminality (thereby dispelling concerns over proper notice to the suspect).[49] It is not clear whether they do so out of a sense of international legal obligation. Some transnational crime conventions explicitly provide for optional passive personality-based jurisdiction. This is the case for the anti-terrorism conventions,[50] but also, perhaps more surprisingly, for conventions such as the UN Torture Convention[51] and the UN Convention against Corruption.[52]

Outside the criminal law, the passive personality principle is, as such, not normally relied on to justify assertions of extraterritorial jurisdiction. Possibly, it could play a limited role in the context of extraterritorial sanctions law.[53] It is also of note that, in private international law disputes, some States grant jurisdiction if the plaintiff has the nationality of the forum State.[54]

From a normative perspective, boundless passive personality-based jurisdiction appears unjustified, as it conflates the individual interests of victims with the interests of the larger society. In practice, prosecutors will have to weigh case-by-case whether extraterritorial victimization warrants a prosecution on the basis of passive personality, taking into account the impact of the offense on wider societal interests. A prosecution appears especially warranted

---

[46] This explains why Harvard Research (n 4) did not incorporate the principle in its Draft Convention, although it did discuss it (445).

[47] See, e.g., for US law: Section 402, Fourth Restatement, Reporters' Note 8.

[48] The last incident of the US protesting another State's exercise of passive personality jurisdiction arguably dates back to the *Cutting Case* of 1886. US Dep't of State, 1887 Foreign Relations 751 (1888), 2 Moore, *International Law Digest* 228 (1906). However, common law countries have not formally distanced themselves from their principled opposition to passive personality. Accordingly, they may qualify as persistent objectors to the principle outside the terrorism context. Gallant (n 1) 443–44.

[49] E.g., Article 5(1) Dutch Penal Code.

[50] International Convention for the Suppression of Acts of Nuclear Terrorism (2005) art 9(2)(a).

[51] Article 5(1)(c) UN Torture Convention.

[52] Article 42(2)(a) UN Convention against Corruption.

[53] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (12 March 1996). In particular, Title III of the US Helms–Burton Act, which allows a US national who has a claim for property confiscated by Cuba to bring suit in US courts against any person who 'traffics' in such property, may be based on the passive personality principle, but only at first sight. See William S. Dodge, 'The Helms–Burton Act and Transnational Legal Process' (1997) 20 *Hastings Int'l & Comp. L. Rev.* 713, 725, fn. 70.

[54] E.g., French Civil Code, Article 14.

in case a substantial number of nationals have been victimized, even if these persons have not specifically been targeted because of their nationality.[55]

There is one further issue with this type of prosecution, namely whether passive personality jurisdiction can be extended to try crimes committed against foreigners in a context where the State's own nationals were also victimized. One could think of a massacre perpetrated in State X by perpetrators *x*, against persons of different nationalities, including of State Y. State Y has passive personality jurisdiction over the crimes committed in State X against its own nationals, but does this extend to crimes committed against non-nationals? It appears that the answer is in the negative, although some States have claimed jurisdiction over such a situation.[56]

Protective Principle

Pursuant to the protective or security principle, States have extraterritorial jurisdiction over foreign acts which threaten their sovereignty, political independence and governmental functioning, even absent (direct) territorial effects. Given the aim of the protective principle, in principle, only a limited number of offenses qualify for protective jurisdiction, such as espionage, counterfeiting currency, making false statements to immigration authorities, sedition and crimes committed by the enemy in times of war.[57] A number of transnational crime conventions provide for protective jurisdiction, mostly regarding terrorism. Such jurisdiction is mostly optional.[58]

Some States tend to define national security threats rather vaguely in their codes, leading to concerns over proper notice of the defendant as well as over the freedom of speech in the territorial State. For instance, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, adopted in 2020, provides in Article 38 that it "shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region."[59] The net of offenses under this law is cast widely, as it includes secession, subversion, terrorist activities and collusion with foreign or external elements to endanger national security. While the law may target foreign Hong Kong diaspora commu-

[55] An example is the Dutch prosecution of those allegedly responsible for downing flight MH17 over Ukraine, which killed 196 Dutch nationals. See the website of the Dutch Public Prosecutor for all news relating to the investigation, prosecution and trial concerning MH17: www.prosecutionservice.nl/topics/m/mh17-plane-crash.

[56] Lachezar Yanev, 'Jurisdiction and Combatant's Privilege in the *MH17* Trial: Treading the Line Between Domestic and International Criminal Justice' (2021) 68 *Netherlands International Law Review* 163 (criticising the contrary position of the Dutch public prosecutor in the MH17 trial, who claimed Dutch jurisdiction over the non-Dutch victims of the MH17 crash).

[57] See on the latter: Matthew Garrod, 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' (2012) 12 *International Criminal Law Review* 763–826.

[58] UN Convention against Corruption (2003) art 42(2)(d); International Convention for the Suppression of the Financing of Terrorism (1999) art 2. Some treaties seem to provide for mandatory protective jurisdiction, e.g., International Convention against the Taking of Hostages (1979) art 5.

[59] Simon Young, 'The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region' (2020) 60(1) *International Legal Materials* 1–17.

nities, in a literal reading, it may also include non-Chinese nationals based abroad criticizing China's policies with respect to Hong Kong.[60]

It is not clear to what extent such sweeping laws violate the international law of jurisdiction, as the latter does not as such limit the type of threats to national security that can ground protective jurisdiction.[61] In essence, international law leaves this to States, as in the exercise of their sovereignty, they should be allowed to define national security for themselves.[62] That being said, some extraterritorial national security laws may be in tension with civil liberties and international human rights law, to the extent they threaten freedom of expression.[63] Insofar as foreign States hold such freedoms very dear—liberal democracies, for example—such security laws may even be considered as violating the latter's sovereignty.[64]

Most observers would consider the protective principle to be applicable in a non-criminal context as well, notably where States enact national security-based administrative regulations with an extraterritorial dimension.[65] Such regulations may well address indirect, that is non-elemental, territorial harm, which cannot be covered by the territoriality principle.[66] Coupled with the possible non-reviewability of a State's security concerns, these jurisdictional assertions may well be overbroad. That said, insofar as these extraterritorial economic sanctions qualify as trade restrictions, the Dispute Settlement Mechanism of the World Trade Organization may provide a legal check, as it has considered a State's reliance on the security exception under WTO law to be not entirely self-judging.[67]

---

[60] David Gilbert, 'China thinks it can arrest basically anyone on the planet for criticizing communism' (*Vice*, 2 July 2020) www.vice.com/en/article/3azv88/china-thinks-it-can-arrest-basically-anyone-on-the-planet-for-criticizing-communism.

[61] This has also been the reaction by the Chinese Foreign Ministry, which pointed out that also other States rely on the protective principle in similar situations. 'China says Article 38 follows principle of protective jurisdiction' (*The Standard* (Hong Kong) 21 July 2020).

[62] See, e.g., Deutscher Bundestag, Wissenschaftlichte Dienste, US-Sanktionen gegen den Bau der Pipeline Nord Stream 2 aus völkerrechtlicher Sicht, WD 2 – 3000 – 075/20 (2020), p.13.

[63] See, e.g., Patrick Wintour, 'Academics warn of chilling effect of Hong Kong security law' (*The Guardian* 12 October 2020).

[64] To dent the impact of extraterritorial security laws in a criminal law context, States can refuse extradition or any other form of cooperation with the extraterritorially legislating State, citing the requirement of double criminality or fundamental rights concerns.

[65] See, e.g., Susan Emmenegger, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 *Arizona Journal of International and Comparative Law* 651, 652, 658.

[66] Gallant (n 1) 402. For instance, in *US v Reza Zerrab*, which concerned the geographical reach of US economic sanctions regulations, a New York District Court held that if the 'issue of extraterritoriality were to be reached, Zarrab's argument that the [International Emergency Economic Powers Act (IEEPA)] and [the Iranian Sanctions and Transactions Regulations (ISTR)] do not apply extraterritorially would likely prove unpersuasive [where the] law at issue is aimed at protecting the right of the government to defend itself'. *United States v Reza Zarrab* 15 Cr 867 (RMB) (SDNY, 17 October 2016) (Decision and Order) 18. See also Christian Tietje and Cristina Lloyd, 'Secondary Sanctions', Chapter 26, this volume.

[67] Russia – Measures Concerning Traffic in Transit, Panel Report, WT/DS512/R (5 April 2019), para. 7.134 (ruling that WTO members must 'articulate the essential security interests […] sufficiently enough to demonstrate their veracity').

Universality Principle

Whereas the aforementioned permissive principles operate on the basis of a connection to the State, universality, at least in its pure form, does not require any connection. Instead, it is ordinarily grounded on the gravity of the offense only, regardless of where or by whom it may be committed. Accordingly, universal jurisdiction appears as one of the most far-reaching forms of extraterritorial jurisdiction. Over the years, it has generated a tremendous amount of academic and civil society interest. Actual prosecutions, let alone trials on the basis of universality, remain few and far between, however—even if, as of late, their number appears to be growing somewhat.[68]

There are two categories of offenses that give rise to universal jurisdiction: on the one hand, core crimes against international law, which tend to be linked to serious violations of international human rights law (atrocity crimes, such as war crimes, genocide, crimes against humanity, torture), and on the other, crimes committed against the community of States (such as piracy and terrorist offenses). Universal jurisdiction over both categories is animated by a desire to prevent impunity and deter future criminal behavior.

There is a criminal and a civil variant of universal jurisdiction. Universal criminal jurisdiction concerns the prosecution of international criminals, whereas universal civil jurisdiction concerns private lawsuits for damages initiated by victims. The latter is less accepted internationally.

Universal criminal jurisdiction can be based either on customary international law or on treaty law. Most treaties which provide for universality in fact do so by means of an *aut dedere aut judicare* clause, which requires States parties to either prosecute or extradite a presumed offender present on their territory.[69] In *Belgium v Senegal* (2012), the ICJ interpreted the *aut dedere aut judicare* clause in the UN Torture Convention in such a way that States parties have an obligation to prosecute and an option to extradite.[70] In principle, an *aut dedere aut judicare* obligation only works *inter partes*. It cannot be invoked in respect of nationals of States that have not ratified the treaty,[71] and may not represent customary international law, as there does not appear to be evidence of general State practice and *opinio juris*.[72] When implementing the clause in their domestic law, States do not always make the distinction between treaty parties and non-parties, however.

Where a treaty clause on universality is lacking, customary international law may authorize, although not require, the exercise of universal jurisdiction. Going by the legal practice of States, in particular their domestic codes, such authorizations may exist in relation to a number

---

[68] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30(3) *European Journal of International Law* 779–817.

[69] E.g., Art. 5(2) and Art. 7 UN Convention against Torture; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970) art 3(5); International Convention for the Suppression of the Financing of Terrorism (1999) art 9.

[70] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 2012 422, paras 94–95.

[71] Article 34 Vienna Convention on the Law of Treaties (1969).

[72] ILC Final Report, 'Obligation to Extradite or Prosecute' (2014) UN Doc. A/CN.4/L.844 paras 50–51.

of core international crimes,[73] although not necessarily all. Most domestic codes require the presence of the offender for universal jurisdiction to be exercised,[74] but it is not clear whether they do so out of a sense of legal obligation (*opinio juris*).

Universal jurisdiction, and more in particular its scope and application, has received considerable international pushback.[75] This has led some (Western) States to scale back their universality laws.[76] Research has demonstrated that most prosecutions brought under the universality principle relate to lower- or mid-level offenders, who have fled the *locus delicti* and sought refuge in a bystander State.[77] This mitigates the risk of diplomatic tension. Such is likely to be the future trajectory of universality, which in practice will remain a most exceptional form of extraterritorial jurisdiction.

The resurrection of the US Alien Tort Statute (ATS),[78] which gives US federal courts tort jurisdiction over violations of the law of nations (wherever they may be committed),[79] has triggered the question whether there is also universal civil jurisdiction. The answer is likely to be in the negative. In fact, the ATS itself, which is often cited as providing for universal jurisdiction,[80] is a rather idiosyncratic statute, which in the current Supreme Court interpretation cannot be said to provide for universality: it only captures cases which "touch and concern" the US.[81] Moreover, US rules of personal jurisdiction require that defendants have minimum contacts with the US, which, when the lawsuit arises from a defendant's activity outside the United States, currently means that the defendant must be essentially at home in the US.[82] Also in other States, there is little indication of relevant practice and *opinio juris* supporting a customary norm authorizing universal civil jurisdiction.[83] Still, some authors, writing mostly in the first decade of the 2000s, have supported the legality of universal civil jurisdiction.[84] In

---

[73] See for a useful overview: Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update*. See on war crimes: ICRC, *Customary International Humanitarian Law*, Volume II, Chapter 44, Section B. Rule 157 ('States have the right to vest universal jurisdiction in their national courts over war crimes'), citing substantial practice.

[74] E.g., Article 2 Dutch International Crimes Act (2003).

[75] See reactions of States compiled in UN Report of the Secretary General, "The Scope and Application of the Principle of Universal Jurisdiction" (2015) paras 80–88. See on African States' opposition to particular forms of universality: Martin Mennecke, 'The African Union and Universal Jurisdiction' in Charles Chernor Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (OUP 2017).

[76] Steve Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97(4) *The American Journal of International Law* 888–97; Rosa A. Alija Fernández, 'The 2014 Reform of Universal Jurisdiction in Spain From All to Nothing' [2014] *Zeitschrift für Internationale Strafrechtsdogmatik* 717–27.

[77] Máximo Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' (2015) 13(2) *Journal of International Criminal Justice* 245–56.

[78] 28 U.S.C. Section 1350 ('The 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').

[79] There is a string of ATS cases. See for a good overview until 2015: Curtis A. Bradley, *International Law in the US Legal System* (OUP 2015) Chapter 7: Alien Tort Statute Litigation.

[80] Ernest A. Young, 'Universal Jurisdiction, the Alien Tort Statute, and Transnational Public Law Litigation after *Kiobel*' (2015) 64 *Duke Law Journal* 1023.

[81] *Kiobel v Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).

[82] *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011).

[83] Abhimanyu G. Jain, 'Universal Civil Jurisdiction in International Law' (2015) 55 *Indian Journal of International Law* 209–37.

[84] Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142; Cedric Ryngaert, 'Universal Tort

addition, some domestic codes of private international law (conflict of laws) set forth a jurisdictional principle that somewhat resembles universality, namely forum of necessity. Under forum of necessity, a court can exceptionally establish its civil jurisdiction if the plaintiff faces a denial of justice elsewhere. Unlike universality, forum of necessity does not pay attention to the gravity of the crime; its rationale rather lies in access to justice considerations. Most States, although not all, require some connection to the forum State for necessity-based jurisdiction to obtain.[85]

Other Permissive Principles

The aforementioned jurisdictional principles are arguably specifications of a more general principle according to which, in the words of Section 407 of the Restatement (Fourth) of US Foreign Relations Law (2018), "[c]ustomary international law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the State seeking to regulate." This means that other grounds of jurisdiction based on genuine connection could potentially be recognized.[86] Nonetheless, States tend to shun reliance on principles other than the established principles of jurisdiction. Invocation of a new principle may imply a wish to develop the law, the outcome of which is uncertain in light of the unpredictability of other States' reactions. Moreover, the existing principles are relatively capacious. The territoriality principle in particular may allow for the "territorialization of the extraterritorial," as explained earlier.

At this moment, there appear to be three relatively rare jurisdictional principles which are not typically discussed in an overview of permissive principles of prescriptive jurisdiction under public international law, but which appear to be internationally permissible: jurisdiction based on, respectively, representation, transfer, and anti-evasion.

Pursuant to the principle of representational or vicarious jurisdiction, States exercise jurisdiction over non-national presumed offenders present on their territory who have committed crimes abroad, subject to double criminality and the impossibility of extradition for reasons unrelated to the nature of the crime.[87] This type of jurisdiction is unknown in the common law, but exists in some civil law countries.[88] To the extent that the prosecuting State truly "represents" the territorial State, that is, applies the latter State's crime definitions and penalties, such representational jurisdiction need not raise international eyebrows or present issues of fair notice to the defendant.

In case of transfer of jurisdiction, a State which does not have original jurisdiction acquires such jurisdiction on the basis of an agreement with the State of original jurisdiction. For instance, the Netherlands acquired jurisdiction over the killing of non-Dutch nationals onboard flight MH17, which was shot down over Ukraine in 2014, on the basis of a bilateral agreement

---

Jurisdiction over Gross Human Rights Violations' (2007) 38 *Netherlands Yearbook of International Law* 3–60.

[85] See for a discussion Lucas Roorda and Cedric Ryngaert, 'Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction' (2016) 80(4) *Rabels Zeitschrift für internationales und ausländisches Privatrecht* 783–816.

[86] Section 407, Reporters' Note 2, p.192.

[87] Some literature considers this jurisdictional ground as a subspecies of universal jurisdiction. See Gallant (n 1), Chapter 8.VI.

[88] E.g., Article 65 Austrian Penal Code; Article 8c Dutch Penal Code.

with Ukraine.[89] Transfer of jurisdiction is quite common in the field of maritime drugs and migrant smuggling. Relevant conventions even explicitly provide for such transfers by means of bilateral ship-boarding agreements between flag States and third States, which may apply to both prescriptive and enforcement jurisdiction.[90] As the territorial or flag State explicitly consents to yielding its jurisdiction, such practices do not raise sovereignty concerns. However, problems of fair notice may arise to the extent that the State of transfer applies crime definitions and penalties that do not mirror those of the State of original jurisdiction.

Anti-evasion is a jurisdictional ground which "is intended to catch artificial behavior designed to evade obligations" laid down in domestic law, often financial law.[91] More specifically, it is used to address "[a]n arrangement that intrinsically lacks business rationale, commercial substance or relevant economic justification and consists of any contract, transaction, scheme, action, operation, agreement, grant, understanding, promise, undertaking or event."[92] Accordingly, it can be relied on to regulate extraterritorial behavior of a person who establishes a legal vehicle to deliberately circumvent domestic law. It is a bridge too far, however, to allow States to invoke anti-evasion as a ground to restrict *bona fide* transactions between third-country actors, who have no further connection to the regulating State.

Limiting Principles

In the standard model of prescriptive jurisdiction, an exercise of jurisdiction is presumptively valid if it rests on one of the permissive principles of jurisdiction. Especially in the economic field, this state of affairs may not be entirely satisfactory. When regulating transnational business transactions, States sometimes rely on tenuous territorial, personal or security connections to project their regulatory power. The aforementioned genuine connection requirement may come to the rescue here and weed out excessive jurisdictional claims. What constitutes a genuine connection, however, is not further defined in international law. Also, there is little practice of States actually invoking the genuine connection requirement to limit State jurisdiction. Furthermore, even if the requirement could have traction, multiple States may convincingly demonstrate a genuine connection to the subject-matter. To avert or restrict the ensuing risk of jurisdictional overlap and conflict, other international law-based limiting devices then come into view, such as the principle of non-intervention, abuse of rights, self-determination, or reasonableness.[93] In the actual practice of States, these limiting devices, if once more prevalent, now appear to be rarely used, at least not explicitly.[94]

---

[89] Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014, 7 July 2017, *Tractatenblad van Het Koninkrijk Der Nederlanden* (2017/102).

[90] Article 17 Drugs Convention (1988); Article 8 Migrant Smuggling Protocol.

[91] Joanne Scott, 'The New EU "Extraterritoriality"' (2014) 51 *Common Market Law Review* 1343, 1359.

[92] Commission Delegated Regulation 285/2014 of 13 February 2014 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on direct, substantial and foreseeable effects of contracts within the Union and to prevent the evasion of rules and obligations [2014] OJ L85/1, art 3(2).

[93] See also Austen Parrish, 'Sovereignty, Self-determination, and the Duty to Cooperate', Chapter 3, this volume.

[94] See on reasonableness notably Section 403 Restatement (Third) of US Foreign Relations Law (1987) (codifying US courts' practice, especially in the field of antitrust law).

Jurisdictional limitation is in fact more likely to follow from domestic doctrines or canons of statutory construction, such as (prescriptive) comity or the presumption against extraterritoriality.[95] States may also auto-limit their extraterritoriality by statutorily requiring dual illegality (double criminality), recognizing other States' legal regimes as adequate, or granting exemptions.

ENFORCEMENT JURISDICTION

Enforcement jurisdiction concerns a State's authority to enforce rather than merely prescribe its laws. Enforcement can consist of the arrest of a fugitive, the seizure of evidence or the inspection of facilities. In principle, extraterritorial enforcement jurisdiction is outright prohibited. Unlike with respect to prescriptive jurisdiction, there are no permissive principles allowing for the exercise of extraterritorial jurisdiction. This was enunciated by the PCIJ in the *Lotus* case:

> Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[96]

Ever since, this *dictum* has been a staple of the law of enforcement jurisdiction.

It is beyond contestation that States cannot arrest, let alone liquidate persons abroad without securing the consent of the territorial State.[97] Incompatible State practice has met with clear international condemnation,[98] although this condemnation has not stopped States from occasionally exercising extraterritorial enforcement jurisdiction.[99] It is more contested, however, whether States' law-enforcement agencies are barred from accessing mere evidence located abroad. Sure enough, they cannot just travel abroad and physically seize evidence without territorial State consent. But does remote access to digital data via production orders imposed on internet intermediaries, or via direct network searches constitute a violation of the prohibition of extraterritorial enforcement jurisdiction?[100]

---

[95] See also William S. Dodge, 'Extraterritoriality of Statutes and Regulations', Chapter 13, this volume.

[96] *S.S. Lotus (France v Turkey)* PICJ Rep Series A No 10, 18–19.

[97] Such enforcement action is possible, however, in the context of international armed conflicts, where parties to a conflict have detention authority and are entitled to use lethal force against combatants or persons directly participating in hostilities. See Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24(3) *European Journal of International Law* 819–53; Els Debuf, *Captured in War: Detention in Armed Conflict* (Hart 2013).

[98] UN Security Council Resolution 138 (1960) (Israeli abduction of Nazi *génocidaire* Eichmann from Argentina). See in relation to the poisoning of Russian nationals in the UK, allegedly at the hands of Russian agents, United Kingdom: PM Commons statement on Salisbury incident, 12 March 2018.

[99] See, e.g., the forcible abduction by the US of Alvarez-Machain from Mexico. In *United States v Alvarez-Machain*, 504 U.S. 655 (1992), the Supreme Court did not consider this a bar to the criminal trial of the suspect in the US.

[100] See also Asaf Lubin, 'The Prohibition on Extraterritorial Enforcement Jurisdiction in the Datasphere', Chapter 20, this volume.

There is little official practice on States' law-enforcement authorities remotely breaking into networks, computers, or other devices to obtain evidence ('State hacking').[101] Therefore, such practices are likely to fall foul of the prohibition of extraterritorial enforcement jurisdiction. That being said, it may be lawful for State agents to remotely access an extraterritorial network after having validly obtained log-on credentials; such a practice could in fact be seen as an exercise of *territorial* enforcement jurisdiction.[102]

The jury is still out on the permissibility of extraterritorial production orders. These are orders, issued by law-enforcement agencies or courts, compelling intermediaries (internet service providers) to produce digital data under their control but stored on servers abroad. These intermediaries may be incorporated in, or only offer services in the State's territory. There is an expanding practice of (Western) States issuing or envisaging such production orders,[103] but it is hardly universal. Therefore, it is unclear whether this form of indirect extraterritorial enforcement jurisdiction is in keeping with international law. Much will probably depend on how States restrict the scope of their production orders and what safeguards are built in.[104]

It bears notice, for that matter, that the discussion on extraterritorial production orders predates the internet era. In the second half of the twentieth century, transatlantic tension arose as a result of US courts issuing civil discovery orders against persons over whom they had personal jurisdiction, mandating them to produce documents held abroad.[105] This practice was later emulated outside the US, in the field of regulatory law enforcement, such as where banking supervisors order the production of a bank's records located abroad.[106] The international jurisdictional basis of this practice has never fully been settled.[107]

ADJUDICATIVE JURISDICTION

In particular, US doctrine, following the Restatements of US Foreign Relations Law, distinguishes a third category of "international" jurisdiction, titled "jurisdiction to adjudicate," and

---

[101] Some such practice has an explicit domestic legal basis, for that matter. See Article 539a *et seq.* Dutch Code of Criminal Procedure (applying some jurisdictional constraints, however).

[102] Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) 70.

[103] US CLOUD Act, § 103(a)(1), adding 18 U.S.C. § 2713; European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM(2018) 225 final, 17.4.2018.

[104] Note that pursuant to Section 426 of the US Restatement (Fourth), which concerns production orders in civil matters, courts are not required to restrict their scope, but have '[d]iscretion to limit orders in light of principles of proportionality and international comity' (Reporters' Note 2, p.265).

[105] E.g., *SEC v Banca della Svizzera Italiana*, 92 F.R.D. 111 (1981); *Société Nationale Industrielle* Aérospatiale, 107 S. Ct. 2542 (1987).

[106] E.g, Dutch Board of Appeal for Business (*College Beroep Bedrijfsleven*), decision of 10 January 2018, ECLI:NL:CBB:2018:2 [5.2].

[107] See also Frederick A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', *Collected Courses of the Hague Academy* (Nijhoff 1985) 49. The Restatement (Fourth) of US Foreign Relations Law, Section 426, considers this as a form of adjudicative jurisdiction, and sets forth, in Reporters' Note 1, p.265, that '[c]ourts in the United States have authority […] to order the production of information from persons over whom they may exercise personal jurisdiction.'

defined as "the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals."[108] While the Restatement considers this category of jurisdiction to be relevant to civil and criminal law, its analytical value is largely limited to civil law, where the courts of the forum State may *adjudicate* a dispute (offer a forum) while *prescribing* (applying) the law of another State via choice of law rules.[109] As, in such cases, adjudication does not follow prescription, the introduction of a separate category of jurisdiction that captures the specific jurisdictional activity of the courts is warranted.

The principles of adjudicative jurisdiction are extremely diverse.[110] Some of them have been referenced before, insofar as they resemble permissive principles of prescriptive jurisdiction such as territoriality, nationality/personality, and universality. Others do not bear such a resemblance at all, such as the principle of party autonomy which allows private parties to choose the jurisdictional forum in which their disputes will be resolved.[111]

Jurisdiction to adjudicate tends to be governed by domestic and regional (EU) law rather than by public international law.[112] The Reporters' Notes to Section 422 of the Restatement (Fourth) of US Foreign Relations Law even go as far as to state that "modern customary international law generally does not impose limits on jurisdiction to adjudicate."[113] Indeed, States tend not to formally object to other States' assertions of adjudicative jurisdiction, but rather, as the drafters of the Restatement point out, they may refuse to recognize and enforce another State's judgment if the latter was based on an exorbitant ground of jurisdiction.[114]

This need not mean, however, that, as a matter of principle, public international law does not provide the outer limits of the permissible exercise of adjudicative jurisdiction.[115] Arguably, grounds of adjudicative jurisdiction can only pass muster with the international law of jurisdiction if they constitute a "genuine connection" with the forum State. Accordingly, the genuine connection requirement may not be limited to the law of prescriptive jurisdiction, but may also govern the exercise of adjudicative jurisdiction.

---

[108] Section 401 of the Restatement (Fourth).

[109] Regarding the criminal law, the Restatement Fourth (Sections 427–429) limits its discussion to the presence of the defendant, extradition and mutual legal assistance, which are in other States not often considered as jurisdictional questions proper.

[110] See for a list of such principles under EU law: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 351/1 (2012). EU Member States may use additional principles, e.g., forum of necessity, as discussed before. In the US, a court can only exercise adjudicative jurisdiction if it has both subject-matter over the claim and personal jurisdiction over the parties. See for the relevant rules and criteria Sections 421–422 Restatement (Fourth).

[111] Alex Mills, *Party Autonomy in Private International Law* (CUP 2018).

[112] For an example of regional law: Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] *OJ* L 351/1.

[113] Section 422, Reporters' Note 1, p.230.

[114] Ibid.

[115] See for a discussion Lucas Roorda and Cedric Ryngaert, 'Public International Law Constraints to the Exercise of Adjudicatory Jurisdiction in Civil Matters' in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction – Which Way Forward?* (Brill 2021) 74–98.

CONCLUDING OBSERVATIONS

On the surface, international jurisdictional law has remained relatively stable over the years. States continue to rely on the classic principles of jurisdiction to justify their assertions of authority. This stability is misleading, however, as there is only international consensus over the basic ordering principles. Uncertainty remains as to the precise scope of particular principles. What is a sufficient territorial connection for purposes of valid territorial jurisdiction? Are there any limits to a State's invocation of the protective principle? This uncertainty has at times led to international conflict, in particular over the geographical reach of a State's economic regulation.

Uncertainty renders the principles of international jurisdiction particularly malleable and susceptible to manipulation, serving particular political and global governance agendas. Worrisome power relations may hide behind a facade of stability. Powerful States and non-State actors push jurisdictional interpretations that may formally be in keeping with the law of jurisdiction, but that serve predefined normative outcomes and may have adverse impacts on weaker States—even if the latter do not protest. Formal jurisdictional continuity then conceals the normative change that is in fact taking place.

This chapter has also highlighted that the law of jurisdiction is not simply a matter of State sovereignty, the traditional concern of public international law, but also a matter of individual rights.[116] The genuine connection requirement, on which the law of jurisdiction is ultimately based, may not just safeguard State interests, but also satisfy the individual defendant's interest and right to receive due notice of the application of the law (an aspect of the principle of legality). In addition, some assertions of extraterritorial jurisdiction may be formally justified under a permissive principle but may nevertheless lead to violations of fundamental rights, for example, where States rely on the protective principle to stifle free speech abroad. Finally, international human rights have informed a practice of more forceful assertion of extraterritorial jurisdiction. The slowly expanding practice of universal jurisdiction over gross human rights violations obviously comes to mind, but human rights have also buttressed more expansive interpretations of the principles of territoriality and nationality, for example, in the expanding field of business and human rights regulation.

[116] This point is developed at length by Mills, above note 7.